

FIRST INTERIM REPORT ON
THE ACTIVITIES AND THE CASES UNDER THE COMPETENCE OF
THE SPECIAL PROSECUTOR'S OFFICE (SPO)



The content of this report is produced by the OSCE Mission to Skopje. The Project is financed through extra-budgetary contributions provided to the Mission by the Kingdom of the Netherlands and the United States Department of State, Bureau of International Narcotics and Law Enforcement Affairs (INL). The expressed opinions of the authors do not necessarily reflect the views of the donors.

Contents

List of acronyms	4
Executive summary.....	5
1. Introduction	7
1.1. General Background: the 2015 Political Crisis and the Establishment of the SPO7	
1.2. Political Developments Following the Przhino Agreement.....	9
1.3. Scope and Structure of this Report..	9
2. Legal and Operational Framework	11
2.1. The Criminal Justice System and the Law on Criminal Procedure	11
2.2. The Establishment of the SPO: Legal Basis, Jurisdiction and Accountability....	13
2.3. Mandate and Deadline for Filing Indictments: Issue of Continuity.....	15
2.4. Operational Structure of the SPO	16
3. The SPO Cases	18
3.1. Introduction	18
3.2. SPO-indicted cases related to the wiretap scandal.....	19
3.3. SPO-indicted cases arising from the content of the wiretapped conversations	25
3.4. Cases Taken Over from the Public Prosecution Office Post-Indictment.....	41
4. Analysis of Selected Issues	50
4.1 Introduction	50
4.2. Initial Challenges Faced by the SPO	50
4.2.1. Problematic Co-operation.....	50
4.2.2. Presidential Pardon	51
4.2.3. The Conflict of Competence with the Chief Public Prosecutor....	52
4.2.4. The Issue of the Admissibility of the Wiretaps Before the Supreme Court	52
4.3. Prosecutorial Strategy: SPO Decisions Regarding Defendants, Procedures and Charges	53
4.3.1. Defendants	53
4.3.2. Proceedings	54
4.3.3. Charges	55
4.3.4 Transparency	57
4.4. The Use of Precautionary Measures in SPO Cases	57
4.4.1. National Legal Framework	57
4.4.2. International Legal Framework	59
4.4.3. Requests for Precautionary Measures Prior to the Submission of the Indictments.....	60
4.4.3.1. Sead Kochan’s Detention in the Trust Investigation.....	61
4.4.4. Requests for Precautionary Measures with the Submission of the Indictments	62
4.4.5. The Grounds for Requesting ... Precautionary Measures	64
4.4.5.1. Flight Risk	64
4.4.5.2. Witness Tampering	65
4.4.6. Reasoning for Denying or Imposing Detention	65
4.4.6.1. Reasonable Suspicion	66
4.4.6.2. Flight Risk	66
4.4.7. Observations and Conclusion .. Regarding the Use of Precautionary Measures.....	70
4.5. The Admissibility of the Wiretaps at the Confirmation Stage of the Indictment	71
4.5.1. Background	71
4.5.2. National Legal Framework	72
4.5.3. International Legal Framework	73
4.5.4. The Centar case	75
4.5.5. Confirmation of the Indictments	76
4.6. Statute of Limitations	78
5. Conclusions and Recommendations	80

LIST OF ACRONYMS

BPPO OCC	Basic Public Prosecutor's Office for Organized Crime and Corruption
Chief PP	Chief Public Prosecutor
Chief SPP	Chief Special Public Prosecutor
CPP	Council of Public Prosecutors
DPA	Democratic Party of Albanians
DUI	Democratic Union for Integration
EC	Electoral Code
EU	European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
LCP	Law on Criminal Procedure
LoC	Law on Courts
MEC	Municipality Election Commission
PP	Public Prosecutor
PPO	Public Prosecutor's Office
SDSM	Political party "Social Democratic Union of Macedonia"
SEC	State Election Commission
SIMs	Special Investigative Measures
SoL	Statute of Limitations
SPO	Special Prosecutor's Office
VMRO-DPMNE	Political party "Internal Macedonian Revolutionary Organization - Democratic Party for Macedonian National Unity".
UBK	Bureau for Security and Counterintelligence

EXECUTIVE SUMMARY

This report is the result of the OSCE Mission to Skopje's trial monitoring observations of cases under the competence of the Public Prosecutor's Office for Prosecuting Criminal Offences Related to and Arising from the Content of the Illegally Intercepted Communications (hereinafter, Special Prosecutor's Office, or SPO). The SPO was established by Parliament in September 2015, pursuant to an EU-brokered political agreement to overcome the political crisis that arose following the 2015 wiretap scandal. The scandal was triggered by the release of a series of illegally intercepted conversations containing discussions, between senior state officials, ultimately revealing alleged government interference in the judiciary, control over a number of media outlets, and election interference. The SPO was established as a separate prosecution office within the judicial system of the country with a limited duration of five years (with possibility of extension). Moreover, the SPO was bound by a deadline to file indictments that expired on 30 June 2017.

This interim report focuses primarily on the 20 cases in which the SPO filed indictments by the above statutory deadline. It contains a factual overview of the charges in those cases and analyses relevant developments up to and including confirmation of the indictments, with a specific focus on precautionary measures and the controversy over the admissibility of the wiretaps. In addition, this report includes information related to four cases initially prosecuted by the Public Prosecutor's Office (PPO), and taken over by the SPO, as well as an overview of publicly available information related to ongoing SPO investigations. Although the SPO has been diligent in ensuring transparency with the public, more effort could be made with respect to providing reasons for the assertion of jurisdiction over ongoing PPO cases, where the underlying criminal offenses do not arise from the content of the wiretaps, nor, (if strictly construed), relate to them.

In less than two and half years the SPO succeeded in filing 20 indictments within a very narrow statutory deadline, and despite considerable interference from other institutions. All indictments were confirmed (one was partially confirmed) and the cases are currently in trial. The confirmation process of many indictments took a significant amount of time (five-six months).

With respect to the application of precautionary measures, the report found that SPO cases exposed a flaw in the LCP framework governing the enforceability of pre-trial detention pending appeal. By not explicitly requiring the immediate enforcement of pre-trial detention, the law allows for the possibility that suspects will flee, tamper with evidence or re-offend pending appeal. Moreover, while in

SPO-cases the Court has been scrupulous in ensuring that pre-trial detention is granted only as a last resort, there is an impression that different standards may be applied in non-SPO cases, where detention is quite frequently ordered.

The report has also discusses the admissibility of the unauthorized wiretaps for the purpose of criminal proceedings, i.e., whether the intercepts can be used as evidence, and/or admitted at trial, or form the basis for a lawful conviction. The report accounts for the decision of the Court to admit the wiretaps in the indictment confirmation stage of all cases. At the time of writing this report, the majority of SPO trials were still ongoing, and the admissibility of the wiretaps at trial, as opposed to indictment confirmation, is one of the main issues likely to impact the outcome of SPO cases.

Despite the successful achievements reached by the SPO thus far, the current limitations in the legal and institutional framework jeopardize the process of ensuring accountability for the serious crimes revealed in the wiretaps. Whatever the choice of the legislator regarding the continuity and institutional collocation of the SPO, it is recommended that all the cases be brought to a conclusion in order to ensure full accountability for the crimes revealed in the wiretaps. Therefore, a fair and efficient adjudication of the SPO cases will serve as a mechanism to rebuild trust in the criminal justice system in the country.

1. Introduction

1.1. General Background: the 2015 Political Crisis and the Establishment of the SPO

The Public Prosecutor's Office for Prosecuting Criminal Offenses Related to and Arising from the Content of the Illegally Intercepted Communications (hereinafter, Special Prosecutor's Office, or SPO) was established by Parliament in September 2015, pursuant to an internationally-brokered political agreement to overcome the political crisis that arose following the 2015 wiretap scandal.¹ On 9 February 2015, Zoran Zaev (Zaev), leader of the then opposition party SDSM released the first in a series of illegally intercepted telephone conversations containing discussions, among others, between senior government and ruling-party officials revealing alleged government corruption concerning interference in the judiciary, abuse of office, control of the editorial policy of a number of media outlets, and election interference. Released recordings unveiled the illegal interception of communications of thousands of citizens, including government ministers, government employees, judges and journalists.² The wiretaps revealed an extensive surveillance operation which raised serious legal and ethical concerns about its impact on the rule of law and human rights in the country. By 3 May 2015, Zaev and the SDSM held 28 press conferences, releasing some recordings to the public in both audio and transcript form. The released recordings became popularly known as "bombs."

The SDSM alleged that the surveillance was carried out upon the orders of the then Prime Minister and leader of the ruling party, the VMRO-DPMNE Nikola Gruevski (Gruevski), together with his cousin and director of the Bureau for Security and Counterintelligence (UBK)³ Sasho Mijalkov (Mijalkov). According to Zaev, the government's massive surveillance plan targeted more than 20,000 people.⁴ The VMRO-DPMNE did not contest the existence of the recordings, but denied having any connection to them, claiming that the surveillance was conducted by foreign intelligence agencies, and that these

¹ See statement of Commissioner Johannes Hahn, <https://bit.ly/2JLl9Ng>.

² See "Macedonia PM Accused of Large-Scale Wire-Tapping", Sinisa Jakov Marusic, <http://www.balkaninsight.com/en/article/eavesdropping-bombshell-explodes-in-macedonia>.

³ The domestic counterintelligence and security agency under the jurisdiction of the Ministry of Interior (MoI).

⁴ See Amnesty International Report: "Former Yugoslav Republic of Macedonia: Submission to the Human Rights Committee," Amnesty International, pg. 15.

recordings had been selectively edited, “created, montaged, cut, glued and glued over.”⁵ The disclosure of the conversations led to a major political crisis. Starting on 5 May 2015, protests occurred across the country with thousands of citizens and activists demanding the resignation of Gruevski and his cabinet. Interior Minister Gordana Jankuloska (Jankuloska) and Transport Minister Mile Janakieski (Janakieski) (both heard on the wiretaps) resigned on 12 May, along with UBK Director Mijalkov, while Prime Minister Gruevski did not step down.

A solution to the crisis was mediated by the European Union (EU) and the United States. Between 2 June and 15 July 2015, the internationally-brokered negotiations among the country's four major political parties began. The negotiations involved the ruling conservative party VMRO-DPMNE led by Gruevski; the main opposition party, SDSM, led by Zaev; and two ethnic-Albanian parties, the Democratic Union for Integration (DUI) led by Ali Ahmeti (Ahmeti), and the Democratic Party of Albanians (DPA) led by Menduh Thaci. The negotiations resulted in the “Przhino Agreement.”⁶ The accord called for the early resignation of Prime Minister Gruevski, the organization of a caretaker government to prepare early elections in April 2016, and the appointment of a Special Prosecutor to investigate issues surrounding or arising from the content of intercepted communications.

The creation of an ad hoc prosecution office tasked with the investigation of the wiretap scandal addressed two significant issues. First, was the belief that, due to political interference in the work of the judiciary exposed by the intercepted conversations, the regular prosecution system of the country was unwilling to investigate senior state officials.⁷ Second was the apparent selective approach of the Public Prosecutor's Office in response to the publication of the bombs. The PPO brought charges related to “the acts of making, obtaining, releasing and publishing the interceptions but not to the many potentially criminal or otherwise illegal acts revealed in the content of the interceptions themselves.”⁸

⁵ See “SDSM ne bira sredstva i prodolzhuva da odrabotuva za dugite interesi” available at <https://vmro-dpmne.org.mk/node/3336>; “Integralen tekst od obrachanjeto na g. Nikola Gruevski (02.05.2015)” available at <https://vmro-dpmne.org.mk/node/3460>.

⁶ See EU Commission website, “Agreement Reached in Skopje to Overcome Political Crisis,” <https://bit.ly/2MaBwAt>. For the text of the Przhino Agreement, see: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_agreement.pdf.

⁷ See Independent Senior Experts' Group, “The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015,” 8 June 2015 (hereinafter “Priebe Report 2015”), pg. 9, noting that “[i]t was reported to the group by several sources that there is an atmosphere of pressure and insecurity within the judiciary. This is confirmed by the revelations made by the leaked conversations. Many judges believe that promotion within the ranks of the judiciary is reserved for those whose decisions favour the political establishment”.

⁸ *Id.*, pg. 11.

On 30 December 2015, Zaev provided the SPO with one hard disk containing 540,646 audio-files of intercepted communications and six boxes of transcripts.⁹

1.2. Political Developments Following the Przhino Agreement

In January 2016, Gruevski stepped down after almost ten years in office, leading to the formation of a caretaker government and early elections on 11 December 2016.¹⁰ The previous governing coalition formed by VMRO-DPMNE and DUI failed to reach an agreement on forming a government.¹¹ After these negotiations broke down in January 2017, Zaev's SDSM managed to strike a deal with DUI and one other ethnic Albanian party to form a government. However, due to filibustering by VMRO-DPMNE and President Gjorge Ivanov's refusal to give Zaev a mandate to form a government, the political crisis escalated further. Daily demonstrations in support of VMRO-DPMNE turned violent on 27 April 2017, when protestors stormed Parliament and attacked several MPs following a move by the majority to elect a Speaker over the objections of VMRO-DPMNE.¹² In the days that followed, VMRO-DPMNE relented, the new Speaker assumed office, and President Ivanov gave Zaev a mandate to form a Government. On 1 June 2017, the SDSM-led government assumed office.

1.3. Scope and Structure of this Report

This report is the result of trial monitoring observations of cases under the competence of the SPO carried out by the OSCE Mission to Skopje within 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 Project"). The Project is financed through extra-budgetary contributions provided to the Mission by the Kingdom of the Netherlands and the United States Department, Bureau of International Narcotics and Law Enforcement Affairs (INL).

This is an interim report covering the first phase of the SPO's activities. The primary focus of this report highlights cases in which the SPO filed indictments by the statutory deadline of 30 June 2017.¹³ With respect to those cases, the report analyzes relevant developments up to and including the confirmation

⁹ See 1st SPO Report, pg. 8, (original language version). See also Target case below for the way Zaev came into possession of these materials. Cases contained in this report shall be referred to by their code names.

¹⁰ The elections originally scheduled for 26 April 2017 were postponed twice, the 5 June and 10 December, respectively.

¹¹ See "The Macedonian-surveillance scandal that brought down a government," Tena Prelec, <http://www.computerweekly.com/feature/The-Macedonian-surveillance-scandal-that-brought-down-a-government>.

¹² See "Violence Erupts as Protesters Storm Macedonia Parliament," Sinisa Jakov Marusic, <http://www.balkaninsight.com/en/article/macedonia-elects-parliament-speaker-amid-ongoing-tension-04-27-2017-1>.

¹³ For additional information about the 30 June statutory deadline, See § section 2.3, below.

of indictments. Considering that at the time of writing the majority of trials in those cases were still ongoing, the analysis presented herein is largely of a factual nature, with a view to preserving the principle of non-interference inherent in OSCE trial monitoring activities.¹⁴ Accordingly, developments following the confirmation of indictments, including the observations of trials, fall outside the scope of this publication and will be the subject of further trial monitoring reports, to be released following the adjudication of the cases.

In addition, this report includes information related to cases taken over by the SPO from the Public Prosecutor's Office (hereinafter, PPO), as of 30 June 2018. The focus of the analysis in those cases is on the SPO's decision to assert jurisdiction. Furthermore, this report includes an overview of publicly available information related to ongoing SPO investigations.

This report is structured in five chapters: Chapter I - introduction; Chapter II - contains a brief overview of the country's criminal justice system, the law on criminal procedure, and a discussion about the legal and operational framework within which the SPO operates; Chapter III contains a factual overview of the cases under SPO jurisdiction, and the related developments falling within the scope of this report; Chapter IV- contains an analysis of relevant legal issues arising from trial monitoring observations, notably the judicial practice on precautionary measures in the SPO cases and the controversy over the admissibility of the wiretaps; and Chapter V- presents the interim conclusions and recommendations.

¹⁴ See OSCE-ODHIR, "Trial Monitoring: A Reference Manual for Practitioners," 2012, pg.18.

2. Legal and Operational Framework

2.1. The Criminal Justice System and the Law on Criminal Procedure

Pursuant to Art. 98 of the Constitution, the courts are organized in one single system. The Law on Courts¹⁵ incorporates 27 lower courts (Basic Courts),¹⁶ referred to as the Courts of First Instance; four Courts of Appeal,¹⁷ and one Supreme Court located in Skopje. According to the Law on the PPO,¹⁸ the competence of the PPO is organized in accordance with the courts structure. As such, there are 22 Basic Public Prosecution Offices competent to act before one or more Basic Courts, four Higher Public Prosecution Offices competent to act before the Courts of Appeal, and a State Public Prosecution Office, headed by the Chief Public Prosecutor (hereinafter, “Chief PP”), competent to act before the Supreme Court.

The normative framework applicable to criminal proceedings was significantly amended following the entry into force of a new Law on Criminal Procedure (LCP) in 2013.¹⁹ Similar to many jurisdictions in the Western Balkans the country abandoned the inquisitorial model in which the investigation was led by an investigative judge and adopted a hybrid system with elements inspired by the adversarial Anglo-American tradition. Pursuant to the new LCP, the Public Prosecutor (PP) is now in charge of the investigation and the collection of evidence (including exculpatory evidence).²⁰ The defense can also conduct its own investigations and present evidence before the trial judge(s). A major innovation brought by the reform concerns the relationship between prosecutors and police. According to LCP, Art. 291, the PP “shall have the judicial police at his disposal.” To this end, the law requires the creation of “investigative centres” within the PPO, with police personnel functionally dependent upon the PP.²¹ However, this part of the reform is yet to be implemented and PPOs still rely solely on police officers belonging to the organizational units of the Ministry of Internal Affairs, the Financial Police and the Customs Administration. The SPO represents the only exception to this practice, in that it is the only prosecution

¹⁵ Law on Courts, Art. 22-37, Official Gazette 58/2006, 62/2006, 35/2008, 150/2010 and 83/2018.

¹⁶ Established within the Skopje Basic Court is a department specializing in crime and corruption committed anywhere in the country.

¹⁷ The four Appellate Courts are located in the cities of Skopje, Gostivar, Stip, and Bitola.

¹⁸ Law on Public Prosecution Office, Art.11-28, Official Gazette No. 150/2007 and 111/2008.

¹⁹ Law on Criminal Procedure, Official Gazette No. 150/2010, 100/2012 and 142/2016.

²⁰ LCP, Art. 291(4).

²¹ LCP, Arts. 41(1)(2), 48(1)(2), and 51.

office in the country equipped with an investigative center.

The criminal procedure process consists of four stages: (i) preliminary procedure, (ii) indictment stage, (iii) trial (1st instance), and (iv) legal remedies (including both regular and extraordinary legal remedies). The preliminary procedure phase is comprised of two sub-phases: the pre-investigation and the investigation. The pre-investigation is a preliminary period during which the prosecutor considers the *notitia criminis* and decides whether to open a “formal” investigation.²² There are no significant differences between the two stages in terms of investigative powers of the prosecutor or the police. Most significantly, however, the pre-investigation is conducted secretly and does not have a predetermined duration (i.e., the LCP does not set a deadline for the completion of the pre-investigative stage). The investigation commences when the prosecutor issues an “order to conduct an investigation,”²³ and ends with either a decision to file an indictment or to terminate the investigation.²⁴ Unlike the pre-investigation, the investigation itself must be completed within six months from the issuance of the above-mentioned order. This deadline can be extended up to nine months (12 months for investigations concerning organized crime).²⁵

The Preliminary Proceedings Judge guarantees protection of rights of the defendant during the investigative stage,²⁶ intervening only at the request of the PP for specific purposes foreseen by law, such as the application of measures restricting personal liberty, search warrants, and/or the interception of communications. If, at the end of the investigation, the PP believes that “there is enough evidence to expect a conviction,”²⁷ she/he submits the indictment before the reviewing Judge or Panel (hereinafter, “indictment-review Judge/Panel”).²⁸ By approving or rejecting the indictment, the indictment-review Judge/Panel decides whether to commit the person to trial, which is held before a different

²² According to LCP, Art. 288, a pre-investigation will be concluded with a decision rejecting the criminal report if “from the criminal report itself, one may conclude that the reported crime is not a criminal offense that is being prosecuted ex-officio, or if the statute of limitation applies or if the criminal offense is subject to amnesty or pardon, or if there are other circumstances that exclude any prosecution or if there are no grounds for suspicion that the reported person has committed the crime.” On the other hand, if the pre-investigation shows the existence of grounded suspicion that a person committed a crime that is prosecuted ex-officio or upon a motion, the public prosecutor will issue an order to investigate pursuant to LCP, Art. 291-292.

²³ LCP, Art. 292.

²⁴ According to LCP, Art. 301, “the public prosecutor shall terminate the investigation procedure when he or she believes that the case has been sufficiently clarified so as to raise an indictment or terminate the investigation procedure.”

²⁵ LCP, Art. 301(2)(3).

²⁶ LCP, Art. 294.

²⁷ LCP, Art. 319(1).

²⁸ Pursuant to LCP, Art. 320, an individual judge reviews the indictment when the crime charged entails a prison sentence of up to ten years, whereas a panel of three judges reviews the indictment when the crime charged entails a prison sentence of more than ten years.

judge or panel. The trial phase of the proceedings follows the rules of the adversarial model regarding the admissibility of evidence and the examination of witnesses.

2.2. The Establishment of the SPO: Legal Basis, Jurisdiction and Accountability

The SPO was established pursuant to the “Law on Public Prosecutor’s Office for Prosecuting Cases Related to and Arising from the Content of the Unauthorized Interception of Communications” (hereinafter, “SPO Law”), adopted by parliament on 15 September 2015, regulating the “authority, establishment, termination, organization and functioning” of the SPO.²⁹ During the same session in which the SPO Law was adopted, the parliament elected the Special Public Prosecutor (SPP), Katica Janeva (Janeva), who, until then, was Chief Prosecutor of Gevgelija, a town in the south east of the country. In accordance with SPO Law, Art. 3(1), the SPP is nominated by Parliament with a qualified majority of two-thirds and the “prior consent of the four major political parties,” and appointed by the Council of Public Prosecutors (CPP).³⁰ The SPO is a separate prosecution office within the judicial system of the country, independent and autonomous from the PPO, albeit acting before the same courts. Unlike the PPO whose competence is organized in accordance with the hierarchy of the courts, the SPO was established “for the whole territory” of the country, seated in the city of Skopje, and competent to act before all the courts in the country.³¹

The SPO’s jurisdiction is limited to “criminal offences related to and arising from the content of the unauthorized interception of communication” conducted between 2008 and 2015.³² Notably, the law does not specify which criminal offenses fall under the SPO’s jurisdiction but leaves the SPO free to decide how to qualify the alleged criminal acts resulting from the intercepts.³³ The SPO’s jurisdiction is exclusive and has primacy over that of the PPO. In accordance with SPO Law, Art. 6(5), the Chief PP, and any other public prosecutor “may not undertake investigations or prosecutions of cases within the mandate of the SPO without the latter’s written consent.” In addition, during any phase of

²⁹ Official Gazette No.159/2015.

³⁰ This qualified parliamentary majority must also include a majority vote of the MPs that belong to the non-majority communities of the country.

³¹ SPO Law, Art. 5(2)(3). Furthermore, pursuant to SPO Law, Art. 9(6), the SPP may establish specialized departments within the office, including those with prosecutors who represent cases before the Appellate and Supreme Court.

³² SPO Law, Arts. 5(1) and 2(1).

³³ See “Establishment of Special Judicial Mechanisms: The Case of Macedonia’s Special Public Prosecutor,” paragraph 3, 2016, Ermira Mehmeti and Bekim Kadriu, http://www.academia.edu/24934934/The-Establishment_of_Special_Judicial_Mechanisms_the_Case_of_Macedonias_Special_Public_Prosecutor.

the proceedings the SPO may take over cases from the PPO falling within its jurisdiction.³⁴ Upon the request of the SPO, the PPO has an obligation to transfer the case files of its ongoing cases to the SPO within eight days. The SPO then has eight days to decide whether to take over the case.³⁵ The SPO Law does not include any form of judicial oversight over the SPO decision to assert jurisdiction.

The principle of autonomy of the SPO is clearly explained in SPO Law Art. 6, which states that the SPO has full autonomy in investigating and prosecuting the crimes within its jurisdiction, without taking directives from any other prosecution office, including that of the Chief Public Prosecutor. Art. 6 states that none of the other public prosecutors may “influence the SPO’s work, or request case-related reports from it.” In addition, the SPO “shall not be summoned to or attend the staff meetings” of the Chief PP, “nor shall any other issues within the SPO’s jurisdiction be subject to review.”³⁶ The SPO therefore falls outside of the hierarchical structure of the PPO.

The SPO is however, accountable to parliament and the CPP. As far as the former is concerned, the SPO’s accountability relates to the progress of its work and is ensured by the submission of periodic reports (every six months) on its activities, “including description on the progress of any investigation or prosecution undertaken.”³⁷ This form of accountability does not require any form of review or approval of the SPO reports by parliament. The position of the SPO towards the CPP is not dissimilar to that of the PPO, in that the SPO is accountable for “the quality and the lawfulness” of its work.³⁸ Pursuant to SPO Law, Art. 18, the CPP may initiate the procedure for removal of the SPP from office prior to the expiration of her mandate due to “unlawful, unprofessional or negligent performance of her function.” The CPP submits a report to parliament specifying the factual grounds for the removal.³⁹ Based on this report, parliament may authorize the removal with a two-third majority vote (including a majority vote of the MPs that belong to the non-majority communities of the country). In addition, pursuant to SPO Law, Art. 17, parliament may terminate the term of office of the SPP based on the following reasons: (i) explicit request of the SPP; (ii) permanent loss of capacity

³⁴ SPO Law, Art. 11(1).

³⁵ SPO Law, Art. 11(2)(3).

³⁶ SPO Law, Art. 6(2)(3).

³⁷ At the time of writing, the SPO had published five reports pursuant to SPO Law, Art. 7(2): 1st SPO Report, 15 September 2015 - 15 March 2016; 2nd SPO Report, 15 March - 15 Sept 2016; 3rd SPO Report, 15 September 2016 - 15 March 2017, 4th SPO Report, 15 March - 15 Sept 2017 and 5th SPO Report, 15 September 2017 - 15 March 2018.

³⁸ SPO Law, Art. 7(3). Pursuant to the Law on CPP, Art. 9, the CPP has competence to appoint and dismiss prosecutors as well as to adopt disciplinary measures against them.

³⁹ Pursuant to SPO Law, Art. 18, the report shall be made available to the public through the parliamentary committees, unless the disclosure of the report infringes on the rights of individuals mentioned therein or jeopardizes ongoing criminal proceedings.

of the SPP; and (iii) final conviction of the SPP. Pursuant to SPO Law, Art. 17(2), the decision of the parliament would still require the same qualified majority and “confirmation” by the CPP.

In addition, SPO Law Art. 8 requires a duty to regularly inform the general public about the progress of the SPO’s work during investigation and prosecution. This obligation has been fulfilled by the SPO through several press conferences announcing the opening of investigations and the submission of indictments.

2.3. Mandate and Deadline for Filing Indictments: Issue of Continuity

The SPO was established as a temporary institution. The SPO Law “shall be effective for 5 years from its adoption by parliament and may be extended once a year by a two-thirds majority vote.”⁴⁰ According to SPO Law Art. 3(1), the mandate of the SPP is one year less (four years) than the duration of the law that established it. Accordingly, the SPO law will cease to have effect on 15 September 2020, whereas the mandate of Katica Janeva will expire on 15 September 2019. The SPO law, however, envisages a “right to re-election” of the SPP,⁴¹ which is expected to follow the same procedure as her election. It is difficult to predict how the inconsistency between the duration of the SPO Law and that of Janeva’s mandate will be reconciled in practice. Additionally, SPO Law, Art. 20, states “the function [of the SPO] shall terminate upon completion of all investigations and prosecution within his/her mandate.”⁴²

In addition to the temporary mandate, the SPO Law contains another time-constraint which is strictly procedural; specifically, a deadline for filing indictments. In accordance with SPO law Art. 22, the SPO may file indictments “no later than 18 months from the day in which it took over cases [from the PPO] and materials within its jurisdiction.” The law does not specify whether these deadlines run concurrently or disjunctively. In other words, if a case is taken over at a later stage than the related intercepted materials, it is not clear whether the 18-months deadline runs from the date of taking over the materials or the case.

As previously mentioned, on 30 December 2015, Zaev provided the SPO with the audio-files of the wiretap conversations (the audio files contained over 20,000 unauthorized intercepts).⁴³ Accordingly, the deadline to file all the

⁴⁰ SPO Law, Art. 1(3).

⁴¹ SPO Law, Art. 3(1).

⁴² SPO Law, Art. 20.

⁴³ See fn. 9, above.

indictments arising from those intercepts expired on 30 June 2017.

The existence of this deadline places the SPO in a considerably different position from the PPO. The 18-months for the SPO also includes the pre-investigation phase of the procedure, while the PPO has unlimited time to complete the pre-investigation stage, in accordance with the LCP the deadline to file indictments starts to run only from the issuance of a formal order to conduct an investigation.⁴⁴ Janeva has repeatedly criticised this disparity, observing that the deadline is too short, given the amount of material that the SPO had to process.⁴⁵ On several occasions, Janeva has advocated for the amendment of Art. 22 to correspond with LCP provisions.

While Art. 22 prevents the SPO from filing new indictments after the expiration of the statutory deadline, it does not prevent it from continuing to conduct investigations. In the 5th SPO Report, published after the expiration of the 18-month indictment deadline, Janeva stated that the SPO will continue investigating. The report further stated that as of 15 March 2018 the SPO conducted 182 pre-investigations and are processing 85% of the intercepted materials.” Currently, the SPO is conducting at least 12 investigations.

Neither the law, nor the SPO, have clarified what would happen to any investigation completed by the SPO after the expiration of the statutory deadline, e.g.: whether the SPO could (or would) transfer those cases to the PPO for indictment. This creates a situation of legal limbo over the ongoing SPO investigations, which could potentially hamper accountability for some of the crimes revealed through the wiretap scandal. While the Government's Draft Strategy for the Reform of the Judicial Sector (2017-2022) tackles these issues of long-term continuity of the SPO by anticipating its transformation into a specialised Office within the PPO, there is an urgent need to address the fate of ongoing investigations, in a way that would not frustrate the pursuit of accountability.

2.4. Operational Structure of the SPO

On 15 September 2015, parliament nominated the SPP and approved the SPO law. It was not until early November however, that the CPP appointed the full team of 12 prosecutors.⁴⁶ The SPO is the only prosecution office in the country that has established an investigative center under the LCP, specifically, 23 MOI

⁴⁴ See ¶ 2.1 of this report.

⁴⁵ See 3rd SPO Report, pg.4.

⁴⁶ See 1st SPO Report, pg. 2, (original language version).

police officers (3 from the Financial Police)⁴⁷ located in the SPO premises.⁴⁸ Pursuant to SPO Law, Art. 9(9), all law enforcement agencies and the Chief PPO shall provide assistance to the SPO pursuant to the LCP. Pursuant to LCP, Art. 81(1), the courts, the PPO and the police may request assistance from colleagues of other offices, as well as public administrations or entities, institutions with public authority and bodies of the local self-government. The institutions shall respond to requests for assistance without delay.⁴⁹ In addition to prosecutors and investigators, the SPO also relies on a number of external experts and legal advisers.⁵⁰

⁴⁷ *Id.*

⁴⁸ *See* 4th SPO Report, pg. 6.

⁴⁹ Pursuant to LCP, Art. 81(2), state administrative bodies and other state institutions may refuse to comply with such requests for assistance if this would cause a violation of their duty to preserve classified information, unless the confidentiality obligation is lifted by a competent body.

⁵⁰ *See* 2nd SPO Report, pg. 6.

3. The SPO Cases

3.1. Introduction

During the statutory period set by the SPO law for the filing of indictments,⁵¹ the SPO actively pursued a total of 21 investigations announced during 13 press conferences held between 12 February 2016 and 22 May 2017.⁵² These investigations were either initiated by the SPO or taken over from the PPO pursuant to SPO Law, Art. 11 (e.g.: cases *Centar*, *Transporter*, and *Titanic*). The investigations resulted in 20 indictments being filed by the SPO within the statutory deadline. 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. By the end of January 2018, all 20 SPO indictments were confirmed, with only one being *partially* confirmed.⁵³

This chapter offers a factual overview of the charges in those cases based on the redacted versions of the indictment summaries published on the SPO website at the end of September 2017. Furthermore, this chapter also outlines relevant procedural developments observed through the monitoring of those cases, up to and including the confirmation of indictments. The report divides the SPO-indicted cases based on subject matter, rather than their chronology. Accordingly, they are grouped under two main categories: those relating to the *causes and modalities* of the wiretap scandal, targeting the alleged authors/abettors of the illegal interceptions, and those *arising from* the wiretap recordings and the crimes revealed by the intercepted communications.

In addition to the filed indictments, the SPO claimed jurisdiction over four cases from the PPO that had already reached the trial stage; specifically, the cases known as *Coup*, *Sopot*, *Spy*, and *Smiljkovci Lake murders* (a.k.a. *Monster*). The *Coup* case will be discussed in some detail, due to its strict relation to the wiretap scandal. The *Sopot*, *Spy* and *Monster* cases will be only briefly summarized with a focus on the SPO's jurisdictional claim.

⁵¹ SPO Law, Art. 22, prohibits the SPO from filing indictments after 18 months from when the SPO “took over a case [from the PPO] and was handed over the materials within its 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.

⁵² Pursuant to SPO Law, Art. 8, the SPO regularly announced the opening of investigations in press-conferences.

⁵³ See discussion related to *Titanic 2*, below.

This chapter contains a brief description of the ongoing investigations, including two of the early investigations which were not completed by the statutory deadline,⁵⁴ as well as other investigations announced in press conferences on 19 December 2017⁵⁵ and 20 March 2018.⁵⁶

3.2. SPO-indicted cases related to the wiretap scandal

Fortress-Target - KOK br.47/17 (Fortress-Target)

Status:⁵⁷ Ongoing trial

Case announcement: 30 March 2016 (*Fortress*) and 18 November 2016 (*Target*)

Filing of indictment: 30 June 2017

Confirmation of indictment: 15 September 2017

i. Background

On 30 March 2016, the SPO announced the *Fortress* investigation involving the destruction of the wiretap equipment allegedly committed by four defendants, including former Interior Minister Jankuloska and former Chief of the 5th Directorate of the UBK Goran Grujevski (Grujevski). On 18 November 2016, the SPO announced the *Target* investigation, which sheds light on whom, in what manner, and for what reasons the illegal intercepts were conducted. The defendants are UBK employees, including former UBK Director Sasho Mijalkov (Mijalkov).⁵⁸

ii. Indictment summary

a. Facts relating to the Fortress investigation: from February 2015 to March 2016:

The SPO alleges that in February 2015, following the publications of the wiretaps, Grujevski and Mijalkov attempted to conceal the fact that the illegal

⁵⁴ On 23 March 2017, the SPO announced the *Board* investigation; and on 22 May 2017, the SPO announced the *Talir* investigation.

⁵⁵ Investigations announced in the 19 December 2017 press conference, *Foreign Services, Pay toll, X-Ray, Producer, Leaders, Tariff 2, and Transporter 2*.

⁵⁶ Investigations announced in the 21 March 2018 press conference, *Census, Powerman and Aktor*.

⁵⁷ All case status information has been updated as of 20 July 2018.

⁵⁸ Sasho Mijalkov is the first cousin of former Prime Minister Gruevski and was the Director of the UBK from 2006 to 2015.

wiretapping took place in the premises of the UBK. Mijalkov ordered Grujevski to destroy the Vernit and Nice Track monitoring systems when Nice Track was still in use. Grujevski, together with the Chief of the UBK Co-ordination Department, Toni Jakimovski (Jakimovski), activated the internal procedure (through the establishment of an *ad hoc* Commission) for destroying obsolete and dysfunctional equipment, in the absence of any lawful grounds. This process was sanctioned at the highest level of government by former Interior Minister Gordana Jankuloska. According to the indictment the destruction of the monitoring equipment caused damage to the country's budget in the amount of 87,261,058.50 MKD.

The destruction of the Nice Track and Vernit systems was carried out in two stages.⁵⁹ On 28 March 2015, in the waste iron dump of the legal entity BU-BO Metallica, the monitoring systems were dismantled and put inside press machines. Grujevski, Jakimovski, and UBK employee Nikola Boshkoski organized the transportation of the materials to the iron dump with freight vehicles owned by the MoI. The destruction was carried out by several people referred to in the indictment as witnesses (including two employees of BU-BO Metallica and all the members of the above-mentioned Commission). The destruction was documented with photographic evidence and video footage taken by one of the commissioners.

On 3 April 2015, Grujevski ordered a select number of commissioners to ensure complete destruction of the monitoring systems. The destruction occurred at the premises of the legal entity Eko Circon, in Madzari (municipality of Gazi Baba). There, two of the company's employees put the pressed material into a crusher and shredded it. Once again, the process was documented through photographs and video footage taken by the same commission-member. Upon completion of the destruction, the Commission submitted a report to Mijalkov and Jankuloska proving that the task was complete. Subsequently, Boshkoski destroyed the photographs and video record of the operation.

Elena Djilanova (Djilanova), Head of Section of Telecommunications at the MoI was charged with the crime of Assisting a Perpetrator after the Commission of a Crime, pursuant to Crim. Code, Art. 365(2)(1). According to the indictment, on 28 January 2016, Djilanova helped Grujevski (her direct supervisor) to conceal evidence of the intercepted telephone numbers. Specifically, Djilanova removed the data from three LI IMS servers⁶⁰ owned by operators

T-Mobile, ONE and VIP, and transferred the data onto a memory stick. Using

⁵⁹ The Nice Track system was disconnected on 27 March 2015. The Vernit system was disconnected in 2009.

⁶⁰ These servers were located in building no. 3 of the UBK premises (in the vicinity of the MoI).

the excuse that the UBK needed to archive some data, Djilanova requested that an Ericsson employee who performs maintenance on the servers show her how to archive the data. Subsequently, the Ericsson employee demonstrated how to archive the data in the three servers using different user-names.⁶¹

b. Facts (2008 to 31 December 2015) relating to the Target investigation:

The SPO alleges that the former UBK Director Mijalkov created a criminal association aimed at conducting widespread unlawful intercepts, in order to gain information pertaining to all spheres of society, and in doing so obtained a political and business advantage. Alleged co-founders of the criminal association are the Chief of the 5th Directorate of the UBK Grujevski, and the Head of Operation Section (OS), Nadica Nikolikj (Nikolikj). The defendants are all charged as leaders of a criminal association pursuant to Criminal Code (Crim. Code.), Art. 394(1), and Abuse of Official Position and Authority, pursuant to Crim. Code, Art. 353.

According to the indictment, acting upon Mijalkov's orders, Grujevski and Nikolikj instructed several of their subordinates to enter phone numbers into the systems for the purposes of monitoring the communications at the UBK, specifically, the Vernit, Nice Track, and the IPS systems.⁶² Subsequently, the employees transcribed the conversations and turned the transcripts over to Grujevski. Four of these employees are charged as participants in the criminal association pursuant to Crim. Code, Art. 394(2), and Abuse of Official Position and Authority pursuant to Crim. Code, Art. 353.⁶³ However, the SPO has not charged three other employees who also assisted in intercepting the communications. Instead these employees are listed as witnesses.⁶⁴ The indictment specifies that those employees were members of the criminal group due to the hierarchical set up of the UBK and because they feared for their lives.

One of the witnesses is Zvonko Kostovski (Kostovski), Chief Engineer of the Maintenance and Telecommunication Section of the 5th Directorate of the UBK and subsequently, Head of the Unit for Information and Technical Support of Operations. Kostovski oversaw the technical process for conducting unlawful intercepts.⁶⁵ At the request of the leaders of the group he created special user profiles and grouped the profiles into a shared folder labelled "important"

⁶¹ Djilanova pleaded guilty and was sentenced to a 6-month suspended sentence. Sentence will not be imposed as long as the defendant does not commit another offense within a 2 year period.

⁶² The Vernit system was active in 2008, the Nice Track system was active from the end of 2008 to 20 January 2015, and the IPS system was active from 21 January 2015 to 31 December 2015.

⁶³ Vladimir Varelov, Marjan Sumulikovski, Silvana Zlatova, Vasil Isakovski.

⁶⁴ Marjan Jankuloski, Vlado Gorgievski and Zvonko Kostovski.

⁶⁵ This witness was a defendant in the Coup case. The witness pleaded guilty and received a 3-year prison sentence.

giving each of the creators and members of the group access to the system for monitoring the communications, and the ability to listen to the intercepts from their own computers. Subsequently, Kostovski copied the recordings onto a CD and USB sticks and handed them over to Gjorgji Lazarevski (Lazarevski), who, in turn, gave the recordings of the intercepts, to Zoran Verushevski (Verushevski), who then delivered them to Zaev. On 30 December 2015, Zaev delivered the recordings to the SPO. The SPO alleges that the defendants violated the constitutionally granted rights of freedom and confidentiality of correspondence and other forms of communications, as well as the privacy of more than 4819 people.

Treasury - KOK br. 60/17 (Treasury)

Status: Ongoing trial

Case announcement: 28 September 2016

Filing of indictment: 29 June 2017

Confirmation of indictment: 29 November 2017

i. Indictment summary

The SPO indicted former UBK Director Mijalkov, former Chief of the 5th Directorate of the UBK Grujevski and former Assistant Minister of Internal Affairs Nebojsa Stajkovikj (Stajkovikj) with Abuse of Official Position and Authority, pursuant to Crim. Code, Art. 353(5)(3)(1) in relation to the unlawful purchase by the UBK of “electronic and communication equipment.”⁶⁶ The SPO charged Mijalkov’s Chief of cabinet, Toni Jakimovski, with Aiding and Abetting the commission of Abuse of Official Position and Authority, pursuant to Crim. Code, 353(5)(3)(1) and Art. 24.

a. From July 2010 until the end of 2012

The SPO alleges that between 7 July and 9 July 2010, Mijalkov, Grujevski and Stajkovikj, in a series of meetings with the U.K. legal entity G.T., arranged the purchase of the electronic and communication equipment from manufacturer G. Instead of purchasing the equipment directly from manufacturer G., (which would have been the most cost-effective solution), the defendants agreed to

⁶⁶ The indictment does not explicitly state that this equipment was used to conduct the unlawful intercepts. The indictment takes issue only with the purchase of the equipment. However, the media have always connected this case with the intercepts.

purchase the equipment through the legal entity DTU F. DOOEL S., managed by V.S., the brother of Stajkovikj. According to the indictment, DTU F. DOOEL S. is registered as a branch of the US Company F. DOO. However, in the US registries such a company does not exist.

Upon their return from the UK, Mijalkov, Grujevski and Stajkovikj ordered G.P., an MoI assistant whom the indictment refers to as witness, to begin the public procurement process for the purchase of the equipment. In accordance with the Law on Public Procurement, Art. 7, G.P. invited the legal entity DTU F. DOOEL S. to submit an offer. The company submitted a proposal with specifications and a payment plan for delivery, including the offer of training and support provided by manufacturer G., for a total cost of 124,293,233.00 MKD. Subsequently, on 26 November 2010, the MoI, represented by witness G.P. signed a contract with DTU F. DOOEL S., (represented by V.S.) for the purchase of the equipment. DTU F. DOOEL S. purchased the equipment from company G.⁶⁷ which invoiced DTU F. DOOEL S. in four instalments in the approximate amount of 111,588,294.00 MKD. Therefore, DTU F. DOOEL S. made a profit of 22,265,449.00 MKD, causing equal damage to the State budget. In December 2011, Mijalkov and Grujevski purchased additional equipment from DTU F. DOOEL S. in the approximate amount of 35,695,030.00 MKD. In June 2012, a system for movable video surveillance was additionally purchased from the same company. According to the indictment Grujevski requested the purchase of this equipment in a letter signed by Jakimovski. With this additional purchase, DTU F. DOOEL S. gained a profit of 13,222,845.00 MKD.

b. Throughout July 2014

Following a pattern similar to the one described above, the indictment states that the defendants also outsourced the maintenance service of the purchased equipment to DTU F. DOOEL in the absence of any need for such service. With this new contract, DTU F. DOOEL S. gained an additional profit of 17,527,500.00 MKD.

⁶⁷ The indictment references four invoices.

Fortress 2⁶⁸ - K.br. 1905/16 (Fortress 2)

Status: First instance proceedings completed on 7 November 2017.⁶⁹

Appeal pending.

Type of procedure: LCP, Art. 468, Summary judgment⁷⁰

Case announcement/Filing of indictment: 14/15 September 2016

i. Indictment summary

SPO alleges that between 16 February and 26 June 2015, Grujevski, the former Chief of the 5th Directorate of the UBK, ordered six UBK administrative employees to destroy documents relating to the equipment for the wiretap communications. Grujevski and the other six defendants are charged with Falsifying an Official Document pursuant to Crim. Code, Article 361(2)(1).

According to the indictment, Grujevski, lacking the authority, ordered the other six defendants to form a Commission tasked with the inventory and destruction of materials in the Unit of Technical Support of Operations (OTS) of the UBK. The rationale behind this order was to destroy all documents from (2007 to 2015) connected with the wiretap equipment. The destruction took place in Brest and Petrovec and was carried out by two people referred to in the indictment as witnesses.⁷¹ The second witness placed the documents in an area surrounded by rocks and set the documents on fire. On 24 June 2015, after the destruction of evidence, the UBK employees informed the Chief that all documents on the inventory list had been destroyed.

⁶⁸ The *Fortress 2* investigation was originally part of the main *Fortress* investigation, announced on 30 March 2016. On 15 September 2016, however, the SPO announced *Fortress 2* as a separate case to be tried in summary judgment.

⁶⁹ The Court found all six defendants guilty. The Court sentenced Grujevski to 18 months in prison and sentenced the remaining defendants to a suspended sentence of one year, with three-years' probation.

⁷⁰ Summary procedure (summary judgment) applies by default when the law requires a lesser sentence for the charged offense, specifically, a monetary fine or imprisonment for up to five years.

⁷¹ In the indictment, the SPO called four witnesses to testify, including the two people who carried out the destruction of the documents. It appears that the SPO waived its power to prosecute pursuant to LCP, Art. 44 (3), which states that the public prosecutor shall not be obliged to prosecute if "the suspect, as a member of an organised group, gang or another criminal enterprise, voluntarily collaborates before or after the detention or during the criminal procedure and if such co-operation and statement given by that person is of essential importance for the criminal procedure."

3.3. SPO-indicted cases arising from the content of the wiretapped conversations

Titanic cases

On 12 February 2016, the SPO announced the *Titanic* investigation giving rise to three separate cases, referred to as *Titanic 1*, *Titanic 2* and *Titanic 3*. The SPO alleges that former government officials and VMRO-DPMNE members/affiliated persons, State Election Commission (SEC) members, administrative judges, and a member of a Municipality Election Commission (MEC), committed widespread electoral violations.

Titanic 1 - KOK.br. 7/18

Status: ongoing trial

Case announcement: 12 February 2016

Filing of indictment: 30 June 2017

Confirmation of indictment: 28 December 2017

i. Indictment summary

Titanic 1 is one of the most significant cases because it was the first investigation announced by the SPO, and the VMRO-DPMNE leadership were among the 21 defendants. Specifically, the case involves former Prime Minister Gruevski,⁷² Gruevski's former Chief of Cabinet Martin Protogjer (Protogjer), former government Secretary General Kiril Bozhinovski (Bozhinovski), former Transport Minister Mile Janakieski (Janakieski) and former Interior Minister Jankuloska. The defendants are accused of establishing a criminal association for committing electoral offenses pursuant to Crim. Code, Art. 394(1). The SPO alleges that participants in the criminal association are government and police officials, VMRO-DPMNE members, and public administration employees. The indictment refers to several electoral crimes that occurred in preparation for and during the parliamentary elections of 2011 and 2014, and the local elections of 2013. Below is a list of the most significant criminal offenses alleged by the prosecution.

⁷² Nikola Gruevski was Prime Minister of the country from July 2006 to January 2016.

i. *Early parliamentary elections 2011*

- Gruevski and Protogjer are accused of having financed the VMRO-DPMNE election campaign with 31,780,000.00 MKD originating from unidentified sources, disguised as donations;
- Protogjer, Janakieski and Jankuloska are accused of having organised a system by which VMRO- DPMNE activists pressured citizens in threatening phone calls to obtain their vote.

ii. *Local elections March 2013*

- Jankuloska, instructed by Gruevski, organized the unlawful registration of citizens residing abroad onto the voters' lists of three municipalities. The purpose of this action was to influence the election outcome in those municipalities in favor of the VMRO-DPMNE coalition. In addition, Jankuloska instructed her chief of cabinet, the mayor of the Albanian municipality of Pustec, Albania, and a senior police official to organize the transportation of the voters via bus to the above municipalities on the day of the elections.
- Jankuloska directed a team of police officers to follow the commands of a senior police official who co-ordinated the team to carry out unlawful patrols in the municipality of Ohrid. The purpose of these unlawful patrols was to locate and block campaigners who were influencing citizens to vote for the SDSM-coalition. On the 24 March 2013, the day of the election, the police patrol prevented two people from voting by arresting one person on false accusations and forcing the other person to stay inside his home.
- Janakieski requested that the president of the Municipal Election Commission (MEC) for the municipality of Centar turn over the voters' lists pertaining to several polling stations after the first and second round of elections. Janakieski also requested the lists in order to see how many of the registered persons actually voted, in order to exercise pressure on those who did not vote.

iii. *Parliamentary elections of 2014*

- Gruevski is accused of having instructed two VMRO-DPMNE members to finance the campaign with money (62,732.874.00 MKD) from an unknown origin. The money was used to fund the electoral campaign of the VMRO- DPMNE coalition.

Titanic 2 - KOK br.62/17 (Titanic 2)

Status: ongoing trial

Case announcement: 12 February 2016

Filing of indictment: 30 June 2017

Confirmation of indictment: 1 December 2017

i. Background

The facts of the case relate to the 2013 elections of the mayor of Strumica.⁷³ VMRO-DPMNE filed a complaint with the State Election Commission (SEC), requesting to invalidate the voting in one of the polling stations because of a discrepancy between the number of voters and the ballot-papers, i.e., there was one ballot-paper less than the number of people who had cast their vote). According to VMRO-DPMNE, this was a violation of Electoral Code (EC), Art. 151(1), which states that the SEC shall annul the voting in a polling station “if the Election Board fails to conduct the voting in the manner defined by this Code.” On 28 March 2013, the SEC upheld the complaint and nullified the voting in accordance with EC, Art. 151(1).

Consequently, SDSM filed an appeal with the Administrative Court requesting that the Court reverse the decision of the SEC, because the SEC did not inspect the election materials and failed to provide a reason for annulling the vote. On 1 April 2013, the Administrative Court rejected the SDSM complaint and confirmed the SEC decision to nullify the vote. However, it did so based on different grounds. The Administrative Court found that the issue invalidating the election was not the difference between the ballots and the signatures as VMRO claimed in its complaint, but the fact that on the voters list there was a name that had been selected without the corresponding signature. In the Administrative Court’s view, this violated EC, Art. 108(5), which states that “having verified the voter’s identity, the Election Board circles the ordinal number of the voter in the excerpt of the Voters List and the voter puts his/her signature there.”

⁷³ Zaev was running for Mayor of the Municipality of Strumica during that time.

Therefore, the provision of the EC that was violated was Art. 108(5), and not Art. 151(1) as found by the SEC.

ii. Indictment summary

The SPO alleges that three defendants who participated in two telephone conversations revealed that the SEC decision making process was rigged and motivated for political gain. Specifically, on 28 March 2013, one conversation between former UBK Director Mijalkov and the leader of the DPA, Menduh Thaci (Thaci), revealed that Mijalkov had ordered Thaci to instruct the SEC member in his party to vote in favor of the VMRO-DPMNE complaint. A second telephone conversation between Thaci and the SEC member indicated that Thaci acted as instructed by requesting the SEC member to rig the voting within the SEC.⁷⁴

Based on these conversations, the SPO charged Mijalkov with Accepting a Reward for Unlawful Influence, pursuant to Crim. Code, Art.359(5)(4). In addition, the SPO charged Thaci with Instigation to Commit Abuse of Official Position and Authority, pursuant to Crim. Code, Art. 23 and 353(5)(1), and four members of the SEC and five judges of the Administrative Court with Abuse of Official Position and Authority in co-perpetration, pursuant to Crim. Code, Art. 353(5)(1). With respect to the SEC members, the indictment alleges that their abuse of position consisted of not inspecting the electoral material as required by the EC, and failing to explain their decision, in order to benefit VMRO-DPMNE. With respect to the administrative judges, the indictment alleges that they unlawfully upheld the SEC decision, knowing that pursuant to EC, Art. 147(7), their decision could not be appealed any further. The illegal conduct consisted of establishing “a different fact of the case”⁷⁵ by deciding outside the scope of the SDSM complaint and against the SEC decision, which is beyond the grounds that the SEC referred to in its own findings (i.e. the administrative judges found a violation of EC, Art. 108(5), rather than EC, Art. 151(1)). In doing so, it is alleged that the judges violated the Law on Administrative Disputes, Art. 37, which states that “the legitimacy of the contested administrative act shall be investigated by the [administrative] court within the scope of the complaint’s request, without being bound by the causes for filing the complaint.” Consequently, the mayoral election had to be repeated, once again allowing the VMRO-DPMNE candidate for mayor to participate in the election process. This caused damages to the State budget in the amount of 146,824.00 MKD.

⁷⁴ According to the SPO indictment, on 28 March 2013, the second conversation occurred two minutes after the first conversation.

⁷⁵ See *Titanic 2* indictment.

iii. Indictment confirmation process

On 29 June 2017, the indictment was submitted to the indictment-review Panel (hereinafter “Panel”). On 1 December 2017, the Panel approved the indictment only in relation to certain defendants. The Panel found that the SPO provided sufficient evidence to charge the former UBK Director, the DPA leader and the SEC members. In relation to the administrative judges, the Panel found that the “conduct that is the object of the indictment is not a criminal offence,” and in accordance with LCP, Art. 337(1)(1), rejected the indictment. The Panel reasoned that one of the necessary requirements for the commission of the crime of Abuse of Official Position and Authority is the existence of direct intent. In the present case, the Panel held that the evidence provided by the SPO did not support the allegation that the administrative judges upheld the SEC decision with unlawful intent. In the absence of such proof, the general rules safeguarding the independence of the judiciary and its functional immunity must apply. Specifically, amendment XXVII of the Constitution according to which “a judge shall not be held responsible for an opinion given in the process of rendering a court decision,” and Law on Courts, Art. 65(2), which has similar wording.⁷⁶ Moreover, the Panel referred to the “Opinion and Conclusions” about the responsibility of judges in the Consultative Council of European Judges,⁷⁷ according to which, “judges should be criminally liable in ordinary law for offences committed *outside* their judicial office,” and “criminal liability should not be imposed on judges for unintentional failings in the exercise of their functions,” and “it is not appropriate for a judge to be exposed, in respect of the purported exercise of judicial functions, to any personal liability, even by way of reimbursement of the state, except in a case of willful default.”⁷⁸

On 7 December 2017, the SPO appealed the Panel’s decision pursuant to LCP, Art. 414(1)(3) and in relation to LCP, Art. 416 (i.e., the incorrect application of the substantive law). According to the SPO, the crime of Abuse of Official Position and Authority does not necessarily require direct intent. In fact, Crim. Code, Art. 353 does not specify whether direct or indirect intent is required for

⁷⁶ Law on Courts (LoC), Art. 65(2), states “A judge cannot be held criminally liable for pronouncing an opinion and deciding when making a court decision.” The judges also referred to LoC, Art 11 (1) which states that “[t]he judge decides impartially, in accordance with the Laws on the basis of a free assessment of the evidence;” and LoC, Art 11(2) stating that “every form of influence on the independence, impartiality and autonomy of the judge in the exercise of judicial function on any ground and from any subject is prohibited.”

⁷⁷ The Court does not refer to it explicitly, but from the text of the decision it is clear that reference is made to CCJE (2002) Op. N° 3, 19 November 2002: <https://bit.ly/2Jp90J>.

⁷⁸ *Id.*

the commission of the crime.⁷⁹ The general provision regarding intent in the Crim. Code is Art.13, which also makes no explicit distinction between direct and indirect intent.⁸⁰ As a consequence, the SPO argued that “any criminal act that is committed with intent, can be done both with direct or indirect intent.”⁸¹

The SPO appeal contends that in the present case the indictment alleges that actions of the administrative judges in upholding the SEC decision on unlawful grounds was carried out with indirect intent. According to the SPO, this indirect intent would be evident because the judges knew that their unlawful decision could not be appealed and was therefore final. In addition, the SPO took issue with the argument of the functional immunity of judges invoked by the Panel. According to the SPO, the provision of the Law on Courts by which judges cannot be held criminally liable for their decisions covers only the decisions that are rendered in compliance with the law and without any unlawful intent. Furthermore, decisions that are rendered against the law with the intention to obtain a personal benefit or cause harm to others, such as that of the administrative judges, are not covered by immunity. Whenever the unlawful intent of the judges is established, immunity does not apply. Doing otherwise would jeopardize the foundations of the rule of law and the principle of equality before the law.

On 23 February 2018, the Appellate Court confirmed the decision of the Panel. According to the Appellate Court, the actions of the defendants as described in the indictment (i.e., the violation of the EC and Law on Administrative Dispute by deciding outside of the scope of the SDSM complaint against the SEC decision) do not constitute the crime of Abuse of Official Position and Authority pursuant to Crim. Code, Art. 353, in that the Administrative Court

⁷⁹ Crim. Code, Art. 353 states: “(1) An official person who, by using his official position or authority, by exceeding the limits of his official authority, or by not performing his official duty, acquires for himself or for another some kind of benefit or causes damage to another, shall be sentenced to imprisonment of six months to three years; (2) If the offender of the crime referred to in paragraph (1) acquires a greater property benefit, or causes greater property damage, or violates the rights of another more severely, he shall be sentenced to imprisonment of six months to five years; (3) If the offender of the crime referred to in paragraph (1) acquires a significant property benefit or causes a significant damage, he shall be sentenced to imprisonment of at least three years; (4) A responsible person in the foreign legal entity which has a representative office or performs an activity [in the Republic] or a person that performs activities of public interest, shall be sentenced with the punishments referred to in paragraphs (1), (2) and (3), in case if the crime is committed while performing his specific authority or duty; and (5) If the crime stipulated in paragraph (1) and (4) is performed during execution of public purchases or causing damage to the finances of the Budget [of the Republic], public funds or other state owned funds, the offender shall be sentenced to imprisonment of at least five years.”

⁸⁰ Crim. Code, Art. 13 states: “A crime was committed with intent when the offender was aware about his act and he wanted it to be committed; or when he was aware that because of his act or omission, there could be a damaging consequence, but he agreed for it to happen.”

⁸¹ See SPO Appeal, NSK-KO br.11/15, Dec 7, 2017.

was the competent body to decide upon the SDSM complaint. This was the first time the issue of competence was raised by the Court. The judges, therefore, did not abuse their position. Moreover, the intent of the judges cannot be inferred from their knowledge that their decision would not be appealed further because this is foreseen by the law and the Constitution. In this respect, the Appellate Court endorsed the Panel's interpretation confirming that the crime of Abuse of Official Position and Authority requires direct intent.

Titanic 3 - K.br.1905/17 (Titanic 3)

Status: Ongoing trial

Case announcement: 12 February 2016

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 11 December 2017

i. Indictment summary

In *Titanic 3*, the SPO charged Ismet Guri (Guri), Secretary General of the Chair Municipality Election Commission and Ejup Alimi (Alimi),⁸² (hereinafter, "defendants") with Destroying Electoral Material, pursuant to Art. 164 (3), (2) and (1), and Art. 164 (3)(1) respectively, during the local elections for the mayor of the Municipality of Chair in 2013. Specifically, the defendants are accused of forcing the Presidents of the Election Boards for some of the polling stations of the Municipality of Chair to alter the election results in favor of one political party (DUI). The SPO alleges that falsified records of the votes were submitted to the SEC. Doubting their authenticity, the SEC annulled the votes cast at those polling stations.

⁸² The indictment does not specify the working position of Alimi. However, Alimi is affiliated with DUI and is a member of parliament since December 2016.

Municipality of Centar - K.br.1904/16 (Centar)

Status: Ongoing trial

Type of procedure: Summary proceedings pursuant to LCP, Art. 468

Filing of the indictment/case announcement: 14/15 September 2016

i. Indictment summary

The SPO alleges that during the 7 and 10 June 2013 protests, former Prime Minister Gruevski, former Transport Minister Janakieski, and three VMRO-DPMNE municipal councillors instigated VMRO-DPMNE supporters (nine VMRO-DPMNE supporters are also charged in the indictment) to commit acts of violence against the mayor of the Centar Municipality and the SDSM-municipal councilors. The defendants are all charged with the crime of Violence, pursuant to Crim. Code, Art. 386(2)(1).⁸³ According to the indictment, during a telephone conversation on 1 June 2013, Gruevski instructed Janakieski to organize VMRO-DPMNE activists in a violent protest in front of the Municipality building. The reason for organizing the protest was to prevent the 7 June 2013 session of the municipal council from proceeding and to disrupt a discussion about the abolishment of an urbanistic plan called "Small Ring" which would have damaged the interests of the highest levels of the VMRO-DPMNE party and of their business partners. In order to disguise this reason and gather protesters, the organizers stated that the protest was against the demolition of the Konstantin and Elena church. This church, however, was still under construction at the time, and its destruction was not part of the agenda of the session of the municipal council for that day.

Based on this conversation, the indictment alleges that Janakieski executed the order and requested that three VMRO-DPMNE municipal councillors organize the protest and instruct the activists to use violence. On 7 June 2013, several protesters entered the grounds of the municipality and started shouting offensive words and knocking on the windows of the building. In order to prevent a major incident, the council's session was postponed until 10 June 2013. According to the indictment, during both protests, the 3 VMRO-DPMNE municipal councilors were inside the building giving instructions to protesters over the phone and encouraging them to be louder and more aggressive. On 10 June 2013, nearly a hundred people gathered in front of the municipality. This time, for security reasons, the entrance doors to the grounds were closed.

⁸³ Gruevski and Janakieski, as well as the other three defendants are referred to as instigators, pursuant Crim. Code, Art. 23.

However, protesters broke the fence and while shouting offensive words, threw rocks, bottles, and other objects towards the building. One of the three VMRO-DPMNE-councilors opened the windows for the protestors to hurl objects at the people inside, resulting in one councilor receiving a minor eye injury. Furthermore, protesters broke the entrance door of the building in an attempt to break into the room during the session.

Torture - K.br.1959/17 (Torture)

Status: Ongoing trial

Case announcement: 28 March 2016

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 7 December 2017

i. Indictment summary

The SPO charged former UBK director Mijalkov, and six police officers with Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, pursuant to Crim. Code, Art. 142 (1). The SPO alleges that Mijalkov instigated six officers of the Alpha Police Unit to commit the offense during the arrest of Ljube Boshkoski (Boshkoski), president of the UFM political party.⁸⁴ On 6 June 2011, one day after the 2011 national elections, the officers of the Alpha Police Unit arrested Boshkoski on suspicion of illegally financing his party's campaign. The arrest occurred in the parking lot of restaurant V. According to the SPO, the officers used excessive force despite the fact that Boskovski complied with the arrest. The indictment alleges that the officers hit Boskovski on his feet forcing him to the ground, holding him by his hands, while shouting insults at him and his family. One of the officers put his firearm against Boshkoski's cheek. Subsequently, the officers moved Boshkoski in front of a portable toilet and held his face towards the door for more than half an hour while waiting for the arrival of the media. According to the indictment, Mijalkov allegedly pressured the media to broadcast the unfolding events and spread the news to every newspaper. The SPO alleges that the above-described criminal actions were politically motivated against Boshkoski.

⁸⁴ Ljube Boshkoski is a former VMRO-DPMNE politician (Interior Minister in 2001) who in 2009 formed his own political party "United for Macedonia."

ii. Indictment confirmation process

On 7 December 2017, the indictment-review Judge confirmed the indictment against every defendant except Mijalkov for whom the indictment was rejected pursuant to LCP, Art. 337(1)(4) (insufficient evidence to support the indictment). According to the Judge, the crime of instigation to commit torture could not be proved since the UBK Director, Mijalkov had no functional and organizational competence over the activities of the Alpha Unit pursuant to Law on Police, Art. 3(1)(1), and Law on Internal Affairs, Arts. 3(1)(2), 15 and 16.⁸⁵ Therefore, Mijalkov was in no position to instigate the police officers of the Alpha Unit. In addition, regardless of the official capacity of Mijalkov, the SPO did not provide sufficient evidence to prove that Mijalkov instigated the police officers to commit the crime.

On 5 March 2018, the Appellate Court overruled the indictment-review Judge's decision upholding the SPO's appeal and confirmed Mijalkov's indictment. According to the Court, the act of instigation can be performed by any person regardless of their official capacity or authority over the material perpetrators. Furthermore, the Appellate Court Judges found that the conclusion regarding the insufficiency of evidence was based on an analysis of the credibility of the evidence, which the indictment-review Judge is not supposed to engage in, as it is the responsibility of the trial judge(s).

TNT - KOK br. 53/17 (TNT)

Status: Ongoing trial

Case announcement: 21 April 2016

Filing of indictment: 29 June 2017

Confirmation of the indictment: 13 November 2017

i. Indictment summary

The SPO alleges that former Prime Minister Gruevski and former Transport and Communication Minister Janakieski motivated by political revenge ordered the unlawful destruction of the building *Cosmos* (a residential complex) owned by Fijat Canoski, president of the Party for European Future (PEI). PEI was created in 2006 and was coalition partner of VMRO-DPMNE in the governments of 2006 and 2008. In 2011, Canoski joined the SDSM-led coalition, in view of the parliamentary elections in 2011. According to the indictment, the events occurred

⁸⁵ According to these provisions, the Director of the Public Security Bureau is responsible for the work of police officers, not the UBK Director.

between 1 April 2011 and the end of 2012. Gruevski and Janakieski ordered Toni Trajkovski (Trajkovski), former mayor of the municipality of Gazi Baba, to set up the demolition process. Trajkovski, in turn, instructed four members of the Gazi Baba procurement commission to proceed with the bureaucratic steps required for the demolition. The seven defendants are charged with the crime of Abuse of Official Position and Authority, pursuant to Crim. Code, Art. 353. Gruevski, Janakieski and Trajkovski are charged with Instigation, pursuant to Crim. Code, Art.23.

Toplik - KOK br.57/17 (Toplik)

Status: Ongoing trial

Case announcement: 20 October 2016

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 21 November 2017

i. Indictment summary

Toplik involves the illegal selling of State-owned land (636,459.48 m²) in order to construct a residential area, Sun City, in the Municipality of Sopishte. The SPO alleges that between 3 April 2007 and 18 February 2013, former Transport and Communication Minister Janakieski and five members of the Ministry's public procurement commission abused their official position. According to the indictment, Janakieski knew that the public announcement requirement regarding the selling of the land had not been fulfilled;⁸⁶ however, he still formed a new public procurement commission and instructed its members to issue the call for tenders and published it in several newspapers (Vecer, Dnevnik, Vest, and the Financial Times). Upon completion of the procedure, the Ministry of Transport and Communication signed a sales contract with the TDGTU F.H.I.B.C SUN CITY. LLC Company. Due to the above-mentioned irregularities, the selected company filed a lawsuit and terminated the contract. Consequently, the Ministry had to pay 64,206,839.00 MKD to the company, resulting in an equal amount of damages to the State budget.

⁸⁶ The land was comprised of 616 parcels. However, the Ministry only had the necessary information for approximately 4% of the land.

Tenders - KOK br.64/17 (Tenders)

Status: Ongoing trial

Case announcement: 20 October 2016

Filing of indictment: 29 June 2017

Confirmation of indictment: 26 December 2017

i. Indictment Summary

The SPO alleges that former Minister of Culture, Elizabeta Kancheska Milevska (Milevska), participated in a fraudulent bidding process relating to the additional construction of the Museum of the Macedonian Struggle for Statehood and Independence – The Museum of the Internal Macedonian Revolutionary Organization, and the Museum of the Victims of the Communist Regime. The SPO charged Milevska and two members of the Ministry's procurement commission with Abuse of Official Position and Authority, pursuant to Art. 353 (5)(1) and Art. 22. According to the indictment, between June 2011 and 5 August 2011, the defendants rigged the process by awarding the bid to perform the additional work in favor of the GTD B. Sh. AD Sh. Company; the same company that had won the previous bid for the construction of the entire museum complex.

Tank - KOK br.59/17

Status: First instance proceedings completed on 23 May 2018.⁸⁷

Appeal pending

Case announcement: 24 January 2017

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 27 November 2017

i. Indictment summary

On 29 June 2017, the SPO charged former Interior Minister Jankuloska and former Assistant MoI for General Affairs Gjoko Popovski (Popovski), with Abuse of Official Position and Authority pursuant to Crim. Code, Art. 353 (5)(1). The

⁸⁷ The Court found Gruevski and Popovski guilty as charged and sentenced Gruevski to two years in prison, and Popovski to six years, six months in prison. The Court separated the proceedings for the third defendant. These proceedings are ongoing.

prosecution alleges that between February and October 2012, in order to satisfy a request by former Prime Minister Gruevski, the defendants issued an unlawful public bid for the purchase of a vehicle (Mercedes -Benz model S 600 Gard) for the MoI. Gruevski is also indicted with the crime of Receiving a Reward for Unlawful Influence, pursuant to Crim. Code, Art. 359(2). According to the indictment, Gruevski requested that Jankuloska activate the public procurement process for purchasing the Mercedes in favor of the company M.A.DOOEL S., (the general distributor of Mercedes vehicles in the Country). The indictment alleges that Jankuloska, in order to comply with the Prime Minister's request, gave written instructions to her assistant Popovski to issue the public bid, specifically tailored for the selected company. According to the SPO, Popovski complied with this request, and on 3 April 2012, issued the public bid contrary to the Law on Public Procurement, Art. 36. As expected, M.A.DOOEL S. was the only company to participate in the bid and was awarded the contract in the amount of 35,226.000 MKD.

Three hundred (300) - KOK br. 40/17

Status: First instance proceedings completed on 22 May 2018.⁸⁸

Appeal pending

Case announcement: 23 March 2017

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 27 September 2017

i. Indictment summary

The SPO charged former Assistant MoI for General Affairs Popovski, with Abuse of his Official Position and Authority, pursuant to Crim. Code, Art. 353(5) (1). The SPO alleges that between 23 June 2008 and 3 May 2012, Popovski misused the public procurement process. By not selecting the most economical offer for the purchase of 300 vehicles for the MoI, Popovski violated the Law on Public Procurement, Art. 2 and 162. According to the indictment, Popovski caused damages to the State budget in the amount of 27,894,522 MKD.

⁸⁸ The Court found Popovski guilty and sentenced him to nine years in prison.

Trajectory - KOK br.52/17 (Trajectory)

Status: Ongoing trial

Case announcement: 22 May 2017

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 1 November 2017

i. Indictment summary

The SPO alleges that between October 2012 and October 2013, former Prime Minister Gruevski, former Vice Prime Minister for Economic Affairs Vladimir Peshevski (Peshevski), former Transport and Communication Minister Janakieski, and former Director of the Agency of State Roads, Ljupco Georgievski (Georgievski), violated the selection process for hiring a company-contractor to construct two highway sections resulting in damage to the state budget in the amount of 9,569,183,522.00 MKD. The SPO charged Peshevski, Janakieski, and Georgievski with Abuse of Official Position and Authority, pursuant to Crim. Code, Art. 353, and Gruevski was charged with Accepting a Reward for Unlawful Influence, pursuant to Crim. Code, Art. 359. According to the indictment, Gruevski encouraged the other defendants to fix the bid for the construction violating the Law on Public Procurement and the conditions set by the Chinese Government (the loan was obtained from the Chinese bank Eksim).⁸⁹ Following Gruevski's orders, the defendants conducted negotiations only with the Chinese company Sinohydro Corporation Limited, excluding the China International Water and Electric Corporation who had submitted an offer with a lower price.

Trust - K.br.1459/17 (Trust)

Status: First instance proceedings completed on 20 July 2018⁹⁰

Case announcement: 28 February 2017

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 29 September 2017

⁸⁹ See Official Government Press Release, 27 November 2012: <http://vlada.mk/node/5165>.

⁹⁰ The Court found Seat Kochan and Vasilije Avirovikj guilty as charged, and sentenced them to six years and three years in prison, respectively. The Court acquitted the third defendant, Safet Vatikj.

i. Indictment summary

The SPO alleges that between October 2011 and January 2012, Sead Kochan, Vasilije Avirovikj and Safet Vatikj, managers of three different companies referenced in the indictment, rigged the tender process for the exploitation of a coalmine in Bitola by submitting false documents. The SPO charged the defendants and the legal entities with Abuse of a Public Call Procedure for Awarding a Public Procurement Agreement or a Public or Private Partnership pursuant to Crim. Code, Art. 275-c (3)(1) and Art. 275-c (4)(3)(1). According to the indictment, the defendants gained a profit of 1.000.000.000.00 MKD.

Transporter - KOK br.30/17 (Transporter)

Status: Ongoing trial

Case announcement: 14 April 2016

Filing of indictment: 5 April 2017

Confirmation of indictment: 20 June 2017

i. Indictment summary

The SPO alleges that between September 2009 and December 2014 the former Mayor of Bitola, Vladimir Taleski (Taleski), the secretary of the municipality Slobodan Bonkanoski (Bonkanoski), eight directors of elementary schools and high schools, and 11 managers of transporting companies rigged the public procurement process involving the arrangement of transport for elementary and high school students in the city of Bitola.

The SPO charged the defendants with the crime of Abuse of Official Position and Authority, pursuant to Crim. Code, Art. 353. Specifically, on 12 January 2009, Mayor Taleski, contrary to the Law on Public Procurement, Art. 24 and 28, issued a call for public bids in order to award the contract but did not specify the allocated budget amount. Therefore, the transport companies were chosen based on the offers they provided. In addition, the contract called for the formation of a three-member commission tasked with overseeing the fulfilment of the companies' obligations, however, contrary to the provisions in the contract this never happened. Furthermore, transport providers charged the municipality a higher price than the one set in their original offers, and the municipality registered the payments from the transport companies as loans.

Tariff - KOK br.51/17 (Tariff)

Status: Ongoing trial

Case announcement: 24 January 2017

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 1 November 2017

i. Indictment summary

The SPO alleges that between September 2011 and July 2016, the former director of the

State-owned electric company AD ELEM and three employees unlawfully approved payments to a group that won the contract to provide a software system to AD ELEM. The SPO charged the defendants with Abuse of Official Position and Authority, pursuant to Crim. Code, Art. 353.

Total - K.br. 1493/17 (Total)

Status: Ongoing trial

Case announcement: 23 March 2017

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 3 October 2017

i. Indictment summary

The SPO charged three marketing companies and their owner, Dragan Pavlovikj Latas (Latas),⁹¹ with Tax Evasion between 1 January 2008 and 15 March 2016, pursuant to Crim. Code, Art. 279(2)(1), in the amount of 5,363,364.00 MKD for legal entities and 3,459,730.00 MKD for the defendant.

⁹¹ Latas is also Chief Editor of the national TV Sitel.

Trevnik - K.br. 238/18 (Trevnik)

Status: Ongoing trial

Case announcement: 22 May 2017

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 24 January 2018

i. Indictment summary

SPO alleges that between July 2011 and 24 January 2013, Latas and two members of his family constructed three weekend houses in Zelenikovo without a construction permit, in violation of Construction Law, Art. 56(1). The SPO charged the defendants with Unlawful Construction, pursuant to Crim. Code, Art. 244-a(1).

Tiffany - K.br. 144/18 (Tiffany)

Status: First instance proceedings completed on 19 February 2018.

Case announcement: 23 March 2017

Filing of the indictment: 29 June 2017

Confirmation of the indictment: 5 January 2018

i. Indictment Summary

The SPO charged a communication and consulting company and its owner, Ivona Talevska (Talevska),⁹² with Tax Evasion, pursuant to Crim. Code, Art. 279(2)(1) between 2008 and 15 March 2015, in the amount of 1,671,611.00 MKD for the defendant and 2,184,677.00 MKD for legal entities.

3.4. Cases Taken Over from the Public Prosecution Office Post-Indictment

The cases discussed in this section involve ongoing trials where the SPO, claiming jurisdiction, took over cases from the PPO pursuant to SPO Law, Art. 11(1). According to this provision, the SPO may take over cases from the PPO that fall within its jurisdiction during any phase of the proceedings. Except for the *Coup* case, the facts pertaining to those cases long precede the wiretap

⁹² Talevska is also Editor of the National TV Sitel.

scandal, and the alleged criminal activities of the defendants do not relate to the intercepted communications. *Sopot* involves a landmine explosion that occurred in 2003; *Monster* involves the murder of five men in 2012; and the *Spy* case involves former military and intelligence agents accused of selling state secrets to foreign intelligence services in 2009. Proceedings in these cases had been ongoing for years prior to the establishment of the SPO. Two of these cases (*Monster* and *Sopot*) are ethnically sensitive due to the fact that the defendants are ethnic Albanians.

The SPO did not publicly explain their decision to take over these cases from the PPO. However, it would appear that these cases were taken over due to existence of wiretap recordings which revealed conversations casting doubt on the credibility of the investigations and trials initiated by the PPO. Therefore, the significance of the SPO assertion of jurisdiction in these cases is not limited to ensuring accountability for the wiretap scandal, but also stretches to remedying possible abuses of the judicial process which have come to light through the wiretap scandal.

It should be emphasized however, that the underlying offenses in these cases are not clearly connected to the wire intercepts. In accordance with SPO Law, Art. 2(1), the SPO jurisdiction is limited to “criminal offenses related to and arising from the content of the unauthorized interception of communication conducted between 2008 and 2015.” The criminal offenses of the defendants in *Sopot*, *Monster* and *Spy*, certainly do not arise from the intercepted communications, and it is also questionable whether the underlying criminal offenses even *relate* to the intercepts. It can be argued that the SPO assertion of jurisdiction in these ongoing cases is based on a broad interpretation of the term “related to.”

Coup - KOK-77/15 (Coup)

i. Background

Between January and February 2015, following Zaev's public announcement that he planned to release the intercepted conversations, and upon the request of the Basic Public Prosecutor's Office for the Prosecution of Organized Crime and Corruption (BPPO OCC), the Basic Court of Skopje issued precautionary measures against Zaev and five other individuals suspected of illegal wiretapping, espionage and destabilizing the country. The Court remanded into custody former UBK Director Zoran Verushevski, his wife Sonja Verushevska (employed at the Stopanska Banka AD, as an English translator), UBK employee Zvonko Kostovski (Kostovski), an MoI employee Gjorgji Lazarevski (Lazarevski), and

an employee of the Municipality of Strumica, Branko Palifrov (Palifrov).⁹³ Zaev was not remanded into custody but he was required to report to Court on a weekly basis. On 25 February 2015, Kostovski pleaded guilty to Unauthorized Tapping and Audio-Recording, pursuant to Crim. Code, Art. 151(4)(1) and Assisting in Espionage, pursuant to Crim. Code, Art. 316(4). The Court sentenced Kostovski to three years in prison.

On 30 April 2015, the remaining defendants were indicted by the BPPO OCC in what is known as the *Coup* case. BPPO OCC charged Zaev with Attempted Violence against Representatives of the Highest State Authorities, pursuant to Crim. Code, Arts. 311 and 19; Verushevski was charged with Unauthorized Tapping and Audio-Recording, pursuant to Crim. Code, Arts. 151(4)(1), 23 and 45; Espionage, pursuant to Crim. Code, Art. 316(4); and Aiding and Abetting in Violence Against Representatives of the Highest State Authorities pursuant to Crim. Code, Arts. 311 and 24. In addition, Sonja Verushevska was charged with Aiding and Abetting in Espionage, pursuant to Crim. Code, Arts. 316(4) and 24; Lazarevski was charged with Unauthorized Tapping and Audio-Recording, pursuant to Crim. Code, Arts. 151(4), 23 and 45, and Assisting in Espionage, pursuant to Crim. Code, Arts. 316(4) and 24; and the BPPO OCC charged Palifrov with Aiding and Abetting in Violence Against Representatives of the Highest State Authorities, pursuant to Crim. Code, Arts. 311 and 24.

ii. Indictment Summary

The SPO alleges that between 2010 and 22 January 2015, the former UBK Director Verushevski⁹⁴ obtained sensitive and confidential information relating to the socio-political and economic situation in the country (including photographs and profiles of the most prominent public figures). According to the indictment, Verushevski planned to deliver the information to unspecified foreign intelligent services. Verushevski ordered Kostovski, (the Chief Engineer of the Maintenance and Telecommunication Section of the 5th Directorate of the UBK, and, subsequently Head of the Unit for Informatics and Technical Support of Operations), to intercept the conversations of several political figures and senior public officials in the country, including the then Prime Minister Gruevski, Interior Minister Jankuloska, Transport Minister Janakieski, UBK Director Mijalkov, and also prominent figures of the opposition such

⁹³ In late July 2015, Sonja Verushevska and Gjorgji Lazarevski posted bail in the amount of 50.000 EUR. Both defendants had their passports confiscated.

⁹⁴ Verushevski was the Director of the UBK in 1998. The indictment refers to Verushevski as a university professor at the time of the alleged offense.

as Radmila Shekerinska.⁹⁵ Kostovski entered their phone numbers into the communication monitoring systems in use at the UBK. In addition, Kostovski recorded the conversations and saved the recordings on USB sticks which he delivered to Lazarevski. Lazarevski then gave the intercepts to Verushevski to turn over to the foreign intelligence services. Sonja Verushevska translated the content of the recordings.

According to the indictment, in addition to sharing the above-mentioned information with foreign intelligence services, Verushevski also shared the information with Zaev. During secret meetings Verushevski advised Zaev about how he should make use of the illegally gathered information. The meetings were scheduled with the assistance of Palifrov, who served as a contact point between the two, hosting them at his house, and turning over the data to the opposition leader (both in hard copy and electronic form). Once in possession of the information Zaev threatened the then Prime Minister Gruevski, demanding that he form a caretaker government with SDSM participation and call early parliamentary elections.

iii. Trial Developments

On 1 June 2015, the Basic Court of Skopje confirmed the indictment. On 5 August 2015, the trial began. On 18 December 2015, the SPO took over the case due to its strict relation to the wiretap scandal. On 18 January 2017, the SPO dropped the charges explaining that the factual situation presented in the indictment was inconsistent with the evidence that the SPO had gathered in the course of the *Fortress* and *Target* investigations.⁹⁶ The SPO further clarified that this decision was made in order to collect additional evidence that would fully clarify the facts, allowing for a correct and lawful prosecutorial decision

iv. Zvonko Kostovski's Plea Agreement

On 16 September 2016, the SPO filed a Motion for Protection of Legality to the Supreme Court, requesting the Court overturn the conviction of Kostovski due to a Violation of the Criminal Code, pursuant to LCP, Art. 414 (1)(3) and an Unclear or Contradictory Verdict or Verdict Lacking Motivation, pursuant to LCP, Art. 415 (1)(11). With respect to the crime of Unauthorized Wiretapping and Audio-Recording, pursuant to Crim. Code, Art. 151(4)(1), the SPO asserted that the

⁹⁵ Radmila Shekerinska is the former leader of SDSM and the current Minister of Defense.

⁹⁶ Between 5 August 2015 and 18 January 2017, 11 hearings were scheduled, all of which were postponed due to various reasons. At the 12th hearing held on 18 January 2017 the SPO informed the Court that the charges would be dismissed.

BPPO OCC did not provide evidence with respect of the commission of this crime besides the controversial confession of the defendant. According to the SPO although the conviction was based on a plea agreement, the judge should have verified its authenticity and the existence of the supporting evidence. LCP, Art. 483, states that the prosecution shall submit the draft plea agreement to the Preliminary Proceedings Judge “together with all the evidence.” In addition, LCP, Art. 489 mandates that the Preliminary Proceedings Judge reject the agreement if s/he “finds that the collected evidence regarding the facts relevant for selecting and determining the criminal sanction do not justify the pronouncing of the proposed criminal sanction.”

With respect to the crime of espionage the SPO emphasized the inconsistency that Kotovski's plea agreement created. The basis for Kostovski's conviction was his participation in assisting Verushevski to commit espionage; however, Verushevski's charges were later dismissed, creating an unjust result. The SPO therefore posed the rhetorical question of how it was possible to be found guilty of assisting someone in committing an offense when it still has not been proven whether the other individual actually committed the underlying offense.

On 6 November 2017, the Supreme Court partially upheld the SPO's Motion for Protection of Legality. The Supreme Court endorsed the SPO's argument with respect to the crime of Assisting in Espionage, pursuant to Crim. Code, Arts. 316(4) and 24. Accordingly, it overturned the conviction in relation to this charge and vacated the sentence. However, the Supreme Court did not accept the SPO's argument with respect to the crime of Unauthorized Wiretapping and Audio-Recording, pursuant to Crim. Code, Arts. 151(4)(1), 23 and 45. Furthermore, the Supreme Court noted an inconsistency between the SPO's oral arguments, and the SPO's written arguments in the Motion for Protection of Legality. The Court stated that “at the session held following the submission of the motion, the SPO acknowledged that there is sufficient evidence that Kostovski was a member of a criminal association.” According to the Court, the SPO described in detail Kostovski actions, as well as his role and contribution in the entire scheme. Moreover, the Supreme Court pointed out that Kostovski was a witness in the connected *Fortress-Target* case, emphasizing that “the reason why he is not being prosecuted by the SPO [in that case] is because (...) his statement was of particular importance for the discovering other perpetrators of criminal offenses in accordance with Article 43 of the LCP.” Accordingly, the Supreme Court confirmed the conviction solely with respect to the crime of Unauthorized Wiretapping and Audio- Recording, upholding the sentence of one year in prison that had been imposed by the Preliminary Proceedings Judge.

Sopot - KOK br.53/10 (Sopot)

On 4 March 2003, in the village of Sopot, Kumanovo area, a landmine exploded causing the death of two NATO soldiers and one civilian. On 11 March 2011, the PPO filed an indictment charging a total of twelve persons (all Sopot villagers) with Terror and Endangerment of the Constitutional Order and Security, pursuant to Crim. Code, Arts. 313, 327(2) and Art. 22. On 10 July 2017, during re-trial⁹⁷ before the Basic Court Skopje 1, the case was taken over by the SPO. The SPO's assertion of jurisdiction followed the public presentation of an unauthorized intercepted communication between former Interior Minister Jankuloska and former UBK Director Mijalkov which revealed that promises may have been made to influence the outcome of the Sopot case. In October 2017, the SPO moved to admit new evidence in the case such as additional witnesses and the intercepted conversation. As of March 2018, the SPO dropped the charges, stating that the SPO found no evidence supporting the guilt of the defendants. Specifically, the only evidence against the defendants was a statement by a witness who had been subjected to torture. This statement, therefore, was unreliable and could not be used at trial. The Court issued a verdict "rejecting the indictment" pursuant to LCP, Art. 402(3). The SPO announced that further investigative activities would be aimed at identifying the actual perpetrators.

Spy - KOK br.99/16 (Spy)

The Spy case involves several former military and intelligence agents charged with committing crimes, including theft of classified information, blackmail and extortion. On 14 December 2013, the BPPO OCC filed an indictment charging 19 people. The prosecution alleged that in 2009, the defendants created a criminal enterprise to collect and sell intelligence about the country to foreign intelligence services.⁹⁸ On 6 October 2014, the Basic Court found the defendants guilty as charged and sentenced them to aggregated sentences ranging from one to fifteen years in prison. On 25 March 2016, the SPO took

⁹⁷ Between September 2003 and June 2009, the PPO filed five separate indictments charging 11 defendants with Terrorism, pursuant to Crim. Code, Arts. 313, 327(2) and Art. 22. Sentences ranged from **14 years to 15 years in prison. The Appellate Court confirmed the** sentences. On 19 February 2010, a Standing Parliamentary Inquiry Committee for the Protection of Civil Freedoms and Rights reviewed the case, producing a report establishing that human rights violations had been committed. On 11 March 2011, the PPO filed joint indictments charging 11 defendants with Terrorism. The re-trial started in March 2011 and in July 2017 the SPPO assumed jurisdiction over the case.

⁹⁸ Charges ranged from Criminal Association, pursuant to Crim. Code, Art. 394 (1); Espionage, pursuant to Crim. Code, Art. 316 (3); Fraud, pursuant to Crim. Code, Art. 247(3)(1); Blackmail, pursuant to Crim. Code, Art. 259 (2)(1); Disclosing State Secrets, pursuant to Crim. Code, Art. 317(2); and Extortion, pursuant to Crim. Code, Art. 258(2)(1).

over the case while the appeal was pending and did not publicly announce the reasons for their jurisdictional claim. On 14 October 2016, the Appellate Court upheld the guilty verdict of the Basic Court with respect to 13 defendants, but reduced sentences for some of them. The Appellate Court quashed the verdict for 6 defendants, ordering a re-trial. The re-trial started on 27 January 2017.

Monster - K.br.66/17 (Monster)

On 12 April 2012, five men were murdered near Smiljkovci Lake in Skopje. Because the homicide happened the day before Good Friday (Orthodox Easter) and the victims were ethnic Macedonians, the murder was believed to be ethnically motivated. Between 2012 and 2013, the BPPPO OCC charged seven defendants with terrorism pursuant to Crim. Code, Art. 394 (1)(1). The trial began on 20 December 2012 and lasted until 30 June 2014. The Court found six defendants guilty as charged and sentenced them to life in prison. One defendant was acquitted. On 9 October 2015, the Appellate Court confirmed the verdict of the Basic Court. On 31 October 2017, following the defendants' appeal, the Supreme Court quashed the verdict and ordered a re-trial. The Acting Chief Public Prosecutor joined the defense in requesting a re-trial, due to procedural shortcomings during the trial, as well as the existence of undisclosed intercept recordings that cast doubt over the fairness of the proceedings. The SPO took over the case on 20 March 2018 and the proceeding is currently in the re-trial phase. As in the other cases, the SPO did not publicly announce the reasons for their jurisdictional claim.

3.5. Ongoing Investigations

The SPO did not complete two of the earlier investigations by the 30 June 2017 indictment deadline: *Talir* (announced on 22 May 2017) and *Board* (announced on 23 March 2017). In *Talir*, former Prime Minister Gruevski and ten other people are suspected of illegally financing the political party VMRO-DPMNE using laundered money between 2009 and 2015.⁹⁹

In *Board* the Director of an elementary school is suspected of abusing his official position and authority by disregarding the public procurement process for the construction of a new school in the village of Zajjas.

⁹⁹ English translation of the press-conference in which the SPO announced and described this case. See SPO's website, <http://www.jonsk.mk/?p=807>.

On 19 December 2017, the SPO announced seven new investigations during a press conference:¹⁰⁰

- *Foreign Services*: the former Chief of the 5th Directorate of the UBK (instigator) and a former Assistant of the MoI (material perpetrator), are suspected of abusing their official positions and authority in October/November 2014, by ordering from a foreign company through an unlawful public bid, wiretap equipment. According to the SPO, this crime was committed to bolster former Prime Minister Gruevski's claim that foreign intelligence services were spying on the country at the time of the wiretap scandal.
- *PayToll*: a former member of parliament is suspected of making fraudulent claims relating to travel/commuting expenses and business trips.
- *Roentgen (X-Ray)*: the former Minister of Health, is suspected of favoring one company over other bids during a 2012 public procurement of radiological equipment for four healthcare institutions.
- *Producer*: the then Minister of Agriculture is suspected of having financed the production of a TV show between 2009 and 2012, contrary to the Law on Public Procurement.
- *Leaders*: the SPO investigates the destruction of a building that was illegally built between 2011 and 2013.
- In *Tariff 2*: the SPO investigates suspected abuse in the implementation of the software ERP for the electric company ELEM relating to the *Tariff* case.
- In *Transporter 2*: the SPO continues the existing case *Transporter*, relating to the misuse of the public procurement procedure in the arrangement of the transport of elementary and high school students in the city of Bitola. The investigation involves ten suspects.

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

On 20 March 2018 the SPO announced three new investigations:¹⁰¹

- *Census*: Former Prime Minister Gruevski and leader of DUI Ali Ahmeti,

¹⁰⁰ See SPO's website, <http://www.jonsk.mk/?p=1490>.

¹⁰¹ See SPO's website (original language version), <http://www.jonsk.mk/?p=1619>.

are suspected of the crime of Abuse of Official Position and Authority pursuant to Art. 353 (1)(4) for stopping the ongoing process for the census of the population in 2011. Specifically, the suspects requested that the Parliament withdraw the Law on Census with the excuse that the procedure was not in line with the international standards set by Eurostat. However, their real intention was to conceal truthful data on the demographic and economic condition of the country.

- *Powerman*: Four suspects, one current VMRO-DPMNE MP, his father and the former mayor of Makedonski Brod are suspected of fraud and abuse of official position in relation to the unlawful sale of a state-owned building in the municipality of Makedonski Brod.
- *Aktor*: Former Prime Minister Gruevski, former transport Minister Janakieski and eight other people are suspected of rigging the public procurement procedure for the construction of a highway (Demir Kapija-Smokvica) in favour of the company AKTOR. Moreover, the management of AKTOR is suspected of money laundering together with two other companies involved as sub-contractors.

4. Analysis of Selected Issues

4.1 Introduction

This chapter analyzes legal issues arising from monitoring observations within the scope of this report. Particular attention will be devoted to the judicial practice on precautionary measures in SPO cases before and after the filing of the indictments, as well as the issue of the intercepts admissibility in the indictment confirmation stage.

4.2. Initial Challenges Faced by the SPO

4.2.1. Problematic Co-operation

The initial functioning of the SPO was marred by the reluctance of many of the country's bodies and institutions to co-operate with it. As noted by the Report of the European Commission, 2016, the work of the SPO "continued to be hampered in practice. Criminal courts regularly refused to grant pre-trial measures requested by the SPO during the investigative stage, and the Council of Public Prosecutors and the ruling party publicly criticized its work."¹⁰² This is confirmed by the SPP Janeva's periodic reports to Parliament,¹⁰³ where she expressed frustration about the repeated violations by many judicial bodies regarding the obligation to comply with the SPO requests for assistance in a timely manner, as well as the initial refusal of the PPO to hand over cases pursuant to SPO Law, Art. 11(2).¹⁰⁴ It should be mentioned however, that in her last two reports Janeva acknowledged that many of the institutions no longer harbored hostile attitudes towards the SPO and were more willing to co-operate.¹⁰⁵

¹⁰² European Commission, "The former Yugoslav Republic of Macedonia 2016 Report," 9 November 2016, pg. 13, (hereinafter "EU Commission 2016 Report") https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf.

¹⁰³ See 1st, SPO Report, pg.13; 2nd SPO Report, pg.11; and 3rd SPO Report, pg. 32.

¹⁰⁴ See SPO Report 3, pg. 32; "The obstruction of Special prosecutor Katica Janeva's work already confirmed by EU and EPI," Teo Blazevski, <https://bit.ly/2OtpR9>; and "Standoff Over Access to Police Data Rocks Macedonia," Sinisa Jakov Marusic, <https://bit.ly/2ejwfUO>.

¹⁰⁵ See 4th SPO Report, pg. 24 and 5th SPO Report, pg. 34.

4.2.2. Presidential Pardon

The most significant obstruction to the SPO's work and the pursuit of accountability, came from President Gjorge Ivanov. On 12 April 2016, Ivanov issued a blanket pardon for 56 individuals. In an address to the nation, Ivanov emphasized that the purpose of the pardon was to preserve the interest of the state, its stability and independence, and put an end to the political crisis.¹⁰⁶

Notably, the pardon came shortly after the SPO announcement of the investigations *Titanic* and *Fortress*. Former Prime Minister Gruevski, former Interior Minister Jankuloska and former Transport Minister Janakieski were among those who were pardoned.

Ivanov's pardon provoked strong reactions from the SDSM-led opposition and the general population, including the protest movement known as "the colorful revolution."¹⁰⁷ Protesters called for the resignation of the government and the president, as well as measures to improve the transparency and fairness of elections.¹⁰⁸ The pardons were also strongly criticized by the international community. The EU Commission noted that this move "reinforced the public perception of impunity and selective justice. It also showed a serious lack of political will to engage effectively against corruption."¹⁰⁹

On 6 June 2016, under the pressure of two months of internal protests and the criticism of the international community, Ivanov revoked the pardons, referring to the existence of a new reality in the country, with functioning institutions capable of dealing with the challenges.¹¹⁰ This move required retroactive amendments to the Law on Pardon, to allow for the possibility of revoking a pardon.¹¹¹

It is unclear, at this stage, whether the revoked presidential pardon will have any effects on the cases adjudicated before the country's judiciary. It is worth noting that the Supreme Court of Greece cited the revoked pardon as justification for its decision to reject the extradition request of two defendants charged by the SPO.¹¹²

¹⁰⁶ See "Ivanov: Amnesty for one person and interruption of criminal proceedings for politicians," <http://netpress.com.mk/ivanov-amnestija-abolicija-pomiluvanje/2/>.

¹⁰⁷ Protests started on 27 February 2016. See "Macedonia charges protesters in 'Colourful Revolution'", Patrick Strickland, <https://www.aljazeera.com/indepth/features/2016/06/macedonia-charges-protesters-colourful-revolution-160621113604856.html>.

¹⁰⁸ See "Macedonia corruption: Fourth night of protests as snap election called", 15 April 2016, <https://www.bbc.com/news/world-europe-36058173>.

¹⁰⁹ See EU Commission 2016 Report, pg. 16.

¹¹⁰ The pardons were revoked in two separate phases: On 27 May, President Ivanov revoked 22 pardons which included senior public officials. On 6 June, he announced that he was revoking the 34 remaining presidential pardons. Ivanov's statements are available at the following links: <http://www.president.mk/en/media-centre/speeches/3821%20obrankanjepomiluvanja.html>; and see also <http://www.president.mk/en/media-centre/press-releases/3830.html>.

¹¹¹ Official Gazette no. 2436, 20 May 2016.

¹¹² See Decision of Supreme Court of Greece in the extradition cases of Goran Grujevski and Nikola Boshkoski, dated 18 May 2018, available at: <https://bit.ly/2uXZb1c>.

4.2.3. *The Conflict of Competence with the Chief Public Prosecutor*

A conflict of competence arose in the context of the SPO *Trust* investigation. In March 2017, the SPO's request for detention of the main suspect in the case, businessman Sead Kochan, was granted by a Panel of the Skopje Basic Court 1 after having been refused by an individual judge deciding in first instance. The Panel also ordered the immediate execution of the decision pending appeal. The detention was later confirmed by the Appellate Court.¹¹³

On 27 March 2017, Chief PP Marko Zvrlevski (Zvrlevski) filed a Motion for the Protection of Legality with the Supreme Court, requesting the highest court to declare the immediate execution of the detention measure unlawful.¹¹⁴ A Motion for the Protection of Legality is an extraordinary remedy that the Chief PP may file against final judicial decisions that violate the law, the Constitution, or a ratified international agreement pursuant to LCP Art. 457. Janeva reacted by filing a counter motion in which she "withdrew" the motion filed by Zvrlevski and affirmed her exclusive competence over the case in accordance with SPO Law, Art. 5(3). On 11 May 2017, in a disputable decision due to the fact that the Chief PP does not have any competence to act in SPO cases based on the SPO Law, the Supreme Court accepted Zvrlevski's motion, ruling that the immediate execution of detention had been unlawful. Instead of analysing the issue of competence (or lack thereof) of the Chief PP and declaring the motion inadmissible, the Court addressed the merits. Although this outcome did not have much practical consequences on the personal freedom of the suspect (in that he was already a fugitive), the decision of the Supreme Court set a dangerous precedent by allowing the Chief PPO to interfere in a case under the jurisdiction of the SPO.

4.2.4. *The Issue of the Admissibility of the Wiretaps Before the Supreme Court*

In early April 2017, the president of the Supreme Court, Jovo Vangelovski (Vangelovski), requested that the Court issue a legal opinion regarding the admissibility of the wiretaps in court. Vangelovski did so by filing a written request pursuant to the Law on Courts Art. 37(1) titled "Can the evidence obtained unlawfully be used in court proceedings?"¹¹⁵ In his request Vangelovski took a decisive stance against *any* use of the wiretap conversations in court proceedings. According to Vangelovski, the intercepted conversations must be considered

¹¹³ For a more detailed analysis of the precautionary measures in this case, see below ¶ 4.4.3.1.

¹¹⁴ The substance of the legal issue at hand is as follows: whether a custodial precautionary measure issued for the first time by the 25(5)-Panel, after being denied by a single judge, can be immediately executed.

¹¹⁵ In accordance with the Law on Courts, Art.37(1), the Supreme Court shall ensure the uniform interpretation of the law upon *its own initiative* or upon the initiative of the judges of the lower courts, by issuing binding opinions.

“evidence collected in an unlawful manner” pursuant to LCP, Art.12.¹¹⁶ Therefore, the intercepts should only be used for investigative purposes as springboard evidence (i.e. “only as indications to investigate whether the content of such communications results in a criminal offence”),¹¹⁷ but must be excluded from the admissible evidence in court pursuant to LCP, Art. 93. Vangelovski’s decision to trigger the *proprio motu* power of the Supreme Court was expressly linked to the SPO’s request that he recuse himself from deciding on the Motion for Protection of Legality in the *Trust* case (see paragraph above),¹¹⁸ due to the fact that he was one of the persons overheard on the wiretaps. As discussed in the report this is a key issue upon which a successful prosecution in SPO cases depends. On 22 May 2017, the Supreme Court announced that it was postponing the hearing and has not addressed the matter further.¹¹⁹

4.3. Prosecutorial Strategy: SPO Decisions Regarding Defendants, Procedures and Charges

4.3.1. Defendants

The SPO filed charges in 20 criminal cases, against a total of 142 defendants (including seven companies). There are five large multi-defendant cases: *Titanic 1* and *Transporter* (21 defendants in both cases), *Titanic 2* (11 defendants), *Fortress-Target* (15 defendants) and *Centar* (14 defendants). In keeping with the above-made thematic distinction of the cases (i.e., those relating to the *causes and modalities* of the wiretap scandal and those *arising from* the wiretap conversations), the following can be observed: the three cases investigating the origins of the wiretap scandal *Fortress 2*, *Fortress-Target* and *Treasury* indict the former UBK leadership, together with lower-ranking UBK employees. Specifically, former UBK Director Mijalkov, Mijalkov’s former Chief of Cabinet Jakimovski and former Chief of the 5th Directorate of the UBK Grujevski are all indicted. Notably, former Interior Minister Jankuloska is also indicted in the *Fortress-Target* case for her assistance in the commission of the alleged crimes. Besides Jankuloska, no other holder of political office from the former ruling party is indicted in these cases.

¹¹⁶ LCP, Art.12 states: “any evidence collected in an unlawful manner or by violation of the rights and freedom established by the Constitution (...), the laws and the international agreements, as well as any other evidence resulting thereof, may not be used and may not provide the ground for a judicial verdict.”

¹¹⁷ Extracted from the President of the Supreme Court, Jovo Vangelovski’s, motion.

¹¹⁸ Pursuant to Law on Courts, Art. 37(1) and LCP, Art. 36(2), the Supreme Court decides upon requests for the exclusion of its president during the plenary session.

¹¹⁹ See Supreme Court’s website, <https://bit.ly/2LzSzA7>.

In addition, 11 of the 17 cases that were initiated due to the intercepted communications involve the highest-ranking officials of the former ruling party VMRO-DPMNE. One of the most significant cases is *Titanic 1*, where former Prime Minister Gruevski, former Interior Minister Jankuloska, former Transport Minister Janakieski, former government Secretary General Kiril Bozhinovski, and Gruevski's former cabinet chief Martin Protugjer stand accused of creating a criminal association for the purpose of committing electoral offenses. Former Prime Minister Grueski is indicted in a total of five cases.¹²⁰ Furthermore, five of the 17 cases *Transporter*, *Tiffany*, *Total*, *Trust* and *Trevnik* do not involve high profile defendants but relate to offenses committed at the local government level or within the private-sector.

Considering several intercepted conversations were released to the public implicating DUI members in possible criminal activities,¹²¹ it is noteworthy that the SPO indicted only one defendant affiliated with DUI (in *Titanic 3*). In response to journalists' questions in June 2017, Janeva explained that although there were no other open investigations against DUI members at the time, the SPO had only processed 42% of the wiretaps.¹²² As discussed in ¶ 3.5, in March 2018 the SPO announced the *Census* investigation, into inter alia, the leader of DUI Ali Ahmeti.

4.3.2. Proceedings

The LCP contains several expedited forms of procedures pursuant to Art. 468 - 500; such as summary procedure (also referred to as summary judgment). Summary procedure applies when the law prescribes a lower sentence for the crimes charged, specifically, a monetary fine or a maximum prison sentence of five years. The main differences between summary judgment and ordinary procedure are the following:

¹²⁰ In addition to *Titanic 1*, Gruevski is indicted in *TNT*, where he is accused of instigating the unlawful destruction of a building owned by a political opponent; in *Centar*, where he is accused of instigating violence during a protest against SDSM-municipal councillors; in *Trajectory* and *Tank*, where he is accused of having exercised unlawful influence in the selection of a company-contractor.

¹²¹ See: Wiretapping scandal set 38: The "Chair and Tetovo" exchange, available at: <http://truthmeter.mk/wiretapping-scandal-set-38-the-chair-and-tetovo-exchange/>. See also, *Slobodnaevropa.mk*, *Zaev: DUI together with Gruevski involved in criminal and corruption*, 16 June 2015, <https://www.slobodnaevropa.mk/a/27075282.html>; *Kapital.mk*, *DUI remains in the government because it is the same as VMRO DPMNE*, 16 June 2015, <http://kapital.mk/zaev-dui-ostanuva-vo-vladata-zashto-e-ista-kako-vmro-dpmne/>; *Focus.mk*, *Zaev: Ahmeti is arranging sale of a property to a businessman for 1000 euro per m2*, 16 June 2015, <http://fokus.mk/zaev-abmeti-posreduva-na-biznismen-da-mu-se-prodade-imot-za-1-000-evra-kvadrat/>.

¹²² See also video of the press conference, beginning at minute 1:12, at <https://www.youtube.com/watch?v=5nHB2N4twpQ>.

(i) In summary judgment the Prosecutor undertakes all necessary action during the pre-investigative phase, and there is no formal investigation phase.

(ii) In summary judgment there is no formal confirmation of the indictment process. The judge, upon receiving the indictment proposal from the prosecution immediately sets a date for the main hearing before him/her (unless s/he finds grounds for rejecting the indictment proposal). Conversely, in the standard trial procedure the process is longer. The law requires that a different judge/panel reviews the indictment and allows for the defendant to object to the indictment, and for a judge to review the indictment in a formal hearing.

The application of summary judgment is tied to the charges chosen by the prosecution. Out of 20 cases, only the first two indictments submitted by the SPO in September 2016, *Fortress 2* and *Centar*, involved summary proceedings. Seventeen cases where SPO filed indictments in June 2017 are all tried in standard trial proceedings.¹²³ However, in seven of these cases 13 defendants are charged with crimes that entail a sentence below five years and are therefore tried in a summary judgment. Procedurally, these summary judgments are tied to the main case and the defendants participate in the same trial proceedings as their co-defendants. Two of the defendants charged with crimes involving a sentence below five years are high profile defendants. Former Prime Minister Gruevski, is indicted in five cases (*Titanic 1*, *Trajectory*, *Tank*, *Centar* and *TNT*), three of which are summary proceedings (*Tank*, *Centar* and *Trajectory*). Former UBK Director Mijalkov is indicted in four cases (*Titanic 2*, *Fortress-Target*, *Torture*, and *Treasury*), two of which are summary proceedings (*Fortress-Target* and *Titanic 2*).

4.3.3. Charges

There are two cases alleging the existence of widespread criminal networks carried out through criminal associations pursuant to Crim. Code, Art. 394, specifically observed in *Titanic 1* and *Fortress-Target*. These criminal associations involve the then leadership of the political party VMRO-DPMNE (which was in power from 2006-2017), and the Bureau for Security and Counterintelligence (UBK).

The most frequent offense charged by the SPO in nine indicted cases is that of Abuse of Official Position and Authority, pursuant to Crim. Code, Art. 353. In eight of the nine cases the indictment refers to Crim. Code, Art. 353 (5) which prescribes a higher sentence (minimum of five years) and applies when officials abuse their official position “during the execution of public purchases” or when the offense causes “damage to the finances of the Budget of the [State], public funds or other State-owned funds.”

¹²³ The *Transporter* case announced in April 2017 is also tried in a standard trial proceeding.

Other offenses charged by the SPO are as follows: Crim. Code, Art. 165-a, Abuse of Funds for Financing the Electoral Campaign; Crim. Code, Art.160, Violation of the Voters Freedom of Choice; Crim. Code, Art. 159, Violation of the Right to Vote; Crim. Code, Art. 275-c, Abuse of a Public Call Procedure; Crim. Code, Art. 279, Tax Evasion; Crim. Code, Art. 359, Accepting a Reward for Unlawful Influence; Crim. Code, Art. 244-a, Unlawful Constructing; Crim. Code, Art. 361, Falsifying an Official Document; Crim. Code, Art. 386, Violence; and Crim. Code, Art. 142, Torture and other Cruel, Inhuman or Degrading Treatment and Punishment.

While acknowledging that the Mission was not in a position to review the evidence in these cases and that it is within the prosecutor's discretion to decide how to qualify charges in any given indictment, it is apparent that the SPO did not charge some offenses that could be applicable to some of the alleged facts in the indictments. For example, in the *Fortress-Target* case, where the SPO indicted the former UBK Director and several employees for conducting unlawful wire intercepts, none of defendants were charged with Unauthorized Wiretapping and Audio Recording, pursuant to Crim. Code, Art. 151.¹²⁴ As previously stated, in *Fortress 2*, the SPO alleges that Grujevski ordered six UBK administrative employees (his subordinates) to destroy documents relating to the wiretap equipment. Although the facts stated in the indictment consist of the destruction of evidence, the defendants are charged with Falsifying an Official Document pursuant to Crim. Code, Article 361(2)(1).

One possible source of concern is whether these cases sufficiently reflect the full extent of the criminal acts revealed in the wiretaps. For instance, there are no cases involving some of the most concerning conversations published in 2015, that revealed possible allegations of control over the appointment, discipline and dismissal of judges by the executive branch,¹²⁵ and the alleged abuses surrounding the urbanistic plan "Skopje 2014," promoted by the VMRO-DPMNE government. This has not resulted in any indictment.¹²⁶ On 19 December 2017, however, the SPO announced that they have taken over the case regarding Skopje 2014 from the PPO. As explained previously, it is unclear

¹²⁴ See Crim. Code, Art. 151(1): "[w]hoever, by using special devices, without authorization taps or records conversation or statement not intended to him shall be fined or sentenced to imprisonment of one year (...)". Paragraph (4) of the same provision reads: "[i]f the crime referred to in paragraphs 1, 2 and 3 is committed by an official person while performing the duty, that person shall be sentenced to imprisonment of three months to three years."

¹²⁵ See "Macedonia Opposition: Transcripts Show 'Staggering' Interference in Courts," Sinisa Jakov Marusic, 15 February 2015, <https://bit.ly/2JepGJk>.

¹²⁶ See "Skopje 2014 Uncovered", <http://skopje2014.prizma.birn.eu.com/en/>; "New Tapes Show Macedonian PM 'Designed' Skopje 2014," Sinisa Jakov Marusic, 1 June 2015, <http://www.balkaninsight.com/en/article/macedonian-opposition-exposes-skopje-revamp-project>; "True Cost of 'Skopje 2014' Revealed," Meri Jordanovska, 27 July 2015, <https://bit.ly/1LPk28D>.

whether the 18-months statutory deadline runs from the date of the transfer of the materials or from the date the case is transferred from the PPO. If the latter is true, then the SPO could still file an indictment in this case, until June 2019.

4.3.4 *Transparency*

It is legitimate to expect that the SPO will investigate and if warranted, prosecute the full scope of the criminal acts, and all suspects (evidence permitting) discovered in the wiretap recordings.

While it is entirely up to the SPO to decide who to investigate and prosecute, it is important that the SPO updates the public and communicates those decisions. This applies, not only to decisions to investigate and indict, which the SPO has been duly informing the public about, but also to decisions not to proceed when SPO prosecutors have concluded that there is insufficient evidence to investigate or prosecute a case. Communicating these decisions to the public does not mean compromising the confidentiality of the investigative process.

4.4. The Use of Precautionary Measures in SPO Cases

4.4.1. *National Legal Framework*

Precautionary measures are preliminary decisions of a procedural nature based on suspicion or on elements of incriminating evidence. The primary goal of precautionary measures is to ensure the presence of the defendant at trial, where his/her guilt would have to be established beyond reasonable doubt. Therefore, precautionary measures affect the personal liberty of persons who, at the stage in which the measures are enacted, are presumed innocent. LCP, Art. 144-180, address precautionary measures in Chapter XVI, titled “measures to ensure the presence of persons and unobstructed conduction of the criminal procedure.” The LCP lists such measures in progressive order based on their restrictive nature: summons, non-custodial precautionary measures, bail, court order to enforce the presence of the defendant, deprivation of liberty, holding, short term detention, house detention and pre-trial detention.¹²⁷ In conformity with international standards, LCP, Art. 144(2) mandates that the less restrictive measure must be applied when the facts indicate that it is sufficient to achieve the intended aim.¹²⁸

¹²⁷ See LCP, Arts. 145-180.

¹²⁸ LCP, Art. 144(2) states “[w]hile deciding which of the measures will be applied, the court shall bear in mind the conditions for applying specific measures, making sure not to apply a more severe measure if the goal can be achieved by a less afflictive one.”

LCP, Art. 165 sets the conditions that the court must adhere to when imposing detention. The first condition is the existence of reasonable suspicion that the suspect has committed a crime.¹²⁹ In other words, the court must first verify that there are sufficient elements of incriminating evidence against the suspect or accused person to justify the decision. Once the existence of reasonable suspicion has been established, the court may impose detention based on the following legal grounds: (i) if the person is hiding, his or her identity cannot be established, or there are other circumstances indicating that the person might flee; (ii) if there is a reasonable fear that the person will destroy the traces of the crime, or if certain circumstances point out that she or he will obstruct the investigation influencing witnesses or collaborators; and (iii) if articulable facts justify the fear that the person will repeat the crime, attempt the crime or commit a crime.¹³⁰

In addition, LCP, Art. 167(2) has stringent requirements with respect to the reasoning for imposing detention. Specifically, such decisions shall comprise of: (1) all the facts and evidence that substantiate that there was reasonable suspicion that the defendant committed the criminal offense; (2) particularized reasons that justify each separate ground for detention; and (3) specific reasons that establish that the detention objective (i.e. securing the presence of the defendant) cannot be achieved by applying other measures. Precautionary measures are a stand-alone phase of the criminal proceedings characterized by strict deadlines. Most often, they are issued upon request of the prosecution by the Preliminary Proceedings Judge in the investigative stage.¹³¹ Pursuant to LCP, Art. 169(1) the Preliminary Proceedings Judge must issue a detention decision within six hours of the person's first appearance in Court. The LCP provides for a two-tier system of judicial review of precautionary measures. During the investigation, an initial detention order by the Preliminary Proceedings Judge may be challenged before a panel of the First Instance Court comprised of three judges pursuant to LCP, Art. 25(5). Hereinafter, this panel shall be referred to as the "Article 25(5)-Panel." The Article 25(5)-Panel's decision may in some cases, be challenged before the Appellate Court.¹³²

The prosecution may request precautionary measures against the defendant also after the closure of the investigation, with the submission of the indictment and pending its approval. Pursuant to LCP, Art. 322(1), in these cases, the Article 25(5)-Panel is competent to decide on the requested measure within twenty-four hours. This provision does not specify whether the Article 25(5)-Panel decision may be appealed further. However, the general clause envisaged by LCP, Art. 440,

¹²⁹ See LCP, Art. 165(1).

¹³⁰ See LCP, Art. 165(1), ¶¶ (1)(2)(3).

¹³¹ See LCP, Art. 146(5) for non-custodial measures and LCP, Arts. 168 and 169 for detention measures.

¹³² See LCP, Art. 146(6) for non-custodial measures and LCP, Art.169(3) for detention measures.

must be deemed applicable. Pursuant to this provision, unless otherwise stipulated by law, “any parties or persons whose rights have been violated” may appeal against any Court’s decision issued in first stage of review. Accordingly, the Article 25(5)-Panel’s decision may be appealed before the Appellate Court.¹³³

4.4.2. *International Legal Framework*

The authority to apply pre-trial detention is limited by the presumption of innocence and the right to liberty and security of persons.¹³⁴ International and regional human rights instruments establish certain procedural guarantees and minimum standards relating to pre-trial detention. According to the International Covenant on Civil and Political Rights (ICCPR), Art. 9(1), “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.” Significantly, the ICCPR mandates that detention shall be used as an exception, and not as a rule. According to ICCPR, Art. 9(3), “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.” In other words, detention should be used only as a last resort.

Similar wording is contained in the European Convention on Human Rights (ECHR), Art. 5(1). The latter instrument is explicit as to the limited circumstances under which pre-trial detention is permissible, specifically, when a reasonable suspicion exists that the person has committed a criminal offense “or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.”¹³⁵ Drawing upon this provision, the European Court of Human Rights (ECtHR) case law has developed four basic grounds for imposing pre-trial detention: (i) danger of absconding, (ii) obstruction of the proceedings, (iii) repetition of offenses, and (iv) preservation of public order.¹³⁶ The ECtHR has consistently held that the use of each ground cannot be “general and abstract.”¹³⁷ On the contrary, “arguments for and against release must contain references to the specific facts and the applicant’s personal circumstances justifying his detention.”¹³⁸

According to ECHR, Art. 5(3), the arrested person “(..) shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned

¹³³ See LCP, Art. 25(7).

¹³⁴ See OSCE Spillover Monitoring Mission to Skopje, “Pre-Trial Detention: National Practice and International Standards,” pg. 8, Skopje, March 2008.

¹³⁵ See ECHR, Art. 5(1)(c).

¹³⁶ See ECHR, “Guide on Article 5 of the Convention: Right to Liberty and Security,” pg. 27-28.

¹³⁷ See also, ECtHR, *Clooth v. Belgium*, Application No. 12718/87, ¶ 44 (5 March 1998).

¹³⁸ ECtHR, *Aleksanyan v. Russia*, Application No. 46468/06, ¶ 177 (22 December 2008).

by guarantees to appear for trial.” This provision enshrines a presumption in favor of release. Until conviction, the accused must be presumed innocent and must therefore be released once his/her continuing detention ceases to be reasonable.¹³⁹ By this logic, the case law has clarified that when deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring the person’s presence at trial.¹⁴⁰

Finally, in accordance with ECHR, Art. 5(4), “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” This provision provides detained persons with the right to actively seek judicial review of their detention.¹⁴¹

4.4.3. *Requests for Precautionary Measures Prior to the Submission of the Indictments*

During the investigations, the SPO requested different types of precautionary measures covered by the LCP (from detention to confiscation of passport, or prohibition to undertake certain working activities). According to the SPO reports between March 2016 and March 2017,¹⁴² the SPO requested pre-trial detention for 23 people in four investigations.¹⁴³ The court only imposed detention upon five persons who, following the defense appeal were placed on house arrest or less restrictive precautionary measures within a few days.¹⁴⁴ The Court denied the SPO’s requests for detention pertaining to the remaining defendants. In denying the detention requests, the court imposed other less restrictive precautionary measures upon eight people.¹⁴⁵ Besides detention, in six investigations the SPO also requested that the court impose less restrictive precautionary measures against 23 defendants. The Court denied all but one request.¹⁴⁶

¹³⁹ See ECHR, *Vasilikoski and others v. The Former Yugoslav Republic of Macedonia*, Application No. 28169/08, ¶ 55 (20 October 2010).

¹⁴⁰ See ECHR, “Guide on Article 5 of the Convention: Right to Liberty and Security,” pg. 29.

¹⁴¹ *Id.*, at pg. 30

¹⁴² The data contained in this paragraph is based on data in SPO Reports 2 and 3.

¹⁴³ See *Transporter* (12 persons), *Fortress* (one person), *Titanic*, (nine persons); and *Trust* (one person).

¹⁴⁴ In the *Transporter* case the Preliminary Proceedings Judge ordered three suspects into custody, and in both *Fortress* and *Trust*, one suspect was ordered into custody by the Article 25(5)-Panel.

¹⁴⁵ The Court ordered home detention against two persons and other non-specified precautionary measures against six persons in *Transporter*.

¹⁴⁶ See *Trust*; however, in the *Tenders* case although the Article 25(5)-Panel granted the measures the measures were later revoked on appeal.

4.4.3.1. *Sead Kochan's Detention in the Trust Investigation*

On 28 February 2017, the SPO requested the detention of Sead Kochan (first suspect in the *Trust* investigation). On 7 March 2017, the SPO's request was denied by the Preliminary Proceedings Judge. Two days later, acting upon the appeal of the SPO, the Article 25(5)-Panel reversed the decision and ordered Kochan be immediately detained for 30 days. On 15 March 2017, the Appellate Court confirmed the detention. The detention measure was never enforced because Kochan fled the country.

On 27 March 2017, the Chief PP filed a Motion for the Protection of Legality pursuant to LCP, Art. 457¹⁴⁷ with the Supreme Court, whereby the Chief PP requested that the Court declare that the Article 25(5)-Panel and the Appellate Court violated the law by ordering the immediate execution of the detention order pending appeal. As noted earlier, the case was brought to the Supreme Court's attention by the Chief PP who had no jurisdiction to act. There is also a question regarding the legal issue at hand, i.e., whether a custodial precautionary measure issued for the first time by the Article 25(5)-Panel acting in the second of stage of review after a request is denied by the Preliminary Proceedings Judge can be immediately executed. This is addressed in the legal arguments brought forward by the Chief PP in the Motion for Protection of Legality.

The Chief PP's argument was based on LCP, Art. 169, regulating the appeal against detention decisions. LCP, Art. 169(3) explicitly states that the prosecution appeal against the decision of the Preliminary Proceedings Judge denying detention "shall not prevent the enforcement of the decision." However, the same provision addresses the 25(5)-Panel review of the Preliminary Proceedings Judge's decision, without stating whether the detention decision of the Panel is immediately enforceable. In other words, the LCP is silent on whether detention decisions issued for the first time by the Article 25(5)-Panel acting in second stage of review can be immediately executed. In the view of the PPO, the issue is regulated by the general principle set in LCP, Art. 442, which states "unless established otherwise, the filing of an appeal against a decision shall delay the enforcement of that decision." Accordingly, the PPO argued, Sead Kochan's detention could not have been declared immediately enforceable. On 11 May 2017, the Supreme Court upheld the motion of the Chief PP sanctioning its argument. Additionally, the Court stated that the decision of the Article 25(5)-Panel and the Appellate Court did not contain enough facts and evidence to justify the grounds for suspicion that Kochan committed the crime for which

¹⁴⁷ LCP, Art. 457 states that the Chief PP "may file a motion for Protection of Legality [to the Supreme Court] against judicial verdicts that have entered into effect if there was a violation of the Constitution, the law or an international agreement that was ratified in accordance with the Constitution."

he was charged.¹⁴⁸

The Court's ruling clarified the legal framework governing the enforcement of pre-trial detention measures issued by the Article 25(5)-Panel acting in the second stage of review. The confusion was due to the wording of LCP, Art. 169 which states that the decision of the Preliminary Proceedings Judge imposing detention is always immediately enforceable, however, it remains silent regarding the enforceability of the detention measures imposed for the first time by the Article 25(5)-Panel. The Supreme Court clarified that when detention is imposed for the first time by the Article 25(5)-Panel following the prosecution appeal against a decision by the Preliminary Proceedings Judge denying the request, the measure shall not be immediately executed pending appeal to the Appellate Court. Accordingly, the person will remain at liberty pending appeal.

The ruling sparked significant controversy in the country and was perceived as being unlawful and aimed at obstructing the work of the SPO. As already stated, the Court should have ruled the Chief PP's motion inadmissible. Nevertheless, the decision itself adheres to the letter of the LCP with respect to its merits, i.e.: the non-immediate enforceability of pre-trial detention decisions issued for the first time by the Article 25(5)-Panel, pending appeal. This case has exposed a flaw in the LCP framework, which possibly defeats the purpose for imposing pre-trial detention by giving the suspect(s) an opportunity to flee, tamper with evidence, or re-offend pending appeal. While this decision was inconsequential in allowing Kochan's escape, it may have set a precedent which allowed for the escape of the defendants in the *Fortress-Target* case, addressed below.

4.4.4. Requests for Precautionary Measures with the Submission of the Indictments

Between 29 and 30 June 2017, the SPO submitted 17 indictments, adding to the three that were previously filed (*Centar*, *Fortress 2* and *Transporter*). The first three indictments did not contain any request for precautionary measures, however, with the submission of the last 17 indictments the SPO requested that the Court order pre-trial detention for 18 persons in eight cases, and less severe precautionary measures to be imposed upon 47 people in 11 cases (i.e., periodical reporting obligations to the court, confiscation of passports and prohibition to

¹⁴⁸ Therefore, according to the Supreme Court, the Article 25(5)-Panel and the Appellate Court violated LCP, Art. 415(1), 11, Art. 167(1), ¶ 3 and 167(2), ¶ 1. The Supreme Court overturned the decisions and Sead Kochan returned to the country and was hospitalized. On 18 May 2017, once again the Preliminary Proceedings Judge denied the SPO's detention request, this time due to the health condition of the suspect. However, the Court imposed bail in the amount of 875,298.56 euros and imposed other precautionary measures, namely the confiscation of the defendant's passport and a weekly reporting obligation to an official of the court.

undertake certain work activities). In addition, the SPO requested detention for several proponents of the VMRO-DPMNE leadership in *Titanic 1*, for the two Chair Municipal Counselors in *Titanic 3*, and for the highest UBK officials in *Fortress-Target*. The grounds for which the SPO requested detention are in accordance with LCP, Art. 165. In the majority of the cases the SPO requested detention based on flight risk pursuant to LCP, Art. 165(1)(1), as well as the possibility of witness tampering, pursuant to LCP, Art. 165(1)(2).

The Article 25(5)-Panel denied all detention requests, imposing less restrictive precautionary measures instead.¹⁴⁹ In the cases where the SPO requested less restrictive precautionary measures, those measures were granted. Both the SPO and the defense appealed the decisions. The Appellate Court confirmed the Article 25(5)-Panel decisions in all cases, except for *Fortress-Target* and on 17 July 2017, it granted the SPO's request for the detention of Jakimovski, Grujevski and Boshkoski,¹⁵⁰ finding that there was definite flight risk and witness tampering. The defense appealed this decision to the Supreme Court, and on 26 July 2017 the Supreme Court upheld the Appellate Court's decision with respect to Grujevski and Boshkoski, overturning it in relation to Jakimovski. The decision of the Supreme Court could not be enforced because Grujevski and Boshkoski fled the country.¹⁵¹

Similar to the Kochan case, this case raised a great deal of public controversy. As discussed in ¶4.4.1, the LCP does not clearly regulate the procedure for the judicial review of precautionary measures requested during the indictment process. The public perception was, and several prominent legal experts believed,¹⁵² that the Appellate Court decision should have been final and immediately executed. Therefore, the defense had no right to appeal the Appellate Court decision to the Supreme Court.

However, this is not how the Appellate Court and the Supreme Court interpreted the law. The Appellate Court stated that the execution of the detention measure was suspended pending the defense appeal to the Supreme Court without specifying the legal basis. Although the Appellate Court did not make any

¹⁴⁹ Only in *Titanic 3* did the court deny the SPO's request for detention without replacing it with other precautionary measures.

¹⁵⁰ Grujevski was also the main defendant in the *Fortress 2* case, and Boshkoski was an SPO witness in the same case.

¹⁵¹ On 19 October 2017, the fugitives were arrested at Thessaloniki (Greece) airport in possession of counterfeited documents. See Meta.mk, "Grujevski and Boshkoski have been arrested in Thessaloniki," 19 October 2017, <http://meta.mk/en/grujovski-and-boskovski-have-been-arrested-in-thessaloniki>. On 18 May 2018, the Supreme Court of Greece denied the extradition request.

¹⁵² See Prof. Besa Arifi's statement for Alsat-M media outlet: "it is incomprehensible why they [Grujevski and Boshkoski] were given so much time and why the detention decision of the Appellate Court was not immediately enforced. Any detention decision becomes enforceable the moment it is issued. This means that the persons should have been detained immediately. Only then could they have submitted an appeal to the Supreme Court and pursued other legal avenues," <https://bit.ly/2M2J0pG>.

reference to the Kochan precedent (*see* ¶ 4.4.3.1), the similarities between these cases are evident. For example, in both cases detention was imposed for the first time in the second stage of review and the defendants fled the country after the court-imposed detention.

The Supreme Court allowed the appeal arguing that, whenever detention is imposed for the first time, the defendant has the right to appeal. The Court based its conclusion on LCP, Arts. 440 and 445 and ECHR, Art. 5(4). As previously stated, a joint reading of LCP, Arts. 440 and 445 would allow for such a possibility. However, the reference to ECHR, Art. 5(4) appears misguided as this provision “does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention.”¹⁵³

4.4.5. *The Grounds for Requesting Precautionary Measures*

Along with the filing of the indictments in eight cases the SPO requested pre-trial detention against 18 defendants. OSCE Monitors were able to review ten of the SPO's motions in four cases.¹⁵⁴ The requests were filed as part of the indictments; therefore, they did not contain specific allegations in relation to the reasonable suspicion requirement pursuant to LCP, Art. 165(1). Based on the reviewed motions, the SPO requested detention pursuant to two out of the three grounds incorporated in LCP, Art. 165, specifically, flight risk and/or the risk of obstructing the proceedings by influencing witnesses and co-defendants.¹⁵⁵

4.4.5.1. *Flight Risk*

In all the reviewed cases the SPO supported the allegations concerning flight risk based on the following circumstances: (i) type and severity of the crimes charged and sentence prescribed by law; (ii) failure to appear for questioning during the investigation and after its completion; (iii) frequent travel abroad; (iv) the existence of concurrent criminal proceedings against the defendant; and (v) the ownership of several bank accounts (including in foreign countries) and properties abroad. In some cases, the SPO listed all the above elements, other times only some of them. The SPO's requests indicate a commendable effort to comply with the

¹⁵³ See ECHR, *Kučera v. Slovakia*, Application No. 48666/99 (17 July 2007), § 107; ECHR, *Navarra v. France*, Application No. 13190/87 (23 November 1993), § 28; ECHR, *Toth v. Austria*, Application No. 11894/85 (8 May 1989), § 84.

¹⁵⁴ OSCE Monitors reviewed the SPO's request for detention pertaining to defendants in *Titanic 1*, Nikola Gruevski, Martin Protogjer, Kiril Bozhinovski, Mile Janakieski and Gordana Jankuloska; *Titanic 3*, defendants Ismet Guri and Ejup Alimi; *Trajectory*, defendant Vladimir Peshevski; and *Tenders*, defendants Elizabeta Kancheska-Milevska and Lidija Lazarova-Cvetkovska.

¹⁵⁵ See LCP, Art. 165(1), ¶¶ 1 and 2. None of the requests reviewed by the OSCE Monitors were made pursuant to the third prerequisite contained in LCP, Art. 165(1), ¶ 3 (risk of re-offending).

ECHR standards regarding the danger of absconding, according to which such danger “cannot be gauged solely on the basis of the severity of the possible sentence [but] must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention. In this context regard must be had in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts.”¹⁵⁶

4.4.5.2. *Witness Tampering*

With respect to influencing witnesses and co-defendants, the SPO alleged that the hierarchical position of the defendants in the party structure was *per se* sufficient to exert influence over the testimony of co-defendants and witnesses. In many of the reviewed requests the SPO supported this argument by claiming that, since the indictment was based on the statements of several witnesses, one could expect that the defendant would influence them into changing their testimony at trial. Only in two of the reviewed requests did the SPO reference actual witness statements alleging witness tampering by the defendant.¹⁵⁷

4.4.6. *Reasoning for Denying or Imposing Detention*

The Article 25(5)-Panel denied all the eighteen detention requests filed with the indictments. According to the judges, the prosecutors' requests for detention had insufficient grounds and the presence of the defendants at trial could be guaranteed through less restrictive measures, in accordance with LCP, Art. 144(2) and the ECHR. Accordingly, the Article 25(5)-Panel imposed periodical reporting obligations and the confiscation of passports. With the exception of the *Fortress-Target* case (see below), the Appellate Court upheld the Article 25(5)-Panel's findings in all cases. OSCE Monitors reviewed seven decisions of the Article 25(5)-Panel issued in three cases,¹⁵⁸ and 15 decisions of the Appellate Court, issued in eight cases.¹⁵⁹

¹⁵⁶ See ECtHR, *Smirnova v. Russia*, Application No. 46133/99 and 48183/99, ¶ 60 (6 March 2008).

¹⁵⁷ See SPO's request for detention pertaining to the defendants in *Titanic 3*, Ismet Guri and Ejup Alimi; and SPO's request for detention in *Trajectory* pertaining to defendant Vladimir Peshevski.

¹⁵⁸ OSCE Monitors reviewed Article 25(5)-Panel decisions concerning the following defendants: *Titanic 1*, Nikola Grujevski, and Mile Janakieski; *Titanic 3*, defendants Ismet Guri and Ejup Alimi; and in *Fortress-Target*, defendants Sasho Mijalkov, Nikola Boshkoski and Goran Grujevski.

¹⁵⁹ OSCE Monitors reviewed the Appellate Court decisions concerning the following defendants: *Titanic 1*, Nikola Grujevski, Mile Janakieski and Gordana Jankulosa; *Titanic 3*, defendants Ismet Guri and Ejup Alimi; *Fortress-Target*, defendants Sasho Mijalkov, Goran Grujevski, Nikola Boshkoski and Toni Jakimovski; *Trajectory*, defendant Vladimir Peshevski; *TNT*, defendant Toni Trajkovski; *Three-hundred*, defendant Gjoko Popovski; *Total*, defendant Dragan Pavlovikj-Latas; *Tenders*, defendants Elizabeta Kancheska-Milevska and Lidija Lazarova-Cvetkovska.

4.4.6.1. Reasonable Suspicion

In the reviewed decisions, neither the 25(5)-Panel nor the Appellate Court elaborated on the first requirement for imposing detention envisaged by the LCP, that is, reasonable suspicion of the commission of the offense by the defendant.¹⁶⁰ This is regrettable, in that the reasonable suspicion that the person committed a criminal offense is a *condition sine qua non* for the lawfulness of his/her detention. Therefore, the court should always provide a rationale on the facts and evidence that substantiates the grounded suspicion in relation to the criminal offense.¹⁶¹ A possible explanation for this omission could be the fact that detention requests were filed with the indictments and not during the investigation. However, the purpose and *ratio* of precautionary measures must not be confused with that of the indictment confirmation process. Precautionary measures are aimed at ensuring the presence of the defendant in case the indictment is confirmed and the person is committed to trial. Accordingly, precautionary measures are imposed by a different judge and under much stricter deadlines (*see above*).¹⁶² The reasoning of the court, therefore, should always encompass all the requirements envisaged by LCP, Art. 165(1), regardless of the procedural phase in which the decision on detention is taken.

4.4.6.2. Flight Risk

Both the Article 25(5)-Panel and the Appellate Court rejected the SPO's arguments on flight risk. The judges believed that the defendants did not pose a flight risk because they were public figures whose whereabouts and residential addresses were well-known, and who had close family ties in the country. Using that same rationale, the judges also thought that the frequent travels abroad did not indicate that the defendants had a propensity to abscond, especially because the defendants always returned to the country. However, in one case the SPO mentions Gruevski's multiple bank accounts abroad, which indicates that Gruevski also had financial ties and financial security in another country. This fact potentially indicates that the defendant could sever ties with his home country and begin a new life elsewhere; however, the Court did not address the SPO's argument. In addition, the Article 25(5)-Panel did not comment on the fact that Gruevski is a defendant in multiple proceedings. One could argue that

¹⁶⁰ See LCP, Art. 165(1).

¹⁶¹ See OSCE Mission to Skopje and Association for Criminal law and Criminology: "Application of Pre-trial Detention Pursuant to the Criminal Procedure Code of 2010 Legal Analysis," pg. 46, highlighting the same issue in non-SPO cases.

¹⁶² In July 2017, the Court issued decisions regarding precautionary measures in SPO-cases, whereas between September 2017 and January 2018, the Court issued decisions regarding the confirmation of the indictments.

considering Gruevski is indicted in multiple cases only serves to strengthen the prosecutor's argument with regards to flight risk due to the fact that the defendant is facing multiple prison sentences and statistically there is a greater likelihood of the defendant being found guilty of one or more offenses. However, the Appellate Court stated that this cannot be considered an indicator because the court must consider only the circumstances relating to the case before it.

The Article 25(5)-Panel took issue with the SPO's argument in *Titanic 1* that the suspect's failure to appear for questioning during and after the investigation indicates a willingness of the suspect to obstruct the proceedings and is therefore a flight risk. In this respect, the Article 25(5)-Panel stated that the suspects may make themselves available to the prosecution during the investigative stage; however, the suspect was under no obligation to co-operate with the prosecution team. According to the judges, the fact that the defendant did not respond to the SPO's invites does not necessarily indicate that the defendant would not comply with a court summons.

Unfortunately, neither the SPO nor the Article 25(5)-Panel clarified the legal basis for their opposing conclusions on this matter. This is an important issue which deserved more elaboration by the judges, especially in the absence of a clear indication in the law. The relevant provisions are LCP, Arts. 292(3) and 302(2). The first provision, concerning the pre-investigation phase mandates that "before issuing the order to conduct an investigation procedure, the public prosecutor *may* examine the person that the investigation procedure was requested for." In addition, LCP, Art. 302(2) stipulates that "prior to the completion of the investigation procedure, the public prosecutor *shall be obliged* to examine the suspect if she/he has not done it earlier." One provision provides the possibility for the prosecutor to request the presence of the suspect for an interview, and the other provision requires an obligation on the part of the prosecutor to make the request. The law does not however, impose an obligation on the suspect to co-operate and respond to the prosecutor's invitation for questioning. The Article 25(5)-Panel, therefore, concluded that the refusal of the suspect to co-operate with the prosecution during the investigation cannot be considered an indicator of the person's intention to obstruct the proceedings and/or unwillingness to appear at trial. In fact, it is an essential component of his/her right to a defense. In conclusion, the Appellate Court added that the presence of the defendants at the hearing¹⁶³ and their assurance to attend the trial provided sufficient reasons to believe that the defendants would not abscond.

¹⁶³ Between 12 July and 26 July 2017, the Appellate Court held hearings (the majority of which were public) where the parties' appealed the Article 25(5)-Panel decisions.

4.4.6.3. Evidence and Witness Tampering

In nearly all the reviewed decisions, the judges stated that once the investigation was completed, tampering with evidence was much more difficult and therefore unlikely to happen. According to the judges, if the accused had intended to destroy the traces and material evidence regarding criminal activities, she/he could have done so during the investigation. This conclusion is in line with the ECtHR jurisprudence according to which “whilst at the initial stages of the investigation the risk that an accused person might pervert the course of justice may be self-evident and justify keeping him or her in custody, after the evidence has been collected that ground becomes less strong.”¹⁶⁴

With specific reference to the risk of witness tampering, the Article 25(5)-Panel and the Appellate Court consistently stated that the SPO showed only an abstract possibility of the defendants influencing the witnesses and failed to provide concrete examples as to who these witnesses were and how the defendants unduly influenced them. In *Fortress-Target*, *Titanic 3*, and *Trajectory*, the Article 25(5)-Panel stated that, from the statements of the witnesses referred to in the indictment, it could not infer that the defendants had participated in witness tampering and that the statements of these witnesses had already been taken by the investigative authorities.¹⁶⁵

4.4.6.4. Reasoning for Imposing Detention in the *Fortress-Target* Case

Only in the *Fortress-Target* case did the Appellate Court reverse the Article 25(5)-Panel decision denying the SPO's request for detention against three defendants (Goran Grujevski, Boshkoski and Jakimovski). In relation to Grujevski, the Court established all three grounds required by LCP, Art.165 (flight risk, risk of witness tampering, and risk of re-offending); in relation to Boshkoski, the Court held that there was sufficient evidence of flight risk and risk of witness tampering; and in relation to Jakimovski, the Court held that there was sufficient evidence indicating that Jakimovski posed a flight risk.

With regards to Grujevski and Jakimovski the Court held that the defendant posed a flight risk based on the nature and severity of the crimes charged, sentence prescribed by law, and the frequency of the defendants' travels within the country and abroad. In addition, the Court considered the fact that Grujevski owned a property in Ohrid, had relatives in Veles, and due to his past seniority

¹⁶⁴ ECtHR, *Yevgeniy Gusev v. Russia*, Application No. 28020/05, ¶ 87 (5 December 2013).

¹⁶⁵ See *Fortress-Target*, Article 25(5)-Panel's decision concerning Grujevski; *Titanic 3*, Article 25(5)-Panel's decision concerning defendants Ismet Guri and Ejup Alimi; and *Trajectory*, Article 25(5)-Panel's decision concerning Vladimir Peshevskii.

had connections throughout the country. In Jakimovski's case, the Court emphasized the fact that he was working in Romania,¹⁶⁶ owned a diplomatic passport, and did not have strong family ties in the country. In Boshkoski's case, flight risk was established solely based on the gravity of the charges against the defendant, as well as the potential penalty required by the LCP. In light of international standards, the Court's reasoning is not the most persuasive and appears to be insufficient in the case of Boshkoski. Furthermore, it is unclear how the situation of these defendants differed from the others for which the request for detention was denied. The fact that two of the defendants fled the country¹⁶⁷ does not negate the legal requirement for the court to provide sufficient reasoning when imposing detention.

The risk of witness tampering was established based on the material evidence contained in the case file, specifically, investigators discovered that the files on the computer removed from Grujevski's office contained a manual describing how witnesses subpoenaed by the SPO should behave, and official notes which contained detailed information about individuals summoned by the SPO to give statements. Furthermore, the Court considered the hierarchical position of both defendants within the structure of the UBK, concluding that they had a capacity to exercise pressure on their subordinates. Therefore, it can be concluded that the rationale by the Court concerning the risk of witness tampering was well supported and aligned with international standards.

The Court established that Grujevski could re-offend because he was still employed by the UBK and had access to the communications monitoring system. In addition, given the fact that Grujevski destroyed and hid evidence of the crime indicated that there was a high risk of Grujevski re-offending. The Court however did not substantiate these claims by referencing facts and/or evidence contained in the SPO's request, nor did it elaborate any further.¹⁶⁸

The Supreme Court upheld the Appellate Court's decision pertaining to Grujevski and Boshkoski but vacated Jakimovski's decision. The Supreme Court emphasized that Jakimovski had returned from the United States in order to attend the hearing, demonstrating an interest and a commitment in participating in the proceedings. Moreover, the Supreme Court considered the mere presence of family in the country a sufficient indication of Jakimovski's intention to return. With respect to witness tampering, the Supreme Court found that because Jakimovski was no longer employed by the MoI, there was

¹⁶⁶ In August 2016, Jakimovski was appointed General Manager of the Southeast European Law Enforcement Center in Bucharest, Romania.

¹⁶⁷ See *supra* ¶ 4.4.4.

¹⁶⁸ OSCE Monitors were unable to review this request.

no possibility of him exercising pressure on his lower-ranking colleagues, and further noted that there was no evidence of witness tampering in the case file. Accordingly, the Supreme Court imposed less restrictive measures, specifically periodic reporting obligations and confiscation of his regular and diplomatic passport.

4.4.7. Observations and Conclusion Regarding the Use of Precautionary Measures

Securing precautionary measures was one of the most difficult challenges faced by the SPO. During the investigative phase, judges proved reluctant to impose any kind of precautionary measures on SPO suspects. None of the suspects were detained prior to the submission of the indictment, and non-custodial measures were imposed infrequently. After the submission of the indictments the situation only partially changed. Out of 18 requests for pre-trial detention, the Court only granted three requests in the second stage of review, while the Supreme Court only confirmed two of those requests. In the remaining 16 cases, the judges deemed that securing the presence of the defendants for trial could be achieved through less restrictive measures.¹⁶⁹

A statistical comparison shows that the Court practice in ordering pretrial detention during the investigation phase observed in SPO cases is different from the practice observed in PPO proceedings. The following data published on the website of the Skopje Basic Court offers an interesting perspective. In 2015, the PPO requested precautionary measures prior to the submission of indictments in 151 cases; out of the 151 cases the PPO requested detention in 121 cases and the Preliminary Proceedings Judge granted detention in 116 cases. Also, in 2015, the BPPO OCC requested precautionary measures in 144 cases, out of the 144 cases the PPO OCC requested detention in 80 cases and the Preliminary Proceedings Judge granted detention in 74 cases.¹⁷⁰ This practice was criticized as being predisposed to imposing pre-trial detention in violation of national and international standards demanding that detention is restricted to a minimum and only used as a last resort.¹⁷¹

Based on the information contained in this report, it would appear that the courts have adopted a significantly different practice in SPO cases, as demonstrated

¹⁶⁹ With the exception of the Appellate Court's decision in the *Fortress-Target* case (the Court remanded three defendants into custody), the judges denied all requests for detention and continued to impose less restrictive precautionary measures (some of which were granted *in lieu* of detention) in almost all cases.

¹⁷⁰ See Basic Court Skopje 1 statistics: <https://bit.ly/2l0ThHb>.

¹⁷¹ See OSCE Mission to Skopje and Association for Criminal law and Criminology: "Application of Pre-trial Detention Pursuant to the Criminal Procedure Code of 2010 Legal Analysis," April 2015, pg. 24; and the Coalition All for Fair Trials "Analysis of Data Collected from Trial Monitoring in 2016," pg. 101.

by the fact that the court only ordered three persons into detention, whereas in non-SPO proceedings detention is imposed very frequently. It is difficult to fully analyze the reasons for this differing practice; however, it is impossible to rule out that courts have applied different standards in SPO vs non-SPO cases. In the interest of fairness and impartiality, courts need to ensure that the same standards are applied evenly and consistently in all cases.

With the caveat that monitors do not review the evidence submitted by the SPO to support their requests, it appears that the decisions by the court denying detention in general provided a solid justification and exposed weaknesses in the SPO's arguments; especially with regards to witness tampering. In several cases, the SPO did not go beyond alleging an abstract possibility that the defendants would influence potential witnesses. In other cases, the court found that the witness statements submitted with the indictment failed to demonstrate any risk that the witness would be influenced by the defendant. However, the SPO often did provide more substantive reasons why flight risk was a justifiable ground for detention, and some reasons were not addressed by the court in the written decisions.

With respect to the justification of the decisions imposing detention, significant room for improvement remains. Foremost, within the written decisions the courts did not discuss the reasonable suspicion of the commission of the crime by the defendant, which is the prerequisite for imposing detention.¹⁷² In addition, the courts did not always provide sufficient reasoning with respect to the risk of flight. In one case flight risk was established solely based on the gravity of the charges against the defendant, as well as the potential penalty incorporated in the LCP. The risk of witness tampering, on the other hand, was more thoroughly reasoned indicating that the SPO provided more solid evidence to support its requests.

4.5. The Admissibility of the Wiretaps at the Confirmation Stage of the Indictment

4.5.1. Background

The illegal intercepts were allegedly conducted from inside the UBK national intelligence service's facilities. Both the Priebe Reports of 2015 and 2017, and the 2015 EU Commission Report repeatedly criticized the fact that the UBK "has direct access to the technical equipment allowing mirroring of the communication

¹⁷² Naturally, the justification for reasonable suspicion is mandatory also in decisions denying pre-trial detention. The absence of reasoning, however, is even more concerning when detention is imposed.

signal,¹⁷³ reasoning that holding the monopoly over intercepted communications for both security purposes (intelligence) and criminal investigations is in violation of the autonomy of prosecution and police authorities.¹⁷⁴ The EU senior experts recommended moving the proprietary switches to the premises of the telecommunication providers.¹⁷⁵

The wiretap recordings were performed outside of any legal criminal process and, in the absence of a court order. As such, the wiretaps do not amount to special investigative measures (SIMs) pursuant to LCP, Art. 252, and are not governed by the Law on Intercepted Communications.¹⁷⁶ Therefore, the unauthorized wiretaps violated fundamental rights, i.e., the right to have private and family life protected pursuant to ECHR, Art. 8.¹⁷⁷ However, the wiretaps are evidence of the crimes that serve as the basis for the SPO prosecutions. Introducing illegal intercepts as evidence at trial poses legal dilemmas; specifically whether, and to what extent the unlawfully obtained evidence can be used to support indictments admitted at trial and/or form the basis for a lawful conviction. As discussed in detail below, on 4 August 2017, the Appellate Court ruled in favor of the admissibility of the intercepted conversations in the Centar case based on a distinction between the manner in which the evidence materialized (the conversations were recorded unlawfully absent a Court order) and the manner in which the evidence was obtained by the SPO (lawfully and in accordance with the LCP).

4.5.2. National Legal Framework

The rules on the exclusion of evidence are contained in the general provisions of LCP, Art. 12 (2), which states “any evidence collected in an unlawful manner or by violation of the rights and freedoms established in the Constitution (...), the laws and international agreements, as well as any evidence resulting thereof, may

¹⁷³ See: Priebe Report 2015, page 8, supra, fn. 7.

¹⁷⁴ See Priebe Report 2015, page 5-9; see also: Independent Senior Experts' Group, “The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017”, 14 September 2017 (hereinafter “Priebe Report 2017”), ¶¶ 56-57, <https://bit.ly/2x9R4jk>; EU Commission 2016 Report, pg. 9; European Commission, “The former Yugoslav Republic of Macedonia,” 10 October 2015, (hereinafter, “EU Commission 2015 Report”), pg.9, <https://bit.ly/2ui0dGP>.

¹⁷⁵ See Priebe Report 2017, paragraph 55-56, and Priebe Report 2015, pg. 5-6, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf.

¹⁷⁶ Official Gazette No.121/2006; 110/2008 and 116/2012.

¹⁷⁷ ECHR, Art. 8 states: 1. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

not be used and may not provide the ground for a legal decision.”¹⁷⁸ The first opportunity for the defense to challenge the admissibility of unlawful evidence is during the confirmation of the indictment process. In accordance with LCP, Art. 336(4), the indictment review Judge or Panel may, on its own initiative or upon a defense motion exclude from the case file the unlawful evidence pursuant to LCP, Art. 12(2) stating that unlawful evidence must be excluded and kept under seal by the Preliminary Proceedings Judge. Any excluded evidence may neither be reviewed nor used in the proceedings. The decision of the indictment review Judge/Panel may be appealed before the Appellate Court.

After confirmation of the indictment and during the preparation of the main hearing, the parties have a second opportunity to request the exclusion of evidence. In accordance with LCP, Art. 347(1), the court may exclude evidence gathered in an unlawful manner or whose use is not allowed by law. Moreover, the second paragraph of this provision permits the court to summon the parties to appear before it “in order to elaborate their proposals or objections in regard to any proposed evidence.”

4.5.3. *International Legal Framework*

The European Court of Human Rights (ECtHR) adopts a rather flexible approach on this matter. According to the ECtHR, “the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them.”¹⁷⁹ The Court’s role is to “ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair.”¹⁸⁰ With respect to evidence obtained in violation of the right to privacy protected by the ECHR, Art. 8, the relevant jurisprudence is developed under Art. 6 of the Convention, governing the right to a fair trial. There is no strict exclusionary rule or fruit of the poisonous tree doctrine¹⁸¹ embodied in Art. 6. According to the Court, the use of evidence obtained

¹⁷⁸ See also LCP, Art. 93 which states, “(1) when this law establishes that the court verdict may not be based on a certain piece of evidence, the judge of the preliminary procedure, ex officio or upon proposal by the parties, shall bring a decision to set that evidence apart from the rest of the case file, by the completion of the investigation at the latest. If an indictment has already been raised, the decision to set evidence apart shall be brought by the Chamber for review of the indictment. A separate decision shall be allowed against this decision, and the higher court shall rule on it. (2) After the decision becomes valid and enforceable, any evidence that was set apart shall be kept with the judge of the preliminary procedure, apart from the rest of the case-file and such evidence may neither be reviewed, nor used in the proceedings. Any records that were set apart shall be put and sealed in a separate file and kept with the judge of the preliminary procedure.

¹⁷⁹ See ECtHR, *Van Mechelen and others v. the Netherlands*, Application Nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23, ¶ 50 (April 1997).

¹⁸⁰ *Id.*

¹⁸¹ See Legal Information Institute, https://www.law.cornell.edu/wex/fruit_of_the_poisonous_tree.

illegally under national law is not, in itself, a breach of the right to a fair trial. The decision about the admissibility of evidence depends on the assessment of the following criteria: (i) fairness of the proceedings as a whole (i.e., the defendant had the opportunity to challenge the authenticity/credibility of the recorded conversations, or the unlawful intercepts were not the only evidence upon which the conviction was based),¹⁸² and (ii) the relevance and reliability of the evidence.¹⁸³ Far from envisioning rigid exclusionary rules, the ECtHR adopts a case-by-case approach to the admissibility of evidence obtained in violation of the right to privacy. Within this context, the question of fairness of the proceedings assumes greater significance than the violation of the substantial right to privacy which plays a secondary role.¹⁸⁴

The United States system can offer a useful comparative perspective.¹⁸⁵ The Fourth Amendment to the US Constitution protects people's right to privacy and freedom from unreasonable intrusions by the government.¹⁸⁶ In accordance with the exclusionary rule, evidence gathered in violation of the rights protected by the Constitution cannot be used in court. This rule is supplemented by the fruit of the poisonous tree doctrine, according to which a court may exclude from trial not only evidence that itself was gathered in violation of the Constitution but also any other evidence that is derived from it. The evidence (fruits) arising from a tainted source (poisonous tree) is contaminated and must therefore be excluded from trial. The exclusionary rule is designed to prevent misconduct by the authorities. The law punishes their unlawful behavior during the investigation by imposing the exclusion of evidence gathered through an abuse of process.

However, there are exceptions to the exclusionary rule. Specifically, the clean hands exception provides that when a prosecutor is "an innocent recipient" of illegally obtained evidence, the exclusionary rule does not apply and the illegally obtained evidence may be admitted into evidence.¹⁸⁷ Therefore, if the unlawful intercepts were conducted by a private entity or party (not connected to the prosecutorial authority) and turned over to the prosecutor who has "clean hands," the prosecutor can be considered an "innocent recipient" of the

¹⁸² See ECtHR, *Schenk v. Switzerland*, Application No. 10862/84 (12 July 1988).

¹⁸³ See ECtHR, *Khan v. the United Kingdom*, Application No. 35394/97 (12 May 2000).

¹⁸⁴ See "Restriction on Admissibility of Improperly Obtained Evidence in Criminal Trial," Volha Ramanenka, LL.M Long Thesis, CEU, 2011, pg. 60.

¹⁸⁵ See *Silverman v. United States*, 365 U.S. 505 (1961); *Katz v. United States*, 389 U.S. 347 (1967); *Lee v. Florida*, 392 U.S. 378 (1968).

¹⁸⁶ The Fourth Amendment to the US Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. iv.

¹⁸⁷ *Murdock v. United States*, 63 F.3d 1391, 1404 (6th Cir. 1995).

otherwise unlawful intercepts. As a result, the intercepted communications may be admitted at trial.¹⁸⁸

4.5.4. *The Centar case*

The wiretap issue arose for the first time in the Centar case, during preparation for the main hearing.¹⁸⁹ On 16 December 2016, a judge ruled that the intercepted communications introduced as evidence by the SPO amounted to evidence collected in an unlawful manner pursuant to LCP, Art. 12(2), since it was conducted in the absence of a court order, in violation of the law on intercepted communications and LCP, Art. 252 governing SIMs. According to the judge “it is undisputed that the audio-record was obtained without the application of a special investigative measure (i.e., in the absence of a court order), and was not performed by an authorized authority for the purpose of a criminal investigation.”¹⁹⁰ Therefore, the recordings cannot be introduced as evidence. The SPO may only use the intercepts to follow evidence leading to the commission of the crime and gather additional lawful evidence to prove those offenses.¹⁹¹

The SPO appealed this decision and on 4 August 2017 the Appellate Court upheld the appeal and overturned the decision of the judge to exclude the wiretap material from evidence. According to the Appellate Court, LCP, Art. 12(2) regulates the manner in which the evidence was obtained by the public prosecutor, rather than the way in which it was created or materially formed. In the present case, although the conversations were recorded unlawfully, they were obtained lawfully by the SPO. The reasoning applied by the Appellate Court appears to reflect the “clean hands” doctrine.

The legal basis relied upon by the Court is LCP, Art. 287, according to which “state entities, units of the local self-government, organizations, natural and legal persons with public authority and other legal entities” have an obligation to deliver the information requested by the public prosecutor. According to the judges, this provision requires that whoever is in possession of illegally intercepted communications turn over those communications to the SPO. This article sets a reactive obligation to deliver requested information rather than a proactive obligation to provide unsolicited information in one’s possession. The

¹⁸⁸ See “Restriction on Admissibility of Improperly Obtained Evidence in Criminal Trial,” Volha Ramanenka, LLM Long Thesis, CEU, 2011, pg. 67.

¹⁸⁹ This case is a summary judgment. Therefore, there was no formal confirmation of the indictment.

¹⁹⁰ Centar case, Basic Court decision pursuant to LCP, Art. 468, Art. 347(2), Art. 12(2) and Art. 19(3), 16 December 2016, pg. 3.

¹⁹¹ *Id.* at pg. 4.

SPO law does not foresee such a duty either. A proactive obligation was contained in the Law on Privacy Protection adopted two months after the SPO Law on 10 November 2015 (hereinafter, “old Privacy Law”).¹⁹² Pursuant to old Privacy Law, Art. 2, everyone in possession of material arising from unlawful interception of communications should hand it over to the “relevant public prosecutor”¹⁹³ within twenty days from the “entry into force of this Law.”¹⁹⁴ However, the new Privacy Law, issued on 19 May 2016 does not repeat this obligation.¹⁹⁵ It is unclear why the Court did not make any reference to the old Privacy Law which was in force at the time the materials were handed over to the SPO, in support of its conclusions.

In addition, the Court emphasized that with the adoption of the SPO law, the audio recordings of the telephone conversations entered the legal system of the country and became evidence that the SPO may rely on in court. In conclusion, the Court cited the Spy case as precedent. In this case, one of the defendants secretly recorded the conversations between him and the other defendants in his private premises. The prosecution obtained the recordings through SIMs,¹⁹⁶ i.e., during the search of the defendant’s house pursuant to LCP, Art. 146(1)(2), regulating the access and search of a computer system, the seizure of a computer system or its data.¹⁹⁷ The verdict issued by the Basic Court was based on the seized recordings, among other evidence. In appealing the verdict, the defense argued that the Basic Court relied on unlawful evidence because these conversations were the result of a crime, specifically, Unauthorized Wiretapping and Audio Recording, pursuant to Crim. Code, Art. 151. The Appellate Court dismissed this argument with the same reasoning used in the Centar case, that since the prosecution had obtained the intercepts lawfully (i.e., through a SIM foreseen by the LCP), the intercepts could be used as evidence at trial.¹⁹⁸

4.5.5. Confirmation of the Indictments

Between September 2017 and January 2018, the 17 indictments filed at the end of June 2017 underwent the confirmation process by the indictment-review Panel/Judge, pursuant to LCP, Art. 319-344. The defense filed objections to the

¹⁹² See Law on Privacy Protection, Official Gazette No.196/2015.

¹⁹³ The expression “relevant public prosecutor” should be interpreted as referring to the SPO.

¹⁹⁴ Pursuant to Privacy Law, Art. 7, this law would enter into force on the day of its publication (10 November 2015) and would apply for the six-month duration after the day of its entry into force.

¹⁹⁵ Law on Privacy Protection, Official Gazette No.99/2016. Pursuant to the Law on Privacy Protection, Art. 7, the law “shall enter into force on the day of its publication [16 May November 2016] and “shall start to apply as of 1 July 2017.”

¹⁹⁶ Special Investigative Measures.

¹⁹⁷ This provision refers to the old LCP, which was in use at the time of the investigation. The corresponding article of the new LCP is Art. 252(1)(4).

¹⁹⁸ See verdict KOKZH, 35/15, 26 Sept 2016, pg. 33.

confirmation of all indictments in accordance with LCP, Art. 327;¹⁹⁹ requesting that the court exclude the wiretaps from the case file and declare them inadmissible pursuant to LCP, Art. 336(4). Despite the above-mentioned decision by the Appellate Court in Centar, the indictment-review Panels/Judges ruled against the admissibility of the wiretap recordings in nearly all 17 cases.²⁰⁰ The indictment-review Judges/Panels reiterated the arguments used by the judge in Centar, specifically stating that the wiretaps had to be excluded because they amounted to unlawful evidence pursuant to LCP, Art. 12(2). Upon the SPO appeal, the Appellate Court vacated all those decisions and ruled in favor of the admissibility of wiretap evidence affirming the same rationale used in the Centar case. Seven months after the deadline for filing of indictments, all indictments had been confirmed, and admissibility of wiretap evidence had been affirmed in all cases.

4.5.6. Interim Conclusion on Admissibility of the Wiretaps

The admissibility of the wiretaps at trial, as opposed to for the purposes of indictment confirmation, is one of the main issues likely to impact the outcome of the SPO cases. As stated previously, the wiretaps released by the SDSM in early 2015 were obtained outside of any legal process and in the absence of a court order. As such, the wiretaps do not amount to SIMs pursuant to LCP, Art. 252, and are not governed by the Law on Intercepted Communications.²⁰¹ In other words, the wiretaps were performed illegally and in violation of fundamental rights, first and foremost the right to have your private and family life protected pursuant to ECHR, Art. 8.

However, the wiretaps are the key pieces of evidence that serve as the basis for the SPO prosecutions. Introducing illegal intercepts as evidence at trial can pose legal dilemmas, specifically whether and to what extent they can be used to support indictments, admissions at trial and/or form the basis for a lawful conviction. The Appellate Court considered the wiretaps lawful evidence upon which the decision on the confirmation of the indictments can be based. According to the Court, although the wiretaps were unlawfully “created,” they were lawfully “obtained” by the SPO which makes them admissible in court proceedings. Despite the Appellate Court ruling however, the admissibility of the wiretaps at trial continues to be challenged by the defense in SPO trials. Since the trials are currently ongoing, this report shall not take a position on this issue.

¹⁹⁹ In accordance with LCP, Art. 327, the defendant may object to the indictment within eight days of receiving the indictment from the court.

²⁰⁰ Exceptions to this practice were observed in the *Trust, Trajectory and Tariff* cases, where the wiretap recordings were immediately admitted.

²⁰¹ Official Gazette No.121/2006; 110/2008 and 116/2012.

4.6. Statute of Limitations

A further issue is the possible expiration of the statute of limitation in SPO cases. The Crim. Code regulates the statute of limitation (hereinafter, "SoL") in Crim. Code. Arts. 107 - 112. There are two kinds of SoL; the SoL of the criminal prosecution and SoL of the execution of the sanctions.²⁰² The SoL of criminal prosecution is further divided into *relative* (barring the commencement of a criminal investigation) and *absolute* (barring the continuation of an ongoing criminal prosecution).²⁰³ The *relative* and *absolute* SoL are tied to the commission of the crime (or the consequences arising from that crime), and the sentence prescribed by law. The *relative* SoL is stipulated in Crim. Code, Art. 107(1), which states that criminal prosecutions may not be initiated after: i) 30 years from the commission of a crime, punishable with a life sentence; ii.) 20 years from the commission of a crime, punishable with imprisonment of more than ten years; iii) ten years from the commission of a crime punishable with imprisonment of more than five years; iv) five years from the commission of a crime punishable with imprisonment of more than three years; v) three years from the commission of a crime punishable with imprisonment of more than one year; and vi) two years from the commission of a crime punishable with imprisonment of one year or a fine.

There are instances however, in which the relative SoL is interrupted and starts running from the beginning.²⁰⁴ Specifically, when any kind of investigative action is undertaken against the suspect,²⁰⁵ and when the suspect commits a crime of the same or greater gravity.²⁰⁶ Once the trial commences, the absolute SoL stipulated in Crim. Code, Art. 108(6) will apply. Pursuant to this provision, a criminal prosecution must be terminated when twice the time prescribed for the relative SoL elapsed, regardless of the stage of the proceedings. This means that if the trial is ongoing and a final verdict has not been reached, the trial cannot continue. Therefore, the court shall issue a verdict rejecting the indictment pursuant to LCP, Art. 402(6). The final verdict must be understood as a verdict that cannot be appealed further.

In the case Tank, relating to an unlawful public bid for the purchase of a luxury vehicle for the MoI, the SPO charged the former Prime Minister Gruevski with the crime of Accepting a Reward for Unlawful Influence, pursuant to Crim. Code, Art. 359(2), punishable with a one to three-year prison sentence. According to

²⁰² See, "Commentary to Criminal Code," V. Kambovski, Skopje 2015.

²⁰³ See Crim. Code, Arts. 107-108.

²⁰⁴ Crim. Code, Art. 107(5).

²⁰⁵ Crim. Code, Art. 107(3).

²⁰⁶ Crim. Code, Art. 107(4).

the indictment, the bidding and purchase process took place between February and the end of October 2012. Based on the last date of the commission of the offense, 31 October 2012 which is deemed to be the date of the commission of the crime, the absolute SoL would apply after six years.²⁰⁷ This indicates that the statute expires on 31 October 2018.²⁰⁸

In *Trajectory*, former Prime Minister Gruevski is charged with the same crime, relating to the unlawful award of a tender for the construction of a highway. According to the indictment, the crime was committed between October 2012 and October 2013. Based on the last date of the commission of the offense, 31 October 2013, the absolute SoL would apply after six years.²⁰⁹ Therefore, this indicates the SoL expires on 31 October 2019.²¹⁰

In *Centar*, relating to a violent protest before the building of the Centar Municipality, former Prime Minister Gruevski, former Transport Minister Janakieski and 12 other defendants were charged with the crime of Violence pursuant to Crim. Code, Art. 386(2)(1), punishable with a prison sentence of three months to three years. The protest occurred on 7 and 10 June 2013. Based on the last date of the commission of the offense, 10 June 2013, the *absolute* SoL would apply after six years which means the SoL would expire 10 June 2019.²¹¹

Based on the above, it can be concluded that most likely some SPO cases will not be finally adjudicated before the absolute SoL expires. While statutes of limitation are a fair trial guarantee for the defendant, the expiration of absolute statutes of limitations during ongoing trials creates inefficiencies and frustrates accountability efforts. Accordingly, the Mission recommends that all parties involved in the criminal proceedings make every effort to avoid unnecessary delays in order to avoid the statute of limitations from expiring.

²⁰⁷ Crim. Code, Art. 108(6) in conjunction with Crim. Code, Art. 107(1)(5).

²⁰⁸ In the absence of an explicit indication in Crim. Code, Art. 359, this calculation has been made on the assumption that the SoL for this crime is tied to the date of the commission of the crime, rather than the manifestation of its consequences.

²⁰⁹ Crim. Code, Art. 108(6) in conjunction with Art. 107(1)(5).

²¹⁰ In the absence of an explicit indication in Crim. Code, Art. 359, this calculation has been made on the assumption that the SoL for this crime is tied to the date of the commission of the crime, rather than the manifestation of its consequences.

²¹¹ *Id.*

5. Conclusions and Recommendations

In less than two and half years since the establishment of the SPO, and despite considerable interference from other institutions, significant steps have been made towards ensuring accountability for the crimes surrounding and revealed through the wiretap scandal. The SPO succeeded in filing 20 indictments within the narrow statutory deadline and all indictments were confirmed.²¹² The confirmation process, however, took a significant amount of time. Many of the indictments filed at the end of June 2017 were confirmed five-six months later, between November and December 2017. Although the LCP does not establish a deadline by which an indictment must be confirmed, the time between filing and confirmation could be considered excessive and has created a perception of bias against the SPO by the Court.²¹³ Furthermore, these delays may impact the right to trial within a reasonable time,²¹⁴ and are particularly concerning for cases in which the absolute statute of limitation will expire shortly. With respect to the application of precautionary measures, the Court has been scrupulous in ensuring that pre-trial detention is granted only as a last resort in SPO-cases. There is an impression, however, that different standards may be applied when compared to non-SPO cases where detention is quite frequently ordered. In addition, it has been noted that the reasoning behind the decisions regarding preliminary measures often fails to address the reasonable suspicion requirement.

Cases Trust and Fortress-Target exposed a flaw in the LCP framework governing the enforceability of pre-trial detention pending appeal, when detention is imposed for the first time by the Article 25(5)-Panel deciding in the second stage of review. By not explicitly requiring the enforcement of pre-trial detention, the LCP leaves room for the possibility that suspects will flee, tamper with evidence or re-offend pending appeal.

Despite the SPO's achievements thus far, the current limitations in the legal²¹⁵ and institutional framework jeopardizes the process of ensuring accountability for some of the serious crimes revealed in the wiretaps. Therefore, it is recommended that legislation is amended in accordance with the 2017-2022 National Judicial Reform Strategy. Whatever the choice of the legislator regarding the continuity and institutional collocation of the SPO, it is recommended that all the cases

²¹² In *Titanic 2*, the Court partially confirmed the indictment.

²¹³ Priebe Report 2017, ¶ 69.

²¹⁴ *Id.*

²¹⁵ As previously stated, in addition to the Chief SPP's temporary mandate expiring in September 2019, the SPO Law contains a deadline for filing indictments arising from the wire intercepts.

be brought to a conclusion in order to ensure full accountability for the crimes revealed in the wiretaps. It is hoped that the fair and efficient adjudication of the SPO cases, will serve as a mechanism to rebuild trust in the criminal justice system in the country.

While the SPO has been diligent in ensuring transparency with the public, there are some areas in which more effort could be made to timely provide relevant information. This relates particularly to the assertion of jurisdiction in ongoing PPO cases, where the underlying criminal offenses do not arise from the content of the wiretaps, nor, (if strictly construed), relate to them. While it is within the SPO discretion to share with the public the reasons for asserting jurisdictional claims over ongoing cases, given the high-profile and political sensitivity of the trials that the SPO have taken over, the Mission advises the SPO to adopt a more transparent approach, to the extent possible while protecting the confidentiality of the investigations.

Based on the analysis contained in this interim report, the Mission recommends the following:

To the executive and the legislative branches of power:

- Address the limitations existing in the legislative framework that may prevent the ongoing SPO investigations from being completed and possibly leading to indictment;
- Ensure long-term continuity of the SPO in accordance with the 2017-2022 National Judicial Reform Strategy;
- Address the shortcomings in the LCP legal framework on the immediate enforceability of pre-trial detention.

To the SPO:

- Investigate the full scope of the criminal acts, and all suspects (evidence permitting) discovered in the wiretap recordings;
- Although the SPO believes that the office sufficiently informs the public about relevant cases, the Mission recommends that the SPO informs the public when prosecutors have concluded that there is insufficient evidence to proceed with an investigation or prosecution of a case, particularly where the content of publicly available wiretaps might generate expectations of accountability.
- Although the SPO is in accordance with the law with regards to the assertion of jurisdiction over PPO cases, the Mission recommends that

the SPO adopt a more transparent approach when asserting jurisdiction over ongoing PPO cases.

To the Basic Court Skopje 1:

- Ensure that the reasoning of decisions on precautionary measures always encompass all the requirements envisaged by LCP;
- Apply the same standards in both SPO and non-SPO cases when ruling on pre-trial detention motions, in a consistent, impartial and equitable manner.

To all parties involved in the criminal proceedings:

- Make efforts to avoid unnecessary delays in order to avoid the expiration of the statute of limitations.