

# **EFFICIENT CRIMINAL JUSTICE: OVERVIEW OF THE CASES INITIATED BY THE SPP**

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FOUNDATION ФОНДАЦИЈА  
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EFFICIENT CRIMINAL JUSTICE:  
OVERVIEW OF THE CASES  
INITIATED BY THE SPP

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# INTRODUCTORY NOTES

## Scope and goal of the Analysis

The deep political crisis which grew in Republic of North Macedonia, followed by continuous dysfunctionality of the regular Public Prosecution, but also the imposed political influences on it were the main reasons that in 2015 led to initiating an ad hoc body with a role to sanction the preceding “damage” from the several year-long, commonly accepted policy and practice of impunity, especially regarding the high political elites and officials in the country. After the events which happened in the Special Public Prosecution in August 2019, which peaked with the arrest of the Special Public Prosecutor and raising charges for conduction of two crimes – receiving prize for unlawful influence and misuse of official position and authorization, the SPP de facto ceased to exist, and its authorizations were “transferred” to the regular Public Prosecution. Starting from the relevance of the problem, which is the key question to this Analysis – the efficiency of the criminal justice, the issue of the capacities of the courts for leading these cases is raised, i.e. what is the reason for the impression of the audience, both professional and non-professional, that the justice is not satisfied.

Continuing its effort in monitoring and participating in the conduction of inclusive and transparent, good quality reforms, the civil society organizations acting in the field of judiciary, which are part of the Blueprint Group for Judicial Reform, conducted this Analysis which elaborates the dynamics of leading the SPP cases before the Criminal Court Skopje, with regards to the capacities of the Court and the Public prosecution, while also analyzing the amendments to the Criminal Code which may have an impact on some of the cases initiated by the SPP.

The Blueprint group for Judicial Reforms is composed of the Institute for Human Rights, the Helsinki Committee for Human Rights of Republic of Macedonia, the Coalition “All for Fair Trials”, the Macedonian Young Lawyers Association, the European Policies Institute, the Center for Legal Research and Analysis and the Foundation Open Society – Macedonia.

The primary goal of this document is to analyze the method of conducting the procedures initiated by the SPP, which would give us clear insight of the manner of conducting these procedures before the Primary Criminal Court, by identifying the defaults in the actions undertaken by the Court and the Public prosecution, as well as the perils from breach of the rule of law principle, by entailing the principle of impunity of high corruption in Republic of North Macedonia.

This Analysis has been prepared as a part of the continued joint action for monitoring of the judicial reforms of the Blueprint group, titled “For justice – Monitoring of the implementation of the Strategy for Reform of the Judicial Sector 2019-2020”, which realization is supported by the Foundation Open society – Macedonia.

This joint action arose from the need for continuing effort for transparent, timely and accountable implementation of the judiciary reforms. General goal of the action is to increase participation and impact of the civil society organizations in the process of implementation of the Strategy for Reform of the Judicial Sector (2017-2022) and strengthening the independence and impartiality of the judiciary, especially when it comes to respecting the timeframe as determined with the Action plan, the transparency of the process, the transparency and inclusiveness, evaluation of the quality of the proposed laws and policies and grade of realization of the aims for which they were reached, as well as influencing the judiciary reform process through preparing and delivering evidence-based recommendations for the proposed laws and policies and improvement of the public debate.

## Methodology

Subject to this Analysis are the court procedures initiated by the SPP, i.e. an overview of the distribution of cases, work dynamics on the court cases, the reasons for postponement of the hearings, the capacities of the defendants in the procedures and the amendments to the Criminal Code, and their impact on the SPP cases.

The methodology for gathering data for conducting this Analysis includes insight in the documentation and statistical data, i.e. overview of the data available from the court procedures which were initiated on grounds of the recordings from the unlawful eavesdropping, overview of the Strategy for the Reform of the Judicial Sector 2017-2022 with the Action Plan, Plan 18, the Unique National Electronic Registry of Regulations (<https://ener.gov.mk>), of relevant institutions (Ministry of Justice, Assembly of Republic of North Macedonia, Basic Criminal Court Skopje, Ministry of Finance).

We also gathered data through the method of direct surveillance of the court procedures before the Criminal Court. The processing of the collected data was conducted through qualitative, quantitative and normative analysis.

## Structure of the Analysis

The Analysis starts with introductory notes which sum up the goal and the scope of the Analysis and the used methodology for gathering and analyzing the data. After

the introductory notes, the Analysis continues with the essence and the findings of the Analysis. **The first part** is dedicated to the court procedures initiated by SPP. **The second part** analyses the amendments to the Criminal Code and their possible impact on the procedures initiated by SPP.

The document closes with summed up conclusions and recommendations from the conducted Analysis.

In the Annex to this Analysis, graphics are given to show the dynamic flow of the cases, specifically the cases which as per the composition of the Trial chamber, intensity and volume of evidence, etc., are possibly the most problematic, and are registered as cases where the hearings are most usually postponed.



# FINDINGS FROM THE ANALYSIS

## Part 1: Overview of court cases

### 1.1. Case distribution

The automated computer system for managing court cases, which is an integrated computer system for inscribing each and every court action is introduced in 2009, and it is the basis, i.e. on the grounds of the program by which this system is managed, the activities in all courts in Republic of North Macedonia are being conducted.

As per Article 174 from the Court Rules of Procedure, the automatic distribution of cases in the court shall be conducted through the automatized computer system for managing the court cases, in a manner that will provide that each judge in the court receives an equal number of cases upon defined criteria by the Working body for Standardization in the Supreme Court of Republic of Macedonia. The presidents of the courts in RNM shall determine which criteria anticipated by the automated computer system for managing court cases shall be used for automatic distribution of the cases in each department. What is most important here, when it comes to efficient work and correct, i.e. optimal determination of the capacities of the judges, is the fact that the President of the court is responsible for equal distribution of the cases between the judges.

In the case distribution process, which is automated, it is allowed for the human factor to be involved in some exceptional situations, for the purpose of appropriately conducting case distribution. So, if a situation arises in which a certain judge is to be excluded from receiving new cases, i.e. from the automated distribution of the cases (for example: exemption), the President of the court shall reach a Decision containing an order for exclusion, containing the reasons for such exclusion, after which, the judge shall be eliminated from the judges which could receive the said case. In another situation (Article 179 from the Court Rules of Procedure), when one judge no longer works on specific type of subjects (dismissed, transferred to another department, transferred to other type of cases, longer absence, etc.), the President of the Court shall reach an Amendment to the Annual Working Schedule of the Court. The Annual schedule for the work of the judges, i.e. for their appointment, shall be reached by the President by 31<sup>st</sup> of December in the current year for the following year. This will determine the annual working schedule for the court, upon previously received opinion at the session of the judges, i.e. General session of the Supreme Court of Republic of Macedonia, as per law. The redistribution of the cases which were conducted by a judge who is no

longer acting, can be conducted with delivering all of the cases to a certain judge (usually a newly elected or newly assigned judge in that department), or if no judge is determined, through the automated redistribution of all cases from the judge to all of the other judges in the department working with that type of cases.

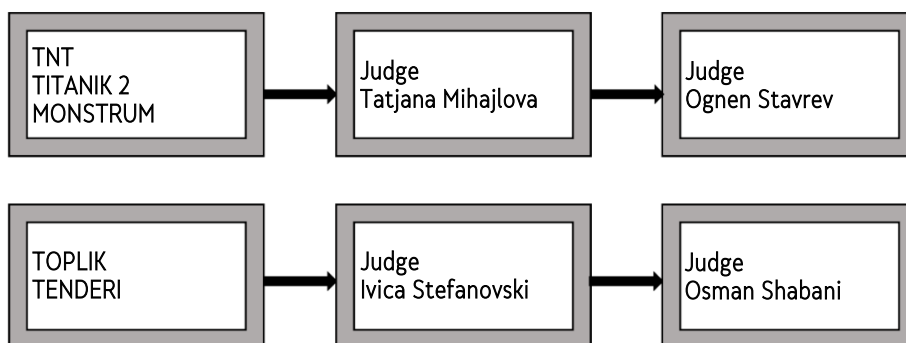
The automated distribution of the cases (Article 181) is conducted through three anticipated models in case of a newly elected or newly assigned judge, and the President of the court shall decide which model shall apply in a specific case. The first model anticipates delivering all cases to a certain judge (most commonly to the newly elected or newly assigned judge in that department, or as per the type of case), which shall be obliged to conduct all of the cases by another judge that have not yet been archived (unsolved cases and cases that are solved but the procedure is ongoing).

As per the second model, the judge shall receive only newly formed cases through inclusion of the judge in the automated distribution of the cases with initial value, which is a percentage (the percentage shall be determined by the President of the court). The third model means redistribution of cases given to judges working with the certain type of cases. At the same time, it is important to follow that the cases where the hearings or the trial chamber session are finished, or the cases are re-inscribed, are not redistributed.

When it comes to the cases initiated by the SPP, which are mostly in the Department for Organized Crime and Corruption in the Basic Criminal Court in Skopje, it has to be stated that they were initiated on several specific dates, i.e. some of charges were filed on 29.6.2017, some on 30.6.2017 and only one was filed on 5.4.2017. After their submission in court, the phase of evaluation of the charges followed, i.e. the dismissal or approval of the charges, i.e. their entering into force. With the completion of this phase, the charges are transformed into a court case which receives its own number and shall further be distributed to a judge as per the above stated distribution models. Considering that in the moment of submission and approval of these charges, the composition of the judges in the Department for Organized Crimes and Corruption in the Basic Criminal Court was drastically different than it is today, the cases were subjected to changes of the trial chambers. As per the Court Rules of Procedure, the President of the court is entitled to an annual change of the allocation of judges per departments, so, without further elaboration of the past period, the scope of this analysis will be the period from the submission of the charges – 2017, i.e. the first change after the charges were submitted.

Starting with June 2017 as a ground base, when most of the charges were filed, but not excluding the timeframe for reaching decision for approval from the moment of filing the charges, the first cases were given to judges during October/November 2017. But, with the election of the new President in 2017 and his decision two months later to

create new annual allocation<sup>1</sup> in 2018, the already assigned judges were changed, since most of them left this department. For instance, the cases from two judges which conducted these cases were redistributed to two other judges already working in that department, and already deciding in the previously given SPP cases. These changes affected the duration and the quality of the procedures, since the newly assigned judges are in the same Trial chamber for the cases that require to be conducted by a Trial chamber.<sup>2</sup>



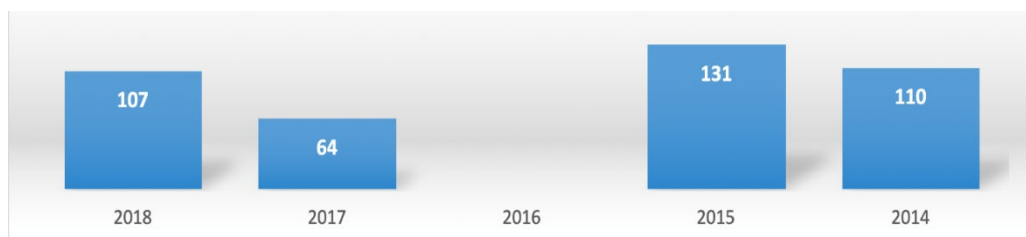
As per the publically available information from the monthly reports of the Basic Criminal Court, the Department for Organized Crime and Corruption in the past 5-6 years has various annual workload. With an exception for 2016, when there is no data on the workload of the court, since this data is not published on their web-site, most significant is the data that in the year when all (around twenty) charges by the SPP, this Court registered annual income of 64 cases in total in the area of organized crime and corruption.

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<sup>1</sup> Public Announcement from 12.01.2018, available at <http://www.sud.mk>

<sup>2</sup> Article 25 from the LCP: In first instance, the court judge in trial chambers composed of two judges and three jurors for crimes for which the Law prescribes punishment – 15 years of imprisonment, a life imprisonment, and in trial chambers composed of one judge and two jurors for the crimes for which the law prescribes more lenient sentence. For crimes for which the main punishment is a fine or up to five years of imprisonment, the cases shall be conducted by a single judge.

## Filed cases



*Source: Annual and monthly reports of the Basic Criminal Court Skopje*

What draws our attention additionally, apart from the decreased workload, is the decreased number of judges in this Department from 2018 until now. In the period from 2013 until 2016/2017, the number of judges working in this Department is 12, but in the last two years, this number drops to 9.

The allocation of judges in departments and their organizing in trial chambers, which is necessary for one case to be conducted by a trial chamber composed of two judges and three jurors, is an exceptionally important part of the court case management. It is important, because if one Department, for which in the Systematization is determined a certain number of human resources – judges, lacks the corresponding amount, the efficiency of their work shall directly affect the work with the court cases, the quality of the procedures, etc. The lack of judges in the Basic Criminal Court in Skopje is also stated in the Report<sup>3</sup> prepared by the Commission for surveillance of the application of the provisions from the Court Rules of Procedures for the last conducted insight (9.03.2019), where it is stated that the Systematization determined that the number of judges in this court should be 73 for uninterrupted and optimal work of the Court, but at the moment, the Court has only 49 judges. In addition to this, except from the anticipated optimal number of judges which is necessary for regular and normal functioning of the Court, it is necessary for them to be appropriately and precisely distributed within the trial chambers. In the moment, the Department for Organized Crime and Corruption has 9 judges, which form 4 constant trial chambers and one trial chamber in which the judge-member rotates. Within these chambers, the judging judges have different workload of SPP cases. The judges Ognen Stavrev and Osman Shabani have 3 cases each, and at the same time, they are in the same chamber, the judges Vladimir Tufekdzikj and Dzeneta Bektovikj have 2 cases each and are in the same chamber, the judge Dobrila Kacarska has (had) 3 cases, but her colleague- chamber member for these cases is not included in any chamber with any of the remaining judges

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<sup>3</sup> Minutes from the insight in Basic Court Skopje 1 Skopje, no. 08-1417/2 from 16.04.2019, available at <http://www.pravda.gov.mk>

conducting SPP cases. Furthermore, the judges Goran Boshevski and Sofche Gavrilova-Efremova have only one SPP case each, and the chamber member is overlapping for one judge only. On the other hand, there are two judges which don't have any SPP case at all. The achievement of this balance – equal distribution of the cases, especially bearing in mind that the charges are submitted in two successive days, is necessary for the optimum usage of the human resources within this Department, which at the end would result with efficient and economic conduction of the procedures. The Court Rules of Procedure anticipate consultative processes framed as a Session of Judges, led by the President of the Court at least once a month, and if needed, meetings with the court officials in the Court, in order to elaborate the organization of the internal operations in the Court, the schedule etc., especially in cases of facing challenges as the ones above stated.

## **1.2. Working dynamics of the court cases**

The manner of conducting, and the urgency of the cases initiated before the Courts are mostly dependent on the type and grounds, but also on the circumstances related to each individual and specific case. The Court Rules of Procedure states that the priority shall be given, and first cases to be conducted are the cases whose procedure lasts longer, and cases which have such treatment on grounds of special provisions, as well as cases for which the President of the court, on grounds of a justified request, approved priority in deciding.<sup>4</sup> When it comes to the criminal procedure, priority is given to cases in which a person has been put into custody or is serving a sentence, or a person is removed from duty or is temporarily banned from performing certain profession, activity or duty. Both the judge acting upon the case and the President of the court are responsible for working on cases as they arrive, or giving priority to urgent or other preferential cases.

The Court Rules of Procedure have direct prohibition for scheduling hearings for several cases at the same time (for the same judge), except in cases when several cases are merged to constitute one procedure. The number of hearings during one working day is determined in accordance with the duration of separate official activities, number of persons summoned, the type and number of evidence and the complexity of the procedure, bearing in mind at the same time not to breach the working hours of the court, and to rationally use the time of the parties. In any case, the scheduling of cases as per the Court Rules of Procedure shall normally be conducted so that the hearings would be scheduled every second day. As per the Court Rules of Procedure<sup>5</sup>, the activities undertaken by the judge and the court officer, regarding the movement of the

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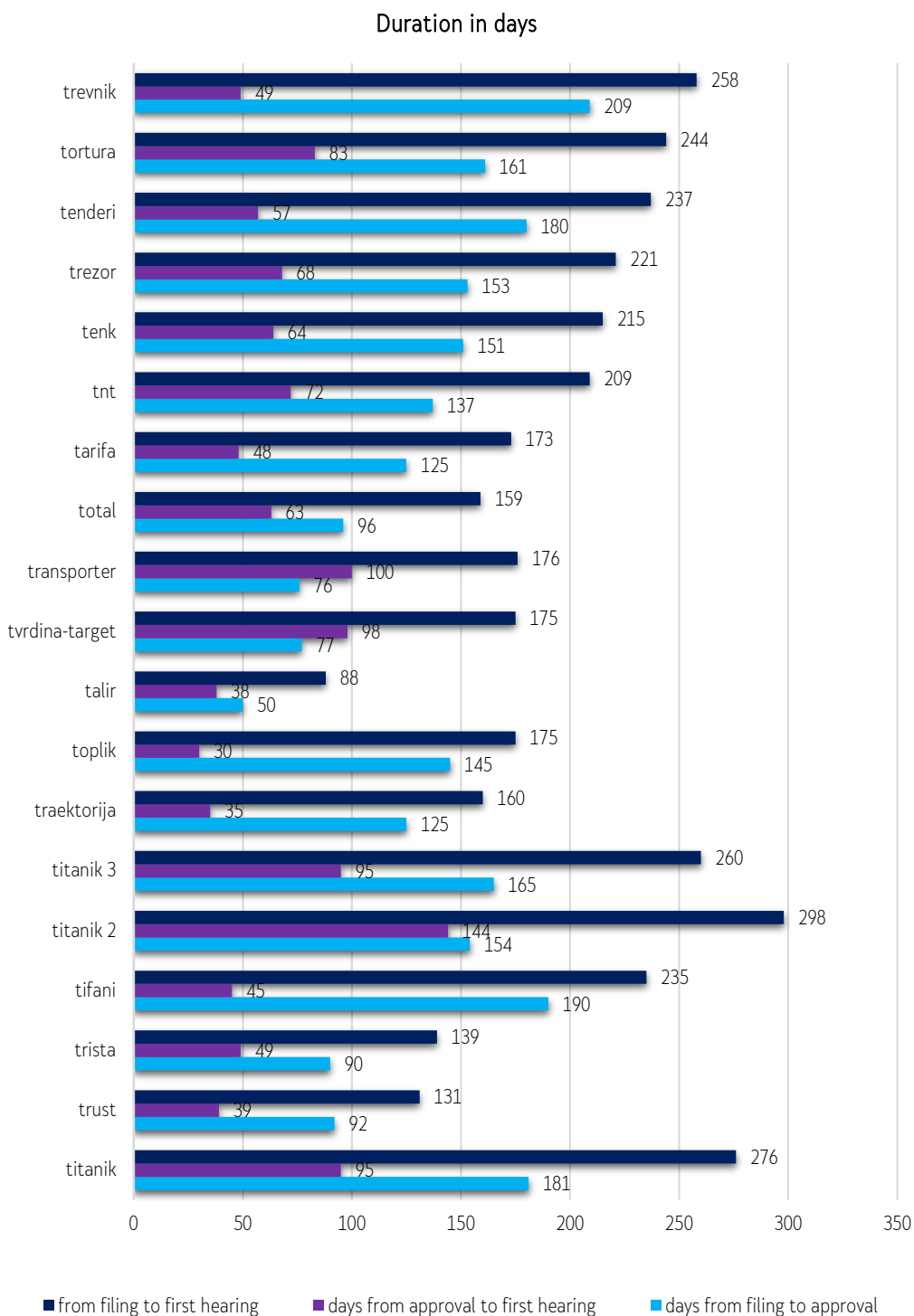
<sup>4</sup> Article 182 Court Rules of Procedure

<sup>5</sup> Article 5 Court Rules of Procedure

cases in the court, shall be undertaken during the same day, or by the end of the next working day at latest. There are exemptions from this rule, such as that in case of excessive scope of work, these activities may be undertaken outside of the prescribed timeframe, i.e. within five working days from the day they were originally to be conducted, at latest, but only upon previously obtained written approval by the President of the court, i.e. by the court administrator. In this manner, it is anticipated that the President of the court is entitled to schedule Judge Sessions at least once in a month, aiming towards more efficient conduction of the job assignments in the Court, gaining opinions for the work schedule, harmonization of the work between the departments, trial chambers and writing office, improvement of the working methods, professional development and other important issues in relation to the work of the Court.

Bearing in mind the dynamics of scheduling of the SPP cases, as of the separate high-profile court cases, it can be determined without a doubt that there is a more intense working process for these cases, and an exemption from the rule set for scheduling, i.e. scheduling the hearings every second day. Almost every time when it comes to cases of high interest, especially if this interest overlaps some specific societal-politic circumstances, the cases are intensively scheduled, and the judges are led by the intention to close them as soon as possible.

In the first initial phase of the cases - from the submission of the charges (Bill of Indictment, or Indictment proposal), until its approval, although the Law on Criminal Procedure states that the trial chamber deciding on the evaluation, shall schedule a session within 8 days upon the receipt of the Objection, i.e. upon the expiry of the deadline for filing an objection against the Bill of indictment, which means deciding relatively quickly, if we eliminate the problem with possible delivery of the files to the defendants, but when it comes to the charges of the SPP, this phase on average lasts from 4 to 5 months. Bearing in mind that the charges were filed in two consecutive days (29.6.2019 and 30.6.2017), the duration of the approval process of the charges is different, i.e. in the cases "Target-Tvrđina", "Transporter", "Total", "Trust" and "Trista", the charges were approved within 2-3 months, while for the cases "Tifani", "Trevnik", "Tenderi" and "Titanik" this process lasted 6-7 months.



*Source: Database of the Coalition "All for Fair Trials"*

The phase following the approval of the Bill of Indictment and prior to the start of the hearings, despite that the Law on Criminal Procedure anticipates scheduling the main hearing within 30 or 60 days (for cases in relation to organized crime) from the receipt of the Bill of Indictment in the court, when it comes to the cases initiated by the SPP, the timeframe is quite different than the one anticipated with the Law. On average, the main hearings not related to organized crime has been scheduled in 55,8 days, which leads to a number of days much higher than the set 30-days deadline. When it comes to cases on organized crime, they are scheduled, on average, after 70,9 days, or around 10 days later than the anticipated timeframe. The average time from filing the Bill of Indictment in the Court to scheduling a hearing in these cases is 201 day, or a bit more than 6 months.

Most of these cases are still ongoing; the dominant percentage of the cases is still in phase of examining evidence, while only 4 cases are closed and effective<sup>6</sup> and 3 are in front of the Court of Appeal<sup>7</sup>. The closed cases are, as most of the “regular” criminal cases, closed within less than a year; the case “Trust” has become closed and effective within 8 months, the case “Tifani” was closed in one hearing since the defendant admitted guilt, while the case “Tvrdina 2” is left to become effective for one defendant, while being effective for the remaining defendants. In these 6 cases, the two professional judges act alternatively as a president and member of the trial chamber, i.e. both judges act in the capacity of a President of the trial chamber in 3 cases and as member of the trial chamber in the remaining 3 cases. This means that, when working on these 6 cases, these judges are not allowed to schedule any two of these 6 cases in the same time, but since the Court Rules of Procedure state that the hearings should be scheduled on every second day, there is a very high probability of their overlapping. These cases have a lot of material and verbal evidence, which elaboration requires longer duration of the hearing, sometimes even during the whole working day, which means that these two judges could in no way achieve to work on other cases represented by the other prosecutions. In addition to this, it is necessary to bear in mind that all of the judges, as per their schedules, do not judge every day in the week, on the contrary, they judge only during two working days, or 8 days a month on average. There is a similar case with another chamber, in which two judges have two cases each, but the scheduling frequency is not as dynamic as with the previously mentioned trial chamber.

At this moment, out of the nine active judges in the Department for organized crime, three judges have 3 SPP cases each, two judges have 2 cases each, two judges have one case each and two judges do not have any of these type of cases. Two of the

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<sup>6</sup> “Trust”, “Tifani”, “Tvrdina 2”, “Tenk” (and “Tenk divided procedure”)

<sup>7</sup> “Tarifa”, “Trevnik” and “Trista”



judges with 3 cases each, as previously mentioned, are in the same trial chamber, but the third judge with 3 cases is in a trial chamber with a judge who is not included in any other trial chamber and who does not have any SPP case, which gave an additional opportunity for the President of this trial chamber to intensively direct the cases, while also conducting cases not represented by the ex SPP (such as 27 april), and to close effectively two of the SPP cases.

What makes these procedures and cases in general complex and with a plethora of challenges, are, on the one hand, the circumstances under which they were initiated, and on the other hand, the several month-long “war” of the Prosecution which initiated them with the remaining state institutions which were supposed to act like partners and to provide cooperation in combating organized crime and corruption in the state, but quite contrary, it faced many obstructions and reticence for cooperation, as well as the huge number of proposed evidence, which, obviously were not sufficiently filtered. In many of the cases, the Court is faced with hundreds of material and verbal evidence, which must be examined in this phase, because it did not react on time regarding the volume and sufficiency of a certain amount of evidence, so now, even after more than 50 hearings held (case “Titanik”), the evidence procedure is not yet closed. In addition to this, the Court showed relatively low level of “awareness” and attention to the cases which are expected to expire, so their bad management at the end results with decisions for rejection of charges due to expiry of the charges (case “Traektorija” for one of the defendants. As an additional argument to the bad dynamics of case movement is the common re-starting the cases due to expiration of a certain time limit (cases “Tenderi” – twice, “Transporter”, “Total”, “Titanik 3”, “Trezor”, “Trista”, “Opstina Centar”). On the other hand, the defence in almost all of the cases, regardless whether they have real possibilities to expire for one, two or several years more, uses every given possibility to prolong the process. The Defense uses every possible “aces” at its disposal – from absence from hearing due to worsened health condition of the defendant, of the Attorney at Law, witness, through the necessity of longer time period for preparing defense or examination, and to exhaustion of the technical laws regarding application of languages in the criminal procedure (case “TNT”).

Each of these preconditions and each activity of every one from the actors in the procedure has an impact to the circumstances under which the procedure is being conducted, as well as to its length, efficacy and thriftiness. The transformation process of the Special Public Prosecution, i.e. its “dismantlement” is expected to also have an impact to the efficacy and to the prosecutors which shall represent the cases. Especially if the Public prosecution for prosecuting perpetrators of criminal acts in the field of organized crime and corruption fails to be upgraded with human resources and public prosecutors, and even more important, with appropriate financial support from the budget.

Regarding the number of public prosecutors, as per the *Decision for determining the number of Public Prosecutors of the Public Prosecutions and Public Prosecutors in the Public Prosecutions*<sup>8</sup>, reached by the Council of Public Prosecutors of Republic of North Macedonia, the prescribed number of public prosecutors for the whole territory of Republic of North Macedonia is 257 public prosecutors. However, the numbers from the Annual Report of the CPPRNM for 2018 state that the Public prosecution in North Macedonia works with decreased number of public prosecutors for approximately 20%. From the anticipated 257 positions for public prosecutors, in 2018 there were 193 prosecutors. This situation is worrying when we have in mind the new authorizations of the public prosecutor as per the Law on Criminal Procedure. Instead of strengthening and increasing the human resources of the PPRNM, its capacities are being decreased. In one part, this is due to the natural selection (fulfilling the age criteria for retirement), but mostly, this condition is due to the non-functionality of the recruitment system and training of candidates for public prosecutors. In addition to this, the lack of public prosecutors in the country was also noticed by the European Commission. In the Progress Report for Republic of North Macedonia for 2019<sup>9</sup>, it has been noted that the lacks public prosecutors, i.e. only 10 of the anticipated 15 job posts are fulfilled.

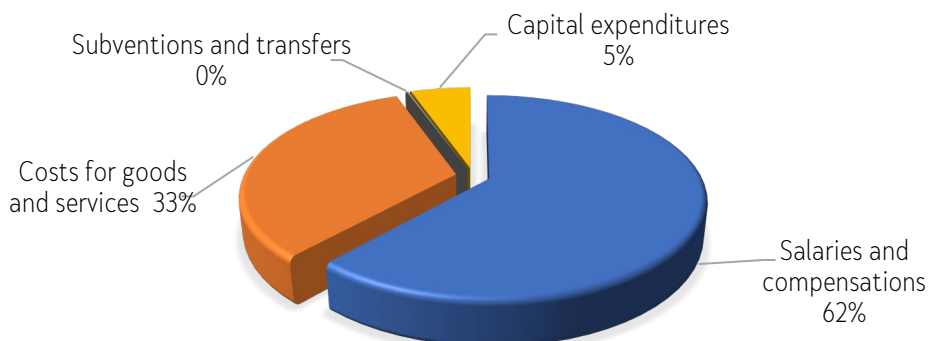
In addition to this, when analyzed, the approved budget of the Public prosecution shows that its biggest part is spent on salaries and compensations; this is for each year, and covers over 50 or even 60 percent from the budget. The costs for goods and services are constant throughout the analyzed period, creating one third from the approved budget. The most concerning item is the percentage for assets approved for capital investments in the public prosecutions, which varies from 4 and 5 percentage from the total approved budget for the public prosecutions. Since the capital expenditures are investments for maintenance and upgrading of the buildings and equipment of the public prosecutions, there is an urging need for recommending immediate increase of the assets for such expenditures.

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<sup>8</sup> The Decision has been reached on 13.12.2019, published in Official Gazette of RNM no. 18/19

<sup>9</sup> Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf>

### Approved budget for PP for 2017 – scheme in percentages



### 1.3. Reasons for postponing hearings

As previously stated, the SPP cases had their complexity, not only due to the nature of the crimes for which they were initiated, but also due to the societal circumstances and the politic climate in the country, which contributed for these cases to face deadlocks in every phase of their procedures. But if we see the general statistics for the SPP cases, we can notice that they are held much more often than the remaining cases related to corruption or organized crime. As per the data from the Coalition “All for Fair Trials”, until now, on average, the main hearing sessions of the SPP cases have been postponed in a bit less than in one third of the cases, which is quite contrary to the remaining cases being conducted before the Department for organized crime and corruption, and which, as per the data collected by the Coalition, are postponed in almost two thirds of the cases. Despite all this, most of the SPP cases are still in the phase of examining evidence, lasting more than a year now for all of these cases, and the postponements in some of the cases led to re-starting of the main hearing due to expiry of 90 days.

For the purpose of this Analysis, we will take as referent the cases which statistically have the highest percentage of postponed hearings, as well as cases in which the trial chamber is overlapping, in order to emphasize the problems which are the key for efficient and uninterrupted conduction of the court procedures.

Regarding postponements, supporting the thesis that the defense often tends to delay the procedure, regardless whether it is in the interest of the defendants, we show the part of the statistics stating that most of the postponed hearings happened upon request of the defense. The postponements requested by the defense include absence of the defendants or their attorney, as well as postponements provoked by other process activities by the defense, such as request for preparation of the defense, conducting

insight in the evidence, requests for dismissal of a judge, etc. It is important to state that the postponements due to absence of the defendants are not proportionate in all cases, so in one part of the SPP cases with longest duration of the procedure, the defendants have very little, or no absence at all. In the cases “Trafika”, “Traektorija” and “Tenderi”, the defendants have no absence, while in “TNT”, “Titanik”, “Toplik” and “Transporter” there is minimal absence of the defendants, or absence from less than 20% of the main hearing sessions. The average of postponements due to the defense (absences, requests for postponement and other activities which provoked postponement of the hearing) for all of these cases is less than 40%.<sup>10</sup> This means that the postponements requested by the defense are the biggest individual factor for the procedure deadlocks (unlike the acts of the Court or of the SPP), but still, if we take into consideration that they are under 40%, it would also mean that the biggest part arose as a result of combination of other factors, so we would reach a hurried conclusion that the defense is the biggest factor for the postponements.

From the postponements that arose as a direct consequence of the acts of the defense, as dominant we share the reasons such as: worsened health condition of the defendants, as well as official duties of the defendants which mostly still are bearers of public offices. In all cases of absence of the defendants, they justified their absence with regular medical documentation, usually delivered directly by their attorneys which were present at the hearings. In this context, it is interesting that the court quite rarely makes any effort to check the justification of these absences by the defendants, especially regarding their official duties. It is important to note that the Court must make a gradation of the official duties of the defendants, and since it is also a pillar of the power parallel to the Government and the Assembly, to accept only these absences of the defendants which are necessary for functioning of the remaining pillars of power. Hence, it is completely understandable and acceptable to be absent due to duties such as voting for significant laws or laws which if not reached, may cause significant damage to the society, but the defendants are usually informed about these duties ahead of time, and the Court may try to provide better coordination and management of the scheduled main hearings, in order to avoid overlapping of the hearings with such urgent and pressing duties of the defendants. Towards this also leads the Opinion by the European Parliament, according to which, the Court must achieve initial balance between the efficacy of the procedure and the execution of the official duties in the

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<sup>10</sup> The percentage is related to the total average for all cases included in this Analysis, and the postponements are from 0% in “Tenk” to 100% in “Talir”.

state, as prescribed by the Constitution, and the Court is obliged to apply the legitimate aims and proportionality criteria.<sup>11</sup>

On the other hand, as per the ECtHR practice, the right of one person to be present at the hearing is not absolute, and it is highly significant that the Court determines whether the absence of the defendant is as a result of its voluntary renunciation of this right, or the defendant could not affect the reasons which led to his absence. Unfortunately, the LCP does not offer separate and precise process possibilities and authorizations for the Court to examine the justification of the absence of the defendants, nor it offers definition of a justified absence. The only option offered by LCP is the forced bringing and possibilities for determining custody in case when the defendant purposefully avoids presence during hearings, but in this case there must be clear evidence that the defendant avoids presence on purpose. On the other hand, the “loose” formulations in the LCP, as well as the absence of prohibitions for the court to re-check the statements and documentation delivered by the defense regarding the justified absences, the court needs to have more active role in managing hearings and coordination between all of the participants in the procedure, in order to avoid unnecessary delays of the procedures. Considering this, the courts must act diligently in these situations, in order to avoid setting inappropriate judicial practice which could be accepted by the other courts, and would lead towards inefficiency and sluggishness in the actions of the Court.

However, the postponements due to requests of the defense are not always a direct consequence of the acting of the defendants or their attorneys. A good percentage of the postponements in these cases, especially those which occurred during the beginning of the court cases, i.e. before of the evidence procedure, are due to lack of appropriate time and conditions for preparation of the defense. As a main reason for this is the reaction of the defense that they were not given access to the evidence in the case, or that they did not have sufficient time to get familiar with the evidence, especially in the cases with proposed great number of evidence by the SPP. In this manner it is really hard to understand how could both the Court and the Prosecution allow lack of appropriate access to the evidence and appropriate conditions for preparing defense before the start of the court procedure, especially if we bear in mind that both the LCP and ECHR prescribe that the defendant needs to be made familiar with all of the evidence in relation to proving guilt, as well as with the evidence in relation to releasing from responsibility. Due to non-fulfillment of these obligations, mostly by the Prosecution, and after that, by the Court, the postponements which occur during the further phases of the procedure, when defense requests additional time for

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<sup>11</sup> [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536461/IPOL\\_IDA\(2015\)536461\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536461/IPOL_IDA(2015)536461_EN.pdf)

examining evidence, cannot be treated as postponements due to the actions of the defense.

. Another challenge for the procedure management, apart from the previously described problems with overlapping of judges in many cases, is the overlapping of many prosecutors, but also of several attorneys in several of the SPP cases. Although the overlapping of schedules for two hearings with the same defendant are amongst the most insignificant reasons for postponements, their existence in a relatively small number of cases leads towards the oversized passivity of the court in its role as a manager and coordinator of the dynamics and schedules of development of all of the activities in the procedures currently in judicial phase. It is interesting to see that there is no correlation between the number of defendants in the case and the frequency or probability for overlapping of the hearing schedules. Moreover, the court still hasn't undertaken any activities for improvement of the coordination between the judges, nor for proactive inclusion of the President of the court in deciding whether some cases will be treated as priority cases, as per the Court Rules of Procedure. Although it is slightly less serious, the situation with overlapping different cases with the same attorney is very similar. This situation has been deemed as problematic even before the start of the SPP, but neither the Court, nor the prosecutions, nor the Bar Association have made any effort to find practical solutions, such as integrating schedules for all of the stakeholders for alleviated coordination and avoiding overlapping.

To these factors for postponement of the procedures, we include the remaining factors which are under complete authorization of the Court, such as incomplete trial chamber, or absence of a single judging judge, change of members in the trial chamber, lack of technical or spacious working conditions, scheduling hearings before the preparation of the Expert finding and opinion which shall be examined during the hearing, etc. As per the statistics of the Coalition, almost 25% of all of the postponements arose due to lack of appropriate technical or spacious conditions, or due to absence of a member of the trial chamber, i.e. in almost one fourth of the postponed hearings, the postponement was a direct consequence of the acting of the court. A part of the postponements due to absence of member of the trial chamber is partly a result of overlapping schedules for cases judged by the same judge, but other types of absences of the judges were also present. This can mostly be connected with the change of the human resources in the Department for organized crime and corruption, which, starting from 2018 works with 3 judges less, which is a decrease in human resources for this department for 25%.

Another burning subject, also connected to the human resources management, is the change of the members of trial chambers. With an exception of one case ("Titanik 3"), where the professional judge had been dismissed before the very end of the

procedure, in all of the other cases, there was a change of a juror. Especially problematic was the mandate of one juror who was a member of the trial chamber in four SPP cases (“TNT”, “Titanik”, “Monstrum” and “Tahir”), which led to different opinions of the public as to whether and how should the court react in such situation. The problem with the mandate of this juror was also emphasized by the attorneys in one of the cases, where they stated that the 4-year long mandate of the juror has expired, as well as that he had already achieved the age limit for conducting the position of a juror. The actions undertaken by the court were mostly declarative and they tried to find a solution which would be a compromise through application of provisions from the Law on Labor Relations, and the Judicial Council never gave a statement regarding this situation. Most of the time, the Judicial council and the Court were included in communications and public debates with the attorneys, and they spent less time to finding solution for overcoming this situation and future avoidance of exact or similar situations. The final epilogue was revoking the juror from its position, and an unavoidable re-start of these procedures, which meant that 15 SPP procedures should start over, regardless whether it could be a formal re-start or with repeated examination of all evidence.

Regarding the management of the flow of the procedures, in several cases the court failed to provide appropriate spacious and technical conditions for holding the hearings, which looks like especially frivolous act by the court, since there was a huge public interest for following these cases, and the court had to provide appropriate conditions for holding these hearings. We would like to mention the rate of postponement, which is over 20%, due to failure to provide a witness, expert or Expert finding and opinion. Although the new model of adversary criminal procedure sets that the witnesses shall be invited as a means of evidence by each of the parties proposing them, some of the professional audience held the opinion that the party proposing the witness, due to the benefit this witness could give the party, should provide the presence of the witness, the court cannot be exempted from liability in the cases with absence of witnesses or experts. As per the LCP, the Court is responsible for providing uninterrupted flow of the procedure, and as per the ECtHR practice, the court must do everything in its capacities, and to exhaust all the means at its disposal in order to be excluded from liability, and in order for the reasons for postponement to be found in the other participants in the procedure.

If we see combined all of the postponements of the hearings, arisen as a direct consequence of the actions of the court (25% due to lack of appropriate conditions or absence of a member of the trial chamber), or as an indirect consequence of insufficient dedication and engagement in the process management and coordination (20% due to failure to provide experts, witnesses and Expert findings and opinions), we can notice that the court’s actions are a reason for postponement in 45% of the cases, in comparison to the 40% postponements due to the defense’s actions.

The conduct of the SPP is shown as the smallest reason for postponement, which is mostly different than the statistics of the other prosecutions, where the absence of the prosecutor is the second reason for postponement, first being the absence of the defense. Only 10% of the postponements arose due to the conduct of the public prosecutors, and in most of these cases, it happened because of the decomposing of the SPP and due to cases being overtaken by the PPRM, i.e. they did not arise as a result of the conduct of the prosecutors, but as a result of the lack of political will for overcoming the problems and controversies of the SPP and its future. However, the conduct of the SPP moderately contributed towards the duration of the dynamics of the cases, through proposing a huge number of evidence. The reasons for such actions of the SPP are not officially stated, but informally, it happened as a result of the wish and attempt to leave better picture for transparent operations, so SPP proposed each of the evidence given at their disposal, which are related to a specific case, so that there is no suspicion for covering evidence. Unfortunately, this resulted with cases with 2000 material evidence ("Transporter"), 100 witnesses ("Target/Tvrdina") and 200 witnesses and 6000 material evidence ("Titanik"), which is a precedent in the work of the public prosecutions. But it is also important to mention here that the court, when examining the Bill of Indictment, and during the main hearing, accepted all of the evidence proposed by the SPP, regardless of the circumstances for which they were proposed, and not taking into consideration the economy and efficiency of the procedure, which are the main arguments for rejecting the evidence proposed by the defense, especially when it comes to the same witness proposed by both parties. The huge number of evidence affects the flow of the procedure and the timeframe for the hearings, but in this manner, it is necessary to state that all of the investigations were closed within less than two years from the incorporation of the SPP, and during that period all of the evidence that are now proposed, were gathered and processed. Under that analogy, the court should not find it difficult to examine the evidence within the procedure as prescribed by Law, but in this case, and until now, the court procedures, part of which still don't have first instance Verdict, are ongoing for a significantly longer period than the investigations.

#### **1.4. Capacity of the defendants in the procedures**

The capacity of the defendants in these cases must be taken into consideration when elaborating the behavior of all of the parties concerned, because this is the first time for the Macedonian judiciary to face so many cases from such nature. In most of the cases, the defendants are high previous or current officials or significant persons from the political life, and the acts they are burdened with are acts for which our courts and prosecutions lack experience. This is especially important for the case "Talir" where for the first time one political party acts in the capacity of a defendant, moreover, it is the biggest political party in the state. This case, even before entering the evidence



procedure, has a high rate of postponed hearings (100% postponement, mostly due to the defense), although in this case a part of the possessions of the political party has been frozen, which under the existing practice and under the Court Rules of Procedure, should be a ground for getting priority in deciding. This situation gets even more complicated with the request for confiscation of the illegally acquired possession by the party, and for this measure, the state bodies have only limited experiences regarding a lot lesser amounts confiscated from far more anonymous perpetrators. Due to these reasons, the court rarely dares to “cut” and not allow the defense to require further postponements, in order not to provoke any possible breach of any of the rules of the procedure, which could result with repeating the procedure, additional costs and possible damage to the budget of RNM, but also for the impression which would be left with the audience, once again, bearing in mind that the subject here is the biggest political party in the state.

Regarding the defendants- natural persons, no specific trend could be noted with the operations of the court or prosecution, related to the position or personal capacities of the defendants, so one of the most quickly solved cases is the case (“Tenk”) in which the defendant was the previous Prime minister of RNM (now in exile), while part of the cases having defendants which are not bearers of functions, (such as “Total” where the defendant is a journalist and several legal entities) is the case with most postponements and least undertaken process activities, although the two hearings (“Total” and “Tenk”) started almost at the same time.

## Part 2: Amendments to the Criminal Code and their impact on the SPP Cases

### 2.1. What did the amendments bring? – Analysis of the legal framework

The Law amending the Criminal code of RM was reached in 2018, and entered into force in January 2019.<sup>12</sup> Some of the interventions anticipated with this Law were positive and essential amendments of the criminal law substance, especially the long expected amendments for appropriate charges and sanctioning the crimes conducted from hate, as well as introducing new provisions for witness protection, and provisions for sanctioning the obstruction of justice. However, some of the amendments, without appropriately justified from the proposers and the lawmaker, left enough space for speculations, especially regarding the real reason behind their reaching. The amendments that entered into force included Article 40 (Sentence mitigation), Article 275-c (Abuse of the public call procedure, granting a Public Procurement Contract or Public-Private Partnership) and Article 279-a (Tax Fraud).

The reason behind these amendments caused reaction by the NGO sector and the expert public, despite the fact that the need for such amendments was not elaborated, also because of the impact on the ongoing cases of high corruption initiated by the Special Public Prosecution.

With the amendments of the Criminal code, Article 279-a introduced seemingly new crime “Tax Fraud”. If we analyze the above stated articles, we can see that they are criminalizing the same acts. Article 279 prescribes penalty for each person which shall either partially or fully avoid to pay tax or other contribution through giving false data for their revenues, while the newly introduced Article 279-a anticipates penalty for every person who, in order to gain property benefit, will lead the tax authorities to misconception through giving false data and shall require reduction of the tax obligation, or will require ungrounded return of tax. It is obvious that these articles incriminate identical activities and that both acts relate to tax malversation of greater value. But the lawmaker thought that despite the fact that it is an incrimination of the same and identical activities, there should be two separate crimes, which, for the same crimes shall anticipate various degree of punishment. For the already existing crime Tax evasion, the lawmaker anticipated sentences from 6 months to 5 years of imprisonment, while the new crime from Article 279-a, “Tax Fraud” for the same acts, the lawmaker prescribed drastically lower sentence – from 6 months to 3 years.

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<sup>12</sup> Law amending the Criminal Code of RM, Official Gazette of RNM no. 248/2018 from 31.12.2018

## Tax Evasion

### Article 279

Whosoever with the intent, for himself or for another, to avoid the complete or partial payment of tax, contribution, or some other fee, which he is bound to by law, gives false information about his revenues, or the revenues of the legal entity, objects or other facts of influence on the determination of the amount of this type of obligations, or whosoever with the same intent in case of mandatory application does not report the income, that is an object or some other fact of influence for determination of such obligations, and the amount of the obligation is of greater value, shall be sentenced to imprisonment of six months to five years and shall be fined.

## Tax Fraud

### Article 279 – a

Whosoever, with the intent, for himself or for another, to gain property benefit, gives false data in the tax return to the tax authority leading the tax authority to misconception, in order to require ungrounded return of the tax or reduction of the tax obligation, of a greater value, shall be sentenced to imprisonment of six months to three years and shall be fined.

It seems that the lawmaker, when introducing the new crime failed to answer some essential questions which may arise during their application, such as, how could the practitioners, i.e. the prosecutors and judge, understand and apply these two articles from the CC. In addition to this, the lawmaker failed to take into consideration whether in practice these two articles may lead to serious violation of the legal security of the citizens and unequal application of the specific provisions of the Law, through selective and unequal acting in relation to the person who should be judged for these acts. Most importantly, the lawmaker did not give any explanation for the justification for introducing penalty policy which is less strict towards the tax malversations in the Regulation Impact Assessment (RIA).

Should we analyze this article from the standing point of the current cases, the qualification of the indictment in the case “Total”, which now is:

*“The defendant D.P.L as an owner and manager of DM T.M.A. DOOEL S., with an intention for him and the Company to avoid partial tax payment (in order to gain*

*unlawful property benefit, o.c.), in the book-keeping evidence of the Company, closing statements and tax reports gave false data for the facts which could have an impact on the determination of the amount of tax obligations (by which, he led the tax body into misconception, o.c.),* it can be initiated under both of the articles. This means that in this case there is a possibility not only for the public prosecution to re-qualify the act in its indictment, but a possibility for the court, when reaching the Verdict, to amend the legal evaluation of the act as per Article 398 para.2 from the LCP. In this case, with the decrease of the penalty, the deadlines for expiry will also be shortened, and in this case, an absolute expiry will occur for the acts conducted before 2013. The time-barring will arise because the new Article prescribes sentence of 3 years of imprisonment, which means that in accordance with Article 107, para. 5 from the CC, the relative time-barring will occur in 3 years, and the absolute time-barring, as in accordance with Article 108, para. 6 will occur in 6 years.

Although in this case, the charges qualify the act as a continuous crime as per Article 45 from the CC, and it would be considered that the time barring shall occur with the last conducted activity, i.e. from 15.03.2016, the court may also evaluate that this is not a continuous crime and that the separate acts conducted from 2008 concluding with 2013 are time-barred.<sup>13</sup> This Article could have even further consequences which could affect not only the operations of the prosecutions and courts, but also the operations of the other bodies which shall face the economy crimes, i.e. the “white collar”crime.

In Article 275-c from the CC, the amendments are in para. 3 where the word “five” is amended with “four”, and is relating to the minimum determined sentence for that specific crime. These amendments are in relation to the case “Trust”, which is in relation to the specific Article and paragraph (Article 275 c, para.3), included with the amendments to the CC, and the precautions are regarding the reduction of the minimal punishment to 4 years, which opens a possibility for the defendants in this case to receive a mitigation of their sentence to 2 years, and in conclusion to this, and in accordance with Article 50 from the CC, the defendants may end up with probation. This also directly affects the possibility for quicker time-barring of the crime. The consequences of this amendment are directly seen in the SPP case “Trust”, i.e. the conducted acts, instead of being time-barred in 2013, will be time-barred in 2021.

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<sup>13</sup> See more: Verdict Kzz no. 7/2007 from 28.03.2007 of the Supreme Court “The time connection as an element of the crime in continuation, cannot be convalidated after the expiry of several months between two actions”, as well as the Verdict Kvp. No. 56/2013 from 30.04.2013 by the Supreme Court “From the content of the stated legal provision (Article 45 from the CC, o.c.), it can be concluded that constant constitutive elements of the term crime in continuation, which shall exist cumulatively, are: the identity of the perpetrator, commission of same crimes in continuation and having time-related actions.”

The Article 40 from the CC, which regulates the borders of the sentence mitigation below the limit prescribed by law, was amended with the newest amendments to the CC from December 2018, by returning the old, unclear formulation of para.2, stating that the court may mete out a punishment below the limit prescribed by law “where it is established that there are particularly alleviating circumstances indicating that the purpose of the sentence may be achieved by the mitigated sentence as well”. This formulation was removed from the CC in 2013, explicitly due to the uneven court practice and insufficient argumentation for existence of the particularly alleviating circumstances by the courts when they decided to apply this Article, and also, were introduced clear criteria for determining when the punishment could be mitigated below the limit prescribed by law.

The Government also proposed amendments to Article 352 from the CC, relating the abuse of official position and authorization, but under the public pressure, gave up from this proposal. If this proposal was also adopted, that would have meant that several more SPP cases would meet time-barring.

## CLOSING CONCLUSIONS AND RECOMMENDATIONS

The lack of judges in the Basic Criminal Court in Skopje, the uneven distribution of cases, passive role of the court in managing the hearings, the limited capacities of the DPPCOCC, reaching amendments to the system laws under fast procedure without appropriate assessment of the impact of the amendments are just a part of the factors affecting the circumstances under which the procedure is being conducted, while affecting its duration, efficacy and economy as well.

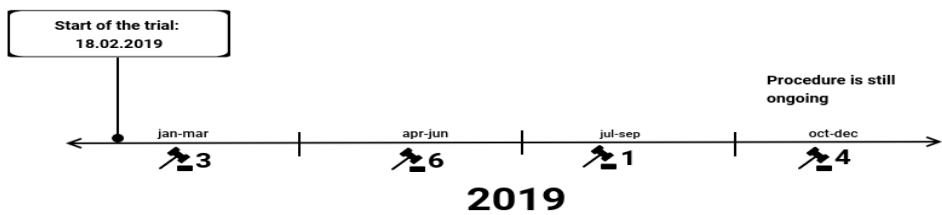
In order to improve the efficacy of the criminal justice, it is necessary to have serious pledge of the state to reconstruct the defaults, especially when it comes to the human resources, material conditions and bigger budget for the specialized departments in the court and public prosecution for combating high corruption. Another challenge in the procedure management, despite the previously described problems with overlapping of the judges in many cases, is the overlapping of the defendants, but also the overlapping of the attorneys in several of the SPP cases. To the above stated factors for postponing of the procedures, we can add the remaining factors which are in complete authority of the court, such as incomplete trial chamber, absence of a sole judging judge, change of the members of the trial chamber, lack of technical or spacious conditions for work, scheduling hearings before the preparation of the Expert finding and opinion which shall be examined during that hearing, etc.

The recommendations arising from this Analysis are:

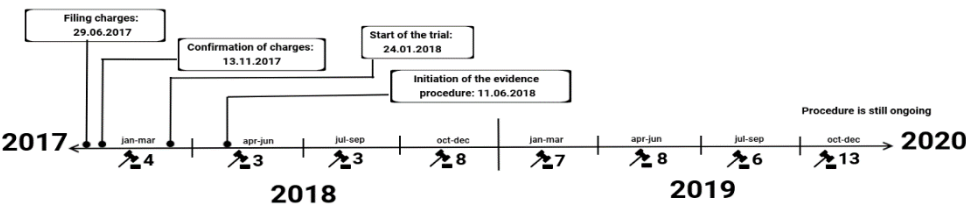
- Providing appropriate number of judges in accordance with the systematization, in order to provide uninterrupted and optimal operations of the court;
- Even distribution of the cases, in order to provide optimal exhaustion of the human resources at disposal to the court, which would result with efficient and effective conduction of the procedures;
- Improvement of the Public Prosecution for prosecuting perpetrators of criminal acts in the field of organized crime and corruption with human resources and public prosecutors, and most importantly, with appropriate financial support from the budget;
- The Court should take more active role in managing the hearings and coordination between all of the participants in the procedure, in order to avoid unnecessary delay of the procedures.

ANNEX I

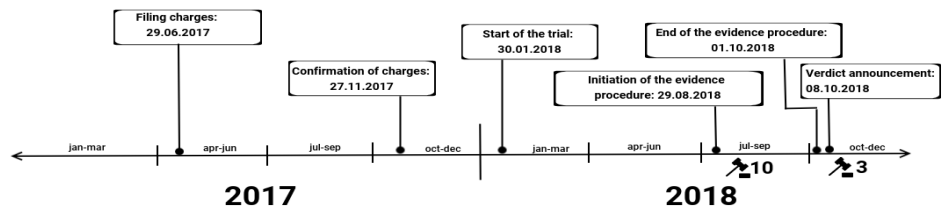
TALIR



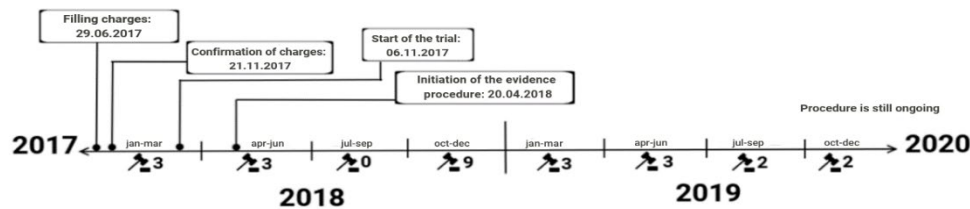
TNT



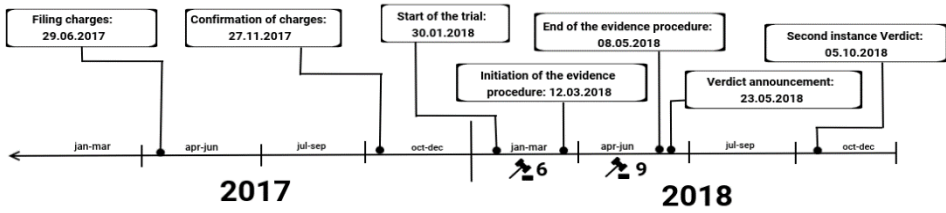
TENK  
(split procedure)



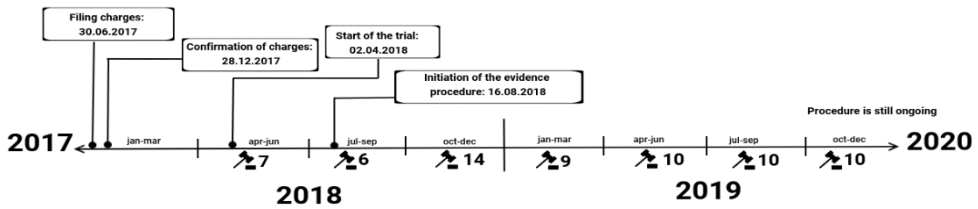
TOPLIK



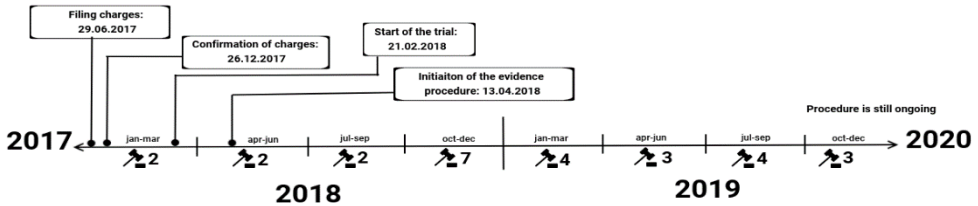
## TENK



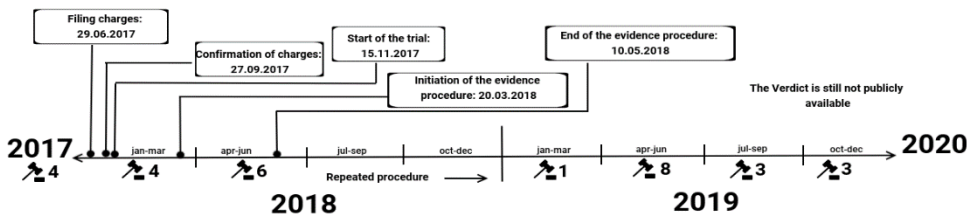
## TITANIK



## TENDERI

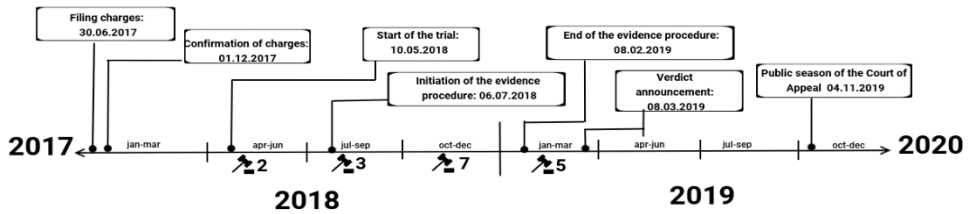


## TRISTA





## TITANIK 2



## TRANSPORTER

