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JUDICIAL EFFICIENCY IN FIGHTING ORGANIZED CRIME AND CORRUPTION IN THE "CAPTURED STATE"

REPORT FROM THE PROJECT "TRIAL MONITORING OF CASES RELATED TO ORGANIZED CRIME AND CORRUPTION UNDER THE NEW LAW ON CRIMINAL PROCEDURE" FOR 2016

JUDICIAL EFFICIENCY IN FIGHTING ORGANIZED CRIME AND CORRUPTION IN THE "CAPTURED STATE"

Skopje, November 2016

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JUDICIAL EFFICIENCY IN FIGHTING ORGANIZED CRIME AND CORRUPTION **IN THE "**CAPTURED STATE**"**

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LIST OF MOST COMMONLY USED ABBREVIATIONS

BPP	Basic Public Prosecutor/Prosecution
CC	Criminal Code
CPC	Criminal Procedure Code
ECHR	European Convention of Human Rights
EU	European Union
GRECO	Monitoring group of states against corruption of the Council of Europe
ICCPR	International Covenant on Civil and Political Rights
RM	Republic of Macedonia
SPO	Special Prosecutors Office

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GRATITUDE

Respected,

The Coalition “All for Fair Trials” is presenting another analysis from the project "Trial Monitoring of Cases related to Organized Crime and Corruption under the new Criminal Procedure Code”, focused on questions that treat the issue of the fight against organized crime and corruption and the application of the new Criminal Procedure Code.

The analysis summarizes the data gathered from the monitoring of cases in 2016 related to organized crime and corruption before the Department for Organized Crime and Corruption, cases of public interest and a selected sample of other cases relating to corruption, thus achieving the aim of the project - to strengthen the independency, efficiency and objectivity of the Macedonian judiciary in the fight against corruption and organized crime and to contribute towards adequate implementation of the criminal - justice reforms with main focus on the new Criminal Procedure Code.

The responsible person for coordination of the project activities, the analysis of the received data and mainly the preparation of the analysis itself is the Executive Director - Aleksandra Bogdanovska who unreservedly deserves all positive reviews. The whole process was unselfishly supported by the professional engagement of the Project Assistant, Daniel Mitkovski, particularly in the processing of the database, so as the trial monitors who were directly involved in the trial monitoring, without who this analysis would not be completed.

I would like to express special gratitude to the U.S. State Department-Embassy of the United States of America - Bureau for International Narcotics and Law Enforcement Affairs, whose proposals during the implementation of the project activities gave a quality input to the final product of the project as well as for their financial support and good cooperation since 2014 until today.

Mirjana Ivanova Bojadzieva, PhD
President of the Coalition “All for Fair Trials”-Skopje

INTRODUCTION

The Coalition "All for Fair Trials" is an organization of civil associations from all over the Republic of Macedonia. Its main mission is to monitor the respect of human rights and freedoms, particularly the implementation of the international standards for fair trial through various forms of acting.

The Coalition started developing its trial monitoring program related to corruption in 2007 with a six month pilot phase named as "Needs Assessment-Development of Corruption Trial Monitoring Programme in the Republic of Macedonia". This first pilot project gave us empirical materials on the basis of which we detected the problems which the prosecution bodies face when dealing with cases related to corruption. In the scope of this pilot project the criminal offenses related to corruption from the aspect of legislation and judicial practice were defined. The final definition located 24 criminal acts that are in direct correlation with corruption[1]. Since 2012 until today we implemented projects only on the territory of the Basic Court Skopje 1 Skopje, which was not the case before when the monitoring was carried out on the territory of the whole country. The reason behind that was the introduction of the Public Prosecution Department for Organized Crime and Corruption, which treats variety of cases of corruption and its manifestations.

After the creation of this Department, and during the monitoring of the most serious cases, we noted increase in the abuse of human rights of the defendant, especially the right to freedom, since detention was imposed to almost every indictment. Recently this abuse was noted by the courts too who insisted on replacement of this measure with house arrest since the defendants will be still available to the law enforcement authorities, and their right to freedom will be limited to the minimum extent. They would remain in the circle of their families.

The questions relating to corruption, organized crime so as the respect of the fair trial principles are emphasized in the key documents of importance to the Republic of Macedonia, i.e. the Urgent Reform Priorities imposed by the European Commission[2], High Level Accession Dialogue between Republic of Macedonia and European Commission[3],

[1]*Bribery at elections and voting, Fraud, Defrauding buyers, Unauthorized reception of gifts, False bankruptcy, Causing bankruptcy by unscrupulous operation, Misuse of the bankruptcy procedure, Damaging or privileging creditors, Laundering money and other proceeds from crime, Fraud in working with securities and shares, Disclosing and unauthorized acquisition of a business secret, Misuse of official position and authorization, Embezzlement in the service, Fraud in the service, Helping oneself in the service, Receiving bribe, Giving bribe, Unlawful mediation, Covering up the origin of disproportionately acquired property, Disclosing an official secret, Misuse of state, official or military secret, Forgery of an official document, Unlawful collection and payment, and Influencing witnesses in an unlawful manner.*

[2] Urgent Reform Priorities For The Former Yugoslav Republic Of Macedonia, June 2015, www.ec.europa.eu/enlargement/news_corner/news/news-files/20150619_urgent_reform_priorities.pdf

[3]Fifth meeting of the High Level Accession Dialogue between Republic of Macedonia and European Commission, 18.09.2015

European Commission Progress Report on the Republic of Macedonia for 2016[4] and in the Recommendations of the Senior Experts' Group on systematic Rule of Law issues relating to the communications interception revealed in Spring 2015 (known as Priebe Report) [5].

2016 was a year when another analysis from the project "Trial Monitoring of Cases related to Organized Crime and Corruption under the new Criminal Procedure Code" was produced, focused on issues that treat judicial matters in deciding upon cases of organized crime and corruption, as well as on other additional reforms and ongoing issues relating to judiciary in general.

Through monitoring judicial procedures, our experienced trial observers gathered statistical data on the activities of the Prosecution, in particular on the Public Prosecutors as submitters of indictment, which should be professionally and technically prepared, sustained and elaborated with sufficient evidence about the perpetrator of the criminal offense and the act itself. In terms of the role of the courts i.e. the judges, our priority assumption is their professionalism within the legal frames, a fundament for legal security of the citizen, the stability and the development of the state based on the principles of the rule of law. A complete implementation of the judicial moral and outstanding professionalism would create a solid ground for elevating citizens' trust in judiciary.

The corruption represents a socially harmful phenomenon with pronounced influence upon the development of the society, dating back from the early age of the state. Indisputably it represents a complex phenomenon which in its criminological and criminal – legal phenomenology may appear as a singular form of crime, but also as a method of performing other most demanding forms of crime.

When talking about the criminal offenses of corruption, first of all we think of acts committed against the official duty, meaning rights and duties of a person who performs certain activities of public character. Their disrespectful behaviour damage not only the state but the citizens. For a successful implementation of this project in the process of monitoring corruption related cases, one should look into their features separately and in a group. In doing so, it is important to determine the quality of gathered results, the success in knowing the phenomenon in its own characteristics, detecting its weaknesses since most of the perpetrators hold responsible positions in the state institutions and public services, and they are the ones who decide about the rights and obligations of the citizens

[4] Commission Staff Working Document - The former Yugoslav Republic of Macedonia 2016 Report http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf

[5] 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, www.ec.europa.eu/enlargement/news_corner/news/news-files/20150619_recommendations_of_the_senior_experts_group.pdf

and the legal bodies. The efficiency of the fight against corruption scientifically demands usage of all means and methods, from classical (conventional) to the latest (modern).

By monitoring trials related to corruption we analyze the judicial procedures in the field of corruption, mainly the criminal offenses Misuse of official position and authorization and Defraud, acts that are repeatedly mentioned in every annual research. The other criminal offenses related to corruption are either rarely committed or the manner they are performed creates difficulties to the Prosecution in securing comprehended evidence about the factual situation. We get an impression that the Prosecution is mainly experienced in prosecuting only the aforementioned two criminal offenses.

Having in mind the harmful effects from the corruption, this research should dig into the judicial cases, assessing the trial from its beginning until its end, so that we can get a clear image about all stages of a concrete criminal – legal event, its participants, the perpetrators, their level of education, recidivism or committer of a first offense, working position – function, a service or a counter-favour, although both situations are abuse of the official duty and authorization. Further on, it is important to monitor the procedure in its all stages and the activities of each party in the procedure. The monitoring should embrace all phases, from the submission of the indictment until the first instance judgement.

The issued sanctions are important segment of this research particularly seen from the aspect of achieving the goal of the punishment, whether the penal politics goes upwards, imposing stricter penalties (imprisonment, fines, alternative measures) or more lenient sentences are issued.

In these criminal offenses we should separately analyze the judicial practice in terms of separate measure, confiscation of assets and property benefits. Confiscation of assets acquired by criminal conduct, of criminal proceeds deriving from the relevant offenses, or property whose value corresponds to that of such revenue or forfeiture of property, equipment and other assets used or intended for performing the offense. This is particularly important to be determined due to the nature of these types of criminal offenses.

By monitoring the trials and by understanding the real picture of the situation with this type of crime, as well as with the ability of the judiciary to deal with these offenders, compared to several years ago, one can determine the results and the expected progress in the work of the courts and one can get the answer to the question whether there is an improvement and success in the fight against the impact of the corruption over the work of the institutions.

That is the main motive for the Coalition “All for Fair Trials” to continue with trial monitoring even after 9 years of active trial monitoring, aiming at determining the new

situation, adopting conclusions and results based on the monitoring, issuing recommendations and proposals for strengthening the judicial efficiency in the fight against this harmful social phenomenon.

The Coalition "All for Fair Trials" with the particularities of its aim and the activities that it performs, besides acting independently through the above stated projects, it acts in a network with other coalitions and partnerships who also treat corruption issues. The participation in such joint coordinated actions creates space for greater impact on the results and findings that the Coalition comes across in its work. For instance, the Coalition is part of the Platform for fighting corruption and the Network 23 where the activities and the findings of the Coalition are incorporated in Monthly monitoring briefing reports, Joint public statements, Statements and Strategic plans and politics with broader scope and impact on implementation.

Mirjana Ivanova Bojadzieva, PhD
President of the Coalition "All for Fair Trials"-Skopje

FOR THE COALITION "ALL FOR FAIR TRIALS"

The Coalition association of citizens "All for Fair Trials"-Skopje represents an organization of 14 civil organizations from the territory of the whole Republic of Macedonia, hereby including:

The First Children Embassy in the World Megjashi-Skopje, the Citizens Association MOST-Skopje, the Youth Educational Forum MOF-Skopje, the Youth Cultural Center MKC-Bitola, the Association for Democratic Initiative ADI-Gostivar, the Council for Prevention of Juvenile Delinquency SPPMD-Kavadarci, Association for counciling, treatment, reintegration and re-socialization Choise-Strumica, Association for Roma rights ZPR-Shtip, Association for children rights ZPD-Skopje, Civil informative center GIC SPEKTAR-Shtip, Humanitarian charity association of Roma HDZR Mesechina-Gostivar, Association of Tikvesh Roma ZTR-Kavadarci, Roma educative center REC Ambrela-Skopje and Association of citizens MULTIKULTURA-Tetovo.

Mission

Monitoring the respect of human rights and freedoms, particularly the implementation of the international standards for fair trial through various forms of acting and the intent to increase the level of their implementation by initiating institutional and legal reforms, recovering citizens' trust in the judiciary and in the other institutions of the system.

Vision

Powerful and stable organization, a driving force and partner to the institutions of the system, elevating the Republic of Macedonia as a country where the human rights and freedoms will be fully respected, with special emphasis on the fair trial standards as an elementary condition for its integration in the European Union.

Goals of the Coalition

- to increase the respect towards fair trial standards before the national courts;
- to set up a public confidence in the legal system and the judiciary in general;
- to identify the inherited problems in the judicial system and to specify the need for legal and institutional reform;
- to acquaint the public with the standards for fair trial and to strengthen citizens' trust in the functioning of the legal system;
- to reduce the risks for improper treatment of the parties in the dispute by the judges and the other participants in the procedures.

1. SUBJECT, OBJECTIVES AND METHODOLOGY OF THE RESEARCH

1.1. SUBJECT OF THE RESEARCH

Corruption is a global phenomenon. The uprooting of corruption for every country is one of the most important priorities, thus undertaking adequate measures for prevention, protection and sanction. In the Republic of Macedonia the corruption is ranked as the fifth biggest problem (27,9%) after the unemployment, the poverty, the low incomes and the high prices.[6]

There are a number of measures that the country undertakes in order to deal with this problem. There are also numerous state institutions whose competence is exactly the prevention of corruption, its timely detection, assessment of the finances of the politicians and other officials, education of the population and encouragement of the citizens to report corruption. Hence, significant part of the obligation for dealing with corruption remains in the judicial system which sanctions the corruptive crimes. The sanctioning itself i.e. the judicial efficiency in dealing with organized crime and corruption is the subject of this analysis.

Within the Basic Public Prosecution Office there is a specialized Public Prosecutor's Department for Organized Crime and Corruption. It has the jurisdiction to act upon criminal offenses committed by a structured group of three or more persons, existing for a certain period of time and acting in order to perform one or more criminal offenses with the intention to directly or indirectly obtain financial or other benefits for which a sentence of at least four years imprisonment is stipulated. The basic element in defining organized crime is to be committed by a group of people and the group should deliberately perform criminal acts for the purpose of acquiring certain benefit. Within the definition of organized crime, there are criminal offenses committed by structured group or criminal association, as for example, "Misuse of official position and authorization", "Receiving a bribe of considerable value", "Illegal mediation", "Unauthorized production and release for trade of narcotics, psychotropic substances and precursors", "Money laundering and other unlawful property gain", "Terrorist threats to the constitutional order and security", "Giving a bribe of considerable value", "Unlawful influence of witnesses", "Criminal association", "Terrorist organization", "Terrorism", "Human trafficking", "Smuggling of migrants" and other crimes against humanity and international law of the CC, regardless of the number of perpetrators.

There are several forms of organized crime depending on who is conducting it and in which area. In this regard the offenses are grouped in organized forms of drug

[6] Nuredinoska, Emina, "Report *on the assessment of the corruption in Macedonia" (authors Emina Nuredinoska, Marija Sazdevski, Borjan Guzelov)-Skopje, Macedonian Centre for International Cooperation (MCIC), 2014*.

trafficking, organized forms of human trafficking, organized economic-financial crime. The organised economic-financial crime is directly linked to corruptive activities, and according to the analysis on the need for trial monitoring of cases related to corruption, corruption is defined as misuse of individual or somebody else's position or function in order to gain a profit, obtain an advantage or profit for him / her by the others.[7]

In the course of the nine years of trial monitoring of cases of organized crime and corruption, the judicial reform process in the Republic of Macedonia in parallel took place. As a result of this process, the most significant judicial reform of the Macedonian judiciary was introduced in the new Criminal Procedure Code (CPC). Namely, the new CPC introduced few changes which shall be separately discussed in this analysis. The biggest key change is the abandonment of the inquisition model and introduction of the accusatory one. During 2015 and 2016 there have been some other legislative and political changes in the country. Namely, the political crises[8] led to introduction of the Special Public Prosecutors Office (SPO) mandated to investigate and prosecute criminal offenses related to and derived from the content of the illegal interception of communications, in order to introduce justice through the principle of the rule of law.[9] In the essence of the SPO are exactly the cases of organized crime and corruption. Also, as a result of the political crises i.e. its resolution, pursuant to the Priebe Report, in the course of 2015 there were activities for adoption of a new law for the so called "whistle-blowers" which came into force on 18.03.2016 named as Law on Whistleblowers' Protection.[10] Additionally on 12 April 2016 the President of the country adopted a decision to sign a pardon for all politicians against whom an investigation was carried out, filed charges or who were serving a prison sentence. Due to that, our monitoring of the procedures had a discontinuity, and it was recessed after the withdrawal of the President' pardon.[11]

To monitor cases of organized crime and corruption has been a necessity all these years, in particularly this one when the political party influence over the judiciary in the Republic of Macedonia, the disrespect of the principle of the rule of law and the lack of separation of powers was confirmed in the revealed recordings of the conversations among high ranking officials. According to these recordings, the state services illegally intercepted communications of more than 20.000 citizens of the Republic of Macedonia, some of the Government officials and persons close to them, who have committed in great extent numerous criminal offenses ranging from endangering security up to misuse of official position, criminal association and election fraud. Some of the published

[7] Analysis on the Need for monitoring court cases in the area of corruption, prof. Ljupcho Arnaudovski PhD, Slagjana Taseva, PhD and Suzana Saliu, Coalition "All for Fair Trials", Skopje 2007.
[8] Chronology of the political crises in Macedonia
[9] Progress Report Macedonia 2015, www.wbcrti.info/object/document/14557/attach/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf
[10] Ibid
[11] On 27.05.2016 the President of the Republic of Macedonia, Gorge Ivanov withdrew the decision to pardon 22 persons or "politically exposed persons" – suspected of committing criminal offenses for which criminal charges were submitted and criminal investigations are ongoing, most of them carried out by the Special Public Prosecution.

conversations referred to the judiciary and the way how the executive power influences the selection of judges and public prosecutors, but also how they negotiate decisions for particular cases. Additionally the published conversations gave indications for interconnection of the executive power with the Public Prosecutor of the Republic of Macedonia.[12]

Due to the above stated the eyes of the public are turn towards the judicial closure or at least the start of the judicial proceedings of the criminal corruptive activities contained in the intercepted conversations. The process of monitoring was carried out in such way that emphasis was put on the way the criminal proceeding was implemented i.e. the length of the procedure, the reasons for its delay, the right to defence during the procedure and other parameters which determine the judicial efficiency in the fight against the organized crime and corruption, the application of fair trial standards as well as the application of the new provisions of the CPC.

1.2. OBJECTIVES OF THE RESEARCH

The main objective of the project and the analysis itself is to strengthen the independence, efficiency and impartiality of the country's judiciary in the fight against corruption and organized crime and to contribute to proper implementation of the criminal - justice reforms with main focus on the new CPC.

We monitored cases from the Department of organized crime and corruption, so as other corruptive cases and cases of interest to the public.

The monitored cases included *Unauthorized production and release for trade of narcotics, psychotropic substances and precursors, Defraud, Extortion, Usury, Concealment, Money laundering and other unlawful property gain, Smuggling, Misuse of official position and authorization, Receiving bribe, Giving bribe, Forgery of an official document, Unlawful influence on witnesses, Falsifying a document, Criminal association, Terrorist threat to the constitutional order and security, Terrorism, Falsification or destruction of business books, Murder, Counterfeiting money, Tax evasion, Smuggling, Human trafficking, Smuggling of migrants, Organizing group and inciting the perpetration of acts of trafficking in persons trafficking in juveniles and smuggling of migrants, Smuggling of a child, Abuse of the visa regime with the countries members of the European Union and the Schengen Agreement, Participation in a crowd which prevents an official to perform an official act, Violence against representatives of the highest state authorities, and Espionage*.

[12] Chalovska, Neda, м-r Golubovska, Jasmina, м-r Stojanovski, Voislav, м-r Jovanovski Aleksandar, *"Judiciary and the fundamental rights in the Republic of Macedonia"*, 2015

The monitoring of the problems with the corruption and organized crime, and the need to ensure judicial independence were highlighted in the reports of GRECO, the EC Progress Report on the Republic of Macedonia and the Urgent Reform Priorities of the Group of Experts led by Priebe. The Progress Report on the Republic of Macedonia for 2016 noted a limited progress in respect to the implementation of the Urgent Reform Priorities, and a second year in a row notified regression in the key area – judiciary. As for the corruption which is closely linked to judiciary, it is noted that the Republic of Macedonia already for 10 years have focused on reforms in these areas, but the political influence seriously undermined the previous achievements.[13] Yet, apart from theoretical, no further progress in the last year in relation to identified problems and corruption was achieved, but rather it was directly noted that Republic of Macedonia is a "captured state" in the institutions, hereby including judiciary and media.[14]

1.3. **METHODOLOGY OF THE R**ESEARCH

The main goal of the research is to influence over the strengthening of the independence, efficiency and fairness of the judiciary in the fight against organized crime and corruption by using the obtained data from the trial monitoring, and to contribute to proper implementation of the judicial reform, according to the strategic documents of the Republic of Macedonia for EU integration. Namely, starting with the damaging effects of the corruption and organized crime, the research will give a picture on the course of the procedures for this type of crime, will present a detailed analysis on the stages of the procedure, determining the court efficiency with the new legislative solutions of the criminal procedure in practice, so as the level of respect for the right to fair trial, aiming at increasing the citizens' confidence in the judiciary. In this sense, one of the objectives of the research was the application of the novelties of the CPC in terms of greater efficiency, but also protection of the rights of the defendant.

The methods that are used by the Coalition are the trial monitoring and the tool-questionnaire, prepared by experts in this field and upgraded adequately every year. The monitoring as a method allows direct observation by the trial monitors, or direct observation of the subject of the research. Identified cases related to organized crime and corruption before the Department for organized crime and corruption were monitored by 4 trial monitors, a team of 2 most experienced trial monitors and 2 prominent lawyers in this field. In this way the trial monitoring was reinforced by the perception and the ability of the foremost trial monitors of the Coalition and lawyers who directly monitored the court cases.

[13] Commission Staff Working Document - The former Yugoslav Republic of Macedonia 2016 Report http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf
[14] Ibid.

The second method, the completion of questionnaire, was prepared in advance form of 75 questions that along with the answers were submitted to the Project Coordinator and were inserted into the database of the Coalition. This activity was of crucial importance since the obtained data are in fact data that provide a fair and transparent picture on the monitored cases. By analyzing the questionnaires and their subsequent processing and the presentation of the research results in the final publication, the report gains a new value, supported by new and relevant information on the status of the court cases in the area of organized crime and corruption.

The questionnaires were completed during the trial monitoring, in the textual section of the answers there were comments added by the trial monitors that were not taken into consideration by the working group who drafted the questionnaires and/or comments that could only be descriptively explained. Namely, when processing the questionnaires in the data base in most cases only the first offense is inserted, leading to a wrong conclusion about the type of the crimes because the cases of organized crime and corruption usually contain several criminal offenses. This shortcoming was timely detected, thus a good part of the data elaborated in this analyses come as a result not only from the statistical performance of data, but also as a manual processing of the questionnaires. The same method was used in the section for processing the textual questions that offer direct narrative observation of the trial monitors on the specifics during the procedure.

Additionally, the lack of some of the responses was due to the monitoring of the procedure on a later stage, but also due to the short time for monitoring which did not cover the outcome of the trial i.e. the issuing of the judgements, and the sentencing policy for criminal offenses of organized crime and corruption. We tried to cover only small number of cases that were earlier started in order to prepare an analysis that gives answer to the entire judicial process, from the start of the procedure until the adoption of the judgment.

2. ANALYSIS OF THE TRIAL MONITORING RESULTS OF CASES IN THE FIELD OF ORGANIZED CRIME AND CORRUPTION

2.1. GENERAL INFORMATION

The analyzed data refer to a period of 9 months, when 75 cases with 224 hearings in the Basic Court Skopje 1 were monitored. The initial idea of the project was to monitor only cases before the Department for organized crime and corruption, other corruptive cases and cases of importance to the public in accordance with the current situation of the country.

According to the data base 37 cases before the Department for organized crime and corruption were monitored, 4 cases were of interest to the public, related to the protests of May 5th, 2015 and April 12, 2016, and a selected sample of 34 corruptive cases.

*Conclusion: From the general data of the Department for organized crime and corruption, we may conclude that majority of the criminal offenses relate to acts of Human trafficking, Smuggling of migrants, Organizing group and inciting the perpetration of acts of trafficking in persons, trafficking in juveniles, (art.418-**a, 418**-b, 418-c **u 418**-d of the Criminal Code), i.e. this offense alone or in conjunction with other criminal offenses appears in 12 cases. Second, criminal offenses that occurred most often were Unauthorized production and release for trade of narcotics, psychotropic substances and precursors and Misuse of official position and authorization. The other offenses are Criminal association, Counterfeiting money, Receiving bribe and Falsifying a document.*

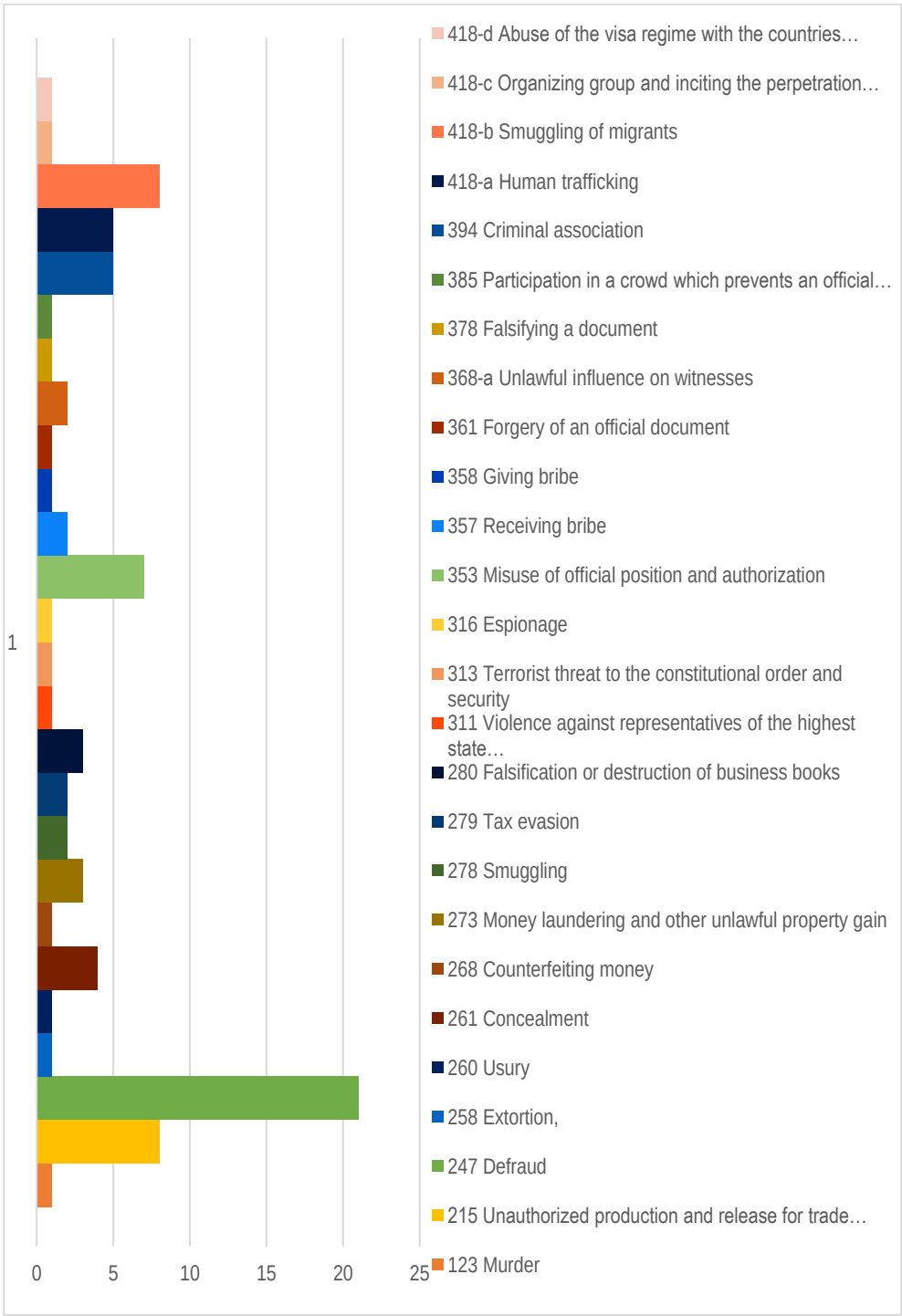
From the remaining corruptive cases, majority relate to Defraud, in 20 cases, then Unauthorized production and release for trade of narcotics, psychotropic substances and precursors and Concealment, in a smaller percentage are cases like Falsification or destruction of business books, Misuse of official position and authorization, Falsifying a document, Tax evasion and Forgery of an official document.

The monitored trial cases of interest to the public are “Divo naselje”, “Puch”, “Rover” and cases related to the protests of May 2015 and April 2016.

Conclusion: The total number of defendants in 70 monitored cases is 168, while as for 5 cases such data are not obtained.

In the focus of the monitoring this time is the organized crime and corruption from one side, and the application of the new CPC on the other. The close link among the offenses in the field of organized crime and corruption reflects the best the situation of one society, so as the judicial mechanisms in response to that situation. Additionally, the

judicial reforms of the CPC also point to the legal efforts for better and more efficient suppression of the crime.



Criminal offenses

It was noted that both this year and the previous one[15] majority of the criminal offenses in the field of organized crime and corruption relate to Smuggling of migrants and Human trafficking. The increase in percentage of these acts during 2015 and 2016 in comparison to the previous years, comes as a result of the refugee and migrant crises which directly affected Republic of Macedonia as a key transit destination for refugees and migrants, the country is used by the smuggling groups. On the other side, the country should secure safe transit for these persons instead of ignoring the situation and prosecuting persons who offer illegal transfer. With the amendments of the Law on Asylum and Temporary Protection whose goal is to overcome i.e. prevent the problem of illegal migration, and to grant the potential asylum seeker access to the relevant bodies responsible for such procedure, partially the state undertook measures for regulating this phenomenon, but apparently there is a need of longer time frame for this regulation to present the legal consequences by minimizing the numbers of judicial cases from this kind.[16]

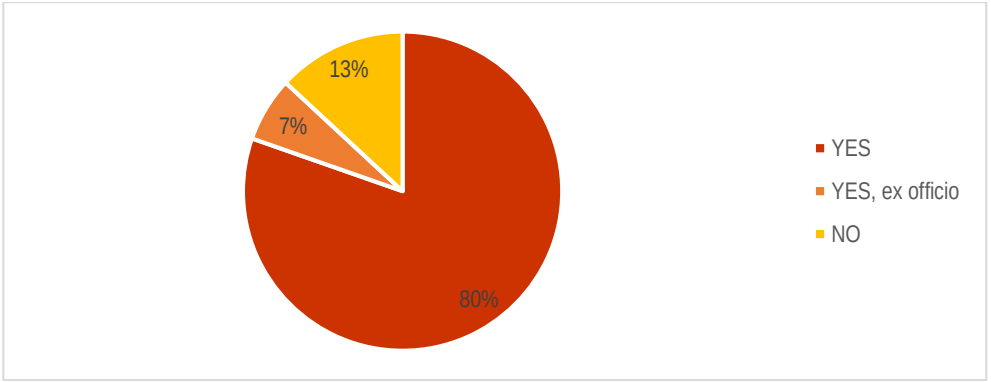
The international standards also establish a ban on harassment and intimidation over the lawyer (attorney), the right to confidential communication with the attorney and the right to free legal aid. One of the basic rights of the defendant is the right to a defender (attorney). The CPC introduces a mandatory defence attorney and an ex-officio attorney. If the defendant is mute, deaf or unable to successfully defend him/her self, or if against him/her a criminal proceeding is carried out for which the law prescribes a life imprisonment, the person must have a defender at the very first hearing. If the defendant was issued a detention, he/she must have a defender during the entire time of detention. If there are no conditions for mandatory defence, if according to his/her economic circumstances the defendant cannot bear the costs of the defence, he/she may, upon request, be assigned a defender in cases when the interest of the justice requires that, the gravity of the offense and the complexity of the case.

Conclusion: The trial monitoring data point that in 87% the defendant had their own defenders, in 7% an ex-officio defender was appointed, while as in 13% from the cases the defendant did not have a defender.

In respect to this data, in cases where the defendant did not have a defence, in majority of cases it was about criminal proceedings where the defence is not mandatory or where the hearings were delayed for the purpose of appointing an ex-officio defender.

[15] Aleksandra Bogdanovska, "Judicial efficiency in fighting with organized crime and corruption" – Coalition All for Fair Trials, 2015 http://all4fairtrials.org.mk/wp-content/uploads/2016/06/INL_Analiza_2015_MKD.pdf

[16] Law on Asylum and Temporary Protection, http://www.pravdiko.mk/zakon-za-azil-i-privremena-zashtita

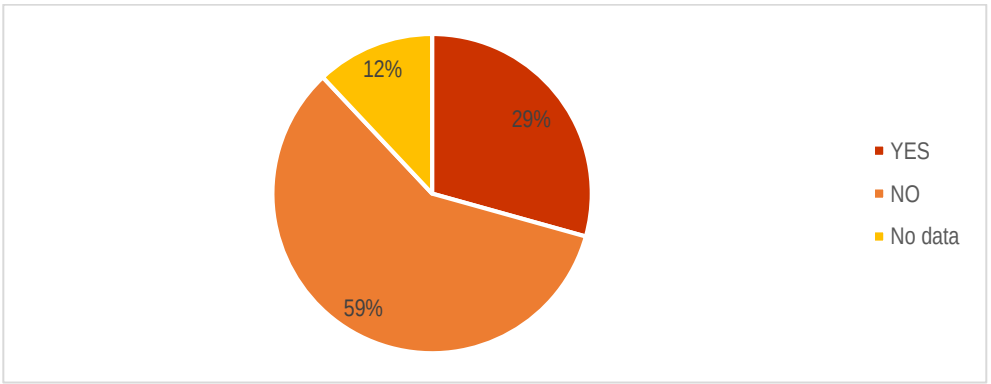


Defender of the accused person

2.1.1. Application of the summary proceedings

The summary procedure is carried out for offences punishable by fine or imprisonment for a term less than five years as a principal punishment, and it is initiated on the grounds of an indictment or a private lawsuit.

Conclusion: According to the elaborated data, the summary procedure was carried out in 29%, i.e. 22 cases, 44 cases (59%) were carried out in a regular procedure, while as for the other 12% i.e. 9 cases this data is unknown.



Abridged procedure

2.1.2. Public trial

The public trial in a reasonable time by an independent and impartial tribunal makes part of the fair trial standards. Article 6 of the European Convention on Human Rights and Freedoms (ECHR)[17] guarantees everyone a public trial during the determination of his/her civil rights and obligations or when persecuted. This provision

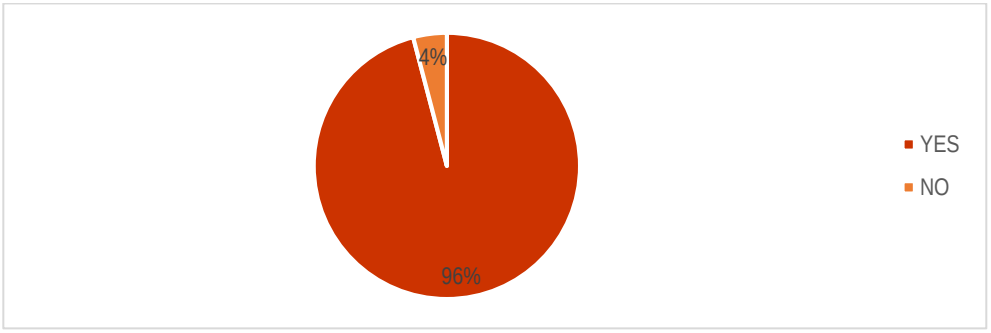
[17] European Convention on Human Rights,(http://www.echr.coe.int/Documents/Convention_MKD.pdf), Council of Europe, 1950;

requires presence at the main hearing by both parties, so as the hearing to be open to the public.

The presence of the public at the trial is of importance since it ensures confidence in the judiciary and prevention of eventual pressure or influence during the court proceeding. The question of the right to a public trial is determined in the Universal Declaration on Human Rights[18], and the International Covenant on Civil and Political Rights[19]. The public hearing is in fact an oral hearing on the essence of the dispute in presence of the public, including even the media.[20] The public trial is also a principle stated in the Constitution of the Republic of Macedonia[21] and the procedural laws[22].

Conclusion: If we look into the data from the trial monitoring we could see that in 96% the hearings were public, while as in 4% the presence of the public was forbidden as per the legislative provisions.

The presence of the media was always allowed when there was a presence of the public. The cases like "Divo naselje", "Puch", the trial about the protesters and "Rover" attracted the greatest publicity. During the hearings of these cases, the court security, the procedure for registering presence of the public, as well as the lack of adequate space for the case "Divo naselje", hampered the process for timely announcement of the time, place and the possibility for public presence at these trials. When it comes to the regular announcement of the time and the place of the trials on the board outside the courtroom, it was noted that in 20% this was not adequately respected. The possibility for checking the trials at the website of the court was a regularly used tool by the trial monitors, but often it came to non-compliance of the publically announced data on the time and place with the actual time of the hearing in allotted time and place.



Public trials

[18] United Nations Universal Declaration of Human Rights, 1948
[19] International Covenant o Civil and Political Rights, 1966
[20] Fair Trials, Manual / Fair Trials Manual, Humanitarian Law Fund Belgrade 2001 (translation of Amnesty International Fair Trials Manual)
[21] Constitution of the Republic of Macedonia, Official Gazette No.52, 22.11.1991 http://www.slvesnik.com.mk/Issues/19D704B29EC040A1968D7996AA0F1A56.pdf
[22] Ciminal procedure Code, Official Gazette of the Republic of Macedonia No. 150 from 18.11.2010

2.1.3. Preparations and conditions for holding the main hearing

In a criminal procedure the central place has the main hearing. Although since the adoption of the new CPC 6 years have passed, and another 3 years since its application, still there are prevailing conclusions concerning the slow transition from the old to the not so new CPC. The main hearing contains in itself the evidentiary hearing and the presentation of evidence. The CPC regulates the roles of all participants in the procedure in a manner, in which the court is placed in a passive role, but the parties / the prosecutors and the lawyers are the ones who have the primary role in providing, proposing and presenting the evidence, thus the greatest responsibility lies within the parties in the procedure.

In order to evaluate the main hearing, it is necessary to firstly address the conditions for its running. Compared to the previous year, we have increased the contempt of time and place of the hearings. An additional reason for such consequence is the strike of the court administration that lasted from 18.05.2016 until the beginning of September[23] as in the case "Divo naselje". The case "Divo naselje" is of great importance to the general public and it has its hearings very often (16 hearings since February until mid October 2016), each of them under heavy police security which was the reason for the other cases scheduled on the same day to be always postponed and/or the trial monitors to be refused entry in the court.

Conclusion: According to data gathered by the trial monitors we can conclude that the preparations for the main hearing i.e. scheduling the main hearing in a certain time and place in the court is often ignored by the court, the court does not respect the time of the hearing and very often changes the earlier announced place.

Unlike the last year, when in several occasions certain hearings did not take place without prior explanation nor announcement for its next session, during this year this phenomenon is far more frequently observed. Namely, during January and February 2016 in the Basic Court Skopje 1 personnel changes occurred and some judges were transferred from one to another place which directly affected the quantity and the quality of the procedures in this time period.[24] The moment this change began to work properly, the case "Divo naselje" was launched which, as discussed above, again influenced the course of the judicial proceedings. During the judicial summer break, from 15 July until 15 August, the judicial proceedings in general decreased, while as the number of adjourned cases increased. Finally, at the beginning of September the uncertain situation with the strike of the court administration led to another wave of adjourned cases.

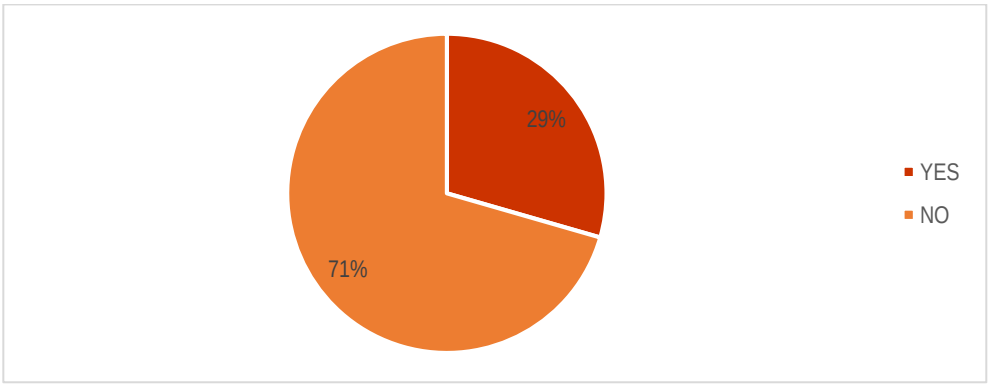
[23] Strike of the court administration, http://zsarm.com/read_more.php?un=151304dfdab76e1463da824883c7c079b4e3b2e1

[24] Changes in the personnel in the Skopje Criminal Court, http://www.akademik.mk/kadrovski-promeni-vo-skopskiot-krivichen-sud/

Such omissions make it difficult to the trial observers and the public who are legally entitled to attend the trial. Delaying the hearing without explanation or not holding it at all is contrary to the principle of transparency and impartiality of the court. Furthermore, the growing resistance of the judges towards to public and the defensive attitude of the judiciary in general, directly affects the rest of the court administration, especially the judicial police. Some of the members of the judicial police very often behave insolently towards the trial monitors although the Coalition "All for Fair Trials" have been cooperating with the Basic Court Skopje 1 for more than 13 years. This behaviour of the judicial police is unacceptable because only the court has the unique right to exclude the public from the main hearing in legally defined cases.

Conclusion: From the monitored 75 cases with 224 hearings in total, only 66 had some procedural actions, while as 158 hearings were adjourned.

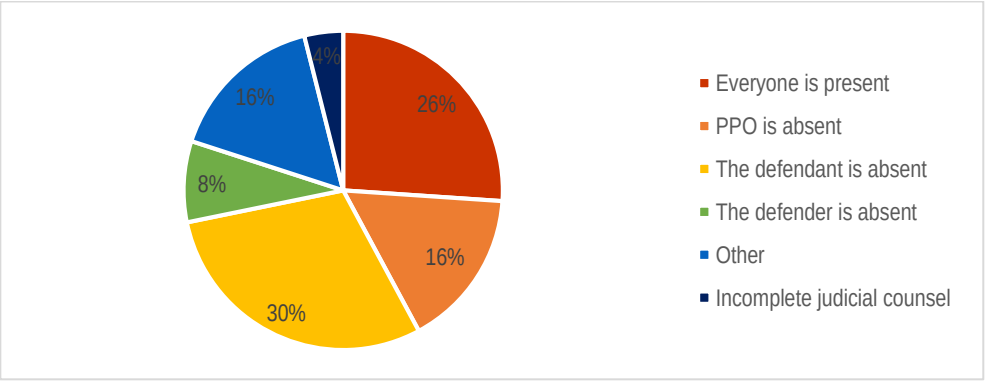
This finding is striking, in 70% the hearings were delayed for reasons which will be explained in details further in the text. Very often in the time frame of January until September, numerous cases that were subject of trial monitoring were constantly adjourned, "Rover" being one of them, whose all 9 hearings were adjourned.



Actions in the procedure

The key feature of the main hearing in the new CPC is in line with the adversarial system, where the parties propose and present evidence, whereas the court is released from the obligation to voluntarily propose evidence. In the main hearing the burden of proof falls on the parties, while the prosecution is obliged to prove the guilt of the defendant. Still the court retains the oversight role which is required for a smooth trial. For the main hearing to take place it is necessary to secure the adequate conditions, in particularly to have the presence of all invited persons.

Conclusion: From the gathered data of the trial monitoring we can note that only in 26% of the hearings all invited persons were present i.e. in 73 hearings. In the other cases the defendant was mainly absent, in 83 hearings or 30%. The public prosecutor was absent in 45 hearings or 16%. The absence of the defender was noted in 23 cases or 8%. As an additional answer to this question this year is the incomplete judicial council. The need to monitor this aspect derives from the trial monitoring of the last year. The incomplete judicial council was the reason for delay in 11 hearings (on 27 hearings). In 45 hearings the reasons for delay were classified ***as "other", hereby including reasons such as delay of the hearing without h****olding the session, absence of any information on the door of the court, and postponement of all criminal* ***cases due to the case "Divo naselje"****.*



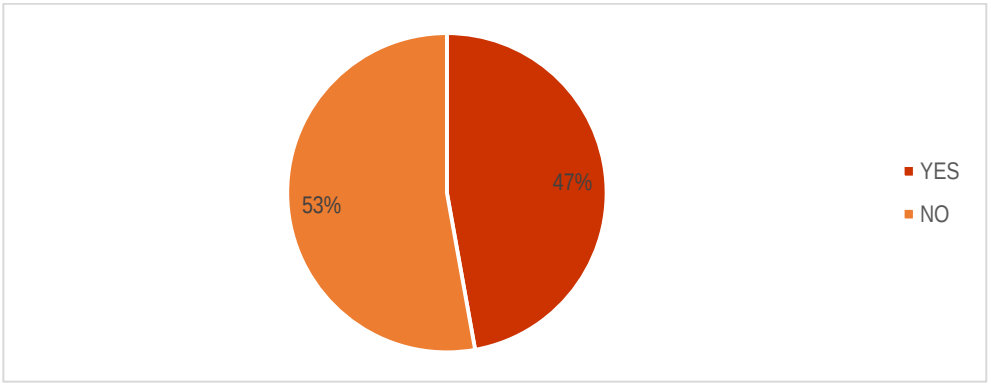
Presence at the main hearing

Since the data about the number of issued security measures often are lacking, it is difficult to determine the reasons for absence of the defendant i.e. were there objective reasons on the part of the authorities who enforce the security measures. However, in a qualitative analysis of the questionnaires the most common reason for absence of the defendant was the omission to bring the defendant to the scheduled hearing from prison or detention. We pointed at this problem in every analysis of the Coalition, but neither the problem was made a topic of discussion much less a solution was found. In some cases, or hearings, it is noted that the defendant is inaccessible to the prosecution bodies i.e. is on the run. The CPC provides for the defendant to be tried in absentia only if he/she is on the run or if he/she is inaccessible for the authorities, and if there are particular reasons to be tried in absentia, a legal provision which the court may use if there are legal conditions for that in place. It is of concern the fact that the hearings were adjourned due to the absence of the Public Prosecution Office. In 16% of the monitored cases the absence of the PPO was the reason for delay of the hearing. The absence of the PPO was mainly because of involvement in another case of greater significance, involvement in another detention case, duty travel and health reasons. Hence, even of greater concern is the fact that very often the absence of the PPO was without explanation, and the court tolerates that without applying the article 364 par.1 of the CPC. This data indicates that

the PPO does not have sufficient number of public prosecutors and/or there is an uncoordinated timetable of work between the court and the PPO in place, so as the inadequate organization of the PPO.

Conclusion: The absence of witnesses and experts is noted in 53% of the hearings, a key pre-condition for having the hearing in place.

The court is obliged to notify the witnesses and the experts that in case of unjustified absence they could be forcibly brought to court, or fined if they were regularly summoned and the absence was not appropriately justified. The trial monitoring data once again highlighted the absence as a problem which could be a result of improper delivery service, but also as a result of insufficient awareness in citizens for the need of presence at the main hearing.



Presence of all witnesses and experts

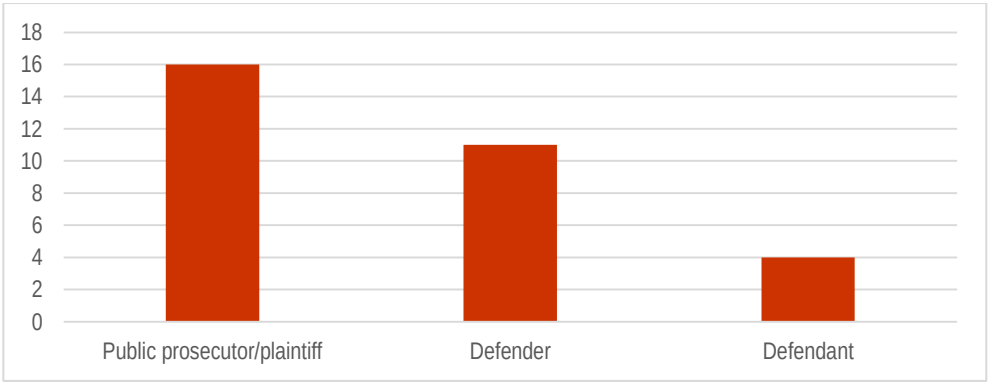
2.1.4. Opening statements

With the new CPC the main hearing starts with opening statements. Firstly, speaks the plaintiff / the prosecutor, then the defender or the defendant. The defendant has the right to refrain from an opening statement. In their speeches the parties could present which decisive facts they intend to prove, to present the evidence, to determine the legal questions which shall be discussed. In their opening statements they cannot present evidence about the previous convictions of the defendant.[25]

[25] Shopova Ivanovska, Ljiljana, Judge at the Appellate Court Skopje, Dimitrievski, Zoran, Judge at the Appellate Court Skopje, Marichikj, Momir, member of the Council of Public Prosecutors. Advanced training on the new CPC Module: Main hearing - Manual - 2013

Conclusion: According to received data, this novelty was successfully applied, thus in 17 cases monitored in their full extent, opening statements were held, in 16 cases the public prosecutor gave an opening statement, in 11 cases the defender, and in 4 the defendant. It was noted that in 1 case the judge did not allow the defendant to have an opening statement.

In the other 58 cases this data is missing due to a subsequent inclusion of the trial monitors in the procedure, monitoring the case at a later stage, i.e. in 22 cases held in abridged procedure the opening statements were not obligatory, also 39 monitored cases were continuously postponed.



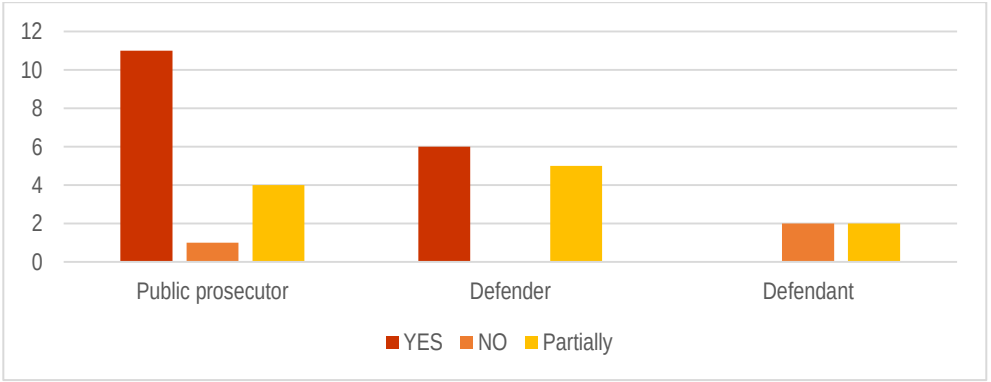
Opening statements

According to the trial monitors, in 11 cases the claims presented in the opening statement of the PPO were understandable, so as which decisive evidence shall be proved. In 1 case the claims were not understandable, while as in 4 cases only partially.

When it comes to the opening statement of the defender, in 6 cases the content could be understood so as which decisive evidence shall be proved, in 5 cases only partially, there is no registered case where the content of the opening statement of the defender was incomprehensible.

In 2 of the 4 cases where the defendant gave an opening statement, the content was partially understandable, while as in the other 2 it was incomprehensible.

In several cases the judge interrupted the opening statements of the parties with explanation that they are entering into politics.



Comprehension of the opening statement of the PPO/plaintiff, defender and defendant

2.1.5. Rights of the defendant

The rights of the defendant are part of the fair trial principle. According to ECHR the minimum rights of the defendant are: the person should be immediately informed in details about the nature and the grounds of the accusation in a language that he/she understands, sufficient time and facilities to prepare a defence, the right to defend him/herself by a defender of his/her choice, right to an ex officio defender when a person does not have sufficient financial means to pay a defender, the right to examine the witnesses, and to be provided with an interpreter if he/she cannot understand or speak the language of the court. Similarly, the International Covenant on Civil and Political Rights regulates the issues of the rights of the defendant. Namely ICCPR[26] provides that "everyone charged with a criminal offense shall have equal rights to attend the trial, to defend him / herself or with the assistance of a defender, and to be provided free of charge defender if he/she cannot pay." Among the rights of the defendant is to be present at the trial, thus the trial monitors concluded that only in 1 case the defendant was excluded in some of the stages of the trial.

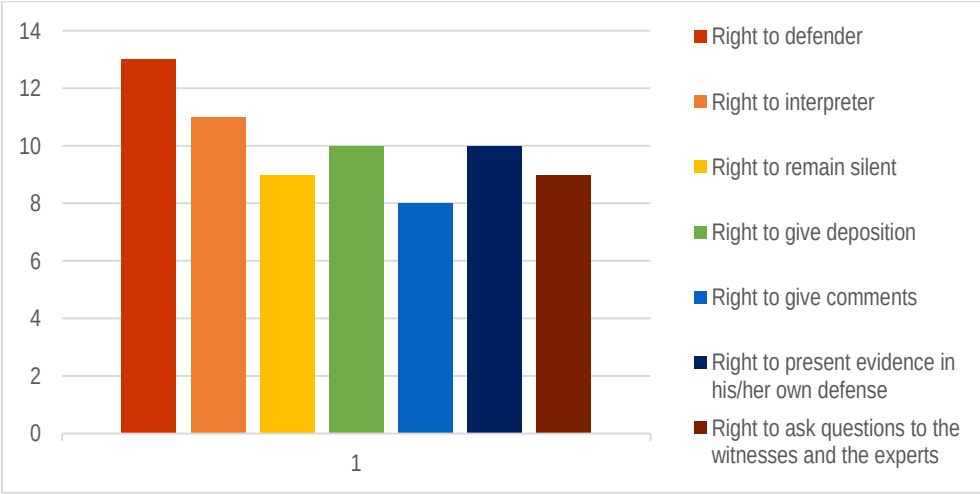
Further on in the procedure, after the opening statements, the trial continues with the instructions upon the defendant i.e. pursuant article 380 par. 1 after the opening statement of the plaintiff, the court asks the defendant whether he/she understands the accusation. If the court finds that the defendant did not understand the accusation, the court shall reveal the content of the accusation in an understandable way.

[26] International Covenant on Civil and Political Rights, 1966

Conclusion: From the monitored trials one could note that in 19 cases the court asked the defendant about the content of the accusation, in 1 case the court missed to do that.

If the defendant says that he/she did not understand the content of the accusation, the court has the duty to explain him/her the criminal offense. From the gathered data, the defendant in 2 cases did not understand the content of the accusation, in 1 case the court gave further explanation, while as in the other case it did not i.e. the judge only said that "everything is stipulated in the indictment".

The court has the duty to instruct the defendant about his/her rights. The principles i.e. the rights pertaining to the right to defender and the right to interpreter are explicitly stated in the CPC, while as article 380, par. 2 determines that the court instructs the defendant about the right to remain silent or to give a statement and to carefully follows the course of the main hearing, emphasizing that he/she may present evidence in its own defence, ask questions to the other defendants, witnesses or the experts, and to give comments to their statements.



Moral rights

Conclusion: From the gathered data we can conclude that in 13 cases the defendant is instructed about the right to defender, in 11 cases about the right to interpreter, in 10 cases about the right to give a statement and to present evidence in its own defence, in 9 cases the defendant was instructed to the right to remain silent and to ask questions to the witnesses and the experts, and in 8 cases to the right to give comments.

It can be noted that in majority of the monitored cases there is no data about the moral rights, having in mind that 75 cases were observed, which once again points to the subsequent inclusion of the trial monitors i.e. trial monitoring in a later stage of the

procedure, and the fact that 39 cases did not commence at all, being constantly adjourned. Thus, in order to elaborate on this question about the moral rights as one of the fair trial principle, it is necessary for the trial to be monitored from the beginning i.e. to monitor the main hearing of the trial. Although the instructions about the rights should be told in their full extent, the judges usually either state the article from the CPC where the rights of the defendant are stipulated or they state them partially without stipulating each of them separately. This practice is observed in those trials where the defendant had a defender. However, this should not be an approved practice since the instructions about the rights of the defendant are an essential precondition for adoption of a legal judgement based on the fair trial standards.

The right to defence provides sufficient time for preparation, thus it is important to know whether the defence complained about lack of sufficient time for preparation or there were certain restrictions, so as whether according to the perception of the trial monitors the defence was prepared to represent its clients adequately. According to data, in 1 case the defence gave impression of inappropriate representation of its clients and another one where the defence complained about lack of sufficient time to prepare.

The legal system in our country guarantees the right to remain silent but lacks an explicit mechanism of how that affects the court. According to the assessment of the trial monitors, in 1 case the court drew negative conclusions about the use of the right to remain silent which is not easy to detect since the court does not explicitly stipulates that, but this impression is concluded on the basis of further analysis of the number of convictions in cases when the defendant used this right.

As to the right to free legal aid, only in 1 case the defendant was instructed about this possibility. Although among other, the CPC provides for this possibility (article 70), the defendant is entitled to free legal representative when he/she is not able to pay a defender, when that is required by the interests of the justice, so as the severity of the offense and the complexity of the case, and for the purpose of a defence for poor people. The right to free legal aid depends on the accomplishment of two cumulative conditions: the person cannot reimburse the costs of its own defence and the free legal aid is in the interest of the justice.

Conclusion: Small is the number of cases when the person was instructed about the right to free legal aid. Accordingly, not always the courts make sure if the defendant is financially able to cover the costs of the defence, they mainly react in cases when the law provides for mandatory defence.

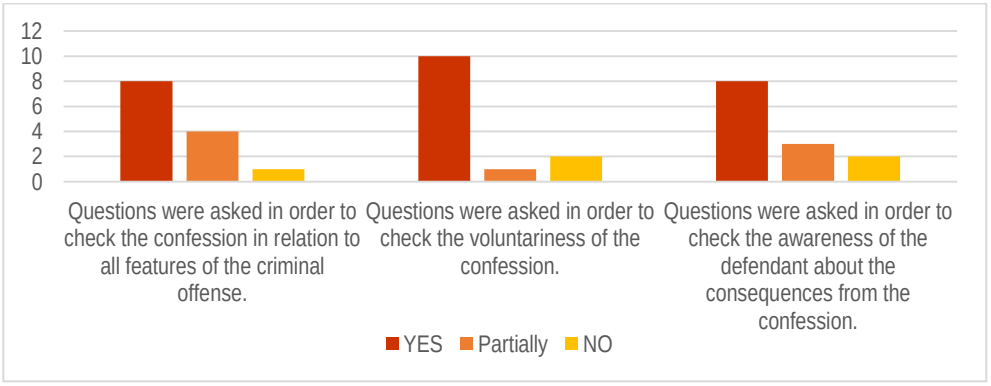
ECHR says that for the purpose of fair and just trial, the defendant should be provided free interpreter in cases when he/she does not understand or does not speak the official language of the court, i.e. is entitled to translation. From the gathered data of 22 cases the defendant needed an interpreter and was provided immediately. In 4 of these cases the quality of the translation was suspected. In 1 case, upon submitted complaints

about the quality of the translation, the judge replaced the interpreter. Quality interpretation is of particular importance for fair trial procedure since the interpreter not only that translates the orally given evidence but also translates documents and other written materials. The quality translation enables the equality of arms in the procedure. The correct translation is necessary precondition for the right to fair trial. Still, our system does not provide a possibility to challenge the translation as incompetent or biased, as it is provided in the European Directive on the right to an interpreter.

Conclusion: Questioning the quality of the interpretation which occurred in 4 cases, of importance to the public, cast a shadow over the whole process of fair trial.

2.1.6. Guilty plea

The new CPC envisages a novelty in terms of the possibility to plead guilty even at the main hearing, after the opening statements of the parties, and before the evidentiary hearing. The defendant may voluntarily plead the guilt in relation to one or more offenses from the indictment. The confession of the guilt is not limited neither to the nature nor to the severity of the offense, meaning that the defendant may plead the guilt for any of the offenses he/she is charged for.[27] The court invites the defendant to plead upon the offenses from the indictment, whether he/she feels guilty or not. In case the defendant plead the guilt, during the course of the trial only the evidence in relation to the decision on the sanction shall be presented.[28] The guilty plea must be voluntarily, the court has the obligation to investigate that, thus protecting the rights of the defendant. Of particular importance for the defendant is to fully understand the offense but also the consequences deriving from the guilty plea, since in cases when the defendant pleads guilty, the verdict cannot be appealed on the basis of wrongly established factual situation.



Guilty plea

[27] Buzharovska, Gordana *"Guilty plea:Manual for practitioners" (Gordana Buzharovska*, Michael G. Karnavas, David Re), - Skopje: OSCE, 2010

[28] More on judgments because of guilty plea in Chapter 3 - Analysis of the penal politics

In a case of a guilty plea the court has an obligation to examine whether the confession was voluntary, whether the defendant is aware of the legal consequences of the guilty plea, and the consequences relating to property - legal claims and legal costs.

Conclusion: In 13 cases the defendant plead guilty. In 10 of them questions were raised about the voluntariness of the confession, while as in 8 cases questions were raised in order to check the confession towards the characteristics of the crime and the awareness of the defendant about the legal consequences from the confession. From the above stated it seems that in 3 i.e. 5 cases, according to the perception of the trial observers, the judges do not pay attention to these important and key facts of the guilty plea.

Compared to the last year, it seems that this year very little attention is paid to check the voluntariness, awareness and the characteristics of the crime which was not the case last year when in all cases of guilty plea these type of questions were asked.

The judges and the lawyers overreacted about our conclusion from last year when we noted that often the judges and sometimes the lawyers put pressure over the defendant to confess the guilt.

Conclusion: The common remark of the trial monitors is in respect to the judges who before the beginning of the trial openly discuss the possibility for the defendant to plead the guilt, in which case a lower sentence would be issued – stipulated on the spot, but if not a heavier one – also stipulated on the spot.

If we take into account that the question about the guilty plea happens on the first main hearing after the opening statements, we come to conclusion that the judge has already established stance about the verdict and the sanction even before the trial has began. It is obvious that such situation happens very often and directly contradicts the legal provisions as well as the constitutional principle of presumption of innocence. Thus, instead of notifying this observation in a report, we should worry why is this happening at all.

2.2. PRESENTATION OF EVIDENCE

With the new CPC the whole process relating to the presentation of evidence, the examination of the witnesses, the experts and the technical councillor, so as the examination of the defendant, done on a proposal of the defence, goes to the parties who proposed the evidence. The role of the court is minimized in accordance with the accusatorial principle of the criminal procedure.

2.2.1. Order of the presentation of evidence

The evidentiary procedure starts with the presentation of evidence proposed by the prosecution and accepted by the court. In the new criminal procedure there is no presentation of evidence on proposal of the court.

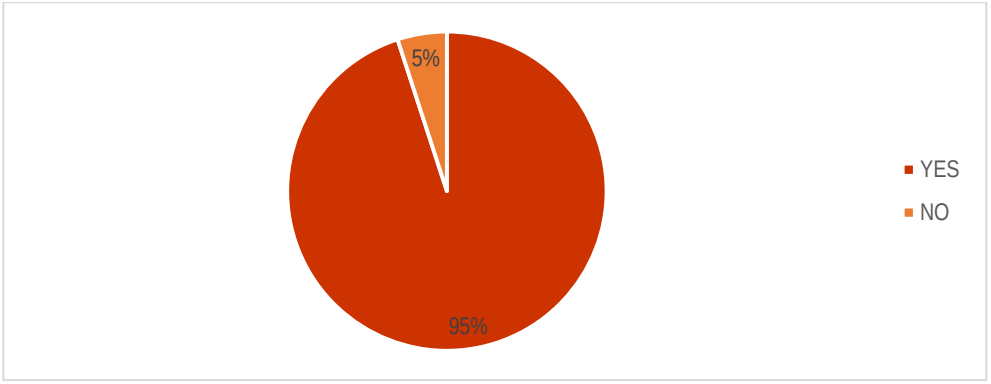
At the main hearing, during the evidentiary procedure, the proposed evidences are presented in a certain legal order. Firstly are presented the evidences on the basis of which the indictment is founded, and then the evidences related to property - legal requirement, followed by presentation of evidence offered by the defence. After the presentation of evidence of the defence, the new CPC gives a possibility for presentation of evidence to refute the evidence of the defence - called replica, followed by presentation of evidence by the defence, in response to the challenging - called rejoinder.

Conclusion: The gathered data conclude that in all 17 cases the legislative order for presentation of evidence was respected.

2.2.2. Direct, cross and re-direct examination

During the presentation of the evidence, the examination could be direct, cross and re-direct examination. The direct examination is performed by the party who has invited the witness i.e. the expert witness; the cross-examination is performed by the opposite party, while as the re-direct examination is once again performed by the party who has invited the witness or the expert. Questions that provoke answers are allowed during the cross-examination, and during the direct and re-direct examination for the purpose of clarifying the foregoing.

In direct examination questions are asked to its own witnesses, the questions should be short in order to get more extended answers, the witnesses should be prepared for the examination because the direct examination is a basis for further cross-examination. During the direct examination explanation by the person who is examined is expected, it is necessary to present answers who is the perpetrator of the criminal acts, where and when the event took place, what is the motive, what are the consequences, i.e. what are the damages incurred upon its commitment. It is of particular importance that during the direct examination, the questions to the witness or the expert should be clear and precise. This year we also introduced two new questions that refer to the moral rights of the witness and the oath - solemn declaration. In 20 cases when a witness or an expert were examined, in 95% i.e. in 19 cases the witness was instructed about its rights, while as in 5% or in 1 case he/she was not. The witness took an oath- solemn declaration in 11 cases out of 20.

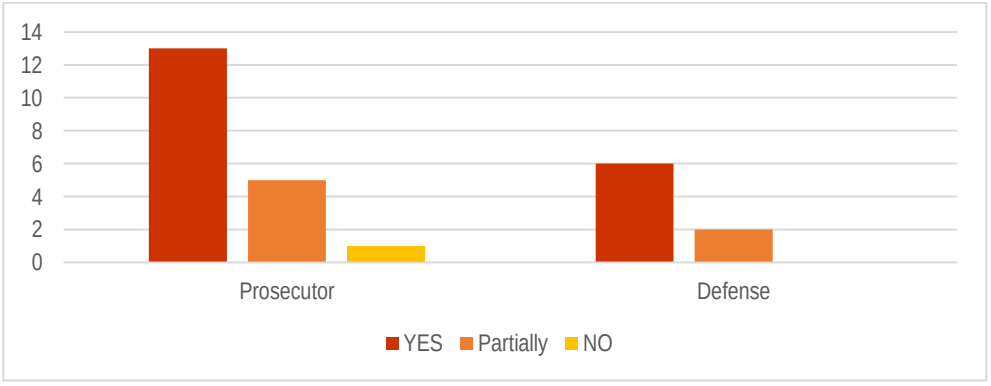


The witness was instructed about its own rights

Conclusion: From 20 monitored trials where there was a need for direct examination of a witness/expert, the questions were clear and precise in 19 of them, only in 1 case the questions were partially clear and precise.

We have interesting data about the preparation of the prosecution and the defence for direct examination. In the last 2 years we have an increased number of cases where the defence is properly prepared for direct questioning, i.e. from 8 cases where the defence conducted a direct examination, in 6 it left an impression to master the case, while as in 2 only partially. When it comes to the preparation of the prosecution, out of 20 cases, in 13 the prosecution left the impression to master the case, while as in 5 only partially, in 1 case the PPO gave the impression that it does not master the case at all. Such percentage was not detected in the defence.

Conclusion: In direct examination the defence has presented better preparation than the prosecution.



Preparation of the prosecution and the defence for direct examination

We noted that direct examination is sometimes used by the opposite party which is allowed by the court, for example the court allows for the defence and the PPO to ask direct questions although it is about deposition of witnesses or experts on a proposal of the opposite party.

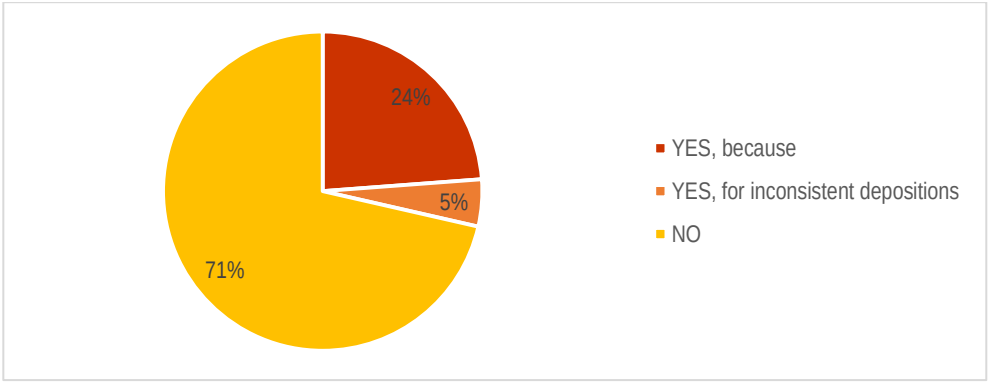
The new concept of the CPC envisages an active role of the parties in the preparation and presentation of evidence in the court. Besides direct and additional examination, the cross-examination is the novelty that requires compliance with the rules of admissibility and relevance of evidence regardless of which party in procedure we are talking about.[29] The purpose of the cross-examination is to reduce the value of the witness' statement given in direct examination, i.e. the possibility to refute certain statements or to diminish certain actions. The cross-examination requires special preparation, cooperation with the lawyer in order to achieve preparation for the cross-examination. It is worth saying that cross-examination may not be exercised if the defender believes that it is in the interest of defence. Trial monitoring data reveal that cross-examination was equally used both by the PPO and the defence.

Conclusion: When analyzing the cross-examination we concluded improvement of this novelty by the PPO and defence by using so called closed questions. The examination is carried out in order to reduce the probative value of the ***witness'*** *testimony given in direct examination and not to humiliate the witness.*

One of the benefits of the cross-examination is its smooth implementation in order to prove the purpose of the questions. In comparison to the previous year, breaks were rarely registered, only in 2 or 18% of the cases, the reason behind that is the fact that under the new CPC the audio-visual recording of cases has not been yet introduced.

In 8% of the monitored cases we noted that previously given statements were used during the examination, in cross-examination the legal structure allows for the questions to contain reminder of what the witness has emphasised during the direct examination, in 3 other cases the statements given previously were used due to inconsistency in the statement.

[29]Buzharovska, Gordana and others, *"Cross-examination manual for practicioners"*- Skopje, OSCE 2010



Use of the deposition given previously

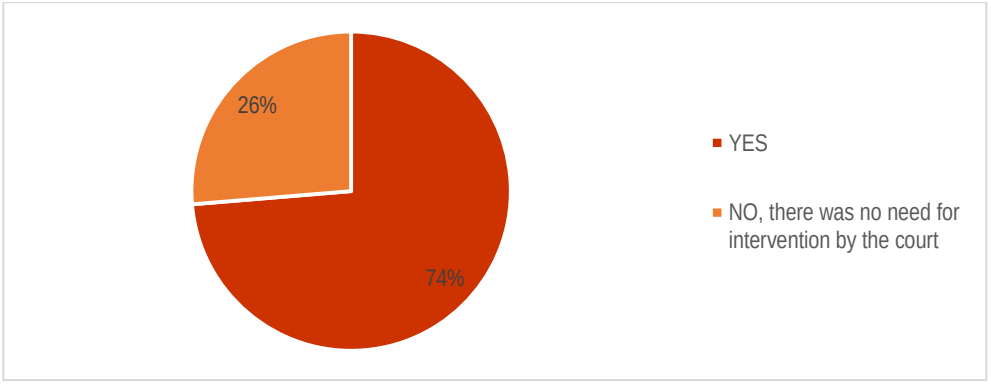
Although the main examiners in the procedure are the parties, the court may ask questions but only after the examination of the parties is completed. The court used the right to question the witness i.e. the expert in 17 cases.

2.2.3. Admissibility of questions and objections

The court is obliged to control the manner and the order of examination of witnesses and the presentation of the evidence, taking into consideration the efficiency of the procedure, it may refuse presentation of evidence if it considers it unnecessary, it may approve cross-examination, care about the admissibility of questions, fair examination and justification of objections, and the dignity of the parties, the defendant, the witnesses and the experts.

When it comes to the intervention of the court in respect to the admissibility of questions, in 74% of the cases the court took care of the admissibility of questions, the validity of the responses and the fair trial, in 26% of the cases the court did not need to intervene.

Conclusion: In comparison to the previous year, we noted improvement since in majority of cases the court cared about the admissibility of questions. No negative example is noted in this respect.

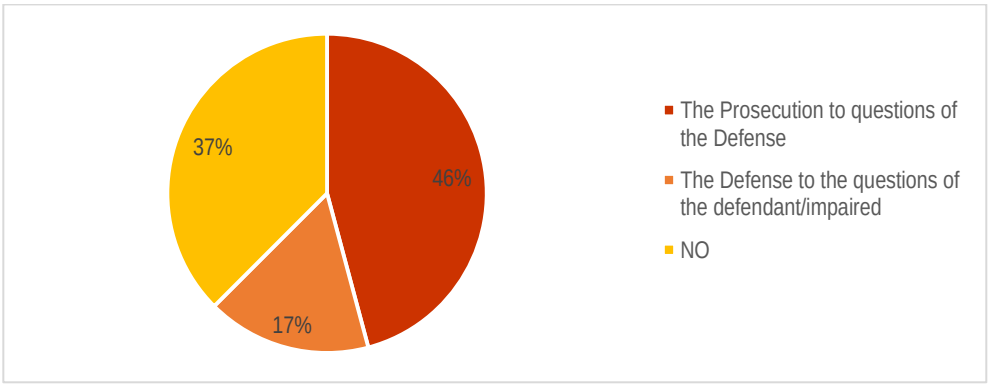


The Court cared about the admissibility of the questions, the validity of the responses and the fair trial

The court may act upon objections of the parties and may ban a question and answer of a question that has already been asked, if it considers it inadmissible or irrelevant, so as to prohibit questions that contain question and answer, except in cross-examination.

Conclusion: The data from the trial monitoring show that both the defence and the PPO used objection to the questions.

More specifically, the defence objected in 9 cases, in all of them to questions asked by the PPO, while as the PPO objected in 11 cases, all of them asked by the defence. Last year the gathered data were more extensive because the objections were directed by the prosecution and the defence towards the opposite party, but also towards the questions of the court. The data from this year show no objections to the questions asked by the court which is mainly because the court rarely asked questions which is in line with the accusatorial principle of the procedure. That is a good indicator for improving the practice of passivity of the court.



Objection to questions

Although the CPC governs the principle of immediacy, it also foresees exceptions of proving at the main hearing. According to the law, the prove of evidence is based on a statement of a person that should be examined at the main hearing, except in cases of examination of a protected witness, while as the statements of witnesses given during the investigation and the statements collected in the framework of the activities of the defence during the investigative procedure may be used in cross-examination or in disproving of any of the allegations or in response to rebuttal, for the purpose of assessing the authenticity of the statements made during the main hearing.

In Article 388, paragraph 3 it is determined that "If, after the commencement of the main hearing there are indications on the basis of which it may be concluded that the witness was subjected to violence, threat, promise of money or other benefits in order to refrain from testifying or false testimony at the main hearing, the witness statements given to the public prosecutor in the pre-trial procedure may, by decision of the court, be presented as evidence".[30]

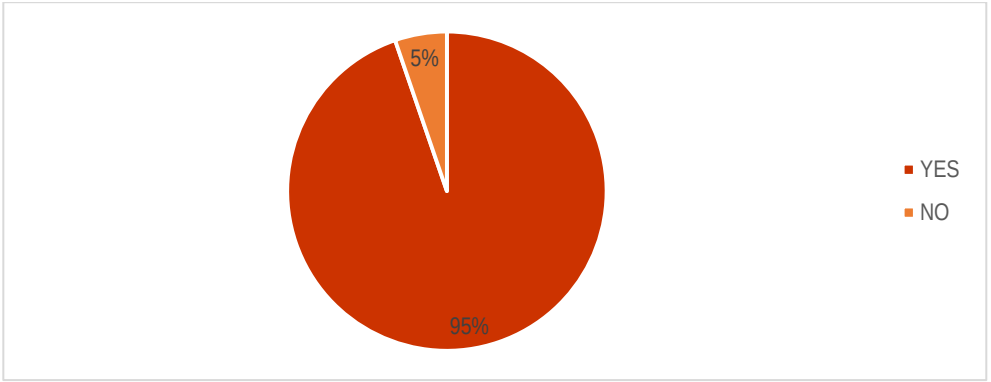
Also, exception is made when the person who gave a statement died, became mentally ill, or is unavailable. To the question whether the article 388 of the CPC was applied, the trial monitoring data show that only in 5 cases exception was made during the procedure of presenting evidence at the main hearing, when the depositions of the witnesses were read.

2.2.4. Equality of arms

In defining fair trial, particularly important is the principle of equality of arms which implies equal opportunities to the parties during the presentation of evidence, so as equal treatment by the court. This means that each of the parties must have a reasonable possibility to present its case to the court i.e. none of the parties shall be in a disadvantaged position. The practice of the European Court of Human Rights shows that equality of arms means that the parties shall have equal procedural position during the trial and equal position when presenting the defence or the indictment.[31] In the criminal procedure the equality of arms is a guarantee of the right to the defence. The principle requires sufficient time and possibility for preparation of the defence, but also includes the right to a defender, the right to propose and examine witnesses and the right of the defendant to be present during the trial.

[30] Criminal procedure code, Official Gazette of the Republic of Macedonia, No. 150 from 18.11.2010

[31] Fair Trials, Manual / Humanitarian Law Center, Belgrade 2001



The defence and the prosecutor were equally treated by the judge in respect to the objections and similar

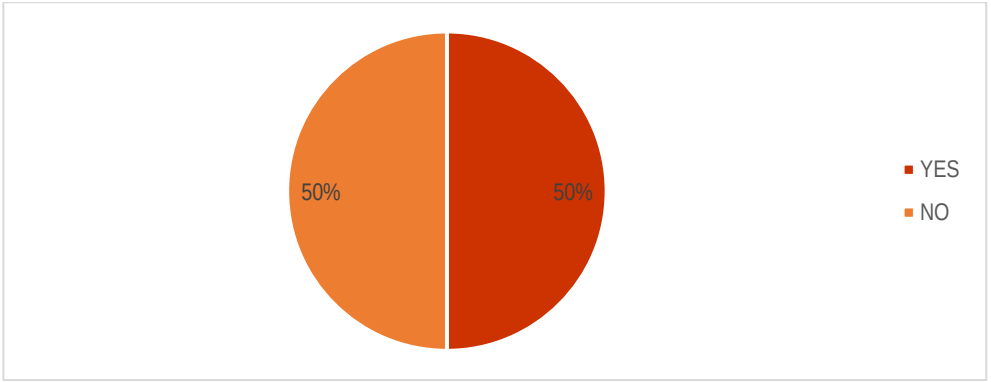
Asked if the prosecutor and the defence were equally treated by the judge in connection to the objections and the other actions during the course of the procedure, in 95% a positive response was given, only 5% are of opinion that the defence and the prosecutors were not equally treated. It was noted that when the prosecutor leaves the courtroom, the judge does not punish that behaviour, while as when the defenders do that the court regularly fines them for disrespecting the court and imposes judicial expenses for the hearing. It is interesting that we noted a different treatment of the court towards the prosecutors of the PPO and those of the Special Prosecutors Office (SPO). Namely, when the SPO asked for a copy of evidence within their competence, the court refused the claim. This has never happened when PPO requires evidence.[32] Such data suggest selective compliance of the principle of equality of arms and fair trial which is an interesting trend given that the greatest remarks in the previous model of criminal procedure referred to the unequal treatment of the parties, i.e. with an opinion that the court is more inclined towards the prosecution.

Conclusion: This inclination towards the prosecution by the court was noted in the course of this monitoring year. The violation of this principle usually occurs aside of the hearing, for example when the prosecution is called in the courtroom before the defence, when the prosecutor did not show up in a hearing and did not excuse his/her absence, and the court did not sanction him/her.

2.2.5. Examination of the defendant

With the new CPC the defendant may be examined only if there is a proposal by the defence. With this novelty the legislator endeavoured for the defendant to decide together with the defender whether to be examined. From the data obtained in 5 cases the defendant was questioned at the main hearing, while as in 5 cases he/she was not.

[32] Until the closure of the data base within this monitoring period, SPO was present at the trial of "Puch" , the data provided are gathered here

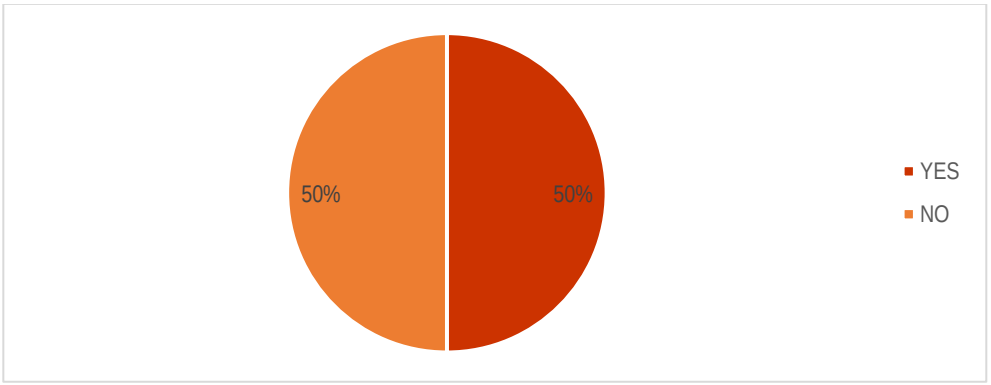


Examination of the defendant in relation to the crime

In 4 cases the defendant was questioned in respect to the circumstances relevant to the determination of the sentence.

The Criminal Procedure Code stipulates that the defendant should not be compelled to testify against himself or confess the guilt or present his defence. In line with this, it is necessary to distinguish between giving testimony about the event and presenting defence, which implies that presenting a defence does not mean at the same time giving a deposition on the case.

Conclusion: In the 10 noted cases when the defendant did not have a defender, the examination was carried out in a way that in 5 cases the defendant narrated the act at the main hearing, while as in 5 other cases he/she answered to questions by the court.



Manner of examination of the defendant who did not have a defender

In terms of the possibility to use the deposition of the defendant given in the pre-trial procedure, considering the one given to the police in presence of the public prosecutor, no data of this practice was noted.

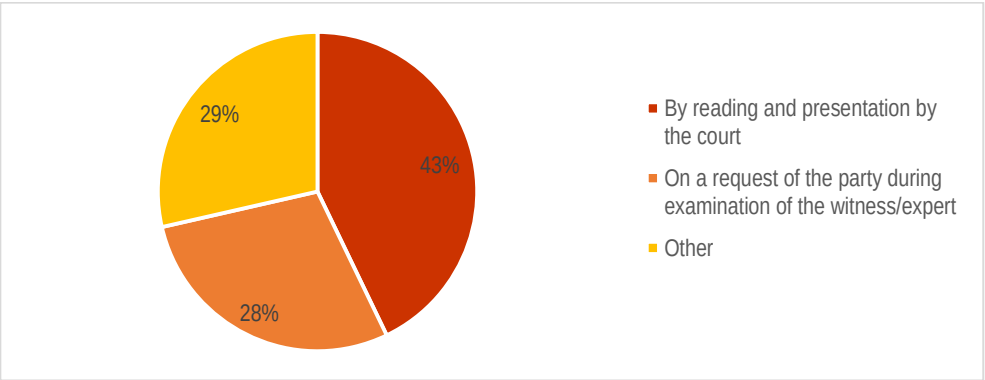
Conclusion: In this part we may conclude that in general the courts have a positive practice, taking into consideration the fact that the intention of the new law was to present the evidence in a public and adversarial hearing in the court, while as reading the depositions from the pre-trial procedure were used only as an exception.

2.2.6. Manner of presenting the written and the material evidence

The presentation of evidence or the manner of presenting the written and the material evidence under the new CPC has brought uncertainties in the procedure. Namely, as per the introduced changes, the court has a passive role, whereas PPO and the defence play an active role in the procedure for proving the guilt by the Public Prosecutor, and the readiness of the defence to respond to the PPO. According to the monitored cases in 6, i.e. 43% of the cases the evidence in the procedure were presented by reading and presentation made by the court, and only in 4 cases on a request of the party during the examination of the witness or the expert.

Conclusion: From the presented data we may conclude that majority of the written and the material evidence are read by the court, instead of the parties in the procedure which should be the case as per the new CPC.

Hence, in comparison to the previous year, we noted a decrease in the number of cases where the court reads and presents the evidence which is of course slow but still one step forward in the implementation of the new CPC.



Manner of presenting the written and the material evidences

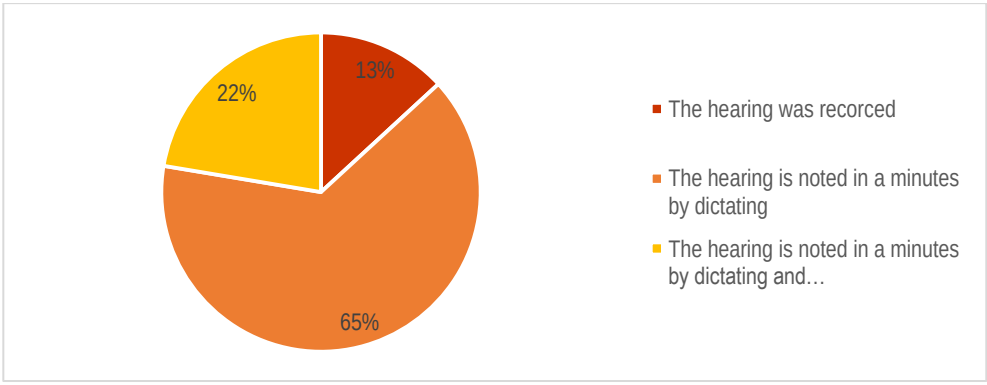
2.2.7. Manner of registering the course of the trial and the presentation of the evidence

The new CPC imposed new material - technical conditions for recording during the main hearing. Namely, article 374 states that the main hearing is audio or visually recorded. When there are no technical requirements for audio or visual recording of the main hearing,

the presiding judge of the council may order a shorthand minutes for the course of the main hearing. But one of major objection is still present, the courts remain further insufficiently technically equipped to be able to use the modern technologies for registration.

Namely, data showed that in most cases the registration of the hearing and the presentation of evidence is by record dictation by the President of the Council, in 65% the courts still use this method. In 28 cases minutes are taken during the hearing through dictation by the judge and by direct insertion of the questions and answers given in direct and cross-examination.

Conclusion: After almost 3 years since the implementation of the new CPC, in 13% of the cases we noted for a first time a use of registration technique: visual – audio recording. ***This data is taken from the hearings of the case "Divo naselje"****.*



The manner of registration in the course of and during the presentation of evidence at the main hearing

2.2.8. Unbiased trial

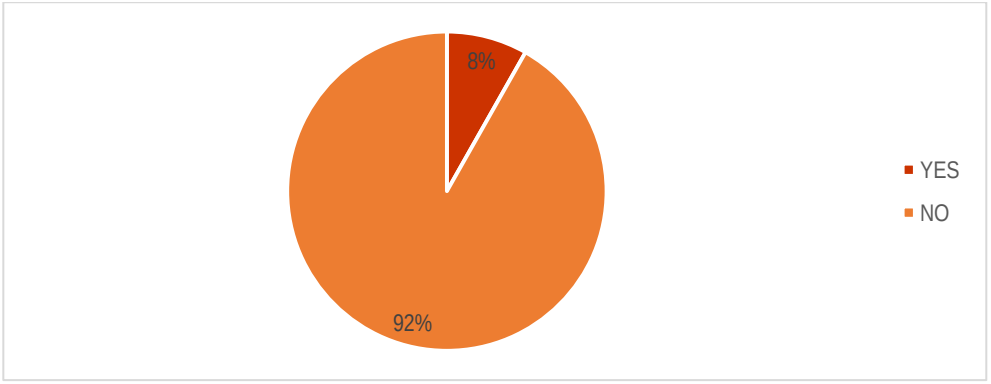
The right to an impartial/unbiased trial is also one of the rights that enable fair trial. In order to ensure an impartial trial, the instrument of recusal of the judge or the jury is foreseen. The right of impartiality of the court requires for the judges or the jurors to have no interest in the dispute i.e. the procedures should be conducted fairly and to respect the rights of all parties in the dispute. The Human Rights Committee of the United Nations points out that the impartiality "means that the judge must not have a view on the case in advance, and that he/she must not act in a manner that favours the interests of one party in the dispute."[33] The basic principles for the independence of the judiciary determine that "the judges must behave in a manner that ensures impartiality and independence of the court".

[33] "Fair Trials, Manual" / Fair Trials Manual Humanitarian Law Center, Belgrade 2001, – see the case Karttunen v. Finland (387/1989), 1992 Report of the Human Rights Committee

The exemption is a way to challenge the impartiality of the court. This was covered by the trial monitoring, and the data show that no recusal of a judge or jury was demanded. It is interesting that there was one request for recusal of the public prosecutors i.e. so that the case would be transferred within the competences of the SPO. The court did not decide upon this request since for a case to be transferred to the SPO, the SPO should submit a notification for taking over the case.

In 95% of the monitored cases the judges or the jury do not have a formed opinion which may affect the judgement, and the judges did not prevail towards inappropriate ex-parte communication.

Conclusion: In 5% of the cases the judges and the jury have already an opinion which may affect the judgement, also in 8% the judges used inappropriate ex-parte communication often with the prosecutor and the defendant in direction of further discussing the possibility for confession of the guilt.



Existence of inappropriate ex-parte communication

From the obtained data of the trial monitors no use of discriminatory language by the court on grounds of sex, race, etc. is detected, in 2 cases the trial monitors had remarks about the attention of the court during the procedure.

3. **ANALYSIS OF THE PENAL POLICY**

For a first time in the Macedonian criminal – procedural legislation, the new CPC contains provisions that regulate the possibility for settlement of the public prosecutor and the suspect upon the type of the criminal sanction, envisage different status of the guilty plea in the phase of control of the indictment, and of the confession given during the main hearing of the regular procedure, and during the hearing in the abridged procedure, than it was the case by now when the defendant could have done it in the court.[34]

These new legislative solutions brought substantial reform in the procedural actions, transferred from the Anglo-Saxon institute specific for countries of *common law* with their necessary adaptation to the European judicial practice. The criminal - procedural law and the judicial practice are typical for the traditional European territory, until now they opposed the conventional or consensual justice starting from the determination that the penal reaction is strictly statutory determined and it does not recognize dialogue, compromise nor a settlement in view of the fact that the main objective is to protect the fundamental social values. Already for some time in the criminal - process literature there are accusations that the mixed criminal procedure features slowness, stressed formalism, inflexibility and, as a result of all this, inefficiency. It is expected that with the given possibility for settlement, partially it shall overcome these objections and shall enable the criminal justice to be achieved in shortest possible time.

However, in order for the settlement to begin functioning, it is necessary for the country to have two preconditions: a stable and uniform penal policy. In Macedonia, when the application of the new CPC has started, had none of these two preconditions, thus in order to revive the settlement we approached towards the creation of instruments for equality of the penal policy when imposing the penalties. In this respect, in 2014 the Ministry of Justice proposed adoption of a Rulebook on sentencing.[35] The adoption of this regulation caused variety of strong reactions by all stakeholders in the justice system. While some of the actors supported the existence of this type of rulebook for harmonization of the penal policy and the need for creation of instruments for unification of the penal policy when imposing the penalties, another significant group of experts severely criticized the adoption of this rulebook due to the fact that it interferes with the independence of the judiciary expressed through discretionary decision on fines.[36] The apparent discontent over the Rulebook on sentencing culminated when the adoption of

[34] "Manual on the Criminal Procedure Code", Ministry of Internal Affairs, Bureau for Public Security, Training Center, Skopje, 2012

[35] Rulebook on Sentencing (Official Gazette of the Republic of Macedonia No.64/14).

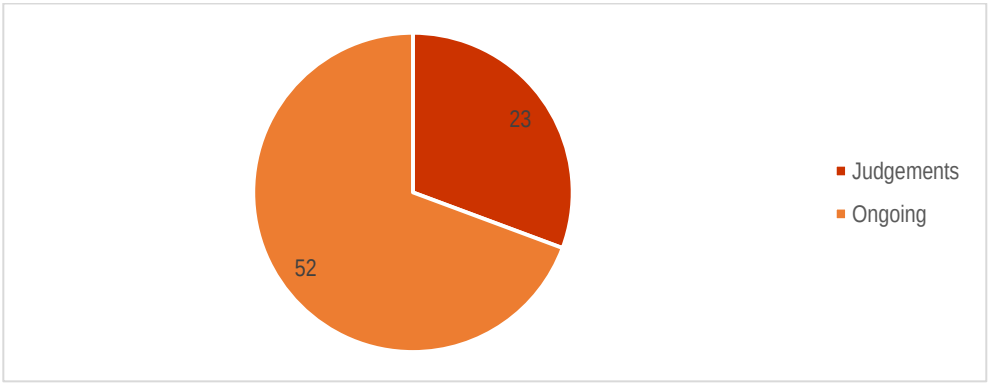
[36] Reform in the penal policy or something else, 1.02 Scientific review article UDKZ 43.19.077.6.04(497.7), Bogdancho Gogov, PhD

the Law on determining the type and the severity of the sentence was proposed [37], especially with its entry into force and application starting from 06.07.2015.

The greatest benefit i.e. criticism towards the Rulebook on sentencing and the Law on determining the type and the severity of the sentence lays in the newly introduced institute in the CPC – the plea-bargaining. Unfortunately, this analysis cannot fully address this issue, because the monitored cases are only cases that are in the court, not in the earlier stages of the procedure, especially during prosecution' investigative procedure.

However, the Law has a visible application during the procedure, in cases of guilty plea and in the determination of the sentence by the court.

From the gathered data, out of 75 monitored cases, 23 were completed, while as one third are still ongoing.



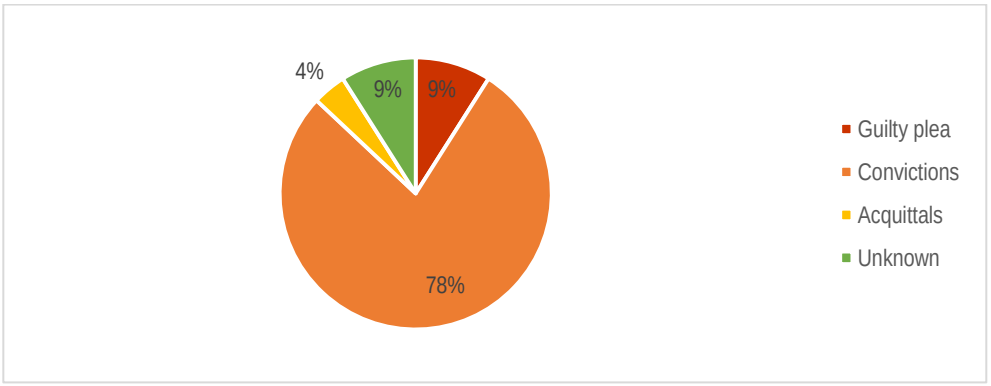
Number of completed cases

Out of 23 verdicts, 12 were adopted by the Department for organized crime and corruption, while as 11 verdicts are in relation to other criminal offenses of importance to the public and other corruptive cases.

The guilty plea as a right of the defendant is nothing unknown and new, it was envisaged in the old CPC. The key novelty that comes from the new CPC is that now on the basis of this confession and under conditions stipulated by the Law, the court may adopt at the main hearing a judgment without obligation thereby of presenting additional evidence. It means that now there is a significant change regarding the probative value of the confession of guilt. The procedure for confessing the guilt at the main hearing -guilty plea is regulated in Articles 380 and 381 of the CPC. It is interesting that the defendant may plead the guilt or reach settlement no matter the nature and the severity of the offense for which the procedure is about. Also, he/she may plead the guilt in respect to one or more criminal charges of the indictment.

[37] Law on determining the type and the severity of the sentence (Official Gazette of the Republic of Macedonia No.199/14)

From the monitored trials and 23 adopted verdicts pertaining to 37 defendant persons, 6 verdicts are made on the basis of a guilty plea, 14 convictions and 3 acquittals. According to this data, convictions were adopted in 20 cases and only in 3 acquittals. Compared to the last year there is a decrease in the number of convictions based on guilty plea. Yet, the court once again consciously or unconsciously makes a pressure over the free will of the defendant.



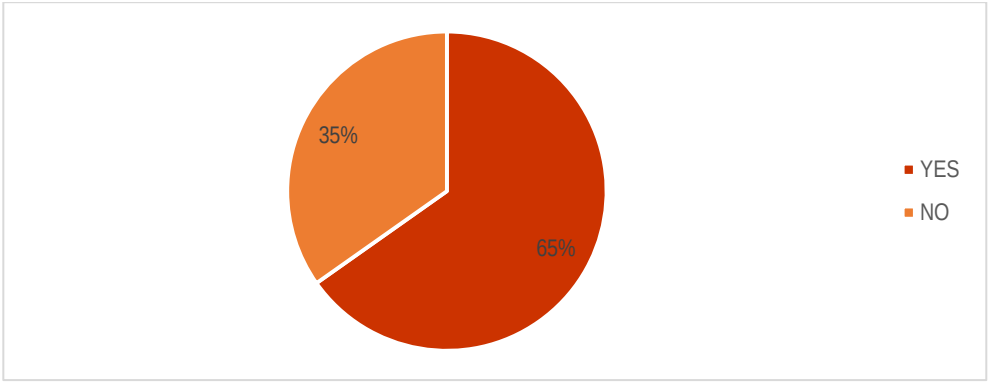
Types of judgments

The court usually issued imprisonment, i.e. in 11 cases it issued prison sentence, ranging from the minimum 6 months to the maximum 5 years and 6 months, and in 1 case probation. In 1 case the court issued a sporadic measure – expulsion from the country of a foreign citizen. It is of concern the fact that the court did not apply at all the measure extended forfeiture although this measure could contribute towards considerable results in fighting corruption.

Another important principle when adopting a judgment is its publicity, unless there are no restrictions in that respect. In accordance with the principles of the ICCPR [38] exceptions to publicly announce the judgment exist when it refers to a minor whose privacy must be protected when it comes to matrimonial disputes and in cases of child custody. Public announcement of a judgment is applied even when the public was fully or partially excluded from a trial.

From the trial data we noted that in 8 cases or 35% the court did not issue the judgment publically, while as the hearings for announcement of the judgement in 90% were scheduled for more than 3 days.

[38] International Covenent on Civil and Political Rights, 1966



Publicly issued judgments

When the announcement of the judgment is concerned, the court has an obligation and a duty to instruct the defendant about the right to appeal. The legal remedies are particularly important for assessment in terms of the access to justice. The European Court emphasizes that, although in the Article 6 of the European Convention on Human Rights the right to appeal is not explicitly stipulated still that right is indivisible from the right to a fair trial. This guarantee is confirmed with Article 2 of the Protocol No. 7 to the Convention which provides for the right of appeal in criminal cases. Having this into account our data point to the fact that the court explained the defendant the conditions for submitting an appeal.

The ultimate conclusion about the judicial efficiency in fighting organized crime and corruption is that with the new amendments of the Criminal Procedure Code and the institute settlement and the confession of the guilt, the conviction rate is significantly increased and the duration of court procedures is reduced. On the other side, by adopting the Law on determining the type and the severity of the sentence, the necessity for implementation of the law through a mathematical calculation of the length and the type of the sanction by the judges, significantly degrades the judicial role in terms that the court is unable to adopt a decision upon the sanction which would be personalized and adequate for each individual case.

4. GENERAL CONCLUSIONS

The judicial authority is the third pillar of a democratic state. While the legislative and executive authorities function through the so-called system of actuators and brakes, the judicial functions according to the constitution and the laws. In order to have a rule of law in place, it is necessary to have an independent judicial authority. In the Republic of Macedonia according to the Progress Report for 2016, the judicial system possesses certain level of preparation but there is a setback in terms of the independence and political interference in the work[39].

As far as fighting corruption is concerned, it was also noted that the legislative and the institutional framework was developed in the course of a decade and more, but even in this phase there have been signs of political interference in the work of the authorities. The corruption becomes widely spread in many spheres and continues to become a serious problem.

The Urgent Reform Priorities aiming at urgent and systematized approach towards resolution of the political crises, were hardly implemented, except formally in certain areas. The most competent in the implementation of these priorities was the judiciary which already for 2 years in a row notes a setback.

The political interference and the dependence of the institutions on the will of the executive authorities do not end in the courts and the bodies whose activities are turned towards suppression of this criminal phenomenon. Accordingly, it was noted that the Parliament does not perform its role in securing control over the work of the executive authorities, the judiciary is not independent, and political pressure is noted in other spheres. More precisely, the system of "checks and balances" does not function, thus we come to the situation of capturing the state in the institutions, the so called "captured state".

As far as the implementation and the adaptation of the judicial system to the new CPC, our conclusions go in direction that even after 3 years from its entry into force, there are certain provisions that have not been exercised, a slow adjustment to certain changes related primarily to the role of the parties in a procedure, and in particular the role of the court, so as certain successes in terms of the new institutions such as opening statements, direct and cross-examination, guilty plea and rights of defendant. But in a situation when the judiciary is criticized openly and with arguments in relation to its independence and efficiency, the implementation of the legislative changes is of secondary importance, especially if they are adopted and applied in a captured system and state.

[39] Commission Staff Working Document - The former Yugoslav Republic of Macedonia 2016 Report http://ec.europa.eu/enlargement/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf

5. RECOMMENDATIONS

For the state

- To strengthen the standards for independence of the judges and creation of conditions for independent action without political pressures and influences when adopting the decisions;
- To depoliticize the system of appointment and promotion of judges in practice, not only in the law and to reform the system of disciplinary proceedings and dismissal of judges, in accordance with the recommendations of the EU and the Venice Commission;
- To provide full support and resources to the SPO;
- To develop a serious strategy for reforms in the judiciary and an action plan to address the remaining gaps in a sustainable way;
- Development of credible record on combating high-level corruption, including reimbursement of funds.

For the donors and the public authorities

- The trial monitoring should cover the procedure until it is completed, until the adoption of a final judgement in order to reach a conclusion on judicial efficiency and the criminal – legal response in the fight against the organized crime and corruption;
- The analysis of the Coalition "All for Fair Trials" should be used as a resource and a base for amending and supplementing the legislation, with participation of the Coalition' experts in working committees and groups for legislative amendments and adoptions of the public politics;
- Continuation of the training on the new concept of the CPC for the prosecutors and the defenders in terms of the novelties for cross-examination and the need for mastering the case in the evidentiary procedure.

For the work of the courts, the prosecution and the lawyers

- Strengthening the control over the delivery in order to implement proper delivery of the summons, so as application of the measures for securing presence of all participants in the procedures;
- Securing access to the evidence of the defence, so as sufficient time for preparation, having in mind that one of the basic rights of the defendant is sufficient time and possibilities for preparation of the defence and access to the files in order to get acquainted with the evidence against and in his/her favour;
- When giving instructions about the rights, the court should check the possibilities for free legal aid and accordingly to instruct the defendant;

- The opening statement given by the parties should be understandable and to clearly and precisely inform the court about what the party intends to prove, so as which crucial evidence will try to present;
- In direct examination the questions should be clear and precise, while as in the cross-examination closed type questions should be used by which the proposed witnesses by the opposite party shall be examined;
- The confession of the guilt as a right of the defendant should be explained and indicated by the defender before the start of the procedure, thus the defendant independently, without pressure shall decide whether to exercise this right;
- The right of the defendant to remain silent should not affect the judgement of the court;
- The court should ensure equality of the parties and should refrain from improper ex parte communications with the prosecutors;
- Only on exceptions the court should propose presentation of evidence;
- Providing material - technical preconditions for recording of the main hearing, i.e. use of modern technologies for registration as stipulated in the CPC;
- To maintain the principle of transparency through public announcement of the place and the time of the trial;
- To determine the possibility for challenging the translation if the party suspects that it was incompetent or biased having in mind the essential importance for exercising the fair trial standards;
- The court should obligatorily give instructions about the right to appeal, so as the right to respond to appeal, guaranteed in the article 2 from the Protocol 7 of the European Convention on Human Rights which provides for the right to appeal on criminal offenses.

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