



THE AIRE CENTRE
Advice on Individual Rights in Europe



**REGIONAL
ANTI-CORRUPTION
INITIATIVE**

Case study

North Macedonia

**- Confiscation of instrumentalities and
proceeds of crime-**

Tobacco products' smuggling and tax evasion assumed serious extent in the 1990s and early 2000s, thus the Macedonian authorities paid due attention to dealing with the challenges of preventing and sanctioning these crimes. The successful processing of the so-called "Pepel" ("Ash") case warrants its short description in the following paragraphs.

Following the discovery of a "tobacco mafia" in the North Macedonia's town of Kumanovo, which caused a substantial damage to the State budget,¹ and based on the findings of the criminal investigation pointing out the likelihood of committing series of criminal offences, the Skopje-based Basic Public Prosecution Office for Prosecuting Organised Crime and Corruption in 2009 indicted 33 persons before the Basic Court Skopje 1 – Skopje (the first instance court) under the charges of "Criminal association" (Article 394(1) of the Criminal Code (CC)), "Abuse of official position and authority" (Art. 353(4) of CC), "Unauthorised trade with [...] tobacco products" (Art. 60 of the Excises Act) and/or "[...] unauthorised use of another's firm" (Art. 285(1) of CC)² and also sought confiscation of instrumentalities and proceeds of these crimes.

The first instance court in 2010 rendered a judgment,³ thereby finding that the first defendant B.S. in mid-2006, after acquiring 59,95% of the shares of the Kumanovo Tobacco Company (TKK), placed his own protégés N.S. and R.R. in the company's management structures, and together with them he created a criminal group with 20 other defendants aimed at committing the crimes of unauthorised trade and unauthorised use of trademark of another's firm by production of low quality cigarettes without production licences. The Court found that no cigarettes tax (excise) has been paid until October 2008 in a denar-equivalent amount of 6.57 mil. Euros (EUR) and that B.S. incited N.N. and M.Gj. to abuse their official position and authority in the TKK by ordering the payment of 1.05 mil. US Dollars and 5.18 mil. EUR to the foreign company "Sh.k" from K., under invoices issued with relation to fictive purchase contract with that company, in spite "Sh.k" did not deal with tobacco production. B.S. was sentenced to five years of imprisonment and he was ordered to pay a fine in amount of 25,200 EUR, while the sanctions against the other defendants were milder.

In accordance with the general provision of Article 100-a ("Conditions for forfeiture of instrumentalities"), which stipulates that no one may retain or acquire objects which derived from committing a crime, or which were intended or used for committing the crime (instrumentalities), and the specific provisions of Articles 285 and 394 of the

¹ Ministry of Interior, *Situation and results in discovering cases of corruptive abuse of official duty 2007-2009*, 09.12.2009 (<http://arhiva.mvr.gov.mk/ShowAnnouncements.aspx?ItemID=8011&mid=1094&tabId=201&tabindex=0>). The Ministry's information referred to 47 suspected perpetrators and claimed that the overall damage amounted to 55,3 mil. EUR. The authorities discovered on various locations more than 20 tons of unlawfully produced cigarettes (see Makfax's article, *infra*).

² The first defendant B.S. was charged (under the indictment Ko.no.119/08 of 16 January 2009) for the aforementioned criminal offences, while the remaining 32 defendants were indicted for some of these criminal offences.

³ Basic Court Skopje 1 (Criminal Court) – Skopje, judgment V KOK.no.3/09 of 25 March 2010, now final (available at: <https://www.akademik.mk/wp-content/uploads/2011/10/Presuda-pdf.pdf>), convicting most of the defendants.

Criminal Code relating to forfeiture of instrumentalities of the respective crimes, the first instance court ordered the following forfeiture of instrumentalities: 77 photographic films – negatives and 25 offset plates with inscriptions of Marlboro, HB, MT, West, Ronson, Rodeo and other types of foreign cigarettes; large amounts of cigarettes, sheets of paper for cigarettes and cigarette boxes; wrappers, carton packaging and control marks and markings for different types of cigarettes with the respective inscriptions; machines for production and packaging of cigarettes; a number of vehicles (and documents thereof) used for transporting the cigarettes; large amounts of domestic and foreign currencies; many mobile phones, computers and other technical devices etc.

In accordance with the provision of paragraph 1 of Article 97 (“Confiscation of property and proceeds of crime”) of the Criminal Code, which stipulates that no one may retain or acquire proceeds of crime, the first instance court’s decision for confiscation of proceeds of crimes (rendered under Art. 97(2) of the CC) required:

- the convicted defendants to pay on a solidarity basis (correlated to their individual contribution to the realization of the criminal endeavours and their acquisition of property gain (proceeds of crimes)) a total amount of a denar equivalent of 6.57 mil. EUR (which is equal to the amount of unpaid excise duty on tobacco goods), and if the confiscation of that amount is not possible, the perpetrators’ movable or immovable property, as well as any other property, assets, material or immaterial rights or other property corresponding to the acquired proceeds of crime would be confiscated; and
- the legal entity “Sh.k.” to pay 1.05 mil. US Dollars and 5.18 mil. EUR (unlawful property gain acquired by payments received under fictive invoices in relation to non-existing sales of tobacco to TKK), and if the confiscation of these amounts is not possible, the perpetrator’s movable or immovable property, as well as any other property, assets, material or immaterial rights or other property corresponding to the acquired proceeds of crime would be confiscated.

The first instance judgment was upheld upon appeal.⁴ The confiscation was not addressed by the judgment of the European Court of Human Rights (ECtHR),⁵ which rejected the claim for payment of pecuniary damages in amount of 5,76 mil. EUR which allegedly occurred on account of B.S.’s inability to undertake activities necessary for the normal operation of the company TKK while he was in detention on remand, because there was no causal link between the established violation of B.S.’s right to liberty and the pecuniary damage alleged.

⁴ Makfax, “The Appels Court had confirmed the sentence to [B.S.]”, 16 March 2011 (<https://makfax.com.mk/crna-hronika/249095/>).

⁵ ECtHR judgment in the case of *S[...] v. [...] Republic of Macedonia*, no. 8784/11, 7 June 2018 (<https://hudoc.echr.coe.int/>), §§ 47 and 49.

The processing of “tobacco-mafia” cases in the late 2000s⁶ seemed to have a positive impact on reduction of the tobacco products’ “grey market” (4 time smaller in 2010 compared with 2006⁷) and tax evasion (2,5 times more taxes were collected in 2018 compared to 2010, according to the Ministry of Finance), despite big tax evasion due to raw tobacco smuggling.⁸ The Macedonian success story is further confirmed by the findings of a recent regional study on illegal trade of cigarettes and other tobacco products in the Western Balkans.⁹

	Croatia	Slovenia	BiH	Serbia	Montenegro	North Maced.	Kosovo*
Taxes evaded due to tobacco smuggling, in EUR million	59.22	8.55	129.07	64.72	23.28	6.24	15.69
Total uncollected tobacco taxes, in % of GDP	0.2	0.1	0.9	0.2	0.6	0.1	0.2
Total uncollected tobacco taxes, as a share of total tax evasion, in %	6.6	1.9	11.6	3.4	8.0	1.0	7.4

Although the level of tax evasion in North Macedonia due to tobacco smuggling is the lowest in the region, the success in dealing with specific crimes by, *inter alia*, confiscation of instrumentalities and proceeds of the crimes, is yet to be matched by

⁶ According to “Kanal 5” TV, “Confiscation of property of perpetrators of tobacco-related organised crime”, 19 March 2013 (<https://kanal5.com.mk/articles/168603/konfiskacija-na-imot-na-storitelite-na-organiziran-kriminal-so-tutun>), the Government’s Spokesperson on 19 March 2013 informed about the confiscation of 56% of Mr B.S.’s shares in the TTK, as well as substantial amounts of money (some real estates were about to be confiscated then) and about confiscation of property of: persons involved in “Jaka tabak” Radovish, who caused damage to the State in amount of 2,5 mil. EUR from March 2001 to March 2007; and persons involved in the Prilep Tobacco Company, who caused damage to the State amount of 7 mil. EUR from 1.1.2005 to 31.3.2006.

⁷ Ministry of Finance, “Macedonia successfully deals with organised smuggling of cigarettes, the grey market reduced to 6%” (<https://www.finance.gov.mk/mk/node/1814>), a non-dated article, providing information that the decrease of the grey market’s share from 25% (2006) to 6% (2010) was accompanied by 80% increase of the incomes from lawful trade of tobacco products.

⁸ Teofil Blaževski, “Tobacco smuggling – the State and legal market lose millions of Euros”, at CSO’s web Platform for Fight against Corruption, 2019 (<http://antikorupcija.mk/uploads/documents/3/Istrazuvacka%20storija%20-%20Teofil%20Blazevski.pdf>).

⁹ The project “Illegal Trade of Tobacco Products: Smuggling as Experienced along the Balkan Route – BalkanSmugg” (funded by PMI IMPACT and implemented by the Zagreb-based Institute of Economics from July 2017 to September 2019), whose specific objective was to produce a strong evidence base on the illegal trade of tobacco in Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, North Macedonia, and Kosovo*, resulted in the publication of an eponymous study (<https://www.eizg.hr/UserDocsImages/projekti/Balkansmugg/BalkanSmugg-Study.pdf>). The project assessed the smokers’ attitudes and practices of buying cigarettes on the “grey market”, and the relevant data were obtained in 2018 by conducting a survey of 3,000 respondents per country, totaling 21,000 respondents in the region.

overall success in processing high-profile cases of organised (notably “white collar”) crime in various spheres.¹⁰

¹⁰ In the so-called “Trust” case, movable and immovable property valuable about 14,5 mil. EUR was frozen during the criminal proceedings against few companies and their CEOs who, by abusing the public tender procedures, caused damage to the State budget in amount of 17 mil. EUR. Information about the recent confiscation efforts of the Agency for Managing the Forfeited Property can be found in Svetlana Božinovska’s article “Decisions to confiscate the property of S.K. are prepared”, “24 vesti” TV, 18 July 2019 (<https://www.24.mk/details/izgotveni-reshenija-za-konfiskacija-na-imot-na-sead-kochan>).