DHOMA E POSAÇME E GJYKATËS SUPREME TË KOSOVËS PËR ÇËSHTJE QË LIDHEN ME AGJENCINË KOSOVARE TË PRIVATIZIMIT	SPECIAL CHAMBER OF THE SUPREME COURT OF KOSOVO PRIVATIZATION AGENCY OF KOSOVO	POSEBNA KOMORA VRHOVNOG SUDA KOSOVA ZA PITANJA KOJA SE ODNOSE NA KOSOVSKU AGENCIJU ZA PRIVATIZACIJU

AC-I.-14-0169- A0001

In the legal matter of

"T" JSC from Serbia, represented by lawyers D. K,D.N, M.ll, S.M and D.N,of Law Firm "K&N", from Belgrade,

Claimant/Appellant

Vs.:

Privatization Agency of Kosovo, street "Ilir Konushevci" no. 8, Prishtinë/ Priština

Respondent

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters (SCSC), consisting of Mr. sc. Sahit Sylejmani, Presiding Judge Witold Jakimko, Ondrej Pridal, Sabri Halili and Ilmi Bajrami, Judges, on the Claimant's appeal, filed against judgment SCC-05-0113, dated 15 April 2014, of the SCSC Specialized Panel, after deliberation held on 02 April 2015 issues the following:

JUDGMENT

1. **The appeal is hereby rejected as ungrounded.**
2. **The Judgment SCC-05-0113 dated 15 April 2014 of the SCSC Specialized Panel, is hereby upheld.**

Factual and procedural background

On 11 April 2005, the Claimant "S" JSC filed a claim against the Respondent- KTA. According to the claim, the company "S" is the sole owner of "F-S" LLC – the enterprise sold on 16 September 2004 by the Kosovo Trust Agency as a socially-owned enterprise. To prove this allegation, the Claimant introduced a decision issued on 28

October 1992 by the Interim Governing Body of the SOE "F – Wallpaper Factory", to join the "S", an Joint Stock Company, which had mainly maintained a private capital. On 4 November 1992 the Commercial Court in Novi Sad registered the company that survived the merging and thus all assets and liabilities of the Wallpaper Factory were transferred to the "S". However, the Governing Body of "S" decided to incorporate a New Company in Kosovo - namely "F-S" Limited Liability Company. On 2 December 1992, the New Company LLC was registered in the Commercial Court in Prishtinë/Priština as "S" JSC as the sole founder.

This legal circumstance continued to exist until arrival of International Forces in Kosovo. Then the newly established Kosovo Trust Agency, after studying the status of "F-S" LLC decided to disregard the company that was joined and to treat it as a Socially-Owned Enterprise, which resulted with its privatization accruing the total amount of 3 331 250 euros.

The Claimant is claiming payment of the amount of 3 331 250.00 euros including interest from 16 September 2004 until final payment. In addition, the Claimant also claimed payment of 250,000.00 euros as a compensation for the lost profit as a result of illegal treatment by the KTA.

On 26 October 2005, the KTA submitted its defence to the claim with the Special Chamber of the Supreme Court. The KTA requests from the court to order the Claimant to submit more evidence in support of the claim. Amongst other, the KTA requests to be proved whether the shareholders have approved the current claim, or are advised for the action undertaken by management; that Claimant monitored the activities of its alleged affiliate "F" and that has paid its shareholders; that the Claimant had made any investment with its alleged affiliate "F" and requires proofs how the financial loss alleged by the Claimant was calculated.

Further in the KTA's defence, it asserts that this merging was not based on the Federal Law on Enterprises (adopted in 1988 and promulgated in the Official Gazette no. 77/88, later amended in 1989 and twice in 1990), which may constitute an Applicable Law because the significant provisions of this law were not applied during the merging process.

Otherwise, the Respondent claims that the grounds for this merging are with the Interim Measures for the Protection of the Rights of Self-Management and Social Protection of F, adopted by the Assembly of Serbia on 6 November 1990. Moreover, the Respondent

asserts that this law does not mean the Applicable Law under UNMIK Regulation 1999/24, primarily because it does not cover the legislative gap in virtue of Article 1.2 of UNMIK Regulation 1999/24. The KTA also claims that the Article 1.2 of UNMIK Regulation introduces a presumption that laws passed from 22 March 1989 normally are not applicable and the burden of proof rests with the Claimant that the law after 22 March 1989 was not discriminatory.

At the hearing held on 20 June 2013, the Trial Panel summoned in capacity of the Respondent the Privatization Agency of Kosovo (PAK) as the ex lege successor of the former - Kosovo Trust Agency (KTA). At the same hearing, the Claimant explained that the claiming company (S) was merged with a company called "T" LLC from Backa Palanka, and as a result of this the Claimant should have been considered as a "T" LLC from Backa Palanka.

Both parties in the case at hand (Claimant and Respondent) confirmed that they stand by the claim, respectively the Respondents stand by the defence to the claim filed by the KTA on 26 October 2005.

At the hearing held on 22 January 2014, the main issue was the admissibility and connection of the requested evidence. After hearing the Panel decided that the admissibility and connection of the written evidence will be decided during the deliberation on merits.

The last hearing for this case was held on 13 March 2014. Both parties declared that have no new suggestions for additional evidence, so the court decided to close the proceedings of the evidence over this case and gave a word to parties for their closing statements.

It is important to emphasize that both parties stood by their previous approaches.

Given that both parties have claimed the costs, the Presiding Judge has given them 5 days to specify the amount of costs claimed.

On 14 March 2014 (within deadline), the PAK complied with the court order and claimed the costs in the total amount of 992 euros (nine hundred and ninety two euros).

On 25 March 2014 (after the deadline), the Claimant’s representative complied with the court order and claimed the costs in the total amount of 25,558 euros (twenty-five thousand and five hundred fifty-eight euros).

On 15 April 2014, the Specialized Panel rendered the judgment SCC-05-0113, whereby the claim for compensation of alienation of property in the amount of 3,331,250 euros and profits loss in the amount of 250,000 euros, was entirely rejected as ungrounded.
The Claimant is required to pay the Kosovo Privatization Agency, the amount of 992 euros for the procedural costs. In the reasoning of this judgment, the Specialized Panel states that the main part of this legal issue lies in the court's findings related to two key issues:
(1) What laws were applicable to the merging of 1992 and if they were duly enforced.
(2) Was it simply the fact that on behalf of the "F" the decision for merging was issued by the so-called Internal Body, sufficient to consider the transformation as discriminatory.
According to Claimant, the Law on Companies would be applied only in 1988 and the challenged merging was based on its Article 187-a. In the view of the Respondent, the whole privatization laws, approved in the late 1980s - and the well-known "Laws of Markovic" (according to last prime minister of SFRY A.M) should have been implemented. Therefore merging based on only one of them has no effect.
Regarding the second issue, the Claimant presents the view that although the imposition by the Interim Body in the SOE "F" was based on discriminatory laws, it is not itself sufficient to consider the merging as discriminatory. What is important according to the Claimant is that how the transformation was made (in this case the merging). The Claimant alleges that because most of the employees of "F -S" LLC who were given free shares, were of the Albanian ethnicity, proves that the process was conducted in a non-discriminatory way.

According to assessments of the first instance court, the UNMIK Regulation 2002/12 shall apply because the privatization of the property in stance was done in 2004. Under that Regulation, Section 5.4, any merging that occurred after March 22, 1989 is valid only if based on applicable laws, and to be executed in a non-discriminatory way. Merging in question occurred in 1992 and therefore satisfies both requirements. Merging was like "taking over" - SOE "F" was completely absorbed by JSC "S" and had lost its legal personality. The socially-owned capital of "F" became part of the capital mainly in the private ownership of the absorbing company. Therefore, the merging of 1992 was itself a classic example of privatization - a part of social capital was

transferred to become part of the primarily private company. Consequently, privatization related laws would apply.

The court found that at the time of the merging, the Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC) of 1990 set forth rules concerning privatization issues. In fact, this law - even in its first version in 1989 - was adopted after the deadline specified in the UNMIK Regulation 1999/24 (22 March 1989). However, the law that was first regulation on privatization was not itself discriminatory and therefore should be applied in accordance with Section 1.2 of UNMIK Regulation 1999/24. According to Article 2 (1) of LTSSC an enterprise can be sold whole or in part, and the proceeds accrued shall be allocated to the Development Fund - a special body established in each of the constituent members of the SFRY. The contract for the sale / privatization of socially-owned entities and capital will be encompassed by the Development Fund as per Article 2-b. In accordance with Article 4 of the same law, a special agency will provide estimates on the value of social capital for sale. The merging between JSC "S" and SOE "F" had the effect of sale of the entire Socially Owned Enterprise and privatization rules would apply. Otherwise, the JSC "S" practically acquired the enterprise for free. The fact that later the Management of the Company granted free shares for the workers of “F "is insignificant as workers were not owners of the socially-owned capital. As long as the company that survived the initial union had legal deficiencies, subsequent incorporation of the LLC "F-S" and all changes in registration and status of the Company "S" had no effect on the socially-owned capital in stance. For the whole period, from its foundation until privatization in 2004 "F – Wallpaper Factory" should be considered as a Socially-Owned Enterprise.

Concerning the issue of discrimination during merging, the court is of the opinion that for the case at hand it does not matter. Having decided on the merging without complying with the normal procedure of privatization, the Temporary Body assigned for the SOE "F" issued an unlawful decision and it is unimportant whether this decision was executed in a non-discriminatory way.

Therefore, a claim for compensation for loss of property and loss of profits will be rejected as ungrounded.

On 19 May 2014 the appeal was filed against judgment SCC-05-0113 dated 15 April 2014 of the Specialized Panel, by the “T” JSC from B-P- Serbia, due as it is said,

breach of procedure, erroneous determination of the factual situation and wrongful law interpretation.

Initially, the Appellant objects the assessments of the Specialized Panel, which found that the union-merging of “F” and “S” which occurred in 1992, constituted a classical example of privatization, given that the socially-owned capital was transferred, namely it becomes primarily a private company, therefore laws on privatisations were applied, basically the Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC). The Panel established that the Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC) although adopted after 22 March 1989 it was not discriminatory and shall be applied in accordance with Article 1.2 of UNMIK Regulation no. 1999/24. The Panel established that by deciding for merging, without obeying respective procedures of privatization, which the temporary body imposed on SOE “F”, was approved an unlawful decision and is unimportant haw such decision was rendered.

According to Appellant the Law on Enterprises (official gazette of SFRY no. 77/88, 40/89) was applied for the subject matter transaction. The law is valid along with part 1.1 of UNMIK Regulation no. 1999/24 taking into consideration that has entered into force on 01 January 1989, namely before 22 March 1989. Article 187 paragraph 1 of the Law on Enterprises sets forth that decisions on change of the enterprise status (separation or merging) shall be rendered by the Administrative Body of the enterprise. Under Article no. 187a paragraph 3 it is defined that the mutual relations of enterprises arising from the status changes will be set forth by the contract. For this purposes the management of the F enterprise – interim body rendered a decision for joining – merging respectively integration of enterprise “F” with enterprise “S” on 28 October 1992. In accordance herewith may be noticed that the procedure was followed as it was set forth by Article 187 a, paragraph 1 of the Law on Enterprises. In addition, enterprises “F” and “S”, on 28 October 1992 signed the Protocol whereby established mutual relations in accordance with Article 187a paragraph 3 of the Law on Enterprises. Article 27 of the Law on Enterprises defines that enterprises stated in paragraph 1 through 4 of this Article (socially-owned enterprises, enterprises of corporations, mixed ownership enterprises and privately-owned enterprises), have same status but also rights and obligations in the market. In consideration of this provision, it is obvious that the socially-owned enterprises have also had the rights and obligations in the merging procedure with privately-owned enterprise in accordance with Article 187 a, of the Law

on Enterprises. The Appellant alleges that no provisions exist to prohibit such merging. According to him the reasoning in the judgment of the first instance Panel is erroneous taking into consideration that the social capital of “F” became part of private ownership enterprise. For the existing transaction the Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC) shall apply. At the time the Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC) and the Law on Enterprises were in force respectively were valid and no provisions were in force to oblige “F” and “S” to apply the Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC) instead of the Law on Enterprises. F and S have chosen to apply the Law on Enterprises because it was in the common interest of these enterprises taking into consideration that this was more efficient manner to commence with business cooperation. Moreover, the legality of these transactions are also confirmed by the fact that the transaction (merging and separation) were registered with the competent body of the state namely with the Economic Court in Prishtinë/Priština and in the Economic Court in Novi Sad.

In addition, an attention shall be paid to the Regulation 2002/12 which sets forth that the unification-merging may be done when the socially-owned enterprises, in a way as it is defined by Article 5.4 of this Regulation. The Article 5.4 provides as follows: “*A re-registration or merger of a Publicly-owned or Socially-owned Enterprise after 22 March 1989 shall affect its status as a Publicly-owned or Socially-owned Enterprise only if such re-registration or merger was: Based on Applicable Law; and Implemented in a non-discriminatory manner”.*

In spite to what is stated hereupon, the subject matter transaction was allowed pursuant to applicable law even if it was based on any grounds of the Law on Enterprises or the Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC).

Merging and separation of the socially-owned enterprises was allowed pursuant to Law on Enterprises (which is valid in accordance with UNMIK Regulation no. 1999/12, taking into consideration that was adopted on 22 March 1989. Furthermore, transformation of the social capital into private capital was allowed in accordance with the Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC) (which is valid as it is not discriminatory, in accordance with part 1.2 of the UNMIK Regulation 1999/12. Basis for the respective transaction is the one valid for application of Article 5.4 of UNMIK Regulation 2002/12, not the steps which should have been undertaken during the process of implementation of this transaction. Taking into consideration the above

mentioned, merging and separation of “F” was based on a valid law. Therefore, the first condition pursuant to Article 5.4 of UNMIK Regulation 2002/12 was fulfilled. The second condition that the transaction was implemented in a not discriminatory manner was also fulfilled as it is clarified by the following paragraph.

At the hearing held on 22 January 2014 the Respondent confirmed that a single contestable issue among parties remains whether the interim measures were discriminatory or not. The Respondent does not mention the non-discriminatory manner of merging as contentious. This is sufficient for the Court to establish that the second condition under Article 5.4 of UNMIK Regulation 2002/12 was fulfilled. According to Appellant this is confirmed by the fact that during the process no employees of Albanian ethnicity were expelled from their working positions. In this aspect it shall be specified that the Respondent has provided proofs related to employees employment termination which occurred prior to merging of “F”. However, dismissal of Mr. S.S occurred in December of 1990, whereas Mr. R.Z was expelled in October of 1991. Merging of “F” took place in October 1992 and the said dismissal and expelling could not have been obstacles for merging and do not confirm the Respondent’s allegations over the discriminatory manner of the “F” merging. The Respondent provided no proofs on termination of employments after merging (as no employments of employees were terminated).

Concerning the SDR (Status Determination Report) whereby the Respondent intended to indicate that the merging of “F” was followed by discriminatory actions. The Claimant established that SDR contains errors. For instance, under point b 2.4 of the SDR, it is erroneously stated that the Head of Legal Service was expelled because of political reasons in 1993. Moreover Mrs. S.Gj, Head of the Legal Unit continued to work in “F” until 1999. Under point B 8.2 it is stated that registration of company as “F-S”, a ground which Serbia considers company as a social whereas the extract attached, by the court registry indicates that the company is in a private ownership. It is apparent the SDR intention was not to show the manner the “F” merging was carried out, but to provide the Respondent with a ground to set aside the merging, and to sell “F” afterwards, alleging that merging never took place.

The Appellant replicates and cites the Article 5.4 of UNMIK Regulation no. 2002/12 which sets forth: A re-registration or merger of a Publicly-owned or Socially-owned Enterprise after 22 March 1989 shall affect its status as a Publicly-owned or Socially-owned Enterprise only if such re-registration or merger was: Based on Applicable Law;

and Implemented in a non-discriminatory manner. The fact that the interim body administered the “F” at the moment of merging with “S: shall not be considered discrimination because of the following reasons: (i) most of employees were of the Albanian ethnicity; (ii) no employees of the Albanian ethnicity were expelled; (iii) employees of Albanian ethnicity enjoyed the same status as before merging, acquired free shares in “S” which is not contestable among parties.

In view of all these facts and grounds, the Appellant suggests the Appellate Panel to entirely amend the appealed judgment SCC-05-0113, dated 16 April 2014; to grant the Claimant’s request and to oblige the Respondent to pay the Claimant the amount of 3.331.250 €, including the interest accrued from 16 September 2004 until final payment; to pay the Claimant the amount of 250.000€ including the interest, and to compensate the Claimant with the amount of 25.558 € for the proceeding costs; or to set aside in full the appealed judgment.

On 29 May 2014 the PAK filed a response on this appeal whereby amongst others it is said that the PAK entirely objects the appeal considering it to be legally ungrounded. The Appellant’s representative have only repeated their ungrounded statements provided earlier in the proceedings, and did not prove to have any alleged breach. For this reason, the PAK upholds the challenged judgment and considers it to be correct and legal.

The PAK suggests to reject the Claimant’s appeal and to uphold the challenged judgment.

Legal Reasoning

The appeal is ungrounded

Pursuant to Article 64.1 of the Annex to Law no. 04/L-033 on SCSC (Annex), the Appellate Panel decided to dispense with the oral proceedings.

The Appellate Panel upon careful examination of all appealed allegations, the appealed judgment and all evidences submitted in the case file came to a conclusion that the appeal is ungrounded.

Appealed allegations and findings of the Appellate Panel

Initially, the Appellant objected the judgment of the Specialized Panel in all points of its reasoning.

The Appellant quotes Article 27 of the Law on Enterprises which, according to it, defines that enterprises stated in paragraph 1 through 4 of this Article (socially-owned enterprises, enterprises of corporations, mixed ownership enterprises and privately-owned enterprises), have same status but also rights and obligations in the market. According to Appellant, taking into consideration this provision it is obvious that the socially-owned enterprises have also had the rights and obligations in the merging procedure with privately-owned enterprise in accordance with Article 187 a, of the Law on Enterprises and the Appellant alleges that no provisions exist to prohibit such merging.

Based on these Appellant's allegations, the Appellate Panel has found that paragraph one and four of the Article 27 of Law on Enterprises which is referred by the Appellant sets forth decisively that the decision on merging one of another enterprise by the enterprise that joins necessarily requires consent of the Employees' Council of that enterprise. In virtue of the facts introduced in the case files it appears that this decision was rendered through a Protocol signed by the members of the interim body of "F" installed by Serbia and an representative of JSC "S" with no members of Albanian ethnicity, whereby the merging of the SOE "F" with JSC "S" from Serbia was approved. By doing so, an illegal decision was taken as it was rendered by interim body without approval of the Employees' Council which represents interest and willingness of employees.

The Appellate Panel has also found that in conformity with Article 14 of the Law on Enterprises (Official Gazette no. 77, dated 31 December 1988). "Employees shall decide to organize the joint associated labour organization, in accordance with the Statute of the Enterprise". Meanwhile, this matter is set forth by the Article 13 of the statute of this SOE which reads that: "the employees may do the changes in the organization of the enterprise so as it can join, merge into another enterprise or to be divided in two or more enterprises. The employees will decide concerning the changes and organization of the enterprise by the majority votes of the total number of employees, through referendum".

As it is stated hereupon, for the case in hand it is obvious that changes in the enterprise were undertaken in full contradiction with Article 13 of the Law on Enterprises and contrary to Article 13 of the Statute of the Enterprise.
According to Appellant Article 187 paragraph 1 of the Law on Enterprises sets forth that decisions on change of the enterprise status (separation or merging) shall be rendered by the Management Body of the enterprise. The Appellant aslo mentione the Article 187a paragraph 3 of the Law on Enterprises, which defined that the mutual relations of enterprises arising from the status changes will be set forth by the contract.

The Appellate Panel found that Article 187 of the Law on Enterprises of 29 December 1988 to which is referred Appellant, with Supplements and Amendments of this Law of 08 August 1990, the Article (187) was deleted and Article 187a was inserted, which was related to statutory changes. This amendment of the basic law, pursuant to which the decision was rendered, took place after the period defined by Article 1.1 and 2 of UNMIK Regulation no. 1999/24, because the law was amended on 08 August 1990. For this reason these appealed allegations are ungrounded.
The Appellate Panel finds that initially, the decision was rendered by interim bodies at the time when the interim measures were installed in all enterprises of Kosovo, fact which are well-known, and decisions of this body were arbitrarily and contrary with legal provisions. Thus, the decision was rendered by an incompetent body, thereforesuch decision was unlawful from the beginning.
In the other hand, related to other legal requirement of Article 187a, paragraph 3 which set forth that: “mutual relations of enterprises arising from the status changes will be set forth by the contract”. In the case at hand, we have no such mutual relations because the social capital of “F” was given for free to a private company. This is contrary to Law on Turnover and Disposition of the Socially-Owned Capital (LTDSOC), which in Article 2 reads for sale of this capital and for the body which may render such decision for sale, to be the Employees Council. To the contrary, in the case at hand the social capital of the SOE “F” was given away for free or merging of the social capital of the SOE “F” to a Joint Stock Company in Serbia, which constitutes a typical example of arbitrary and illegal decisions.

The Appellate Panel has found that truly as asserted by the Appellant a large number of employees of Albanian ethnicity retained with their work and even shares were

distributed to them. However the problem lays on the fact if any of managers of Albanian ethnicity remained to work with the SOE. If we have a look over the records dated 28 October 1992, where the merging procedures and reasons for transformation of “F” were discussed, can be seen that no Albanian was amongst six members of Interim Body of this Enterprise.

This proves another crucial moment that all transformation procedures were undertaken by violent or interim bodies installed by the government of Belgrade, having no until than Albanian manager and without approval of the Employees Council. Although a certain number of the employees retained, managers of this SOE were dismissed from their duties because they were substituted by interim management. Whereas labor force continued to work as they were needed to maintain production.

For the above reasons, the Appellate Panel establishes that the Claimant’s appealed allegations are not grounded therefore the appeal is rejected as ungrounded, and consequently the appealed judgment of the Specialized Panel is hereby upheld to be correct and legally grounded.

Therefore, because of the reasons stated above and pursuant to Article 10.10 of the SCSCL, it is decided as in the enacting clause of this Judgment.

Court fees

Given that the Appellant has paid the court fee in the amount of 100 euros, no additional tax shall be imposed.

Decided by the Appellate Panel of the SCSC on 02 April 2015.

Mr.sc. Sahit Sylejmani, Presiding Judge _____