The Constitutional Court of Bosnia and Herzegovina, sitting, in accordance with Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 57 (2) (b), Article 59 (1) and (2) and Article 62 (1) of the Rules of the Constitutional Court of Bosnia and Herzegovina – Revised text (*Official Gazette of Bosnia and Herzegovina,* 94/14), in plenary and composed of the following judges:

Mr. Mato Tadić, President
Mr. Miodrag Simović, Vice-President
Mr. Mirsad Ćeman, Vice-President
Ms. Valerija Galić,
Ms. Seada Palavrić,
Mr. Zlatko M. Knežević,
Ms. Angelika Nussberger,
Ms. Helen Keller, and
Mr. Ledi Bianku

Having deliberated on the appeal of **Mr. Aleksandar Tucikešić** in the case no. **AP 3879/20,** at its session held on 3 December 2021, adopted the following

DECISION ON ADMISSIBILITY AND MERITS

The appeal lodged by Mr. **Aleksandar Tucikešić** is hereby granted.

A violation of the right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is hereby established.

The Verdict of the Court of Bosnia and Herzegovina, no. S1 2 K 029157 20 Kž of 2 October 2020 is hereby quashed.

The case shall be remitted to the Court of Bosnia and Herzegovina, which is to take a new decision in an expedited procedure in accordance with Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Pursuant to Article 72 (5) of the Rules of the Constitutional Court of Bosnia and Herzegovina, the Court of Bosnia and Herzegovina is hereby ordered to inform the Constitutional Court of Bosnia and Herzegovina, within 30 days as from the date of delivery of this Decision, of the measures taken with a view to enforcing this Decision.

REASONING

I. Introduction

1. On 30 October 2020, Mr. Aleksandar Tucikešić ("the appellant") from Banja Luka, represented by Law Firm Pizović d.o.o. Sarajevo, lodged an appeal with the Constitutional Court of

Bosnia and Herzegovina ("the Constitutional Court") against the verdicts of the Court of Bosnia and Herzegovina, nos. S1 2 K 029157 20 Kž of 2 October 2020 and S1 2 K 029157 19 K of 28 May 2020. The appellant requested an interim measure postponing the enforcement of the imposed sentence of imprisonment pending a final decision on his appeal.

II. Procedure before the Constitutional Court

2. The Constitutional Court passed a Decision on interim measure no. AP 3879/20 of 3 March 2021 (available on the website of the Constitutional Court: www.ustavnisud.ba), dismissing as unfounded the appellant's request for an interim measure.

3. Pursuant to Article 23 of the Rules of the Constitutional Court, on 8 December 2020 the Court of BiH and the Prosecutor's Office of Bosnia and Herzegovina ("the Prosecutor's Office of BiH") were requested to submit their respective replies to the appeal.

4. The Court of BiH submitted its reply on 18 December 2020 and the Prosecutor's Office of BiH did so on 22 December 2020.

III. Facts of the Case

5. The facts of the case, as they appear from the appellant's assertions and the documents submitted to the Constitutional Court, may be summarized as follows.

6. By its verdict no. S1 2 K 029157 19 K of 28 May 2020, the Court of BiH found the appellant guilty of having committed, by means of actions described in more detail in the enacting clause of the verdict, a criminal offense of Associating for the Purpose of Perpetrating Criminal Offenses under Article 249 (2) of the Criminal Code of BiH and a criminal offense of Accepting Gifts and Other Forms of Benefits under Article 217 (1) of the Criminal Code of BiH, all in conjunction with Articles 29 and 53 of the Criminal Code of BiH. The Court of BiH convicted the appellant and imposed a sentence of one-year imprisonment and a single fine of BAM 7,000.00. The same verdict forfeited from the appellant property gains acquired through the perpetration of the criminal offense, and the appellant was obliged to compensate the damage to BiH, in the amounts specified in the verdict.

7. According to the reasoning for the verdict, at the main trial on 7 February 2020 the Court of BiH, pursuant to Article 240 of the Criminal Procedure Code of Bosnia and Herzegovina ("the Criminal Procedure Code of BiH"), accepted a consensual proposal by the prosecutor and defence counsel of the then accused T.K. and D.D. that, prior to hearing the witnesses proposed in the

indictment, the accused T.K. and D.D. be heard in the capacity of witnesses. In that connection, references were made to Article 6 (2) of the Criminal Procedure Code of BiH, which stipulates that the suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence favourable to him. In addition, it was mentioned that it was about a consensual proposal by both the prosecution and the defence. According to the position of the Court of BiH, this did not amount to a violation of the appellant's right to defence, since he was, as were T.K. and D.D., already during the first examination, advised about his right that he may deposit a testimony in the capacity of a witness, during which occasion he will be subjected to direct, cross and additional examination. Furthermore, it was indicated that the appellant failed to avail himself of the aforementioned right before the end of the main trial, as well as that he did have and did use a possibility to cross-examine witnesses T.K. and D.D. and to question their credibility and authenticity and reliability of their testimonies. Finally, it was indicated that the court assessed all evidence conscientiously within the meaning of Article 281 (2) of the Criminal Procedure Code of BiH, including the testimonies of witnesses T.K. and D.D., individually and in connection with other evidence, so that the convicting verdict was not based solely or to a decisive extent on the testimonies of these two witnesses.

8. Furthermore, it follows from the reasoning of the verdict that the appellant's assertion suggesting that the testimonies of witnesses T.K. and D.D. were unlawful evidence given the plurality and accumulation of procedural roles was assessed as ill-founded, since, at the time of depositing the testimonies at the main trial, they had the capacity of accused persons, which was the reason why they could not be heard simultaneously in the capacity of witnesses. In that connection, it was indicated that the testimonies of these witnesses were not obtained contrary to Article 10 of the Criminal Procedure Code of BiH, which regulates the lawfulness of evidence. In support of the aforementioned, the position of the Court of BiH in the case no. S1 2 K 023053 19 Kž of 22 February 2019 was interpreted in detail, wherefrom, among other things, it follows that in the event where the defence proposed for the accused to be heard as a witness in the evidentiary proceedings, the court was obliged to accept the mentioned evidentiary proposal, in view of Article 6 (2) of the Criminal Procedure Code of BiH, in conjunction with Article 259 (2) of the Criminal Procedure Code of BiH, given that, unlike other evidentiary proposals of the defence, regarding this evidentiary proposal, it did not enjoy discretion. The Court of BiH further indicated that T.K. and D.D. availed themselves of their lawful right and deposited the testimonies about the facts in the capacity of witnesses, that they were warned about the obligation to tell the truth, and subjected to

direct and cross-examination, thereby making their testimonies lawful evidence. The mentioned testimonies were not obtained through violations of human rights and freedoms safeguarded by the Constitution and international treaties, which BiH had ratified, or through serious violations of the Criminal Procedure Code of BiH, but through the exercise of the rights of the accused to defence. According to the position of the Court of BiH, if it had not accepted the proposals of the defence for the accused T.K. and D.D. and if it had not allowed them to deposit their testimonies in the capacity of witnesses, it would have acted contrary to Article 259 of the Criminal Procedure Code of BiH and it would have violated their right to defence.

9. The Court of BiH indicated that the presented evidence indisputably confirmed that the appellant had committed the criminal offenses he had been found guilty of. In that connection, it was indicated that the appellant, as a Senior Associate – Shift Leader at the Customs Reporting Office at Gradiška Border Crossing, within the scope of his powers, and the scope and substance of duties stipulated under the Rulebook on Internal Organization at the Indirect Taxation Authority ("the Rulebook"), omitted to carry out a duty of supervision of the regularity of work of customs officers, the accused T.K. and D.D., and gave permission for the realization of previously agreed plan of importing second hand appliances without carrying out a regular procedure of customs control, in which way he contributed his part as a member of a group to the perpetration of a criminal offense of Accepting Gifts and Other Forms of Benefits under Article 217 (1) of the Criminal Code of BiH. According to the position of the Court of BiH, the presented evidence indisputably confirm the connection of the appellant with the convicted persons T.K. and D.D. and their actions in committing a criminal offense, which were mutually complementary, since T.K. and D.D. as associates-customs officers omitted to perform mandatory customs control and to charge the import duties, whereas the appellant, as a Shift Leader and their immediate superior, omitted to carry out supervision of the regularity of their work and approved their conduct in advance. All the aforementioned, according to the position of the Court of BiH, was confirmed by the testimonies, which were consistent with one another, given by witnesses T.K. and D.D. who stated that without the approval of their boss (the appellant) they were unable to omit to carry out official actions, *i.e.* to omit to carry out customs control and charge import duties, which was the reason why they requested and obtained the consent from the appellant to do so, and they gave the accepted gift in the form of money for omitting to carry out official actions to the appellant himself. In support of the aforementioned, it was pointed out that, in order to realize the arrangement, they were waiting for the appellant to return from vacation at the time.

10. In addition, based on the specific provisions of the Rulebook, which prescribe the job description for the position in question, it was established that the appellant, as a Shift Leader, was obliged to look after the regularities of the work of the shift staff (associates - customs officers) regarding the application of regulations, in the case at hand of the presently accused T.K. and D.D., and to undertake appropriate measures if there existed elements of customs offences. Based on the testimonies deposited at the main trial by T.K. and D.D. in the capacity of witnesses and undercover investigator "Dušan", as well as based on all other evidence presented at the main trial, the court established that the appellant had acted contrary and omitted to look after the regularity of the work of T.K. and D.D. regarding the application of regulations governing the procedure of customs control of goods and that he had given them permission to let the specific truck, which transported the second hand appliances, pass via the border crossing without performing a regular procedure of customs control and charging the import duties, and that he had received a gift in the form of money in the amount of 1,400 EUR.

11. The reasoning of the judgment further indicated that, in their testimonies, witnesses T.K. and D.D. described in a thorough and convincing manner that in August 2018 first T.K. on his own and then T.K. and D.D. together got in touch and met with informant "Fanatikos" and with undercover investigator "Dušan" with whom they had agreed the import of a truck of second hand appliances via Gradiška Border Crossing without employing a regular procedure of customs control, and that they had requested and received from the mentioned persons for the favour a gift in the form of money, which arrangement had been realized on 16 September 2018, when they had let the truck, which transported second hand appliances, to pass the Gradiška Broder Crossing without employing a regular procedure of customs control. Witnesses T.K. and D.D. confirmed that their immediate superior – the appellant was informed about their arrangement with informant "Fanatikos" and with undercover investigator "Dušan" and that he agreed and approved the implementation of the plan to import appliances without employing a regular procedure of customs control, as well as that they had requested and received from the undercover investigator a gift in the form of money in the amount of 2,000.00 EUR, which amount of money they turned over to the appellant, who subsequently gave each of them 300.00 EUR of that amount, while he kept the remaining amount of money of 1,400.00 EUR for himself. In addition, both witnesses confirmed that already during the first contact with the informant and the undercover investigator they had said that the boss (the appellant) had been on vacation and that they had not been able to promise anything before his return from vacation. Furthermore, both witnesses confirmed that they had informed the appellant about the plan as soon as he returned from vacation and that he approved the plan. According to the

testimony of witness T.K., the price was set initially at 10 euros per piece, but the appellant set it at seven euros, and T. K. informed the informant and the undercover investigator about it. Besides, T.K. explicitly stated that the appellant did not attend any of the meetings with the informant and the undercover investigator but was familiar with all the details of the arrangement and the plan to import appliances without applying the customs control and paying customs duties, which realization he approved, stating that he had no contact with the informant and the undercover investigator without informing the appellant thereof. According to the testimony of witness D.D., T.K. communicated with the informant and the undercover investigator via the application Viber, they agreed the amount of money they would receive as a gift not to carry out customs control they were obliged to perform and, as he understood, the amount of 100 euros per one ton of goods had been agreed. At the evening when the truck with appliances arrived at the border, he and T.K. had met again with the persons one of whom introduced himself as Dušan, with whom they had agreed to let the mentioned truck pass without customs control. They all went to a coffee shop, where they continued negotiating the price for not carrying out customs control and, eventually, they accepted 2,000 euros as a gift for that favour.

12. The reasoning for the verdict interpreted in detail the testimony of the witness - undercover investigator “Dušan” who, among other things, confirmed that T.K., during the meeting on 2 August 2018, had told him that his boss Aco – the appellant was on annual leave and that they had to wait until he returned, as they could not realize anything without his approval. The same happened during their second meeting on 16 August 2018, during which D.D. was also present, when they repeated that their arrangement had to be confirmed by the boss who was sleeping at the time, whereas, during their third meeting on 16 September 2018, T.K. and D.D said that their boss – the appellant approved the realization of the plan and issued an instruction to prepare CSD. The witness further stated that at the evening when the informant and he had arrived at the border crossing, he made the third contact with T.K. and D.D. and they went to a nearby coffee shop. On that occasion, T.K. told them that the price was seven euros per piece, stating that one could take as much as 2,200 euros for that truck, to which undercover investigator “Dušan” said that he would give him a total of 2,000 euros and T.K. immediately accepted it. In addition, on the same occasion T.K. told them that the boss – the appellant approved the realization of the plan and that everything was fine and that the goods could pass without customs control and that they should make CTD. The witness further confirmed that he had personally counted and handed over to D.D. 2,000 euros and that all the banknotes were marked and that he did not recall whether all the banknotes were €100 banknotes. Furthermore, the witness stated that he had later learnt that an employee of the

Indirect Taxation Authority ("ITA"), who was sitting in the same cafe three or four tables away from them, was the Shift Leader Aco Tucikešić (appellant). However, the witness was unable to confirm in the courtroom whether that employee was actually the appellant, stating that the employee did have a beard and grey hair, which description corresponded to the appellant's physical appearance, but the witness stated that he could not assert that it was him, as the employee did not approach the table where they were sitting with T.K. and D.D. Besides, it follows from the reasoning of the verdict that the testimony of witness "Dušan" was confirmed by his reports, which he had made as an undercover investigator on the circumstances of special investigative actions, which were also interpreted in the relevant part of the verdict, as well as audio recordings of meetings with T.K. and D.D., and a video footage of the meeting held at that evening.

13. Furthermore, witnesses B.H. and M.P, employed with the State Investigation and Protection Agency ("SIPA") as investigators, confirmed in their testimonies at the main trial that they had carried out investigative actions in the present case and established cooperation with informant "Fanatikos" who conveyed them information that he had started importing second hand appliances and that a person aka "Kapetan" at the Gradiška Broder Crossing asked for 1,500 euros from him or from the persons who import second hand appliances in order not to carry out customs supervision and control, *i.e.* to allow that imported goods enter into BiH without customs procedure and control. They checked the said information and established that it was about T.K. They confirmed that special investigative actions were conducted first concerning T.K. and then concerning D.D. and that no investigation and special investigative actions were conducted concerning the appellant. The witness B.H. stated also that he knew the appellant, as T.K. said to the undercover investigator (he was familiar with the contents of his reports) that he could do nothing without his "Boss Aco" who was on annual leave at the time.

14. Furthermore, the Court of BiH indicated that it took into account the fact that witnesses T.K. and D.D. had also perpetrated and had been convicted of the same criminal offense as the appellant, but that that in itself was not a reason not to give credence to their testimonies. In that connection, it was indicated that the appellant's defence was afforded a possibility to cross-examine the aforementioned witnesses and possibly to find any inconsistencies in their testimonies and to discredit them, which, in the view of the Court of BiH, the appellant's defence failed to do so. In so doing, it was indicated that the appellant himself did not even try to do that. In view of the aforementioned, the Court of BiH admitted these testimonies as lawful and reliable evidence, on which a court decision may be based, and assessed them individually and in connection with other evidence, all in accordance with the principle of free evaluation of evidence.

15. In addition, the Court of BiH indicated that the testimonies of witnesses T.K. and D.D. were objective and reliable, and that the witnesses described in a thorough and convincing manner how the mentioned criminal event had occurred and what the role of the appellant had been. Furthermore, it was indicated that these testimonies were assessed as consistent regarding the decisive facts, and were corroborated with other presented evidence of both subjective and objective nature. In so doing, not a single reason or motive was found on the part of these witnesses to blame the appellant for something he had not done, including a plea-bargaining arrangement entered into between these witnesses and the prosecutor in a written form, as claimed by the defence for the appellant. During the course of testimonies deposited by these witnesses, the appellant himself did not challenge their testimonies for once.

16. Next, the Court of BiH indicated that the conclusion suggesting that the testimonies of T.K. and D.D. are truthful and reliable and that they can and must be trusted was supported by the fact that the realization of the plan and the arrangement regarding the transportation of goods without taxation had been postponed until the appellant's return from annual leave. If T.K. and D.D. had had realized the plan without the knowledge of the appellant they would have actually used his absence and stay on annual leave and they would not have waited and insisted on the realization to begin only upon his return from annual leave. The realization of the arrangement had started precisely at the time when the appellant had returned from vacation and started working. In support of the aforementioned, it was indicated that, based on the administrative decision on annual leave for the appellant carrying the specified number and date, it was established that the appellant had used the annual leave between 20 July and 6 August 2018, including 2 August 2018, as witnesses T.K. and D.D. claimed.

17. In view of the above, the Court of BiH concluded that witnesses T.K. and D.D., even before the main trial, spoke identically about the appellant's involvement in the perpetration of the criminal actions, which was corroborated by the undercover investigator in his testimony, as well as by the reports he prepared concerning the said circumstances, which was all recorded on audio records. Therefore, the appellant's defence was not accepted suggesting that witnesses T.K. and D.D. blamed him only at the main trial, with a view to getting for themselves as milder punishment as possible, or that these witnesses abused the appellant's name, as their boss, in the conversations with the informant and the undercover investigator with a view to "concluding the bargain and increasing the price" for their "services", *i.e.* that he was involved in this entire event only in order for these two witnesses to get a better outcome in the plea-bargaining arrangement.

18. The Court of BiH concluded that the appellant's actions satisfied all features of criminal offenses he was found guilty of. In addition, it was concluded that the fact that the amount of 1,400 euros, which the appellant had kept for himself, according to the presented evidence, had not been found with him during the search, was not of decisive importance, particularly bearing in mind that from the moment when D.D. had handed over the mentioned amount of money to the accused (16 September 2018) to the moment when the search of the appellant had been carried out (26 February 2019) a longer period of time had passed during which the appellant had certainly disposed of the mentioned amount of money.

19. According to the position of the Court of BiH, the appellant had acted with direct intent. It said that at the time of the perpetration of the criminal offense he was aware of all the elements of these criminal offenses. In that connection, it was indicated that the appellant had been employed with the ITA for a long period, and had known all about the process of customs clearance at border crossings, and that during the engagement in joint illegal affairs he had been inquiring who else had known about them. The appellant connected consciously and freely with T.K. and D.D. for perpetrating a criminal offense of Accepting Gifts and Other Forms of Benefits and became a member of a group. As a member of the group, through deliberate and wilful failure to carry out supervision of the regularity of the work of customs officers T.K. and D.D., and by giving consent and approval for them to omit for money official actions they had to perform, and eventually accepting the amount of money which the two of them accepted in the form of a gift for omitting official actions, he played his part and contributed in a decisive manner to the perpetration of criminal offenses which he was found guilty of.

20. By the verdict no. S1 2 K 029157 20 Kž of 2 October 2020, the Court of BiH dismissed as ill-founded the appellant's appeal lodged against the first instance verdict. The appeal of the Prosecutor's Office of BiH was partly granted regarding the decision on principal punishment, whereby imprisonment for a term of two years was imposed on the appellant as the principal punishment for the criminal offense of Accepting Gifts and Other Forms of Benefits, while the remainder of the appeal of the Prosecutor's Office was dismissed and the first instance verdict was upheld.

21. It follows from the reasoning of the verdict that the appellant indicated in the appeal that: he was pronounced guilty exclusively and solely on the basis of the testimony of the other two co-accused who entered into a plea-bargaining arrangement with the Prosecutor's Office and who testified at the main trial; that undercover investigator Dušan in no way connected him to the perpetrated criminal offense (that he had not established any contact whatsoever with the appellant,

that no special investigative actions had been undertaken against the appellant); that the position referred to in the Decision of the Constitutional Court no. AP 661/04 should be applied to the present case.

22. Examining this part of the allegations stated in the appeal, the Court of BiH concluded primarily that the appellant's indicative position was incorrect suggesting that those were illegal evidence. In support of the aforementioned, it was indicated that there was neither a single situation in the present case that was regulated by Article 10 of the Criminal Procedure Code of BiH, nor did the appellant offer any evidence whatsoever in that regard. In addition, it was indicated that the notion of illegal evidence is substantially broader, thus it was necessary to examine whether the present case concerned a serious violation of the provisions of the criminal procedure referred to in Article 297, paragraph 2 of the Criminal Procedure Code of BiH, namely whether references made in the verdict to such evidence had effect on the lawful and correct adoption of the verdict.

23. Furthermore, as to the question whether the testimonies of witnesses who had entered into a plea-bargaining arrangement (irrespective of the chronology of testimonies – before or after the concluded/submitted arrangement) constitute evidence that have the equal value as all other evidence used in the criminal proceedings, in what way such evidence may be used in the criminal proceedings *i.e.* in which way will the panel approach their assessment, the position of the Constitutional Court was first pointed out that equal criteria should be applied to all the evidence during the assessment thereof, including the testimonies of witnesses who entered into a plea-bargaining arrangement, thereby confessing the guilt for the offenses they were charged with, or witnesses who were granted immunity. Besides, it was indicated that the Constitutional Court explicitly ruled out a possibility for such evidence to be considered unreliable automatically, and thus not to be considered, or, because of the way in which they were obtained, to be subjected to different analysis and assessment when compared to other evidence. According to the position of the Constitutional Court, the panel has the obligation, when considering each testimony, including the testimony of witnesses who entered into a plea-bargaining arrangement or were granted immunity, to act carefully and consider all the facts affecting its reliability. In the Decision no. AP 661/04, which the appellant referred to, the Constitutional Court indicated that: "Although witnesses as this one can oftentimes be unreliable, that in itself is not the reason not to give credence to the testimony of such a witness", and concluded that "where a judgment of conviction is based to the largest extent on the testimony of a witness who had entered into a plea-bargaining arrangement with the prosecutor, where the court did not provide a logical and convincing

reasoning for the assessment of that as well as other pieces of presented evidence, rather such assessment appears arbitrary, there is a violation of the right to a fair trial".

24. The second instance court agreed with the position of the first instance court that T.K. and D.D. availed themselves of the right referred to in Article 259 (2) of the Criminal Procedure Code of BiH to be heard in the capacity of witnesses in their own case, that during the main trial they were appropriately warned within the meaning of Article 86 of the Criminal Procedure Code of BiH and they were subjected to cross-examination by the defence. In addition, it was indicated that the testimonies of the mentioned witnesses were first linked and then assessed individually and in mutual connection with other evidence of objective nature, primarily with the contents of the intercepted conversations of the then suspects, and with the testimony of the witness - undercover investigator "Dušan" who testified on the circumstances of the meeting and communication with the then suspects T.K. and D.D., which indicates that this is not an arbitrary evaluation of their testimonies.

25. In relation to the appellant's claim that the first instance court failed to offer the reasons and reasoning for, as he stated, "unlawful" change of the order of presentation of evidence, it was indicated that Article 261 (2) of the Criminal Procedure Code of BiH prescribed the order of presentation of evidence, as well as that Article 240 of the same Code granted the power to a judge, *i.e.* to the president of a panel to change that order. Accordingly, it was concluded that the judge in charge could determine the stage of the proceedings at which the mentioned witnesses would be heard, and thus in line with that accept the joint proposal of the defence counsels and of the prosecutor to hear, before presenting other evidence, the then accused T.K. and D.D. In addition, it was indicated that the appellant and his defence counsel were informed in a timely fashion of the change in the order of presentation of evidence (by way of the letter of the court dated 15 January 2020), and that they were afforded a possibility to attempt to discredit them through cross-examination. According to the position of the Court of BiH, such conduct in the given situation was in conformity with the law, and the fact that the witnesses were heard before the presentation of evidence proposed in the indictment carried no special meaning in itself. Finally, the second instance court agreed in whole with the reasons and reasoning provided by the first instance court in this part and assessed the appellant's allegations set out in the appeal as ill-founded.

26. Furthermore, it follows from the reasoning of the judgment that the appellant stated in the appeal that the credibility of witnesses T.K. and D.D. was brought into question because of the fact that they had entered into plea-bargaining arrangements on 15 January 2020, which were delivered to the court on 7 February 2020, *i.e.* after they were heard as witnesses. Moreover, the appellant

claimed that a violation of the provisions of criminal procedure existed, which was reflected in the duality of procedural roles of the parties to the proceedings, given that it was impossible for the accused to be both the witness for the Prosecutor's Office and the witness in his own matter, while he had already entered into a plea-bargaining arrangement. Finally, the appellant also pointed to the violation of the provision under Article 297 (2) in conjunction with Article 265 of the Criminal Procedure Code of BiH given that these co-accused, while testifying in their own favour, confessed all criminal actions, and the court had to issue a ruling on the separation of the proceedings concerning them for the purpose of scheduling a hearing for the pronouncement of a criminal sanction.

27. The Court of BiH indicated that the circumstance that T.K. and D.D., at the time of depositing testimonies in the capacity of witnesses, had the capacity also of the accused persons was not in contravention of Article 259 of the Criminal Procedure Code of BiH, *i.e.* that the cited provision precisely prescribes a possibility that the accused may be heard in the capacity of a witness. In addition, in connection with the claim about the duality of the status of the heard witnesses and the treatment of their statements, the Court of BiH referred to the position of the European Court of Human Rights ("the European Court") in the case of *Luca v. Italy*, according to which the European Court made no distinction between the statements of witnesses and co-accused nor does Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention") stipulate any rules whatsoever about the admissibility of evidence. Accordingly, it was concluded that the testimonies of T.K. and D.D. represent valid evidence based on law. In support of the aforementioned, references were also made to Article 15 of the Criminal Procedure Code of BiH (free evaluation of evidence), according to which the court is not bound or limited by special rules of evidence, for which reason also there are no legal impediments to hear the co-accused in the capacity of witnesses. It was also noted that the factual question in every specific case is whether those testimonies, in whole or in individual parts thereof, will be accepted eventually as correct, or not, and to what degree they will confirm or invalidate the claims of the parties to the proceedings.

28. Next, it was indicated that the first instance court rendered a ruling on the separation of the proceedings concerning T.K. and D.D. when conditions were fulfilled to do so – when the previously concluded plea-bargaining arrangements were delivered to the court for consideration. In this part, references were made to Article 265 of the Criminal Procedure Code of BiH, which prescribes that if a confession of the accused during the main trial is complete and in accordance with previously presented evidence, then, in the evidentiary proceedings, only evidence related to

the decision on criminal sanction shall be presented. According to the position of the Court of BiH, the application of the cited provision implies a congruence between the confession of the accused and the indictment in essential elements, wherefrom a logical conclusion follows that partial, incomplete confessions cannot be accepted, or such confessions that are not in accordance with the previously presented evidence that confirm the well-foundedness of the indictment. Next, it was indicated that in the present case the witnesses – co-accused persons were heard in the capacity of witnesses before the presentation of any piece of evidence whatsoever of the prosecution, which would as such confirm the accuracy of legal features of the criminal offense described in the operative part of the indictment, conditions were not met for the evidentiary proceedings to be restricted immediately to the presentation of evidence relating to the decision on criminal sanction. T.K. and D.D., during consultations with their defence counsels, through the testimonies in the capacity of witnesses in their own matter, practically decided to confess their guilt subsequently (during the main trial), and it was logical for them to enter into a plea-bargaining arrangement and thus to reduce the risk regarding the pronunciation of the type and amount of criminal sanction to an acceptable extent, which was done by submitting the plea-bargaining arrangement to the court immediately after depositing their testimonies at the main trial.

29. The Court of BiH assessed as ill-founded the appellant's claims that the enacting clause of the first instance verdict was contradictory in itself as it is clear that the price for the favour was negotiated between undercover investigator Dušan and T.K., that the first instance court dealt with presumptions and speculations when making a decision to forfeit from him 1,400 EUR, as that money had never been found with him, that the first instance verdict failed to present the reasons and reasoning as to his affiliation with the group and his intent.

30. In this part, the Court of BiH primarily indicated that the operative part of the verdict mentioned the appellant's actions reflected in "…deliberate omission to perform his duty of supervision of the work of other members of the group of people... namely he created conditions for customs officers - associates, and then approved the realization of the previously agreed plan... and accepted money which the group members requested and/or accepted as a gift in the form of money, and then he shared the mentioned money into portions known to him and handed it over, among others, to the members of the group of people T.K. and D.D....", which actions were undertaken between 2 August and 16 September 2018 by the group members, in a manner described in the enacting clause of the challenged verdict. The decisive facts were correctly established by hearing primarily the co-accused witnesses T.K. and D.D., whose testimonies were entirely consistent and corroborated with the testimony of undercover investigator – witness "Dušan" and

with material evidence, *i.e.* the contents of the intercepted conversations of the then suspects T.K. and D.D. Furthermore, it was pointed out that the group had three members – the appellant, and the accused T.K. and D.D., which fact was correctly considered in the context of the appellant's superiority in terms of his official position (Senior Associate – Shift Leader) and the two mentioned persons as Associates – Customs Officers at the same border crossing, and their previous arrangement. It was established that the group functioned upon the principle of criminal operation and that the appellant was the member thereof on the basis of the testimonies of T.K. and D.D. who described their own, as well as the appellant's role in planning and realization of the perpetration of the criminal offense of accepting a gift and other forms of benefits under Article 217 (1) of the Criminal Procedure Code of BiH.

31. The Court of BiH assessed as ill-founded the appellant's claim that, considering that special investigative actions had not been undertaken against him, he was not at all aware of the actions taken by T.K. and D.D. and that the two of them abused his name during the negotiations with the undercover investigator with a view to "increasing" the price for their own services. In that connection, it was indicated that the first instance court assessed all allegations of the heard witnesses, as well as material evidence, especially witnesses T.K. and D.D. regarding the circumstance of the appellant's involvement in relation to the omission to carry out the supervision over them as his subordinates, and his approval for the realization of the plan agreed in advance, which was reflected in the omission to carry out the customs control, for which T.K. and D.D. received the amount of 2,000 EUR, which were given to them by the undercover investigator. Furthermore, it was indicated that special attention was paid to the circumstances and contents of communication of the co-accused T.K. and D.D. as members of the group with the informant, and then with the undercover investigator, their negotiation in relation to the amount they requested from the undercover investigator for omitting to carry out the customs control, taking the money from that person and the handover thereof to the appellant, and the final distribution of the received money in a way so that the appellant kept for himself the amount of 1,400 EUR, whereas he gave the two of them 300 EUR each for the undertaken criminal action. According to the position of the second instance court, T.K. and D.D. described credibly and truthfully the incriminating event and their testimonies were corroborated in the relevant parts by the testimonies of other witnesses, primarily by the testimony of undercover investigator "Dušan", as well as with material documents, namely by control evidence.

32. The appellant's claims challenging the truthfulness and credibility of the testimonies of witnesses T.K. and D.D. were assessed as ill-founded, too. In that connection, references were made

to evidence obtained during the investigation relating to the contents of the intercepted conversations of the then suspects T.K. and D.D., which undoubtedly link the appellant directly to the perpetration of the offense. These conversations were analysed in detail and certain parts were interpreted as well (particularly indicative was the conversation of 16 August 2018, which read: "... we will only convey these details to Aleksandar... I will tell you in a message ready, and you tell me when we will have lunch...), which shows how the roles among the members of the group were distributed, and that the appellant's role was reflected not only in giving the consent to the witnesses – co-accused for the perpetration of the offense, which as such could not have been perpetrated without him, but also in relation to the arrangement regarding the requested amount of money. According to the position of the second instance court, also correctly linked was the testimony of witness – undercover investigator "Dušan" who indicated, both at the main trial and in his reports prepared regarding the circumstances of carrying out special investigative actions, that the then suspects T.K. and D.D. said that they had to wait with the realization of the plan until their boss Aco (the appellant) returned from his annual leave, which was confirmed on the basis of the contents of the Ruling of the Indirect Taxation Authority, Banja Luka Regional Centre, dated 14 May 2018. Finally, it was indicated that the appellant, save for pointing to the plea-bargaining arrangements entered into by T.K. and D.D., did not point to the existence of any other motive (feud, revenge and such like), for which the mentioned witnesses would blame him. In connection with the arrangements, it was indicated that T.K. and D.D. tried to resolve their own situation as soon as possible – they admitted the guilt and reached a plea-bargaining arrangement, and had no motive whatsoever to blame their superior for something he had not done. According to the position of the second instance court, it was far more logical to try thereafter to reduce the appellant's role and importance as their superior in order for him to help them subsequently as a token of appreciation. In connection with the appellant's claim that T.K. and D.D. had mentioned his name to the undercover investigator only in order "to increase the price" for their service, and that he had not been aware of the previous arrangement and realization of the plan, it was indicated that it would be completely illogical for T.K. and D.D. to wait for his return from annual leave, *i.e.* that it would have been far more logical for them to use the absence of their boss and to get the job done before he returned from annual leave and to share all the received money between the two of them, instead of giving the total amount of money to the appellant and wait for him to distribute it. According to the assessment of the second instance court, this also shows that it all occurred precisely as T.K. and D.D. described and what they said to the undercover investigator and the informant about the role and importance of the appellant in the realization of the plan.

33. In connection with the appellant's claim that it was not established who the group organizer was, the second instance court indicated that it was irrelevant, as the appellant was not charged with being the organizer, although he was the superior to T.K. and D.D., but only that he was a member of the group, which was to his advantage and put him in a more favourable position.

34. The second instance court assessed as ill-founded the appellant's allegations stated in the appeal, which read that the time limit of 30 days was exceeded between the two hearings, so that the main trial could not have resumed as if this adjournment had not taken place at all. In that connection, it was indicated that the judge in charge had not requested loud and clear the consent of the parties to resume the main trial without presenting anew the already presented evidence, as well as that the challenged verdict in its reasoning had not explicitly addressed this decision, as well as that the appellant's defence counsel, or anyone else, had not reacted for that matter at that moment, but they practically agreed with such conduct of the judge in such a way so as to move right away to the presentation of the closing statement, since the evidentiary proceedings had already been finalized earlier, and that only the closing statement had been left to present. Finally, it was indicated that the appellant had not reasoned in the appeal whether the mentioned proceedings resulted in some detrimental consequences for him, *i.e.* that the court had not established so based on the inspection of the case file.

35. The second instance court assessed as well-founded the appeal of the Prosecutor's Office in the part relating to the decision on the principal punishment imposed on the appellant for the criminal offense under Article 217 (1) of the Criminal Code of BiH. In that connection, it was indicated that the first instance court, in addition to the circumstances qualified as mitigating, had not assessed, as correctly mentioned in the appeal of the Prosecutor's Office, a series of circumstances which, in their essence, were aggravating, which, as such, point to the necessity of distinction between the punishment imposed on the appellant and punishments imposed on the co-accused in this case who entered into plea-bargaining arrangements (the identical punishment of imprisonment was imposed as that imposed on the appellant). Namely, according to the position of the second instance court, the first instance court had not assessed sufficiently the appellant's key role in the perpetration of the offense, which was reflected in his superior position to the other two co-accused, which, as such, was manifested through giving consent for undertaking any of their criminal actions. Also, the first instance court completely unfoundedly disregarded also the circumstance pointing to a greater degree of guilt of the appellant when compared to the already convicted persons, *i.e.* that in the end he was the one to decide about the distribution of the property gain acquired through the perpetration of the criminal offense in such a way as to retain for himself

a greater share (1,400 EUR), while he gave to the other two members of the group 300 EUR each. Thus, in that sense the total amount acquired by the appellant was more significant and required the pronunciation of a more severe punishment. Finally, it was indicated that precisely the appellant was the person who was supposed to oversee the regularity of the work of everyone working in his shift, to prevent unlawful work and to uncover those conducting themselves contrary to the law and rules of service.

IV. Appeal

a) Allegations stated in the appeal

36. The appellant claimed that the challenged verdicts violated his right under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

37. Namely, the appellant claimed that his procedural rights were violated, as the proceedings conducted against him were obviously unfair due to the fact that the Court of BiH did not establish truthfully and completely the facts that were important for the adoption of a lawful decision, that it did not examine and establish with equal attention the facts incriminating him as well as those in his favour, that it had applied the substantive and procedural law in a manifestly arbitrary manner, which all made impossible his right to defence and, eventually, resulted in a verdict of conviction.

38. Among other things, the appellant indicated that the conclusion of the first instance court was unacceptable in that the verdict was not based for the major part on the testimonies of the co-accused in this case T.K. and D.D. who entered into plea-bargaining arrangements with the Prosecutor's Office during the criminal proceedings, which conclusion the second instance court agreed with. He indicated that it was undisputed in the proceedings that he was not the subject of special investigative actions, nor did he engage in contact with the undercover investigator with the code name "Dušan", or with the informant with the code name "Fanatikos", and he did not even know how they looked like, which was all confirmed by the persons heard in the capacity of witnesses: B.H., M.P. and undercover investigator "Dušan", and he cited parts of their testimonies. He indicated in particular that everything that witness "Dušan" knew about him was told to him by the co-accused T.K. on two occasions "the boss is sleeping and the boss is on annual leave". According to his claims, the Court of BiH drew a conclusion from this that he had participated in the group for the perpetration of criminal offenses. In so doing, the part of the testimony of witness "Dušan" was disregarded and was not assessed that when he had a meeting at a coffee shop with T.K. and D.D. the appellant was sitting several tables away from them, that he did not approach their table, or show any interest whatsoever in what was going on at their table. In his opinion, all

the aforementioned suggests that the claim that any other evidence existed that incriminate him was false, except for the testimonies of the two accused who testified at the time when the plea-bargaining arrangements had already been entered into. Finally, as the challenged verdict was based not only "to the largest extent", but also "exclusively and solely" on the testimonies of the accused persons who had entered into the plea-bargaining arrangements with the Prosecutor's Office, in the appellant's opinion, it was necessary to take into account the positions of the Constitutional Court taken in the Decision no. *AP 661/04,* that is to say that the position of the second instance court was unacceptable, reading that there was no room for their application reasoning that other pieces of evidence were assessed as well, given the fact that there was no other evidence.

39. In addition, the appellant claims that the first instance verdict did not mention the important reasons for which the court abandoned the order of presentation of evidence which he opposed, that no special decision was reached about it, and that the position of the second instance court was unacceptable in that a judge had the power to abandon the order of presentation of evidence and that the defence did not oppose that. In this part, the appellant indicated that, at the main trial of 15 January 2020, the prosecutor proposed that co-accused T.K. and D.D. be heard in the capacity of witnesses, and that their defence counsels indicated that they would testify in their own favour. At the hearing for the main trial on 7 February 2020, T.K. and D.D. were heard and they admitted their guilt, thereby trying in every possible way to incriminate him. In support of the above, the appellant indicated that also the defence counsel of accused D.D., while finalizing the examination, pointed out "I finished what the prosecutor needed". Furthermore, the appellant indicated that the judge in charge (who made the decision also regarding the plea-bargaining arrangement), upon his insistence, submitted the plea-bargaining arrangements entered into by T.K. and D.D., wherefrom it followed that they were entered into as far back as 15 January 2020, *i.e.* at the beginning of the main trial, and that they were submitted to the court on 7 February 2020, *i.e.* after both accused had testified. In his opinion, this is indicative of the conclusion that depending on the testimonies of T.K. and D.D. the prosecutor decided whether to submit the arrangements to the court or not. This was a strong motive, as he claimed, on the part of T.K. and D.D. to do whatever it takes to obtain a favourable position for themselves in the form of submission of a favourable plea-bargaining arrangement to the court, particularly so since irrefutable evidence existed against these two accused persons on the perpetration of the criminal offense. In the appellant's opinion, in addition to the above, the credibility of these witnesses was questionable due to the fact that both were categorical during cross-examination that they did not discuss the conclusion of a plea-bargaining arrangement, *i.e.* that is to say that they were not negotiating with the Prosecutor's Office and that

the testimony was not a condition for the conclusion of a plea-bargaining arrangement. In view of the aforementioned, he deemed unacceptable the position referred to in the challenged decisions that he did not manage to dispute, through cross-examination, the veracity of the testimonies and the credibility of witnesses T.K. and D.D.

40. In his opinion, this situation resulted in further unlawfulness because of the fact that the duality of procedural roles of the parties to the proceedings was prohibited. Namely, it is impossible for the accused also to be a witness for the Prosecutor's Office, whereas the accused T.K. and D.D. were heard as witnesses for the Prosecutor's Office (as explicitly stated in the first instance verdict), and in the end to be witnesses in their own matter, while already having entered into a plea-bargaining arrangement. Finally, unlawful conduct of the first instance court, which was all approved by the second instance court, is also reflected, in the appellant's opinion, in the fact that, after T.K. and D.D. had admitted guilt at the main trial on 7 February 2020, the first instance court should have separated the proceedings relating to them and conduct itself in accordance with the provisions of the Criminal Procedure Code of BiH, which regulate an admission of guilt at the main trial, and not to wait for the submission of the plea-bargaining arrangements and only then to separate the proceedings. In his opinion, all of the aforementioned is indicative of a conclusion that the Court of BiH "closed its eyes" and allowed the prosecutor, by abusing the mechanism of testimony in own favour of the accused, first to secure the testimonies to assist him to charge the appellant, and just then to submit the already prepared plea-bargaining arrangements.

41. The appellant claims that the conclusion referred to in the challenged first instance verdict was erroneous reading that he approved the price with undercover investigator "Dušan". In that connection he cited portions of his testimony, as well as of testimonies of T.K. and D.D. wherefrom it follows that T.K. and D.D. agreed the price, namely that T.K. was "bargaining" at the scene and negotiating the price. The second instance court did not even give its opinion about objections raised in the appeal in this part.

42. Next, the appellant indicated that during the proceedings it was established as a decisive fact that the banknotes in the total amount of 2,000.00 EUR were marked and in denominations of 100 EUR. During the search, no marked banknotes were found with him, while they were found with T.K. and D.D. Therefore, he found unacceptable the conclusion of the first instance court that it was not of decisive importance that the amount of 1,400 EUR which, as he alleged, he allegedly kept for himself, was not found with him, for from the moment he was handed over the money by D.D. (16 September 2018) to the search date (26 February 2019) a prolonged period of time had elapsed and that he must have certainly disposed of the mentioned money. In the appellant's opinion this

constitutes a gross violation of the presumption of innocence and of the principle *in dubio pro reo*. In doing so, the appellant indicated again that the money referred to in the indictment and which was forfeited had never been entered as evidence in the court case file nor was it presented as evidence in these proceedings.

43. In the appellant's opinion, the challenged decisions lacked completely, *i.e.* had unacceptable conclusions: about his intent (which, as he claimed, the prosecutor did not even prove), who the organizer of the group was and his affiliation with the group, namely that he was mentioned only at the end of the enacting clause of the first instance verdict (that he had distributed the money), the existence of a previous arrangement without any specification and without a single piece of evidence to that end. In his opinion, the Court of BiH disregarded this obligation to reason its verdicts by stating clear and comprehensible reasons on which the decisions were based and which would be impartial, and would not arbitrarily apply the positive law.

44. According to the appellant's claims, the Court of BiH also violated the principle *in dubio pro reo*, as based on evidence presented during the proceedings it was not possible to conclude that he had perpetrated beyond a reasonable doubt the criminal offense he was found guilty of. In his opinion, during the evaluation of evidence the presumption of innocence was completely overlooked. The appellant reiterated that, during the entire proceedings, he was only mentioned in the testimony of the accused/witness T.K. ("the boss is sleeping, the boss is on annual leave"), which, according to him, points to the conclusion that T.K. "by mentioning the boss "was bargaining" and only wanted to "increase the price" for himself".

45. Finally, the appellant claimed that the second instance court acted arbitrarily when it mentioned as an aggravating circumstance that other accused got the same punishment under the plea-bargaining arrangement, as the punishment was pronounced based on alleviating and aggravating circumstances, that is to say that the punishment negotiated in the arrangement cannot be a standard. Also, he deems that something representing by its contents an action of the perpetration of the offense was regarded as an aggravating circumstance in his case (he omitted to supervise the regularity of work in his shift, to prevent unlawful work...), which was neither established nor described in the indictment.

b) Reply to appeal

46. In the reply to the appeal, the Court of BiH indicated that the appeal did not mention any new arguments or evidence, which were not already indicated in the appeal against the first instance verdict of the Court of BiH, and, as such, considered in detail and assessed by the second instance

court in the verdict dated 2 October 2020. Furthermore, it was indicated that the Court of BiH provided detailed and clear reasons and reasoning about all objections raised by the appellant in the appeal, which were reiterated also in connection with the allegations indicated in the appeal. Finally, in connection with the appellant's claims regarding the modification of punishment, the Court of BiH indicated that the challenged second instance verdict provided the clear reasoning and the detailed assessment of all circumstances which were assessed and which constituted the basis for the increase of the term of imprisonment and for the pronunciation thereof for the term of two years.

47. In the reply to the appeal, the Prosecutor's Office of BiH indicated that the appellant only reiterated the allegations stated in the appeal, which were already the subject of consideration before the second instance court, that the allegations come down to the claims about erroneously established facts of the case, which, according to the position of the Prosecutor's Office, is not within the competence of the Constitutional Court.

V. Relevant law

48. The **Criminal Code of Bosnia and Herzegovina** (*Official Gazette of BiH*, 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15 and 35/18). For the purpose of this decision unofficial revised text prepared at the Constitutional Court of BiH will be used, which reads in its relevant part as follows:

General Principles of Meting out Punishments

Article 48 (1)

(1) The court shall impose the punishment within the limits provided by law for that particular offence, having in mind the purpose of punishment and taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances), and, in particular: the degree of criminal liability culpability, the motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offence, as well as other circumstances related to the personality of the perpetrator.

Accepting Gifts and Other Forms of Benefits

Article 217 (1)

(1) An official or arbiter or juror judge or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person or an international official, who demands or accepts a gift or any other benefit for himself or another person or who accepts a promise of a gift or a benefit for himself or another person in order to perform within the scope of his official powers official function an act, which ought not to be performed by him, or for the omission of an act, which ought to be performed by him or whoever mediates in such bribing of an official or responsible person,

shall be punished by imprisonment for a term between one and ten years.

Associating for the Purpose of Perpetrating Criminal Offences

Article 249 (1) and (2)

(1) Whoever organises or directs at any level a group of people or otherwise associates three or more persons with an aim of perpetrating criminal offences prescribed by the law of Bosnia and Herzegovina, for which a punishment of imprisonment of three years or a more severe punishment may be imposed, unless a heavier punishment is foreseen for such organising or associating for the purpose of perpetrating a particular criminal offence,

shall be punished by imprisonment for a term between six months and five years one and ten years.

(2) Whoever becomes a member of the group of people or an association referred to in paragraph 1 of this Article,

shall be punished by a fine or imprisonment for a term not exceeding one three year.

49. The **Criminal Procedure Code of Bosnia and Herzegovina** (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 49/17 – Decision of the Constitutional Court of BiH, 42/18 - Ruling of the Constitutional Court of BiH, 65/18 and 22/21 – Decision of the Constitutional Court of BiH). In the present case unofficial revised text of the Criminal Procedure Code of Bosnia and Herzegovina will be applied (*Official Gazette of BiH*, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 49/17 - Decision of the Constitutional Court of BiH and 42/18 - Ruling of the Constitutional Court of BiH and 65/18),

which was prepared at the Constitutional Court of BiH, which was applicable at the time of adoption of the challenged decisions, which reads in its relevant part as follows:

Article 3

Presumption of Innocence and In Dubio Pro Reo

(1) A person shall be considered innocent of a crime until guilt has been established by a final verdict.

(2) A doubt with respect to the existence of facts composing characteristics of a criminal offense or on which depends an application of certain provisions of criminal legislation shall be decided by the Court with a verdict and in a manner that is the most favourable for accused.

Article 6 (2)

Rights of a Suspect or Accused

(2) The suspect or accused must be provided with an opportunity to make a statement regarding all the facts and evidence incriminating him and to present all facts and evidence in his favour.

Article 10 (2)

Legally Invalid Evidence

(2) The Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code.

Article 15

Free Evaluation of Evidence

The right of the Court, Prosecutor and other bodies participating in the criminal proceedings to evaluate the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules.

Article 82

Persons Not To Be Heard As Witnesses

(1) The following persons shall not be heard as witnesses:

a) A person who by his statement would violate the duty of keeping state, military or official secrets until the competent body releases him from that duty;

b) A defence attorney of the suspect or accused with respect to the facts that became known to him in his capacity as a defence attorney;

c) A person who by his statement would violate the duty of keeping professional secrets, including the religious confessor, professional journalists for the purpose of protecting the information source, attorneys-at-law, notary, physician, midwife and others, unless he was released from that duty by a special regulation or statement of the person who benefits from the secret being kept;

d) A minor who, in view of his age and mental development, is unable to comprehend the importance of his privilege not to testify.

(2) If the person who is not allowed to be heard as a witness has been heard as a witness, the Court decision shall not be based on his testimony.

Article 231 (1), (2), (3) and (6)

Plea-bargaining

(1) The suspect or the accused and the defence attorney, may negotiate with the Prosecutor about the conditions of admitting guilt for the criminal offence with which the suspect or accused is charged until the completion of the main trial proceedings or the appellate hearing proceedings.

(2) The plea-bargaining arrangement shall not be entered into if the accused pleaded guilty at the plea hearing.

(3) In plea-bargaining with the suspect or the accused and his defence attorney on the admission of guilt pursuant to Paragraph 1 of this Article, the Prosecutor may propose an imprisonment sentence bellow legally prescribed minimum or more lenient criminal sanction for the suspect or accused in accordance with the provisions of the Criminal Code.

(6) In the course of deliberation of the arrangement on the admission of guilt, the Court must ensure the following:

a) that the arrangement of guilt was entered voluntarily, consciously and with understanding, and that the accused is informed of the possible consequences,

including the satisfaction of the claims under property law, forfeiture of property gain obtained by commission of criminal offense and reimbursement of the expenses of the criminal proceedings;

b) that there is enough evidence proving the guilt of the accused;

c) that the accused understands that by arrangement on the admission of guilt he waives his right to trial and that he may not file an appeal against the pronounced criminal sanction,

d) that the agreed sanction is in accordance with Paragraph 3 of this Article,

e) that the injured party was given an opportunity before the Prosecutor to give statement regarding the claim under property law.

Article 240

Order of the Main Trial

The main trial shall proceed in the order set forth in this Code, but the judge or the presiding judge may order a departure from the regular order of proceedings due to special circumstances, and especially if it concerns the number of accused, the number of criminal offenses and the amount of evidence. The reasons why the main trial is not conducted in the order prescribed by the law shall be entered in the main trial record.

Article 251 (2)

Resumption of the Adjourned Main Trial

(2) The main trial that has been adjourned must recommence from the beginning if the composition of the Panel has changed or if the adjournment lasted longer than 30 days but with consent of the parties and the defence attorney, the Panel may decide that in such a case the witnesses and experts shall not be examined again and that the new crime scene investigation shall not be conducted but the minutes of the crime scene investigation and testimony of the witnesses and experts given at the prior main trial shall be used.

Article 259 (2)

Instructions to the Accused

(2) The judge or the presiding judge shall instruct the accused that he may give a statement in the capacity of a witness during the evidentiary proceedings and if he decides to give such statement he shall be subject to direct and cross-examination as provided for in Article 262 of this Code, i.e. instructed as provided for in Article 86 of this Code. In that case, the accused as witness shall not take an oath or affirmation. The Court shall give the opportunity to the accused to consult about this right with his defence attorney beforehand, and if he does not have the defence attorney, the Court shall carefully assess whether the legal assistance of a defence attorney is necessary.

Article 261 (2)

Presentation of Evidence

(2) Unless the judge or the Panel, in the interest of the justice, decides otherwise, the evidence at the main trial shall be presented in the following order:

a) evidence of the prosecution;

b) evidence of the defence;

c) rebutting evidence of the prosecution;

d) evidence in rejoinder to the Prosecutor's rebutting evidence;

e) evidence whose presentation was ordered by the judge or the Panel;

f) all evidence relevant for the pronouncement of the criminal sanction.

Article 265

The Consequences of Accused's Confession

If a confession of the accused during the main trail is complete and in accordance with previously presented evidence, then, in the evidentiary proceedings, only evidence related to the decision on criminal sanction shall be presented.

Article 281

Evidence on Which the Verdict is Grounded

(1) The Court shall reach a verdict solely based on the facts and evidence presented at the main trial.

(2) The Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.

Article 298 subparagraph (e)
Violations of the Criminal Code

The following points shall constitute a violation of the Criminal Code:

e) if the decision pronouncing the sentence, suspended sentence or decision pronouncing a security measure or forfeiture of property gain has exceeded the authority that the Court has under the law,

VI. Admissibility

50. Pursuant to Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, the Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any court in Bosnia and Herzegovina.

51. Pursuant to Article 18 (1) of the Rules of the Constitutional Court, the Constitutional Court shall examine an appeal only if all effective remedies that are available under the law against a judgment, or decision challenged by the appeal, are exhausted and if the appeal is filed within a time-limit of 60 days as from the date on which the decision on the last effective remedy used by the appellant was served on him.

52. In the present case, the subject matter challenged by the appeal was the Verdict of the Court of BiH no. S1 2 K 029157 20 Kž of 2 October 2020 against which there are no other effective legal remedies available under the law. Next, the appellant received the challenged verdict on 28 October 2020, whereas the appeal was lodged on 30 October 2020, i.e. within a time limit of 60 days, as prescribed under Article 18 (1) of the Rules of the Constitutional Court. Finally, the appeal also meets the requirements under Article 18 (3) and (4) of the Rules of the Constitutional Court, for it is neither manifestly (*prima facie*) ill-founded nor is there any other formal reason rendering the appeal inadmissible.

53. Having regard to the provisions of Article VI (3) (b) of the Constitution of Bosnia and Herzegovina, Article 18 (1), (3) and (4) of the Rules of the Constitutional Court, the Constitutional Court has established that the appeal meets the admissibility requirements.

VII. Merits

54. The appellant contested the mentioned verdicts, claiming that they were in violation of his rights under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 of the European Convention.

55. Article II (3) (e) of the Constitution of Bosnia and Herzegovina, in so far as relevant, reads as follows:

> *All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:*
>
> *(e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings.*

56. Article 6 (1) of the European Convention, in so far as relevant, reads as follows:

> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]*
>
> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

57. The essence of the appellant's allegations come down to the claim that the proceedings conducted against him were not lawful because of the fact that the Court of BiH had not truthfully and completely established the facts relevant for the adoption of a lawful decision, that it had failed to examine and establish with equal attention the facts incriminating him as well as those facts that were in his favour, thus violating the principle *in dubio pro reo*, that it had applied the substantive and procedural law in a manifestly arbitrary manner, which all resulted in making impossible his right to defence, and that his appeal against the first instance verdict had been unfoundedly dismissed, *i.e.* that the second instance court had not decided at all some of the allegations indicated in the appeal.

58. On the basis of comprehensive allegations stated in the appeal it follows that the appellant, in essence, deemed that the facts of the case were not completely and truthfully established, for the reason that the challenged verdicts were based, as he claimed, exclusively on the testimonies deposited by witnesses T.K. and D.D., whose credibility, as he held, he had contested in the proceedings before ordinary courts. In addition, the appellant deems that the acceptance of their testimonies amounted to a violation of the procedural law, too, for the prohibited duality of

procedural roles of the parties to the proceedings was established (it is not possible for the accused also to be a witness for the Prosecutor's Office), the provisions on the order of presentation of evidence at the main trial were violated (T.K. and D.D. were heard before the presentation of evidence as proposed in the indictment), and the provisions regulating an admission of guilt at the main trial were not applied (as T.K. and D.D. had completely confessed the guilt in their testimonies at the main trial).

59. As regards the aforementioned, the Constitutional Court recalls that, generally speaking, it has no competence to check the established facts and ways in which the ordinary courts had interpreted positive law regulations, unless the decisions of the ordinary courts are in violation of constitutional rights. That will be the case if an ordinary court had erroneously interpreted or applied some constitutional right, or disregarded that right, if the application of law had been arbitrary or discriminatory, if a violation of procedural rights had occurred (fair trial, access to court, effective legal remedies and in other cases), or if the established facts of the case are indicative of a violation of the Constitution of Bosnia and Herzegovina (see the Constitutional Court, Decisions nos. U 39/01 of 5 April 2002, published in the *Official Gazette of Bosnia and Herzegovina*, 25/02 and no. U 29/02 of 27 June 2003, published in the *Official Gazette of Bosnia and Herzegovina*, 31/03). In addition, the Constitutional Court emphasizes that it is beyond its competence to appraise the quality of the conclusions reached by ordinary courts regarding the evaluation of evidence, unless this evaluation appears manifestly arbitrary.

60. Furthermore, the Constitutional Court recalls that the European Court indicated in numerous decisions that Article 6 of the European Convention occupies "a prominent position in a democratic society" (the European Court, *De Cubber v. Belgium*, judgment of 26 October 1984, Series A, no. 86, paragraph 30). The consequence thereof is that Article 6 of the European Convention cannot be interpreted restrictively (the European Court, *Moreira de Azevedo v. Portugal*, judgment of 23 October 1990, Series A, no. 189, paragraph 66). Article 6, paragraph 1 of the European Convention carries a number of elements that are inherent to a fair administration of justice, therefore, if there is a violation of any of the elements contained in this right there will be a violation of Article 6, paragraph 1 of the European Convention too (see the Constitutional Court, Decision no. U-25/01 of 26 September 2003, published in the *Official Gazette of Bosnia and Herzegovina*, 3/04, paragraph 25). If the constitutional right to a fair trial is viewed in the context of the applicable positive law in Bosnia and Herzegovina, then it has to be observed that the important segment of the right to a fair trial is a careful and conscientious evaluation of evidence and facts established in the proceedings before ordinary courts. This is one of the fundamental provisions in relation to the presentation and

evaluation of evidence, which is present in all applicable procedural laws in Bosnia and Herzegovina, in the Criminal Procedure Code of BiH, wherein the provision of Article 281, paragraph 2 reads as follows: [...] *The Court is obligated to conscientiously evaluate every piece of evidence and its correspondence with the rest of the evidence* [...], thus it makes an inseparable element of the right to a fair trial.

61. Therefore, although it imposed restrictions on itself as to whether to examine the ways in which ordinary courts had established the facts of the case and evaluated the evidence, the Constitutional Court did not rule out that possibility completely, instead it restricted its competence on that issue to the case where the examination of the facts of the case is carried out if "the proceedings contained the violation of the right to a fair trial within the meaning of Article 6 of the European Convention", that is to say "if the established facts of the case are indicative of a violation of the Constitution", or if the evaluation of evidence "appears to be manifestly arbitrary". To that end there are numerous examples of the case law where the Constitutional Court addressed the ways in which ordinary courts had assessed the facts of the case and evidence (see the Constitutional Court, Decision on Admissibility and Merits no. AP-661/04 of 22 April 2005, Decision on Admissibility and Merits no. AP-1185/11 of 14 May 2015, available at the website of the Constitutional Court: www.ustavnisud.ba).

62. The case-law referred to in the mentioned decisions may be applied in the present case, too. Namely, the Constitutional Court observes that during the proceedings the first instance court faced a situation where the Prosecutor's Office corroborated the allegations stated in the indictment, to a decisive extent, with subjective evidence: the statements of the accused – witnesses T. K. and D. D. who had entered into a plea-bargaining arrangement with the Prosecutor's Office, as well as the statements of informant "Fanatikos" and undercover investigator "Dušan". In that connection, the Constitutional Court points to the case law of the former European Human Rights Commission, according to which the use at trial of evidence obtained from accomplices who, because of testimony, were granted immunity from criminal prosecution, may bring into question the fairness of the proceedings concerning the accused within the meaning of Article 6, paragraph 1 of the European Convention (see former Human Rights Commission, *X v. the United Kingdom*, Application no. 7306/75 of 6 October 1976). In addition, the Constitutional Court refers to the position of the European Court in the case of *Adamčo v. Slovakia* (12 November 2019, Application no. 45084/14, paragraphs 56-71), concerning the conviction based to a decisive degree on statements by an accomplice arising from a plea-bargaining arrangement. The European Court found a violation of Article 6 of the Convention having regard to the following considerations: the

statement constituted, if not the sole, then at least the decisive evidence against the applicant; the failure by the domestic courts to examine the wider context in which the witness obtained advantages from the prosecution; the fact that the plea-bargaining arrangement with the prosecution was concluded without the judicial involvement; and the domestic courts' failure to provide the relevant reasoning concerning the applicant's arguments.

63. In order to be able to answer the question whether the appellant's right to a fair trial was violated in this way, it is necessary to consider the proceedings as a whole and in the light of the applicable positive criminal law regulations.

64. The Constitutional Court indicates that one of the fundamental principles of the Criminal Procedure Code of BiH is that a court and prosecution authorities are obligated truthfully and completely to establish the facts incriminating the suspect, or the accused, as well as those facts that are in his favour. Also, the Law prescribes the presumption of innocence and the application of the principle *in dubio pro reo*, the rule that even the slightest doubt about evidence should be in favour of the accused, which is an important element of the right to a fair trial under Article 6 of the European Convention (see the European Court, *Barbera, Messeque and Jabardo v. Spain*, judgment of 6 December 1988, Series A, No. 146, paragraph 77). A court is obligated to conscientiously evaluate all evidence individually and in connection with other evidence, and then, on the basis of such, conscientious assessment, draw a conclusion whether some fact is proven. In doing so, under Article 15 of the Criminal Procedure Code of BiH, a court and other authorities are not bound or restricted by special formal proofing rules, but according to the principle of free evaluation of evidence, they assess the existence or non-existence of a fact. Free evaluation of evidence is, therefore, free from legal rules, which would *a priori* determine the value of certain evidence. However, this free evaluation of evidence requires the reasoning for every piece of evidence individually, as well as all evidence together, and brining all the presented evidence into a mutual logical connection. The principle of free evaluation of evidence does not constitute absolute freedom. That freedom is restricted by general rules and legalities of human opinion and experience. Therefore, it is the obligation of an ordinary court to describe in the reasoning for the judgment the process of individual evaluation of evidence, the linking of every piece of assessed evidence with other evidence and to draw a conclusion on a certain fact being proven.

65. In addition, the Constitutional Court indicates that circumstantial evidence is not in itself contrary to the principles of a fair trial under Article 6, paragraph 1 of the European Convention. However, the rule applicable to making proof by circumstantial evidence is that circumstantial evidence must have an effect as a solid closed circle that allows for only one conclusion in relation

to the relevant fact, and that a possibility of a different conclusion concerning the same fact is objectively completely ruled out. Therefore, the facts established by circumstantial evidence have to be undoubtedly established and mutually firmly and logically connected, so that they point to a sole possible conclusion that precisely the accused perpetrated the criminal offense charged with. Also, the presented circumstantial evidence have to be in complete harmony and not to constitute the sum of evidence, but a system of circumstantial evidence, which would in their context and connection rule out every other possibility other than that established by the first instance court (see the Constitutional Court, Decision no. AP-661/04 of 22 April 2005, available at: www.ustavnisud.ba).

66. In the light of the aforementioned, the Constitutional Court observes that the first instance court based to a decisive degree the verdict of conviction against the appellant on the testimony of the witnesses who had entered into a plea-bargaining arrangement with the Prosecutor's Office, as the sole direct piece of evidence. Other evidence, which, according to the position of ordinary courts, corroborate the accuracy of these two testimonies, are actually indirect evidence *i.e.* circumstantial evidence. As far as the testimonies of the mentioned witnesses are concerned, the Constitutional Court indicates that, although such witnesses may frequently be unreliable, that in itself is not a reason not to give credence to the testimony of such a witness. On the other hand, the law provides a possibility to the defence to try, by employing cross-examination, to demonstrate inconsistency in the statements of such a witness and, possibly, to discredit him in that way. The Constitutional Court did not find the elements which would indicate that the appellant was denied this procedural possibility.

67. Furthermore, the Constitutional Court indicates that, when employing the mechanism of admission of guilt, it is necessary to apply to such type of evidence the fundamental principles of criminal procedural law, such as careful and conscientious evaluation of evidence individually and in mutual connection, as well as the principle *in dubio pro reo*. As already stated, by applying the principle of free evaluation of evidence, the courts cannot *a priori* attribute a greater value to this piece of evidence because it was obtained based on a plea-bargaining arrangement with the witness who was convicted earlier of the same offense. On the contrary, the courts have to assess that piece of evidence too in the same way and under the same rules that the Law stipulates for every other presented piece of evidence, namely individually and together with other evidence, and bring all the presented evidence into a mutual logical connection.

68. The Constitutional Court observes that, regarding the appellant's allegations that he was not at all aware of the actions of T.K. and D.D., and that the two of them had abused his name during the arrangement with the undercover investigator with a view to "increasing" the price for their own

services, the first instance court alleged that it assessed all the allegations made by the heard witnesses, as well as material evidence, particularly of witnesses T.K. and D.D. concerning the circumstance of the appellant's involvement in relation to the omission to carry out the supervision of the two of them as his subordinates, and his approval of the realization of the plan agreed in advance, which was reflected in the omission to carry out customs control, for which T.K. and D.D. received the amount of 2,000 EUR, which the undercover investigator had handed over to them. In addition, the first instance court alleged that special attention was given to the circumstances and contents of communications that the co-accused T.K. and D.D., as members of the group, engaged in with the informant, and then with the undercover investigator, their negotiation in relation to the amount of money they requested from the undercover investigator for omitting to carry out the customs control, receiving the said amount and handing it over to the appellant, and the final distribution of the received money in such a way that the appellant kept for himself the amount of 1,400 EUR, while he gave the two of them 300 EUR each for the undertaken criminal action. The second instance court was of the opinion that T.K. and D.D. credibly and truthfully described the incriminating event and their testimonies were corroborated in the relevant segments with the testimonies of other witnesses, primarily the testimony of undercover investigator "Dušan", as well as with substantive paperwork, namely control evidence. However, the Constitutional Court observes that the first instance court failed to mention in specific terms what the substantive and control evidence were that corroborated the testimonies of these two witnesses, *i.e.* on the basis of which evidence (along with the statements of witnesses) it would be possible undoubtedly to conclude that the appellant had perpetrated the criminal offense that the Prosecutor's Office charged him with.

69. Furthermore, the Constitutional Court observes that the second instance court pointed in the reasoning for the challenged decision to the position of the Constitutional Court enunciated in the Decision no. AP-661/04 that the testimonies of the witnesses who had entered into a plea-bargaining arrangement constitute evidence that have the same value as all other evidence used in the criminal proceedings, that equal criteria are being applied during the evaluation thereof, *i.e.* that such evidence are automatically regarded as unreliable, and that "in a situation where a verdict of conviction was based for the major part on the testimony of a witness who had entered into a plea-bargaining arrangement with the prosecutor, and the court did not provide a logical and convincing reasoning for the assessment of that as well as of other presented evidence, instead the assessment appears to be arbitrary, there is a violation of the right to a fair trial". The present case concerns precisely a situation where the ordinary courts failed to provide the sufficiently logical and

convincing reasons to support their position as to why they deemed it established that the appellant had been a member of the group, whose role was reflected in giving consent for the perpetration of the offense to the witnesses – co-accused, which, as such, could not have been perpetrated without him, but also in connection with the arrangement regarding the amount of money requested, which is supported solely by the testimonies of the witnesses who have a significant personal interest, precisely because of the plea-bargaining arrangement with the Prosecutor's Office. This is particularly important in a situation where there is not a single piece of other direct evidence concerning the circumstance of the arrangement on the perpetration of the criminal offense, while circumstantial evidence were not such as to constitute a system of solidly and logically connected indications, which would point to a sole possible conclusion that it was precisely the appellant who had perpetrated the criminal offense he was charged with.

70. In view of the aforementioned, the Constitutional Court deems that the challenged verdicts violated the right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention.

VIII. Conclusion

71. The Constitutional Court concludes that there is a violation of the right to a fair trial under Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention in a situation where the verdict of conviction was based to a decisive degree on the testimonies of the witnesses who had entered into a plea-bargaining arrangement with the Prosecutor's Office. In addition, the ordinary courts failed to provide a sufficiently logical and convincing reasoning as to what circumstantial evidence make a system of solidly and logically connected indications, which would corroborate the testimonies of the mentioned witnesses and point to a sole possible conclusion that it was precisely the appellant who had perpetrated the criminal offense he was charged with.

72. Pursuant to Article 59 (1) and (2) and Article 62 (1) of the Rules of the Constitutional Court, the Constitutional Court decided as stated in the enacting clause of this decision.

73. Pursuant to Article 43 of the Rules of the Constitutional Court, a Separate Joint Dissenting Opinion of Judges Angelika Nussberger and Helen Keller is annexed to the present Decision.

74. Pursuant to Article VI (5) of the Constitution of Bosnia and Herzegovina, the decisions of the Constitutional Court shall be final and binding.

Mato Tadić
President
Constitutional Court of Bosnia and Herzegovina

Joint Dissenting Opinion of Judges Angelika Nußberger and Helen Keller

To our regret and for the reasons explained below, we are unable to join the majority in concluding that there has been a violation of Article II (3) (e) of the Constitution of Bosnia and Herzegovina and Article 6 (1) of the European Convention of Human Rights and Fundamental Freedoms.

Overall fairness of the criminal proceedings

The starting point for our considerations is the case law of the European Court of Human Rights (ECtHR). It should be recalled that the ECtHR's primary concern under Article 6 § 1 is to evaluate the overall fairness of the criminal proceedings. In making this assessment, the Court looks at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interests of the public and of the victims in proper prosecution and, where necessary, to the rights of witnesses (*Schatschaschwili v. Germany* [GC], 15 December 2015, application no. 9154/10, §§ 100-101).

Rights of the defence

Regarding the rights of the defence, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy (*Bykov v. Russia* [GC], 10 March 2009, application no. 4378/02, § 89; *Jalloh v. Germany* [GC], 11 July 2006, application no. 54810/00, § 96). In order to establish a violation of Article 6, it must be demonstrated that the restriction of defence rights affected the overall fairness of the proceedings.

Plea bargaining

It is true that plea bargaining is a specific factor that has to be taken into account in assessing the overall fairness of the procedure. In *Kadagishvili v. Georgia* (14 May 2020, application no. 12391/06, §§ 156-157), the ECtHR did not consider that the reliance on the statements of suspects who had concluded plea-bargaining agreements with the prosecution rendered the trial as a whole unfair. The ECtHR laid emphasis on the fact that the plea-bargaining procedure had been carried out in accordance with the law and was accompanied by adequate judicial review. Moreover, the witnesses concerned gave statements to the trial court in the applicants' case, and the applicants had ample opportunity to cross-examine them. It was also important for the ECtHR that no finding of fact in the plea-bargaining procedure was admitted in the applicants' case without full and proper examination at the applicants' trial.

Application of the ECtHR's jurisprudence to the present case

In our view, there has been no interference with the appellant's defence rights that could have affected the overall fairness of the proceedings in the present case. As the majority of the Constitutional Court states in para. 66, there are no elements which would indicate that the appellant was denied the possibility of cross-examination. Furthermore, there are no indications that the plea-bargaining procedure was not carried out in accordance with the law or that it was not accompanied by adequate judicial review. Indeed, it is permissible to rely on statements by suspects who have concluded plea-bargaining agreements with the prosecution as long as the appellant's procedural rights are not violated.

We agree that the challenged decisions were prevalently based on the testimonies of witnesses who had entered into a guilty plea-bargaining arrangement with the Prosecutor's Office. However, we do not agree with the statement of the majority of the Constitutional Court that the ordinary court based the verdict of conviction against the appellant to a *decisive* degree on these testimonies. It follows from the reasoning of the second instance decision that the ordinary courts had assessed the testimonies of these witnesses individually and in connection with other presented evidence, which unambiguously corroborated and confirmed the testimonies of these two witnesses (i.e. the testimony and reports of the undercover agent).

Moreover, it is beyond the jurisdiction of the Constitutional Court to appraise the quality of the courts' conclusions regarding the assessment of evidence unless this assessment appears manifestly arbitrary. In our view, the reasoning of the second instance court is conclusive and not obviously arbitrary. It is well established that the Constitutional Court does not interfere with a situation in which ordinary courts give credence to the evidence provided by one party to the proceedings on the basis of free judicial evaluation. This restraint follows the logic that the ordinary courts had direct contact with the accused and the witnesses and are therefore better suited to evaluate their credibility.

Conclusion

Taking into account all these factors, we cannot agree with the majority's conclusion. In our view, the requirement of overall fairness is met in the present case, and the assessment of the ordinary court does not appear manifestly arbitrary.