TEDER, GLIKMAN & PARTNERID

Teder Glikman & Partnerid
Advokaadibüroo
Tornimäe 2
10145 Tallinn
Tel + 372 665 7070
Faks + 372 665 7071
info@tgplegal.ee
www.tgplegal.ee

Reg kood 11068840
KMKR nr EE100924138

Teder Glikman & Partnerid
Professional Law Partnership
Tornimäe 2
10145 Tallinn
Phone + 372 665 7070
Fax + 372 665 7071
info@tgplegal.ee
www.tgplegal.ee

Reg code 11068840
VAT code EE100924138

Leon Glikman

Sworn Advocate

Tartu University, J.D.

Harvard University, Master of Law (LL.M)

+ 372 665 70 70

leon.glikman@tgplegal.ee

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MEMORANDUM TO SHAREHOLDERS

Regarding the criminal case in which Merko Ehituse AS participates as a suspect

1. Introductory notices and our general principles.

1.1. ÄS (Commercial Code) § 226 and 287 provide the shareholders' right to information. The Supreme Court has also stressed that shareholder has a right to information and to examine relevant documents in order to perform right to manage the legal entity via general meeting and to affect decisions of the legal entity (3-2-1-6-03 p. 14; 3-2-1-145-04). Merko Ehituse AS acts on the basis of these principles. Unfortunately law and court practice do not provide instructions in the present unprecedented case – how to inform shareholders about the criminal case and the relevant position of the company. We are based on the aspect that even if there are some doubts regarding disclosure, these doubts should be interpreted towards the expansion of shareholders' rights. Merko Ehitus has discussed the disclosure issue also with Tallinn Stock Exchange. We are not interested that the shareholders shall make their standpoints based on speculations. The general meeting shall grant an opportunity to provide to the shareholders the „live message" regarding the vision of Merko Ehitus and to answer to shareholders' questions. Such approach is the honestest and direct. ÄS § 226 names realization of right to information at general meeting. We hereby are based above all on shareholders' interests.

1.2. Pursuant to § 32 of TsÜS (General Principles of Civil Code Act) shareholders and members of administrative bodies of legal entity shall follow the principle of good faith in mutual relations and shall consider legal rights of each other. The same derives from TsÜS § 138 and VÕS (Law of Obligations Act) § 6 principle of good faith. AS Merko Ehitus intends to follow these legal requirements and finds that shareholders have a right to know the subject matter of the suspicion, as well as initial objections of Merko Ehitus. We would have nothing against, if the prosecution authority disclosed the text of the suspicion, giving prior notice to us, but we do not approve such self-activity.

1.3. This memorandum is not claiming to be „absolute truth". Although we have a certain position in the matter, we are partly in vacuo of information. Merko Ehitus knows, that it has not given any bribe. We do not know thoughts of other people. We are based on the aspect that a legal entity has an obligation to provide information through its management board. We cannot provide the shareholders with any other vision about the case than the one of Merko Ehitus and its defenders.

1.4. Merko Ehitus does not know today what is the suspicion based on. No evidence has been introduced to Merko Ehitus. Legal analysis is based on the text of the suspicion, court practice, law and legal theory. We are based on law, which grants to the shareholders right to information, above all at general meeting (ÄS § 226). Shareholder has a right to know what is going on and what are our intentions.

1.5. We would like to stress separately, that Merko Ehitus is not looking for confrontation with law enforcement authorities. Employees of prosecution authority shall remain to be colleagues of defence attorneys. Law Firm Teder, Glikman & Partners who is representing Merko Ehitus shall certainly use all the possibilities of competing procedure, thus being during the pre-trial proceedings as well as in court „on two sides of the frontline" with the prosecutor's office, which does not exclude respect towards the opposite party, cooperation in good faith and exchange of legal standpoints. An obligation of the prosecutor's office, deriving from law, is to assist to honest and legal proceeding in a way that rights of a person are granted and that innocent person is not irrelevantly repressed (KrMS (Code of Criminal Procedure) § 7, 8, 9, 30 etc.). This is also the wish of the

defence, therefore there are several anchors for cooperation. State based on the rule of law could not act in any other way.

1.6. Merko Ehitus is suspected in a criminal offense qualified in § 298 subsection 4 of the Penal Code (hereinafter KarS) - giving or promising a bribe, committed at least twice. Pecuniary punishment prescribed by law means for legal person pecuniary punishment decided by court in a sum between fifty thousand (50 000) up to two hundred and fifty million (250 000 000) kroons (KarS § 44 subsection 8) / we hereby leave aside the question of disproportion pursuant to PS (the Constitution) § 11 /. Together with pecuniary punishment an additional punishment of compulsory dissolution i.e. termination of operation of the shareholding company may be sentenced.

Thus, even in case if Merko Ehituse AS would be declared guilty, the maximum punishment would be 250 000 000 kroons. As it is known, assets of the company exceed this sum by magnitude. In case of compulsory dissolution the shareholders would receive the distribution ratio (ÄS § 226), not the state. Thus, risk of fine or even compulsory dissolution is secondary. There are other risky factors of creating damage.

1.7. AS Merko Ehitus has published a public notice regarding the subject matter of the suspicion. We remain at our standpoint, that the suspicion is discursive and extremely unintelligible[1]. Such indistinct suspicion impairs performance of right of defence. Anyone would be convinced in this after reading the text of the suspicion. The purpose of suspicion is to provide a person with possibility ti defend itself. Unfortunately, from the plot of the suspicion it remains in basic part incomprehensible, who, via whom and what offered as a bribe. In contradiction with principles of state based on the rule of law, by unexplained reasons there are systematic references to anonymous persons or legal entities with no names. What is the reason of anonymity, is unclear. Anonymity and non-concreteness may be

[1] Pursuant tp PS § 13 and § 21 and EIÕPKonv art 6 (1)(3) a and b a person must know the incriminated action in details so that he or she can have effective defence of his or her rights in conformance with principles valid in a state based on the rule of law (*Artico v. Italy; APM/S Europe Ltd. V. the Commission, S. v. Switzerland; Niemietz v. Germany; Supreme Court decisions no* 3-1-1-16-04; no 3-1-1-130-05; no 3-1-1-146-05). The suspicion does not correspond to these requirements, which impairs performance of right of defence as well as commenting the suspicion. In case if Merko Ehitus shall be sued on the basis of non-concrete accusation, this may result in declaration not guilty, which has been so in several decisions, inter alia Supreme Court decisions (3-1-1-24-05).

proof that there are no concrete evidence against Merko Ehitus. The suspicion is full of logical mistakes and also controversies. The suspicion is selective and artificial. Accepting of such a suspicion would give a chance to declare anyone to be under suspicion merely for the reason that he or she or it made transactions with the state, or for the reason, not dependent on the person, that in small state Estonia at some moment any person known to any official has calculated to make or has made transactions regarding the same assets. We are on opinion that the suspicion is farfetched and is not based on usual scheme: „*A promised to give or gave a certain sum B or thing C exactly to this competent official D as evidently established reciprocity for received illegal action E*". As we have stressed, § 19 of Nature Conservation Act expressly stipulated such exchanges and 184 transactions have also been made on the basis of exactly the same procedure and law, which transactions law enforcement authorities by some reason do not consider as illegal. The only difference is that Merko Ehitus did not participate in these transactions which are considered to be legal. Only four transaction episodes have been stated to be illegal and their only specification is participation of Merko Ehitus. Today we may obviously be based on presumption that if there were certain undisputable evidence, then a clear and certain suspicion would have been formulated on their basis and in any case anonymity and indistinctness would have been dropped. Naturally, more precise conclusions may be drawn only after analysis of the materials.

1.8. Short evaluation is: there is no necessary elements of bribe and there is no act, for which to give bribe or grant gratuities. The plot provided in the suspicion does not conform with the necessary elements of the actually incriminated offence.

1.9. We hereby try to refer the same plot of suspicion once more, with systematization of the suspicion by persons who were allegedly promised or given any bribe.

1.10. We wish to stress that it is merely a suspicion, i.e. not finalized subjective opinion of the body conducting proceedings. The suspicion may not result in accusation, not mentioning conviction. First, the defence shall receive the materials for examination, thereafter there is a right to submit requests. Pursuant to

KrMS § 226 subsection 1 the statement of charges shall be prepared only if the prosecutor's office has submitted a criminal file for examination and is thereafter convinced that the necessary evidence in the criminal matter has been collected. In conformance with KrMS § 225 subsection 1 the defence may submit requests to the prosecutor's office after the date of submission of the criminal file to them for examination. Thus, we cannot exclude either possibility – bringing charger or withdrawal from bringing charges in case if not convinced in proof.

1.11. AS Merko Ehitus fights for the rights of itself and its shareholders, defends itself actively against unreasoned suspicion and uses qualified legal assistance of law firm Teder, Glikman & Partnerid for that purpose. We confirm once more that we shall use all and any legal procedural means for our defence in all stages of the proceeding. If Merko Ehitus would not defend itself, this would also be a management mistake, as administrative bodies must act in the best interests of the company and the shareholders.

1.12. The purpose of this memorandum is not to open the defence position of AS Merko Ehitus. Still, we confirm, that Teder, Glikman & Partners has developed a thorough legal position disproving the suspicion. The defence position shall be adjusted pursuant to the development of the proceeding. In this memorandum we shall only provide our shareholders with an overview of the suspicion and the basic objections within the frames which interdigitate with the shareholders' right to information.

1.13. Merko Ehitus shall be granted a possibility to examine the materials of the criminal case. When this opportunity shall come, is not clear yet. We may presume, that it will take place soon and we are ready for this extensive work. According to the media the amount of materials is about 200 folders and this is regarding only five quite simple episodes. We are aware, that in the same matter some episodes not concerning Merko Ehitus are also discussed, but the magnitude is the same. As it is unprecedented to have about 40 folders for one simple episode, therefore we are forced to analyse quite thoroughly which evidence is relevant and which not, what is tried to prove by which evidence etc. As the amount of materials is unprecedented and clearly disproportional, therefore during

examination three possible versions must be checked: (i) such large amount of documents is actuated from the intention to make the defence more difficult, as it is not possible to select material from immaterial and on the basis of unclear suspicion it is very hard to find out which evidence is considered as incriminating in respect of which episode; (ii) there has been a disproportionally long term total surveillance which is contradicting to the European Convention of Human Rights and Fundamental Freedoms and the Constitution; (iii) is it not a searched suspicion „in a form of casual fishing on high sea" (English language legal cant „fishing expedition"). For example, if one tapes many sayings of a person throughout several years and thereafter searches for single bits (eg. in the style shown by media – „three beers and five vodka" or „homeland will not forget You"), then it is always possible to find „suspicious sayings". Naturally artificial welding of such mosaic allegations is not a ground for any accusation, as in such case absolutely anybody could be selectively repressed, whereas special blow would take those known for their talking nonsense or strange wording. Taping can never replace necessary elements of criminal offence.

1.14. State based on the rule of law follows the principle that if the law enforcement authorities have sufficient proof, then the matter is submitted to court. Therewith it is not necessary to have two hundred folders for proving five simple episodes. Merko Ehitus prefers fast submission of the case to court, as in such case it can examine the grounds of the suspicion and it would be ready to have adequate defence in the competing proceeding in court. Unfortunately we have not yet been provided the possibility to defend ourselves in court. Defence possibilities in the pre-trial stage are extremely narrow.

1.15. Most probably the affiant of the suspicion does not feel safe enough, otherwise the case, which has been proceeded so long, would have been submitted to court much earlier. The suspicion touches episodes from 2004, the search was performed in 2006 etc. Current uncertainty regarding the further scenario and even terms of proceeding is the worst version, which creates material damage to AS Merko Ehitus, which is also known to the law enforcement authorities.

1.16. In case of any suspicions, they are interpreted in favour of the person in any state based on the rule of law pursuant to the *in dubio pro reo* principle which is part of our legal system (KrMS § 7).

1.17. AS Merko Ehitus fears most of all repeating of scenarios of several big and resounding criminal cases which began with aplomb, in which resolving of problems was postponed to undetermined future. There have been several situations, when law enforcement authorities felt inside that the case was not suitable for court, but preferred „indefinite horror" to „quick finish". Such inadmissible tactics, which has temporarily postponed subjectively a not nice situation and which has finished with „falling out" of the case in court after some years, has also been unfortunately used before. Humanly such tactics is understandable – today it would be hard to say, that the case is suspicious and it is hoped for example that the officials have changed their work position after some years, media has ceased to be interested etc. At the same time everybody understands that in such case rights of a person as well as trustworthiness of the whole legal system is damaged irreversibly, not to mention creation of enormous costs. In a state based on the rule of law it should not be feared to say: „Yes, we had doubts, initially we considered them to be justified, but we interpret them on behalf of the person, therefore we close the criminal case due to insufficient suitability for court. Pre-trial investigation was for checking out the circumstances and for becoming convinced in whether we have sufficient proof or not. We deem to spend our resources for other clear matters."

2. Suspicion in three episodes of promising a bribe to Villu Reiljan or persons related to him and standpoint of AS Merko Ehitus

2.1. Plot of suspicion: Alleged promising of bribe to Villu Reiljan is in the fact that a person from the same political party - Lea Kiivit bought an apartment from Mr. Astover, who had earlier bought the apartment from Mr. Karjatse. The suspicion is also based in promising free use of this apartment, which Kiivit obtained. Lea Kiivit wished to buy an apartment at Rävala pst 19-33 in Tallinn (67,7 square meters) with sales value 1 624 650 kroons together with parking plot and

additional works. As Lea Kiivit did not enter into the buy-sell agreement within reasonable time, Merko Ehitus sold the apartment to Paavi Karjatse, who in his turn sold the apartment to Eldur Astover. The latter sold the same immovable property together with parking plot to Lea Kiivit for the price 3 176 000 kroons, which sum was 100% paid.

Standpoint of AS Merko Ehitus: There was no promising of bribe. How can making of such ordinary transactions (in which Merko has not made any transaction with Kiivit) meet the necessary elements of bribe, is not understandable. The price corresponds exactly to the market situation of that time and the aforesaid delay cost 1 500 000 kroons to Lea Kiivit. Kiivit was not an official, to whom bribe could be given and there is not any logical reasoning for giving a bribe.

2.2. Plot of suspicion: Annus allegedly promised to Viilu Reiljan to grant a possibility for him or for a person named by him a holding in a legal entity not mentioned in the suspicion which is related to Toomas Annus.

Standpoint of AS Merko Ehitus: Annus has not promised any bribe and there is no logical need to promise a bribe. Such suspicion is so dim that it violates defence rights. It is not understandable, which person and holding is spoken and what to whom and on what conditions was promised. Why is it not named, what company and what holding is it about, is not understandable. Reiljan has not either personally or through any shadow persons participated in any companies related to Toomas Annus. We do not know, what does the suspicion bear in mind concretely, but it is decided in such way that only employees of Merko have been involved in its real estate projects for the purpose of expanding motivation.

2.3. Plot of suspicion: The immovable property in Tallinn at Sõpruse pst 178 was allegedly transferred to an anonymous person named by Villu Reiljan, at the same time waiving from realization of commercial interests of the subsidiary of AS Merko Ehitus – OÜ Woody. Bribe allegedly is coming from the fact that an anonymous person in good relations with Reiljan could have acquired a state owned immovable property without an auction. According to the suspicion this person waived from acquisition of the property.

Standpoint of AS Merko Ehitus: No bribe was given nor promised and there is no reasonable reason for that. Again the plot is not understandable and anonymous and it remains unclear, what on which terms and to whom was offered. So it remains unclear, what was the bribe. There is no data that Villu Reiljan had any personal interest in respect of the said property and OÜ Woody has not waived from its commercial interests, as it sold the property for market price which was paid pursuant to the contract.

3. Suspicion in giving bribe to Kalev Kangur and standpoint of Merko Ehituse AS

3.1. Plot of suspicion: AS Merko Ehitus sold in 2003 an apartement to Hansa Liising, a lessee of which was OÜ Sootel. Kangur concluded in 2005 a lease agreement with Hansa Liising. The furnished flat was allegedly sold to Kalev Kangur below the market price. AS Merko Ehitus allegedly sold the flat at Lossi 18/ Soone 3 in Tallinn for the price 1 000 000 kroons on 30.12.2003 to AS Hansa Liising Eesti, a lessee of whom was OÜ Sootel who in its turn allegedly sold the apartment on 07.02.2005 to Kalev Kangur.

Standpoint of AS Merko Ehitus: No bribe was given and there is no logical reason for that. Merko has never sold an apartment to Kalev Kangur and neither Merko nor Annus has no relation whatsoever with OÜ Sootel. It is also unclear, how ordinary transactions, like former sale to lease company, be considered as elements of bribe.

Plot of suspicion: Promise for Kangur to participate in management of other company via another person and intention to give the sole share of OÜ KV-Tarantel in autumn 2006 to a person named by Kalev Kangur.

Standpoint of AS Merko Ehitus: There has not been any such intentions. KV Tarantel OÜ, which is a subsidiary of E.L.L. Kinnisvara AS, has never discussed nor decided sale of KV-Tarantel OÜ.

4. AS Merko Ehitus confirms to shareholders, that it has not given any bribe and that there was no need whatsoever for giving bribe.

4.1. We stress to shareholders, that neither Merko Ehitus nor Toomas Annus has promised or given any bribe either in his own name or in the name of the company. The company has also not given or promised any financial or other benefits to officials for receiving from the state more valuable immovable properties with the exchange procedure or for expediting the exchange procedure. Merko Ehitus is able to prove, that exchanges of other persons were made much faster, as well as that several land plots of Merko remained non-exchanged. Law explicitly provided legality of land exchange transactions and there is no illegal act which is imperative element of KarS § 294 necessary elements of an offense, for which there would be a reason to give bribe.

4.2. As it was mentioned above, a suspicion in a criminal offence qualified in § 298 subsection 4 of Penal Code (KarS) has been presented to AS Merko Ehitus and to Toomas Annus. Existence of the necessary elements of criminal offense is possible only in case if it is directed to performance of an unlawful act by an official. It is not understandable from the suspicion, which legal act the land exchange was in contradiction with (considering the 184 identical exchanges – vide infra), also for which concrete act of an official the bribe was allegedly given and why was it necessary at all to give bribe. Land exchange transaction was a transaction provided by law, i.e. a lawful transaction.

4.3. Penal Code (KarS) provides the definition of unlawful act. Pursuant to KarS § 27 an act is unlawful if it comprises the necessary elements of an offence prescribed by law and the unlawfulness of the act is not precluded by KarS, another Act, international convention or international customary law. In the present case it continuously remains incomprehensible, what was the exact act for which bribe was offered and why was it necessary at all to give bribe, if the law explicitly provided permission of such land exchange, whereas another 184 same (via the same law and procedure) land exchanges were performed, which law enforcement authorities have not associated with bribe[2].

[2] The Supreme Court explained in the decision 3-1-1-118-06 p. 14. That pursuant to the necessary elements of the bribe the prerequisite of liability is equivalency relation. The action of an official must be something made or to be made for counter payment: for the person granting gratuition or bribe this is in its essence a counter service purchased or to be purchased, for the person taking gratuition or bribe i.e. official this is a payable or paid favour. (Legal theory / Sootak, Pikamäe/ eg. professor Jaan Sootak, Juridica „Altkäemaks, kas uus tõlgendus seadusele?“, as a minimum, an abstract relation must be established, which need not be on certain *quid pro quo*

4.4. Whereas the land exchange transactions (Merko's 4 episodes) were in itself objectively lawful (as were the other 184 exchanges, which are not alleged to be unlawful and in respect of which no different characteristics have been brought forth except participation of Merko), then the necessary elements for giving bribe are excluded (KarS § 298). If it was proven that any benefits were promised or given, then a question of qualifying pursuant to KarS § 297 (granting of gratuities as secondary criminal offence) would arise. There would be no logical explanation, why it was necessary for Merko to grant gratuities for a legal action in a situation where 184 same exchanges to other persons were made without any gratuition. Merko has not received any priorities, as lands were evaluated by the same experts who were officially acknowledged by state, Merko did not gain any priorities in speed (we can prove that other persons finished their exchanges faster), several exchanges of Merko were not made at all etc.

5. Land exchanges were lawful transactions and AS Merko Ehitus acted on the basis of valid law and administrative acts, thus establishing on them the legal certainty granted by § 10 of the Constitution.

5.1. We would like to mention to shareholders as introduction, that every state is interested in nature conservation restrictions in public law interests. At the same time, establishing of nature conservation restrictions to immovable properties of private persons was prejudice of fundamental rights of a person and the state was obliged to secure defence of a person pursuant to § 14 and 32 of the Constitution. The Nature Conservation Act was discussed by the Parliament as well as by nature committee. The purpose of the act was obvious – to achieve transfer of ecologically valuable lands to the state ownership. For that purpose ecologically more valuable land plots were exchanged for ecologically less valuable ones.

5.2. Law provides several alternatives how the state can obtain the land which is object of nature conservation, one alternative was also long term and financially expensive expropriation. In case of expropriation of one property other owners should also be treated equally. Much easier and more reasonable is voluntary exchange procedure. A person may

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basis, but still the action needs to be identified official action. In the present case it is unclear, what was the action for which bribe was given and the equivalency relation has not been estimated.

not consider the ecological value as much as the state and the person is rather interested in economic potential of the exchange. Here the reasonable balance shall be achieved. Thus, Nature Conservation Act as a priority special norm provides exchange procedure for cases when a person wishes to receive land but not tax-payers' money in exchange for immovable property with nature conservation restriction. By such procedure the state granted to person rights provided in PS (the Constitution) § 32. Pursuant to PS § 32, in case of all the alternatives the state should have compensated to owners of immovable property at least the normal value of the property. This aspect also derives from additional protocol No 1 of the European Convention of Human Rights and Fundamental Freedoms.

5.3. An authorized administrative body was entitled to decide which legal means to use for acquiring an immovable property. One legal means was land exchange pursuant to § 19 of Nature Conservation Act. AS Merko Ehitus is on opinion that law enforcement authorities are trying, ignoring the PS § 4 principle of separation of powers, to prescribe to administrative bodies ex post, which would be better way of land exchange, i.e. „proper discretion" in case of several legal versions. Still, authorized administrative body has a right of choice, not the law enforcement authority. According to the „logics" of the suspicion a preliminary approval by law enforcement authority would be needed prior an authorized administrative body can make the decision. The Supreme Court resolved, for example, in an administrative case number 3-3-1-15-01 that „Assets of the state as well as local municipality are set up mainly by the assets which are meant for performing public duties. Upon choosing from amongst several interested persons the one to whom the use of the asset shall be granted, a city performs public authority. A city must consider public interests upon granting lease of assets, which interests may not always be receipt of material profit.". Thus, in case of permitting law, an administrative body, not a law enforcement authority, decides which permitted law shall be implemented, which land and for which one needs to be exchanged and with whom to exchange in public law interests.

5.4. Exchange of immovable property with nature conservation restriction against state owned immovable property took place pursuant to § 19 of Nature Conservation Act and pursuant to „Rules of immovable property exchange and grounds for establishing value of immovable property and its material parts" adopted by July 8th 2004 Resolution No 241 of the Government (hereinafter *rules for exchange of immovable property*). § 19 subsection 1 of Nature Conservation Act explicitly stipulated that an immovable which contains an individual

protected natural object or is located, as a whole, within the territory of a protected area, special conservation area or species protection site and whose use for its intended purposes is significantly hindered by the protection procedure may be exchanged for an immovable owned by the state based on an agreement between the state and the owner of the immovable. Thus, the priority specific provision uniquely and explicitly permitted such kind of exchange.

5.5. Nature Conservation Act (LKS) § 19 (21 04 04 wording) was a specific provision and the said provision was an independent and legal grounds for land exchange, if:

- the land is partially or as a whole located within the territory of a protected area (special conservation area) and was hindered by the protection procedure;

- the exchange was decided by Minister of Environment;

- immovable properties were exchanged on value basis.

5.6. All the aforesaid conditions were fulfilled and law did not prescribe any other conditions. Thus, „establishing" of additional restrictions, which are not prescribed by law, by law enforcement authorities is in contradiction with the principle of legality stipulated in PS § 3.

5.7. Pursuant to the PS § 10 legal certainty principle, every person, including AS Merko Ehitus, has legitimate expectation that laws and administrative acts shall remain in force, and certainty in realization of one's rights. Laws and administrative acts were adopted by the same state, which suspects Merko Ehitus. The suspicion does not find that the exchange transaction was performed with violation of authorities. The suspicion agrees that by law the Minister of Environment was authorized to exchange immovable property with nature conservation restriction against state owned immovable property. The suspicion does not state also that the Minister of Environment made such decisions which were not provided by LKS or that he did not perform any of his discretional rights provided in LKS. Pursuant to § 94 of the Constitution, corresponding ministries shall be established, pursuant to law, for the administration of the areas of government. A minister shall direct a ministry, shall manage issues within its area of government, shall issue regulations and directives on the basis and for the implementation of law, and shall perform other duties assigned to him or her on the bases of and pursuant to procedure provided by law.

Thus, decisions made on the basis of the Constitution and laws which are in conformity therewith, shall be lawful. However, establishing of restrictions not prescribed by law, what the law enforcement authorities are trying to do, is unlawful.

5.8. Being unlawful would mean action in contradiction with law. The suspicion does not express, what was the direct violation of law. The fact that the author of the suspicion finds, that a transaction could be made in a better way, does not make the transaction to be unlawful. If law enforcement authorities shall afterwards, despite of lack of breach of law, evaluate economic or administrative feasibility, then it means farewell to the PS § 4 separate power principle and takeover of these functions by law enforcement authorities, which would breach the fundamental principles of state based on the rule of law (in such case it would be more „reasonable" to provide explicitly, that an administrative decision shall be passed by law enforcement authority). Law has not provided any restrictions or conditions to the exchangeable land (location, intended purpose etc), the law did not also provide any restrictions to persons who were permitted to participate in exchange transactions. In several cases such restrictions are provided by law (eg. to the person acquiring right of claim for return of land prior 2004, as well as to privatization of land with right of pre-emption etc). Thus, it was the will of the legislator that all and any persons who own an immovable which meets the transaction requirements, can apply for exchange transaction. It did not matter whether the immovable was acquired for exchange. Pursuant to PS § 3 and 10, anyone, including AS Merko Ehitus, could rely on legal certainty regarding the published act.

5.9. Exchange of immovable property provided in the aforesaid legal norms is an administrative procedure, to which provisions of Administrative Procedure Act (HMS) shall also be applied, unless there are relevant specific provisions in other acts.

5.10. In the present case all the administrative acts as well as transactions are valid today. It was sufficient for AS Merko Ehitus to know that the law and administrative acts were in force at the time of the transactions. All challenging terms have expired. From the Supreme Court decisions No 3-3-1-64-04 p. 17, 3-3-1-20-04 p. 19 it derives that even a challenged administrative act is in force and enforceable, until declared invalid by court. This principle also derives from legal theory (K. Merusk, I. Koolmeister „Haldusõigus. Õpik Tartu Ülikooli õigusteaduskonna üliõpilastele", Õigusteabe AS Juura, 1995, Tallinn „... invalid act has effect until it has not been challenged and declared to be invalid"). Thus, the acts had effect during

the time of the transactions and are valid today. All means of challenging have expired. Merko Ehitus could rely on valid administrative acts.

5.11. The suspicion is also in obvious contradiction with the PS § 3 legitimacy, PS § 10 legal certainty and PS § 31 market economy principles, whereas law enforcement authorities unlawfully protect „*acquisition in good faith*" (pursuant to authors of the suspicion acquisition not applying for profit), preferring it to acquisition in commercial interests. The authors of the suspicion have disregarded that in bad faith would be unlawful acquisition. Pursuant to TsÜS (General principles of Civil Code Act) § 35 (as well as ÄS (Commercial Code) § 315 and 317) a legal entity shall act via its administrative bodies in the best interests of the entity, which means using all legal means for earning profit. Thus, AS Merko Ehitus is accused in performance of its legally primary purpose – applying for profit to the company (a possibility of conflict of obligations pursuant to KarS § 30 might also derive from this). We indicate that taxes received by the state are also dependent on profit. Law permitted land exchange not dependent on whether a person acquired the land knowingly for the purpose of further exchange and profit earning. It is unprecedented to incriminate the purpose of gaining economic profit in a state based on market economy[3]. Therewith the suspicion is deeply contradictory, as Toomas Annus is incriminated in gaining insufficient profit from the said transactions[4]. We hereby stress that it is easy to prove that not every acquisition was made

[3] In criminal law one must be based on written law not expandingly (*lex scripta*) and the principle of determination (*nullum crimen nulla poena sine lege certa*). It is important that law does not prohibit use of valid and favourable (permitting land exchange) law for business. Pursuant to PS § 3 only written law is valid and PS § 31 (freedom of undertaking) and 32 (ownership protection) rights can be restricted only by law. Nature Conservation Act § 19 did not separate „exchangers in good faith" from those who exchanged land within commercial interests. Suspicion is furnished with non-foreseeable reproaches not prescribed by law. European Court of Human Rights has indicated that the principle of legal certainty and legality means right to enjoy fundamental rights on the basis of unique and foreseeable regulation (*N.F. v. Italy,* 02.08.2001). A rule must be clear and a reasonable person must understand the consequences of ignoring it (*Rekvenyi v. Hungary,* 20.05.1999). Without clearly fixed legal regulation liability of a person is excluded (see also European Court of Human Rights II decision in the matter *T. Veeber v. Republic of Estonia*). This concerns also unfavorable interpretation principles. We consider it necessary to be based on the Supreme Court standpoints in Jaan Mugra criminal matter 3-1-1-24-05 (Cassation submitted by L.Glikman was satisfied, A. Glikman represented at Supreme Court hearing). The Supreme Court stressed that the requirement of determination of criminal offense derives from PS § 23 subsection 2 and § 13 subsection 2, as well as from art 7 subsection 1 of European Convention of Human Rights and fundamental freedoms (EIÕKonv). The authors of the suspicion do not point to any law which would prohibit acquisition for favorable exchange for the purpose of gaining economical profit and how could Merko foresee that such action shall be disapproved. .

[4] Toomas Annus is suspected in abuse of confidence, by which Merko Ehitus did not use the possibility to earn additional profit from allegedly unlawful transaction (!?).

with the purpose of exchange. For example, the immovable properties of Pirita river dale Merko acquired in March 2004, when there was no building restriction. The protection rule was adopted only in October 2005.

5.12. AS Merko Ehitus points out that law does not prescribe any limitations to transfer of an immovable property with nature conservation restriction, inter alia restriction to act in the interest of gaining profit. Thus, an owner of an immovable property with nature conservation restriction is entitled to transfer, encumber or make other unlimited transactions with the property. Naturally existence of nature conservation restriction affects the value of the property, as use of such property is generally limited.

5.13. Nature Conservation Act prescribed that exchange shall be made on value basis. In all the episodes named in the suspicion the state (not AS Merko Ehitus) ordered evaluations from property evaluation experts acknowledged by the state, which evaluations confirmed parity of the price. Nature Conservation Act § 19 provides that the exchange of the immovables shall be based on their value. Considering the specific ecological value of the exchanged immovable, the usual value of the immovable to be transferred to a person in public law may exceed, with the consent of the Government of the Republic, the usual value of the immovable to be transferred to the state (subsection 3). Rules for exchange of immovables and grounds for evaluation of the immovable and its essential parts is provided by a governmental regulation. The aforesaid regulation provides precise grounds and rules for evaluation of the exchanged immovable and the exchange land. Pursuant to § 16 subsection 1 of the regulation the value of the land plot, except the land plot covered by forest, is established on transaction comparison method, thus finding the value of the object of evaluation by transaction prices of similar objects. Transaction prices are considered to be only those buy-sell transaction prices, which reflect the market situation as of the evaluation time. Thus, in exchange transactions usual value of land plots is established. Presumed that land plots were evaluated fairly, then the exchange transaction is legal also in this aspect, and the allegation in the suspicion that AS Merko Ehitus acquired the immovables favourably is also ungrounded. The same procedure was used in all evaluations. The state hired acknowledged real estate experts. There is no grounds that experts gave wrong opinions namely in respect of Merko. Furthermore, Merko acted in certainty that the state has checked

the value and acquisition necessity. We add, that upon estimation by Merko Ehitus namely the immovables offered by state within the land exchange were overvalued.

5.14. Merko Ehitus shall have a possibility to prove all these circumstances.

6. AS Merko Ehitus is treated unfairly. 184 analogous exchanges were made at the same time period on exactly the same grounds, which ones law enforcement authorities have not considered to be unlawful.

6.1. On the grounds of Nature Conservation Act different persons not related to each other (private and legal persons) exchanged with the state immovables with nature conservation restriction within 2003 to 2006 in total 184 times. Ignoring the PS § 12 principle of equal treatment, these persons are not alleged to have made unlawful transactions and no suspicions have been submitted to these persons. Even in case if some episodes were connected with giving bribe and the others were not, the administrative act and the exchange transaction made on its basis would not in itself become unlawful[5]. The concept of the suspicion is illogical, as it cannot be understood, why only Merko Ehitus needed to give bribe to achieve land exchange, when 184 persons who made exactly the same transactions could make them without any bribe and legally. In case if the criminal matter does not contain documents of other identical exchanges, then the defence shall have to file an application for enclosure of such data. Most probably the defence shall request also making of a specification why it is considered that the four land exchange transactions with participation of Merko were unlawful and why the other 184 are considered to be legal, i.e. which specific aspect distinguishes the said four episodes from the remaining 184.

6.2. The special panel of the Supreme Court has stressed in its 20. December 2001 decision in administrative case number 3-3-1-15-01 that upon granting use, transfer or other transactions with state owned property, a person is only entitled to request to be treated equally with other bidders, that its right of undertaking is not restricted and that the state follows the regulations adopted for protection of bidder in such situation. Why the suspicion finds that all

[5] The Supreme Court explained in decision 3-1-1-118-06 p. 16 that considering an action of an official to be legal or unlawful does not depend on other objective requirements of the necessary elements of the criminal offence, but only separately on the valuation given separately to the action of the official. Thus, indistinct of receipt of the benefit the action (land exchange) should in itself be also unlawful.

transactions besides those of AS Merko Ehitus were objectively legal, is unclear. Upon land exchange same evaluation principles were also used. It derives from nowhere that in case of Merko Ehitus the state used other real estate evaluation experts or that any valuation reports were falsified. In case if the reports are not enclosed to the suspicion, then we shall request them to be enclosed to the matter. From here a request may arrive, why the same experts are being believed in 184 cases and not in four cases.

6.3. Allegation that Merko Ehitus achieved faster exchanges, is easily overruled by the defence. Several persons who are not suspects could make several exchange transactions for a significantly faster (2-5 months) period. The exchanges via KV Tarantel described in the criminal matter took about 2 years. These data are already systematized in big part. Merko Ehitus has received numerous refusals and has still not been able to exchange several immovables. KV-Tarantel, which pursuant to the suspicion concept is a company related to Kangur, has also been refused. Thus, according to the "logics" of the suspicion, Kangur refused to a company related to himself. We hereby notice, that such speculations as the one that forest land was exchanged with city land, need no comments, as there has not been any such exchanges, which fact can be checked from the documents.

6.4. Thus, in respect of the 184 transaction the PS § 12 principle of equal treatment has been ignored. The Supreme Court explained in its March 24th, 1997 decision 3-3-1-5-97, that the principle of equal treatment must be acknowledged as one of the general principles of Estonian law. Pursuant to this principle equal situations shall be treated equally[6]. Most certainly the law enforcement authorities must provide an answer to the question, on the grounds of what principle 4 transaction episodes of Merko are unlawful and the remaining 184 exchanges are legal.

Sincerely,

Leon Glikman

Attorney at Law

Representative of Merko Ehituse AS

[6] Principle of equal treatment also derives from Art. 14 of European Convention of Human Rights and Fundamental Freedoms and from decisions of European Court of Human Rights (eg. *Abdulaziz, Cabales and Balkandali v. The United Kingdom*). Therewith, selective prosecution is prohibited.