[Translated from the French]

Federal Supreme Court Received 18 Jan 2008

6B_581/2007
6B_582/2007/rod

Judgement of 9 January 2008
Criminal Court

Composition

Presiding Judge Schneider
Judges Wiprächtiger and Ferrari
Court Clerk Mr Vallat

Parties

6B_581/2007
Michael **Cherney**, 52 Hagiva Street, IL-56500 Savyon
Tel Aviv, Israel
Appellant, represented by Me Robert Assaël, advocate, rue de Hesse 8-10, 1204 Geneva and Me Alain Macaluso, advocate, rue de Hesse 8-10, 1204 Geneva.
and
6B_582/2007
Joseph **Karam**, ch. du Pontet 5b, 1132 Lully VD,
Appellant, represented by Me Jean-Marie Crettaz, advocate, place de la Taconnerie 3-5, 1204 Geneva
versus
The Public Prosecutor for the Canton of Geneva
Postbox 3565, 1211 Geneva 3
Respondent.

Regarding

Decision to take no further action (criminal organisation)

Appeal against the ruling by the Indictment Division of the Canton of Geneva of 22 August 2007.

Facts:

A.

A.a On 22 November 1996, during the course of criminal proceedings instigated in the Canton of Geneva (P/11194/1996), Michael Cherney was charged with being a member of a criminal organisation (Article 260ter CP - *Procedural Code*). He was accused of being a member of an organisation which kept its structure and membership a secret and the objective of which was to commit criminal acts or to procure income through criminal means. He was suspected of "drug trafficking, money laundering, fraud and sponsoring murder, committed in particular on behalf of the Ivankov V organisation, being behind the Russian mafia and the Ismailova gang headed by Anton Malevski."

On 10 June 1999 the company known as Trans-World Metals SA (TWMS) filed a criminal complaint with the Investigations Office for the district of La Côte (VD) against Joseph Karam, Walter Niggli and Oleg Deripaska, in particular, for actions constituting fraud, mismanagement and breach of trust. The Public Prosecutor for the Canton of Geneva (hereinafter: the Public Prosecutor) agreed to take over the proceedings initiated in the Canton of Vaud and instigated a criminal enquiry into the aforementioned offences (P/5279/2001).

A.b According to a notice dated 5 November 2002 the Examining Magistrate for the Canton of Geneva forwarded the proceedings under number P/11194/1996 to the Public Prosecutor, making the following note: "Charged in 1996, considering detention on remand deficient". By an order of that same date the Public Prosecutor ruled that no further action should be taken in the proceedings "considering the absence of any charge". In fact, this first decision not to take further action was taken "as a matter of expediency and considering the lack of detention on remand". On 14 February 2003 the Indictment Division of the Canton of Geneva overturned the decision not to take further action in these proceedings and referred them back to the Examining Magistrate. The latter joined action no. P/5279/2001 with action no. P/11194/1996. Michael Cherney appealed against that decision to the Indictment Division, which upheld the joinder of the two cases by a ruling dated 4 September 2003.

A. c On 5 July 2004 Joseph Karam was charged with mismanagement, in Geneva from 1997 onwards, in having fraudulently permitted the Bluzwed group to appropriate goods and profits half of which should have accrued to TWMS, whose interests had been entrusted to him through the trust company of Tradalco Ltd. He was also charged with being a member of, or providing support to, a criminal organisation in Geneva from 1997 onwards, the said organisation having been set up by Michael Cherney, in particular – who had already been charged in that respect – so as to fraudulently and permanently take control of the production and processing of alumina and other raw materials in the former USSR; he had been its manager and financial adviser outside the former USSR. By a letter of 27 June 2005 TWMS withdrew its complaint as a result of an agreement of a financial nature having been concluded with Oleg Deripaska on 2 June 2005, who controlled the Bluzwed group in particular. Having considered the preliminary enquiries to have come to an end, the Examining Magistrate for the Canton of Geneva forwarded the proceedings to the Public Prosecutor by an order of 25 August 2005. By letters of 6 and 21 March 2006 the Public Prosecutor informed Michael Cherney and Joseph Karam that the proceedings had been placed on the file for no further action to be taken, as a matter of expediency, on 29 August 2005.

A. d Michael Cherney and Joseph Karam appealed to the Indictment Division against the decision to take no further action; they asked for a ruling that the indictments against them be completely quashed. In two orders of 7 August 2006 (OCA 181 and 182/2006) the Indictment Division dismissed those appeals. It considered, in substance, that there were still sufficient indications of the commission of offences against Article 260ter CP with regard to Michael Cherney and that the actions revealed during the course of the investigation into the complaint by TWMS fell within the scope of the charge of 22 November 1996, even though it had been imprecise. As for Joseph Karam, he had not produced sufficient evidence to exonerate him from the accusations made against him; there was still sufficient reason to suppose that the matters of which he had been accused constituted, in particular, infringements of Articles 158 and 260ter CP. In neither case, therefore, had the conditions for a ruling that the indictments be completely quashed under Article 204(1) of the Geneva Code of Criminal Procedure (CPP/GE) been satisfied.

By two judgments of 16 February 2007 (judgments 1P. 654/2006 [Karam] and 1P 656/2006 [Cherney]), the First Public Law Appeal Court of the Federal Supreme Court annulled the orders of 7 August 2006. It ruled that, as worded, the orders challenged, in which no precise mention was made of the outcome of the enquiry on the basis of which the Indictment Division had ruled that there existed sufficient elements of guilt, did not permit the appellants to effectively dispute the content thereof, nor was it possible for the constitutional nature thereof to be verified. The Indictment Division had not therefore fulfilled its duty to state its reasons so that there was good cause for the cases to be referred back to it for a new ruling by way of orders in which the reasons were sufficiently stated, specifying the offences to which the evidence shown related and referring to numbered exhibits that it would be possible to consult. These two judgments also made it clear that the only police report specifically mentioned, namely the report of 18 July 2001, did not contain evidence likely to corroborate the accusations made against the appellants. That report just consisted of an index of bank movements and stated that, according to "certain sources", the head of a Russian criminal organisation was concerned with protecting the interests of the appellant [Michael Cherney]. A note by the examining magistrate of 4 October 2001 referred to an examination of Joseph Karam on 10 April 2001 during the course of which "certain unusual financial movements" were examined and commented upon; the transcript of the examination procedure in question did not, however, elucidate the reasons why those financial movements were deemed unusual nor did it enable any link to be established with the charge of being a member of a criminal organisation within the meaning of Article 260ter CP. The report by the Federal Police Department of 10 August 2000 did certainly describe the appellant [Michael Cherney] as "a prominent member of what might customarily be called Russian organised crime" but the basis for that vague suspicion is unknown. Finally, neither did the orders OCA/257/2003 or OCA/258/2003 mentioned by the Canton Appeal Court contain any references to documents contained in the file.

B.

After calling for matters to be determined by the parties the Indictment Division pronounced two new orders (nos. OCA/156 and 157/2007) on 22 August 2007 in which it once more dismissed the appeals lodged by Michael Cherney and Joseph Karam and upheld the decisions at issue.

C.

Michael Cherney and Joseph Karam both lodged an appeal in a criminal matter against the orders pronounced against them. They principally asked, along with costs and expenses, for the orders to be amended so that their indictments were completely quashed or, alternatively, for the cases to be referred back to the canton authority for new decisions to be pronounced as stated in the recitals.

During the preliminary investigation proceedings the Canton Appeal Court was asked to forward to the Federal Supreme Court various documents mentioned in the orders at issue. Those documents were produced on 27 November 2007.

The Public Prosecutor asked for the appeal to be dismissed since the Indictment Division had referred to the recitals in its decision.

Whereas in law:

1.

The two orders appealed against dealt to a considerable extent with the same set of facts so that there was justification for the joinder of the criminal proceedings brought against each of the appellants (see *supra* recital A.b). They relate to the same legal issues. It is therefore proper for the cases to be joined and for them to be decided in a single judgment.

2.

Under Article 81(1) LTF - *Law governing the Federal Supreme Court* - (which applies in this case because of the date on which the order appealed against was pronounced; Article 132(1) LTF) an appeal in a criminal matter may be brought by a person who has been a party to the proceedings before a lower court or who has been deprived of the opportunity of doing so (subparagraph a) and has a legal interest in the annulment or amendment of the decision challenged, specifically the accused (subparagraph b.1).

2.1 The Federal Supreme Court has repeatedly ruled that where a person has been charged but the case has been placed on the file for no further action to be taken under Article 198 CPP/GE that person has a legally protected interest in obtaining a ruling that the indictment should be completely quashed under Article 204 CPP/GE where the conditions for the same are satisfied. A decision to take no further action pronounced on the basis of Article 198 CPP/GE – which happens when the Public Prosecutor to whom a file has been forwarded by an examining magistrate at the end of preliminary enquiry proceedings (Article 185(1) and 197 CPP/GE) considers that there is no justification for bringing a public prosecution – means that there is still a possibility of those proceedings being resumed "in the event of new circumstances arising", that is to say in the event of any new facts being established such as would make it appropriate for the expediency of the decision to take no further action to be reconsidered. Under Article 204(1) CPP/GE the Indictment Division must, however, pronounce an order for an indictment to be completely quashed where it does not find sufficient indication of guilt or where it considers that the facts do not constitute an offence. A decision to completely quash an indictment must therefore be based on reasons of fact (because of the absence of sufficient proof) or on reasons of law (where the facts provoking the investigation are not legally relevant or where the legal requirements for proceedings to be taken are not (or are no longer) satisfied, particularly because the offence is statute-barred or the complaint has been withdrawn [cf. GÉRARD PIQUEREZ, Traité de procedure pénale suisse, Zurich 2006, n° 1092 ss; Mémorial des séances du Grand Conseil du canton de Genève 1977, p, 2825]). The effect of completely quashing an indictment is that the accused can no longer be pursued again on the basis of the same facts unless new evidence is forthcoming (Article 206(1) and (2) CPP/GE), meaning genuinely new facts necessitating further enquiries. Furthermore, a person whose indictment has been completely quashed might (where appropriate) claim damages for loss sustained as a result of the criminal proceedings (Articles 206(3) and 379 CPP/GE). Unlike a decision to take no further action based on Article 198 CPP/GE, the quashing of an indictment finally puts an end to the criminal proceedings against the accused, who then ceases to incur the sanctions threatened and also has the right to obtain such a decision if the requirements laid down by law are satisfied (see judgment 1P.737/1999 of 16 May 2000, published in SJ 2000 I p. 572 recital 1c; see also the unreported judgment 1P.769/2005 of 12 April 2006 recital 2.1 and references).

In the present case Michael Cherney particularly states in his pleadings that he was only formally charged with being a member of a criminal organisation (Article 260ter CP) in relation to accusations of drug trafficking, money laundering, fraud and sponsoring murder committed, in particular, on behalf of the Ivankov V organisation, being behind the Russian mafia and the Ismailova gang headed by Anton Malevski (charge dated 22 November 1996) and not in relation to the other matters deriving from the proceedings instigated as a result of the complaint by TWMS. Hence, it is necessary to examine, first of all, whether the appellant has any right of action insofar as the order at issue contains a refusal to completely quash the indictment in relation to these latter accusations as well.

2.2 It is apparent from the order at issue (OCA 156/2007) that the Canton Appeal Court, which referred to its previous orders on this point, considered that all of the accusations against the appellant fell within the scope of the charge pronounced on 22 November 1996 even though that charge appeared imprecise (order at issue, p. 7/22). In his pleadings the appellant does not dispute the fact, moreover, that he could have benefited from the rights guaranteed to an accused person after he is charged. He did not attempt to bring about a decision even though Geneva criminal procedure allows a person who is the subject of investigation to demand to be charged in order to benefit from the rights resulting therefrom (Article 137 CPP/GE; PIERRE DINICHERT, BERNARD BERTOSSA and LOUIS GAILLARD, Procédure pénale genevoise, review of recent case-law, SJ 1986 p. 465 ss, particularly n. 4.4, p. 478). Finally, the appellant is not attempting to show that the Canton Appeal Court arbitrarily applied decisive rules of canton law.

Hence, there is reason to consider, along the lines of the Canton Appeal Court, that the appellant was charged with all of the offences stated in the order at issue. He therefore has capacity to contest the refusal to pronounce an order completely quashing his indictment with regard to all of the offences in question.

2.3 There is no doubt at all about Joseph Karam's right to appeal.

3.

An appeal in a criminal matter may be lodged for a legal violation as defined in Articles 95 and 96 LTF. The Federal Supreme Court applies it of its own motion (Article 106(1) LTF). It is therefore not restricted by either the arguments raised in the grounds of appeal or by the reasons given by the lower court. It may allow an appeal on grounds other than those invoked and may dismiss an appeal by adopting an argument different to that raised in the lower court (cf. ATF 130 III 136 recital 1.4 p.140). In view of the requirement to state reasons contained in Article 42(1) LTF on penalty of inadmissibility (Article 108(1) subparagraph b LTF), the Federal Supreme Court, in principle, only examines the heads of appeal invoked; unlike a court of first instance it is not obliged to deal with all legal questions that might arise if they should not be raised before it. It may not deal in substance with a breach of constitutional law or a question based on canton or inter-canton law if that head of appeal has not been invoked and specific reasoning stated by the appellant (Article 106(2) LTF). The Federal Supreme Court does not look in substance at criticisms of an appellatory nature (ATF 133 III 393 recital 6 p.397).

Michael Cherney and Joseph Karam state, on pages 11 and 5 of their respective pleadings, that they are invoking the plea of arbitrary application of canton law in relation to Article 204 CPP/GE. Their pleadings do not, however, set out any substantial reasoning in relation to the rule of canton law in question, or its interpretation or application by the Geneva authorities. These heads of appeal are inadmissible in this respect (Article 106(2) LTF). The appellants' arguments essentially relate to issues of fact and evaluation of evidence, from which they only indirectly deduce that canton law has been arbitrarily applied. They therefore take issue with the Canton Appeal Court for having recourse to arbitrariness in ruling that there were in this case, at probability level, substantial indications of the commission of the offences with which they were charged.

4.

The Federal Supreme Court, when hearing an appeal on a criminal matter, rules on the basis of the facts established by the lower court (Article 105(2) LTF). It only re-examines the facts established – subject to an allegation of a breach of the law within the meaning of Article 95 LTF – if they are manifestly incorrect (Article 97(1) LTF), that is to say established in arbitrary fashion (Federal Council Memorandum on the complete review of federal judicial organisation dated 28 February 2001, FF 2001 4000 ss, particularly p. 4135; judgment 6B_89/2007 of 24 October 2007, recital 1.4.1 to be published in ATF 133 X xxx).

A decision is arbitrary if it is clearly untenable, if it seriously misinterprets a clear and undisputed legal rule or principle, or if it runs absolutely contrary to any sense of justice or fair play. It is not sufficient for its reasoning to be untenable; it is also necessary for the decision to appear arbitrary in outcome. The Federal Supreme Court will only overturn a solution arrived at if it should appear untenable, if it clearly conflicts with the actual situation, if it is arrived at without objective grounds or in breach of an established right. It is not arbitrary merely by virtue of the fact that a different solution would also appear conceivable, or even preferable (ATF 129 I 8 recital 2.1; 128 I 273 recital 2.1). As far as the evaluation of evidence and establishment of facts are concerned, arbitrariness is deemed to exist where the court for no good reason does not take into account an item of evidence liable to change its decision, if it is clearly mistaken as to its meaning and scope or if, based on the evidence adduced, it draws untenable conclusions therefrom (ATF 129 18 recital 2.1; 127 138 recital 2a p. 41).

4.1 Michael Cherney

4.1.1 The Canton Appeal Court ruled that Michael Cherney had at least been in contact with Anton Malevski deceased, who at the time had been the head of the criminal organisation Ismailova, and Iskandar Makhmoudov, who was a member of the said organisation. With their support he was said to have been working to grab the whole or part of the Russian aluminium market for his own benefit and in this context, in 1995, under the aegis of Bluzwed, his group's beacon company, he concluded a joint venture agreement with TWMS, in which he was a sleeping partner. At the end of 1997 he arranged, unbeknown to his contracting partner, for a corporate structure to be set up in which he was the sole economic beneficiary. These companies were identical twin companies with the same names as the official entities that had equal shares in the joint venture. They were substituted for the official entities for the marketing of aluminium

rocessed at the Sayansk factory, leading to the appropriation of goods and profits half of which should have gone to TWMS. The proceeds of such misappropriation were said to have been paid in part to Anton Malevski deceased and to Michael Cherney through various entities owned by them, particularly offshore companies. TWMS was said to have been finally ousted from the market for aluminium coming from the aforementioned factory, thereby benefiting Alpro SA, which was in the hands of Michael Cherney, Oleg Deripaska and Joseph Karam (order at issue, recital 1.3 p. 19/22).

4.1.2 The Canton Appeal Court does not appear to have tried to establish the existence of substantial signs that the group of companies controlled by the appellant did in itself constitute a criminal organisation within the meaning of Article 260ter CP. There is, in particular, no mention of any signs of perpetration of the offences referred to in the charge sheet of 22 November 1996. In as much as it might be possible to understand the reasoning for the order at issue, the relationship with such an organisation that was attributed to the appellant essentially consisted, according to the Canton Appeal Court, of the contact that he was said to have had with Anton Malevski and Iskandar Makhmoudov.

According to the recitals in the Canton Appeal Court judgment, the involvement of those persons in a criminal organisation and the existence of contact between them (or the Ismailova criminal organisation) and the appellant was essentially based on a report by the Federal Police Department on organised crime in the former USSR dated 10 August 2000 (order at issue, recital 1.3, p. 16/22). The Canton Appeal Court certainly indicated that, in its view, there were no tangible factors that might lead it to doubt that report (order at issue, *ibid*). However, as the First Public Law Appeal Court noted in its judgment of 16 February 2007 (judgment 1 p. 656/2006), there is no real knowledge of the basis for the vague suspicions mentioned in that document. Reference is simply made there to a previous report by the Federal Police Department, dated 16 August 1997, which does not provide any more specific details, and to future reports the ultimate existence of which is unknown. The outcome of any proceedings that might have been brought in Russia against the appellant is still unknown (see the report by the Federal Police Department of 10 August 2000, p. 3). However, that report is also bolstered by factors deriving from the present proceedings, which cannot therefore, by referring to itself, back up those very suspicions that are intended to be confirmed. A document such as this does not therefore, in itself, show that the existence of signs of the appellant's involvement in a criminal organisation are rendered sufficiently probable.

4.1.3 The Canton Appeal Court also referred in its reasons for its judgment to the observations made by the Public Prosecutor on 19 April 2007 (judgment at issue, recital 1.3 p. 16/22) the reproduction of extensive excerpts from which constituted most of the recitals of fact contained in the order at issue. Quite apart from the fact that such an exclusive reference to the arguments put forward by one party, without any discussion of the evidence adduced, does not constitute sufficient reasoning, it is quite clear that the statements made by the Public Prosecutor do not provide any additional concrete support for the argument accepted by the Canton Appeal Court. The involvement in a criminal organisation run by Anton Malevski and Iskandar Makhmoudov, who were said to be the appellant's link with the said criminal organisation, is only substantiated by a reference to the aforementioned report by the Federal Police Department and to allegations made by the judicial police as to the allegedly well-known nature of that involvement.

4.1.4 The Canton Appeal Court, referring to a further report by the judicial police of 18 July 2001, also ruled that it had been established that a sum of US$ 10 million had been transferred to a company whose economic beneficiary was Anton Malevski through the intermediary of the Alucor Trading SA (BVI [British Virgin Islands]), Sayana Foil SA (BVI) and Benet companies. As already noted by the First Public Law Appeal Court in its judgments of 16 February 2007, this report nevertheless does not contain any matters likely to substantiate the accusations made against the appellant; it simply records bank movements and states that, according to "certain sources", the head of a Russian criminal organisation was concerned with protecting the appellant's interests. The transaction that the Canton Appeal Court referred to in coming to its conclusion on this basis is nevertheless not at all clear.

4.1.5 It is apparent from the foregoing that in concluding, on the basis of these documents alone – which do not provide any tangible element of proof to support the allegations made therein – that there were substantial signs of the appellant's membership of a criminal organisation, the Canton Appeal Court clearly misinterpreted the true scope of those documents and inferred untenable conclusions from them, both as regards the indication factor and probability. This being the case, it succumbed to arbitrariness. This head of appeal is well-founded.

4.2 Joseph Karam

4.2.1 In relation to Joseph Karam (order n°. OCA/157/2007) the Canton Appeal Court made reference to the same factors as those developed in relation to Michael Cherney. It therefore concluded that the probability of Joseph Karam's involvement in a criminal organisation derived *ipso facto* from his contact with Michael Cherney, since Joseph Karam had admitted that he dealt with all of the latter's business matters (administration, financial management and accounting for the companies in the Cherney group outside the former USSR) (order at issue recital 1.3 p.20/24). Reference can therefore be made to what has just been set out above in this context (cf. *supra* recital 4.1). It therefore follows that it was an arbitrary decision to find that there were sufficient signs of involvement in a criminal organisation within the meaning of Article 260ter CP. The head of appeal raised by the appellant on this point is well-founded.

4.2.2 Joseph Karam was also charged with mismanagement under Article 158 CP. The refusal to completely quash the indictment also relates to this point.

Under Article 158 CP a person who, under the law, by official authority or a legal transaction, is under a duty to manage the financial interests of another or to supervise their management and who, in breach of such duty, causes those interests to be adversely affected or permits them to be harmed shall be liable to be punished by a term of imprisonment (subparagraph 1); if the perpetrator acts with the aim of procuring an unlawful advantage for himself or for a third party the court may sentence him to a maximum term of imprisonment of five years (subparagraph 3). Just as under the former Article 159 CP, this offence is made up of four elements: it is necessary for the perpetrator to have had a duty of management or safekeeping, for him to have been in breach of an obligation imposed upon him in that capacity, for a loss to have been sustained as a result and for him to have acted intentionally (ATF 120 IV 190 recital 2b p. 192).

4.2.2.1 It is apparent from the judgment appealed against that, firstly, Joseph Karam had been appointed by Bluzwed to be the manager of the joint venture between Bluzwed and TWMS via the Blofin SA company of which he was a director (order at issue, recital 1.3 p. 18/24 and 20/24) and, secondly, that he managed the Bluzwed company, together with the Tradalco, Alastro (BVI), Alucor Trading SA (Bah [Bahamas]) and Sayana Foil (Bah) companies (order appealed against, recital 1.3 p. 20/24), that is to say the "subsidiaries" of the joint venture which were intended to conclude tolling contracts in order to avoid creating a monopoly situation in the eyes of the competent Russian authorities so that production licences could be granted. At the end of 1997 companies with the same names as those in the joint venture were set up through Oleg Deripaska, or even Joseph Karam (cf. *infra* recital 4.2.2.3) but these were incorporated in the British Virgin Islands and consisted in particular of Alucor Trading (BVI) and Sayana Foil (BVI) (order at issue, recital 1.3 p. 18/24). The Canton Appeal Court judgment also finds that Joseph Karam was in charge of these latter companies and held banking signatures for them (order at issue, recital 1.3 p. 18/24).

The Canton Appeal Court found that there were in existence indications that essentially confirmed the scenario described by TWMS in its complaint, according to which Bluzwed (controlled by Oleg Deripaska) through the aforementioned twin companies managed by Joseph Karam, had misappropriated raw materials and finished products by taking advantage of the licences to process raw materials and the tolling contracts awarded and concluded in the name of the companies initially created by the joint venture and then used and sold those goods for the benefit of third parties.

4.2.2.2 As for Joseph Karam, however, Oleg Deripaska did not wish to renew the joint venture agreement when it expired. However, as there were still contracts running in relation to raw materials for delivery belonging to Alucor Trading SA (Bah) and Alastro (BVI), Bluzwed had set up twin entities so that this operation would not be interrupted and the aforementioned licences could be used until they came to an end without any need to have recourse to TWMS. In this context the appellant, firstly, challenges the Canton Appeal Court ruling that it did not find it probable that the joint venture agreement had been validly terminated prior to 18 January 1998 since the misappropriation complained of by TWMS had been committed at the end of 1997 (order at issue, recital 1.4 p. 21/24). He does not invoke violation of the presumption of innocence on this point but raises an objection to the Canton Appeal Court argument in that "termination of the joint venture agreement had been shown by Michael Cherney in

is appeal for the indictment to be completely quashed dated 20 March 2006" and that the said appeal showed "that the agreement was not of an exclusive nature".

It is not necessary to go into this head of appeal in substance, the reasoning of which consists of a mere reference to the pleadings in the Canton proceedings (cf. in relation to the requirements of reasoning inferred from the OJ: ATF 131 III 384 recital 2.3 p. 287; 126 III 198 recital 1d; applying Articles 42(2) and 106(2) LTF; unreported judgment 4A.137/2007 recital 4).

4.2.2.3 The appellant finally takes issue with the finding that the companies formed with the same names had been incorporated through him. He counters that it has been properly established that he took no part in the decision to set up these companies, referring to the testimonies of Oleg Deripaska and Gregor Wrzosowski (Tradalco's auditor at the time).

In an argument of an essential appellatory nature (although inadmissible in this context: ATF 133 III 393 recital 6) the appellant confines himself to contesting the findings of fact accepted by the Canton Appeal Court by putting forward his own evaluation of the evidence. It is not possible to claim arbitrariness by the Canton Appeal Court in having deviated from the statements made by Oleg Deripaska – who had himself been the subject of a complaint lodged by TWMS (*supra* recital A.a) – and by Gregor Wrzosowski, the auditor of the Tradalco company managed by Joseph Karam (according to the latter's own statements: order at issue, recital b, p. 9/24). Furthermore, the specific point of establishing what had been the appellant's involvement in the setting up of the identically named twin companies could be left open since the order at issue found that he did at least manage some of these companies from the date that they were set up (order at issue, recital 1.3 p. 20/24), which is not disputed by him in his pleadings. As for the indication of guilt element, however, that position of manager would appear to be just as vital having regard to Article 158 CP as the manner of setting up these companies. The head of appeal is unfounded insofar as it is admissible.

4.2.2.4 The appellant also argues that all of the raw materials allegedly misappropriated remained in stock for the use of the Tradalco company and that the latter's liquidator had been able to sell all of those assets at a price higher than the figure shown in the balance sheet. He takes issue in this respect with any indication of the existence of a loss.

Since no inventory of assets liquidated in this manner was drawn up until 30 June 2001 (order at issue recital 1.4 p. 22/24) – which the appellant does not contest – that is to say, almost four years after the incidents in question, the Canton Appeal Court cannot be accused of succumbing to arbitrariness in finding that this inventory did not enable the possibility of any prevention of misappropriation of assets or profits in 1997 to be ruled out. It is not actually possible to establish from reading the order challenged – which is not the subject of any head of appeal on the part of the appellant – what developments took place with regard to the Tradalco stock in the meantime, although the Canton Appeal Court ruled that it had been established that some of the Tradalco stock had actually be transferred to Alucor Trading SA (BVI) and sold by the latter on the basis of an agency agreement executed by Bluzwed in November 1997 (order at issue, recital 1.3, p. 19/24 and 1.4 p. 22/24), an issue of fact that is not expressly disputed by the appellant. However, the serious jeopardising of the assets of another party does, in itself, constitute loss within the meaning of Article 158 CP, even if only temporary (BERNARD CORBOZ, Les Infractions en droit suisse, vol. I, Berne 2002, Art. 158 CP no.10). The appellant has not shown how the Canton Appeal Court might have succumbed to arbitrariness in ruling that there were substantial indications of the existence of a loss without it nevertheless being necessary to examine whether the agreement concluded between Bluzwed and TWMS on 2 June 2005, which led to the withdrawal of the latter's complaint and provided for compensation to be paid by Bluzwed to TWMS (Canton Appeal Court judgment, recital 1.4 p. 22/24), confirmed the existence of such loss.

4.2.2.5 The appellant finally attempts to find an argument in his favour in the second agreement concluded on 16 March 2006, which appears to have led to a payment of US$ 1.9 million being made to him by TWMS.

The Canton Appeal Court stated in this respect (recital 1.4 p. 22/24) that, in its opinion, the two agreements of 2 June 2005 and 16 March 2006 were complementary, the second agreement having been accepted by the appellant at the request of Bluzwed, which had entered into a commitment to TWMS in the agreement of 2 June 2005, on penalty of being obliged to pay the latter further compensation of US$ 2 million, to convince the appellant to conclude a similar contract to that binding the principal partners, plus a deed of release. TWMS was ultimately said to have assumed responsibility for that sum as a result of an injunction ordered by the High Court of Justice in London on 26 January 2006 and not because it had considered that the appellant had not been "substantially guilty" of the offences alleged.

In maintaining that payment of this compensation showed that TWMS did not consider the appellant to have been substantially guilty of the offences alleged, the appellant confines himself to stating his own evaluation of the facts in opposition to the evaluation made by the Canton Appeal Court, which does not appear to be completely untenable in view of the matters available to it from the file and, in particular, the deed of release of 16 March 2006. Section 2.4 of that document states, in fact, in relation to the complaint filed in Switzerland, that nothing in that agreement can oblige a "Transworld party" to acknowledge that the allegations by TWM were devoid of any factual basis (*With respect to the Swiss Complaint, nothing in the Deed shall: (a) oblige any Transworld Party to acknowledge that there was no factual basis for the allegations made by TWM).* A similar clause is also to be found in section 11.4 of the agreement concluded on 2 June 2005, as is apparent from the judgment of the High Court of Justice in London (p. 4: *it shall be on terms and conditions that the Parties shall reasonably agree, the Parties acknowledging that the Transworld Parties will not state that there is no factual basis for the allegations TWM made in the Swiss Complaint).* These clauses therefore enabled the Canton Appeal Court to rule without arbitrariness that the conclusion and performance of these agreements by TWMS could not be interpreted as an implied acknowledgement that TWMS did not consider the appellant to be substantially guilty of the offences alleged. The head of appeal of arbitrariness is unfounded insofar as it is admissible.

4.2.3 It is apparent from the foregoing that it was without arbitrariness that the Canton Appeal Court established the existence of signs rendering it sufficiently probable that the appellant had assumed a duty of management of Bluzwed's interests, or of certain subsidiaries in the Bluzwed group, of which he was in breach in carrying out his management activities in relation to the aforementioned companies with the same names in competition with the said subsidiaries – and that loss was sustained as a result. It was therefore entitled to refuse to completely quash the indictment in relation to the charge of mismanagement under Article 158 CP.

5.

The appeal by Michael Cherney is allowed insofar as it is admissible. The appeal by Joseph Karam is allowed in part in as much as it relates to the refusal to completely quash his indictment in relation to the accusation of membership of a criminal organisation. The rest of it is dismissed insofar as it is admissible.

As to the merits, the dispute relates exclusively to the application of Canton rules of procedure so that it is appropriate to refer the cases back to the Canton Appeal Court for it to pronounce judgment anew and completely quash the indictments by reference to the relevant Canton rules and having regard to the reasoning in this judgment.

6.
Michael Cherney is successful. He is not liable for costs, nor is it appropriate for the Canton of Geneva to be held liable for them (Article 66(4) LTF). However, the latter shall bear the expenses due to the appellant, who has been represented (Article 68(2) LTF).

7.
Joseph Karam is only partially successful. It is appropriate to hold him liable for part of the costs and to award him reduced compensation for expenses.

On these grounds the Federal Supreme Court pronounces judgment as follows:

1.
In so far as it is admissible, the appeal by Michael Cherney is allowed. Order OCA/156/2007 is annulled and the case is referred back to the Canton Appeal Court for it to pronounce judgment anew in accordance with the recitals hereof;

2.
The appeal by Joseph Karam is allowed in part. Order OCA/157/2007 is annulled insofar as it refuses to completely quash the indictment against the appellant on the charge of membership of a criminal organisation. The rest of the appeal is dismissed in so far as it is admissible. The case is referred back to the Canton Appeal Court for it to pronounce judgment anew in accordance with the recitals set out above;

3.
Court costs put at 1,000 francs are to be paid by Joseph Karam.

4.
The Canton of Geneva is ordered to pay a sum of 3,000 francs to Michael Cherney and 1,500 francs to Joseph Karam by way of expenses.