

# BASIC COURT OF PRISHTINË/PRIŠTINA

P. No.: 279/2012

Date: 28<sup>th</sup> June 2013

The judgments published may not be final and may be subject to an appeal according to the applicable law.

## IN THE NAME OF THE PEOPLE

The Basic Court of PRISHTINË/PRIŠTINA through the trial panel composed of EULEX Judge Vitor Hugo Pardal, as presiding, EULEX Judge Jonathan Welford-Carroll and Kosovo Judge Hava Haliti as panel members, assisted by EULEX Legal Officer Clemens Mueller and Court Recorder Jacqueline Ryan, in the criminal case against:

**B.D.; S.D.; I.B.; S.H.; R.GJ.**

As per the confirmation ruling issued on the 25<sup>th</sup> November 2011, the first three charged on **Fraud** contrary to Article 261, paragraphs 1 and 2 CCK, **Entering into harmful contracts** contrary to Article 237, paragraphs 1 and 2 CCK and **Falsifying documents regarding special cases of falsifying documents**, contrary to articles 332, paragraph 1 and 333, paragraph 3 CCK, all in co-perpetration, in conjunction with Article 23 of the same legal instrument.

The two last identified defendants have been charged with **Entering into harmful contracts** contrary to Article 237, paragraphs 1 and 2 CCK all in co-perpetration, in conjunction with Article 23 of the same legal instrument as well as each one of them with **Abusing Official Position**, contrary to Article 339, paragraphs 1 to 3 CCK.

After having held 17 public trial sessions respectively on the 31 July 2012, 15, 16, 17 and 23 October 2012, 22 January 2013, 20 and 21 March 2013, 16, 23, 24, 27 and 31 May 2013 and 25, 26, 27 and 28 June 2013, in the presence of the defendants and their respective Defense Counsels Mr. V.I., Mr. B. G. Ch, Mr. G. T., Mr. A. F., Ms. I. O., Mr. R. G., Mr. A. R, Mr. B. P. and Mr. H. H., together with the SPRK Prosecutors Mr. Joachim Stollberg and Mr. Charles Hardaway, the injured parties xxx, xxx and their legal representatives, respectively M.G. and L.S.,

and after the trial panel's deliberation and voting held on 27<sup>th</sup> June 2013, pursuant to articles 388.1 and 390.3 of the KCCP issues the following

## **JUDGMENT**

On Count 1 - **Fraud** contrary to article 261, paragraphs 1 and 2 of the CCK, as follows:

*"I.B., deployed between 21 and 25 November 2008 as the legal representative of Dardafon LLC and Dardafon.net LLC, upon a prior collusion and agreement with and under the supervision by B.D. and S.D., filed an application to the Telecommunications Regulatory Agency (TRA) in Pristina on 25 November 2008 for the transfer of a Mobile Virtual Network Operator (MVNO) license from Dardafon LLC to Dardafon.net LLC, despite knowing of the overall shareholder structure within Dardafon LLC. He claimed untruthfully to the decision makers at TRA that the transfer of the license was based upon the knowledge and agreement of the majority of the shareholder of Dardafon LLC, Unitel World and its owner, Mr. A.S. neither knew that such transfer of the MVNO license should take place, nor did he agree to have the license transferred to Dardafon.net LLC. Due to I.B.'s false application, TRA transferred the MVNO license trustfully from Dardafon LLC to Dardafon.net LLC, which resulted in Dardafon LLC losing the license, for which it invested 50.000,00 Euros. Therefore the financial worth exceeded 15,000.00 Euro."*

pursuant to article 390 paragraph 3 of the KCCP, the accused B.D., SH.D. and I.B. with personal data listed above, are all

### **ACQUITTED.**

because in concrete case it has not been proven that any of the accused have committed the acts which they have been charged with.

On Count 2 – **Entering into harmful contracts** contrary to article 237, paragraphs 1 and 2 of

the CCK, as follows:

*“Despite knowing that by reason of the facts described under count 1 that Dardafon LLC would lose its MVNO license, I.B. upon orders from and under supervision by B.D. and S.D., drafted, signed and submitted the application to TRA. Given that the xxx company was only a minority shareholder of Dardafon LLC, yet Sh.D. xxx 90% of Dardafon.net LLC, B.D. and SH.D.gained factual control over the MVNO license by having it transferred to Dardafon.net LLC, resulting in grave damage for Dardafon LLC”*

pursuant to article 390 paragraph 3 of the KCCP, the accused B.D., SH.D.and I.B. are all

### **ACQUITTED**

because in concrete case it has not been proven that any of the accused have committed the acts which they have been charged with.

**On Count 4 – Falsifying documents as a special case**, contrary to articles 332, paragraph 1 and 333, paragraphs 1 and 3 of the CCK, as follows:

*“B.D., SH.D. and I.B., in an undetermined place and time in 2008 or 2009, took influence on the drafting of the wording of the final MVNO agreement dated 16 January 2009 between XXX and Dardafon.net LLC, or drafted the wording themselves, despite knowing that false facts are included in the document. The agreement states that Dardafon.net LLC concluded a “Heads of Agreement” in August 2008 with XXX, whereas in reality this “Heads of Agreement” was concluded between Dardafon LLC and XXX. Dardafon.net LLC did not exist in August 2008. The final MVNO agreement was written as a specification and further development of the “Heads of Agreement” as an integral part of the MVNO agreement.”*

pursuant to article 390 paragraph 3 of the KCCP, the accused B.D., SH.D. and I.B. are all

### **ACQUITTED**

because in concrete case it has not been proven that any of the accused have committed the acts which they have been charged with.

**On Count 6 – Entering into harmful contracts** contrary to article 237, paragraphs 1 and 2 of the CCK, as follows:

*“On 20 October 2008 in Pristina in the meeting of the XXX Board of Directors, R.GJ. as a chairman of the XXX Board of Directors intentionally voted in favor – and without reservations – for XXX to enter into a MVNO agreement with Dardafon.net LLC. The approval foresaw that Dardafon .net LLC has the right as an MVNO to use XXX telecommunications resources and in return has the obligation to pay a profit share to XXX in the amount of 22%. R.GJ. knew that the agreement included an*

*unacceptable split in profit share and a lack of sufficient securities for XXX, and was based on a profit split proposal, which the Board previously rejected. R.GJ. was the driving force in the XXX Board to have the MVNO agreement be approved with its unfavorable profit split and unsecure content.*

*SH.H. as the Xxx of XXX as of 14 December 2008 signed the final MVNO agreement, dated 16 January 2009, between XXX and Dardafon.net LLC, knowing that the deal would cause a financial loss for XXX in an incalculable amount exceeding 100.000,00 Euro. SH.H. signed every page of the MVNO agreement between Dardafon.net LLC and XXX, including the Annex 7, which contains the "Heads of Agreement" between Dardafon LLC and XXX, thus violating pre-contractual obligations with Dardafon LLC. Furthermore, S.H., despite having knowledge of its unfavorability and insecurity, signed the MVNO agreement with a profit split of 27% to the detriment of XXX, causing XXX a grave damage. He did so, by knowing the contrary recommendation given by the so-called Task Force 2 initiated by the Board of Directors to find out a lucrative share for XXX. Task Force 2 came to the result that a split of at least 73% in favor for XXX was acceptable to avoid losses". "*

pursuant to article 390 paragraph 3 of the KCCP, the accused SH.H. and R.GJ. with personal data listed above, are both

### **ACQUITTED**

because in concrete case it has not been proven that any of the accused have committed the acts which they have been charged with.

**On Count 7 – Abusing Official position** contrary to article 339, paragraphs 1, 2 and 3 of the CCK, as follows:

*"SH.H. signed the agreement described in Count 6 despite knowing that the contract is economically unfavorable for XXX and violates the pre-contractual obligations towards Dardafon.net LLC. He entered into such agreement by violating his obligations as CEO in such terms as he received pressure from outside sources to sign the MVNO agreement rather than signing the agreement on the basis of his fiduciary duties towards XXX. Since SH.H. signed the agreement with Dardafon.net LLC and not Dardafon LLC, this has resulted in damage for Dardafon LLC exceeding 2,500.00 Euro and provided Dardafon.net LLC with a material benefit exceeding 5.000,00 Euro".*

pursuant to article 390 paragraph 3 of the KCCP, the accused SH.H. is

### **ACQUITTED**

because in concrete case it has not been proven that the accused has committed the acts which he has been charged with.

**On Count 10 – Abusing Official position** contrary to article 339, paragraphs 1, 2 and 3 of the CCK as follows:

*“As R.GJ. pressured the XXX Board of directors in October 2008 in Pristina to approve the aforementioned MVNO contract, he overstepped his authority as the XXX to take ungrounded influence on the Board members, knowing that the MVNO agreement was unfavorable and knowing that the majority of the Board members prior to 20 October 2008 did not support the opinions of the Task Force 1, R.GJ. thereby gave Dardafon.net LLC a material benefit, which was not reflective of the uninfluenced opinion of the majority of the Board members. Despite a member of the Board only gave support for MVNO agreement upon further review of the level of percentage in the profit split, this limitation has been ignored by R.GJ. and has not found its reflection in the Board decision.”*

pursuant to article 390 paragraph 3 of the KCCP, the accused R.GJ. is

### **ACQUITTED**

because in concrete case it has not been proven that the accused has committed the acts which he has been charged with.

Pursuant to article 103 paragraph 3 of the KCCP, the budgetary resources shall pay the costs of this criminal procedure as listed by article 99, paragraphs 1 and 2, subparagraphs 1 to 5.

### **REASONING**

#### **Procedural background**

On 8 June 2011, the SPRK Prosecutor Mr. Joachim Stollberg filed an indictment against 5 individuals, B.D., S.D., I.B., SH.H. and R.GJ., containing charges of Fraud, contrary to article 261.1 and 2 CCK (count 1), Entering into Harmful Contracts, contrary to article 237.1 and 2 CCK (count 2), Breach of Trust, contrary to article 269.1 CCK (count 3), Special Case of Falsifying Documents, contrary to articles 332.1 and 3 and 333.1 CCK (count 4), Organized Crime, contrary to article 274.1 to 3 CCK (count 5) with which the first three defendants have been indicted for in co-perpetration, as per article 23 CCK. In order to support these charges the SPRK Prosecutor

provided documentary evidence (page 47 to 50 of the indictment) 21 witnesses (page 46 and 47), and 1 expert witness (page 46).

The same evidence has been provided in order to support the charges of Entering into Harmful Contracts, contrary to article 237. 1 and 2 CCK (count 6) with which the fourth and the fifth defendants have been indicted for in co-perpetration, as per article 23 CCK, as well as Abusing Official Position or Authority, contrary to article 339.1 to 3 CCK (count 7) and Misuse of Economic Authorizations, contrary to article 236.1.5 and 2 CCK (count 8) regarding the defendant S.H., and Misuse of Economic Authorizations, contrary to article 236.1.5 and 2 CCK (count 9) and Abusing Official Position or Authority, contrary to article 339.1 to 3 CCK (count 10) regarding the defendant R.G.J.

On the 25<sup>th</sup> November 2011, the Confirmation judge issued a confirmation ruling dismissing the aforementioned charges 3, 5, 8 and 9 which have subsequently now been confirmed by a ruling of an Appeals Panel dated 22<sup>nd</sup> March 2012.

Ordinary proceedings were followed on this case within the main trial.

Seventeen public trial sessions respectively on the 31 July 2012, 15, 16, 17 and 23 October 2012, 22 January 2013, 20 and 21 March 2013, 16, 23, 24, 27 and 31 May 2013 and 25, 26, 27 and 28 June 2013, with the judgment being orally announced in the last session.

Several rulings were issued, namely on: a. defense request for discovery, dated 25 July 2012, ruled on the 31 August 2012; b. defense request for exclusion from the function in trial dated 25 July 2012, ruled on the 31 July 2012; c. defense request to exclude evidence ruled on the 31 August 2012; d. defense request to change trial schedule, ruled on the 31 August 2012; e. defense motion to sever the proceedings, ruled on the 31 July 2012 and 31 August 2012; f. defense motion

and prosecutor motion to adjourn the trial for September 2012, dated 21, 24 and 27 June and 26 June 2012, and ruled on 31 July 2012; g. Prosecution motion to appoint expert witness, filed on 18 May 2012 and ruled on 31 August 2012; h. order for Expertise by an appointed expert panel, ruled on 14 November 2012 after decision of 31 August 2012 upon previous tender procedure; ruling on motion to submit documents to the expert panel, dated 12 March 2013; i. Ruling on defense's motion on judgment of acquittal, dated 28 May 2013.

The defendants SH.H. and R.G.J. produced a statement whilst being examined during the trial, pursuant to article 372 KCCP. All defendants provided closing statements by themselves (SH.H. and R.G.J.) or through their respective defense counsels. In addition, both the injured parties and the SPRK Prosecutor gave closing statements.

All the defendants were present during the oral announcement of the final judgment.

### **Jurisdiction of this Court**

The judges composing this panel are competent to adjudicate this case and the court has material and territorial jurisdiction pursuant to article 33 CCK and articles 21 and 23.1.i) KCCP. Following a decision of the President of EULEX Judges issued on the 22<sup>nd</sup> May 2012 to assign the undersigning EULEX Judges for adjudicating this case, the local judge was appointed following the applicable roster in force at the Pristina DC. Seventeen main trial sessions have been held and no objections have been raised by the parties as to the composition of the panel or the court's jurisdiction. Thus, the panel is competent to hear this case pursuant to article 3.1 LoJAF (Law 03/L-53).

## **Administered Evidence**

The following set of evidence was considered relevant to the final deliberation and subsequent judgment.

Written exhibits: The following list of documentary evidence was considered at the main trial:

- Kosovo business registration agency, information about business Dardafon.net LLC, xxx company;
- Statement of action, minutes of organizational meeting of K-Com group;
- Article from newspaper Koha Ditore, dated 28 September 2010;
- Consultancy and advisory agreement between Dardafon LLC and Evere, dated 27 March 2008;
- Application of license Dardafon dated 29 October 2007;
- Evaluation of application and verification on TRA board meeting dated 29 May 2008;
- Grant of MVNO license by TRA to Dardafon LLC, dated 12 June 2008;
- Request TRA for payment, payment of 50.000 Euro for license
- Application of Dardafon LLC to TRA for transfer of license dated 25 November 2008;
- TRA board meeting dated 5 December 2008;
- TRA decision to transfer license to Dardafon.net, dated 10 December 2008;
- Registration Dardafon LLC and Dardafon.net LLC;
- Letters Mr. A.S. to XXX and reply, dated 2009;
- Letter Mr. B.D. to XXX informing of sole ownership and agreement on shares' transfer, dated September 2009;
- Bank statement of Xxx group to UNIFI for payment of 700.000 Euro, dated 3 September 2009;



- UNIFI press release on signing of heads of agreement and UNIFI information and ViaOne Information;
- ViaOne expression of interest, dated 27 May 2007;
- Correspondence XXX/B.D. dated December 2007/January 2008;
- Letter B.D./XXX informing the structure of Dardafon LLC and obtainment of MVNO license, dated 17 June 2008;
- Correspondence B.D./TRA;
- Letter L.B./TRA, dated 17 December 2007;
- XXX invitation for MVNO, dated 3 October 2007;
- TRA board memo, date 29 May 2008;
- Letter N.R.;
- XXX board paper dated 11, 14, 15 and 22 July 2010;
- Summary minutes of XXX board meetings, dated 14 August 2008, 4, 5, 16 and 22 September 2008, 2, 8, 14 and 20 October;
- XXX board paper dated 20 October 2008 containing Task Force 2's report corresponding resolution of the board;
- Summary minutes of XXX board meetings, dated 22 March 2010, including resolution of the board the same date;
- Letter Genc Lami/Board dated 7 August 2008 project for MVNO;
- Petition of the XXX Trade Union First;
- Letter L.B./ICR, dated 5 November 2008;
- Letters L./XXX BoD;
- Ovum Consulting Mobile Network operators papers, with handwritten notes;
- Report signed Afrim Bajtullahu;
- MVNO draft agreement XXX/Dardafon LLC draft 1, dated 25 August 2008;
- MVNO draft agreement XXX/Dardafon LLC, version 1 and version 2, dated 26 August 2008;

- MVNO draft agreement XXX/Dardafon LLC, dated 28 September 2008;
- MVNO draft agreement XXX/Dardafon LLC, dated 8 October 2008;
- MVNO draft agreement XXX/Dardafon LLC, dated 15 December 2008, in two versions one of which with Dardafon.net LLC;
- MVNO final agreement XXX/Dardafon.net LLC, signed B.D. and S.H.;
- Heads of agreement XXX/Dardafon LLC, signed B.D. and S.H.;
- Verbatim transcription of XXX board meetings, dated 2, 8 and 14 October 2008;
- Audited financial statements/report of XXX regarding years of 2010 and 2011;
- Share purchase agreement, dated 3 September 2009, with annexes;
- Draft MVNO framework issued by TRA;
- Media report dated 15 December 2010 regarding SIM to SIM activities;
- Declaration of A.S. confirming sale of shares by Dardafon LLC, dated 31 May 2010;
- Bank statement of payment by Xxx group to Dardafon LLC regarding MVNO license fee, dated 11 August 2008;
- Bank statement of deposit of 50.100 Euro by Xxx to Dardafon LLC, dated 11 August 2008;
- Dardafon.net LLC financial statements for 2009 to 2011;
- Presentation and payment reconciliation for 2010 and 2011 by Dardafon.net to XXX;
- Correspondence R.S./ S.R., dated 18 June 2008;
- Letter TRA approving regulatory framework, dated 15 January 2008;
- E-mail correspondence of XXX/TRA regarding MVNO competitors;
- TRA report on internal investigation, dated 7 January 2010;
- TRA regulatory framework on MVNO and TRA decision.

Witnesses: statements produced at the main trial by N.R., A.Y., E.P., M.G., B.K., A.B., G.L., S.A., S.R., G.R., D.H., M.K., F.B., A.M., X.S., F.S., X.R. and N.A..

Expert witnesses: statements produced at the main trial by V.M, R.B, H.K and Zh.T as entirely reproduced in the official record.

Expert reports: dated 02<sup>nd</sup> April 2013 signed by H.K, R.B and Zh.T determined by the Court upon request submitted by the Prosecutor and dated 22<sup>nd</sup> October 2012 signed by J.O., P.P.A., C.J. and M.V, as submitted by SH.D. and his Defense Counsel, Mr. A.F. on the 22<sup>nd</sup> November 2012.

## **Statement of Grounds**

### Factual Grounds:

- a. *The following relevant facts have been considered as PROVED:*

#### *Count 1*

*I.B., deployed between 21 and 25 November 2008 as the legal representative of Dardafon LLC and Dardafon.net LLC, upon agreement with and under the supervision by B.D. and S.D., filed an application to the Telecommunications Regulatory Agency (TRA) in Pristina on 25 November 2008 for the transfer of a Mobile Virtual Network Operator (MVNO) license from Dardafon LLC to Dardafon.net LLC. He claimed to the decision makers at TRA that the transfer of the license was based upon the knowledge and agreement of the majority of the shareholders of Dardafon LLC, Unitel World and its owner, Mr. A.S.. Due to I.B.'s application, TRA transferred the MVNO license trustfully from Dardafon LLC to Dardafon.net LLC, which resulted in Dardafon LLC transferring the license.*

#### *Count 2*

*I.B. upon orders from and under supervision by B.D. and S.D., drafted, signed and submitted the application to TRA. B.D. and SH.D. gained factual control over the MVNO license by having it transferred to Dardafon.net LLC.*

#### *Count 4*

*B.D., SH.D. and I.B., in an undetermined place and time in 2008 or 2009, at least took influence on the drafting of the wording of the final MVNO agreement dated 16 January 2009 between XXX and Dardafon.net LLC. The agreement states that Dardafon.net LLC concluded a "Heads of Agreement" in August 2008 with XXX, whereas in reality this "Heads of Agreement" was concluded between Dardafon LLC and XXX. Dardafon.net LLC did not exist in August*

2008. The final MVNO agreement was written as a specification and further development of the “Heads of Agreement” as an integral part of the MVNO agreement.

Count 6

On 20 October 2008 in Pristina in the meeting of the XXX Board of Directors, R.GJ. as a XXX of the XXX Board of Directors voted in favor – and without reservations – for XXX to enter into a MVNO agreement with Dardafon.net LLC. The approval foresaw that Dardafon .net LLC has the right as an MVNO to use XXX telecommunications resources and in return has the obligation to pay a profit share to XXX in the amount of 22%. R.GJ. knew that the agreement was based on a profit split proposal, which the Board previously rejected. R.GJ. was the driving force in the XXX Board to have the MVNO agreement to be approved. SH.H.as the Xxx of XXX as of 14 December 2008 signed the final MVNO agreement, dated 16 January 2009, between XXX and Dardafon.net LLC. SH.H. signed every page of the MVNO agreement between Dardafon.net LLC and XXX, including the Annex 7, which contains the “Heads of Agreement” between Dardafon LLC and XXX. Furthermore, SH.H. signed the MVNO agreement with a profit split of 27% to XXX. He did so, by knowing the contrary recommendation given by the so-called Task Force 2. Task Force 2 came to the result that a split of at least 73% in favor for XXX.

Count 7

SH.H.signed the agreement described in Count 6 with Dardafon.net LLC and not Dardafon LLC.

Count 10

None

Also the following relevant facts arose from the trial sessions:

Counts 1, 2 and 4

Mr. A.S., owner of the majority of the shareholder of Dardafon LLC, Unitel World and its owner, sold his position at Dardafon LLC to Xxx group in an undetermined date not after the 11th August 2008.

**b. The following relevant facts were considered as NOT BEEN PROVED:**

Count 1

I.B. claimed in an untruthful manner to the decision makers at TRA that the transfer of the license was based upon the knowledge and agreement of the majority of the shareholders of Dardafon LLC, Unitel World and its owner, Mr. A.S..

*A.S. neither knew that such transfer of the MVNO license should take place, nor did he agree to have the license transferred to Dardafon.net LLC.*

*The application to TRA was false and untruthful which resulted in Dardafon LLC losing the license or any financial worth exceeding 15,000.00 Euro.*

*Count 2*

*The transfer of the license from resulted in grave damage for Dardafon LLC.*

*Count 4*

*B.D., SH.D.and I.B., in an undetermined place and time in 2008 or 2009, drafted themselves the wording of the final MVNO agreement dated 16 January 2009 between XXX and Dardafon.net LLC, knowing that false facts are included in the document.*

*Count 6*

*Rexhe Gjonballaj knew that the agreement included an unacceptable split in profit share and a lack of sufficient securities for XXX, The approved agreement presented an unfavorable profit split and insecure content.*

*SH.H.knew that the deal would cause a financial loss for XXX in an incalculable amount exceeding 100.000,00 Euro. SH.H.violated pre-contractual obligations with Dardafon LLC and knew it was unfavorable and insecure, causing XXX to be rendered unable to avoid losses and inflict grave damage to XXX.*

*Count 7*

*SH.H.knew that the agreement described in Count 6 is economically unfavorable to XXX and violates the pre-contractual obligations towards Dardafon.net LLC. He entered into such agreement by violating his obligations as CEO in such terms as he received pressure from outside sources to sign the MVNO agreement rather than signing the agreement on the basis of his fiduciary duties towards XXX. Signature of this agreement resulted in damage for Dardafon LLC exceeding 2,500.00 Euro and provided Dardafon.net LLC with a material benefit exceeding 5.000,00 Euro.*

*Count 10*

*As R.GJ. pressured the XXX Board of directors in October 2008 in Pristina to approve the aforementioned MVNO contract, he overstepped his authority as the Xxx to take ungrounded influence over the Board members, knowing that the MVNO agreement was unfavorable and knowing that the majority of the Board members prior to 20 October 2008 did not support the opinions of the Task Force 1, Rexhe Gjonballaj thereby gave Dardafon.net LLC a material benefit, which was not reflective of the uninfluenced opinion of the majority of the Board members. Despite a member of the Board giving support for the MVNO agreement upon further review of the level of percentage in the profit split, this limitation*

*had been ignored by R.GJ. and as such had not been reflected in the Board decision.”*

1. Reasoning and findings:

Throughout a critical evaluation of all produced evidence, the main trial panel considered the aforementioned evidence as follows (for facilitating purposes the facts are referred to at page 12 to 15 of this judgment):

The facts above referring to Counts 1, 2 and 4 which have been considered as proved are heavily documented in the case file, namely the application to TRA dated 25 November 2008 for transfer of MVNO license from Dardafon LLC to Dardafon.net LLC. The content and signature of this application was never disputed and the decision of the TRA to grant this application confirms the facts in their entirety. The knowledge of B.D. and SH.D. regarding this application is clear from the very beginning which is evident from the facts presented through their own defense as well as subsequent facts, namely the previous agreement on transferring the majority of shareholders from Dardafon LLC and the respective payment to Mr. A.S. on 11 August 2008, as documented in the declaration of A.S. confirming the sale of shares by Dardafon LLC, dated 31 May 2010, the Bank statement of payment by xxx group to Dardafon LLC regarding MVNO license fee, dated 11 August 2008 and the Bank statement deposit of 50.100 Euro by Xxx to Dardafon LLC, dated 11 August 2008. Moreover, the final MVNO agreement dated 16 January 2009 between XXX and Dardafon.net LLC refers to a Heads of Agreement dated 8 August 2008 with XXX which does not contradict the aforementioned date of 11 August 2008, although it does indicate an inaccuracy on the parties involved. This inaccuracy may be explained in two reasonable ways: the prosecution’s version, based on allegations as provided in the investigation stage by Mr. A.S.; and the defense’s version which can also be interpreted by the trial panel as based on an attempt to facilitate and speed up bureaucratic procedures with TRA, keeping the transfer between Dardafon LLC and Dardafon.net

as irrelevant and quiet as possible. However, any possible collateral effects regarding possible tax evasion are out of the scope of this trial.

Having considered the evidence produced before the Court, the panel has no reason to consider the letter of Mr. A.S. as corresponding to truthful facts; Mr. A.S. was never confronted with the letter during the main trial as it was impossible for the court to summon him as a witness. Indirect evidence coming from the press - Koha Ditore - is to be considered as inadmissible given that the mentioned facts could not be duly cross-examined in any possible way. Moreover, the payments made to Mr. A.S. on 11 August 2008 which have a coherent connection to the letter of Mr. A.S. dated 31 May 2010 fully supports the allegations of the defendants involved.

Therefore, there is no evidence that the transfer of the license, as claimed by TRA, was untruthfully based on the knowledge or agreement of Mr. A.S. and formed false statements. There is no evidence either that Mr. A.S. was subject to worth exceeding 15.000.00 Euro, nor causing grave damage to Dardafon LLC. There is no evidence produced before the Court in order to determine who drafted the wording of the final MVNO agreement with XXX dated 16 January 2009, beyond their previous knowledge and according to B.D. and S.D.'s instructions.

According to the records and information of The Kosovo business registration agency, Dardafon.net LLC did not exist before 8 August 2008, however it was still involved in the payments of 11 August 2008 as mentioned before.

The facts above referring to Counts 6, 7 and 10 have been sufficiently scrutinized through the sequence of statements of all witnesses who were directly involved in the voting process of the XXX Board with reference to 20 October 2008, and who were confronted with the minutes of all sessions held, being it on this date or before, as provided in the trial before the panel.

The contents of both Task Force 1 and 2 reports are undisputed and as such raise no issue as to the members and the proposed profit shares.

However, the minutes as well as the witness statements demonstrate nothing but some reservations based on technical incapability to participate in a decision beyond their own professional skills, although it must be borne in mind that these are members included in a panel who are fully entitled to decide on issues as the XXX Board of Directors. All statements of R.G.J. included in those minutes may indicate pressure to accept the MVN0 agreement with Dardafon.net LLC but not in a manner that might be considered as inadmissible, even as a chairman. It is worthy to be mentioned that no influence of R.G.J. has been proven regarding any previous involvement with the report of Task Force 2. In light of the more recent assessment (Task Force 2), it is not considered that illegal pressure was placed upon the Board of Directors to speed up the proceedings, bearing in mind that only the final voting would decide the matter. No personal or professional influences or pressures have been proven to be placed upon any of the directors, as a result of the statements of the witnesses examined in trial.

Moreover, the Court analyzed the grounds and the conclusions of both expert reports submitted before the Court and found no conclusive facts and/or findings leading to cause damage to XXX whatever might be its value, having in mind a commercial perspective of this MVN0 agreement, as well as its developments when concretely applied in the field.

Regarding the defendant S.H., no collusion with R.G.J. has been proven (Count 6); the subsequent signing of the MVN0 agreement on the 16 January 2009 may only be considered as nothing but his professional executive obligation as a CEO regarding a previous decision as voted by the Board of Directors wherefore it cannot be considered a criminal action. It has not been proven by any evidentiary means produced before the Court that S.H. knew of any financial loss of XXX resulting from the MVN0 agreement upon any unacceptable split of profit, unfavorable or



insecure. As CEO no evidence has been produced that he received external pressures to sign the MVNO agreement.

Legal grounds:

Count 1

As per article 261.1 and 2 KCC (now 335 new CCK) a person shall be found guilty of the criminal offense of fraud if *“with the intent to obtain a material benefit for himself... or another person, deceives another person or keeps such person in deception by means of a false representation or concealing facts and thereby induces such person to do or to abstain from doing an act to the detriment of his... property or another’s person property...”*

An application filed before the TRA claiming a transfer of a MVNO license from Dardafon LLC to Dardafon.net LLC omitting previous negotiations substantiating this transfer but referring to them instead is not a deceiving act to the detriment of the property of Dardafon LLC or of TRA. . Simply mentioning a wrongful transferee would not damage the property of TRA or Dardafon LLC since there was a previous and herein proved transfer of that license to Dardafone.net LLC. Any problem raised in regard to this previous transfer could always be subject to a commercial legal suit, civil by nature, but it would not substantiate a criminal action. Besides, this allegedly deceitful behavior could always be contested by Dardafon LLC - *rectius* by Mr. A.S. — through a civil claim, which means the application is of no standing as a deceitful action.

Hence, no evidence of deceitful action has been presented by any of the defendants or the Prosecution, which is a necessary and fundamental legal element. In its absence, no criminal action has been committed and the acquittal of B.D., SH.D. and I.B. is the necessary consequence.

Counts 2 and 6

Pursuant to article 237.1 and 2 KCC a person commits the criminal offense of Entering into Harmful Contracts if he or she as *“A representative or an authorized person of a business organization or legal person which engages in an economic activity, enters into a contract that he... knows to be harmful for the business organization or legal person... and thereby causes damage to the business organization or legal person...”*

Regarding specifically Count 2, it is not possible to conclude that any of the aforementioned defendants entered into harmful contracts when simply applying before the TRA for a transfer of a license, since this application is not a contract at all. Moreover, the contract itself substantiating this application has been proved before the court as existent and no damage has been proven as well.

Both these two legal elements are not present and as such there is no criminal offense and acquittal is the necessary consequence.

Regarding Count 6 and specifically to R.G.J., voting in a XXX Board of Directors or pressuring any of its members to vote in favor does not substantiate a contract and has no contractual effect at all by itself. This is sufficient for the inexistence of this criminal offense and his subsequent and necessary acquittal.

Regarding S.H., considering that no evidence of collusion with R.G.J. has been produced, SH.H. could not be conscious of any harmfulness of a contract which has not been proved to be harmful. This suffices to find the criminal offense as inexistent and to acquit SH.H. regarding this Count since the mere intention, even if existent, is not legally sufficient to warrant this criminal offense.

#### Count 4

As per article 332.1 and 3 and 333.1 KCC (now 399 CCK) a person commits the criminal offense defined as falsifying documents if that person, *“draws up a false document... if this person deceives another person with regard to the content of any document and such person signs the document thinking that he... is signing some other document or a document with some other content”*

It is worth mentioning that the final MVNO agreement refers to a Heads of Agreement dated August 2008 concluded between Dardafon.net LLC and XXX where it was concluded between Dardafon LLC and XXX. However, this slight difference is of no deceiving effect for XXX. A necessary connection between the untruthful reference and the decision to sign from XXX should be demonstrated in order to substantiate a deceitful action, and it was not. A proven intent should be established and therefore, as per the facts in hand, this is not substantiated at all either. Regarding Dardafon LLC, no deceiving effect has been detected, since the previous transfer of shareholders has been proven. For all the aforementioned reasons, the criminal offense is not factually and legally substantiated wherefore acquittal is the necessary consequence.

#### Counts 7 and 10

Pursuant to article 339.1 to 3 KCC a person commits the criminal offense of Abusing Official Position as he or she as *“an official person who, with the intent to obtain an unlawful material benefit for himself... or another person or a business organization or to cause any damage to another person or business organization, abused his... official position... or does not execute his... official duties...”*

Regarding Count 7, as CEO of XXX, and by a simple signature to the MVNO agreement after a decision issued by the Board of Directors, SH.H.is far from having the proven intent to cause any damage for XXX, even if he is aware of any previous Task Force 1 report. No pressure from

outside has been proven as to result in the aforementioned signature. Moreover not even damage inflicted to Dardafon LCC has been proved either.

The inexistence of this criminal offense as committed by SH.H.is clear and his acquittal is the necessary consequence regarding this Count.

Regarding Count 10, there was no significant evidence showing illegal pressure or ungrounded influence exercised upon the other members of the Board of Directors and/or in its final decision. Moreover, the report of Task Force 2 was not proven as influenced by him and contradicts the conclusions reached before by the Task Force 1. Moreover, not even damage inflicted to Dardafon LCC has been proved which clearly undermines any allegation on his supposed intent to provoke any damage. The inexistence of this criminal offense as committed by SH.H.is clear and his acquittal is the necessary consequence regarding this Count.

Considering all aforementioned grounds it is decided as stated in the enacting clause.

**Legal remedy:** This Judgment may be appealed by the Prosecution or/and injured parties before the Court of Appeals through the Basic Court of Pristina within 15 (fifteen) days of the day the full written judgment has been served to the parties, according to Article 398, paragraph 1 of KCCP, if duly announced within the next 8 (eight) days from the date below.

Pristina 28<sup>th</sup> June 2013

Vitor Hugo Pardal  
Presiding Judge

Jacqueline Ryan  
Court Recorder