

District Court of Pristina

KA no.417/11

(GJPP no.125/10)

(PPS no.376/09)

25.11.2011

EULEX judge Gianfranco Gallo, as confirmation judge, in the criminal case against:

Blerim DEVOLLI, father's name , born on , in , with the address at Street , no. , Peje;

Shkelqim DEVOLLI, father's name , born on , in , with the address at Street , no. , Peje;

Ismet BOJKU, father's name , born on , with the address at Street , no. , Peje;

charged with:

Fraud, art.261 par.(1), (2), as read with art.23 CCK;

Entering into harmful contracts, art.237 par.(1), (2), as read with art.23 CCK;

Breach of trust, art.269 par.(1), where **Blerim DEVOLLI** and **Shkelqim DEVOLLI** allegedly acted in assistance, as read with art.25 CCK;

Falsifying documents, art.332 par.(1) CCK; read in conjunction with **special cases of falsifying documents**, art.333 sub-par.1), read with art.332 par.(3) CCK; as read with art.23 CCK;

Organized crime, art.274 par.(1), (3), as read with art.23 CCK;

against:

Shyqyri HAXHA, father's name , born on , in , with the address at Street , no. , Pristina and , the United Kingdom;

Rexhe GJONBALAJ, father's name , born on , with the address at Street , no. , Peje;

charged with:

Entering into harmful contracts, art.237 par.(1), (2) CCK;

Abusing official position, art. 339 par.(1), (2), (3) CCK;

Misuse of economic authorizations, art.236 par.(1) sub-par.5) and par.(2) CCK;

HAVING SEEN the indictment PPS no.376/09, dated 08.06.2011, and filed by the EULEX special prosecutor with the court on the same day of 08.06.2011;

AFTER the confirmation of the indictment hearings held on 13.10.2011, 27.10.2011 and 03.11.2011, in presence of all the defendants, as represented by their defence counsel:

Blerim DEVOLLI represented by the defence counsel Virtyt Ibrahimaga and Benjamin Chew;
Shkelqim DEVOLLI represented by the defence counsel Gani Tigani and Andrew Friedman;
Ismet BOJKU represented by the defence counsel Illiriana Osmani Serreqi;
Shyqyri HAXHA represented by the defence counsel Rame Gashi and Tahir Rrecaj;
Rexhe GJONBALAJ represented by the defence counsel Blerim Prestreshi and Hekuran Haxhimusa;

and in the presence of the EULEX special prosecutor Joachim Stollberg of the Special Prosecution Office of Kosovo (SPRK);

PURSUANT to art.316 par.(4) of the Kosovo Code of Criminal Procedure (KCCP);

issues the following ruling:

RULING
ON CONFIRMATION OF INDICTMENT
AND ADMISSIBILITY OF EVIDENCE

1. The indictment PPS no.376/09, dated 08.06.2011, filed with the court on the same day, charging Blerim DEVOLLI, Shkelqim DEVOLLI, Ismet BOJKU, Shyqyri HAXHA and Rexhe GJONBALAJ with the aforementioned criminal offences, is hereby **PARTLY CONFIRMED**.
2. Count 3 of the indictment, **Breach of trust**, contrary to art.269 par.(1) CCK, read in conjunction with art. 25 CCK, count 5 of the indictment, **Organized crime**, contrary to art. 274 par.(1), (3) CCK, read in conjunction with art.23 CCK, counts 8 and 9 of the indictment, **Misuse of economic authorizations**, contrary to art.236 par.(1) sub-par.5) and par.(2) CCK are hereby **DISMISSED**.
3. Count 1 of the indictment, **Fraud**, contrary to art.261 par.(1), (2), as read with art.23 CCK, count 2 of the indictment, **Entering into harmful contracts**, contrary to art.237 par.(1), (2), as read with art.23 CCK, count 4 of the indictment, **Falsifying documents**, contrary art.332 par.(1) CCK read in conjunction with **Special cases of falsifying documents**, contrary to art.333 sub-par.1), read with art.332 par.(3) CCK, as read with art.23 CCK, count 6 of the indictment, **Entering into harmful contracts**, contrary to art.237 par.(1), (2) CCK, counts 7 and 10 of the indictment, **Abusing official position**, contrary to art.339 par.(1), (2), (3) CCK, are hereby **CONFIRMED**.

4. The conversations and text messages registered through the interception of the telephone numbers X , X , X undertaken after 27.01.2011 are deemed inadmissible evidence; once the ruling on inadmissibility of interceptions becomes final the above evidence shall be removed from the case file.
5. All the other pieces of evidence collected during the investigation are not found inadmissible and therefore shall remain in the case file.
6. The indictment PPS no.376/09, dated 08.06.2011, with all the case file and evidence submitted by the EULEX special prosecutor shall be sent to the presiding judge for the main trial, immediately after this ruling becomes final.

REASONING

A. Procedural background

1. On 08.06.2011, the Head of the SPRK Isabelle Arnal and the EULEX special prosecutor Joachim Stollberg filed with the District Court of Pristina the indictment PPS no.376/09, dated 08.06.2011.
2. Upon receiving the indictment, the Confirmation Judge verified that the indictment complied with the requirements foreseen in art.305, 306(2) KCCP. Thereafter, the confirmation hearings were scheduled and held on 13.10.2011, 27.10.2011 and 03.11.2011.

B. Disclosure by prosecution

3. At the confirmation hearing held on 13.10.2011, the Confirmation Judge considered whether the prosecution had complied with the disclosure obligation pursuant to art.307 KCCP. The defence of Shyqyri HAXHA submitted that:
 - some statements of the witnesses, proposed by the special prosecutor in the indictment, had not been disclosed to the defence;
 - the documents in the binder 7 of the case file had not been translated into Albanian.
4. With respect to the statements of the witnesses, it was determined in the course of the hearing that some of the witnesses indicated in the indictment had not been examined yet by the prosecution. As such, their statements were not in possession of the prosecution and no disclosure obligation therefore could apply. The statements of two witnesses were provided to the defence of Shyqyri HAXHA at the hearing on 13.10.2011.¹

¹ Minutes of the confirmation hearing, 13.10.2011, pp.4-6 (in the English version)

5. As to the failure of the prosecutor to translate the documents contained in binder 7, it was assessed in the course of the hearing that the above binder contained also some police reports and therefore the prosecutor was requested to provide the defence with the necessary translations.² At the hearing on 27.10.2011, the defence confirmed that defence had been provided by the prosecution with the above translations.³
6. Following aforementioned, the Confirmation Judge deemed that the prosecution had complied with the disclosure obligation in accordance with art.307 KCCP.

C. Charges

7. The indictment brings the aforementioned charges against the defendants in relation to the following factual circumstances:
 - the transfer of the Mobile Virtual Network Operator (MVNO) license from Dardafon LLC to Dardafon.net LLC;
 - the adoption of the financial terms for Post and Telecommunications of Kosovo JSC (PTK) as to the MVNO agreement between PTK and Dardafon LLC;
 - the drawing-up and signing of the MVNO agreement between PTK and the company Dardafon.net LLC.
8. At the hearing on 27.10.2011 all defendants pled not guilty to all the counts in the indictment.⁴
9. Consequently, in order to decide on the confirmation or the dismissal of the indictment, the Confirmation Judge is bound to perform an assessment in accordance with art.316 KCCP.

D. Initial assessment

10. As to art.316 par.(1) sub-par.1), 2), 3), par.(2), par.(3) KCCP, the Confirmation Judge finds that none of the circumstances in those provisions exist that would preclude a further assessment of the indictment.
11. In particular, there do not exist circumstances which exclude criminal liability, the period of statutory limitation has not expired and there are no other reasons barring prosecution (art.316 par.(1) sub-par.1), 2), 3) KCCP).

² Minutes of the confirmation hearing, 13.10.2011, p.10 (in the English version)

³ Minutes of the confirmation hearing, 27.10.2011, p.4 (in the English version)

⁴ Discrepancies in the translation of the indictment in the Albanian Language beforehand had been clarified at the hearing on 27.10.2011. See minutes of the confirmation hearing, 27.10.2011

12. The defence of **Blerim DEVOLLI** and **Shkelqim DEVOLLI** argued that the indictment was time-barred since the investigation had been initiated on 17.09.2009 and the indictment had been issued on 08.06.2011.
In this regard, it is noted that the court file contains a ruling of the special prosecutor on initiation of investigation, dated 17.06.2010 and that the investigation was lawfully extended by the pre trial judge until 17.06.2011. It is therefore evident that the indictment was issued by the special prosecutor and filed with the court prior to the expiry of the investigation.
13. In any case, it is opinion of this Confirmation Judge that the time frame foreseen in art. 225 KCCP is just related to the collection of the evidence and not to the filing of the indictment which is not an investigative action *strictu sensu*. Therefore the indictment can be filed even after the maximum period granted for the investigation has expired.
14. The indictment was correctly filed with the District Court of Pristina (art.316 par.(3) KCCP). In fact as to subject matter jurisdiction of the court (art.23 sub-par.1) item i) KCCP), it is assessed that the charges are related to criminal offences allowing imprisonment beyond five years. As to territorial jurisdiction of the court (art.27 par.(1) KCCP), the conducts described in the indictment took place in Pristina.
15. Therefore, both, the subject matter and territorial jurisdiction, belongs to the District Court of Pristina.
16. In view of the foregoing considerations, the Confirmation Judge is entitled to proceed to a further examination of the indictment as to sufficiency of evidence to support a well-grounded suspicion that defendants have committed the criminal offences (art.316 par.(1) sub-par.4) KCCP).

E. Well-grounded suspicion

17. The concept of 'grounded suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned *may* have committed the offence.⁵
Art.316 par.(1) sub-par.4) KCCP requires something more: a 'well-grounded suspicion' that the defendant has committed the criminal offence which means that there must be a sound probability as to the culpability of the defendant, even though the law does not require that full evidence is provided by the prosecutor.
18. In light of the aforementioned considerations, the counts in the indictment are further assessed.

⁵ See, e.g., European Court of Human Rights, *Case of Fox, Campbell and Hartley v. The United Kingdom*, Judgment 30.08.2011, par.32

E.1. Count 1, Fraud

19. According to count 1, on 25.11.2008, **Ismet BOJKU** as representative of both companies Dardafon LLC and Dardafon.net LLC, filed an application with the Telecommunications Regulatory Agency (TRA) for the transfer of the MVNO license from Dardafon LLC to Dardafon.net LLC.

The indictment claims that **Ismet BOJKU** untruthfully stated to the TRA that the transfer of the MVNO license was based on the agreement of the major shareholder of Dardafon LLC which was UNITEL World Inc (at the time wholly owned by Unifi Holdings whose chairman was Adrian Shatku). As a result of the transfer of the MVNO license, Dardafon LLC lost the MVNO license as to which it had invested EUR 50 000.

The indictment states that the above conduct was undertaken by **Ismet BOJKU** in co-perpetration with **Blerim DEVOLLI** and **Shkelqim DEVOLLI**.

20. With regard to count 1, it is assessed that the objective element of Fraud, as defined in art.261 CCK, requires that another person be deceived by a false representation and that false representation might cause detriment to the property of the victim.

A well-grounded suspicion as to existence of the above misrepresentation can be argued from the letter signed by Adrian Shatku and Asheen Aggarwal (who together owned 58 % of Dardafon LLC) and addressed to Rexhe Gjonbalaj. The letter states that the negotiations carried out by the Devolli Company (which owned 42 % of Dardafon LLC) with PTK after the conclusion of the 'Heads of the Agreement' (the preliminary agreement between Dardafon LLC and PTK as to the MVNO license) had taken place without their consent and without them being informed.

21. In this regard, the indictment (indictment § 33, 51) provides that **Ismet BOJKU** made an application to the TRA on behalf of both companies, Dardafon LLC and Dardafon.net LLC. In the application to the TRA, **Ismet BOJKU** provided that the transfer of the license was made for branding purposes (indictment § 33). As examined by the court, the request on transfer of the MVNO license, dated 25.11.2008, indeed bears the signing name of **Ismet BOJKU** and provides that the transfer of the license was requested in view of the branding strategy.⁶

22. By making the above application to the TRA, **Ismet BOJKU** created the false representation that the actual intent of the company Dardafon LLC was to alienate its MVNO license to Dardafon.net LLC (whereas this intent did not exist as it results from the above mentioned letter).

Besides the above letter, also the following considerations indicate that Dardafon LLC did not have any intention to give up its license and that **Ismet BOJKU** was not acting in accordance with his mandate as a responsible person of the above company:

⁶ Request for approval of transfer of the license, from Dardafon LLC and Dardafon.net LLC, dated 25.11.2008 (evidence binder 1, p.E54)

- On 22.10.2007, Dardafon LLC filed an application for individual license with the TRA.⁷ The application proposed to build domestic and international MVNO services based upon the Vala network.
- The invoice of the TRA no.0013-2008, dated 02.06.2008, for the payment of the MVNO license fee EUR 50 000 was issued to Dardafon LLC.
- On 12.06.2008, the MVNO license was granted to Dardafon LLC for a term of 15 years.⁸
- On 27.08.2008, Dardafon LLC concluded with PTK the 'Heads of Agreement'. In the 'Heads of Agreement' it was provided that a definite agreement shall be negotiated between the parties (*id est* Dardafon LLC and PTK) by 01.10.2008.⁹
- According to clause 2.f of the 'Heads of Agreement', the agreement was personal to the two parties, Dardafon LLC and PTK and neither of them had the right to assign or transfer any rights under the 'Heads of Agreement'.

23. The aforementioned suggests that Dardafon LLC had planned to develop its commercial activity based on its MVNO license and therefore it is highly unlikely that the transfer of the license was the actual strategy of Dardafon LLC and of the majority of its shareholders. Moreover it is noteworthy that by transferring the license (apparently without receiving any payment from Dardafon.net LLC) the company Dardafon LLC has been deprived of an asset without any consent from the major shareholders, without them being aware of that (and in fact no money was given to Dardafon LLC for the transfer of the licence).
24. The involvement of **Shkelqim DEVOLLI** and **Blerim DEVOLLI** in the alleged offence of **Fraud**, is assessed in view of the following:
- the application to the TRA on transfer of the MVNO license was made on behalf of both companies, Dardafon LLC and Dardafon.net LLC.
 - the application was made on 25.11.2008. Dardafon.net LLC was entered in the Kosovo business registry only four days earlier, on 21.11.2008;¹⁰
 - one of the founders of Dardafon.net LLC was **Shkelqim DEVOLLI**, at the time holding 90% of the share capital.
 - as such, it must be concluded that **Shkelqim DEVOLLI** founded Dardafon.net LLC in order to obtain the MVNO license from Dardafon LLC. **Shkelqim DEVOLLI** was in a position to appoint **Ismet BOJKU**, as authorized representative of Dardafon.net LLC, so that the latter could make an application for the transfer of the license, while also holding a position in Dardafon LLC.
 - **Blerim DEVOLLI** was the executive director of Dardafon.net LLC and **Ismet BOJKU** its responsible person.

⁷ Application for individual license, 22.10.2007 (evidence binder 1, pp.E2, E3)

⁸ Telecommunications Regulatory Authority, license for mobile virtual network operator, 12.06.2008 (evidence binder 1, p.E38-E49)

⁹ 'Heads of Agreement', 27.08.2008, between Dardafon LLC and PTK, clause 2.c

¹⁰ Kosovo Business Registration Agency, certificate of registration, business no.70540878, Dardafon.net LLC, dated 21.11.2008 (evidence binder 1, p.E55)

25. Furthermore, as it follows from the statement of **Blerim DEVOLLI** to the SPRK, the business activity was a sort of activity of the Devolli family and that as to that business he and his brother **Shkelqim DEVOLLI** 'are together'.¹¹ Therefore it is unthinkable that he was not involved in the above transaction.
26. At the confirmation hearing held on 27.10.2011, the defence of **Blerim DEVOLLI**, **Shkelqim DEVOLLI** and **Ismet BOJKU** put forward that count 1 would be inconsistent also owing to the inexistence of an injured party. Indeed, it is likely that Dardafon LLC will not bring any property claim as against the defendants, since the owners of Dardafon LLC appear to be now the Devolli brothers.
The blatant conflict of interest might be solved by the main trial panel by appointing an authorized representative pursuant to art. 82 KCCP.
Since the implementation of the above provision should be an analogical one (the case of a conflict of interest does not appear to be regulated by art. 82) this Confirmation Judge preferred to leave the above issue for the main trial panel.
In any case, Dardafon LLC in a person of its responsible person (or authorized representative) is indeed an injured party in the present case.
27. Furthermore, at the end of the confirmation procedure, it can be said that also Adrian Shatku and Asheen Aggarwal must be considered injured parties as to the criminal offence of Fraud since their rights were endangered and/or violated by the criminal offence.
Any eventual and subsequent agreement between the Devolli brothers and the injured parties does not change anything as to the possibility to prosecute the above criminal offence, since, unlike other countries which require at least the request of the injured party to prosecute the culprit, according to the CCK the crime of Fraud must be prosecuted *ex officio*.
28. Hence, it is concluded as in the enacting clause.

E 2. Count 2, Entering into harmful contracts

29. With respect to the charge of Entering into harmful contracts, contrary to art.237 par.(1), (2) and art.23 CCK, it is undisputed that the application to the TRA, dated 25.11.2008, requested the MVNO license be transferred from Dardafon LLC to Dardafon.net LLC. The defence of **Ismet BOJKU** argued that no contract had been signed by **Ismet BOJKU** and that the application to the TRA can not be defined as a contract pursuant art. 237 CCK.
30. In this regard, it is assessed by the Confirmation Judge that, indeed, the application as to the transfer of the MVNO license is the necessary consequence of a previous transaction (and therefore a contract) between Dardafon LLC and Dardafon.net LLC by which the MVNO license was transferred from one company to the other.

¹¹ SPRK, record of the suspect hearing, 22.12.2010, Blerim Devolli, p.11 (in the English version) (evidence binder 6a, p.F11)

31. As to consequences for Dardafon LLC in losing its MVNO license, it is considered that with the transfer of the MVNO license to Dardafon.net LLC, Dardafon LLC surely lost the paid license fee of EUR 50 000 (according to the bank payment order dated 06.03.2008, the license fee EUR 50 000 had been paid by Dardafon LLC)¹² and also the very likely earnings that could be gained through the commercial exploitation of the MVNO license. As it has already been noted, oddly there was no payment for Dardafon LLC from Dardafon.net LLC in relation to the transfer of the license. Therefore the contract was harmful for Dardafon LLC.
32. It is undisputed that **Ismet BOJKU** signed the request to TRA on the transfer of the MVNO license on behalf of Dardafon LLC and Dardafon.net LLC. He surely knew that this would result in damage for Dardafon LLC. As to the Devolli brothers, since they were the owners of the 90% of Dardafon.net LLC, they were clearly the beneficiaries of the entire commercial operation and therefore it is unconceivable that they were unaware of the damage caused to Dardafon LLC. On the contrary, it must be assumed that they were the masterminds behind the entire operation.
33. Hence, it is concluded as in the enacting clause.

E.3. Count 3, Breach of trust

34. As to the above count, the conduct already described undertaken by Ismet Bojku (in co-perpetration with the Devolli brothers) indeed represents a violation of his *bona fide* obligation towards the company Dardafon LLC which was deprived of the MVNO license. The above conduct has already been criminalized in the indictment in relation to the criminal offence of Fraud.
35. Therefore, since the criminal offences of Fraud and Breach of trust protect the same interest (which is the property, as it is made clear by the title of chapter XXIII of the CCK) and the conduct taken in consideration in the indictment for both criminal offences is exactly the same, the criminal offence of Breach of trust, which is punishable more leniently, must be considered absorbed by the criminal offence of Fraud.
36. In fact, even though the principle of substantive *ne bis in idem* is not foreseen in the CCK, it has to be considered as a general principle, immanent in all modern criminal systems, and therefore applicable even without a specific provision. According to the above principle it is prohibited to burden the same culprit more than once with the same fact: in case for the same fact two criminal provisions are apparently applicable, only the one foreseeing the graver punishment shall be applicable.
37. Hence it is decided as in the enacting clause.

¹² Ref. FT0815504103, dated 06.03.2008 (evidence binder 1, p.E52)

E. 4. Count 4, Falsifying documents

38. In count 4 of the indictment it is alleged that **Blerim DEVOLLI, Shkelqim DEVOLLI** and **Ismet BOJKU** in an undetermined place and time in 2008 or 2009 took influence on the drafting of the final MVNO agreement between PTK and Dardafon.net LLC or drafted the wording themselves, despite knowing that false facts were stated in the document. In particular, the MVNO agreement stated that the 'Heads of Agreement' was concluded between PTK and Dardafon.net LLC whereas it is undisputed that the 'Heads of Agreement' was concluded between PTK and Dardafon LLC on 27.08.2008.
39. The defence claimed that what happened was actually just a mistake and therefore no criminal offence was committed, since there was no intention to commit it (as it is well known, the criminal offence of Falsifying documents can not be committed by a mere mistake, but it necessarily requires the intent to commit it).
40. However that alternative scenario does not sufficiently challenge the prosecution case, since the replacement in the final MVNO agreement of Dardafon LLC with Dardafon.net LLC as the company indicated in the 'Heads of Agreement' was instrumental to the above indicated Fraud against Dardafon LLC. The above consideration leads to the only possible conclusion that surely the three defendant (even though it is not specified who materially undertook the action) either drafted the false statement or took influence in the drafting of the document. In any case it is undisputed that a false document (i.e. the final MVNO agreement between PTK and Dardafon.net LLC) was drawn up containing the false indication that the 'Heads of Agreement' was concluded with Dardafon.net LLC.
41. Therefore the existence of a well-grounded suspicion that the crime was committed by the three defendants can be affirmed. In order to reach the threshold of full evidence, the prosecutor will have to prove more accurately (for instance by examining the people who took part in the drafting of the agreement, in particular Genc Lami and Sebahedin Ramaxhiku), the material conduct which led to the above falsification.
42. Hence it is decided as in the enacting clause.

E.5. Count 5, Organized crime

43. Count 5 charges **Blerim DEVOLLI, Shkelqim DEVOLLI** and **Ismet BOJKU** with the criminal offence of organized crime, contrary to art. 274 par.(1), (3) and art.23 CCK. In particular, according to the indictment, the defendants had established a structured group with the aim to commit serious crimes.

44. As it follows from art. 274 par.(7) sub-par.4) CCK, it is an indispensable element of an 'organized criminal group' that the group *is not* randomly formed for the *immediate* commission of an offence. This would entail a *stable* association, which has been created with the aim of committing one or more serious crimes. As it follows from the allegations in counts 1 and 2, the defendants acted jointly specifically in relation to the transfer of the MVNO license from Dardafon LLC to Dardafon.net LLC. The alleged criminal intent appears to be limited to the above action.
45. There is no indication that the group existed before and after the commission of the above criminal offences. The fact that Dardafon.net LLC continues to exist as a business company is not in itself sufficient to draw conclusions as to existence of a structured group operative for a period of time.
46. For the above reasons the Confirmation Judge finds that the threshold of a well-grounded suspicion for the charge of Organized crime in count 5 of the indictment is not met.
47. Hence it is decided as in the enacting clause.

E.6. Count 6, Entering into harmful contracts

48. According to the indictment, **Rexhe GJONBALAJ**, as a chairman of the PTK board of directors (the body responsible for managing and directing the business affairs of PTK), on 20.10.2008, voted in favor of PTK entering into the MVNO agreement with Dardafon LLC, notwithstanding the above agreement contained an unfavorable profit split for PTK.
49. First of all it must be taken in consideration that the evidence indicates that also the 'revenue' sharing had been considered by the board. As it is well known, the terms 'revenue' and 'profit' bear different meanings, with different financial implications. Moreover the final MVNO agreement, dated 16.09.2009, provides for the 'revenue' sharing between PTK and Dardafon.net LLC (clause 7).
The above distinction must be borne in mind in assessing count 6 and the following counts of the indictment.
50. At the PTK board meeting, on 14.08.2008, **Rexhe GJONBALAJ** proposed that a Task Force (the so called Task Force I) be formed to elaborate a proposal for the MVNO.¹³ **Rexhe GJONBALAJ** proposed that chief executive director Adnan Merovci be entrusted to form the Task Force I.¹⁴
51. It is undisputed that at the board meeting on 02.10.2008, Genc Lami, one of the members of the Task Force I, indicated that Dardafon LLC had made two proposals:

¹³ PTK, minutes of the meeting no.4 of the board of directors, on 14.08.2008 (evidence binder 2, pp.C2, C3)

¹⁴ PTK, minutes of the meeting no.4 of the board of directors, on 14.08.2008 (evidence binder 2, p.C2)

the first gave Dardafon LLC 70% and PTK 30% of the net income whereas the second assigned Dardafon LLC 80% and PTK 20% of the gross income.

The MVNO terms proposed to PTK were further discussed: Afrim Bejtullahu, one of the members of the Task Force I, explained to the board of directors that Task Force I had defined the PTK's share between 20% - 30%.¹⁵

52. After several PTK board members expressed their concerns as to the findings of the Task Force I, another working group (the so called Task Force II) was formed. Task Force II considered that the share of revenues - PTK 22% and Dardafon LLC 78% - was detrimental and harmful for PTK and that the percentage of the share should have been 73 % for PTK and 27 % for Dardafon LLC.¹⁶
53. Irrespective of these findings of the Task Force II, **Rexhe GJONBALAJ** at the board meeting on 20.10.2008 asked the board to support the MVNO agreement, with the percentage PTK 22% and Dardafon LLC 78%, and voted in favor thereof.¹⁷
54. In the interview to the SPRK **Rexhe GJONBALAJ** confirmed that he knew about the existence of the Task Force II and about its findings. However, according to **Rexhe GJONBALAJ**, the PTK board believed that the aim of the Task Force II was the project's failure.¹⁸
55. The conduct of **Rexhe GJONBALAJ** appears to be quite bizarre. In particular, it is odd and suspicious that he pushed the board in order to vote in favor of the proposal of task Force I which was clearly much less favorable for PTK (the part whose interest should have been taken care of by the defendant).
The same can be said in relation to **Shyqyri HAXHA** who signed the MVNO agreement on behalf of PTK. Even though he decided to raise the share of PTK to 27 %, it appears bizarre and suspicious that he decided to sign the agreement without taking in consideration the findings of Task Force II which were much more favorable for PTK.
56. It is undisputed that **Shyqyri HAXHA**, in signing the MVNO agreement, acted on the basis of the decision of the PTK board. **Rexhe GJONBALAJ** in the interview to the SPRK noted that it was part of **Shyqyri HAXHA**'s duties to negotiate the contract with Dardafon LLC based on the decision of the PTK board.¹⁹
The decision of the PTK board dated 20.10.2008 clearly stated that the MVNO agreement with Dardafon LLC had been approved.

¹⁵ PTK, minutes of the meeting no.7 of the board of directors, on 02.10.2008 (evidence binder 2, pp.F2-F5)

¹⁶ PTK, board of directors paper, 20.10.2008 (evidence binder 2, p.IJ17)

¹⁷ PTK, minutes of the meeting no.15 of the board of directors, on 20.10.2008 (evidence binder 2, pp.IJ1-IJ5)

¹⁸ SPRK, record of the suspect examination, 10.02.2011, Rexhe Gjonbalaj, pp.8, 9 (in the English version) (evidence binder 6a, pp.A8, A9)

¹⁹ SPRK, record of the suspect examination, 10.02.2011, Rexhe Gjonbalaj, p.15 (in the English version) (evidence binder 6a, p.A15)

Shyqyri HAXHA saw that the PTK board had authorized the MVNO agreement with Dardafon LLC but, notwithstanding that, concluded the MVNO agreement with another company Dardafon.net LLC.

Furthermore he signed the MVNO agreement assigning to PTK a share much lower than the one suggested by Task Force II.

57. **Shyqyri HAXHA** stated to the SPRK that after having perused the TRA decision, dated 10.07.2008, he concluded that Dardafon LLC and Dardafon.net LLC were the same company.²⁰

However, it is very unlikely that he might have made such a mistake: in fact from the preamble of the TRA decision, dated 10.07.2008, it follows that the TRA decision was issued upon a request for the *transfer* of the MVNO license. The word '*transfer*' entails that the license was given from one company to another, making clear that the companies involved were two. Furthermore, in the TRA decision, dated 10.07.2008, the name Dardafon.net LLC and its registration number were mentioned, making it clear that the latter was a company different from Dardafon LLC.

The defendant is a highly educated person with experience in business activity and therefore it is unthinkable that he did not realize that Dardafon LLC and Dardafon.net LLC were two different companies.

Furthermore, since the defendant managed to raise the share for PTK from 22% to 27%, it appears that he was not bound by the decision of the board (at least as to the shares). Therefore he could have taken in consideration the results of Task Force II, but he did not.

58. This Confirmation Judge acknowledges that a thorough financial expertise will have to be performed at the main trial stage, in order to have an expert opinion as to the harmfulness of the agreement. On the other hand, the final MVNO agreement and the decision of the board appear clearly in contrast with the interest of the PTK and lead to the conclusion that the contract was harmful for PTK.

59. The blatant high difference between the PTK share which was supported by **Rexhe GJONBALAJ** (22%) and **Shyqyri HAXHA** (27 %) and the share advised by the Task Force II (at least 73%) makes it clear that both defendants knew that the final MVNO agreement would cause a damage for PTK, but, regardless of this, decided to go ahead.

The reason for this conduct has not been explained by the investigation, but in any case the harmfulness of the contract lingers and therefore it can be concluded that there is a well-grounded suspicion as to the commission of the criminal offence.

60. Therefore the indictment must be confirmed as to count 6.

*E.7. Count 8 against **Shyqyri HAXHA** and count 9 against **Rexhe GJONBALAJ**
Misuse of economic authorization*

²⁰ SPRK, record of the suspect hearing, 20.12.2010, Shyqyri Haxha, pp.23 (in the English version) (evidence binder 6a, p. H23)

61. Since the conduct attributed to the defendants as to the above two counts is the same already described in relation to the criminal offence of Entering into harmful contracts (count 6) and since the two provisions (art. 236 and 237 CCK) protect the same interest (the guardianship of the economic system and the fairness in the economic relations as it is made clear by the title of chapter XXII of the CCK), for the reasons already explained above in relation to count 3, the criminal offence of Misuse of economic authorization must be considered absorbed by the graver offence of Entering into harmful contracts, in accordance with the already invoked principle of substantial *ne bis in idem*.
62. Hence it is decided as in the enacting clause.

*E. 8. Count 7 against Shyqyri HAXHA and count 10 against Rexhe GJONBALAJ
Abusing official position*

63. It is undisputed that the PTK is a Publicly Owned Enterprise, pursuant to the Law No. 03/L-087, and that both defendants (**Rexhe GJONBALAJ** as the chairman of the PTK board of directors, **Shyqyri HAXHA** as the Chief Executive Officer of PTK) exercised in the events described in the indictment specific official duties based on an authorization provided by the above law. Therefore, pursuant to art. 107, par.(1), item 3) CCK, both of them are official persons.
64. After having clarified that, the already described conduct undertaken by the defendants in relation to the voting of the MVNO agreement with an unfavorable split of shares for PTK (**Rexhe GJONBALAJ**) and the signing of the agreement with Dardafon.net LLC (**Shyqyri HAXHA**) are also relevant in relation to art. 339 CCK. In fact, the conducts in question indicate that the defendants, as official persons, abused their position, in order to make Dardafon.net LLC obtain an illegal material benefit (which was both, gaining of the MVNO license and receiving of a share with a percentage clearly unfavorable for PTK).
65. It is noteworthy that as to counts 7 and 10 the above mentioned principle of substantial *ne bis in idem* is not applicable, since the two provisions protect two different interests. In fact art. 236 CCK protects the fairness in the economic relations, whereas art. 339 CCK protects the correctness and impartiality of the public administration. Therefore, even though the conduct is the same, there is no overlapping of provisions and it can not be said that the defendants are burdened more than once with the same fact.
66. It is the opinion of this Confirmation Judge that by pushing the other members of the board to vote without giving the time to peruse the findings of the Task Force II and by voting the approval of an agreement which appeared, *prima facie*, unfavorable for PTK **Rexhe GJONBALAJ** indeed abused his position with the special intent to give the private company an unlawful material benefit.

67. The same can be said for **Shyqyri HAXHA** who decided to sign an agreement which was both unfavorable for PTK as to the share and in violation of the contractual obligation of PTK towards Dardafon LLC. It is therefore undisputable that the defendant abused his position in order to give Dardafon.net an illegal material benefit.
68. Again, the investigation has not highlighted what was the reason why the two defendants decided to take a position not in line with the interest of the PTK and this should be clarified by the main trial.
69. Hence it is decided as in the enacting clause.

F. Admissibility of evidence

70. At the confirmation hearing on 27.10.2011 the defence of **Ismet BOJKU** and **Shyqyri HAXHA** asked that letters signed by Adrian Shatku, contained in the evidence binder 1, tab F, and dated 08.10.2008, 28.07.2009, 11.08.2009, 23.10.2009, 19.03.2010 and 16.03.2010, be declared as inadmissible evidence, pursuant to art.154 par.(2) KCCP. It was argued that the defence has not been accorded the possibility to challenge Adrian Shatku as per art.156 par.(2) KCCP.
71. It is assessed by the confirmation judge that the letters in the evidence binder 1, tab F, to PTK, are not statements, but precisely letters and therefore signed declarations which must be considered as documentary evidence. Since such pieces of evidence have not been obtained in a way contrary to the provisions of the KCCP, the above letters are admissible and have to remain in the case file.
72. In relation to the interception activities, the Confirmation Judge, pursuant to art.264 par.(3) KCCP, has to review *ex officio* the admissibility of the collected evidence. The order for interception issued by the pre-trial judge and dated 27.12.2010 included *inter alia* the authorization for the interception of the following telephone numbers:
- X belonging to Mr. Ismet Bojku and Mr. Blerim Devolli;
 - X belonging to Mr. Shkelqim Devolli;
 - X belonging to Mr. Blerim Devolli.
73. However, during the interception activity, it turned out that the above numbers were utilized by people different from the defendants. In fact, according to the Kosovo Police report on interception, ref. no.DHKO/SHFI 03/2011, dated 11.01.2011:
- the number X was used by X ;
 - the number X was utilized by a person named X ;
 - the number X was utilized by a person named X from X.

74. The reports following the report dated 11.01.2011 confirmed the initial assessment.
75. Since it was evident at least from 27.01.2011 (therefore after one month of activity of interception) that the above numbers were not utilized by the suspects and that the people using the above numbers were not having contacts with the suspects, the interceptions should have been suspended since that day.
76. Therefore it can be concluded that, starting from 27.01.2011, the implementation of the above order was unlawful and the evidence obtained after 27.01.2011 through the interception of the above numbers (X , X , X) is not admissible.
77. As to the other numbers intercepted no reasons of inadmissibility have been found.

G. Legal remedy.

78. It is highly disputed whether or not the ruling confirming the indictment is appealable. On the one hand, the general provision envisaged in art. 431 KCCP states that an appeal against a ruling rendered in first instance is admissible unless it is explicitly prohibited. No prohibition is foreseen in the KCCP as to the possibility to appeal the confirmation ruling.
79. On the other hand, art. 317 KCCP seems to take in to consideration only the possibility for the prosecutor and the injured party to appeal the ruling which dismisses the indictment allowing the interpretation that no appeal would be permitted against the confirmation ruling.
80. It is the opinion of this Confirmation Judge that what can be decisive in order to solve the dispute is a systematic assessment of the provisions of the KCCP related to the appeals against rulings. Such an assessment leads to the conclusion that the ruling confirming the indictment can not be appealed.
81. In fact, if we assume that the ruling which confirms the indictment is appealable, it is undisputed that the appeal must be decided by the three-judge panel (art.317 par. (2) KCCP). However, as it is well known, pursuant to art.431 par. (2) KCCP, no appeal is permitted against a ruling rendered by the three-judge panel.
82. Therefore the following hypothetical scenario could occur: after the indictment is confirmed, the defendant files an appeal against the ruling. The appeal is granted by a three-judge panel and therefore the initial ruling is modified and the indictment dismissed (art. 434 par. (3) KCCP).
83. In such hypothetical scenario the prosecutor could not appeal the ruling of the three-judge panel with the result that the indictment would be dismissed without the possibility for the

prosecutor to appeal (possibility which is, on the contrary, granted when the dismissal is made by the confirmation judge).

It would be an oddity which would render the system preposterous and would leave the prosecutor without any possibility to appeal the decision dismissing the indictment.

84. Therefore it appears that the possibility for the defendant to appeal the ruling which confirms the indictment would lead to a misbalance between the prosecution and the defence.

It is worth mentioning that also in other systems (for instance Italy) the defendant can not appeal the ruling of the judge deciding whether or not there will be a main trial after the indictment filed by the prosecutor. So the fact that the defendant can not appeal the confirmation ruling can not be considered an oddity.

85. It is worth mentioning that no harm can be claimed by the defence on the basis of the above interpretation, since the defendant, in case of an unfavorable judgment at the main trial, will have the possibility to file an appeal.

In view of all foregoing, it is decided as in the enacting clause.

EULEX Judge Gianfranco Gallo
Confirmation Judge

Legal Remedy: The ruling as to its part dismissing the indictment can be appealed by the prosecutor and by the injured parties to the three-judge panel of the District Court of Pristina within three days of its service.

The ruling can be appealed as to its part related to the admissibility of evidence pursuant to art. 264 KCCP within 72 hours from its service.