

# LEGAL ASSESSMENT OF THE CURRENT CRIMINAL CASE AGAINST NIKA GVARAMIA



2020



## HUMAN RIGHTS CENTER

AUTHOR: Giorgi Tkebuchava  
EDITED BY: Aleko Tskitishvili  
Giorgi Kakubava  
TRANSLATED BY: Nikoloz Jashi

*The analytic document was prepared with the financial support of the National Endowment for Democracy (NED). The document does not necessarily reflect the views of the donor. Human Rights Center bears sole responsibility for the content of the analytic document.*



**National Endowment  
for Democracy**  
*Supporting freedom around the world*

## TABLE OF CONTENTS

INTRODUCTION .....	4
RESEARCH METHODOLOGY .....	5
THE SUBSTANCE OF THE ALLEGATIONS.....	6
INTERNATIONAL STANDARDS .....	7
LEGAL BASIS FOR PERSONAL RESPONSIBILITY OF COMPANY DIRECTORS.....	7
CORPORATE LEGAL RESPONSIBILITY OF DIRECTORS .....	10
PRINCIPLE OF BUSINESS JUDGMENT RULE.....	12
( <i>BUSINESS JUDGMENT RULE</i> ) .....	12
CRIMINAL LIABILITY OF DIRECTORS .....	14
NATIONAL LEGISLATION AND COURT PRACTICE .....	16
COURT MONITORING FINDINGS .....	17
SELECTIVE JUSTICE .....	20
(CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (ECTHR)) .....	20
DURATION OF LEGAL PROCEEDINGS.....	23
CONCLUSION.....	24



## INTRODUCTION

The independent, pluralistic media environment plays an indispensable role in forming a democratic society and protecting human rights. Therefore, HRC is particularly interested in the situation and challenges that exist in the country with this regard posing threats to democratic processes. In this term, initiation of criminal proceedings and/or enforcement of investigative actions against the representatives of critical media outlets shall be deemed problematic especially when such prosecution coincides in time with the intensified resistance to the government<sup>1</sup>. Thus, HRC shifted focus on the ongoing criminal case against Nika Gvaramia, the founder and Director-General of TV company Mtavari Arkhi (Main Channel), which critical of the government, and the former Director-General of the Rustavi 2 Broadcasting Company. On 18 July 2019, the European Court of Human Rights delivered a judgment<sup>2</sup> on the Rustavi 2 case, according to which in relation to the Rustavi 2 case, there has been no violation of any article of the European Convention. Consequently, Rustavi 2 was returned to its former owner, who dismissed Nika Gvaramia, the director-general of the channel, the same day<sup>3</sup>. In the aftermath, bringing a conflict of interests as the cause, the head of the news service and the journalists of the leading talk shows were fired from the TV company. A large number of employees who were dissatisfied with the changes in the staff left the broadcaster<sup>4</sup>.

Mtavari Arkhi where lots of former employees of Rustavi 2 were hired<sup>5</sup>, started broadcasting in September of 2019<sup>6</sup>.

On July 20, 2019, after the adoption of judgment by the European Court of Human Rights (ECtHR), the Office of the Prosecutor General of Georgia launched an investigation into the facts of abuse of official power harming the legitimate interests of Rustavi 2 Broadcasting Company, further, of misappropriation of large amounts of the funds belonging to Rustavi 2 through official capacity, and concealing assets through fraudulent and/or sham transactions. In the course of the investigation, charges were brought against Nika Gvaramia, the former Director-General of Rustavi

---

<sup>1</sup>see Reports of HRC court monitoring on the cases with alleged political motivates. [shorturl.at/tBIW5](http://shorturl.at/tBIW5).

<sup>2</sup>see CASE OF RUSTAVI 2 BROADCASTING COMPANY LTD AND OTHERS v. GEORGIA. [shorturl.at/kJLPT](http://shorturl.at/kJLPT).

<sup>3</sup>see the Statement: [shorturl.at/vNVZ9](http://shorturl.at/vNVZ9).

<sup>4</sup>see more information at: [shorturl.at/sB024](http://shorturl.at/sB024); [shorturl.at/nDMPX](http://shorturl.at/nDMPX); [shorturl.at/guwU4](http://shorturl.at/guwU4); [shorturl.at/aijGH](http://shorturl.at/aijGH).

<sup>5</sup>see more information at: [shorturl.at/cqJLO](http://shorturl.at/cqJLO).

<sup>6</sup> see more information at: [shorturl.at/bvGM5](http://shorturl.at/bvGM5).



2, and the founder of the newly established *Mtavari Arkhi*<sup>7</sup>. The excuse for the prosecution was the unprofitableness of the business decisions made by Nika Gvaramia while in the capacity of the Director of Rustavi 2.

The purpose of this document is to assess to what extent the charges brought by the prosecution against Nika Gvaramia - meaning the embezzlement of assets under aggravating circumstances - actually contain the signs of a crime sufficient for holding a person criminally liable.<sup>8</sup> Moreover, to what extent the commencement of criminal prosecution following a decision made by the CEO (Chief Executive Officer) of a company is in line with norms and practice of the national and international laws; Furthermore, whether there are some alleged political motives and signs of selective justice on the case.

Beyond the above-mentioned issues, the current Report shall assess the actions on the part of Nika Gvaramia in terms of corporate law and juxtapose the acts with any possible criminal liabilities.

## RESEARCH METHODOLOGY

The research is based on various documents of criminal cases, further, on the reports of court hearings prepared by the HRC court monitor, and on the identified problem issues of the substantive criminal law and the procedural criminal law. During the course of the research, we have carried out a comparative legal analysis revealing the various legal issues existing in the Case. The comparative analysis is based on the juxtaposition of the national legislation and of the decisions of national courts with some of the judicial decisions by the US and German courts, further with various international standards having the origin in corporate legal relations, and finally with relevant judgments rendered by ECtHR.

---

<sup>7</sup> see Statement by the Office of the Prosecutor General of Georgia at: [shorturl.at/clzC4](http://shorturl.at/clzC4).

<sup>8</sup> See the criminal offense provided for in subparagraphs (a) and (d) of paragraph 2, and subparagraph (b) of paragraph 3 of Article 182 of the Criminal Code of Georgia. [shorturl.at/gBFIR](http://shorturl.at/gBFIR).



## THE SUBSTANCE OF THE ALLEGATIONS

Nika Gvaramia has been charged with the criminal offenses provided for in subparagraphs (a) and (d) of paragraph 2, and subparagraph (b) of paragraph 3 of Article 182, subparagraph (c) of paragraph 3 of Article 194<sup>9</sup>, paragraph 3 of Article 221<sup>10</sup> subparagraph (b) of paragraph 2 of Article 362<sup>11</sup> of the Criminal Code of Georgia<sup>12</sup>. Within the scope of the criminal case, the main charges relate to fewer revenues from advertisements earned by Rustavi 2 at the end of 2015 as compared to the revenues from the previous year which, according to the prosecution, was caused by the business decisions of Nika Gvaramia allowing the prosecution to subsume the acts of Gvaramia under "unlawful embezzlement of property rights" committed in aggravating circumstances.<sup>13</sup>

As we learn from the files on the criminal case, under the agreement concluded in 2013-2015, *InterMedia LLC* was eligible in addition to the set fee to receive as a bonus around 5% of the total revenues from selling the commercial airtime, while the TV company was allowed to keep the rest of the revenue.

On 16 January 2015, on behalf of the Rustavi 2 Broadcasting Company LLC, Nika Gvaramia signed an agreement with InterMedia Plus LLC, according to which Rustavi 2 Broadcasting Company LLC assigned the rights to run commercials on its channels to Inter Media Plus LLC. Under the agreement between the parties, the fee for assigning the right to run commercials was to be paid in the amount agreed on a monthly basis, irrespective of the amount of commercial airtime actually consumed by Inter Media Plus LLC in the corresponding month.

From January to August 2015, Nika Gvaramia, in accordance with the established practice on the market, demanded 90-95% of the total revenue from the alienation of

---

<sup>9</sup>See The criminal offense provided for in subparagraph (c) of paragraph 3 of Article 194 of the Criminal Code of Georgia (*legalization of illegal income (money laundering) accompanied with receipt of particularly large amounts*). [shorturl.at/gBFIR](http://shorturl.at/gBFIR)

<sup>10</sup>See Criminal offense provided for in paragraph 3 of Article 221 of the Criminal Code of Georgia (*Commercial bribery by a person who exercises the power to manage and represent an enterprise or organization, as well as other special powers, or who works in that organization*). [shorturl.at/gBFIR](http://shorturl.at/gBFIR).

<sup>11</sup>See: The criminal offense provided for in subparagraph (b) of paragraph 2 of Article 362 of the Criminal Code of Georgia (*making forged document, seals, stamps, or letterheads causing significant damage*). [shorturl.at/gBFIR](http://shorturl.at/gBFIR).

<sup>12</sup>see: Decree to prosecute a person (01.11.2019).

<sup>13</sup>see: The crime provided for in subparagraphs (a) and (d) of paragraph 2, and subparagraph (b) of paragraph 3 of Article 182 of the Criminal Code of Georgia. [shorturl.at/gBFIR](http://shorturl.at/gBFIR).



the TV company's advertising time from Inter Media Plus LLC while leaving the rest of the amount to Media Plus LLC in consideration for the services rendered.

According to the prosecution, the purpose of concluding the different agreement was to embezzle the property rights of Rustavi 2. The difference between the advertising revenues in 2014 in the amount of GEL 43,230,509 and the advertising revenues in 2015 in the amount of GEL 36,467,000 was determined as the financial loss inflicted upon the broadcasting company. Further, according to the prosecution, since the advertising market had not shrunk, the company should have received the revenue in the same amount as that of the previous year.

According to the defense, the agreement of 2015 served the best interests of the company, aiming to provide insurance for short or long-term risks, and to tackle expected financial difficulties leading the Company to decide to claim less but guaranteed revenues.

Moreover, it is significant to note the fact that since these risks had not been materialized, the old manner of settlement was restored under the 2016 agreement, and Inter Media Plus returned a part of its profits earned in 2015<sup>14</sup>.

## INTERNATIONAL STANDARDS

### Legal basis for personal responsibility of company directors

Corporate governance is a system formed through the multilateral relationships between lots of participants of the system<sup>15</sup>. In general, legal relations constitute one of the most important problems in legal science. However, in this regard, the issue of responsibility in the field of corporate governance is a particularly topical issue<sup>16</sup>, which is referred as one of the tools of corporate governance<sup>17</sup>. Under the issue of responsibility also comes the issues of mutual responsibility of both the management and the partners/shareholders of the corporation. Accordingly, we can differentiate between internal and external corporate responsibilities. Internal responsibility arises

---

<sup>14</sup> see Interrogation Report of Nika Gvaramia of 1 August 1, 2019.

<sup>15</sup>see: Humera K., A Literature Review of Corporate Governance, International Conference on E-business, Management and Economics IPEDR Vol.25, IACSIT Press, Singapore, 2011, 3. [shorturl.at/eqyC2](http://shorturl.at/eqyC2).

<sup>16</sup>see Emmerich V., Habersack M., Konzernrecht, "Verlag CH Beck ", 2005, Munich, 274-277.

<sup>17</sup>see Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law (2006), p.29.



in relationships between members of the corporation (*managers, shareholders, and dominants*), while external responsibility involves the responsibility of the managers of the company before third parties<sup>18</sup>.

The Organization for Economic Cooperation and Development (OECD) has adopted the Principles of Corporate Governance, recognizing that there is no universal model of good corporate governance<sup>19</sup>. Consequently, for an entrepreneurial company to be profitable, the director of the enterprise and its shareholders, including creditors, may consider different ways to be optimal; some of them may care for their public image, while others may deem even criminal activities acceptable<sup>20</sup>.

Further, we should take into account that in Georgia there are mainly the entities established in the form of limited liability company, while other legal forms of companies are quite rare. Even when companies are not required in principle to exist in the form of LLC, they still are established as LLCs. One of the reasons for this is a lack of legislative regulation and the absence of tax benefits<sup>21</sup>. Therefore, the legal form of LLC is a profit-oriented organizational and legal corporate structure, which proved to be the most frequently used and, consequently, the most acceptable for the Georgian reality. Moreover, limited liability companies exist for two main reasons: *(a) this is beneficial for both the enterprise and (b) the economy*. Furthermore, partners of LLC are not liable for the company's liabilities<sup>22</sup> and directors are tasked with managing and representing such company in accordance with paragraph 1 of Article 9 of the Law of Georgia on Entrepreneurs unless otherwise provided for in the charter of the company<sup>23</sup>.

The competence and scope of liability of the director are determined by the same law and/or the articles of incorporation<sup>24</sup>. However, the managerial decision made by the director of the company in managing the entrepreneurial company may not be assessed by ignoring the particularities of the legal status of the director. Namely,

---

<sup>18</sup>see Machavariani, S., *Management of Corporate Groups in Germany and the United States and Integration of Management Principles into Georgian Private Law* (2015) Tbilisi, p.121.

<sup>19</sup>see OECD Principles of Corporate Governance, OECD, Paris, 2004, 13. [shorturl.at/asJNR](http://shorturl.at/asJNR).

<sup>20</sup>see Brodowski, D., Espinoza de Los Monteros de La Parra, M., Vogel, J. 2014 *Regulating Corporate Criminal Liability*. Cham: Springer International Publishing, 47.

<sup>21</sup> see Research into Regulation Law and Practice of Business Sector, *Article 42 of the Constitution*, 2012, 10. [shorturl.at/ioNT8](http://shorturl.at/ioNT8).

<sup>22</sup> see Paragraph 4 of Article 3 of the Law of Georgia on Entrepreneurs. [shorturl.at/egmMV](http://shorturl.at/egmMV).

<sup>23</sup> see paragraph 1 of Article 9 of the Law of Georgia on Entrepreneurs. [shorturl.at/egmMV](http://shorturl.at/egmMV).

<sup>24</sup> see paragraph 3 of Article 47 of the Law of Georgia on Entrepreneurs. [shorturl.at/egmMV](http://shorturl.at/egmMV).



directors' liability should not be perceived as if the said liability aims at nothing else but to punish directors. Determining the grounds for liability is in the interests of both the enterprise and the director, because the absence of predetermined grounds as to when and after which action the director may be held liable will cause complete chaos and uncertainty that will hamper and prevent directors from making innovative and risky decisions that may prove beneficial for the entrepreneurial company<sup>25</sup>.

The corporate law carries a principle of *piercing the corporate veil*<sup>26</sup> according to which the liability of directors and shareholders is permissible only in exceptional cases<sup>27</sup>. The said principle originates in the law of the courts of the USA<sup>28</sup>, which is mainly used in LLCs<sup>29</sup>. The principle implies direct liability when partners, despite their limited liability, may be held individually liable for harm inflicted on creditors.<sup>30</sup> In the case of a director of an entrepreneurial entity, this is possible only when he or she fails to perform fiduciary duties or commits a crime<sup>31</sup>.

The principle of piercing the corporate veil is also found in German case law. This principle, at first glance, contravenes with the principle of corporate law on limited liability of a legal entity, but according to case law, it is considered a lawful action that the court may use to avoid injustice<sup>32</sup>. On their part, managers of the company and members of the supervisory board shall conduct company affairs in good faith and with a belief that their actions are in the best interests of the company<sup>33</sup>.

---

<sup>25</sup>see Posner, R. 1975 THE RIGHTS OF CREDITORS OF AFFILIATED CORPORATIONS. The University of Chicago Law Review, 43, 501-502.

<sup>26</sup> see *Prest v Petrodel Resources Ltd* [2013] UKSC 34; *Dadourian Group International v Simms* [2006] EWHC 2973, at [686]. further: see.: Bakhutashvili, G., Protection of the rights of shareholders holding a small parcels of shares according to the legislation on joint stock companies in the book: Chanturia, L., Knipper, R., Zemler, I., Issues of Development of Corporate Law in Georgia, the German-Georgian Symposium, Tbilisi, 7-8 March 2000, *gtz*, 117.

<sup>27</sup>see Tan Cheng-Han, Jiangyu Wang, Christian Hofmann, *PIERCING THE CORPORATE VEIL: HISTORICAL, THEORETICAL AND COMPARATIVE PERSPECTIVES*, EW Barker Center for Law and Business, National University of Singapore, 2019.

<sup>28</sup> see Cases: *Consumer's Co-op v. Olsen*, Wisconsin Supreme Court, 1988 142 Wis. 2d 465, 419 NW 2d 211; *KC Roofing Center v. On Top Roofing, Inc.*, Missouri Court of Appeals, 1991, 807 SW 2d 545; *United States v. Bestfoods*, Supreme court of the United States, 1998 118 S. Ct. 1876.

<sup>29</sup>see Burduli I., authorized capital and its functions in the book: *Theoretical and practical issues of contemporary corporation law*, Publishing House Meridiani, 2009, 241

<sup>30</sup>see Pfeiffer G., Timmerbeil S., *US-American Company Law-An Overview*, 598.

<sup>31</sup> see L. Tsertsvadze calls fiduciary duties the *Duties of Care*. *Duties of Directors in Managing Company* [Comparative Legal Analysis on the Example of US, Predominantly Delaware, and Georgian Law], *Law Journal*, N1, 2013, 258.

<sup>32</sup>see *DeWitt Truck Brokers v. W., Flumming fruit company*, 540 F. 2d 681 (Cir 1976); also: *Emmerich V., Habersack M., Konzernrecht*, "Verlag CH Beck", 2005, Munich, 144-147; 419.

<sup>33</sup>see Chanturia, L., *Corporate Governance and Responsibilities of Managers in Corporate Law*, 2006, 199



According to paragraph 1 of Article 9 of the Law of Georgia on Entrepreneurs, the entrepreneurial leadership and the members of the Supervisory Board must conduct company affairs in good faith, namely, perform the duty of care like an ordinary, prudent person holding a similar position under similar circumstances, and acting in the belief that their actions are most beneficial to the company. If they do not fulfill this duty, they will be held jointly and severally liable to the company for the harm caused. These persons must prove that they have not breached their duty<sup>34</sup>.

### **Corporate Legal Responsibility of Directors**

According to the principles of corporate governance at the American Law Institute<sup>35</sup>, the director or manager has a duty to the corporation to perform the functions of a director or manager *in good faith* - thus *in a manner* that he *reasonably believes* he acts *in the best interests of the corporation* and with such diligence as is reasonably expected of *an ordinarily prudent person*<sup>36</sup> holding a similar position and under similar circumstances.

In general, opinions over the principle of good faith vary. For example, the Delaware District Court does not recognize this principle and divides the duties of management into *the duty of care*<sup>37</sup> (*Sorgfaltspflichten*) and *the duty of loyalty*<sup>38</sup> (*Treuepflicht*) and places the duty of good faith under the duty of loyalty<sup>39</sup>. Consequently, in corporate governance, the director bears these two primary corporate legal (fiduciary) duties.<sup>40</sup>

Fulfillment of the duty of loyalty would be the strive towards the achievement of common goal of the enterprise, while the breach of the duty of loyalty would be the ignorance of the actions to achieve the common goals. This also applies to shareholders. The corresponding legal norm is Article 3.8. of the Law of Georgia on Entrepreneurs, according to which, if a dominant partner in the enterprise has intentionally abused his or her dominant position to the detriment of the company, he or she shall pay the corresponding compensation to the rest of the partners. Dominant shall be considered a partner or a group of partners acting together, who has a

---

<sup>34</sup>see Ruling №as-471-450-08 of the Supreme Court of Georgia of 31 March 2009.

<sup>35</sup> see ALI Principles of Corporate Governance.

<sup>36</sup>see .: Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, 199

<sup>37</sup>see Emanuel S., Emanuel L., Corporations, Aspen Publishers Online, 2009, 25-31.

<sup>38</sup>see Carney WJ, Mergers and Acquisitions / Cases and Materials, New York, Foundation Press, 2000, 66-229.

<sup>39</sup>see Rossi F., Making Sense of the Delaware Supreme Court's Triad of Fiduciary Duties, 2005, 17.

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=755784](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=755784).

<sup>40</sup>see Jugheli G., 2010. Capital Protection in the Joint Stock Company, Tbilisi, 249.



practical opportunity to make a decisive influence on the voting results at the meetings of partners<sup>41</sup>.

A breach of duty of loyalty in most cases is referred to *self-dealing*<sup>42</sup>, to a breach of duty of disclosure of information, to abuse of powers for attaining personal gains etc.<sup>43</sup>.

Beyond the above mentioned, a number of decisions were made in the USA on the issue of loyalty induces us to conclude that in order to prove the fact of a breach of the fiduciary duty, it shall be established whether the manager was acting more in his/her interests rather than in the interests of the corporation<sup>44</sup>.

An independent form of duties of managers in corporate governance shall be a *Duty of Care or Duty of Diligence* (Sorgfaltspflicht)<sup>45</sup>. In legal science, it is generally believed that the *duty of care or diligence* lays down the standard of conduct of directors and shall be interpreted in such a manner that the director must pay proper attention to corporate affairs. The Duty of Diligence imposes the responsibility upon directors or managers before the company to perform their functions in good faith so that they reasonably believe they act in the best interests of the corporation and with such diligence<sup>46</sup> as reasonably expected from an ordinary, prudent person holding a similar position and under similar conditions<sup>47</sup>.

Noteworthy, the best interests of shareholders and corporations are impossible to be defined in a direct manner. However, we shall be able to determine in each particular

---

<sup>41</sup> see paragraph 8 of Article 3 of the Law of Georgia on Entrepreneurs. [shorturl.at/egmMV](http://shorturl.at/egmMV).

<sup>42</sup> see Corporate Governance in the United States and Germany, European Corporate Governance Institute (ecgi), Law Working Paper # 17/2003, 5; Baums T., Scott KE, Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany, European Corporate Governance Institute (ecgi), Law Working Paper # 17/2003, 4-5.

<sup>43</sup>see Balotti RF, Finkelstein JA, The Delaware Law of Corporations & Business Organizations Statutory Deskbook, New York, "Aspen Publishers", 2010, 8- 3-98; Baums T., Scott KE, Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany, European Corporate Governance Institute (ecgi), Law Working Paper # 17/2003, 5; See also: Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, pp 320-359.

<sup>44</sup>: see Cases: Lewis v. SL & E., Inc., United States Court of Appeals, second Circuit 629 F. 2d 764 (1980); In re The Walt Disney Co., Delaware Court of Chancery, 825 A. 2d 275 (2003).

<sup>45</sup> see Emanuel S., Emanuel L., Corporations, Aspen Publishers Online, 2009, 25-31.

<sup>46</sup>*Seminar*: Another duty characteristic of the USA. law is the duty to act lawfully, which is *the Duty of Obedience*, however, it is, in principle, incorporated into the Duty of Diligence.

<sup>47</sup> see Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, 319; further see: Machavariani S., Management of Corporate Groups in Germany and the United States and the Integration of Management Principles into Georgian Private Law, Tbilisi, 2015, 134.



case, and based on various facts existing on the case, which decision by the director is "most beneficial" for the company and shareholders<sup>48</sup>. Moreover, in making a decision, it is important to thoroughly study the existing facts on which the decision will be based, to undergo consultations, to listen to different opinions, to be aware of the current situation in the market, to share the information available to the director with each other, and so on.<sup>49</sup>.

In the duty of diligence of managers, some scholars include *Business Due Diligence* and *Legal Due Diligence*. The former involves the observance of the procedures of *due diligence* in making economic and financial decisions, while the latter involves the necessity for legal regulations of the decisions. Both of them make a term of *due diligence* which is used when two enterprises merge and which certifies that the enterprise is thoroughly studied in making the decision<sup>50</sup>. In piercing the corporate veil, the attention is paid to a number of aspects, such as: *improper capitalization, non-observance of the rules of corporate governance, acts of omission by directors, the lack of reporting records etc.* <sup>51</sup>.

Notwithstanding the extensive case law and important interpretations in the USA and Germany, there are no uniform precedents for the liability of managers against the company when they breach the duty of diligence, hence it is difficult to argue on the issue<sup>52</sup>. The main ground for the lack of uniformity is the principle of *business judgment rule* that is well introduced throughout the world protecting the rights of directors.

### **Principle of Business Judgment Rule**

#### **(Business Judgment Rule)**

The business judgment rule is an institute that has been created by the case law and incorporated into the corporate law of many countries throughout the world<sup>53</sup>.

---

<sup>48</sup>see Maisuradze D., Measures Corporate and Legal Safeguards when conducting Reorganization of Companies (Comparative Legal Research, Predominantly on the Example of Delaware and Georgian corporate laws), Tbilisi, 2014, 26.

<sup>49</sup> see Case Smith v. Van Gorkom , 488 A.2d 872 (Del. p. 1985).

<sup>50</sup>see Kubota D., Due diligence and commercial transaction - Advanced Corporate Business Transactions, 2009, Ontario, 28.

<sup>51</sup>see Emanuel S., Emanuel L., Corporations, Aspen Publishers Online, New York, 2009, 25-31;

further: Opinion of Friends of the Court, Public Defender of Georgia, 04/11/2019, 4. [shorturl.at/bcJMU](http://shorturl.at/bcJMU); Further see: Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10 (1st Cir. 1985).

<sup>52</sup>see Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, p. 199.

<sup>53</sup>see Gurrea-Martinez, Re-Examining the Law and Economics of the Business Judgment Rule: Notes for its Implementation in Non-US jurisdictions, Working Paper Series, 2017, 5.



The business judgment rule is the presumption that directors were informed in making business decisions, acted in good faith and reasonably believed that their actions were in the best interests of the corporation"<sup>54</sup>. The rule is considered to be a strong guarantee for the protection of decisions made by directors. Where a party appeals against the actions of directors regarding a possible breach of duty of diligence, the party at the court shall overcome the presumption of the business judgment rule which protects formal decisions made by directors<sup>55</sup>. The Delaware Court of Chancery made the same interpretation on Robinson's case stating that *directors enjoy a presumption of sound business judgment, and in making decisions, they act in good faith and the honest belief that their actions are in the best interests of the corporation*<sup>56</sup>. The court made a similar interpretation in Davis's case<sup>57</sup>. Defined as the basis for the exemption from liabilities for the breach of fiduciary duties, the principle of *the business judgment rule* is deemed to be the protection tool of directors from fiduciary liability<sup>58</sup>.

The business judgment rule has a direct impact on the standard of liabilities of directors towards the company and, therefore, on the decisions they make. Thus, the correct application of this rule by courts positively correlates with business developments<sup>59</sup>. According to the principle, a director may not be held liable for any harm resulting from a mistake that could have been made by any diligent director. The basis of liability shall be only a wrong decision made in culpable breach<sup>60</sup>. Consequently, the business judgment rule does not allow for the personal liability of directors where the damages to the company are caused though by a wrong and

---

<sup>54</sup>see Aronson v. Philip 473 A.2d 805 (Del. 1984): "It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company". See further: Maisuradze D., *The Rule of Entrepreneurial Judgment in Corporate Law (on the Example of the United States and Georgia)*, Collection of Corporate Law, Tbilisi, 2011, p. 109.

<sup>55</sup>See: Chanturia, L., *Corporate Governance and Responsibilities of Managers in Corporate Law*, 2006, p. 219.

<sup>56</sup>See: Robinson v. Pittsburgh Oil Refinery Corp., Del. Ch., 126 A. 46 (1924).

<sup>57</sup>See: Davis v. Louisville Gas Electric Co., 16 Del. Ch. 142 A. 654. (1928).

<sup>58</sup>See: *The Delaware Law of Corporations & Business Organizations Statutory Deskbook*, New York, "Aspen Publishers", 2010, 135; O'Kelley RT, Thompson B., *Corporations and other business associations / Cases and Materials*, third edition - Aspen Law & Business, New York, 1999, p. 261.

<sup>59</sup>see Zurabiani L., *The Essence, Functions and Reception of Business Judgment Rule in Georgian Corporate Law*, 2020, 23.

<sup>60</sup>see Andenas M., Wooldridge F., *European Comparative Company Law*, Cambridge University Press, Cambridge, 2009, 486- 487.



unprofitable decisions, but the decisions were not made with *gross negligence* or wrongful intentions<sup>61</sup>.

The Public Defender of Georgia in an *amicus curiae* brief, refers to the standard approach dominating legal studies that is as follows: "An entrepreneurial decision is a managerial decision related to the assumption about the future, with regard to which directors enjoy wide discretionary powers. Where in making an entrepreneurial decision, the director could reasonably have assumed that, on the basis of the relevant information and for the benefit of the enterprise, he/she took action stemming from the necessity to take a reasonable risk, the director would not be held liable for the damage caused to the company"<sup>62</sup>.

This principle of exemption from liabilities applies only to the decision of the directors; it does not apply to the decisions related to the supervision and control<sup>63</sup>. The reason for this could be the fact that so-called *business decisions* depend on certain commercial risks, and the decisions that are protected by the principle shall be made only by managers.

### **Criminal Liability of Directors**

Liabilities arising from corporate governance in the U.S. law, except for the case-law, are regulated by *the Sarbanes-Oxley Act*, while the new regulation of the same field further are laid down in *the Dodd-Frank Act*<sup>64</sup>. In Germany, the mentioned issues are mainly determined by the Stock Corporation Act<sup>65</sup>. Regardless of whether or not a person has acted negligently in the context of the fiduciary duty of care, the court may not control the contents of the director's decision. The court may not discuss what kind of decision an ordinary, prudent person would have made<sup>66</sup>. An example of the principle of non-interference is the decision by the U.S. Federal Court of Appeals in the case of *Shlensky v. Wrigley*. On the case, the court held that the court could not interfere in the management's activities unless it was clearly established that the director had been involved in fraud, misappropriation of property, or other similar acts. However, the court noted that the determination of the court did not confirm

---

<sup>61</sup>see Andenæs, M., & Wooldridge, F. (2009). *European comparative company law*. Cambridge, UK; New York: Cambridge University Press. 486- 487. See further: Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 7.

<sup>62</sup>See: Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 7. See further: Jugheli G., 2010. *Capital Protection in Joint Stock Companies*, Tbilisi, 112.

<sup>63</sup> See: Andenas M., Wooldridge F., *European Comparative Company Law*, Cambridge University Press, Cambridge, 2009, 312-314.

<sup>64</sup> see: The Sarbanes-Oxley Act (SOX), Congress of USA, 2002.

<sup>65</sup> see: Dodd-Frank Act, Congress of USA, 5/01/2010.

<sup>66</sup> see: ohnson, *The Modest Business Judgment Rule*, the Business Lawyer, Vol. 55, 2000, 636.



that the director's decision was right since the issue was beyond the jurisdiction of the court<sup>67</sup>. However, control over the corporate field is also exercised under the criminal justice, and some illegal actions committed in the entrepreneurial field are considered crimes under the legislation of Georgia. Inter alia, noteworthy shall be the article of misappropriation and embezzlement,<sup>68</sup> which is considered an offense against property and constitutes unlawful misappropriation or misuse of another's property or property right if that property or property right was in the lawful possession of the embezzler or the person who misappropriated the property. The assets of the company, which are considered to be the property of the company and, more broadly, its partners, are considered to be the lawful possession of the company directors and misappropriation or embezzlement of this property may be classified as a crime. If directors believe that they act in the interests of the corporation, they are subject to criminal liability only if the act committed by them is an offense<sup>69</sup>.

From the research findings of the corporate legal system of the United States, it may be concluded that it provides high-standard protection of the activities by the chief executive officers of business companies. This opinion is also supported by the fact that the US Department of Justice is actively working on and publishing guidelines, according to which, in addition to other circumstances, the prosecutor shall consider whether there is an adequate alternative to criminal prosecution (legal proceedings)<sup>70</sup>. Civil proceedings may be deemed as such an alternative and, consequently, as the imposition of civil liability, which is also known in the court practice of the Supreme Court of Georgia<sup>71</sup>. However, if the director has breached fiduciary duties, overstepped authority, or improperly performed his or her duties, to protect themselves from dishonest actions, the shareholders and creditors of the enterprise, through a mechanism of *piercing the corporate veil*, already have the right to claim damages directly from the director, which is a well-established practice in the national law.

---

<sup>67</sup> see: Shlensky v. Wrigley, 237 NE2d 776 (III. App. Ct. 1968); Bainbridge, The Business Judgment Rule as Abstention Doctrine, Vanderbilt Law Review, Vo. 57, 2002, 87.

<sup>68</sup> see: Article 182 of the Criminal Procedures Code of Georgia. [shorturl.at/gBFIR](http://shorturl.at/gBFIR).

<sup>69</sup> see: Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 7. Further see R v Seager and Blatch [2009] EWCA Crim 1303.

<sup>70</sup> see: US Attorney's Manual. Principles of Federal Prosecution, §9-27.220.

<sup>71</sup> see: The ruling №33-306-291-2016 of the Supreme Court of Georgia of 18 March 2016.



## NATIONAL LEGISLATION AND COURT PRACTICE

Some issues of the elements of corporate governance on the liability of managers are defined in Article 9.6 of the Law of Georgia on Entrepreneurs, according to which entrepreneurial leadership and the members of the supervisory board shall conduct company affairs in good faith; in particular, they shall care in the same manner as an ordinary, prudent person holding a similar position and under similar circumstances and act in the belief that their actions are most beneficial to the company. If they do not fulfill this duty, they will be jointly and severally liable to the company for the damage caused<sup>72</sup>.

According to the court practice of the Supreme Court of Georgia, the legal basis for the responsibility of managers is regulated by a special law. The director's culpability in relation to the damage caused to the company shall not be examined by the norms regulating the liability arising from the tort; it shall be examined by the special norms determining the responsibility of the management of the company - the Law of Georgia on Entrepreneurs<sup>73</sup>.

The case-law of the Supreme Court of Georgia is in line with international standards; in particular, in relation to one of the cases the court notes that: *"The duty of care requires the director to make decisions that will increase the profits of the company. These decisions may be both high-risk and wrong, but in view of the presumption that corporate decisions are rational if the manager exercises common sense and acts in the belief that his or her decision has been made in the best interests of the company and, in making the decision, he or she was provided with information which he or she deemed sufficient under the given circumstances, the company director is protected from personal liability for the consequences of this decision"*<sup>74</sup>. In addition, as for the criminal liability of the director, following the public defender's amicus curiae brief, *"the case-law of the Supreme Court of Georgia is familiar with cases where the director of the enterprise, in the literal sense, took home the assets of an enterprise". In this case, he was charged with civil and legal liability, which is logical because in similar cases, the optimal process to meet the requirements of creditors or shareholders is civil proceedings.*"<sup>75</sup>.

---

<sup>72</sup> see paragraph 6 of Article 9 of the Law of Georgia on Entrepreneurs. [shorturl.at/egmMV](http://shorturl.at/egmMV)

<sup>73</sup> see the Law of Georgia on Entrepreneurs. [shorturl.at/egmMV](http://shorturl.at/egmMV).

<sup>74</sup> see: The ruling №სს-1158-1104-2014 of the Supreme Court of Georgia of 6 March 2015. Also recommended: Judgment of the Supreme Court of Georgia №სს 6-687-658-2016 Ruling of November 6, 2018; Ruling №2 / 27045-18 of the Civil Cases Panel of the Tbilisi City Court of October 15, 2018.

<sup>75</sup> see The ruling №სს-306-291-2016 of the Supreme Court of Georgia of 18 March 2016.



Thus, despite the fact that the case-law of Georgia on issues with respect to legal relations in corporate governance is scarce and, mainly, the existing case law does not fully comply with the internationally established rules, the Georgian legislation, in an unsystematic form, still includes the provisions reflecting some of the principles. Further, the Supreme Court of Georgia has made important interpretations concerning several cases, and there is an established practice, which is in line with international standards, with respect to the same cases.

### COURT MONITORING FINDINGS

The HRC court monitor observes all court hearings in connection to the ongoing criminal proceedings against Nika Gvaramia<sup>76</sup>. So far, the principle of equality of arms and adversarial proceedings have been formally observed in the court proceedings. The parties have the opportunity to freely submit motions and express their opinion on the motions of the opposing party.

The monitoring of the court hearings leads to the conclusion that the specificity of the given case is known - the case concerns the imposition of criminal liability on the director of a private enterprise for concluding an unprofitable agreement and receiving less revenue. Additionally, the court hearings mainly focus on the issues related to the peculiarities of running the TV company and those of the advertising market, as well as the procedure for calculating the revenue in a private company. Furthermore, the sale and purchase agreement of 27 February 2019, between Tegeta Premium Vehicles LLC and Proesco Media LLC, following which, as the prosecution alleges, the Porsche Macan S Model car (worth of EUR 76,700) was transferred into the actual ownership of Nika Gvaramia and his family, while Proesco Media LLC, was declared to be a formal owner, is being discussed at the hearings, and witnesses are also questioned. The next day, Tegeta Premium Vehicles LLC and Proesco Media LLC signed the advertising services agreement worth of EUR 76,700, within the framework of which Rustavi 2 TV Company aired commercials, as it had been agreed, at a reduced/low price. In addition to the above mentioned, according to the Office of the Prosecutor General, on March 28, 2019, another agreement was signed between Tegeta Motors LLC and Proesco Media LLC, within the framework of which Rustavi 2 TV

---

<sup>76</sup> The court session reports of the HRC court monitor: (1) *Hearings on the merits*: 1.02.2020; 13: 14-17: 25 p.m.; (2) *hearings on the merits*: 21.02.2020; 12: 04-13: 06 p.m.; (3) *hearings on the merits*: 05.03.2020; 14: 13-17: 20 hours; (4) 09.03.2020; 14: 11-15: 45; (5) 11.03.2020; 15: 14-17: 30 p.m.



Company aired commercials, as it had been agreed, at a reduced/low price, thus causing significant damage to the TV company<sup>77</sup>. Issues related to other charges (real estate) are also being discussed at the court hearings.

The contents of the charges brought against Nika Gvaramia by the Prosecutor's Office of Georgia is based on his unprofitable entrepreneurial decision when holding office as director in the Rustavi 2 Broadcasting Company LLC. Conclusion of an unprofitable agreement for an enterprise and a failure to receive the maximum amount, following the position of the Prosecutor's Office, is an "unlawful appropriation of property and misuse of property rights" under aggravating circumstances (Article 182 of the Criminal Code)<sup>78</sup>.

*In this criminal case, the act under consideration (changing the terms of the agreement, and determining the revenue to be accrued) is considered a crime by the prosecution. Following the position of the prosecution, the said act constitutes a crime because the director could have earned more revenue to the company and failed to accrue that revenue<sup>79</sup>. It is also noteworthy that according to the prosecution, the exercise of power by the director was not a precondition for committing another crime, which raises more questions regarding the criminalization of the action in question and possible imposition of criminal liability. Also, as mentioned above, the business judgment rule prohibits the imposition of personal liability on directors, even if the loss to the company is incurred due to a wrong, unprofitable decision but not followed by *gross negligence* or malicious intent<sup>80</sup>. Additionally, according to the international standards, a court cannot interfere in management activities unless it has been clearly established that fraud, misappropriation of property, or other similar act had been committed by the director, which has not been detected in this case. However, the U.S. Federal Court of Appeals noted that the determination did not confirm that the director's decision was right as the issue is beyond its jurisdiction<sup>81</sup>. Furthermore, it should also be considered if the Office of the Prosecutor General of Georgia has given due consideration to the critical circumstances in the criminal case against the defendant and whether these aspects could have proven of decisive importance in defining the*

---

<sup>77</sup> The report of monitoring the court hearings by the HRC court monitor: *Hearings on the merits: 3/5/2020; 14:13-17:20*

<sup>78</sup> see Statement by the Office of the Prosecutor General of Georgia at: [shorturl.at/clzC4](http://shorturl.at/clzC4).

<sup>79</sup> see: Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 9.

<sup>80</sup> see: Andenæs, M., & Wooldridge, F. 2009 European comparative company law. Cambridge, UK; New York: Cambridge University Press () 486 - 487

<sup>81</sup> see: *Shlensky v. Wrigley*, 237 NE2d 776 (Ill. Appl. Ct. 1968); Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, *Vanderbilt Law Review*, Vo. 57, 2002, 87.



act in question as a criminal offense and determining possible culpability of the person.

According to the case-law of the European Court of Human Rights, different aspects shall be considered in assessing the concept of crime. The most critical is legally protected interests to which the provision determining a punishment for a particular action refers. Provisions directly targeting the company (at least potentially) indicate to the criminal nature of the action<sup>82</sup>. The main focus of this case is a private company whose business aims at making more profit. Additionally, it should be emphasized that according to the defense, the decisions by the director were discussed with and approved by the shareholders. In the US, for example, the grounds for exemption from liability may prove to be both the *shareholder approval* of the director's actions and the approval of other members of the board<sup>83</sup>.

In the *Amicus Curiae brief*, the Public Defender of Georgia indicates that to be found guilty, the director must be necessarily aware that he is committing a crime, the committed act must be criminal, and it must be motivated by the desire to gain wealth<sup>84</sup>. However, even in similar cases, given the peculiarities of corporate legal relations, in accordance with the practice established by U.S. and German courts and international standards, criminal prosecution usually is not launched if there is an optimal alternative to satisfy the creditors, which is a civil dispute<sup>85</sup>. According to the *business judgment rule*, the director is held responsible for a gross mistake that should not have made by a reasonable and ordinary, prudent person. The basis of responsibility is only a culpable decision<sup>86</sup>. Consequently, if the director of an entrepreneurial company has not committed a criminal act, which may also lead to the corresponding criminal liability, the judicial bodies shall, in similar cases, pay attention to the corporate legal significance of the disputed act. Additionally, as mentioned above, within the principle of Business judgment rule, the shareholders and creditors of the enterprise, through the mechanism of piercing the corporate veil, already have the right to the claim the damages immediately from the director, which constitutes an established practice by the determinations made by the Supreme Court of Georgia.

---

<sup>82</sup> see: ECtHR, 1/5/2005, Ziliberg v MDA, p. Number: 61821/00, § 34.

<sup>83</sup> see Chanturia, L., Corporate Governance and Responsibilities of Managers in Corporate Law, 2006, 29

<sup>84</sup> see: Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 10.

<sup>85</sup> further 10.

<sup>86</sup> see: Andenas M., Wooldridge F., European Comparative Company Law, Cambridge University Press, Cambridge, 2009, 486- 487.



## SELECTIVE JUSTICE

### **(Case-law of the European Court of Human Rights (ECtHR))**

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*hereinafter referred to as "the Convention"*) applies to both "civil rights and obligations" and "criminal charges". The safeguards enshrined in paragraph 1 of Article 6 of the Convention apply to both types of legal proceedings, while paragraph 2 of Article 6, which ensures the presumption of innocence, and the various safeguards in paragraph 3 of Article 6 are applied in criminal proceedings only. This especially refers to criminal cases in which the risk of violations of human rights is the highest. Article 7 is an effective guarantee against arbitrary criminal prosecution, the imposition of charges, and conviction<sup>87</sup>.

Under Article 6 of the Convention, domestic courts are required to substantiate their decisions. Courts are not required to respond to all possible arguments. Paragraph 1 of Article 6 of the Convention may be construed as the obligation to provide detailed responses to any argument by the parties. However, the national court has definite scope of assessment in a particular case, in selecting the arguments and accepting the corresponding evidence from the parties' statements, and the aggrieved party expects to receive a specific and clear response from the court to the submissions that are decisive for the outcome of the legal proceedings<sup>88</sup>.

This criminal case concerns Nika Gvaramia's tenure as director at Rustavi 2 Broadcasting Company LLC (*hereinafter referred to as "Rustavi 2"*), where he was appointed to the post of director in November of 2012 and director-general in September of 2014 (until 18 July 2019). During this time, Rustavi 2 was known for its critical editorial policy towards the Georgian government. Nika Gvaramia, who is currently the founder and director of *Mtavari Arkhi* and the host of its weekly political show, is known for his strong anti-government stance. Further, noteworthy is the fact that on 18 November 2019, Giorgi Rurua, a shareholder of *Mtavari Arkhi* was arrested for the offense provided for in paragraphs 3 and 4 of Article 236 of the Criminal Code of Georgia, which envisages illegal purchase, storage and carrying of firearms<sup>89</sup>. Rurua

---

<sup>87</sup> see: *Liivik v. Estonia* 12157/05, §§ 92-94, 25 June 2009, *SW v. the United Kingdom*, 22 November 1995, § 35, Series A no. 335-B, and *CR v. the United Kingdom*, 22 November 1995, § 33, Series A no. 335-C.

<sup>88</sup> see *Hiro Balani v. Spain*, 9 December 1994, §§ 27-28, Series A no. 303-B; *Grădinar v. Moldova*, no.7170 / 02, §§ 107-108, 8 April 2008; And *Gheorghe v. Romania*, no. 19215/04, §43, 15 March 2007.

<sup>89</sup> see: Paragraphs 3 and 4 of Article 236 of the Criminal Code of Georgia and paragraph 1 of Article 381.  
<https://bit.ly/2GKiXpI>.



was also charged under paragraph 1 of Article 381 of the Criminal Code, which envisages non-compliance with the court ruling or interference with the enforcement of the court ruling. Giorgi Rurua linked the initiation of the criminal prosecution to his own political position. Giorgi Rurua is one of the organizers and participants of the protest rallies of 20-21 June and November of 2019. On 30 July 2020, the judge of the criminal panel of Tbilisi City Court, Valerian Bugianishvili, rendered a judgment of conviction against Giorgi Rurua, sentencing him to four years in prison. The criminal case was considered politically motivated by Georgia's international partners<sup>90</sup>.

The HRC monitored the court hearings in connection to ongoing criminal proceedings against Giorgi Rurua and identified a number of violations, which, adversely affecting the defendant, could have negatively impacted on the final judgment of the court<sup>91</sup>.

There are a number of cases in the case-law of the European Court of Human Rights, including against Georgia, where the Court has defined convictions of different persons as inconsistent with Article 6 of the Convention for various reasons<sup>92</sup>. The case of *Tchankotadze v. Georgia*<sup>93</sup> is especially important. In this case, the applicant argued that his pre-trial detention was unlawful and the criminal proceedings against him were unjust in violation of paragraph 1 of Article 5 and paragraph 1 of Article 6 of the Convention. He also argued that the criminal proceedings against him and his pretrial detention, in violation of Article 18 of the Convention, were based on improper, covert motives. The court concluded that *"the national courts did not give due consideration to the decisive circumstances in the criminal case against the applicant. Those aspects could have had decisive implications for the determination of the applicant's guilt"*<sup>94</sup>. The ECtHR further noted that: *"The situation, prompted by the absence of sufficient reasons in the decisions of the domestic courts, is that of incomprehension for the Court as to why the applicant's acts - the collection of the fee on the basis of service agreements and the sub-legislative legal act - were described as criminal at all. [...] notably, the scope of the offence of abuse of official authority*

---

<sup>90</sup> see: the information if full: <https://bit.ly/37seotf>; further see <https://bit.ly/3hrbiKF>.

<sup>91</sup> see *Criminal Case of Giorgi Rurua: - Legal Analysis*. the HRC, 2020.

<sup>92</sup> For example: *Rostomashvili v. Georgia*, no. 13185/07, 8 November 2018; *Kartvelishvili v. Georgia*) 17716/08, 7 June 2018 and *Bregvadze v. Georgia*) 49284/09, 17 January 2019.

<sup>93</sup> see Case *Tchankotadze v. Georgia*, no. 15256/05, § 103, 21 2016.

<sup>94</sup> *Ibid*: § 103.



*was inexplicably and thus arbitrarily construed to the detriment of the applicant by the domestic courts.*<sup>95</sup>.

The case *Navalny and Ofitserov v. Russia*<sup>96</sup> is also noteworthy. Navalny is a prominent political activist, opposition leader, anti-corruption campaigner and a popular blogger in the Russian Federation. The ECtHR has ruled that there was no evidence that the intermediary company was driven by any unlawful motive. Neither the deal between Kirovles and the intermediary company was challenged, nor had the fictitious transaction made between the parties, money laundering, tax evasion, *kick-back scheme*, or the attempt to attain an illegal or suspicious goal had become subjects of debates. Both sides pursued independent commercial interests. Also, it was not determined that the parties acted in (*bad faith*), or in violation of competition rules. Moreover, the ECtHR criticized Russian courts for failing to investigate the political motives for the criminal prosecution on this case, which was disputable at least. Therefore, the criminal law was arbitrarily interpreted to the detriment of the applicants in a manner that foreseeing this was impossible, which led the proceedings to a clearly unjustified outcome.

Georgian case-law is also noteworthy. The case-law of the Supreme Court of Georgia is also familiar with cases where the director of the enterprise literally took home the property of the enterprise, but he was made liable under the civil law<sup>97</sup>. According to the Public Defender's opinion, a precedent of imposing criminal liability on the director of a private enterprise in the Georgian case-law does not exist, which calls into question the lawfulness of the charges against Nika Gvaramia.

*Article 182 of the Criminal Code of Georgia, which is the basis for the charges against Nika Gvaramia, may prove problematic in several terms under the ECHR. As the research into the case-law of the Supreme Court of Georgia, and the decisions made by the courts of different states, as well as the international standards clearly show, it has never been used against a director of a private company for making commercial decisions.*

---

<sup>95</sup> Ibid: § 108. „The situation, prompted by the absence of sufficient reasons in the decisions of the domestic courts, is that of incomprehension for the Court as to why the applicant's acts - the collection of the fee on the basis of service agreements and the sub-legislative legal act - were described as criminal at all. "+

<sup>96</sup> see Case *Navalny and Ofitserov v. Russia*, nos. 46632/13 and 28671/14, 23 February 2016.

<sup>97</sup> see Amicus Curiae Brief, Public Defender of Georgia, 04/11/2019, 9. Further see The ruling №36-306-291-2016 of the Supreme Court of Georgia of 18 May 2016.



## DURATION OF LEGAL PROCEEDINGS

It is noteworthy that, initially, the court hearings in connection to the ongoing criminal case against Nika Gvaramia were frequently held. However, eventually, the court hearing scheduled for 18 March 2020 was postponed with an indefinite period<sup>98</sup>. This fact raises questions about selective justice and alleged political motives over the case.

The right to making decisions within a reasonable time is not the right of individuals only; it also includes the obligations of public authorities to maintain a judicial system that meets the requirements of Article 6 of the Convention.

According to Paragraph 1 of Article 6 of the European Convention, the courts must make decision *within a reasonable time*". This guarantee stands, on the one hand, as a component of effective legal remedy. However, a problem with individual court guarantees may be caused, as procedural rights constantly lead to protracted legal proceedings<sup>99</sup>. Especially with regard to criminal proceedings, uncertainty around the case outcome shall be reduced as much as possible. In criminal proceedings, the corresponding period commences before the hearing on the merits of the case, in particular, from the very first stage of the criminal investigative actions<sup>100</sup>.

The Criminal Procedure Code of Georgia provides for the right of the defendant to prompt justice. However, this right may be waived to prepare the defense appropriately<sup>101</sup>. The ECtHR requires the corresponding period to start before taking formal procedural steps to avoid delays in legal proceedings (e.g., due to unavailability of witnesses or documents)<sup>102</sup>.

However, there is no standard rule for determining a reasonable time. The ECtHR considers failures to meet the reasonable time requirement the cases where the length of proceedings in one instance has exceeded three years, in two instances five years and in all three instances six years<sup>103</sup>.

---

<sup>98</sup> see The court monitoring report by the HRC court monitor: 1.03.2020; 15:14-17:30

<sup>99</sup> see ECtHR, 28/6/1978, König v GER, 6232/73, § 100.

<sup>100</sup> see ECtHR, 2/10/2003, Henning v AUT, 41444/98, § 32.

<sup>101</sup> see paragraph 2 of Article 8 of the Criminal Procedure Code of Georgia (*Fair Trial and Prompt Justice*).  
<https://bit.ly/2GHUH7G>.

<sup>102</sup> see Leigh, *The Right to a Fair Trial and the European Convention on Human Rights*, Weissbrodt / Wolfrum, (ed.), *The Right to a Fair Trial*, 1997, p. 653.

<sup>103</sup> see: Davidas Vitkauskas and Grigory Dikov, Council of Europe, "Protection of the Right to a Fair Trial under the European Convention on Human Rights", February 2012, p. 74.



## CONCLUSION

In deciding whether there are grounds that make the disputed act criminal, it is unknown if the Office of the Prosecutor General of Georgia has given due consideration to the decisive circumstances in the criminal case against the defendant. These aspects could have proven of critical importance in considering the disputed actions non-criminal and finding the defendant innocent; Further, the criminal relevance of the issue arising in the given corporate legal relationship also comes into question. In this case, the scope of the abuse of power is completely unclear - it is defined by the prosecuting authority to the defendant' detriment, and arbitrarily.

It has so far been unknown whether the prosecution has discussed the use of legal alternatives to criminal prosecution; it disregarded the fact that the director's decisions were discussed with and approved by the partners and shareholders and, in the director's opinion, for which he had reasonable grounds, after analyzing short and long-term risks, he served the best interests of the corporation, which was also agreed with the above persons concerned.

Due to the specificity of the case, the Office of the Prosecutor General of Georgia should have strictly adhered to the principles of legal certainty and protection against arbitrariness, which are considered to be a common threat to the Convention and the rule of law. The arbitrary application of criminal law is an instance that will be subject to a thorough investigation by the ECtHR, especially with regard to cases of politically active persons with opposing views, and will result in the breach of Articles 6 (*the Right to a fair trial*) and 7 (*No punishment without law*) of the European Convention<sup>104</sup>.

Given all the above mentioned, it can be said that the contents of the charges, the prosecution in time and space, the actions taken by different authorities (*including arbitrary interpretation of a criminal norm*) and other factual circumstances unequivocally point to the possible use of selective justice against a person with different political views and an activist.

---

<sup>104</sup> see Universal Declaration of Human Rights, Article 6- 7. <https://bit.ly/3iOnFjs>.