

## **In accordance with Article 21 (f) of the Organic Law of Georgia on the Public Defender of Georgia, the Public Defender informs the media about the results of the study/examination of Nika Gvaramia's judgment**

The Public Defender of Georgia has studied the judgment delivered by Tbilisi City Court on May 16, 2022, by which Nika Gvaramia, former Director General of Rustavi 2 Broadcasting Company, was found guilty of committing crimes provided for in the Article 220 of the Criminal Code (2 episodes). As a result of the examination of the verdict, the Public Defender considers that the reasoning of the court is unfounded in terms of both conviction and sentencing. The serious lack of substantiation is particularly alarming given the high public interest in the case and a number of amicus curiae briefs<sup>1</sup> that provided the court with a comprehensive comparative-legal analysis of the key principles of criminal and corporate laws.

In accordance with the mandate defined by the Organic Law of Georgia on the Public Defender of Georgia, this report addresses the legal issues of material law that clearly show the violation of the basic principles of criminal law in this case, including the principle of legality.

### **1. The so-called advertising sales episode**

According to the judgment, Nika Gvaramia, while managing the Rustavi 2 TV company in 2015, committed a damaging act against an enterprise, by changing the terms of the contract related to advertising sales, as a result of which the company failed to receive more revenue.

Clearly, not all business decisions can be subjected to the state criminal assessment. Therefore, the judge had to substantiate what had made the case under consideration different from an usual business activity and why was there a need for its criminal assessment. Otherwise, the punishment of a person for a usual business decision violates the main element of the principle of legality - the principle of foreseeability, which prohibits the conviction of a person on the basis of a vague or undefined norm.

On November 4, 2019, the Public Defender filed an amicus curiae brief relating to the mentioned episode to Tbilisi City Court. The document reviews the correlation and interrelationship between corporate-legal and criminal liabilities. The amicus curiae brief reviews the court practices and legislations of the United States, the United Kingdom, countries of continental Europe, and Georgia, according to which, the ordinary business decisions cannot be subject to even corporate-legal liability, not to mention criminal liability. The decision made by the director of a company may involve making less profit but serve the best interests of the corporation and short- or long-term risk insurance.

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<sup>1</sup> Among them, the amicus curiae brief of the Public Defender of Georgia relating to the case of Nika Gvaramia, available at: <<https://ombudsman.ge/res/docs/2019110416234655074.pdf>> [last accessed: 06.06.2022].

In order to impose even corporate-legal liability, it is necessary that the decision of the director be:

- made unilaterally without informing or reaching agreement with partners (use of dominant position);
- aimed at enriching oneself or others by committing fraud;<sup>2</sup>
- risk analysis must rule out that the decision made by the manager could reasonably serve the best interests of the corporation.

It is noteworthy that the court did not even touch upon the first two issues in the judgment, while regarding the third issue, it made only a blanket explanation that "the crisis management did not actually serve to insure against the risks of Rustavi 2, but to protect their own position [...]".<sup>3</sup> The court uses a number of similar blanket assessments, which are of a declaratory nature and do not even contain a hint as to how the court came to such conclusions. In this respect, the judgment is completely empty of reasoning and/or analyzing the corporate-legal content. For example, the court states that the purpose of concluding a contract was "to deprive the new owner of Rustavi 2 of the opportunity to terminate the contract without unjustified financial damage".<sup>4</sup> The court does not elaborate on the factual circumstances, evidence or witness testimonies that indicated the above intention of the director. The court also does not substantiate why consideration of the penalty for the unilateral and untimely termination of the contract can be an "unjustified financial loss".

In response to the issues enlisted in the amicus curiae brief, the court states that it will not assess this indictment "only in the context of corporate law",<sup>5</sup> although it does not analyze the civil or corporate-legal principles of the contract at all. For example, the court deems the contract exploitative and mentions the fact that the contract was valid for 4 years and that Rustavi 2 would be fined in case of early termination.<sup>6</sup> The court makes this assessment without any analysis - it does not substantiate why provision of such a penalty in the contract is unacceptable, why it is a problem to sign a contract for 4 years, or how it differs from other contracts on the market.

The court cites one ruling of the Constitutional Court of Georgia and two rulings of the Supreme Court, according to which, the damage caused to the enterprise by the director, in some cases, may be criminally punishable.<sup>7</sup> Clearly, this position is also shared by the Public Defender as well and that is why the amicus curiae brief contains a specific, well-established test by which it can be assessed in what case a corporate breach may become a crime. Despite the availability of the test, the court does not discuss at all when and in what cases a corporate

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<sup>2</sup> The civil meaning of fraud is implied.

<sup>3</sup> Tbilisi City Court Judgment No. 1/5624-19 of May 16, 2022 (hereinafter: the "judgment"), p.119.

<sup>4</sup> Judgment, p.117.

<sup>5</sup> Judgment, p.118.

<sup>6</sup> Judgment, p.117.

<sup>7</sup> Judgment, pp. 122-124.

breach may become a crime and simply concludes that the director "violated not only fiduciary duties but also [...] committed an unlawful and culpable act".<sup>8</sup>

Consequently, it can be said that the scarce examples provided by the court do not address the issue in question at all. The fact that in some cases a corporate-legal issue may become criminally relevant has never been controversial. The court should have assessed whether this particular case was such a case (worthy of criminal assessment) and should have used the international and domestic practices to substantiate their reasoning. Unfortunately, the three judgments cited by the court concern only the theoretical possibility of criminal punishment and not the specific circumstances that necessitate criminal action. It should be noted that in one of the cases the court provided a quotation from the descriptive part (not the reasoning part) of the judgment of the Constitutional Court.

Thus, when evaluating this episode, the court assessed the contract and the actions taken by the director in such a way that:

- it did not assess the preconditions for the lawfulness of the director's actions based on the business judgment rule;
- did not take into account the importance of the explicit consent of the company owner relating to the conclusion of the contract;
- did not consider it necessary to substantiate why the contract was exploitative or detrimental given the urgent needs of Rustavi 2;
- did not assess why the above case that regarded a corporate-legal issue required criminal punishment.

The Public Defender reiterates that the managerial decision made during the management of the enterprise cannot be evaluated without taking into account the specifics of the legal status of the director. It is unjust to punish a manager for their decision if the court fails to substantiate the existence of his personal gain, a fact of fraud, taking an unilateral decision, or any other criminal action. The court does not even enter into a discussion of whether corporate-legal duties were violated in accordance with the business judgment rule, or why and when the alleged violation of the fiduciary duty became criminally relevant.

Thus, the court mentioned the corporate-legal issues only in general, in a declaratory note, and did not enter into substantive consideration. However, it is even more alarming that the court did not substantiate at all when and in what cases the corporate-legal violation could reach the threshold of criminal punishment and why the episode under consideration was an example of this. Consequently, the verdict is completely unfounded and it also directly violates the principle of legality enshrined in Georgian legislation and Article 7 of the European Convention on Human Rights.

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<sup>8</sup> Judgment, p. 124.

## 2. The so-called car episode

### A) Conviction

The 2019 episode is similar to the previous episode both in terms of content and classification of the crime (Article 220 of the Criminal Code). The issue under consideration concerns the sale of Rustavi 2's advertising airtime for less than the market price for 3 months. According to the court, the reason for this was the personal interest of the director, Nika Gvaramia, to obtain a factual possession of a car for his wife from the advertising company in exchange for the contract.

Thus, also in regard to this indictment, the key subject of the court's assessment should have been the conclusion of a specific contract by the manager and the damage done to the company. Like the action in question (the advertising sales contract) in the previous episode, this issue should have been assessed in the context of the director's special role and its corporate-legal dimension. The judge should have assessed whether any fiduciary duty was breached at the time of signing the contract and whether it constituted a deliberate act of such an extent that might have given rise to criminal liability (according to the tests indicated in the above-mentioned *amicus curiae* brief).

Unfortunately, there is not even a reference to the fiduciary duties or corporate-legal issues regarding this episode in the judgment. The only thing the court assesses is that the contract signed by the company provided for less remuneration than the market price.<sup>9</sup> Without even entering the corporate content of the conclusion of the contract and the business judgment rule, it is unclear how the court could conclude that the contract had greatly harmed the interests of the company.

It should also be noted that, given her mandate, the Public Defender does not assess the content of the court's reasoning in terms of the establishment of factual circumstances, although there may be questions as the court in some cases does not substantiate why it relies on the testimony of a particular witness but does not share the testimony of a neutral witness. This is especially noteworthy when, for example, the issue under consideration is the particular factors that led to the conclusion of the contract, especially considering that the directors of companies, in general, often use informal contacts and flexibility of the legislative space when concluding a contract.<sup>10</sup>

For example, the court makes a blanket statement, without substantiation, that it was "obviously unreasonable"<sup>11</sup> for the contractors to take into account the financial situation of one of the parties to the contract, Proesco Media, when concluding the contract. In the corporate-legal context (for the purposes of the business judgment rule), this issue, as well as the purpose of the contract in general, would be a completely separate subject of consideration,

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<sup>9</sup> Judgment, pp. 127-128.

<sup>10</sup> *Amicus curiae* brief of the Public Defender of Georgia, p.3.

<sup>11</sup> Judgment, p.129.

without which no breach would be possible to establish, but the judge ignored this circumstance altogether.

The *post factum* assessment of a business decision made in the past is difficult even in corporate law and requires the assessment of multiple factors such as the director's experience and qualifications, access to information, complexity of the issue and need for its speedy resolution. Due to the complexity of the issue, the launch of an investigation against the director or primary evaluation of these issues by a criminal prosecutor or a judge is not recommended.<sup>12</sup> Consequently, it is astonishing that in assessing this episode, the court did not even consider the business judgment rule or the grounds for corporate-legal liability (in order to provide further basis for substantiating criminal liability).

The present case is a clear example of the fact that the assessment of such issues requires special caution from criminal specialists - the judge identified key issues without even considering the well-established corporate-legal tests. The judge held that the contract was unreasonable without considering any of the above variables other than the price of the subject of the contract.

In addition, the judge rightly pointed out that the director could have received the possession or the ownership of that particular car (or the corresponding amount of its value) by simply issuing a bonus for himself and it would not be a violation.<sup>13</sup> However, the judge did not explain why the director decided, instead of receiving the car as a bonus, to try to obtain the factual possession of this car in a criminal way by concluding multilateral contracts. It is noteworthy that the car was not ultimately obtained by Nika Gvaramia or his wife into ownership. The judge only indicates that it would be lawful to receive money/car in the form of a bonus, while conclusion of the contract would harm the interests of Rustavi 2. It is unfortunate that the judge did not explain how he had come to such a conclusion, especially since the company would have "lost" much more value if the director had received the car as a bonus.

Asignificant flaw in the judgment must also be noted which directly violates the requirements of the Criminal Code of Procedures. Article 220 of the Criminal Code of Procedures is not a crime for which a covert investigative action may be carried out, or a crime in which evidence obtained through a covert investigative action may be used to find a person guilty.<sup>14</sup> However, the judge used the materials of the covert investigative activity, which were obtained within the framework of other charges, to substantiate one of the factual circumstances.<sup>15</sup>

Finally, if in the previous episode the corporate-legal issues and the contract evaluation rule were mentioned at least at the level of declarative principles, this time the judge does not discuss the essence of fiduciary duties or the standards of assessing the lawfulness of contracts

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<sup>12</sup> Amicus curiae brief of the Public Defender of Georgia, p. 7.

<sup>13</sup> Judgment, p.130

<sup>14</sup> Second part of Article 143<sup>1</sup> of the Criminal Procedure Code.

<sup>15</sup> Judgment, p.128

at all. The judge completely disregards the basic principles of corporate law and does not explain why it is illegal to enter into a contract under certain conditions (even for a price less than the market price), does not use the business judgment rule and does not assess why a specific alleged corporate breach necessitates criminal punishment.

## **B) Sentencing**

After the defendants were found guilty, the court should have substantiated why they used the specific type and size of the sentence. Unfortunately, the verdict is completely unfounded in this episode as well. The court provided only one sentence when substantiating the type of sentence (imprisonment), and it did not explain at all why it considered the size of sentence (3.5 years in prison) appropriate or why it did not use more or less punishment, which is allowed by the disposition of Article 220 of the Criminal Code.

Determining a sentence for a convict is no less important than finding him guilty, which is why the Criminal Code lists the principles that must be met by imposing a sentence every time.<sup>16</sup> In the present case, when the judge does not even mention, not to say anything about substantiation, the compliance of the sentence with the principles of criminal justice, obviously, this obligation cannot be considered fulfilled.

In addition, the reasoning of the judge regarding the type of punishment - deprivation of liberty - is also problematic. To clarify the necessity of imprisonment, the judge indicates that (1) the imposition of a fine is inadmissible because the accused had declared that he would not pay the fine and (2) in the case of ordering house arrest, the accused would commit a new offence.<sup>17</sup> The first argument is inconsistent with the judge's reasoning - in the very same paragraph, the judge imposed a fine for committing the first episode. The second argument is also vague, as the judge does not indicate at all what gives him reason to believe that the convict will commit a new offence under house arrest. Imprisonment is even more inexplicable considering the difference between the damages caused in the first and second episodes - the court imposed a fine in the first episode, but used imprisonment for a similar action in the second episode, whereas the damage caused in the second episode was about 100 times less than in the first episode. The practice of common courts with regard to Article 220 should also be taken into account. In particular, in 2017-2021, imprisonment was not used in any of the cases where defendants were convicted under the above article.<sup>18</sup>

Thus, the judge used only one sentence when defining the type of sentence, but did not substantiate the size of sentence at all, which cannot be considered to be in compliance with the principles set out in the Criminal Code. This flaw is particularly noteworthy given that the

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<sup>16</sup> First part of Article 39 of the Criminal Code of Georgia.

<sup>17</sup> Judgment, p.138.

<sup>18</sup> Letter No. P-544-22 of the Supreme Court of Georgia of May 30, 2022.

judge devoted three full pages of the verdict to the unjustified criticism of the authors of the opinion of the friend of the court.<sup>19</sup>

For example, the court stated that the authors of amicus curiae briefs were subjective because they (other than the Public Defender) had been approached by the defence<sup>20</sup> to submit the opinion and they had obtained the case materials from the defence.<sup>21</sup> With this explanation, the court, in fact, called into question the institution of the friend of the court in general, as it considered any person other than the Public Defender to be prima facie subjective. Moreover, only parties are capable of handing over criminal case materials to a potential author of an amicus curiae brief and therefore, it turns out that the judge will always consider authors of opinions of the amicus curiae brief to be subjective in favor of either party.

We should particularly underline the judge's concern that in the amicus curiae brief he could not see the relevance of the "judgements of some courts" of the United States, Germany, the United Kingdom and Georgia to the issue under consideration.<sup>22</sup> If the judge had such questions, he was authorized to summon the author of the opinion of the friend of the court for an oral explanation – especially given that the Public Defender had expressed full readiness for the above in writing and the relevant motion was also filed by the party, which was denied by the judge.

Finally, the judge did not share the legal opinion of the audit company EY either, arguing that the authors of the opinion "did not check the authenticity of the documents, that is, they consider that any information provided is true."<sup>23</sup> Thus, the judge actually allowed for the commission of a crime by the defence and submission of forged documents to the audit firm.

In the end, the type and size of the sentence imposed by the judge is completely unjustified, which violates the requirements of the Criminal Code.

### **3. The so-called money laundering episode**

The only part of the verdict where the court reasoning contains references to international legal norms<sup>24</sup> is the so-called money laundering episode and it is noteworthy that the accused was acquitted in that very episode. The court used the case law established by the verdict in the case of Mamuka Khazaradze and others and explained the crime of money laundering based on its conventional content. In the mentioned case, the Public Defender filed an opinion of the friend of the court relating to that very conventional content – commission of a predicate offence, the need for a special scheme and purpose. The opinion reflected international practice

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<sup>19</sup> Judgment, pp. 130-132.

<sup>20</sup> Judgment, p.130.

<sup>21</sup> Judgment, p.131.

<sup>22</sup> Judgment, p.132.

<sup>23</sup> Ibid.

<sup>24</sup> Judgment, pp. 107-108.

relating to money laundering, which was later incorporated by the judge in the non-guilty verdict.<sup>25</sup>

The Public Defender welcomes the fact that the case law relating to the most serious crime of money laundering has been established in the right direction. However, concerns can be expressed about the tendency established by the Prosecutor's Office, as already two cases with political components contain the charge of money laundering, which, even according to the court, is vague<sup>26</sup> and does not contain conclusive evidence.<sup>27</sup> Charges of such gravity can cause serious reputational damage to any defendant, which is why the Prosecutor's Office should show special caution.

Clearly, in the context of the present case, it is to be welcomed that the court, when assessing this charge, took into account the specific content of the norm and the well-established international practice and case law in this respect. With this in mind, it is unfortunate that the court showed complete indifference in other episodes, which also required a specific comparative-legal analysis that was available to the court.

## **Conclusion**

The verdict against Nika Gvaramia, due to the extreme scarcity of legal reasoning, analysis and consistency, can be assessed as essentially unfounded. In the end, the court avoided answering all the important legal questions.

Despite the corporate-legal dimension of the indictment, the court only made a few statements of a declaratory nature and fully ignored the importance of well-established corporate-legal institutions, definitions and evaluation tests. In addition, in the second episode, the court did not substantiate and did not answer a question relating to the argument as to why the testimony of the company owner, according to which the company director could have received a car as a bonus, was not considered important.

The court:

- Assessed the lawfulness of the contract concluded by the manager without the business judgment rule in both episodes;
- When evaluating contracts in both episodes, attention was paid to only one, price component, without considering the needs of the company, the consideration of the financial condition of the contractor by the director of the enterprise, the consent of the owner or the specific risks faced by the company;

In both episodes, the court accepted the factual circumstances that required in-depth discussion in the corporate-legal context without any analysis, while these occasions.

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<sup>25</sup> Amicus curiae brief of the Public Defender of Georgia on the case of Mamuka Khazaradze, available at: <<https://ombudsman.ge/res/docs/2020011515423286814.pdf>> [last accessed: 06.06.2022].

<sup>26</sup> Judgment, p.110.

<sup>27</sup> Judgment, p. 111.



However, the most problematic issue in both episodes is of criminal content - the judge did not assess or discuss at all in which cases the corporate-legal action (a managerial decision) could become criminally relevant, when and under what circumstances it required a criminal action and why this case was considered to have such a dimension. In addition, when discussing factual circumstances, the judge relied on information obtained through the covert investigative action, whereas he was not entitled to the above within the framework of charges filed under Article 220 of the Criminal Code.

Finally, the judge did not substantiate either the type or the size of the measure of imprisonment and did not share the issues discussed in the amicus curiae briefs by referring to the arguments that call into question the institution of the amicus curiae brief.

**In view of all the above, as this judgment represents the gross violation of the principle of legality enshrined in the Constitution, national and international laws,** the Public Defender of Georgia, on the basis of Article 21 (h) of the Organic Law on the Public Defender of Georgia, calls upon the President of Georgia to exercise her power of pardon.