

Corporate Legal Dogmatics on the Revocation of Share Donation Due to Breach of the Duty of Loyalty

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Abstract: The article is devoted to the research of the institution of revocation of share donation and, mainly based on the interrelationship of German civil and corporate law, proposes a dogmatics intended for use in the development of a uniform Georgian judicial law on the issue.

Failure to use corporate legal specifics and legal dogmatics in the cancellation of the share donation agreement, which is the direction taken in the latest Georgian judicial practice, may lead to outcomes detrimental to corporate governance and business development. The management of any entrepreneurial entity and, especially, capital-type corporation essentially depends on how the partner will enjoy the rights derived from his share and what influence he will be able to have on making corporate decisions. Of course, it is the general legal duty of the company partner, under both private and corporate law, to exercise the rights arising from the membership in good faith, for the benefit of the common public interest, to reject any individual mercantile intentions and ensure the company's management process with a high standard of duty of loyalty. In violation of this standard, the partner may be held individually liable in case of damage to the enterprise, which is considered a kind of neutralizing deterrent against the violation of the duty of corporate loyalty.

Establishing such a uniform judicial practice of cancelling the

share donation agreement, without considering the specifics of corporate law, threatens to severely constrain the realization and implementation of the rights arising from the share itself, which is not allowed in corporate law.

Keywords: *abuse of voting rights, corporate law, duty of loyalty, exclusion from society, gross ingratitude, non-property rights, revocation of donation of share, serious misconduct towards the donor*

1. Introduction

There are various ways to obtain the legal right to participate in an entrepreneurial entity, that is through membership, from the purchase of a share to the distribution of the expelled partner's share among other partners. A share can be given up through a gift agreement, by virtue of which the donee assumes the status of a full partner in the company and becomes the bearer of the rights and obligations arising from the share. In international corporate practice, the issue of gifting a share, and its cancellation due to obvious and essential ingratitude on the part of the recipient, or rather, the revocation of the gift, rarely becomes the subject of disputes, and therefore, despite the uniform judicial practice, few decisions have been made on this matter. In the justice system of Georgia, there is an established judicial practice regarding the revocation of a gift, even though the Supreme Court has not deliberated on the annulment of the gift of shares. In 2021, the Tbilisi City Court issued a decision on the revocation of the gifted share, in which it satisfied the set claim and, without understanding the specifics of corporate law and the legal dogmas related to this issue, deprived the partner of the right to the share, placing them in a very unfavorable position (Decision of Tbilisi City Court, 2/397-21). The management of any entrepreneurial entity, especially a capital-type corporation, essentially depends on a partner's ability to exercise the rights derived from their share and influence corporate decisions. In case of violation of the obligation to conscientiously exercise the rights arising from the membership and the standard of duty of loyalty, the partner may be held individually liable in case of damage to the enterprise, which is considered as a kind of neutralizing deterrent against the violation of the duty of corporate loyalty.

In the said dispute, an LLC with a personalized partnership structure had a sole director who, according to one of the 50% shareholders, was directly related to the other 50% shareholder of the same company in a manner that led them to jointly act against the company's interests. The removal of the director was vital for the continuation of the further activities of the enterprise. The second partner of the LLC disagreed with the director's dismissal, finding no violations in the director's conduct and, therefore, was satisfied with the latter's performance. The situation resulted in a typical deadlock in the business entity, as the dismissal and subsequent appointment of a new director required at least a simple majority, which was not an attainable decision due to the lack of consensus among the partners. It is worth noting that the partner holding the remaining 50% shares of the company had acquired a certain amount of their shares as a gift. The donor (who will be tentatively called the first partner here) and the recipient were relatives. The escalating tensions and deepening disagreements over the management of the company led the donor to file a lawsuit against the recipient, demanding the cancellation of the share donation agreement and thus the return of the shares. The lawsuit, and because of its sharing, the court's decision was based on the recipient's alleged severe ingratitude towards the donor, which, according to the claim, justified the revoking of the shares. The mentioned facts are not derived from the decision, which leads to a misunderstanding of the corporate-legal use of the rights derived from the share, and, ultimately, to a misperception of the cancellation of the share donation agreement. If such a corporate practice was established and reinforced, it would severely limit the realization and implementation of the rights derived from the share itself, which is functionally inadmissible under corporate law.

2. Economic and social motivation of the gift and the expediency of excluding its revocation in exercising (corporate-legal) rights derived from the share

2.1 Obtaining membership through gifts and its specifics

In international corporate practice, share donation agreements are drawn up in writing and are characterized by minimum requisites established by cautelary practice,¹ ignoring of which may lead to the cancellation of the share donation agreement. After concluding of the gift agreement and

¹ For a definition of the (German) pattern, see Weber and Lohr, 2002, pp. 183–185.

transfer of the share to the acquirer, the latter becomes fully subject to the corporate law regulation, which even transfers the corporate rights and obligations of the partner based on the gift of the share entirely to the sphere of corporate law, as an independent legal matter, a “decree”. Therefore, care should always be taken to ensure that one field is not unjustifiably overshadowed and incorrectly overlapped by another, as this may lead to incorrect results due to misinterpretation.

Ignoring the corporate-legal dogmatic understanding and resolving the issue only by means of purely civil-legal mechanisms completely overshadows and outweighs the most important pillar on which the specifics of internal relations in any given (especially) capital entrepreneurial entity rely on, within the extent of the partner’s actions in the company. In addition, the partner is also limited by the duty of corporate legal fidelity in the enjoyment of the rights derived from the share and their use, which, in turn, represents the extent and measure of the conscientious action of the company member. The Federal Court of Justice of Germany, in one of its founding decisions, which addressed share donation revocation, explained:

In principle, corporate law principles do not stand in the way of an opposite understanding of the use of Article 530 of the BGB [Art. 529 of the Civil Code of Georgia—I. B.]. This view is not based on the institution of mandatory exclusion of a partner from an open trading company [Georgian SPS—I. B.] or from a limited partnership,² the initiation of which and the decision-making and filing of a lawsuit for expulsion should be carried out by the (remaining) partners of the company themselves. However, a distinction must be made between legal relations arising from a gift agreement and legal relations between partners in a corporation. Corporate-legal and gift-legal relations may coexist side by side.³ The corporate legal understanding of the issue may be contrary to the revocation of the gift from a consequential point of view, as obtaining the status of a partner in the entity and, thus, ownership of the share may depend on the mandatory consent of the other partners of the enterprise. This, in itself, would have excluded the transfer (return) of the gifted share to a new buyer. As a result of the cancellation of the gift, the transfer of the share back to the donor on a contractual legal basis may be connected with making an appropriate reservation in the partnership agreement. That is why this too (revocation of the gift) may be based

² The transfer and distribution can be done directly to another legal business form.

³ For the prevailing opinion with reference to judicial practice see Landsittel in Prinz and Kahle, 2020, §11, n189.

on a public contractual-legal relationship. In such a situation, such a record should be stipulated in the articles of statute of the company, and it should be further supported by other partners. The expulsion of a partner from the society has other legal prerequisites than the obligation to transfer the share, according to paragraph 531 of the BGB. This is immensely important, as the appearance of severe ingratitude should be (only) towards the donor. At the same time, the exclusion of the partner from the enterprise should pose a threat to the internal and (in some cases also external) legal relations of the enterprise itself.⁴ Upon exclusion, the ousted partner will be given appropriate compensation for the share, and failure to do so would lead to the application of the rules of unjust enrichment, which do not apply if the gift was revoked. In addition, the compensation is loaded with economic aspect and content. Cancellation of gifts does not lead to the establishment of the right to demand share compensation. (German Federal Court of Justice, BGH, II ZR 243/89)

The exercise of rights deriving from the share (independently and at the discretion of the partner) is aimed at the partner's corporate obligations to the entity and the co-partner(s). Thus, the analysis should consider the rights arising from the share, on the one hand, and on the other hand, the issue of their bona fide exercise in the context of showing loyalty to the public interest on the part of the partner (first of all). Accordingly, in cases of serious misconduct, recognized in the law of those countries, which are most similar to Georgian law,⁵ as a necessary measure of action, the partner must not abuse the right. It is this misconduct, known as *shikana*, which gives the donor green light to initiate the revocation of the gift. However, it should also be noted that not every abuse of corporate rights constitutes a legal ground for rescinding the gift; only the one which, as a result of grave misconduct, is harmful to the enterprise and, therefore, shows ingratitude towards the donor.

⁴ For a more detailed discussion, see Burduli and Chitashvili, 2020, pp. 7–27; Dalley, 1999, pp. 190, 193.

⁵ In this context, German, Austrian law. In most countries formed after the dissolution of the Soviet Union, modern private law was developed by the adoption of foreign law, by legal transplantation and transfer of the law. See Knieper, 2002, pp. 53ff.; Khamidov in Boguslavski and Knieper, 1998, pp. 86–88; Knieper, Chanturia and Schramm, 2008; see also Chochia and Popjanevski, 2016, pp. 197–208; Chochia, 2013, pp. 1–189; Kurzynsky-Singer, 2014, pp. 4ff.; Mattei, 1994, p. 14; and Bregvadze, 2006, pp. 5–37.

2.2 Gift agreement

“A gift is a contractual gratuitous donation” (Wegen & Weinreich, 2021, §516, n1). By virtue of the gift contract, one person must transfer certain property to another person free of charge and at the expense of the donor’s property (Kropholler, 2014, §516, n2), though which the property status of the recipient improves, while that of the donor always deteriorates (Wegen & Weinreich, 2013, §516, n6), that is, the material situation of the gifted person is optimized (Dendorfer-Ditges & Wilhelm in Dauner-Lieb & Langen, 2021, §516, n14), which is why he is freed from reciprocal obligations. The gratuitous nature of gifts is reflected in the benevolent attitude of the donor towards the donee; however, as the Supreme Court of Georgia explains, the motive of the gift itself does not matter from a legal point of view. Naturally, the prerequisite for determining the socioeconomic or other motive of the gift is the “positive attitude towards the recipient” (Decisions of the Supreme Court of Georgia, 402-2021 & as-325-310-201 in Dzlierishvili, 2022, Art. 524, p. 4, n7). But it should also be taken into account that, as a result of the gift contract, as a rule, the recipient is expected be grateful to the donor in the future and fulfill a certain (moral and noble) obligation towards the latter. The unconditional component of the expression of gratitude is not an essential element of the causality of the gift contract. Gratitude and respect shown towards the giver is a human natural category.⁶ It is because of this order of values that the giver usually expects that after the property is transferred through the gift agreement, the recipient will not use it against and to the detriment of the giver. The share represents a distinct category of property, and here an important point related to the share as a corporate legal category should be considered. The share determines a person’s participation in the company and completely subjects him to the principles, concepts, legal reservations, postulates of the statutes, and dogmatic conditions, established by the court. Upon entering a partnership, an individual gains the full (or limited or extended) opportunity to exercise the rights that the partnership status gives him in the enterprise. The concept of using the rights derived from the share and fulfilling the obligation (protection of the duty) and their correct perception and evaluation should not be derived from the subjective judgment of the donor, but should, first of all, be based on and, to a large extent, subject to corporate-legal approaches to the exercise of the

⁶ Corporate decency or corporate morality also characterizes a legal entity. The measure of a corporation’s action (demonstrating ingratitude) may still be different in the case of a gift to an individual and a legal entity. On the practice of the Austrian Supreme Court see, e.g., OGH 10 Ob 22/13b.

rights derived from the share. Following the proper registration of the share transferred through the gift agreement in the business register, corporate legal constraints completely and to the full extent apply to the exercise of the rights and obligations arising from the share. This should ensure the loyalty of the corporate entity's member to the corporation and obliges the partner to unswervingly protect the union created for the achievement of the common corporate goal—that is, the interest of the entrepreneurial entity is to safeguard its primacy, to protect the formal and material-substantive requirements established by the law and the entity's agreement for the exercise of the rights arising from the share. When it comes to the gift of a share, which is based on a purely civil legal agreement, its “completion,” in a way, triggers the activation of the rights and duties which, due to the specificity of the (corporate) relationship, requires a special perception and approach.

2.3 Share donation agreement in corporate practices

There may be various grounds, different (socioeconomic) prerequisites, or more precisely, motivations for donating a share of an LLC. In the context of share donation, three main strategic issues have been identified that warrant attention:

1. The first case entails a much simpler arrangement, as a person (the partner), based on share donation, is limited to purely capitalist participation in the capital entity (Burduli, 2007, pp. 10–39). The person is not involved in the management of the enterprise and, in contrast to an “entrepreneurial partner,” has only an interest in the acceptable dividend, that is, a return on the capital.⁷
2. In the second case, the share is donated to the person (the heir) in whose name the enterprise is registered, or who (the donor) was directly involved in the management processes of the company. Through this “giving up” of the share, the recipient of the share also becomes involved in the management scheme of the enterprise and typically represents the company himself (functions as a representative).
3. Through the mechanism of gifting, the share is transferred not to a family member⁸ but to a relative (even if not distantly related) or to a

⁷ Especially the donation of a share in the so-called GmbH Holding, see *Winheller*, n.d., b.

⁸ For example, in Germany, shares in an LLC are generally gifted to children or spouses or de facto common-law partners, see *Winheller*, n.d., a.

third person who is directly involved in the management processes of the enterprise in the capacity of a formal or actual head.

In the first and second cases, a gift contract often includes the establishment of a certain condition. While it is true that the gift itself is gratuitous, it is “charged” with a kind of property function depending on the share. The main idea behind such gifting of the share is that, despite the full transfer of ownership of the share from the donor, he (the donor) establishes a certain condition. The inheritor may wish to give the share to his heir so that it will remain with the latter in the future but may also wish to keep the material benefits from the share for a specific period, and despite the gift and the use of the (property) right from the share by the recipient (corporate legal right from the share), enjoy it himself. Legally, the possibility of setting various conditions can be distinguished, including: (a) on the right to use someone else’s property (usufruct); (b) on the right of withdrawal; (c) on providing advice; and (d) on life annuity.

Of these four cases, the condition (b), the right to revoke the gift, which is not a frequent case in international corporate practice, is particularly interesting to us. It is possible for the donor to imagine a different use of the gifted right by the recipient, in case of misconception. That is why, based on subjective opinion, the demand for the return of the gift is set as such a condition for the donation of the share. Naturally, it is much easier to reclaim the share on this legal basis (conditional agreement) than by cancelling the gift. In addition, both the cancellation of the gift and the demand for reclaim are usually based on the action of the recipient (ingratitude, disrespect, or any other action that is unacceptable or envisioned differently by the donor), although using the right to demand the share back does not require special economic-legal justification. Accordingly, the gift agreement provides for the realization of the right to reclaim.

As mentioned, it is possible to establish a special condition in the gift agreement, which would leave the donor the opportunity to revoke the gift and reclaim the share at the level of currency ratio (underlying debt relationships, or *Valutaverhältnisse*) (Giehl, 2022, n18). The latter is a constituent part of the gift condition and therefore relies on the concept of free determination. The condition for cancellation of gifts, formed on the basis of currency ratio, should be distinguished from the expulsion of a partner from the entity, or more precisely, the termination of the organizational agreement,⁹ that is, the loss of the legal participation right at the social,

⁹ The so-called *Hinauskündigungsklausel*, recognized in the new practice of the German

contractual and legal level, which is provided for in the company's statute and which is a constituent part of the statute. Similar provisions in the statute, which ensure the right of a partner (or partners) of an enterprise based on free independent opinion, (judgment) or decision to terminate the (co)existence of another partner in the company, represent a rather deep intrusion into the economic and personal freedom of the expelled partner. The inclusion of such statutory reservations in international corporate practice may be seen as establishing disciplinary measures and making the (related) partner dependent on the will of the other partners. As a rule, according to the German law, similar reservations in accordance with paragraph 138 of the BGB¹⁰ are void, although they could be justified by judicial law if the latter is provided for in the enterprise's contract, depending on significant grounds for the partner's exclusion from the society or if a specific objective ground provided for in the statute of similar possibility is established. Although there is a fundamental difference between a gift condition and a partnership agreement, the prohibition of abuse of corporate law also hurts the so-called currency ratio. This means that the condition established in the share donation agreement must not be misused by the donor and should be exercised within the scope of unlimited freedom. The condition for cancellation must be objectively justified, otherwise, we may arrive at it being established as invalid by Article 138 of the BGB (Giehl, 2022, n18). The contractual position of the gifted partner, his status, on the basis of freely calling for the gift, should not limit him to the extent that the latter is excluded from the possibility of expressing a free and well-considered partnership will or forming a corporate will! (Giehl, 2022, n18)

2.4 Management (non-property) rights based on the share

Both property and management (non-property) rights derive from the share of the LLC.¹¹ Specifically, every partner is guaranteed the right to participate in the general meetings of the company, although it may be limited in the context of exercising their (partner's) speech (temporary limitation) or right to vote. The right to vote may be revoked in the LLC in cases provided for by the statute or the law. In the LLC, the declarative right based on the share of each partner is the right to attend the meeting and to speak, even though the right to vote is much more important from the consequential standpoint. The share also provides the right to vote in the company, while implying

Federal Supreme Court in BGH, II ZR 173/04.

¹⁰ An analogous provision in the Civil Code of Georgia is Article 54.

¹¹ For a structural overview see Burduli *et al.*, 2022, pp. 403ff.

that the partner participates in the meetings, expresses his opinions, and asserts his own position on specific issues under discussion.

The director's report, evaluation of his performance, review of the candidate's position, the appointment and removing of individuals to and from the position are directly included in the competence of the partners. Upon becoming a partner in a company, a person is given the opportunity to exercise voting rights based on the share.¹² When exercising the right to vote, the partner acts relying on subjective criteria and judgment, however, due to the fact that he is obliged to act according to the standard of the duty of loyalty and is limited by it, he is required to show a loyal attitude towards the entity and prioritize the enterprise's interests over his personal mercantile interests, and make a decision in this way.

Violation of the duty of loyalty, which is established as one of the important duties derived from the share of the partner in corporate law, warrants a search for its dogmatic premise.

2.5 General standard of the duty of legal corporate loyalty

2.5.1 Content of the duty of loyalty

The duty of loyalty outlined in the contract of the business entity is characterized by two types of action (BGHZ 65, 15/18ff.): on the one hand, it is directed towards the mutual dependence of the shareholders of the enterprise, and, on the other hand, towards the dependence between the partners and the enterprise (Beckerhoff, 1996, p. 23; Grunewald, 2008, p. 13). In partnership-type entities (Grunewald, 2008, p. 13 and the following references), in which the organizational structure has a personal character, the duty of loyalty takes on a much more intense form than in a (large) capital entity, where the circle of shareholders may exceed several hundred partners. That is why it is said that the intensity of the duty of loyalty depends on how this enterprise itself is formed and organized (Grunewald, 2008, p. 13) and what kind of "real structure" it is based on (Schiessl in Priester, Mayer & Wicke, 2018, §32, n13).

The content of the duty of loyalty is the pursuit of the common goal of the enterprise,¹³ its demand (Raiser & Veil, 2006, p. 111), a violation of which is considered the violation of the duty of loyalty. The obligation to take non-

¹² In case any kind of restriction is not stipulated or imposed.

¹³ *Treuebot—Treupflicht—Treubindung*.

personal interests into account is especially important for the content of the duty of loyalty (Wiesner in Priester, Mayer & Wicke, 2012, §17, n19) because in the process of the proceedings, it is possible that the issue of conflict between the partner's personal interest and the public interest may be on the agenda. The duty of fidelity is the partner's "duty of action" (Schiessl in Priester, Mayer & Wicke, 2018, §32, n12). Based on this, it can be said that the measure of the duty of loyalty is what actions the partner takes (Beckerhoff, 1996, p. 23). At this point, the ratio of the interests of the shareholder and the interests of the enterprise is important (Jannott & Hagemann in Frodermann, Jannott & Henn, 2009, p. 81). Such a balance of interests and the requirement to establish its primacy for the community partner is directly related to the membership status. The partner is also required to observe the duty of loyalty because he is the bearer of the combination of powers of membership in the mentioned enterprise. That is why the duty of loyalty is considered the main duty of membership (Schiessl in Priester, Mayer & Wicke, 2018, §32, n13; Raiser & Veil, 2006, p. 108; Jannott & Hagemann in Frodermann, Jannott & Henn, 2009, p. 81).

2.5.2 Fulfilling the duty while exercising the right to vote

Compliance with the duty of loyalty is especially crucial when a partner exercises the right to vote at a general meeting. This is the part where the basic policy of the enterprise, the focus of the enterprise's activity, and the will are formed. The scope of the duty of loyalty also determines the measure of the partner's use of voting (that is, taking action on his part) at this meeting. This underscores the shareholder's obligation to show the duty of loyalty, as a rule, in relation to decisions to be made, because the shareholder's negative and unfair influence on the outcomes of voting on the decision to be accepted at the meeting may become the grounds for harming the enterprise or the co-partner. A partner's unwillingness to support the removal of the director from the position, especially when supported by evidence indicating the closure of a possible crime case by law enforcement agencies, cannot be considered a violation of the duty of loyalty and does not constitute an abuse of the right to vote in any way. In case of abuse of the voting right derived from the share and causing damage to the enterprise (and thus to the co-partner), the partner may be subject to sanctions. Otherwise, it is implied that he does not violate the duty of loyalty while exercising the right derived from the share.

3. Revocation of the gift

Revocation of gifts is an indigenous civil law institution in continental European law.¹⁴ A norm similar to Article 529 of the Civil Code is also known in German civil law,¹⁵ which regulates this institution (calling for gifts) in paragraph 530 of the *Bürgerliches Gesetzbuch* (BGB). Georgian (especially) general private law is the result of the adoption of German law (Zoidze, 2005, pp. 182ff.; Burduli, 2018, pp. 3–15; 2019, pp. 1–25; 2021, pp. 112–141; Zarandia & Chitashvili, 2019, pp. 140–156). The essential structure and the underlying rationale of the norms in the legal systems of both countries are similar, despite variations in the literal content of the norm itself. According to Section 530, paragraph 1 of the BGB, a gift may be revoked on account of the recipient showing severe ingratitude by committing a grave misconduct towards the donor or a close relative of the donor. Georgian law, as mentioned, includes identical content; however, on legislative level, it does not focus on the degree of action by which the person (the recipient) is ungrateful or disrespectful as a criterion leading to this result. When evaluating the action, the severity and nature of the misconduct (as a measure of evaluation) can lead to the instance of ingratitude itself and the revocation of the gift by the donor in court. In German explanatory literature, it is indicated that the legal prerequisite for revocation of gifts is provided by the qualification (assessment) of severity of the gross ingratitude demonstrated by the recipient to the donor or a close relative of the donor (Hoppenz in Prütting, Wegen & Weinreich, 2021, §530, n4).

“A gift is a manifestation of the relationship between law and morality. That is why the giver’s free gift of property is directly related to the recipient’s obligation to behave morally, although not reciprocating.”¹⁶ Therefore, “an objectively determinable degree of severity is required, and subjectively a clearly recognizable lack of gratitude towards the giver” (Hoppenz in Prütting, Wegen & Weinreich, 2021, §530, n4). The intensity of the relationship between the donor and the donee, as well as the kinship, is not of decisive importance, although the fact that the donee has a “special personal responsibility” towards the donor, deriving, as a rule, from a general or power of attorney,¹⁷ should not be ignored (Koch, 2019, §530,

¹⁴ For a brief historical overview see Dzlierishvili, 2022, Art. 529, n4.

¹⁵ See also Dzlierishvili, 2022, Art. 529, n11.

¹⁶ See Dzlierishvili, 2022, Art. 529, n4 with further references to Tbilisi City Court decisions.

¹⁷ This is how the German term *Betreuungsvollmacht* is established in Georgian law, see Rusiashvili, 2022, Art. 725, n3.

n7). Donation of the share, as shown above, excludes the special personal responsibility of the donee towards the donor of the share if the share does not impose any special condition or involve a so-called contract of possession or dominion of the enterprise.¹⁸ At the same time, the exclusion of the institution of property trust indicates that the rights and duties arising from the share are completely free from this “special personal responsibility,” establishing the paradigm of enjoying and independently implementing the rights arising from the share solely for the benefit of the public interest. And if the partner’s harmful action of this interest, which should be concentrated and manifest in the violation of the duty of loyalty, is not present, then such actions do not constitute serious misconduct, leading to gross ingratitude. That is why it is suggested in foreign commentary literature that a clear demarcation line between the legal constructs of grave misconduct and gross ingratitude may not even exist in many cases, as both may replace, condition, and overlap each other in terms of content (Koch, 2019, §530, n7). The appearance of ingratitude is inconceivable without the presence of a person’s operative actions; thus, the severity of misconduct must be decisive in determining ingratitude or disrespect. It is this opinion that ought to be applied to the practices of the Supreme Court of Georgia, which connects the criterion of ingratitude, in principle, to the improper actions or misconduct of a person, detailed in a list: (a) unfair action directed against the life, health, honor, dignity, freedom or business reputation of the donor, a member of his family or an ascending or descending relative; (b) intentional action aimed at causing significant property damage to the donor; (c) renunciation of the duty defined by the law—sustaining the donor (Dzlierishvili, 2022, Art. 529, n13). To this list, the court of first instance relates the annulment of the gift in the context of gross misconduct in the exercise of the right derived from the share, on account of ingratitude.¹⁹

¹⁸ For a Georgian equivalent of *Beherschungsvertrag*, see Rusiashvili, 2022, Art. 725, n3.

¹⁹ The term ‘grave offense’ (Germ. *schwere Verfehlung*) leading to gross ingratitude (*grober Undank*), as has been said, should be the measure of the result. In our case, this would be abuse of corporate legal rights or gross violation of partner’s duty depending on the year. The assessment of the situation from a purely civil legal point of view is a separate issue. This refers to the problems or actions outside the (internal) organizational relationship which, without violating the corporate rights and duties based on the share, can become the grounds for revocation of gifts (for example, causing physical damage or severe emotional trauma to the recipient, etc.). Austrian law would be cited in the context of the meaning of gross misconduct. In particular, paragraph 948 of the Austrian Civil Code, which, like the German and Georgian ones, regulates the cancellation of gifts. According to Austrian civil law, the gift contract is, in principle, irrevocable and cannot be revoked (para. 946), although in paragraph 947 of the Code, donations are allowed in three cases: (1) the giver falling into severe financial and material hardship, for example, due to financial need; (2) on account of ingratitude; and (3) reduction of mandatory material support (maintenance, alimony). Paragraph 948 does not refer to ‘serious misconduct’ like the German one, although the

When analyzing German and Austrian judicial practices,²⁰ it becomes apparent that the cancellation of the contract of donation of shares in the LLC, that is, the revocation of the share, is a rare occurrence. This is clearly confirmed by the most commonly cited examples in commentary literature, which focus on a corporate legal dispute of precedential importance.²¹ This dispute concerns the establishment of a competitive enterprise by a (gifted) limited partner in a limited partnership, potentially related to the violation of one of the most important duties arising from his share as a partner—the prohibition of competition. It is also worth noting the fact that the case concerned a cooperative type of society,²² which was an entrepreneurial society with a personal partnership and organizational structure, and by establishing a competitive company (with the same activity and located in the same city), it could be qualified as an instance of gross ingratitude towards the donor. Prohibition of competition, which falls under the subcategory of the duty of loyalty, is particularly sensitive in cooperative type enterprises,

norm is not interpreted by judicial practice to qualify as serious misconduct (see the Austrian Supreme Court decisions OGH 6 Ob 152/73; OGH 8 Ob 230/02k; and 3 OGJ Ob 46/20s). Paragraph 948 is an interesting article in its literal context, as it attempts to specify the content of gross ingratitude, which, in principle, represents a kind of legal definition of ingratitude. According to the mentioned article, ingratitude is defined as harming the body, marriage, freedom or property in such a way that administrative proceedings against the violator (damaging of property) may be initiated on the basis of the victim's statement under criminal law (derived from the Austrian 'neighboring criminal law' or *Nebenstrafgesetze*). For example, whether the issue of criminal liability against a director is contained in the Stock Corporation Act or, say, the Securities Supervision Act in regard to initiation of proceedings or prosecution. Austrian legislation sets an even stricter standard for revocation of gifts, which is confirmed by extensive case-law (see e.g., the Austrian Supreme Court Decisions OGH 3 Ob 46/20s; OGH 6 Ob 540/83; and OGH 6 Ob 152/73). Moreover, according to Austrian jurisprudence, the mere raising of a criminal question (responsibility) is not sufficient to revoke a gift. It is necessary to be aware of a (subjective) disrespectful attitude by returning gratitude and wishing to cause the donor harm. The approach has been criticized in legal literature (See Austrian US-OS 10Ob1528/94.)

²⁰ For examples from German practice see Hoppenz in Prütting, Wegen and Weinreich, 2013, §530, n8; Koch, 2019, §530, n9. For an even more detailed list, in which the BGH decision (published in the *Neue Juristische Wochenschrift* (New Legal Weekly), BGH NJW, 2002, p. 1047) is also referred to regarding non-competition (i.e., breach of the duty of loyalty), see Gehrlein in Hau and Poseck, 2022, §530, n4. In Austria, the foundational decisions of the Supreme Court are the following: OGH 3Ob590/53; OGH 3Ob64/59; OGH 5Ob85/72; OGH 6Ob152/73; OGH 10b77/74; OGH 5Ob100/75; OGH 3Ob580/81; OGH 3Ob625/81; OGH 6Ob540/83; OGH 5Ob508/86; OGH 4Ob606/88; OGH 5Ob506/93; OGH 5Ob507/93; OGH 5Ob508/93; OGH 6Ob1543/94; OGH 10Ob1528/94; OGH 5Ob539/95; OGH 8Ob230/02k; OGH 3Ob35/03y; OGH 3Ob202/09s; OGH 10Ob22/13b; OGH 4Ob201/16m; OGH 8Ob118/17m; OGH 5Ob205/21i.

²¹ BGH – X ZR 167/99 (*Zweibrücken*). Simultaneously published in the *Neue Juristische Wochenschrift* (New Legal Weekly) in 2002, see BGH NJW, 2002, pp. 1046f. The decision is known as Benteler.

²² Which is not considered an organizational entity with the status of a legal entity in German law.

due to their personal typological nature, the partnership structure, and the intensive relationship between partners. In a capitalist enterprise, this intensity usually decreases unless there is a classical personal partnership structure as well.²³ Therefore, the main consideration for the (Georgian) court to ask the question should have been, first of all, an assessment of the abuse of the corporate legal right and the violation of the duty arising from the share. Failure to take part in the removal of the director from the position does not qualify as a serious (corporation law) misconduct and, therefore, as gross ingratitude in this context. This constellation was supported by the Higher Regional Court of Hamm (Germany) in one of its decisions²⁴ which recognized that the realization of the right derived from the gifted share even against the (donor's) co-partner does not constitute as sufficient grounds for revocation of gifts. Gross ingratitude requires a subjectively reprehensible view, which is present when the recipient harbors hatred towards the partner (donor) and is imbued with an extremely hostile attitude towards him. The determination and justification of this perspective must encompass the general corporate legal framework and be based on its assessment, taking into account every internal organizational detail.²⁵ That is why the extent to which "the misconduct is factually serious enough" and the significance of the grounds for gross ingratitude falls on the adjudicating judge to decide and evaluate (Koch, 2019, §530, nn8, 2).

4. Conclusion

The decision of the Tbilisi City Court regarding the revocation of the donation of shares, as discussed in the article, is legally incorrect and unsubstantiated. One of the legal bases for the acquisition of a corporate share is through a gift agreement, which establishes the possibility for a partner in the enterprise to enjoy the rights derived from the share and provides both directions of standard corporate rights, which include both property and (co-)ownership rights. Among the latter, the most important one is the right to vote, which grants the partner the right to use it freely and independently, and at his own discretion. Although corporate regulations may impose limitations on this right within the framework of statutory freedom, this is not the case in

²³ On the importance of intensity for the qualification standard of fidelity, see Burduli, 2012, pp. 123–145.

²⁴ OLG Hamm, 29 U 313/86. Simultaneously published in *Zeitschrift für Wirtschaftsrecht*, 1989, p. 1055.

²⁵ Cf. OGH 6 Ob 540/83 and OGH 8 Ob 118/17m.

this dispute. Therefore, the main consideration is whether the partner has misused the voting rights derived from his corporate share, that is, whether or not there was face-to-face harassment towards the enterprise, which, in turn, may have resulted in harm to the partner. There is no evidence of such misconduct in this case. It is true that the partner, in exercising corporate rights, is bound by certain duties, such as the duty of loyalty, although the duty of loyalty is not violated when the partner exercises the right derived from the share at his discretion and believes that the resolution of the issue is in the interests of the company.

After the gift share is transferred as a right, it is fully subject to corporate-legal reservations, concepts, and principles. The corporate rights arising from the share give the partner unlimited authority to use them after the transfer of the share. The partner's only constraints are the prohibition of abuse of corporate law and the obligation to adhere to the standard of conduct of loyalty to society. If the plaintiff fails to present such a fact of abuse, the lawsuit will always be unfounded. This case even lacks a "preceding transfer of inheritance," which independently, on a contractual basis, justifies the invoking of a gift, which does not exist in this court case. This point is uncontested in this dispute. Accordingly, civil law annulment cannot interfere with the exercise of corporate rights if the violation of rights and obligations derived from the corporate share itself cannot be proven.

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