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PROHIBITION OF THE USURPATION OF CORPORATE OPPORTUNITIES AND ITS IMPACT ON THE LIABILITY OF COMPANY DIRECTORS

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Abstract. For effective corporate governance in modern business entities, the discharge of fiduciary duties in good faith by company directors and the carrying out of their activities in the best interests of the company are of paramount importance. The duty of loyalty obliges a director to put the interests of the company above his/her personal interests. Because, as business relationships become more complex, the threat of conflict between the objectives of the company and the personal interests of directors increases, it is necessary to have a legal mechanism aimed at preventing conflicts of interest and ensuring that the objectives of the company are given priority in using business opportunities in order to increase the potential of profit and long-term success of the company in the market. The Corporate Opportunity Doctrine established in modern corporate law serves the aforementioned purpose. The doctrine advocates the imposition of liability on company directors for the misappropriation of business (corporate) opportunities intended for the company and the violation of the fiduciary duty of loyalty.

Keywords: Corporate Opportunity Doctrine, duty of loyalty, director's fiduciary liability

I. Introduction

A management body, which is responsible for managing and directing a company and represents a company in relations with third parties, is of prime importance for the effective functioning of a company's corporate governance system. A management body may consist of one or more persons who jointly or individually manage the company in accordance with its statute.¹ A company director is bound by fiduciary relationships with

1. See the Law of Georgia on Entrepreneurs (2021), Article 41, paragraph 3.

the company and partners, which are based on special trust and loyalty². A director is obliged to conduct the company's business with the diligence of a director in good faith and to take care of the company in the belief that his/her actions are in the best economic interests of the company³. Directors owe fiduciary duties to a company. These primarily consist of the duty of care and the duty of loyalty⁴. In addition, a director owes a duty of good faith to the company, which, according to one view, is considered part of the above fiduciary duties, especially the duty of loyalty⁵, and according to another view, should be regarded as a free-standing fiduciary duty, the violation of which may occur in individual cases despite the observance of the duty of care and the duty of loyalty⁶. In any event, the obligation of good faith should be seen as an integral part of the fiduciary duties that a director owes to the company.

On the one hand, a fiduciary duty of care obliges a director to be guided in taking business decisions by the degree of care that an ordinarily prudent person in a similar position would exercise⁷. When testing for a possible violation of the duty of care, the focus is on the decision-making process (rather than the result)⁸ and the extent to which the director has taken appropriate steps to be sufficiently informed before making the decision⁹. The duty of loyalty, on the other hand, obliges company directors to put the interests of a company above all else, including their own interests, and imposes on them an obligation to use their powers in good faith to fulfil the objectives of the business entity and to maximise its profit¹⁰. By virtue of the fiduciary duty of loyalty, a director is prohibited from acting against the interests of the company and from performing actions such as, for example, competing with the company by carrying out activities in another company (without the consent of the company), entering into transactions despite the existence of a conflict of interest, and appropriating the business opportunities of the company¹¹.

The subject of this article is the prohibition of the appropriation of business (corporate)

2. *Kenneth W. Clarkson, Roger LeRoy Miller, Business Law: Text and Cases, 15th Ed. (2021), Chapter 40, 762.*
3. *See the Law of Georgia on Entrepreneurs (2021), Article 50, paragraph 1.*
4. *Roger LeRoy Miller, Business Law Today, 11th Edition (2017), Chapter 29-4c, 731.*
5. *Leo E. Strine Jr., Lawrence A. Hamermesh, R. Franklin Balotti, Jeffrey M. Gorris, Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law (2010), The Georgetown Law Journal, Vol. 98, 640, 690.*
6. *The Decision of 24 January 1983 of the Supreme Court of the State of Illinois in the case of Joseph A. Couri v. Anthony J. Couri, 95 Ill. 2d 91, 447 N.E.2d 334 (Ill. 1983).*
7. *Charles Hansen, The Duty of Care, the Business Judgment Rule, and The American Law Institute Corporate Governance Project, in: The Business Lawyer, Vol. 48, No 4, 1993, 1356.*
8. *The Decision of 21 April 1962 of the Supreme Court of Pennsylvania in the case of Leland E. Smith v. Brown-Borhek Company, 414 Pa. 325, 333, 200 A.2d 398, 401 (1964).*
9. *Charles Hansen, The Duty of Care, the Business Judgment Rule, and The American Law Institute Corporate Governance Project, in: The Business Lawyer, Vol. 48, No 4, 1993, 1358.*
10. *William T. Allen, Reinier Kraakman, Vikramaditya S. Khanna, Commentaries and Cases on the Law of Business Organization, Par. 259, Ch.7.1.*
11. *William T. Allen, Reinier Kraakman, Vikramaditya S. Khanna, Commentaries and Cases on the Law of Business Organization, Par. 259, Ch.7.1.*

opportunities of a company, which restricts the right of a director, by virtue of a duty of loyalty, to take advantage, for personal benefit or the benefit of other persons, of business opportunities related to the field of activities of the company, without the prior consent of the company¹².

II. Basic essence of the Corporate Opportunity Doctrine

The Corporate Opportunity Doctrine is a fundamental principle of modern corporate law. Its purpose is to eliminate potential conflicts of interest that may arise between the company and its director(s). By virtue of fiduciary duties, a director has a duty to act in the best interests of the company. Therefore, he/she should not use his/her position to the detriment of the company to satisfy personal interests and receive profit¹³. The Corporate Opportunity Doctrine serves the realisation of this principle, which prohibits a director, as a fiduciary of a company, from usurping the business (corporate) opportunities in which the company has a pre-emptive interest¹⁴. If a corporate opportunity in which the company has a clear interest, or if there is a reasonable expectancy of such an interest, becomes available to a director, it is unacceptable for the director to use this business opportunity for himself/herself¹⁵.

Based on the Corporate Opportunity Doctrine, a director should not abuse the trust placed in him/her for personal gain and should not usurp business (corporate) opportunities that are necessary or potentially beneficial for the company¹⁶. This doctrine should be seen as an expression of a general principle that requires a director to maintain good faith as much as possible in his/her relations with the company he/she represents¹⁷. Furthermore, the duty of loyalty obliges a director to put the interests of the company above his/her personal interests. This is the very purpose that the Corporate Opportunity Doctrine serves by limiting the scope of action for directors in taking opportunistic action to the detriment of the company¹⁸. It should be noted that the Corporate Opportunity Doctrine prohibits a director from usurping the business opportunities of the company not only for personal gain, but also for the benefit of third parties¹⁹. This approach stems from the obligation of a director, as part the fiduciary duty of loyalty, to perform the functions defined by the statute of the company and the law in the best interests of the company.

12. See the Law of Georgia on Entrepreneurs (2021), Article 54, paragraph 1.

13. *James C. Slaughter*, The Corporate Opportunity Doctrine, *Southwestern Law Journal*, 18 (1964), 96.

14. *John E. Jackson III*, Corporate Opportunity Doctrine: A Historical View with a Proposed Solution, *Missouri Law Review*, Vol. 53, Issue 2 [1988], Art. 9, 394.

15. The Decision of 11 April 1939 of Delaware Supreme Court in the case of *Charles Guth v. Loft, Inc.*, 5 A.2d 503, 23 Del. Ch. 255 (Del. 1939).

16. *John E. Jackson III*, Corporate Opportunity Doctrine: A Historical View with a Proposed Solution, *Missouri Law Review*, Vol. 53, Issue 2 [1988], Art. 9, 394.

17. *Leo E. Strine Jr., Lawrence A. Hamermesh, R. Franklin Balotti, Jeffrey M. Gorris*, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law* (2010), *The Georgetown Law Journal*, Vol. 98, 670.

18. *Holger Fleischer*, *Münchener Kommentar zum HGB*, 5. Aufl. 2022, HGB § 112, Rn. 69.

19. *Martin Henssler*, *Lutz Strohn, Gesellschaftsrecht*, 5. Aufl. 2021, GmbHG, §35 Rn. 24.

Since the main purpose of the business activities of a business entity is to make a financial profit, a director should carry out management activities in such a way as to maximise the profit of the business entity.

The Corporate Opportunity doctrine is closely linked to the concept of conflicts of interest that stems from the fiduciary duty of loyalty²⁰ and includes instances where a director's personal interests are in conflict with his/her fiduciary duties. In the context of the Corporate Opportunity Doctrine, such a conflict arises when a director attempts to take advantage of a business (corporate) opportunity that belongs to and is beneficial for the company²¹. The risk of conflict between the interests of the company and the director is particularly high with a capital-type company, which is characterised by the so-called "foreign body" concept (Fremdorganschaft) and where, unlike in partnership-type companies, management activities are largely performed by outsiders who are not partners of the company²².

The Corporate Opportunity Doctrine, derived from US case law, is based on the principle that directors are obliged, in accordance with the duty of loyalty they owe, to subordinate personal interests to the well-being of the company and put the interests of the latter above all else²³. Based on the Corporate Opportunity Doctrine, a person who owes fiduciary duties to a company is prohibited from using for personal gain business (corporate) opportunities or advantages that belong to the company²⁴. Therefore, to establish a violation of fiduciary duty by a director, it is necessary to determine whether or not the business opportunity belonged to the company and the extent to which the business opportunity was usurped by the director to the detriment of the company.

III. Certain elements of the prohibition of the usurpation of Corporate opportunities and tests for their assesment

The greatest difficulty in assessing a possible breach of the prohibition of the usurpation of business opportunities by a director lies in determining clear criteria, through which corporate opportunities can be identified, on the one hand, and, it can be established whether a particular corporate opportunity belongs to a company, on the other²⁵.

The application of the Corporate Opportunity Doctrine and the imposition of fiduciary liability on a director require the court to examine the relevant legal prerequisites. First,

20. *Holger Fleischer*, Münchener Kommentar zum GmbHG, 4. Auflage 2023, §43, Rn. 224-225.

21. *John E. Jackson III*, Corporate Opportunity Doctrine: A Historical View with a Proposed Solution, Missouri Law Review, Vol. 53, Issue 2 [1988], Art. 9, 397.

22. *Florian Drinhausen, Hans-Martin Eckstein*, Beck'sches Handbuch der AG, 3. Auflage. 2018, §1, Rn. 88.

23. Decision of 13 March 1997 of the Supreme Judicial Court of Massachusetts in the case of *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 677 N.E.2d 159 (Mass. 1997), 529.

24. Decision of 13 March 1997 of the Supreme Judicial Court of Massachusetts in the case of *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 677 N.E.2d 159 (Mass. 1997), 529.

25. *Holger Fleischer*, Die Geschäftschancenlehre im Recht der BGB-Gesellschaft, NZG 2013, 361 (363).



the existence of a corporate opportunity is necessary, otherwise there would be no breach of the prohibition of the usurpation by a director of the business opportunity of the company²⁶. If the existence of a corporate opportunity that belongs to a company is established in a case, the second step should be to check whether the director has made the corporate opportunity known to the company²⁷ and shown his/her personal interest in the corporate opportunity²⁸. If a director fails to fulfil the above obligation and usurps a corporate opportunity, there will be a violation of fiduciary duty on the part of the director²⁹. In contrast, if a director has fully made the corporate opportunity known to the company, and a competent body of the company has refused to take advantage of the business opportunity due to lack of interest, and this refusal has not been caused by a fraudulent act or incorrect information, the director is free to take advantage of the business opportunity for personal gain or the benefit of third parties³⁰. In addition to the fact that the company may formally (explicitly) refuse the business opportunity offered by a director, this refusal may also be expressed implicitly, which implies instances where the competent body of the company is aware of the corporate opportunity that is of interest to the director, although the company does not respond appropriately³¹. If a company does not express (explicitly or implicitly) its refusal, the usurpation by a director of the corporate opportunity belonging to the company will result in a violation of the fiduciary duty of loyalty and the imposition of corporate liability by a court³².

In applying the Corporate Opportunity doctrine establish a corporate opportunity, various theories have evolved over time, through which a fundamental element of the doctrine can be identified, in particular the extent to which a particular business opportunity belongs to a company. Based on these theories, three main assessment tests have been established, namely the “Interest-or-Expectancy”, “Line-of-Business” and “Fairness” tests. Hence business (corporate) opportunities can be determined by considering: (1) whether the company has an interest or expectancy in the business opportunity; (2) whether the business opportunity is within the company’s line of business; and (3) whether the business opportunity should be given to the company taking into account the fairness aspects³³.

26. *Eric Talley, Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, Yale Law Journal, Vol. 108, Issue 2, November 1998, 277, 287-288.

27. *James C. Slaughter, The Corporate Opportunity Doctrine (1964)*, Southwestern Law Journal, 18 (1), 96, 104.

28. *Eric Talley, Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, Yale Law Journal, Vol. 108, Issue 2, November 1998, 277, 288.

29. *Eric Talley, Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, Yale Law Journal, Vol. 108, Issue 2, November 1998, 277, 288.

30. *James C. Slaughter, The Corporate Opportunity Doctrine (1964)*, Southwestern Law Journal, 18 (1), 96, 104.

31. *Michael Begert, The Corporate Opportunity Doctrine and Outside Business Interests*, The University of Chicago Law Review, vol. 56, no. 2, 1989, 827, 837.

32. *Eric Talley, Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, Yale Law Journal, Vol. 108, Issue 2, November 1998, 277, 288.

33. *Michael Begert, The Corporate Opportunity Doctrine and Outside Business Interests*, The University of Chicago Law Review, vol. 56, no. 2, 1989, 827, 837-838.

In accordance with the “Interest-or-Expectancy” test, it should be established under the Corporate Opportunity Doctrine whether the company has a business interest or expectancy in the corporate opportunity³⁴. According to this test, the prohibition of the usurpation of a business opportunity of a business entity applies to those corporate opportunities, in respect of which the interest of a company already exists by virtue of a contractual right (relationships)³⁵, or in respect of which there is a reasonable expectancy that these corporate opportunities will turn into a contractual right, the basis thereof being, for example, long-term contractual relationships between the company and third parties³⁶.

According to the “Line-of-Business” test, a company has a pre-emptive interest (need) in a corporate opportunity offered to the fiduciary of the company if this opportunity is within the company’s line of business and the business opportunity has become known (has been offered) to the director by virtue of his/her official position³⁷. A corporate opportunity is within a company’s line of business when this business opportunity is closely related to the existing or potential activities of the business entity³⁸. According to this test, directors should refrain from taking advantage of a business (corporate) opportunity that is potentially beneficial to the business entity and falls within the scope of its regular activities³⁹. Proceeding from fiduciary duties, it is unacceptable for directors to use for personal interests the trust placed in them and violate the duty of loyalty⁴⁰. In addition, under the “Line-of-Business” test, it should be analysed whether the company will be able to exploit this business opportunity, especially financially⁴¹.

According to the “Fairness” test, the prohibition of the usurpation of a business opportunity depends on whether the personal use of a corporate opportunity by a director is fair in a particular situation, taking into account the interests of the business entity⁴². There are no specific rules to establish such fairness. It is therefore necessary to assess the totality of the facts and circumstances that existed at the time of the usurpation of the corporate

34. Decision of the Supreme Court of Alabama in the case of *Lagarde v. Anniston Lime & Stone Co.*, 126 Ala. 496, 28 So. 199 (1900).

35. *Eric Talley*, Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, *Yale Law Journal*, Vol. 108, Issue 2, November 1998, 277, 292.

36. *Eric Talley*, Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, *Yale Law Journal*, Vol. 108, Issue 2, November 1998, 277, 292.

37. The Decision of 11 April 1939 of Delaware Supreme Court in the case of *Charles Guth v. Loft, Inc.*, 5 A.2d 503, 23 Del. Ch. 255 (Del. 1939).

38. *John E. Jackson III*, Corporate Opportunity Doctrine: A Historical View with a Proposed Solution, *Missouri Law Review*, Vol. 53, Issue 2 [1988], Art. 9, 398.

39. *Michael Begert*, The Corporate Opportunity Doctrine and Outside Business Interests, *The University of Chicago Law Review*, vol. 56, no. 2, 1989, 827, 838.

40. The Decision of 11 April 1939 of Delaware Supreme Court in the case of *Charles Guth v. Loft, Inc.*, 5 A.2d 503, 23 Del. Ch. 255 (Del. 1939).

41. *Eric Talley*, Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, *Yale Law Journal*, Vol. 108, Issue 2, November 1998, 277, 291.

42. Decision of 8 July 1948 of the Supreme Judicial Court of Massachusetts in the case of *Durfee v. Durfee Canning, Inc.*, 323 Mass. 187, 203, 80 N.E.2d 522.



opportunity by the director⁴³. A business opportunity should be regarded as belonging to a company if its usurpation by the fiduciary does not meet the standards of what is ethical and fair in the particular situation for the business entity, which is a difficult criterion to assess⁴⁴.

IV. Prohibition of the usurpation of corporate opportunities in Georgian corporate law

The provision prohibiting the usurpation of business opportunities is an important innovation of the Law of Georgia on Entrepreneurs adopted in 2021. According to paragraph 1 of Article 54 of the current law, without the prior consent of a company, a director shall not have the right to take advantage, for personal benefit or for the benefit of other persons than the company, of business opportunities related to the field of activities of the company, which he/she became aware of while performing his/her official duties or on account of his/her position. Notably, this provision applies only to those business opportunities that may reasonably have been a subject of interest for the company⁴⁵. The same article provides that the prior consent of a company shall not be required if the general meeting or the supervisory board has already discussed such business opportunities and refused to take advantage of them⁴⁶. The prohibition of the usurpation of business opportunities limits the director's ability to exploit and pursue business prospects as long as he/she has not yet offered the business opportunities to the company, which stems from the duty of loyalty under which he/she, as a fiduciary, is obliged to put the interests of the company over personal interests⁴⁷.

Paragraph 1 of Article 9 of the Law on Entrepreneurs, which was in force until 2021, provided that without the prior consent of a meeting of partners, directors had no right to use for personal gain information related to the activities of the company that became known to them in the course of carrying out their duties or by virtue of their official capacity. This clause applied only to information and not business opportunities as defined in Article 54 of the current law, bringing the legislation of Georgia closer to the Corporate Opportunity Doctrine originating from American case law.

The current Law on Entrepreneurs also defines the legal consequences of the Corporate Opportunity Doctrine, in particular establishing that in the event of a violation of the rule prohibiting the usurpation of business opportunities, the company may require from a violator compensation for any damage (including lost profits) incurred by the company

43. *James C. Slaughter*, The Corporate Opportunity Doctrine, *Southwestern Law Journal*, 18 (1964), 98.

44. *Eric Talley*, Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine, *Yale Law Journal*, Vol. 108, Issue 2, November 1998, 277, 293.

45. See the Law of Georgia on Entrepreneurs (2021), Article Article 54, paragraph 1.

46. See the Law of Georgia on Entrepreneurs (2021), Article Article 54, paragraph 1.

47. Decision of 13 March 1997 of the Supreme Judicial Court of Massachusetts in the case of *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 677 N.E.2d 159 (Mass. 1997), 529.

as a result of such violation. Instead of compensation for the damage, a company may require from a violator that he/she transfer to the company any profit earned from the transactions conducted on behalf of the violator or a third party, or to cede the right to earn such profit⁴⁸. As for the right to a claim, it may be exercised by the management body, the supervisory board, or in the cases provided for by law, by each partner⁴⁹.

V. Conclusion

The Corporate Opportunity Doctrine is an important principle of modern corporate law and is closely related to the duty of loyalty owed by a director, as a fiduciary, to a company. The Corporate Opportunity Doctrine serves to balance the interests of directors and partners of a company and to ensure that corporate opportunities belonging to the company are not unfairly usurped and used by a director for personal gain. Since the fiduciary duty of loyalty imposes an obligation on a director to put the interests of the company over personal interests, he/she has a duty to act in good faith and transparently and disclose to the company his/her personal interest in a particular corporate opportunity before exploiting that opportunity in order not to cause damage to the company and a violation of a fiduciary duty, in particular the duty of loyalty, by the director. The requirements of loyalty, good faith, transparency and accountability, imposed as part of the prohibition of usurping business opportunities by a director, serve to protect the interests of a business entity and prevent potential conflicts of interest between the company and its director, so that the business entity should be able to maximise its profits.

The prohibition of the usurpation of the corporate opportunities of a company, known as the Corporate Opportunity Doctrine, is a fundamental principle of modern corporate law and was given its place in the new Law on Entrepreneurs as a result of fundamental legislative reform carried out in Georgia in 2021, which brought Georgian corporate law much closer to western legal systems, especially US corporate law. Although the legislative regulation of the Corporate Opportunity Doctrine in Georgian law is undoubtedly a step forward in the process of the internationalisation and Europeanisation of Georgian corporate law, in the future it will be important to establish clear criteria regarding the definition of the prohibition of the usurpation of business opportunities and its individual elements defined at the legislative level, using Georgian judicial practice, which will facilitate the application of the Corporate Opportunity Doctrine in practice, its refinement in terms of content, and a thorough understanding of the abstract legal terminology related to it.

48. See the Law of Georgia on Entrepreneurs (2021), Article Article 54, paragraph 2.

49. See the Law of Georgia on Entrepreneurs (2021), Article Article 54, paragraph 3.



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3. Decision of the Supreme Court of Illinois in the case of *Joseph A. Couri v. Anthony J. Couri*, 95 Ill. 2d 91, 447 N.E.2d 334 (Ill. 1983).
4. Decision of the Supreme Judicial Court of Massachusetts in the case of *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 677 N.E.2d 159 (Mass. 1997),
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