The Macrotheme Review

A multidisciplinary journal of global macro trends

THE BUSINESS JUDGEMENT RULE AND ITS RECEPTION IN EUROPEAN COUNTRIES

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Abstract

The Business Judgement Rule is the core doctrine of Corporate Law, because it has a major implication on the liability of corporate directors, but also influences the relationship between a company's shareholders and directors. The interpretation of this Rule, as a behavioral standard or as an abstention doctrine, can determinatively influence the judicial findings regarding the liability of directors, who acted in consideration of their fiduciary duties. In the same time, a correct interpretation of the Rule contributes to the innovation of business. This paper examines the application possibility of this typical Common Law Rule in the European legal systems. To test the hypothesis, we present the traditional American approaches of this doctrine and we identify the current procedural, but also cultural impediments of the European jurisdictions, which hinder a faithful transposition of the Business Judgement Rule in Europe. Since this Rule represents the most important consequence of the trust and powers attached to a corporate director's role, the findings establish that the Business Judgement Rule is the answer to the continuous tension between the major values of the corporate world: authority and liability.

Keywords: Business Judgement Rule, directors' liability, fiduciary duties, duty of care, Abstention Doctrine, Immunity doctrine, European Union.

1. Introduction

In the Common Law doctrine and jurisprudence, the directors of a company owe what the Delaware Supreme Court has called ”the triad of fiduciary duties": duty of care, good faith and duty of loyalty. These are almost uniformly recognized by doctrine and jurisprudence as being the standard of fiduciary duties, analyzed by shareholders and by courts in the assessment of corporate directors' conduct.[1] Although the Business Judgment Rule comes into play with respect to all three obligations, it is closely associated with duty of care. In essence, the duty of care requires directors to act with the same degree of care that an ordinary careful and prudent person would have in similar circumstances. By invoking the phrase "reasonable care (attention)", the duty of care would be violated every time a director acted recklessly.

[1] One of the first express mentions of this *triad of fiduciary duties* in the manner it is viewed by the majority doctrine and jurisprudence nowadays, is reflected in the justifications of the Case *Aronson vs. Lewis*, 473 A.2d 805, 812 (Delaware, 1984).

The present paper will first describe the three interpretations of the Business Judgement Rule. The first version appertains to the Rule as a standard of review by which the courts take an objective examination of the merits of board decisions. The second interpretation regards this rule as an Abstention Doctrine, pursuant to which courts simply refuse to analyze board decisions in certain individual cases. The distinctions between the two applications of the Rule has major consequences. Recent years have shown a third possible interpretation of this Rule, by creating an immunity in favor of challenged officers. The study also presents the elements of the Rule that have to be met for its application in each of the possible interpretations.

In line with the evolving case law in the early 2000s, the Business Judgment Rule was regarded as a standard of analysis based on the corporate governance theory and on the principle of "shareholders' primacy"[2]. At the opposite pole, "director's primacy"[3] is a model which highlights the corporate law tension between authority and liability. Courts cannot retain directors' liability without defeating the effective exercise of their powers. Therefore, the Abstention Doctrine underlines the importance of judicial reluctance to review business decisions in absence of manifest conflicts of interest.

The second part of the paper presents a comparative description of the Business Judgement Rule in various jurisdictions within the European Union, with respect to underlying regulations of duty of care and of complementary corporate legal concepts. The study will conclude with the identifications of the efficiency and the use of this common law principle within the European Union.

2. The Role of the Business Judgement Rule

The Role of the Business Judgement Rule essentially determines the aversion of legal liability of corporate management by creating a presumption that directors or officers act knowingly, in good faith and in the honest belief that the actions they undertake are in the best interests of the company. Therefore, even clear errors of judgment will not lead to personal liability proceedings of a director.[4]

Under continental private law, civil liability generally depends on the fulfilling of the conditions laid down by French derived law and taken up by many European jurisdictions, namely the existence of an injury, of an illegal act, of a causal link between the first two, but especially of fault of the person who caused the injury, either under the form of intention, recklessness or negligence. At the beginnings, directors' liability was conditioned by "management fault", i.e. by determining the undeniable existence of guilt. Beginning with the early twentieth century, with the evolution of the concept of *trust*, the issue of a director's correctness began to rise, as well as his right to prove that he is worth the trust he was granted.

[2] The „shareholders' primacy" model is typically met in Common Law countries, the aim being to maximize shareholders' value, their profits and the stock exchange. This model is characterized by verification and control of management bodies by shareholders. This hybrid concept views the board of directors as a last resort decision-making body, but their decisions are evaluated in terms of value maximization as a principle of corporate government.

[3] Bainbridge, S. M (2003), *Director Primacy: The Means and Ends of Corporate Governance*, Northwestern University Law Review and Bainbridge, S. M (2002), *Director Primacy in Corporate Takeovers: Preliminary Reflections*, Stanford Law Review 791, p. 55

[4] The Case *Aronson vs. Lewis*, *supra 2*. Doctrine and jurisprudence sought the answer on whether the Business Judgment Rule is a procedural presumption, a substantial limitation of liability or both. See Arsht, S. (1979), *The Business judgement Rule Revisited*, 8 Hofstra Law Review, which underlines the fact that completely different interpretations of the applications of the Rule are governed by disparate legal principles.

By its nature, the Business Judgment Rule is designed to achieve a compromise between the two competing values of authority and liability, which will be determined on a case-by-case basis. The first element, "authority" refers to the need to preserve the discretionary nature of directors' decisional powers, while the second element indicates the importance of being able to call to account directors for business decisions and the need to prevent and correct improper conduct of decision makers. Although separation of ownership and control raises significant concerns regarding liability, neither of the two competing values can survive as an independent institution in modern corporate law[5]. The interpretation of the Business Judgment Rule is reflected in this paper as an application of the directors' primacy theory, supported by the argument that a centralized decision-making process is an essential attribute of effective corporate governance. From a practical point of view, vesting decision-making powers to the board of directors raises serious concerns regarding liability, and this theory identifies the impending tension between authority and accountability as a core matter of corporate law. We consider that this dilemma can be solved by fair and accurate application of the Business Judgment Rule, namely that courts refrain from examining business decisions, if the precise premises for a substantive analysis are not met[6].

3. Competing apprehensions of the Business Judgement Rule

There are two traditional interpretations of the Business Judgement Rule in American corporate case law, the *Standard of Review Approach* and the *Abstention Doctrine*, each of these interpretations being analyzed by disparate authors who view it differently than the dominant majority. In addition to these, the newest approach of the Rule as an *Immunity Doctrine* is granted considerable attention in the later, post 2010 doctrine.

3.1 The Model of the Standard Assessment of Liability

According to the first intendment, the duty of care would be the ideal behavioral model of corporate managers and the Business Judgment Rule represents the examination standard of the actual conduct[7]. According to this interpretation, the main function of the Business Judgment Rule is to create a less demanding control standard than the ideal standard created by the definition of due diligence and prudence[8]. Thus, certain courts and authors consider that the Rule protects directors as long as they act in good faith, while some authors deem that its only role is to "raise the bar" from simple negligence to gross negligence, indifference or thoughtlessness.

The common base of most doctrinal opinions is that the Business Judgment Rule determines an objective, but limited examination of the quality of business decisions of the board or of a director. It is highly important not to make a confusion between the standard of due care and the standard of review, the latter is the appropriate interpretation of the Rule under this very first approach.

[5] The exercise of powers and liability cannot independently define corporate governance and the organization of a company's business, as each of these protected institutions tends to reach a distinct value, both being essential for the survival of any company. M.P. Dooley identified in *Two models of Corporate Governance*, The Business Lawyer, Vol. 47, Virginia, 1992, p. 461- 463, the importance of establishing corporate governance rules regarding the decision making process.

[6] Bainbridge, S.M. (2003), *The Business Judgement Rule as Abstention Doctrine*, Law and Economics Research Paper no. 03-18.

[7] Eisenberg, M.A. (2000), *Corporations and other business organizations; Cases and materials*, 8th edition, p. 544-549.

[8] Allen, W.T. (2002), *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 NW U. Law Review

The best known and most edifying example to illustrate this theory is *Cede & Co. vs. Technicolor Inc*[9]. In this very controversial case at the time the court was seized in 1982, the board of directors of Technicolor approved a merger of the company with a subsidiary of Forbes Group. The claim of shareholders was the breach of due diligence and prudence by the board of directors of Technicolor at the time of approving the merger.

In the appeal, the Superior Court focused on the decision-making procedure, a requirement established by a similar case, *Smith vs. Van Gorkom*[10]. The "professional diligence" or diligence of the decision making process was identified as a prerequisite for invoking the Business Judgment Rule. In other words, directors who fail to act in an informed manner and after proper deliberation, will not be entitled to rely in their defense on the effects of the Rule. The reasoning of the *Cede* case remained famous, the court highlighted that *„business and affairs of a corporation are managed by or under the direction of its board of directors [who] are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders. The business judgment rule is an extension of these basic principles.*" Moreover, the court underlined the fact that the claimant, who doubts a decision of the board of directors has the „*the burden [...] to rebut the rule's presumption, [...i.e. to show] evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty"*.

We consider that by applying this first interpretation of the Business Judgment Rule, its purpose can be easily diverted. The essence of the Rule is to protect managers whose decisions are challenged, and the trend of the application of the rule after 2000 was precisely the prevention of situations where a court raises the question: did the board of directors breach the duty of care?

3.1.1 The Business Judgement Rule is not a Rule

As derivate of the *Standard of review* approach, this interpretation asserts that the name of this institution would be erroneous and its content misunderstood. According to this view, the Business Judgement Rule cannot be regarded as a proper rule since it has no mandatory content and lacks any substantive "do's or "don'ts" for corporate directors[11]. Therefore it is clearly a standard of judicial non-review of the merits and content of a business decision corporate officials have made.

This approach is very pragmatic from two points of view. First, the advocates of this approach assert that the effects and the functions or the policy basis of the Rule should never be confused with the Rule itself. Secondly, under this conception, the Business Judgment Rule can only be understood either as a presumption in favor of corporate actions or as a safe harbor for directors. This is because these are the only two statutory meanings expressly provided by law. According to the Delaware presumption, courts verify the existence of a judgment or decision, due care and good faith, i.e. absence of conflicts of interest to apply the Rule. By contrast, the principles proposed by the American Law Institute[12] represent a safe harbor for directors, because after officers comply with the burden of establishing the presence of the rule's element, their

[9] *Cede & Co vs. Technicolor Inc*, 13, Delaware, 1987, A 2d 1182

[10] *Smith vs. Van Gorkom*, 488, A.2d 858 Delaware 1985. Even though it is less controversial than the ruling of the *Cede* case, this case is among the first situations where the court defines the application of the Business Judgement Rule as a behavioral standard for directors, therefore it is often being invoked in case law, along with *Cede.*

[11] Branson, D.M. (2002), *The Rule That Isn't a Rule - The Business Judgment Rule*, Valparaiso Univ. Law Rev. no. 36, p. 634.

[12] The principles proposed of the *American Law Institute - ALI Principles of Corporate Governance- Analysis and Recommendations,* part VII, Remedies, Cap. 1, the first issue in June 1985.These statutory models, even without being mandatory, have a great influence in the creation and application of corporate law, academia and research.

payoff is greater. The outcome for directors is far higher by this approach, because they have the chance to "sail into an impregnable harbor" and, unlike the presumptions, this harbor can never be overturned or rebutted.

3.2. The Abstention Doctrine

According to this alternative view, the presumption of good faith does not create a standard of liability, but it rather establishes a negative presumption[13] of the judicial review of due diligence and prudence. According to the latter theory, courts will refrain from analyzing the merits and the substance of directors' conduct, excepting situations when the claimant can rebut the good faith presumption instituted by the Business Judgment Rule.

A baseline case which enshrines the second interpretation of the Business Judgement Rule is *Shlensky vs. Wrigley*[14]. The claimant Shlensky brought before the court Philip Wrigley's famous refusal to install night lights on the baseball Wrigley Field in Chicago. At the time, Wrigley was chairman of the board of directors of Chicago National League Ball Club Inc., a Delaware company which owned the Chicago Cubs and operated on the sports ground. Shlensky was a minority shareholder and claimed that the team has recorded losses due to reduced number of matches played on the local field, which was caused by Wrigley's refusal to install lights and to organize evening games. He also argued that the director was not motivated by maximization of shareholders' wealth, but by his personal views, namely he considered baseball to be a day sport and that nocturnal matches would have a negative impact on the residential neighborhood where the playing field was located.

The approach in this case was one of the first successful attempts to avoid entering into the substance of the dispute. In examining the arguments of the defendant, the court displayed and defined certain "fundamental rules" by developing arguments drawn from previous cases. First, courts will not try to control the company's business tactics and methods, although it believes that a wiser policy could have been adopted, which would have resulted in more prosperous business. Second, the court noted the disparity of views on directors' business decisions and provided a representative and realistic description of equity rulings that should be applied in similar circumstances: "*The behavior of the courts in such cases should reflect their function, which is not to resolve internal political issues and business administration. Administrators are appointed to answer those questions and their judgment should be accepted as decisive, if unless proves to be tainted by fraudulent interests*".

Finally, we keep the court's observation in mind, which we fully support for all situations where fraud or conflict of interest are excluded *ab initio*: "*In a pure business corporation [...] the authority of the directors in the conduct of the business must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors*".

We consider that almost every issue which concerns the analysis of the a corporate director's conduct may be limited to the identification of the existence of circumstances that indicate fraud, illegality or conflict of interests, therefore courts should be reluctant to examine the content of business decisions taken by honest directors. This approach meets the legal and

[13] The interpretation of the Business Judgement Rule as a negative presumption is often in literature. A broad description is offered by Prof. Johnson, L. (2000) in *The Modest Business Judgement Rule*, 55 Business Law Review, p. 625, namely „ *Under a proper understanding of the Business Judgment Rule as a policy of non-review, the substantive force of the Rule always applies in a duty of care case, immunizing the quality of the business decision from judicial review whether or not care was exercised*."

[14] Case *Shlens*ky vs. Wrigley, 95 Ill. App. 2d 173, 237 N.E.2d 776 (App. Ct. 1968)

social needs of contemporary corporate law and it comports with the increased decision-making freedom that should be enjoyed by managers of successful businesses[15]. However, directors have the right to invoke the Rule only when they adopted conscious, properly informed and not irrational business decisions.

To round off, we observe that the Abstention Doctrine promotes the idea of judicial non-interventionism derived from a good faith presumption. However, literature created an under-bracket of this doctrine, which does not derive from a good faith presumption, but from the independent authority that defines a director's position. Sphere sovereignty is a rather uncommon approach of the Business Judgement Rule in the context of the Abstention doctrine that derives from the autonomy and responsibility of directors[16], similar to the sovereignty of the state or of the church.

Courts recognize the autonomy of each societal sphere, as a plurality of self-governing authorities, each being independent in her own sphere. Since no sphere of authority in any area may claim to be all-powerful or all-encompassing, the state is the ultimate legitimate sphere of authority.

The business entity has the right to set its own policy and the civil government should not interfere or violate its sovereignty. Therefore, the Business Judgment Rule is a recognition of the structural authority of the board of directors, rather than of shareholders, as being responsible for the corporate affairs management.

The corporation has the autonomy to function and make its own discretionary decisions, even if they turn out to be wrong. Making a mistake about corporate affairs is no ground for government intervention. When the corporation loses its responsibility of self-government and crosses the limits to infringe on the sphere of the state, the state has the right and duty to enforce the standards of justice and to defend individuals against the abuse of power in the same sphere.

The Business Judgment Rule is a limitation on the power of the courts to set the policy for corporations, but it is not just an arbitrary allowance of power, because it is founded on the plural structure of society. The role of the Rule is instead to protect the dynamic diversity of society.

3.3 The Immunity Doctrine

The specifics of business decisions is that they often involve interpretation. According to this last approach of the Business Judgement Rule, the titular of the immunity is encouraged to make the best possible decision without being forced to take refuge in the obvious safe options. This liberty to exercise independent judgment in risky and controversial situations allows an efficient execution of directors' fiduciary and statutory duties and eliminates both immoderate caution and avid attitudes.

The effect of the Rule is to insulate a director from civil liability for actions undertaken while acting in a capacity related to his position. The immunity doctrine confers directors the

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[15] Although it used an acerb expression, Michigan State Supreme Court clearly described the central idea of the doctrine in the famous Case *Dodge vs. Ford Motor Co.* (70 N.W, , Michigan 1919) - ”*judges are not business experts”*. This case remains important for case law and for the history of Ford Company, being mentioned even in the novel "Wheels", by Arthur Hailey, 1971.

[16] For a detailed and comprehensive explanation about the origins and areas of application of Sphere Sovereignty, see Weinberger, L.D. (2010) *The Business Judgment Rule and Sphere Sovereignty,* T. M. Cooley Law Review, Vol. 27, No. 2. This concept was originally religious, was adapted to the medieval governance and recently transposed to international and private law issues.

right to be comfortable with their business decisions and to stay safe from retaliation or condemnation by unsatisfied stakeholders or from other foredooming of their policies[17].

The directors must be granted with discretionary rights in order for their role to be carried out effectively, which implicates the protection of the individual and of the position he occupies. This theory highlights the higher importance of the position itself than of the individual who fills it. The position of the director is an essential component of a system with a social benefit and the protection granted to the recipients of immunity relies on the idea that their positions that are socially valuable.

This doctrine operates pretty similar to the "Standard of review" approach, since the effect is the same: insulation of directors from liability for business-related decisions. The functional analysis, which is to be made prior to granting immunity, is the same, but the procedural analysis focuses though on disqualifiers that can identify violations of the duty of loyalty, such as fraud, self-dealing, inappropriate information or lack of any decision. In our opinion, this is a slight alienation from the typical Business Judgement Rule that is traditionally closely associated with the duty of care and not with the duty of loyalty. We disagree with this elements of proving the existence of the immunity, preferring the classical elements, such as adequate and prior information of directors and reasonable deliberation, in order to avoid any confusion between the two independent fiduciary duties.

4. The Procedural entails of the Business Judgement Rule

We observe a light trivialization of the Rule, if we establish as its primary function the allocation of the burden of proof. Under the *Standard of liability* approach, the responsibility of the claimant will be to create a *prima facie* case, namely the very same obligation that falls on a claimant in any civil litigation. According to this understanding, the Rule is just a reiteration of the fundamental civil procedure principles, both in Common Law and in French originated legal systems, i.e. the burden of proof to establish a *prima facie* dispute belongs to the claimant[18]. If the claimant successfully creates a *prima facie case*, the „pre-trial phase"[19] converts into the actual litigation of the grounds of the submitted derivative or class action. At this moment the burden of proof shifts to the defendant director and the case grows into a proper judgement of the merits.

In our opinion, the scope and purpose of the Rule is exceeded precisely because shareholders are able to „make that substantial case" and to involve courts into elements of substance and content of trade decisions. By applying the Abstention Doctrine, as we detailed above, the pre-trial phase is limited to verifying elements of fraud, self-dealing or lack of independence and to the interpretation of due diligence and prudence in sole terms of adequacy of the decision making process. According to Nobel laureate in Economics, Kenneth Arrow, this dilemma can be defined in the statement "*the power to hold accountable is ultimately the power to decide*"[20].

[17] McMillan, L. (2014), *The Business Judgment Rule as an Immunity Doctrine*, William& Mary Business Law Review vol. 4.

[18] The term used in Common Law for a summarily entered judgment by a court, i.e., without a full trial is „*Summary judgement*". Such a judgment may be issued on the merits of an entire case, or on discrete issues in that case.

[19] Even though pre-trial conferences are a typical Common Law institution, the same duty to create a prima facie case is common among continental Europe as well. (http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_conference.html)

[20] Arrow, K.J. (1974), *The limits of Organization*, Norton, New York, p. 78.

At this moment, the well-known flaw of *retrospect review* or *hindsight bias* arises[21]. A judge will tend to favor liability for negligence, even if according to an *ex ante* vision, the probability of this event to take place was very low, and if precautions wouldn't have been efficient in terms of costs. Therefore, the risk of *ex post* review is very high, because shareholders (as plaintiffs) and judges (invested to adjudicate cases) often do not distinguish between competent management and negligence, if negative results are regarded *ex post*[22]. The circumstances of a business decision are not easily reconstructed into a courtroom years later, since business activity imperatives require rapid decisions based on incomplete evidence and information. A reasoned decision on that point may seem suspicious years later, in the context of the full understanding of all circumstances[23]. If liability is determined by negative business results, without consideration of the *ex ante* quality of the decision and of the decision making process, directors will be discouraged to bear commercial risks[24].

5. The codification of the Business Judgement Rule in Europe

Prof. Bayless Manning, a former Stanford Law School dean and leading authority on corporate law opened a conference with the statement „*Some people are fortunate since they have never heard of the Business Judgement Rule*"[25]. This assessment deflects from lack of codification of this Rule in most world jurisdictions, albeit it is one of the most disputed invocations in the corporate law doctrine.

This exclusively American legal construct that dates back to the early 19th century, was through time reshaped by Delaware courts and largely remains a product of judge-made law. The first country to transpose the statutory codification of the American Model Business Corporation Act[26] was Australia, in the year 1999.

The complexity of assessing a European business judgement model is challenged by the differences of complementary corporate law institutions. Not only board organization and structure are diverse among the EU members, but also the variety of the legal provisions governing substantive directorial duties and enforcement mechanisms make harmonization undesirable.

The dominant principle in Europe is that directors primarily owe their duties to the company and not to its shareholders. However, even universally accepted principles have exceptions, adjacent approaches or non-uniform implementations. Among the majority of Europe's civil law jurisdictions, the direct legal relationship between directors, shareholders, and other stakeholders is governed by the common tort law, i.e. civil legal obligations and liability.

5.1. The duty of care in EU member states

[21] Jolls, C. (1998), *A Behavioral Approach to Law and Economics*, Stanford Law Review no. 5, p. 1471.

[22] Guthrie, C (2001), *Inside the Judicial Mind,* 86, Cornell Law Review, a debate on the empirical evidence of the alteration of the decision making process due to influences of retrospective thinking.

[23] See also Rachlinsky, J. (1998), *A Positive Psychological Theory of Judging in Hindsight,* 65 University of Chicago Law Review, arguing that in corporate law, the Business Judgement Rule protects corporate managers and board members from liability for their negligent business decisions, partly because of the inevitability of some less successful results.

[24] The idea that retrospective evaluation of business decisions may discourage well-qualified persons to engage as members of the board is detailed by Easterbrook, F.H, Fischel, D.R. (1989), *The Corporate Contract*, Columbia Law Review no. 89, p. 99.

[25] Symposium: *Current Issues in Corporate Governance: The Business Judgment Rule In Overview*, Ohio, 1984

[26] Model Business Corporation Act (MBCA) is a model set of law prepared by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association and is followed by twenty-four states. Section 8.30 provides for the standard of conduct of corporate directors, by imposing upon them the duty to act with good faith and in a manner the director views as being in the best interest of the company.

We will only address some key features of the duty of care, since this fiduciary duty is the corner stone of the Business Judgement Rule. Even though most jurisdictions address this duty[27] as a component of the agency contract (mandate), the standard of care required and the burden of proof have widely different approaches[28].

Common features of EU Member States approaches in regulating directors' duties are mostly owed to the legal and economic problems addressed by corporate law, taking into consideration the generosity of American influences. The Dutch Civil Code for example, stipulates that directors are responsible for "a proper performance of the tasks assigned to them*"*[29]. A different perspective is embraced by the German law (93(1) AktG) that establishes behavioral obligations as elements of the duty of care: the express duty to comply with applicable laws (*Legalitätspflicht*) and the duty of care in a narrow sense (*Sorgfaltspflicht im engeren Sinne*). As in other European jurisdictions, Germany expressly provides for the monitoring duties of directors (*Überwachungspflichten*), the supervision of business affairs and of subordinate offices. The dominant German literature assumes that directors are expected to deploy the integrality of their abilities to the best advantage of the corporation. Part of the general duty of diligent management is the duty to preserve an internal order of responsibilities and to maintain interest in the company's corporate purpose[30] (par. 93 (1) sentence 2 AktG). This social purpose is not an obligation to act exclusively in the interest of shareholders, as long as the company's profitability in the long run is taken care of[31].

A similar component of the duty of care, the duty of supervision of the business as a whole can be deduced in the Romanian Companies Act. Par. 144^2 (1) and (2) as well. This norm reiterates the applicability of trustees' duties and the responsibility of senior staff for the actions of subalterns. Thus, directors will be liable "when the damage wouldn't have occurred if they had exercised the supervision imposed by the duties of their office." In the same direction, par. 225-226 of Spanish Company Law combines the general duty of care with an expressly regulated additional duty to be and remain informed.

France is a similar example, the *Code des Sociétés* only provides in par. 225-251 for „fautes comisses dans leur gestion" and the grounds on which directors can be held liable. Therefore, directors' fiduciary duties have been progressively defined by case law, absent a statutory definition of the content of applicable duties. *Faute de gestion* is seen as a delicate concept even in literature[32], due to the large variety of conducts that can generate it and that are „contrary to the corporate's interest". This idea is endorsed by most authors[33] and even comprises nonintentional faults, severe or not. *Faute de gestion* can occur in the performance of tasks, by an active behavior or by lack of action, by adventurous endeavors through fear, lack of anticipation or incompetence. The judge tends not to consider a faulty behavior "a simple error that reveals a

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[27] Besides the 26 member states that have predominantly codified duties, Cyprus provides for fiduciary duties partly in statutory law, partly in case-law, while Ireland only includes them in case-law.

[28] *Study on Directors' Duties and Liability,* prepared for the European Commission, by Carsten Gerner-Beuerle, Philipp Paech and Edmund Philipp Schuster (Department of Law, London School of Economics), London, April 2013, LSE Enterprise.

[29] Par. 2.9 Dutch Civil Code

[30] Grobecker, W, Junius, A. (2012), *Company Directors – Jurisdictional comparisons* , European Lawyer Reference series, p. 183

[31] Hüffer, K. (2010), *Großkommentar zum AktG, 4th edition,* 9th edition, Munich

[32] Chaput, Y., Lévi, A. (2008), *La direction des sociétés anonymes en Europe. Vers des pratiques harmonisées de gouvernance?*, Lexis Nexis, Litec, Paris, p. 254

[33] Basdevant, F., Carvériat A., Monod., F. (2004), *Le guide de l'administrateur de société anonyme*, Lexis Nexis Litec, Paris, p. 62.

strategic choice, that doesn't demonstrate that he manifested bad faith of that he acted contrary to the interest of the company".[34]

The liability regime of directors established by the French Company's Code has been extended by case law to situations of breach of fiduciary duties. Civil liability is provided by par. 1383 Civil Code, "One shall be liable not only by reason of one's acts, but also by reason of one's imprudence or negligence" and by the key provision of par. 1384 Civil Code, which provides that "One shall be liable not only for the damages he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody".

The interpretation trend shifted from the influences of agency law, a contractual approach, to a legal approach in the later 1940s. However, the term *mandataires sociaux* (company agents) is still used both in provisions of the *Code des Sociétés* and in case law. This shift to an "institutional approach" debuted with a Supreme Court decision of 1946[35] and recognized the distribution of power between shareholders and board of directors.

Following the provisions of L. 225-251 liability is placed on individual directors and not on the whole board, but their responsibility is joint. A famous Supreme Court decision held that "it constitutes an individual mistake for each member of the board [….] who, by his action or abstention, participates in a wrongful decision of this body. The director is liable unless it is established that he behaved as a cautious and careful director, notably by opposing such a decision". Therefore, according to recent jurisprudence, the legal presumption is in favor of shareholders and any director, whether present or not, is liable for the wrongful decision of the board as a collective organ. In order to avoid liability, the director's opposition to a particular decision should be clear and recorded in the minutes, because he bears the burden to prove[36] his diligence as opposed to the other board members.

Mismanagement is defined by French jurisprudence as taking the form of negligence, recklessness or fraudulent maneuvers. As stated before, the director's intent to harm does not have to be proved since the presumption operates against him and fault is judged *in abstracto*. It is commonly accepted that lack of monitoring or delegation of powers to sub-alternates without further supervision leads to liability[37]. Similar to the German model, French courts are very strict and by using the objective standard of director's conduct, liability can arise from failure to consult shareholders[38] or lack of effort to improve the economic situation of the company and of informing shareholders about the gravity of the situation[39]. Directors are also liable for not exercising their duty of compliance, like a director of a night club who refused to comply with copyright law[40].

The convergence of civil regulations with *lex specialis* provisions is similar to the Romanian legislature. Even if the liability regime is established by Commercial Code (France) or Companies Act (Romania), these are complemented by the comprehensive and permissive civil law provisions Irrespective of the civil or commercial nature of the mandate, it extends to all necessary acts for its execution, even if these are not expressly stated. The French legislator

[34] Cass. Com. 21.09.2004, Bull Joly.
[35] Cass. Civ., 4 juin 1946: JCP 1947, II, 3518
[36] Cass. Com. 30.03.2010 n°08-17.841, FP-P+B+R+I, n° 08-17.841, Fonds de garantie des dépôts (FGD) c/ Sté Caribéenne de conseil et d'audit
[37] Cass. Com 6.02.1962: Bull. Civ. III n°80
[38] Cass. Com. 12.03.1974: Gaz. Pal.
[39] Cass. Com. 5.06.1961: Bull. Civ. III n°254.
[40] Cass. Com. 4.07.2006 n°865

includes in par. 1848 *Code Civil*, that „dans les rapports entre associés, le gérant peut accomplir tous les actes de gestion que demande l'intérêt de la société". The Romanian formulation in par. 2016 (3) Civil Code describes that "the mandate extends also on all necessary acts for its performance, even if these acts are not expressly stipulated". The lawmaker admits therefore, that the agent is sometimes forced to take initiative and his business judgment is challenged.

Being the largest British Act of all times, comprising more than 1300 sections, the Companies Act 2006 is also the first codified statement of the general fiduciary duties of directors. Prior to this Act, the United Kingdom didn't provide even the most general statement of directors' duties, because the dominant opinion of judges was, that it would be virtually impossible to express in the words of a statute all the intricacies and nuances of the general law that used to guide the application of fiduciary duties[41]. The main rationale for their comprehensive codified statement was the improvement and standardization of case law by reflecting best practice, accessibility to law and protection for small enterprises with little access to legal advice.

The UK promotes the"enlightened shareholder approach", the prevailing interest is shareholder's maximization of wealth, by considering the relationships of the company with different stakeholder groups. The Companies Act contains seven duties, of which four are of interest to the present paper: duty to act within powers (s. 171), duty to exercise independent judgment (s. 173), duty to exercise reasonable care, skill and diligence (s.174) and duty of good faith, which includes the duty to act in the best interests of the corporation and to use powers for a proper purpose (s 181). Similar to the above mentioned French civil law principle, s. 170(3) provides for codified duties to be substituted for common law rules and to equitable principles that apply in relation to directors.

However, the novelty provision under s. 170(4) underlines that these fiduciary duties should be "interpreted and applied in the same way as the common law rules or equitable principles" on which the duties are based, and requires the court to have regard to "the corresponding common law rules and equitable principles in interpreting and applying the general duties".

The duty to act within powers includes not only the duty to act in accordance with the company's constitution, but also for „the purposes for which [the duties] are conferred". In *Bishopgate Inv. Manag. Ltd vs. Maxwell*, (1994), BCLC 814, Court of Appeal, the Court concluded that breach of the duty is determined not by negligence, but by "misapplication of the assets of the company". The same proper purpose exercised by a director in the "bona fide discretion of what they consider, and not what a court may consider in the best interest of the company" was restated by the Chancery Court in *In Re Smith and Fawcett, Ltd*. (1942).

The duty to exercise reasonable care, skill and diligence (s 174) includes an objective test, i.e. the general skill and experience that can reasonably be expected of a person carrying out those functions in that company, and a subjective test, i.e. the concrete knowledge and skill of the director. Particularly the subjective element can raise the standard in case of director's special knowledge, but this test does not allow shareholders to "expect reasonable standard of general management from the managing director. Management quality is one of the normal risks of investing"[42].

The behavioral constraints that address misconduct go back to the three approaches used in Europe for defining the required standard of care. The *objective/subjective standard*, the

[41] Rt Hon Lady Justice Arden (2007), *Companies Act 2006 (UK): A new approach to directors' duties,* Lawbook Co. 81 ALJ
[42] *Re Elgindata Ltd*, 1991, BCLC, 959

strictest of the triad, is defined with reference to the care exercised by a prudent businessman, owning the knowledge and expertise that can reasonably be expected of a person in a comparable situation[43]. The intermediate approach, the *objective standard* applies to a prudent businessman as well, but unlike the first approach, it does not expressly provide for increased expectations in relation to his individual skills. Finally, *the reduced standard*, although based on an objective definition of care and diligence, provides looser exceptions in cases such as lack of average knowledge or experience. All but four EU jurisdictions provide either for the objective/subjective or for the objective standard[44].

In our opinion, the duty of care can work as an effective deterrent of misconduct only in association with a codified Business Judgement Rule with clear determination of the required standard of care and with a clear allocation of the burden of proof. The majority of EU Member States, i.e. 18 of 28, use the objective standard with reference to a prudent businessman and with few exceptions, the standard is expressly regulated in the applicable national laws.

As suggested by the American inspiration model, the burden of proof belongs to the defendant director in more than half of EU jurisdictions[45]. We strongly advocate for the traditional burden of proof allocation, namely the claimant should demonstrate the violation of the fiduciary duties by the director, the latter being protected by the effects of the Business Judgement Rule. Only in situations when claimants are able to identify elements suggesting a personal or financial interest promoted by the director in a certain transaction, the burden should shift to the defendant. There is however a considerate number of EU states that place the burden of proof on the claiming shareholders[46].

As a last remark of the duty of care, virtually all jurisdictions hold, either in the statute, in case law, or in literature, that delegation of tasks does not lead to an exculpation of the delegating director.

5.2. The Business Judgement Rule in the European Union

The European interpretation of the Rule imposes the fulfillment of the traditional threshold requirements of Delaware law. However, as to 2014, only six Member States adopted a codified Business Judgment Rule, namely Germany, Portugal, Romania, Croatia, Greece and the Czech Republic. After the German model, which was the first European country to adopt this Rule in 2005, the other jurisdictions were positively influenced by European counseling either before their EU accession or during reproaching their member state status. Geographical, historical or political criteria could not be identified to explain why only certain countries opted for the codification of the Rule.

In the year 2014, and to our knowledge, during 2015 as well, half of the 28 member states[47] acknowledge in academia or in case law the existence and application of the Business Judgement Rule, even in the absence of an express regulation. However, there are still more countries that *do not* regulate or imply this protective institution than countries that expressly

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[43] *Supra* 28, p. 12

[44] The four outliers are Cyprus, Greece, Ireland, and Luxembourg.

[45] As shown in the *Study on Directors' Duties and Liability, supra, 28*, p. 104 ff. Austria, Croatia, Czech Republic, Estonia, Germany, Greece, Hungary, Italy, Latvia, Poland, Portugal, Romania and Slovenia.

[46] Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Ireland, Lithuania, Luxemburg, Malta, The Netherlands, Slovakia, Spain, Sweden and the UK.

[47] These countries are Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, Hungary, Italy, Lithuania, Luxemburg, Spain, Sweden, Slovenia and the United Kingdom.

provide this legal protection in their laws. Among these latter countries are Estonia, Ireland, Latvia, Poland, Malta and Slovakia.

The natural question is: How do courts assess directors' behavior in cases of breach of duty of care absent an expressly regulated Business Judgement Rule? Since the duty of care enjoys explicit formulation in most jurisdictions, judges often base their decisions on doctrinal interpretations of the duty and on behavioral expectations of directors. We view the usefulness of a concrete national regulation of the duty of care mainly as a requirement to promote efficient and innovative risk taking in European companies, under the controlled umbrella of a standard of review.

5.2.1. Common and diverse aspects of the codified Business Judgement Rule in the EU

In most jurisdictions, there is strong evidence that courts review business decisions taken under conditions of uncertainty by taking into account that the decision-maker has to rely *ex ante* on expectations and probabilities, and that a full *ex post* review may suffer from *hindsight bias*[48].

The German version of the Business Judgment Rule is a faithful translation of the language used by the American Law Institute in its Corporate Governance Principles. The same faithful transposition of the traditional elements of the Rule were adopted by Lichtenstein[49]. However, the German model deviates from the classical theory and imposes the burden of proof on the director whose corporate decision is challenged (Par. 93.2. Aktiengesetz).

In one of the most controversial decisions, the German Supreme Court[50] reasoned in respect to a director's liability that "*he should have explored all available sources of information",* even though the language of the statute clearly only calls for adequate information. According to German case law, business activities have to be based on careful investigation, if the director intends to use the "liability privilege" of the Business Judgement Rule[51].

In another ruling, a German court regarded the Rule in a similar manner[52], "a safe harbor […] that hinders the paralysis of the entrepreneurship of the director, which would be disadvantageous not only for the Company and its shareholders, but also for the economy as a whole".

The modernity of the German corporate law is brought by the preamble to Section 93(1) Aktiengesetz, expressly stating that entrepreneurial decisions are often based on experience and intuition with regard to future developments, as well as a sense for the market and the reactions of customers and competitors.

The common authority in Germany to enforce claims against members of the executive board lies with the supervisory board. However, since the year 2005, in case of doubts about the diligence of the supervisory board, shareholders have the right to appoint this particular procedural responsibility to a special representative[53].

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[48] See *supra*, Section 4 : The practical importance of the Business Judgement Rule

[49] Kunz. P.V. (2014), *Business Judgment Rule – Fluch oder Segen*?, Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht no 3/2014, Bern.

[50] BGH, Urteil II ZR 202/07 of 14.07.2008

[51] Von Hein, J. (2008), *Die Rezeption US -amerikanischen Gesellschaftsrechts in Deutschland*, Habil, Hamburg.

[52] Anders v. Falkenhausen, NZG 2012, 644, 649.

[53] Wagner, G. (2015), *Officers' and Directors' Liability under German Law. A Potemkin Village,* Theoretical Inquiries in Law no. 16.

Thus we can observe the strictness of German analysis and rulings. Another Supreme Court ruling[54] stated that in "forecast decisions", the board should have recourse to expert assistance, in order to make a decision according to standard "forecasting techniques" of a certain industry. The Court went back to the above mentioned Supreme Court ruling and ascertained that the procedural element of the Rule was not met, because the directors did not exhaust all possible means of information, he did not act according to industry-standard forecasting techniques because he did not engage in external expert counseling. However, German courts acknowledge the application of the Business Judgement Rule when a director acted in the best interest of the company and not in the interest of the shareholders[55].

Another particularity of statutory regulations can be found in par. 55 of the Czech Corporations Act. The wording does not mention the required level of directors' care set by law, but unlike the traditional duty to act "in the best interest of the company", Czech directors are only bound to acting in an „justifiable interest". This vague term reflects in our view the relativity of business operations. However, under Czech law, the director bears the burden of proving this „justifiable interest", only if his good faith is not challenged by the claimants. The law acknowledges the impossibility of a director to prove his good faith, therefore the burden is shifted to the claimants. Even though this is beyond the scope of the present paper, we regard this approach as a risky and glib regulation, since good faith is a *sine qua non* premise of each fiduciary duty, including duty of care. Therefore, good faith should not be an alone standing criteria for allocating the burden of proof[56].

The Romanian doctrinal interpretation of the Rule is mainly conducted through the interpretation of the mandate contract, given the explicit reference in the Companies Act towards these provision. The lack of a rich doctrine of analysis of the Rule can be attributed to the lack of case law, but also to the declarative codification of the Rule, which does not guide to any interpretation that courts should choose. The Romanian legislature trend is to achieve higher flexibility in decision-making within companies and the law-maker clearly opted for broadening the rights of corporate executives. Inspired by the American model of corporate decision making without discouraging the inherent risk of trade and innovation, the Romanian model confirms its preference for "risk of director error to that of judicial error"[57].

One of the few examples that illustrates the duty of care in the Romanian jurisprudence is *Decision no. 2827/2011 of the Commercial Division of the Supreme Court.* The Supreme Court reiterated the interpretation of the provisions of par. 144^1 of the Companies Act, namely that the law only provides protection against negligence and fraud, and not against inherent business risks, when a decision made in good faith turns into a failure. The reasoning is slightly unclear regarding the protection granted by the Rule, the Supreme Court obviously meant the protection of the company and of the shareholders, and not the protection of the director, as the traditional definition of the Rule is intended. The reasoning of the Supreme Court ruling is circumscribed to the application of the Rule according to its interpretation as a standard.

Through the second reference Decision, *No. 2907/2011 of the Commercial Division of the Supreme Court,* the Court maintained the legality of the decision of the boards of directors of Romania's National Bank, ordering the withdrawal of the authorization granted to a member of the board of a commercial bank. The duty of care breach was held when he voted in favor of

[54] BGH, 22.2.2011 – II ZR 146/09
[55] OLG Frankfurt, 17.8.2011 – 13 U 100/10, BB-Entscheidungsreport Paul, BB 2011, 2771.
[56] Koziak, J. (2014), *Business Judgement Rule in Czech Corporations Act,* Tribuna Juridica no. 1/2014, Bucharest.
[57] Catană, R.N. (2007), *Dreptul Societăților Comerciale, Probleme actuale priind societățile pe acțiuni. Democrația acționarială*, Sfera, Cluj-Napoca, p. 192-193.

granting advantageous credits to a company that owned 49% of the share capital of another company, where he was a member of the board as well. According to the *status quo* retained by the court and to the reasoning, we consider that identifying the breach of the duty of loyalty would have been more appropriate than the acknowledgement of breach of duty of care, since conflict of interests is a typical breach of the duty of loyalty and excludes *ab initio* the Rule's application.

The Greek Business Judgement Rule is regulated by art. 22 a par. 2 (c) of Law no. 3604/2007, which replaced the criteria of a "prudent *pater familias*" by the "prudent businessman" term. As a consequence, the director faces a "special liability" as opposed to the previous law, under which he only had to prove the same level of due diligence in business affairs as for its own household. The burden of proof belongs to the directors, who currently *have the right* to prove the conformity of the business decisions with the company's interests, their good faith and their prior information. However, the information duty is not regularly verified by courts, but only examined *ad hoc.*

5.2.2. Does the lack of codification of the Rule offer more protection to directors?

Even though clear norms and bright-line rules are missing in most of EU member states, protection is granted to decisions made in good faith, sometimes even more that in jurisdictions where the Rule is expressly consecrated. A lack of a uniform European framework in the assessment of the duty of care determines a shift of the limits of the implied protection of business judgments.

Even though Austria does not explicitly regulate the Business Judgement Rule, there is a wide doctrinal opinion that the discretion granted by the long standing case-law though the Business Judgement Rule is far larger than the codified versions of the Rule in the six European jurisdictions[58].

In the same manner, Italy adopted a complex procedure, adapting Delaware's principles to the most appropriate version of the Rule in connection to current national requirements. Even though it is one of the most accurate applications within the European Union, this interpretation has never been expressly endorsed by judges. Italian courts prefer the standard of review approach and first try to determine the concrete conduct of the director as regarding the decision-making process. If the conduct is flawless, the Supreme Court already recommended in 1965[59], that courts should try to trace gross negligence (*avvedutezza nella gestione*). If gross negligence is not identified, Italian courts proceed to examining the fairness of the transaction[60] (*vaglio della legittimità della decisione*). If the transaction proves to have undergone a proper decisional process, lacks gross negligence and was made by a fair director, courts apply the Business Judgement Rule if the decision can be attributed to a rational judgement (*decisione irrazionale o arbitraria*)[61].

In Slovenia, a country that does not have an express codification either, some courts have expressed the willingness to apply the American Delaware model as well. Another example for a relaxed review of a director's violation of duty of care in the absence of an express Business Judgement Rule is Luxemburg, which is not an EU member state. Courts accord directors a

[58] *Supra* 28, pag 138
[59] Cass 12.11.1965 n. 2359 (1966) Diritto Fallimentare 29; Cass 06.03.1970, n. 558 (1970) Diritto Fallimentare 81
[60] Cass 16.01.1982, n. 280, Giurisprudenza Italiana I 1 c. 774; Cass 04.04.1998 n. 3483 Diritto Fallimentare 252; App. Genova 05.07. 1986 Giurisprudenza Commerciale 730 and Trib. Milano 10.02.2000, 326.
[61] App. Milano, 28.03.1980, Giurisprudenza Italiana I, 2, c. 219; App. Milano, 21.01.1994, Società.

certain margin of discretion, which don't give rise to liability as long as the business decisions are taken *intra vires*. The reason of this flexible interpretation is that, under the Company Law, directors owe to the company an "*obligation de moyens",* which is a duty to use their best endeavors to achieve the best possible result, without the obligation to achieve that particular result[62].

A different approach is promoted by the Polish Supreme Court, in a country that does not regulate or imply the Rule, by Decision no. IVCKN 117/09.05.2000, namely a director cannot claim the excuse of the economic risk when the prejudice of the company was the result of careless management. On the other hand, in The Netherlands, literature widely recognizes a large margin of discretion that has to be taken into account when analyzing directors' rationales. Dutch judges or appointed experts conduct elaborate analysis of corporate affairs and documents to identify the presence or absence of misconduct[63]. This procedure definitely excludes possible application of the Abstention Doctrine.

Hungarian court practice does not establish a clear relationship between the expected duty of care and the concept of fault. Case law contains indeed a few isolated decisions when directors were liable on the simple ground of inappropriate business decision according to shareholders views. The dominant case law shows however the application of the Business Judgement Rule, even in absence of an elaborated standardization. Regional Court of Budapest, Fővárosi Ítélőtábla 13.Gf. 40003/2003 rejected a claim against a director who made a business decision "in the scope of normal business risks" because it could determine that "he prepared the transaction with the required duty of care, although it proved to be a wrong decision". Average business risk is usually protected by Hungarian courts, but extravagant and risky endeavors are still culturally inacceptable. The Regional Court of Szeged regarded the concession of a diamond mine in Africa as being beyond the normal business risks and the director was liable for high damages (Szegedi Ítélőtábla Pf.I.20 079/2003).

France implies the Business Judgement Rule as defined under Delaware case law and the dominant interpretation of the Rule is the positive presumption in favor of directors, assuming that they acted in good faith, on an informed basis and in the honest belief that their actions were in the corporation's best interest. The strong French presumption functions very close to an Abstention Doctrine, courts are prevented from interfering with management issues, but only as long as the company remains solvent[64].

The UK did not contemplate a transfer of the Business Judgement Rule standardization from its sister Common Law jurisdiction, defining director's skills as personal and subjective. The reference decision dates back from 1925 *Re City Equitable Fire Insurance Co Ltd., Ch. 407,* when the court acknowledged that "a director need not to exhibit in the performance of his duties a greater degree of skill that may reasonably be expected from a person of his knowledge and experience". The same decision admits that delegation may sometimes be necessary and that the director "is not bound "to continuous attention to all affairs of the company". Absent an express codification of the Rule, the UK transposed much of the flexibility of fiduciary standards and of the requirement to analyze them in relation to all aspects of a company, such as size, type, the role of the individual director etc.

The ampleness and flexibility of the British application of the Business Judgement Rule is not surprising. In 1974, Privy Council even decided in *Howard Smith Ltd v. Ampol Ltd,* UKPC 3,

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[62] Casimir, J.P, Germain, M. (2006), *Dirigeants de sociétés*, GroupeRevue Fiduciaire, p. 406

[63] The Amsterdam Court of Appeal or shareholders holding at least 10% of the issued share capital can appoint an expert to investigate the affairs of the company, see Dutch Civil Code, section. 2:344-2:359.

[64] Rivalland, J.C. (2014), *The Company Director Checklist in France*, Allen & Overy LLP report, May 2014.

AC 821 that the power of the directors to issue new shares can be circumscribed as being made for the proper purpose of business, even if it deprived a particular shareholder of his voting majority. The court reasoned that ensuring the financial stability of the company is a proper business scope.

5.2.3. Enforcement mechanisms

Obviously, most Member States have put consistent efforts in the last decade to regulate or to imply this institution, which is largely required for a modern corporate world, for protection of rational commercial risks and inherent innovation. Regarding the recent evolution, we can affirm that the shaping of the Business Judgement Rule will be determined by the best practices, as well as by relevant national case law of EU member states.

As a structural reason, concentrated share ownership often leads to adoption of important business decisions by the board of directors, but with formal or informal approval of controlling shareholders. These situations go back to Arrow's dilemma, "If every decision of A is to be reviewed by B, then all we have really is a shift in the locus of authority from A to B and hence no solution to the original problem"[65]. This unconformable situation is rather a civil law issue than a problem of Common Law countries or South America, where separation of ownership and control already has a longer history and where independent decision making is enfranchised in the common knowledge.

Another obstacle against a smooth implementation of the Rule is institutional. Under-enforcement of directors' duties and of the Rule, as well as courts' reluctance to apply the Business Judgment Rule is determined by lack of an adequate civil procedural framework. This innovative type of liability can only unfold in a proper environment, so currently the procedure is regarded with skepticism and uncertainty. More than a half of member states blame the efficacy of judicial organs in complex corporate law cases, consequently shareholders prefer to revoke incumbent directors rather than resorting to the judiciary. Consequently, lack of predictability of court rulings in cases on breach of fiduciary duties is directly connected to the cultural discrepancy between common law and civil law systems. Therefore, liability of the breach of fiduciary duties is either almost inexistent or totally misunderstood. Although Romanian commercial law for example, tends to augment confidence in the decisional abilities of directors, the society, the legal environment and investors need time to adapt to the new implications of the judiciary. The court should nowadays not be called upon to decide on the usefulness or appropriateness of an act of management, but only on the compliance with the interests of social business while adopting a certain decision[66].

The incentive to enforce the proper execution of the duty of care is even more reduced in the case of minority shareholders, since derivative actions are not of the intrinsic nature of European national laws. Since the claimants also have to advance the costs of the proceedings in most of continental Europe, efficiency of derivative action mechanisms can be mainly identified in the UK. A comprehensive regulation of derivative actions would act as an obvious deterrent of breaches of fiduciary duties. Within Europe, only Estonia, Luxemburg and The Netherlands do not regulate derivative actions, the other member states set a threshold between 5 and 20% of the shares for the initiation of such a claim[67].

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[65] *Supra,* Arrow, 21
[66] *Supra* 43, p. 183
[67] *Supra* 30, p. 213

6. Conclusion

The American financial magazine *Bloomberg Business Week* argued in September 1986 that the position of a director will become "a job nobody wants". This outcome is currently unlikely due to worldwide company law modernizations and adaptations of legislation to the financial markets.

Strengthening of the accountability of directors doesn't need to occur in a harmonized body of directors' liability rules in all Member States. The same conclusion was drawn by the High Level Group of Company Law Experts in 2002[68]. We regard a harmonized standardization of fiduciary duties and of enforcement mechanisms as an inefficient and even harmful procedure, a view which was shared by Member States in the 2006 public consultation launched by the European Commission.

Common features of the approaches taken by EU Member States in regulating directors' duties are mostly owed to the legal and economic problems addressed by corporate law, taken into consideration the generosity of American influences. At the moment, non-implementation remains a matter of principle within member states, first due to legal or cultural traditions that increase the difficulty to create extensive case law on directors' duties. Moreover, the mandatory and uniform implementation of a rule constructed under common law within civil law systems would be very risky, because in continental European systems, directors don't have the same clear duty to maximize shareholders' profits, as in the United States.

The precise wording of the law is of major importance, due to unforeseeable effects or misinterpretations that can follow a patchy legal intervention. Australia introduced the Business Judgement Rule into their Companies Act after 10 years of debate and discussion, but managed to balance the interest of shareholders with the corporate governance reality of risk taking.

We acknowledges similarities between the codifications of the duty of care in numerous European jurisdictions. The standard of care shows resembling elements, it implies a proper information procedure, the duty to supervise business affairs and subordinate offices, duty to consider the best interests of the corporation and to use powers for a proper purpose. However, the standard of review is not a harmonized institution, tort law or civil liability intersects corporate law provisions and liability for duty of care violations is not codified in most jurisdictions. This raises the uneven employment and shifting of the burden of proof under the Business Judgement Rule.

Even though we adhere to the interpretation of the Business Judgment Rule as an Abstention Doctrine, due to its incomparable social and legal advantages, a *Standard of review* approach is a welcomed debut for raising awareness on this protection mechanism within the EU and for resolving the corporate law tension between authority and liability. Our thesis is therefore that for the time being, a correct application of the Rule as a *standard of review* would create a harmonious case law that correctly applies the burden of proof, as presented.

In an accurate corporate system, the liability of the board of directors cannot occur without a transfer of part of the decision-making authority to shareholders or to courts. But if liability is not exceptional, the value of authority will be eroded in time. The most important

[68] *A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts*. This Group was set up by the European Commission and had as objectives to initiate a discussion on the need for the modernization of company law in Europe and to provide the Commission with recommendations for a modern regulatory European company law framework.

aspect that can be derived from the presumption created by the Rule is that business decisions may be reviewed only in situations when the performance is degraded and removed from original shareholders' expectations.

The survival of the modern corporation in the globalized world is preconditioned by wide decisional freedom granted to the board of directors. Thus, we consider that the most efficient legislative approach creates a balance between quality of discretionary actions and the responsible exercise of these authorities.

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