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CONTENT

THE DUTY OF CARE IN COMPANY LAW – BASIC ISSUES FOREWORD

KATEŘINA EICHLEROVÁ

On 26 November 2021, an international scientific conference on the Duty of Care in Company Law – Basic Issues was held at the Prague Law Faculty. The conference was organized by the Department of Business Law and Societas – Central and Eastern European Company Law Research Network.[1]

The seven contributions presented, among others, at this conference are published in this monothematic journal issue. The papers are arranged alphabetically according to the countries whose regulation they report on. Thus, the reader can start to read the Austrian contribution, followed by the two Czech contributions, then the Hungarian, Polish, Romanian, and finally the Slovak contribution. The Czech national report is divided into two articles; the issue of the business judgment rule is dealt with in a separate article, while the other national reports deal with the business judgment rule together.

The aim of the conference and of the papers now presented is to map out, within the national reports, the approach of the individual jurisdictions to the basic issues related to the duty of care in company law. In particular, the individual papers seek to answer the following questions:

1) What is the purpose of the duty of care?
2) How is it regulated in the law of a particular country?
3) Which persons are obliged to comply with the standard of duty of care under company law?
4) Who is entitled to invoke the duty of care?
5) Is the duty of care a statutory or contractual liability?
6) Is there a reversal of the burden of proof?
7) Is there a business judgment rule?

Thus, the contributions are valuable not only in themselves, but precisely by their inclusion alongside the others in this monothematic issue. In fact, they report on the

[1] The goal of the Societas – CEE Company Law Research Network is to promote the development of the study of business law in general and company law in particular with a focus on Central and Eastern Europe (CEE) by encouraging collaboration among lawyers and academics in different countries and the exchange of information on sources, publications, and practice, and to contribute to the development of European Company Law and Comparative Company Law. For more details on its activities see https://www.societas-cee.org/.

approach of the legislature, doctrine, and case law in the selected countries to the fundamental issues related to the duty of care. The articles in their summary thus allow a comparison of selected national regulations. In my view, this is enriching not only for the national debate on the duty of care, but also for its understanding in the European context.

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THE DUTY OF CARE AND BUSINESS JUDGMENT RULE IN AUSTRIAN COMPANY LAW

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Abstract: The duty of care is a core instrument to incentivise managers to act diligently and in the best interest of the company. The following article highlights some key points under Austrian law and puts special emphasis on the business judgment rule, which aims to limit the liability risk of board members arising from the problem of judicial hindsight bias.

Keywords: duty of care; business judgment rule; principal–agent conflict; directors' liability

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1. INTRODUCTION

Directors' duties are an instrument designed to ameliorate principal––agent conflicts. Such conflicts exist when one person's welfare (the principal's) depends on actions taken by another (the agent). Obviously, there is a danger that the agent acts in its own interest and not in the best interest of its principal, either by employing less time and thus being less diligent (e.g., via shirking), by diverting part of the proceeds of its actions directly into its own pockets or via other forms of rent-seeking. The conflict is even more dangerous to the principal in case of a situation of asymmetry of information, where the principal may find it difficult to assess the agent's performance due to a lack of information.[1] To overcome that problem, principals must spend money on monitoring the agent ('agency costs') or else factor in their expectations regarding the agent's self-serving behaviour into the remuneration they are willing to provide.

The most obvious principal–agent relationship exists between the shareholders and management.[2] Shareholder wealth is directly affected by the manager's actions. Under most legal systems, managers are bound by fiduciary duties to the company, i.e., they are obligated by law to act in the company's best interests, which indirectly protects

[1] For the company law context see ARMOUR, J. – ENRIQUES, L. – HANSMANN, H. – KRAAKMAN, R. The Basic Governance Structure: the Interest of Shareholders as a Class. In: ARMOUR, J. – ENRIQUES, L. et al. *The Anatomy of Corporate Law*. 3rd ed. Oxford: Oxford University Press, 2017, p. 52.

[2] ARMOUR, J. – HANSMANN, H. – KRAAKMAN, R. Agency Problems and Legal Strategies. In: ARMOUR, J. – ENRIQUES, L. et al. *The Anatomy of Corporate Law*. 3rd ed. Oxford: Oxford University Press, 2017, pp. 29 et seq.

shareholders as well. That is the core issue of directors' fiduciary duties, among them the duty of care.[3] The latter is the main subject of this contribution. Of course, the main problem for shareholders, however, is to ascertain whether managers actually comply with this duty as information asymmetries are especially strong in this setting – an issue we cannot deal with in this article.

Of course, the duty of care is not a precise rule, but something that law and economics scholars call a standard, that is a general principle, which has to be specified according to the precise circumstances of the case.[4] Company law makes use of such standards since it is impossible to determine the appropriate handling of each and every one of the myriad different situations that may arise during a company's lifetime by precise legal rules or even in the contract setting up the company, that is its statute. Such statutes are always incomplete contracts. If the law uses a standard, the courts will have to determine its correct application *ex post*.

As a matter of statutory law, the duty of care is laid down for both Austrian company types, the *Aktiengesellschaft* or *AG* (the public company form)[5] and the *Gesellschaft mit beschränkter Haftung* or *GmbH* (the private company form)[6] in a very similar manner, although differences exist especially as far as the rules on liability for a violation of the duty is concerned. Similarly, the rule, in principle, applies to all types of board members, i.e., to members of the board of directors and – where it exists – to members of the board of supervisors.

Quite clearly, this type of principal–agent conflict is not only an issue of company law. The situation is very similar in partnerships or even in (private) foundations, which are of considerable importance in Austria. But even outside the law of business organisations the issue is known, even if the specific issues of monitoring resulting from a large number of principals do not exist to the same extent. Hence, in Austrian literature the parallel to the mandate, already regulated in Article 1009 Civil Code from 1812 is emphasized.[7] One can find other parallels, e.g., in the rules for commission agents or commercial agents.

2. PURPOSE AND DISTINCTIONS

The main purpose of the duty of care is to incentivise managers to act diligently and in the best interest of the company but also to avoid shirking. As a rule, Austrian practice emphasises this forward-looking approach.

Of course, the duty also serves as an anchoring point for various consequences if it is violated. First, managers may become liable for damages, which helps in providing redress to the damaged parties. However, one has to be aware that, in most cases,

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[3] See ARMOUR – ENRIQUES – HANSMANN – KRAAKMAN, *The Basic Governance Structure…*

[4] For the distinction between standards and rules see, e.g., POSNER, R. *Economic Analysis of Law*. 7th ed. New York: Wolters Kluwer, 2007, pp. 586 et seq.

[5] See Art. 84 Austrian Aktiengesetz („AktG").

[6] See Art. 25 Austrian Gesetz über die Gesellschaft mit beschränkter Haftung („GmbHG").

[7] See (albeit for the duty of loyalty) TORGGLER, U. Zivilrechtliche Grundlagen der Treuepflichten. In: KALSS, S. – TORGGLER, U. *Treuepflichten*. Wien: Manz, 2018, pp. 1 et seq.

no liability rule can achieve full compensation due to the typically existing mismatch between the damage sustained by the company and the director's personal property, although the company can address this, at least partially, by adequate D&O insurance. In any case, the threat of liability supports the forward-looking aspect of the duty by focussing managers' minds on its proper fulfilment. Second, a violation of the duty of care may be grounds for the removal of a director.[8] This issue is especially important for the *Aktiengesellschaft*, as directors can only be removed for cause,[9] but may also become crucial for directors in a *GmbH*, at least as far as the termination of their employment contract is concerned.[10]

In any case, this duty of care must be sharply distinguished from the duty of loyalty.[11] The former is designed to ensure, as far as possible, careful behaviour, managerial diligence, and proper decision taking, while the purpose of the duty of loyalty is to align the actions of board members with the interests of the company, in particular, but not only, by managing conflicts of interest. In the case of the duty of care, the actions of board members are covered by the Austrian-style business judgment rule (BJR; see in detail below 6.), whereas the BJR is not applicable to the duty of loyalty.[12]

The demarcation between these two duties is not completely clear. This can be demonstrated by the example of donations, which lie, as it were, on the borderline between the duty of care and the duty of loyalty. Such donations can of course be in the interest of the company, but excessive donations are clearly not. Hence, one can understand excessive donations as a problem of the duty of loyalty, as that duty is designed to align managerial actions with the interests of the company or enterprise. This focus also corresponds to the fact that the duty of confidentiality is generally classified as one manifestation of the duty of loyalty – here, too, it is less about a conflict of interest, but rather about the alignment of actions with the interests of society.

However, this would mean that donations as such are not protected by the BJR. This, however, would not be appropriate. Whether or not to donate is a business decision that should, as a rule, only be open to rough judicial scrutiny. Hence, donations are an issue of the duty of care – at least if there is no conflict of interest involved. If, however, a director has a personal interest in the recipient of the donation, the duty of loyalty should apply. This does not mean that excessive donations without such conflict of interest are not open to judicial scrutiny, as excessive donations mean that the member of the executive board may not assume in good faith that they are acting in the best interests of the company; cases of clear abuse of discretion by a director are not privileged by the BJR.

In any case, the following will only deal with issues of the duty of care, not the duty of loyalty.

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[8] See Judgment of the OGH (Austrian Supreme Court) of 23 February 2016, 6 Ob 160/15w.

[9] See Art. 75 para 4 AktG.

[10] Under Austrian law, the employment or service contract is separate from the appointment as such. The former regulates the remuneration and other employment issues, while the latter as a matter of company law results in the power to manage and represent the legal entity.

[11] See WINNER, M. Die organschaftliche Treuepflicht. In: KALSS, S. – TORGGLER, U. *Treuepflichten*. Wien: Manz, 2018, pp. 137 et seq.

[12] Ibid., p. 139.

3. THE BENEFICIARY

Under Austrian doctrine it is clear, who benefits from the duty of care: the company itself. Hence, directors owe the duty to the company and only to the company, not directly to the shareholders or other stakeholders in the company. This does not mean that the duty of care ultimately is not designed to ameliorate the principal–agent conflicts between managers and shareholders, but rather that the company as a legal entity is put between the company and the shareholders – with the effect that creditors are protected by the duty of care as well.

This is important to underline, because the current international discussion tends to go further and to postulate that the directors owe their duty to a much broader set of beneficiaries, namely besides the shareholders also to other stakeholders, such as employees or communities affected by the company's activities. Austrian doctrine does not follow this trend.

Of course, this is closely connected to the issue of corporate purpose and the old discussion of shareholder or stakeholder centric systems of company law. In Austria, Article 70 AktG postulates for the public limited company that the *"board shall, under its own responsibility, manage the company in such a manner as the best interests of the enterprise require, taking into account the interests of the shareholders and employees as well as the public interest"*. This clearly is a pluralistic approach as to corporate purpose but does not change the fact that the directors owe their duties only to the legal entity itself, which, via the "interests of the enterprise" is also given priority in the above-mentioned company law provision.[13]

Hence, violations of the duty of care (and other directors' duties, such as the duty of loyalty) only give rise to legal remedies of the company itself. Thus, any compensation must be made at the company level and not directly to the shareholders. This helps in avoiding many small payments to individual shareholders and concentrates the proceedings at the level of the company. In addition, payment of damages to the company indirectly compensates shareholders via the increase in value of their shares. Quite clearly, damage suffered by other stakeholders cannot be compensated in this way. Hence, it is clear that – even in light of the stakeholder approach stipulated by Article 70 AktG – the interests of other stakeholders than shareholders are not protected by the threat of suits for damages being brought against the directors.

In line with this crucial decision – which, however, is common to most company laws – only the company has, at least as a starting point, standing to sue in the case of violations of the duty of care. Such suits must be brought by the supervisory board (see Article 97 para 1 AktG and Article 30l para 1 GmbHG) or, in the private limited company, by a special representative (see Article 35 para 1 no. 6 GmbHG). Under special circumstances, a minority of shareholders holding 10 percent can raise a liability claim

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[13] Of course, legislation may introduce specific duties of the directors directly against third parties. We will not deal with this issue and, in any case, such provisions are uncommon (see, e.g., Art. 9 and 80 Federal Tax Code or Art. 69 Insolvency Code). Additionally, the application of general rules of private law may result in a direct claim by third parties; see, for example, KRAUS, S.-F. – TORGGLER, U. Commentary § 25 GmbHG. In: TORGGLER, U. (ed.). *GmbHG*. Wien: Manz, 2014, mn. 39.

on behalf of the company (see, e.g., Article 134 et seq. AktG), but even in this case the verdict will order payment of damages to the company, not to the shareholders that have brought the claim. Special interest groups, such as NGOs, do not have standing unless they hold shares in the company.

This situation may lead to underenforcement especially if the company is widely held, as in such situations shareholders often lack the requisite information about the company's affairs necessary to unearth cases of mismanagement or are unwilling to take the cost risks involved with bringing a lawsuit – they may be rationally apathetic. In this situation, it is especially important that the supervisory board fulfils its monitoring function on behalf of the shareholders and claims damages against members of the board of directors. For that reason, Austrian legal scholarship postulates an obligation of the supervisory board to pursue[14] such claims, unless specific reasons, such as the potential unenforceability of the claim, exist. This is in line with a seminal decision by the German Bundesgerichtshof, the supreme court for, inter alia, matters of company law.[15]

Additionally, as long as the shareholders or at least the major shareholder support the directors, they are not exposed to liability in practice. This is especially important if the directors have acted for the benefit of a large shareholder but to the company's detriment. In such situations, liability lawsuits pose threats in two distinct circumstances: first, if the former dominant shareholder sells the shares and the new incumbent discovers what has happened and second, if the company becomes insolvent, as such claims will then be brought by the insolvency administrator on behalf of the creditors.

4. PERSONS SUBJECT TO THE DUTY OF CARE

The duty of care is applicable to both members of the board of directors and members of the board of supervisors, the latter being mandatory in public limited companies and in private ones with more than 300 employees.

As far as the board of supervisors is concerned, it is clear that the standards for the members of that board must be different from those for the directors: First, the board of supervisors has a different task, namely supervision and not management; hence, the requisite knowledge and capabilities of the members of the boards differ. Second, the members of the board of supervisors are not working full-time for the company; hence, they cannot be expected to be as knowledgeable of the company's affairs as directors are. However, in times of crisis, members of the board of supervisors must intensify their involvement in the company's affairs.[16] Apart from that, in substance, the standard is the same for all members of the board of supervisors, irrespective of whether they

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[14] Specifically, the supervisory board has to try getting the general meeting's approval necessary (see Art. 97 para 2 AktG) for bringing such claims; see KALSS, S. Aktiengesellschaft. In: KALSS, S. – NOWOTNY, C. – SCHAUER, M. *Österreichisches Gesellschaftsrecht*. Wien: Manz, 2017, mn. 3/666.

[15] Judgment of the German BGH of 21 April 1997, II ZR 175/95. *Juristenzeitung*. 1997, pp. 1071 et seq.

[16] KALSS, *c. d.*, mn. 3/645.

have been elected by the shareholders or, under the system of board level employee representation, delegated by the works council.

Under Austrian company law, managers have to act with the "due care of a proper and conscientious manager". This means that there is an objective standard of care, which does not depend on the skills of the individual manager but is determined by the objective requirements of the business.[17] Of course, the precise contents of the duty depend on the company's size and its line of business or, more generally, on the circumstances of the case. Hence, the details of the duty are hard to specify on a general level, which is typical of legal standards.[18]

This duty of care is determined by two factors: first, the requisite knowledge and personal capabilities of board members and, second, the proper diligence itself, i.e., the level of care necessary.[19] Apart from clear cases of carelessness, where the director does not get involved with an issue due to lack of interest, the former aspect is often central: If the director had had the necessary knowledge, they would have realised that action would have been necessary or would not have taken an unfortunate decision. This necessary knowledge depends on the industry and director's position in the company, but always is an objective standard. Hence, the argument that the manager did not know better will not help.

Finally, the duty also depends on the director's role on the board. Typically, the board's internal regulations assign specific duties to each board member, e.g., finance to the CFO or operations to the COO. Under Austrian law, this results in a primary responsibility of this member. However, the other members of the board still must monitor this field,[20] apart from the fact that certain core decisions cannot be delegated to single directors. Hence, management mistakes in finance may result in the COO becoming liable if this director did not properly supervise the CFO.

5. BURDEN OF PROOF

Generally, normal civil law rules apply with regard to the burden of proof. Hence, the company has to prove damage and causality. However, Article 84 para 2 AktG contains a reversal of the burden of proof, which is applied to the GmbH as well.[21] According to its wording, this reversal covers fault, i.e., personal reproachability. For the question of whether the director objectively acted in breach of the duty of care or

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17 See KALSS, *c. d.*, mn. 3/508.

18 For standards see above 1. In theory, superior individual knowledge would lead to a higher level of the standard of care; in practice, according to my knowledge this has not been an issue so far.

19 KALSS, *c. d.*, mn. 3/508.

20 See NOWOTNY, C. Commentary § 84 AktG. In: DORALT, P. – NOWOTNY, C. – KALSS, S. *Aktiengesetz Kommentar*. 3rd ed. Wien: Linde Verlag, 2021, mn. 4.

21 Either by analogy or by applying a similar rule of general tort law (Art. 1298 Civil Code).

otherwise unlawfully, the prevailing doctrine[22] and (most) case law[23] differentiate. The company must first present facts that suggest that the actions of the board members were in breach of duty ("prima facie evidence"), which is less than full proof. As a result, the members of the executive board (or the supervisory board) must prove that their conduct in the specific situation was not in breach of duty.

In order to discharge themselves from liability, the board member may also argue that the damage would also have occurred in the case of lawful conduct.[24] The corresponding burden of proof lies with the board member, particularly if the unlawful conduct increased the risk that the damage occurred in comparison to the alternative conduct that would have been in accordance with the duty of care.[25]

6. THE AUSTRIAN BUSINESS JUDGMENT RULE[26]

6.1 DEVELOPMENT AND JUSTIFICATION

Article 84 para 1a of the Austrian Aktiengesetz (AktG), in the version[27] applicable since 1 January 2016, stipulates the following in direct connection with the duty of care: *"A member of the executive board shall in any case act in accordance with the duty of care of a prudent and conscientious manager if, in making a business decision, he or she is not guided by extraneous interests and may assume, on the basis of appropriate information, that he or she is acting in the best interests of the company."*

According to the report of the judiciary committee,[28] the legislature wanted also to promote the Business Judgment Rule (BJR) for Austria, whereby (despite different wording in detail) the model of Article 93 para 1 sentence 2 German Stock Corporation Act was largely followed. Article 25 para 1a Austrian GmbHG contains a corresponding provision for the Austrian private limited company.

The norm is related to liability law and is intended to limit the liability risk of board members. Executive board members are not responsible for the success of the measures they take; these opportunities and risks are borne by the shareholders. Rather, executive board members are only liable if the economically disadvantageous measure in the result was also contrary to due care *ex ante* (Article 84 para 1 and 2 AktG). However, there is a danger that in liability proceedings an excessively strict assessment by the judge

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22 KALSS, *c. d.*, mn. 3/532; NOWOTNY, *Commentary § 84 AktG*, mn. 27; RATKA, T. – RAUTER, R. A. Zivil- und unternehmensrechtliche Haftung des Geschäftsführers. In: RATKA, T. – RAUTER, R. A. *Handbuch Geschäftsführerhaftung*. 2nd ed. Wien: facultas.wuv, 2011, mn. 239 et seq.

23 See judgment of the OGH of 16 March 2007, 6 Ob 34/07d; cf., however, judgment of the OGH of 21 December 2010, 8 Ob 6/10f.

24 See RATKA – RAUTER, *c. d.*, mn. 2/243.

25 Judgment of the OGH of 16 March 2007, 6 Ob 34/07d.

26 This part draws on WINNER, M. Busines Judgment Rule. In: KALSS, S. – SCHÖRGHOFER, P. *Handbuch für den Vorstand*. Wien: facultas, 2017, pp. 1239 et seq.

27 Austrian Official Journal Part I, no. 2015/112.

28 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12.

will not do justice to the prognostic character of every entrepreneurial decision. This is because, first, judges are not entrepreneurial and may therefore emphasise, above all, the risks of every decision. Second, there is a tendency to set requirements too strictly for the standard of care when assessing *ex post* whether a measure was in breach of due diligence from an *ex ante* perspective, because in retrospect the actual events are known, which leads to the conclusion that these circumstances should also have been taken into account from an *ex ante* perspective (so-called hindsight bias).[29] In order to avoid this, corporate decisions are to be exempted by the BJR from full scrutiny under the due diligence standard if they meet certain, above all procedural, requirements (the safe harbour rule). For this reason, the parliamentary committee also states: *"Whoever acts as described in the* [legal] *text acts in any case in accordance with due diligence and does not have to fear any adverse legal consequences, in particular also no criminal prosecution."*[30]

However, in view of the case law on liability, which always showed restraint, it is doubtful whether it was necessary to stipulate the BJR in the wording of the law.[31] It was already generally recognised in case law that there is entrepreneurial discretion, which also allows taking risks; only downright unjustifiable decisions could lead to liability.[32] Whether this is called the BJR is, in contrast, secondary. In any case, the criteria that are part of today's BJR were often regarded as decisive for a waiver of full substantive review even before the 2015 amendment.[33] Today, the courts also apply the BJR to bodies for which it has not been formally enacted, especially to the directors of private foundations.[34]

6.2 PRECONDITIONS

First, according to Article 84 para 1a AktG, the directors must take a "business decision". The decision can lead to action or non-action, whereby it is particularly important in the case of the latter that it must be based on a conscious decision.[35] Mere passivity thus leads to liability in the event of a breach of due diligence.[36] However, not any decision is protected, only a business decision, which is any decision taken under

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29 On this see FLEISCHER, H. Commentary § 93 AktG. In: HENSSLER, M. *beck-online.Großkommentar* [online]. mn. 80 [cit. 2022-03-15]. Available at: https://beck-online.beck.de/?vpath=bibdata/komm/BeckOGK/cont/BeckOGK.htm.

30 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12.

31 NOWOTNY, C. Unternehmerische Entscheidung und Organhaftung. In: *Festschrift für Georg Koppensteiner II*. Wien: LexisNexis, 2016, p. 197.

32 See, e.g., judgment of the OGH of 26 February 2002, 1 Ob 144/01k; judgment of the OGH of 22 May 2003, 8 Ob 262/02s; judgment of the OGH of 11 June 2008, 7 Ob 58/08t (although all decisions refer to members of the supervisory board, nothing else applies to members of the executive board).

33 See KALSS, *c. d.*, mn. 3/389.

34 Judgment of the OGH of 23 February 2016, 6 Ob 160/15w.

35 Ibid.

36 NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 198; SPINDLER, G. Commentary § 93 AktG. In: GOETTE, W. – HABERSACK, M. *Münchener Kommentar zum Aktiengesetz*. 5th ed. München: C. H. Beck, 2019, mn. 51.

uncertainty, i.e., with a prognostic character, and with which a risk is associated.[37] As a rule, this will involve decisions relating to the future. Those who pay out unpromised bonuses for periods that have passed are indeed deciding to voluntarily reward past behaviour, but they are also doing so in order to provide incentives for managers in the future.[38] Similarly, the decision on profit distributions is a business decision.[39]

However, a decision is not entrepreneurial if the board member is required by law[40] or official order to perform a certain act or omission.[41] In principle, this is undisputed and also covers, for example, the prohibition of the return of contributions pursuant to Article 52 AktG. But the course of action necessary to comply with legal norms often is uncertain. When is an internal control system sufficiently sophisticated to meet the legal requirement to establish such a system according to Article 82 AktG? Comparable considerations apply in other areas (accounting, compliance, etc.). According to case law[42] and prevailing opinions,[43] these decisions are not covered by the BJR. But since the issues are similar many scholars argue that the principles of the BJR should be applied (directly or by analogy) (*"legal judgment rule"*), which is why careful and appropriate preparation of decisions is required in such cases.[44] This has to be distinguished from the compliance with contractual obligations of the company against third parties; here, the BJR applies directly as a decision to fulfil a contract is a business decision.[45] This is particularly important if the exact scope of the contractual duties is not clear.

Second, pursuant to Article 84 para 1a AktG, a decision must be made "on the basis of adequate information". Decisions without sufficient factual basis are not privileged by the BJR. Of course, the standard does not require that the board obtains all available information;[46] what is "adequate" depends on the specific decision-making situation.

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37 NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 200; LUTTER, M. Die Business Judgment Rule in Deutschland und Österreich. *Zeitschrift für Gesellschafts und Unternehmensrecht*. 2007, No. 2, p. 82; HÜFFER, U. – KOCH, J. *Aktiengesetz*. 14th ed. München: C. H. Beck, 2020, § 93 mn. 18; see also judgment of the OGH of 23 February 2016, 6 Ob 160/15w (on the private foundation).

38 SPINDLER, *c. d.*, § 93 mn. 49; see also HÜFFER – KOCH, *c. d.*, § 93 mn. 18.

39 Judgment of the OGH of 23 February 2016, 6 Ob 160/15w.

40 This probably also covers foreign law; HÜFFER – KOCH, *c. d.*, § 93 mn. 16; SPINDLER, *c. d.*, mn. 94 et seq. is cautious.

41 Judgment of the OGH of 23 February 2016, 6 Ob 160/15w; NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 201; REICH-ROHRWIG, J. Commentary § 25 GmbHG. In: STRAUBE, M. – RATKA, T. – RAUTER, R. A. *Wiener Kommentar zum GmbH-Gesetz* [online]. 2015, mn. 39 et seq. [cit. 2022-03-15]. Available at: https://rdb.manz.at/document/1125_1_gmbhg_p0025.

42 Judgment of the OGH of 23 February 2016, 6 Ob 160/15w (on the right of inspection under Art. 30 Act on Private Foundations).

43 See KAROLLUS, M. Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen – zugleich ein Beitrag zur Business Judgment Rule. *Österreichisches Bankarchiv*. 2016, p. 257; HÜFFER – KOCH, *c. d.*, § 93 mn. 11 mwN; SPINDLER, *c. d.*, mn. 75.

44 NOWOTNY, Unternehmerische Entscheidung und Organhaftung, pp. 201 et seq.; for Germany SPINDLER, *c. d.*, mn. 76 et seq. However, HÜFFER – KOCH, *c. d.*, § 93 mn. 19, is critical; KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 257, is also cautious.

45 FELTL, C. – TOLD, J. Commentary § 25 GmbHG. In: GRUBER, M. – HARRER, F. *GmbHG*. 2nd ed. Vienna: Linde Verlag, 2018, mn. 31; in principle also SPINDLER, *c. d.*, mn. 88; but HÜFFER – KOCH, *c. d.*, § 93 mn. 17 mwN.

46 See SCHIMA, G. Reform des Untreuetatbestands und Business Judgment Rule im Aktien- und GmbH-Recht. *Zeitschrift für Gesellschafts und Unternehmensrecht*. 2015, Vol. 44, No. 5, p. 292; KAROLLUS, M. Unternehmerische Ermessensentscheidungen und Business Judgment Rule aus primär

Important factors to be weighed by the board are, above all, the time available to obtain information,[47] the scope of the decision, and the expected benefit of further information gathering as well as its cost.[48] Here, too, it is ultimately a case-by-case assessment that relates both to the selection of information in the narrower sense and to the method of obtaining information. Hence, in the case of particularly high risks, careful preparation of information is required; this applies in particular to strategic decisions. If sufficient, i.e., careful, information processing is not possible due to time pressure, the board must refrain from the transaction.

The wording of the Austrian standard states that the information basis must be adequate from an objective point of view.[49] Nevertheless, as with the German AktG[50], it is argued that the board of directors is also protected by the BJR when deciding on the amount and type of information to be obtained, which is why only serious misjudgements about the required information can lead to liability.[51] Given that the decision as to which information basis is appropriate involves in turn weighing up the costs and benefits, taking into account the risks associated with the decision,[52] the board is able to benefit from the BJR in the event of any misjudgement. As a result, there is no detailed control as to whether the basis for the decision was appropriately prepared; rather, it is merely (roughly) examined whether the selection or procurement of information was essentially appropriate.[53]

Of course, this may mean that it becomes necessary to obtain external advice, although this should not be sought as a matter of principle,[54] but only if the knowledge within the company is not sufficient to adequately assess the problem. In practice, the involvement of external advisors is considered an indication of particularly high diligence;[55] additionally, it helps in documenting that the necessary steps have been taken. What is worrying about this is that the focus of those responsible for the decision can shift away from the content and towards the procedure, which amounts, in particular, to external expertise being called in to prepare the basis for the decision in order to at least partially transfer the responsibility for the correctness of the decision to third parties.

Third, according to Article 84 para 1a AktG, in order for the BJR to apply, a member of the executive board must not be guided by extraneous interests. A look at the

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gesellschaftsrechtlicher Sicht mit besonderem Blick auf Versicherungsunternehmen. *Die Versicherungsrundschau*. 2015, No. 10, p. 26.

47 On time pressure as an element of the BJR see already judgment of the OGH of 11 June 2008, 7 Ob 58/08t (on a golden handshake for members of the executive board and thus on a decision of the supervisory board).

48 See KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 258; HÜFFER – KOCH, *c. d.*, § 93 mn. 20.

49 So apparently also KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, p. 26; KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 258.

50 See HÜFFER – KOCH, *c. d.*, § 93 mn. 21.

51 Thus SCHIMA, *c. d.*, p. 292.

52 SPINDLER, *c. d.*, mn. 48.

53 Comparable SCHIMA, *c. d.*, p. 292: no gross negligence.

54 SPINDLER, *c. d.*, mn. 50.

55 See also judgment of the OGH of 23 February 2016, 6 Ob 160/15w.

explanatory memorandum[56] clarifies that this refers to the freedom from conflicts of interest. Here, the duty of care meets the duty of loyalty.

It it is not clear from the law what the intensity of this conflict of interest must be in order not to apply the BJR. This depends on whether, when viewed objectively, the conflict of interest can influence the decision-making behaviour of the board member.[57] However, proof of concrete causality is not required.[58] Thus, in my opinion, despite the unfortunate wording, the board members cannot argue that their decision was not influenced despite the existence of a conflict of interest;[59] rather, the suspect decision must then be examined in terms of content, which does not *per se* lead to liability. Apart from this, a more detailed abstract specification is difficult; rather, a case-by-case assessment must be made.[60] In any case, having an economic interest in the transaction is a clear case of conflicts of interest. The conflict of interest can also be mediated by related natural or legal persons, such as contracts with a manager's spouse or a company in which they are invested.[61]

Fourth, it is necessary that the members of the executive board may assume on this basis that they are acting in the best interest of the company. Hence, the board must actually assume this[62] and this assumption must also be justifiable ("may" assume). This sets objective limits to a subjective standard.[63] However, this also means that courts under the BJR do not exclusively examine the procedure,[64] although the substantive component is limited to a justifiability test. Hence, it is possible to sanction serious misjudgements under liability law even if the procedural requirements have been complied with. This is to be welcomed because (1) an appropriate procedure cannot justify every result, no matter how absurd and (2) it can be assumed that case law would find ways to sanction "completely unjustifiable" decisions anyway. However, not every misjudgement about the suitability of the measure to promote the welfare of the company already leads to the loss of the benefits of the BJR; for then little would be gained by it. The misjudgement must be serious;[65] it is a matter of cases in which the decision was completely unjustifiable, or where the risk was misjudged in a completely irresponsible

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56 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12; also SCHIMA, *c. d.*, p. 291.

57 For all SPINDLER, *c. d.*, mn. 62.

58 Cf., however, KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, p. 27; KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 258. Misleadingly also judgment of the OGH of 23 February 2016, 6 Ob 160/15w: *"does not necessarily mean that they (note: the board members of a private foundation) were guided by extraneous interests"*. In my opinion, however, it is sufficient that the influence can have an impact when viewed objectively.

59 As here SCHIMA, *c. d.*, p. 291.

60 HÜFFER – KOCH, *c. d.*, § 93 mn. 25.

61 For all KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, *c. d.*, p. 258.

62 For all HÜFFER – KOCH, *c. d.*, § 93 mn. 24.

63 See ibid., § 93 mn. 23.

64 NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, pp. 195, 202; KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, pp. 25 et seq.

65 See KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 257. See on the legal situation before the codification of the BJR judgment of the OGH of 11 June 2008, 7 Ob 58/08t.

manner. Thus, the discretionary powers of board members have been expanded without being extended without limits. The proximity to (particularly) gross negligence is rightly emphasised for this rough "health check" for the decision.

Of course, many issues are contested in this context, such as whether or under which circumstances sponsoring and donations can benefit the company's interest.[66] In this context, I just want to mention one additional issue: Can particularly risky decisions – entrepreneurial decisions are always risky – serve the good of the company? Obviously, such decisions need a particularly careful determination of the information basis. Risks customary in the industry may be taken in any case,[67] even if they are high. I think that even taking risks that could jeopardise the company's existence is not *per se* a breach of duty, but only if a failure has more than a low probability of occurrence.[68] Some authors even postulate that the board has a duty to take risks that could jeopardise the company's existence if this is the only possibility for the company to survive;[69] this goes too far because of the danger that managing directors and shareholders act in a particularly risky manner in the vicinity of insolvency (*gambling out of debt*).

Finally, it is not completely clear how the burden of proof is distributed. Who must show that the requirements of the BJR are met? Some place this burden of proof on the member of the executive body;[70] this corresponds to the prevailing opinion[71] in Germany, but not to the US model, which places the burden of proof for the non-existence of the prerequisite of the BJR on the plaintiff.[72] At least to some extent, the prevailing opinion in Austria is problematic as the board members cannot reasonably be expected to prove that they were not guided by extraneous interests. Rather, the plaintiff must present facts from which a conflict of interest can arise; then it is incumbent on the board member to prove that the conflict of interest does not actually exist. With regard to the sufficient basis of information, the burden of proof lies with the board member, who can also provide proof more easily.[73] The burden of proof also lies with the board members as to whether they were entitled to assume that they were acting in the best interests of the company.[74] This must also apply to the question of whether an entrepreneurial decision has been made at all, but this is likely to be a question of legal assessment in most cases anyway.

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66 See e.g., KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, p. 29; SPINDLER, *c. d.*, mn. 71.

67 REICH-ROHRWIG, *c. d.*, mn. 175.

68 Similarly SPINDLER, *c. d.*, mn. 55; HÜFFER – KOCH, *c. d.*, § 93 mn. 27.

69 HOPT, K. – ROTH, M. Commentary § 93 AktG. In: HIRTE, H. – MÜLBERT, P. – ROTH, M. *Großkommentar zum Aktiengesetz*. 5th ed. Berlin: De Gruyter, 2015, mn. 88, 195.

70 KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, p. 27; NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 202.

71 HÜFFER – KOCH, *c. d.*, § 93 mn. 54.

72 MERKT, H. *US-amerikanisches Gesellschaftsrecht*. 3rd ed. Frankfurt: Deutscher Fachverlag, 2013, mn. 923; TOLD, J. Business Judgment Rule: a Generally Applicable Principle? *European Business Law Review*. 2015, Vol. 26, No. 5, p. 718.

73 For details SCHIMA, *c. d.*, p. 293.

74 KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 259.

6.3 CONSEQUENCES

If the requirements of the BJR are met, the board member *"shall in any case act in accordance with the duty of care of a prudent and conscientious manager"*. This "safe harbour" provision[75] further specifies the legal standard of care.[76] If the safe harbour applies, a breach of duty is thus ruled out without further examination. This is not a lack of fault, but a lack of a violation of the objective duty.[77]

However, this does not mean that actions not covered by the BJR are automatically a breach of duty.[78] Rather, the issue must be examined separately. In my opinion, this no longer involves a plausibility check of the decision; Article 84 para 1a AktG conclusively stipulates when such a rough check is sufficient.[79] Rather, the decision is checked in detail, which means that liability does not only arise in the case of decisions that are completely unjustifiable; rather, a "simple" lack of due diligence is sufficient. The fact that, in such cases, there is a particular danger of hindsight bias underlines the importance of the BJR.

If the BJR does not apply, the issue of the burden of proof pursuant to § 84 para 2 sentence 2 AktG arises. One has to distinguish: Insofar as decisions were made under a conflict of interest or with insufficient information, case law varies,[80] but the correct view is that the company must present facts which at least suggest that the actions of the board members violated their duty of care, whereupon the board member must prove that the conduct was not contrary to the duty in the specific situation.[81] If, on the other hand, the board could not reasonably assume that its actions were in the best interests of the company, it has breached its duty of care and liability can at most be excluded due to lack of fault.

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75 See the explanatory memorandum to the amendments: 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12.

76 NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 203; SPINDLER, *c. d.*, mn. 39. Differently for Germany HÜFFER – KOCH, *c. d.*, § 93 mn. 12, 14: irrebuttable presumption.

77 OGH 23.2.2016, 6 Ob 160/15w; SCHIMA, *c. d.*, p. 290.

78 See 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12; judgment of the OGH of 23 February 2016, 6 Ob 160/15w; SCHIMA, *c. d.*, p. 290; KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 255. Also for Germany almost unanimous opinion; for all HÜFFER – KOCH, *c. d.*, § 93 mn. 12.

79 KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 255.

80 As in the text e.g., judgment of the OGH of 9 January 1985, 3 Ob 521/94; judgment of the OGH of 24 June 1998, 3 Ob 34/97i; judgment of the OGH of 22 October 2003, 3 Ob 287/02f; probably also judgment of the OGH of 26 February 2002, 1 Ob 144/01k; different (full burden of proof for breach of duty of care on board member) judgment of the OGH of 16 March 2007, 6 Ob 34/07d (so also KRAUS – TORGGLER, *c. d.*, mn. 20); again different (full burden of proof for breach of due diligence on complaining company) judgment of the OGH of 21 December 2010, 8 Ob 6/10f.

81 KALSS, *c. d.*, mn. 3/410.

7. CONCLUSIONS

This article has dealt with some key points of the duty of care under Austrian law. Largely, this follows the situation in Germany, which is no surprise given the German roots of the Austrian provisions. It is another issue whether these rules are also effective in practice, especially as far as directors' liability is concerned.

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THE DUTY OF CARE IN CZECH COMPANY LAW

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Abstract: The duty of care is a core instrument to incentivise directors to act diligently and in the best interest of the company. The article seeks to answer the following questions concerning the duty of care in company law; 1) who is obliged to exercise it, 2) to whom, 3) what is the content of the duty of care, 4) what place does it occupy among other standards of care, 5) what is its nature, and 6) how does the duty of care differ between a director of a company and director of other legal persons of private law.

Keywords: duty of care; director; company

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1. INTRODUCTION

The duty of care is a legal instrument closely related to managing someone else's property and the regulation of legal persons. Its purpose is to set an expected standard of care from the manager of someone else's property and a board member of a legal person, who is also the manager of someone else's property in a broad sense.[1] The additional purpose is to distinguish this standard from other standards with which private law operates because of the predictability of legal consequences and, therefore, the protection of everyone who participates in legal relations. In this sense, standards of conduct firstly motivate persons to behave following them. Secondly, they help in dealing with cases arising from incomplete contracts.[2] Finally, they are general clauses of desirable behaviour, with the result that their interpretation and application may change over time and adapt to social developments.[3] This paper focuses on the regulation of the duty of care in company law so that the conclusions drawn from it are comparable

[1] The question of the relationship between the management of someone else's property and the performance of the function of a board member of a legal person is dealt with further in the text of the paper.

[2] SITKOFF, R. H. The Economic Structure of Fiduciary Law. *Boston University Law Review*. 2011, No. 91, p. 1044.

[3] HANSMANN, H. – ARMOUR, J. – KRAAKMAN, R. in: KRAAKMAN, R. – ARMOUR, J. – DAVIES, P. – ENRIQUES, L. – HANSMANN, H. – HERTIG, G. – HOPT, K. – KANDA, H. – ROCK, E. *The Anatomy of Corporate Law: a Comparaive and Functional Approach*. 3rd ed. New York: Oxford University Press, 2017, pp. 32–33.

to those of other national reports (Austria, Hungary, Poland, Romania, Slovakia), which are published in this monothematic journal issue, too.

The basic definition of the duty of care is in § 159(1) of the Civil Code (CC). There it is defined as the obligation of each director[4] of a private law legal person, not only of the company, to perform their function correctly with the required due care.[5] Czech law requires the directors to exercise their functions with due care (*péče řádného hospodáře*). This is a duty of care in a broader sense, as it includes not only the component of the duty of care in the narrower sense, but also the component of loyalty.[6] The Civil Code specifies several relationships which the duty of care applies. In the first place, a manager of someone else's property shall be mentioned.[7] Additional particular cases of management of someone else's property are, e.g., parents in the case of care of a minor child's property,[8] guardian *ad litem*,[9] the pledgee in care of the surrendered pledge,[10] executor of the will,[11] and proxy (*prokurista*).[12]

The duty of care of a director of a business corporation is regulated by the Civil Code and by the Business Corporations Act (BCA).[13] The Business Corporations Act governs the issue of the duty of care in general for all business corporations and does not provide for any exceptions for particular forms of business corporations. In light of other national reports, as I mentioned above, and in the interest of comparability, I focus on limited liability companies (*společnost s ručením omezeným*) and joint-stock companies

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4 Further, I use the term *director* in the sense used by EMCA (European Model Companies Act) as equivalent to a board member of a business corporation. Under sec. 1.02(5) EMCA director is a member of the management body or of the supervisory body of a company.

5 Under § 20(2) CC, the rules relating to private law legal persons under the Civil Code shall also apply to public law legal persons in the absence of a particular regulation if the particular rule of the Civil Code is compatible with the nature of public law legal person.

6 It is difficult to choose the correct English equivalent for the Czech concept of due care. The official translation of the Civil Code into English translates the notion *"péče řádného hospodáře"* as due managerial care (see https://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/civil-code.pdf). However, the literature use only a notion of the duty of care, not the duty of managerial care.
If we compare the content of the rule under § 159(1) CC with sec. 174 UK Companies Act 2006, then Czech law works with the concepts of necessary knowledge, necessary care, and loyalty when defining the concept of the duty of managerial care of a director, whereas the UK legislature works with the concepts of reasonable care, skill, and diligence when defining the duty of care of a director. The main difference is an element of loyalty, whether it is or not the part of the duty of care. I use the notion of duty of care under Czech law in broad sense.

7 § 1411 CC.

8 § 896(1) sentence 1 CC.

9 § 949 CC.

10 § 1356(1) sentence 2 CC.

11 § 1554(1) sentence 1 CC.

12 § 454 CC.

13 Act No. 90/2012 Sb., on Commercial Companies and Cooperatives, whose short title is Business Corporations Act (*zákon o obchodních korporacích*). The Business Corporations Act regulates not only companies as partnership, limited partnership, limited liability company, and joint-stock company, but also a cooperative. A cooperative under Czech law is a capital business corporation which can be established for business or another purpose. Cooperatives have certain particular characteristics which could be relevant in the analysis of particular issues related to the duty of care of their directors, in particular the fact that they do not have to be established for the purpose of business (e.g., housing cooperatives) and that only members of the cooperative can be director. A small cooperative is thus limited in the choice of its director by the qualities, skills, and abilities of its own members. However, these issues have not been discussed deeply in Czech doctrine yet.

(*akciová společnost*).[14] However, the conclusions presented also apply *mutatis mutandis* to the cooperative, although I do not explicitly mention it.

The Civil Code has regulated the management of someone else's property (§ 1400 et seq. of the Civil Code) and the duty of care of the director of private law legal persons since the recodification of private law, i.e., since 2014.[15] The doctrine has not been able to agree on whether or not regulation of the management of someone else's property is also applicable to directors of a business corporations by way of a subsidiary. The intention of the legislature is not clear. Under § 59(1) *in fine* of the Business Corporations Act, the rules concerning managing someone else's property do not apply to directors. Instead, the regulation on mandate shall apply complementarily. However, the purpose and sense of this rule do not clear. This rule may be a lawmaker's mistake. Doctrine accepts that a director manages the company's property.[16] If the regulation of legal persons does not exclude it, the rules of management of someone else's property may also apply to the directors of legal persons, including companies.[17]

As I have already stated, the Civil Code requires all directors of legal persons to exercise their functions with the duty of care. Under § 159(1) of the Civil Code, whoever accepts the office of a member of an elected body[18] undertakes to perform it with the necessary loyalty and with the knowledge and care needed. A person is deemed negligent if they are not capable of exercising such care, although they must have discovered

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[14] I leave aside the public partnership and the limited partnership for two reasons. First, there are very few of them in the Czech Republic. Secondly, the doctrine is not uniform as to whether a director is obliged to exercise their function with due care. The reason for this doubt is that a director is a shareholder and becomes a director *ex lege*, not by election, appointment, or other calling to office. See LÁLA, D. Povaha členství ve statutárním orgánu osobní společnosti aneb je člen statutárního orgánu osobní společnosti členem voleného orgánu ve smyslu občanského zákoníku? [Nature of membership in the Board of directors of a partnership or is a director of a partnership a member of an elected body within the meaning of the Civil Code?]. *Obchodněprávní revue*. 2018, Vol. 10, No. 4, p. 106 ff. Conversely NOVOTNÁ KRTOUŠOVÁ, L. *Odpovědnost členů statutárních orgánů právnických osob* [Liability of directors of legal persons]. Praha: Wolters Kluwer, 2019, p. 10; LASÁK, J. Commentary to § 159 CC. In: LAVICKÝ, P. et al. *Občanský zákoník I: obecná část (§ 1–654): komentář* [Civil Code I: General Part (§ 1–654): Commentary]. 2nd ed. Praha: C. H. Beck, 2021, p. 598 (m. 7). However, in my opinion, it is also true that they manage the company's assets, not their own, and therefore they should also act with due care when exercising their functions as a director. See HAVEL, B. in: HAVEL, B. – ŽITŇANSKÁ, L. (eds.). *Fiduciární povinnosti orgánů společnosti na pomezí korporačního, insolvenčního a trestního práva* [Fiduciary duties of company bodies at the interface of corporate, insolvency and criminal law]. Praha: Wolters Kluwer ČR, 2020, p. 152.

[15] Before the recodification of private law, there was no general regulation of the management of someone else's property and the management of all private law legal persons. Even the Commercial Code (Act No. 513/1991 Sb.) did not regulate this issue in general terms, but for each form of company it stipulated that directors were obliged to perform their functions with due care. In detail see NOVOTNÁ KRTOUŠOVÁ, *Odpovědnost členů statutárních orgánů právnických osob*, p. 6 ff.

[16] See HAVEL, B. in: HAVEL – ŽITŇANSKÁ, *c. d*., p. 152; DVOŘÁK, T. Commentary to § 159 CC. In: ŠVESTKA, J. – DVOŘÁK, J. – FIALA, J. et al. *Občanský zákoník: komentář. Svazek I (§ 1 až 654)* [Civil Code: Commentary. Volume I (§ 1 to 654)]. 2nd ed. Praha: Wolters Kluwer ČR, 2020.

[17] HAVEL, B. – PIHERA, V. Povaha funkce a odpovědnost členů orgánů obchodních korporací jako východisko racionální corporate governance [The nature of functions and responsibilities of directors as a basis for rational corporate governance]. *Právní rozhledy*. 2019, Vol. 27, No. 23–24, p. 836 ff.

[18] Under the 152(2) CC, elected bodies are those bodies to which a member is elected, appointed, or otherwise called. The duty of care thus does not apply to non-elected bodies, which include the supreme bodies of business corporations such as the general meeting of a joint-stock company.

this when accepting the office or exercising it and does not draw the consequences thereof.

The basic questions that I try to answer concerning the duty of care in company law are; 1) who is obliged to exercise it, 2) to whom, 3) what is the content of the duty of care, 4) what place does it occupy among other standards of care, 5) what is its nature, and 6) how does the duty of care differ between a director of a company and director of other legal persons of private law.

2. PERSONS SUBJECT TO THE DUTY OF CARE IN COMPANY LAW

The duty of care applies to directors, i.e., members of the board of directors and members of the supervisory board, the latter being mandatory in a joint-stock company with a two-tier board structure.[19] The structure of boards of limited liability companies is one-tier unless the company decides to establish a supervisory board or a particular law requires a supervisory board (e.g., for securities traders, the Capital Market Undertakings Act requires the establishment of a supervisory board).

Under § 62 of the Business Corporations Act the duty of care applies to directors *de facto* and maybe to shadow directors.[20] The lawmaker also intends to extend the duty of care to the shadow directors,[21] but the doctrine has doubts about whether the wording of the Act follows the lawmaker's intention.[22] Despite these doubts however, it is accepted that a shadow director is an influential person and that they are liable to the company under § 71 of the Business Corporations Act for the damage caused by their influence, unless the influence has the quality similar to director's duty of care (arg. they will compensate for the damage unless they prove that they could reasonably have assumed in good faith that they were acting in an informed and defensible interest of the influenced person when they exercised their influence). Stanislava Černá and Lucie Josková add that the same standards which apply to the *de iure* director or *de facto* director shall apply to the shadow director who *"unofficially influences the management of the company so intensively that the influence is comparable to the content of decision-making in the performance of the function of the de iure director as to the de facto director if the only difference between them is the degree of transparency of their real influence"*.[23]

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[19] Czech joint-stock companies have the right to choose between one-tier and two-tier board structures and have the right to change the chosen structure. See §§ 395 and 396 BCA.

[20] Neither the *de facto* nor the shadow director is the *de iure* director. The difference between them is that the *de facto* director presents themselves externally as the director, while the shadow director is hidden from the public. Thus, a *de facto* director will regularly be a director whose term of office has expired and who nevertheless continues to hold the post. Whereas the shadow director is a controlling person who interferes so intensively in the management of the company that the *de iure* directors are probably just dummy.

[21] Důvodová zpráva k zák. č. 33/2020 Sb., kterým byl novelizován zákon o obchodních korporacích [Explanatory report to Act No. 33/2020 Sb., which amended the Business Corporations Act].

[22] LASÁK, J. – DĚDIČ, J. Commentary to § 62 BCA. In: LASÁK, J. – DĚDIČ, J. – POKORNÁ, J. – ČÁP, Z. et al. *Zákon o obchodních korporacích: komentář* [Business Corporations Act: Commentary]. 2nd ed. Praha: Wolters Kluwer ČR, 2021, p. 469.

[23] ČERNÁ, S. – JOSKOVÁ, L. in: HAVEL – ŽITŇANSKÁ, *c. d.*, p. 42.

The duty of care is also applicable to the director's representative if the director is a legal person. Under Czech law, a legal person can be a board member (or the only board member) of limited liability or a joint-stock company. However, under § 46(3) of the Business Corporations Act, legal person, which is a director, is obliged to authorise without undue delay, a single natural person. The representative of a legal person shall fulfil the statutory requirements and prerequisites for a director. A legal person without a representative cannot be entered as a director in the Commercial Register;[24] upon the termination of the authorisation, the legal person is obliged to authorise a new representative.[25] A representative of a legal entity has the exact legal requirements as a director, including the obligation to act with due care.[26] If the representative is not entered in the Commercial Register within three months from the establishment of the function of the legal entity, the office of the legal entity shall cease.[27] The same rule applies in the case of a termination of the authorisation of the previous representative.[28]

3. BENEFICIARY

The question to whom the directors owe the duty of the care is complex. On the one hand, the company can sue the directors for breach of their duty. On the other hand, a breach of the duty of care leads to many legal consequences.

The duty of care serves to fulfil the company's purpose, i.e., the achievement of the benefit (not necessarily profit) defined by the shareholders in the articles of association. The definition of the purpose determines the basic framework of the company's interest.[29] In interpreting the company's interest, a main distinction is made among the shareholder value approach, the stakeholder value approach and the enlightened shareholder value approach.[30, 31] Although the company's interest is defined in the Civil Code and the Business Corporations Act without other details, resp. attributes,[32] the doctrine

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[24] § 46 (6) BCA.
[25] § 46 (8) BCA.
[26] § 46 (5) BCA.
[27] § 46 (7) BCA.
[28] § 46 (8) BCA.
[29] PELIKÁN, R. *Právní subjektivita* [Legal personality]. Praha: Wolters Kluwer, 2012, p. 62.
[30] EMCA, p. 213; HAVEL, B. *Obchodní korporace ve světle proměn* [Business corporations in the light of changes]. Praha: Auditorium, 2010, p. 109 ff; PATAKYOVÁ, M. – GRAMLIČKOVÁ, B. in: HUSÁR, J. – CSACH, K. (eds.). *Konflikty záujmov v práve obchodných spoločností* [Conflicts of Interest in Company Law]. Bratislava: Wolters Kluwer, 2018, pp. 37–41.
[31] The expert discourse seeking to define the notion of company interest and company beneficiary cannot be limited to these three selected models which I choose because they are the most frequently mentioned in the Czech literature and EMCA also works with them; there are more models, e.g., the team production model. KAUFMANN, A. – ENGLANDER, E. A Team Production Model of Corporate Governance. *The Academy of Management Executive (1993–2005)*. 2005, Vol. 19, No. 3, pp. 9–22.
[32] The definition of a company's interest in EMCA, which was inspired by the UK Companies Act, can be seen as a definition of an interest with "attributes". Under sec. 9:04 EMCA "[d]*irectors must act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In doing so the director should have regard to a range of factors such as the long--term interests of the company, the interests of the company's employees, the interest of company's creditors and the impact of the company's operations on the community and the environment"*. Under sec. 172 (1)

concludes that the enlightened shareholder value approach is to be considered in a particular situation.[33] In other words, a director should not be in breach of their duties if they not only consider the company's purpose but also the interests of employees, the protection of the environment, etc. in a particular case, because these interests are consistent with the long-term sustainability of the company, i.e., the long-term achievement of the defined purpose.

Third parties whose interest under the doctrine is to be taken into consideration in determining the company's interest cannot sue the directors directly for a breach of that duty. However, third parties may have a right of action for damages against a member under the general rule of tort liability.[34]

Creditors may also claim damages against members by statutory liability for the company's debts. Under § 159(3) of the Civil Code if a director fails to compensate a legal person for damage caused by a breach of their duty, although they were obliged to do so, they shall be liable to the creditor for the debt to the extent that they have not compensated the damage unless the creditor is unable to enforce performance against the legal person.[35] This rule, which applies to all directors of all legal persons, also leads to doubt whether non-business legal corporations (e.g., foundations) can be negotiated with a limitation of damages with the director to the extent generally permitted in contractual relationships.[36] The limit of damages is forbidden to business corporations by the Business Corporation Act (see below).

Each shareholder in the limited liability company and qualified shareholder in the joint-stock company have the right to bring an *actio pro socio* on behalf of the company against the (former) director for damages caused to the company by the breach of due care.[37] The plaintiff in such a case is the company itself, the (qualified) shareholder is

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UK Companies Act 2006 *"a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to*
(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers, and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company".

33 See HAVEL, B. in: HAVEL – ŽITŇANSKÁ, *c. d.*, p. 153; PATĚK, D. in: ČERNÁ, S. – ŠTENGLOVÁ, I. – PELIKÁNOVÁ, I. et al. *Právo obchodních korporací* [Law of Business Corporations]. 2nd ed. Praha: Wolters Kluwer ČR, 2021, p. 184.

34 Under § 2914 sentence 1 CC *"*[a] *person who, in his activities, uses an agent, employee or another helper shall provide compensation for the damage caused by such a person as if he caused it himself"*. This rule is interpreted as the common liability of person and their agent. Directors are classified as a non-independent agent (helper) within the meaning of this rule and may therefore be liable for damage caused to third parties in the performance of their duties for the company. See FLÍDR, J. *Deliktní odpovědnost člena statutárního orgánu obchodní korporace vůči třetím osobám* [Tort liability of a director of a business corporation towards third parties]. Praha: Wolters Kluwer ČR, 2021.

35 This liability is limited by damage caused to company.

36 Under § 2898 sentence 1 CC an agreement which excludes or limits in advance the obligation to compensate for injury to a person's natural rights or caused intentionally or by gross negligence shall not be considered; nor shall an agreement which excludes or limits in advance the right of the weaker party to compensate for any injury be considered.

37 See §§ 157 and 371 ff BCA.

only its special representative. In addition however, Czech law has an institute of reflexive damages, where under certain circumstances, the shareholder themselves may sue the director on their own behalf for damages to the value of their share caused by a breach of the director's duties. In such disputes, however, the court has the right to decide, even without a particular motion, that the director as the one who caused the damage shall compensate the company for the damage, not the shareholder directly, if it is sufficiently apparent that such measure will also pay for the damage to the devalued share (see § 213 CC).[38] Not all problematic issues are resolved, including the relationship of procedural rules to substantive law.[39]

4. CONTENT OF THE DUTY OF CARE

The duty of care has two parts – the duty of loyalty and duty of care in a narrower sense. The two duties are closely linked and overlap. The conclusion that it is not appropriate to strictly distinguish the duty of loyalty and the duty of care from each other had already been reached by pre-codification doctrine and case law,[40] and the lawmaker followed up on these conclusions by combining the two duties in defining the duty of care in § 159(1) of the Civil Code.[41] Lucie Josková describes the interrelationship of these two components very precisely when she states, *"if a person is imposed a duty of loyalty and at the same time a duty to act with a certain standard of care, the duty of loyalty is necessarily reflected in the duty to act with care. Acting in the interests of the person entitled will be the framework within which the person's competence under an obligation to act will be judged. A director will fulfil his or her duty to act with due care only if, in the exercise of his or her functions, s/he acts with the knowledge, skill and care required in the particular case by the company's interests."*[42]

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[38] The adjustment of reflective damage is a new phenomenon and therefore raises a lot of questions. For example, there are questions whether the *actio pro socio* excludes the possibility for a shareholder to claim reflexive damages. In other words, if a shareholder is able to bring an *actio pro socio* on behalf of the company, they are not entitled to bring an action for reflexive damages. LASÁK, J. Commentary to § 213 CC. In: LAVICKÝ, P. et al. *Občanský zákoník I: obecná část (§ 1–654): komentář* [Civil Code I: General Part (§ 1–654): Commentary]. 2nd ed. Praha: C. H. Beck, 2021, p. 842 (m. 3).

[39] HRABÁNEK, D. Commentary to § 213 CC. In: PETROV, J. – VÝTISK, M. – BERAN, V. et al. *Občanský zákoník: komentář* [Civil Code: Commentary]. 2nd ed. Praha: C. H. Beck, 2019, p. 286 (m. 10); LASÁK, *Commentary to § 213 CC*, p. 848 (m. 30, 31).

[40] HAVEL, *Obchodní korporace ve světle proměn*, p. 155 ff.

[41] ČECH, P. – ŠUK, P. *Právo obchodních společností: v praxi a pro praxi (nejen soudní)* [Law of Business Corporations: in practice and for practice (not judicial only)]. Praha: BOVA POLYGON, 2016, p. 165; NOVOTNÁ KRTOUŠOVÁ, *Odpovědnost členů statutárních orgánů právnických osob*, p. 9; ŠTENGLOVÁ, I. – ŠUK, P. Některé důsledky porušení péče řádného hospodáře (nejen) v judikatuře českých soudů [Some consequences of breach of the duty of care (not only) in the Czech case law]. *Obchodněprávní revue*. 2021, Vol. 13, No. 3, p. 153; Judgment of the Supreme Court of 25 April 2019, case no. 27 Cdo 2695/2018.

[42] JOSKOVÁ, L. Je rozdíl mezi povinností loajality a povinností postupovat s péčí řádného hospodáře? [Is there a difference between the duty of loyalty and the duty to exercise due care?]. *Obchodněprávní revue*. 2019, Vol. 11, No. 11–12, p. 281 ff.

The duty of loyalty does not only mean the prohibition of enriching oneself at the expense of the company or to harm but also the duty to fulfil the purpose for which the company was established.[43]

The duty of care then requires that the function be performed with a certain quality.[44] The propriety of the performance of the function is judged according to the particular circumstances, which may include the type of legal persons,[45] type and size of the business, the number of employees, the market situation, and the company's particular economic situation.[46] Other relevant circumstances may include whether the company has issued securities traded on a European regulated market, whether the director is a member of the managing or supervisory board, whether they are an executive or non-executive board member or whether the horizontal delegation of competence is made in the board. In short, all circumstances shall be evaluated.[47]

The requisite standard of care is objectified in the corporate context because its observance is judged in terms of an imaginary *"reasonably careful"* director who *"must not be anxiously cautious (business is inherently risky – necessarily requiring some degree of 'brave initiative' or 'entrepreneurialism'), nor, again, excessively adventurous or foolhardy (both extremes establish mismanagement)"*.[48]

However, if the director is an expert in a particular field (lawyer, economist, engineer, etc.), it is possible for the company to agree with them to use that professional knowledge, skills, or abilities in their role as a director.[49] Czech doctrine calls this the raising of standard subjectification of the duty of care. The increasing of the standard of the duty of care can be done by the service contract, the articles of association, and by the factual situation, e.g., if a particular person is appointed to a specific position on the board in a horizontal delegation (essentially a tacit agreement to raise the standard of care following the objective expectations associated with a particular position). Thus, the statutory standard of the duty of care cannot be lowered by contract but can be raised. The limit is the requirement that the standard of the duty of care not be raised so that the director is not liable for the propriety of the performance but the result. Directors are not liable for the result; the company and shareholders bring the risk of (business) unsuccess[50] and this is a basic characteristic of companies which cannot be excluded by agreement concluded by company and director.

Doctrine and case law conclude that the objective standard is subjectified even if the director has particular expertise, skills, or abilities.[51] In other words, it is concluded that if

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43 ČERNÁ – JOSKOVÁ, *c. d.*, p. 42.

44 Ibid., p. 42.

45 Lucie Novotná Krtoušová rightly argues that it is necessary to differentiate very sensitively between different types of legal persons as to what the duty of care implies in their circumstances. (NOVOTNÁ KRTOUŠOVÁ, *Odpovědnost členů statutárních orgánů právnických osob*, p. 26).

46 ČERNÁ – JOSKOVÁ, *c. d.*, p. 42.

47 ŠTENGLOVÁ – ŠUK, *c. d.*, p. 153 ff.

48 ČECH – ŠUK, *c. d.*, p. 161.

49 HAVEL, *Obchodní korporace ve světle proměn*, p. 155.

50 ŠTENGLOVÁ – ŠUK, *c. d.*, p. 153 ff.

51 BORSÍK, D. Péče řádného hospodáře a pravidlo podnikatelského úsudku bez legend [Duty of care and business judgement rule without myths]. *Obchodněprávní revue*. 2015, Vol. 7, No. 7–8, pp. 193–205; ČECH – ŠUK, *c. d.*, p. 162; PATĚK, *c. d.*, p. 187.

a director has specific professional knowledge, skills, or abilities, they are obliged to use them in the performance of their function even if it is not explicitly or tacitly agreed.[52]

5. THE DUTY OF CARE IN THE SYSTEM OF CONDUCT STANDARDS

What place does the duty of care have in the system of other standards of expected behaviour? The Civil Code distinguishes between, on the one hand, the ordinary care and caution that is expected of everyone acting (§ 4 CC)[53] and the professional care, on the other hand, that is expected of professionals (§ 5(1) CC).[54] The standard of ordinary care is the lowest standard of all, and the standard of professional care is the highest standard of all. Where does the duty of care fit in?

The doctrine concludes that exercising the functions of a director cannot be regarded as the exercise of a profession requiring professional-level competence.[55] The majority's approach is that the duty of care is the middle standard among ordinary care and professional care.[56]

At the same time however, it recognises that a director cannot be incompetent because they are supposed to be able to conclude that they need professional assistance in solving a particular problem and because they must be able to supervise the provision of such professional assistance.[57] With these conclusions in mind, I do not think that we are precluded from concluding the case that, while a director need not be professionally competent in the way that is required of the company itself in legal dealings, they must be professionally competent in the way that is required of another director in a similar

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52 Czech doctrine has therefore concluded the same rule that the British legislature expressed explicitly in sec. 174(2) UK Companies Act 2006. Under sec. 174(2) UK Companies Act 2006 [reasonable care, skill, and diligence] means the care, skill, and diligence that would be exercised by a reasonably diligent person with (a) the general knowledge, skill, and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
(b) the general knowledge, skill, and experience that the director has.

53 Under 4 CC *"*[i]*t is presumed that every person of full capacity has the mind of an average person and the ability to use it with ordinary care and caution, and that everyone may reasonably expect this of him or her in legal dealings. It's a rebuttable presumption."*

54 Under 5(1) CC *"*[w]*hoever, in public or in dealings with another person, declares himself to be a member of a particular profession or class of persons, thereby shows that s/he is capable of acting with the knowledge and diligence associated with his or her profession or class of persons. If s/he acts without such professional care, s/he shall be held liable."*

55 HAVEL, *Obchodní korporace ve světle proměn*, p. 154 ff; ČECH – ŠUK, *c. d.*, p. 165; NOVOTNÁ KRTOUŠOVÁ, *Odpovědnost členů statutárních orgánů právnických osob*, p. 26; PATĚK, *c. d.*, p. 183 ff; Judgment of the Supreme Court of 30 September 2019, case no. 27 Cdo 90/2019. Controversary Tomáš Dvořák concluded that if the law requires professional management of the company, the performance of the director's office must also be professional. (DVOŘÁK, T., *c. d.*).

56 HAVEL – PIHERA, *c. d.*, p. 836 ff.

57 NOVOTNÁ KRTOUŠOVÁ, *Odpovědnost členů statutárních orgánů právnických osob*, p. 52. In both horizontal and vertical delegation, the director is required to comply with the following rules if the required standard of care is to be achieved: (i) choosing the appropriate person, (iii) creating the appropriate conditions and providing adequate cooperation, and (iii) monitoring EICHLEROVÁ, K. in: ČERNÁ – ŠTENGLOVÁ – PELIKÁNOVÁ, *c. d.*, p. 391; Judgment of the Supreme Court of 30 September 2019, case no. 27 Cdo 90/2019.

position. In other words, I believe that the duty of care is a subset of professional care.[58] However, a director's professional care is lower level than the professional care which is required of the legal person whose a director is involved. The professional care of the legal person is more complex. In other words, the position of a director is a profession within the meaning of § 5 of the Civil Code.

6. NATURE OF THE DUTY OF CARE

The 2012, Civil Code abandoned the doctrine of the single tort and separated contractual and non-contractual liability for damages. It was the reason for opening the debate of the nature of the duty of care. The key question is whether the duty of care is a contractual or non-contractual obligation. Liability for a breach of a contractual duty consists of compensation for damages under § 2913 of the Civil Code. Damages for a breach of a non-contractual duty are dealt with in § 2910 of the Civil Code.

Contractual liability for damages is a simple strict liability, whereas tort liability for damages is a subjective liability with presumed negligence. The difference between them is in fault, imputability in the possibility of awarding so-called net economic loss and the degree of liability for acting of helpers.[59]

Supporters of contractual liability for a breach of the duty of care argue that the director's function is taken over voluntarily, and the relationship between the director and the company is contractual.[60]

Those in favour of tort liability for a breach of the duty of care argue that it is a statutory duty which cannot be excluded by contract. Bohumil Havel and Vlastimil Pihera argue in favour of the conclusion of the director's tortious liability for the performance of their office that the office of the director is a *"private office"* which is *"endowed by law with certain rights and duties, irrespective of the title of the office"*.[61]

Lucie Krtoušová Novotná argues that the director's liability is tortious because they act for the company as its legal and not contractual representative.[62] Ivana Štenglová and Bohumil Havel add that *"the nature of the relationship and from it arising obligations (contractual v. statutory) and the nature of the representative authority arising from this relationship need not to be identical"*.[63] I disagree with conclusion

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58 EICHLEROVÁ, K. in: ČERNÁ – ŠTENGLOVÁ – PELIKÁNOVÁ, *c. d.*, p. 390.

59 In detail see JANOUŠKOVÁ, A. *Náhrada škody při porušení smluvní a mimoslmuvní povinnosti v občanském právu* [Damages for breach of contractual and non-contractual obligations in civil law]. Praha: Wolters Kluwer ČR, 2021.

60 ČECH – ŠUK, *c. d.*, p. 174; LASÁK, J. Commentary to § 51 BCA. In: LASÁK, J. – DĚDIČ, J. – POKORNÁ, J. – ČÁP, Z. et al. *Zákon o obchodních korporacích: komentář* [Business Corporations Act: Commentary]. 2nd ed. Praha: Wolters Kluwer ČR, 2021, p. 360.

61 HAVEL – PIHERA, p. 836 ff.

62 NOVOTNÁ KRTOUŠOVÁ, L. Odpovědnost za jednání s péčí řádného hospodáře… z pohledu teorií právnických osob [Liability for acting with due care... from the point of view of legal entity theories]. *Časopis pro právní vědu a praxi*. 2020, Vol. 28, No. 2, p. 247.

63 ŠTENGLOVÁ, I. – HAVEL, B. Commentary to § 51 BCA. In: ŠTENGLOVÁ, I. – HAVEL, B. – CILEČEK, F. – KUHN, P. – ŠUK, P. *Zákon o obchodních korporacích: komentář* [Business Corporations Act: Commentary]. 3rd ed. Praha: C. H. Beck, 2020, p. 165 (m. 4).

on tort liability based on the argument that they are a legal representative. A director is not a legal representative of the company like, for example, a parent of a minor child, because the company has the ability to influence who the director will be and has internal mechanisms to respond to the director's failure. Statutory representation is characterized by the fact that the represented party is not able to influence who their representative is and the mechanisms against their failure are external (e.g., court interference). This conclusion cannot be altered by the approach of case law and doctrine, which considers the director to be a representative *sui generis*, i.e., neither a contractual nor a statutory representative.[64] Personally, I am inclined to the view that we can consider a director as a *sui generis* representative. The reason for this conclusion is, in my opinion, the fact a director as representative of a legal person is regulated under the regulation of legal persons in the Civil Code and the regulation of representation applies to them only in the subsidiary. I do not agree with the conclusion that the fact the director is a *sui generis* representative means that only the general rules of representation can apply to them.[65] In my opinion the rules of contractual representation, which are consistent with a director's nature, can apply.[66] I regard the director as a *sui generis* representative because I do not consider the conclusion that they are a legal representative to be supportable also because in the exceptional situation where a director is appointed by the court as liquidator, so called against their will [§ 191(3) CC], we can also perceive that by accepting the position of director the person concerned was aware of this possibility if the company enters into liquidation and the court has decided to dissolve the company or no one has been called to act as liquidator in other cases.

Finally, there are views that, as a practical matter, it is irrelevant whether the liability is in contract or tort because the objective standard of the duty of care means that a breach of that standard occurs when a director is unknowingly negligent, which is close to contractual liability where the fault is not required.[67]

7. DIFFERENCES BETWEEN DIRECTORS IN COMPANIES AND OTHER LEGAL PERSONS

What are the basic differences between the care of a duty of a director of a company and the care of a duty of a director of the other legal person? In the following, I mention only the basic ones, leaving aside especially those related to the bankruptcy of the company.

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64 LASÁK, J. Commentary to § 164 CC. In: LAVICKÝ, P. et al. *Občanský zákoník I: obecná část (§ 1–654): komentář* [Civil Code I: General Part (§ 1–654): Commentary]. 2nd ed. Praha: C. H. Beck, 2021, p. 612 (m. 1); ČECH – ŠUK, *c. d.*, p. 21 ff; Judgment of the Supreme Court of 23 July 2019, case no. 27 Cdo 4593/2017.

65 Judgment of the Supreme Court of 23 July 2019, case no. 27 Cdo 4593/2017.

66 EICHLEROVÁ, K. *Zastoupení podnikatele* [Representation of Entrepreneur]. Praha: Wolters Kluwer ČR, 2022, p. 22.

67 LASÁK, *Commentary to § 51 BCA*, p. 360; ŠTENGLOVÁ – ŠUK, *c. d.*, p. 153 ff.

The business judgment rule is expressly articulated only for business corporations in the Business Corporations Act.[68]

We can divide the consequences of a breach of due care into private and public law. The private law consequences of a breach of due care by a director in a company include the possibility of removal from office, the obligation to compensate for damages, the obligation to hand over benefits of a breach, the reversal of the burden of proof, and the creation of legal liability for the debts of the legal entity towards its creditors.[69]

The directors can be removed without cause. The breach of a duty is legally relevant in the case of the removal of the director who is a shareholder. In this case, the shareholder shall not vote on the issue of their removal.[70]

While a director of another legal person than business corporations is obliged to compensate for damage in case of a breach of due care, the liability of a director in a company is broader, as they are obliged to compensate not only for pecuniary damage but also for non-pecuniary damage.[71] The obligation to hand over the benefit and the reversal of the burden of proof only applies to a company's director, not to directors of other legal entities.

It is impossible to limit the extent of a company's director's indemnification *ex ante*; it is possible based on a settlement agreement approved by a two-thirds majority of the general meeting *ex post*.

Under 52(2) of the Business Corporations Act, if the issue before the court is whether a director has acted with due care, the burden of proof is on that director unless the court decides that the director cannot fairly be required to do so. This means that the plaintiff has the burden of alleging and proving the director's conduct, the injury, and the causal connection between the director's conduct and the injury.[72] It is for the director, as the defendant, to allege and prove that they did not breach their duty of care in the conduct in question. Under this doctrine, the burden of proof is on the plaintiff in the case that the defendant is the heir of the director.

The public law consequences of a breach of the duty of care include a disqualification order and the incurrence of criminal liability. While any director of any legal person may commit a criminal offence due to a breach of due care, the court's decision to disqualify a director from office (disqualification) applies only to company directors.

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[68] It is widely debated in doctrine whether the business judgment rule applies only to companies or also to other legal persons. In detail see JOSKOVÁ, L. Business Judgment Rule in the Czech Republic. *Acta Universitatis Carolinae Iuridica*. 2022, Vol. LXVIII, No. 3, pp. 37–47.

[69] ŠTENGLOVÁ – ŠUK, *c. d.*, p. 153 ff.

[70] §§ 173(1) para c) and 426(1) para c) BCA.

[71] This conclusion is implied from § 3(2) of the BCA. According to it, if this law imposes an obligation to compensate for damages, it also imposes an obligation to compensate for non-pecuniary damage. The Business Corporations Act does not expressly impose a duty to compensate directors for damages; the Civil Code provides for that. However, the doctrine implies that a director is also liable for non-pecuniary damage caused by the breach of their duties. LASÁK, J. Commentary to § 3 BCA. In: LASÁK, J. – DĚDIČ, J. – POKORNÁ, J. – ČÁP, Z. et al. *Zákon o obchodních korporacích: komentář* [Business Corporations Act: Commentary]. 2nd ed. Praha: Wolters Kluwer ČR, 2021, p. 31 ff. Conversely HAVEL, B. Commentary to § 3 BCA. In: ŠTENGLOVÁ, I. – HAVEL, B. – CILEČEK, F. – KUHN, P. – ŠUK, P. *Zákon o obchodních korporacích: komentář* [Business Corporations Act: Commentary]. 3rd ed. Praha: C. H. Beck, 2020, p. 11 (m. 4).

[72] Judgment of the Supreme Court of 4th September 2018, case no. 27 Cdo 4163/2017.

Disqualification applies only to directors of the managing board, *de facto* director, shadow director, and liquidator, not to directors of the supervisory board.[73]

8. CONCLUSIONS

During the recodification of private law, the legislature tried to clarify many issues related to the duty of care by detailed regulation. However, some issues have remained unresolved, and new ones have arisen.

This article deals with some key points of the duty of care in Czech company law. Its aim is to describe selected key aspects so that the Czech approach can be compared with approaches in other countries (see other national reports).

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[73] § 63 ff BCA.

THE BUSINESS JUDGMENT RULE IN THE CZECH REPUBLIC[1]

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Abstract: Business Judgment Rule has been part of the Czech written law since 2014. Nevertheless, there are many controversies regarding its formulation as well as interpretation. The objective of this paper is to analyse the purpose of BJR and based on this to suggest pre-requisites which must be fulfilled to apply BJR. At the same time the impact of the introduction of BJR into written law is examined.

Keywords: business judgment rule; duty of care; duty of loyalty; director; company

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1. INTRODUCTION

Entrepreneurship is inevitably accompanied by risk. Without taking risks there would often be no profit (or less profit). This applies everywhere in the word. Legal orders (at least in the western part of the world) deal with this fact through set of rules which serve to protect a director from being found responsible for outcomes of their decision that they cannot influence. These rules became known as the Business Judgment Rule (BJR). However, a more detailed survey makes it clear that these rules differ significantly. Sometimes they are law-in-books, sometimes they are case law. Sometimes they are constructed as standards of judicial review, other times as specification of the conditions under which the standard of care is met.[2] BJR rules also differ in the aspect of proof – in some legal orders the burden of proof lays with the plaintiff (typically a company), in another on the defending director. Moreover, lawyers of the same jurisdiction are not unanimous in interpreting "their" regulation. In any case – in this article, BJR is understood as every rule which enables a director of a company to take business decisions without danger of being found liable for the outcome of these decisions they cannot influence.

[1] This contribution was prepared as a part of the grant project of GAČR No. 18-04757S "Fiduciary Duties (Primary duties of the administrators of matters of others)".

[2] For the difference between these concepts see MERKT, H. Rechtliche Grundlagen der Business Judgment Rule im internationalen Vergleich zwischen Divergenz und Konvergenz. *Zeitschrift für Unternehmens- und Gesellschaftsrecht*. 2017, Vol. 46, No. 2, pp. 134–136.

2. REGULATION

Before 2014, there was no explicit regulation of BJR in the Czech Republic. However, judicature respected that a director is responsible for due performance of the function, not for its outcome: when the director performed the function with due care, they were not obliged to compensate any loss incurred by the company as a result of their actions as a director.[3] This means that there were already signals that the courts were reluctant to interfere in business decisions prior to the incorporation of the BJR.[4]

Since 1 January 2014 § 51(1) of the Business Corporations Act (zákon o obchodních korporacích)[5] says: *"A person shall be deemed to act with due care and the necessary knowledge where, in business-related decisions, he or she could in good faith and reasonably assume to be acting on an informed basis and in justifiable interest of the business corporation. The foregoing shall not apply in cases where such decision-making was carried out without the necessary loyalty."* This regulation was inspired by § 93(1) sentence 2 of the German Stock Corporation Act (Aktiengesetzt)[6, 7] and according to the explanatory report to the Business Corporations Act, it was here where the BJR has become part of Czech law. The rule was introduced with the aim of protecting the directors from liability for decisions whose outcomes they cannot influence.[8]

In order to properly illustrate the situation, it is necessary to specify that Czech law works with reverse burden of proof.[9] Where, in proceedings before court, it is to be assessed whether a director acted with due care, the burden of proof shall be upon such director, unless the court decides that the same cannot be reasonably required from them [§ 52(2) Business Corporations Act].

Despite the fact that the regulation was explicitly described as BJR in the explanatory report to the Business Corporations Act, parts of the Czech literature cast doubts upon this characterisation and consider the rule a description of the manner of performing of the director's function when taking business decisions, i.e., specification of the duty of care.[10] However, as stated above, there is no generally accepted definition of BJR and the aforementioned doubts are based on the formulation of BJR characteristics from

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3 Stable judicature, e.g., see judgment of the Supreme Court of 29 April 2013, case no. 29 Cdo 2363/2011; judgment of the Supreme Court of 19 December 2013, case no. 29 Cdo 935/2012; resolution of the Supreme Court of 18 September 2014, case no. 29 Cdo 662/2013.

4 To the situation before the adoption of Business Corporations Act see BROULÍK, J. Pravidlo podnikatelského úsudku a riziko [Business judgment rule and risk]. *Obchodněprávní revue*. 2012, No. 6, p. 166 ff.

5 Act No. 90/2012 Sb., on Commercial Companies and Cooperatives (Business Corporations Act).

6 See explanatory report to the Business Corporations Act (From § 44 to 75).

7 § 93(1) sentence 2 of German Stock Corporation Act says: *"They shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company*." German regulation was inspired by the US law (MERKT, *c. d.*, p. 130).

8 See explanatory report to the Business Corporations Act.

9 In this case, the inspiration also came from German law.

10 ČECH, P. – ŠUK, P. *Právo obchodních společností: v praxi a pro praxi (nejen soudní)*. [Law of Business Corporations: in practice and for practice (not judicial only)]. Praha: BOVA POLYGON, 2016, p. 160; CILEČEK, F. – RUBAN, R. Remark to the judgement of the Supreme Court of 26 October 2016, case no. 29 Cdo 5036/2015. *Obchodněprávní revue*. 2017, Vol. 9, No. 4, p. 113 ff.

Anglo-Saxon countries.[11] Moreover, the formulation corresponds to structure of BJR which can be described as typical for countries of continental Europe.[12] Therefore, there can be no doubts that BJR is part of the Czech corporation law.

3. PURPOSE

It is generally accepted – both in literature and judicature – that (i) risk-taking is a typical characteristic for entrepreneurship and that business decisions are usually made under conditions of uncertainty[13] and that (ii) directors are not liable for the outcome.[14] Additionally, there is also (iii) the danger of the *hindsight bias* of deciding judges as well as the fact that (iv) judges are not experts in the management of the companies – these facts are well known.[15] Nevertheless, the danger that, in a civil proceeding, the director's act will be considered a breach of duty with all its negative consequences, remains. Therefore, it is universally agreed that judges shall not interfere in business decisions and take over the role of managers.[16]

The BJR should be a solution to the above-mentioned issues. It should fulfil two purposes.

Firstly, as mentioned above, the BJR was introduced to the Czech law with the aim of protecting directors from liability for decisions whose results they cannot influence.[17] This aim is also emphasised in literature: the foreign doctrine states that the BJR should ensure "safe harbour" for directors.[18]

Secondly, it is necessary to add that the BJR protects the company as well. In fact, directors are able to deal with the danger of the wrong assessment of their decisions. Firstly, they can avoid risk completely (but no risk often means no profit). Secondly, they can accumulate various materials supporting their decision and formalize the

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11 MERKT, *c. d.*,134–136.

12 As J. Kožiak concludes, for BJR of continental European countries it is typical that (i) BJR is codified, (ii) it is formulated as rule of behaviour not standard in judicial review and that (iii) burden of proof lies on the director. (KOŽIAK, J. Vzestup pravidla podnikatelského úsudku v evropských jurisdikcích [Rise of business judgment rule in European jurisdictions]. In: EICHLEROVÁ, K. et al. (eds.). *Rekodifikace obchodního práva – pět let poté: pocta Stanislavě Černé. Svazek I.* [The recodification of the business law – five years later: liber amicorum Stanislava Černá. Volume I.]. Praha: Wolters Kluwer ČR, 2019, s. 47).

13 Judgment of the Supreme Court of 19 July 2018, case no. 29 Cdo 3770/2016.

14 Judgment of the Supreme Court of 29 April 2013, case no. 29 Cdo 2363/2011.

15 E.g., LASÁK, J. in: LASÁK, J. – DĚDIČ, J. – POKORNÁ, J. – ČÁP, Z. et al. *Zákon o obchodních korporacích: komentář* [Business Corporations Act. Commentary]. 2nd ed. Praha: Wolters Kluwer ČR, 2021, pp. 362–363.

16 FLEISCHER, H. Die "Business Judgment Rule" im Spiegel von Rechtsvergleichung und Rechtsökonomie In: WANK, R. – HIRTE, H. – FREY, K. (eds.). *Festschrift für Herbert Wiedemann zum 70. Geburtstag*. München: C. H. Beck, 2002, p. 832.

17 See explanatory report to the Business Corporations Act (From § 44 to 75).

18 E.g., ŠTENGLOVÁ, I. – HAVEL, B. in: ŠTENGLOVÁ, I. – HAVEL, B. – CILEČEK, F. – KUHN, P. – ŠUK, P. *Zákon o obchodních korporacích: komentář*. [Business Corporations Act: Commentary]. 3rd ed. Praha: C. H. Beck, 2020, p. 166; LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 362.

decision-making process[19] which is both ineffective and expensive. Thirdly, they can initiate the conclusion of the most advantageous (and the most expensive) D&O-insurance at the expense of the company.[20] And finally, there is always the danger of the pool of potential candidates being limited as many suitable persons would not be willing to take over the function due to eventual liability. Therefore, while it seems that BJR primarily protects directors, it is not true – BJR is far more important for the company and its shareholders.[21]

On the other hand, the company (and thus its creditors) must be protected from manifestly faulty management. Mismanagement can endanger the economic situation (and subsequently, the existence) of the company. This might have negative consequences not only for shareholders as the "ultimate owners" of the company, but also for its creditors (including employees) and society as a whole. Thus, the BJR must not enable hazardous or insane decisions: such decisions do not deserve protection. Therefore, it is necessary to establish a boundary between acceptable and unacceptable risk. However, this could be very tricky as the attitude to the risk is very personal.

To fulfil these purposes the BJR has to be able to influence behaviour of the director at the time of decision making so they are, on one hand, not afraid of taking a risk, but on the other hand are not, at the same time, making a hazardous decision. In another words, directors have to be able to recognize if they are in the "safe harbour" at the time of the decision-making process or not. I call this the steering function.

4. ROLE OF THE COURTS

As settled above, there are many good reasons why judges should not evaluate management decisions. Therefore, the BJR should ensure that business decisions of the directors will be "locked" so they cannot be reviewed by the courts. On the other hand, it is also necessary to protect the company and, by extension, its creditors (and society as a whole) from insane and hazardous management decisions. So, there should remain a possibility of the court's interference in cases of apparent management failure.

The way to reconcile these contradictory aims seems to lie in the division between judicial review of the material content of the decision and the process of its adopting. While the courts are not allowed to review the material rightness of the directors' decisions, they do evaluate the process of the decision-making. If the process is found to have been conducted properly, the review the material rightness is not allowed.

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[19] According to the Czech law, a director may request instructions from the supreme body of the business corporation regarding the management of its business [§ 51(1) of the Business Corporations Act].

[20] In a case where D&O-insurance is taken by the company, directors are not obliged to pay the part of the damage arising from their work for the company [for different solution see § 93(2) of the German Stock Corporation Act which requires that such insurance should provide for a deductible of no less than 10 per cent of the damage up to at least an amount equal to 1.5 times the fixed annual compensation of the director].

[21] ENRIQUES, L. – HANSMANN, H. – KRAAKMAN, R. in: KRAAKMAN, R. – ARMOUR, J. – DAVIES, P. – ENRIQUES, L. – HANSMANN, H. – HERTIG, G. – HOPT, K. – KANDA, H. – ROCK, E. *The Anatomy of Corporate Law: a Comparative and Functional Approach*. 2nd ed. New York: Oxford University Press, 2009, p. 79.

Nonetheless, it is necessary to re-emphasize that the court should also exercise restraint in reviewing the process. It is necessary to ensure that the hindsight bias is not replaced by the outcome bias,[22] i.e., mistake made in the evaluation of the decision in a case where the outcome of the decision is already known. The issue is that in a case where the judge is aware of all relevant information available to the director as well as the outcome of the decision, they tend to evaluate decision better when its outcome was favourable than in a case where it was unfavourable.[23] In other words, an evaluation of the decision is not distorted by the inclusion of information which was not known to a director at the time of decision-making (which is typical for hindsight bias), but by the outlook on the outcome of the decision. Outcome bias can therefore influence the evaluation of the decision-making process.

It seems that the Czech doctrine unanimously concludes that the courts should only review the process of the decision-making, not content of the decision itself.[24] This means that if the court comes to the conclusion that the decision has been made through due process, it should conclude that the duty of care was not breached. Therefore, the BJR can also be described as the "rule of due process".[25]

However, it is important to keep in mind that to ensure that the process was conducted in a proper manner, it is absolutely necessary to deal with the material content of the decision as well. While inspecting, whether the amount of information was sufficient (see below), the courts unavoidably confront the importance of the decision for the company with reliance on the sufficiency of information gathered. The substance of the decision is also touched upon while reviewing whether the decision made was in the interest of the company and whether it was or was not irrational.

5. PRE-REQUISITIES

As mentioned above, the formulation of the BJR in the Czech law is not optimal and it remains unclear how to interpret it.[26] There are attempts to expound the BJR with the help of the US doctrine[27] as well as to consider the BJR a specification of director's proper behaviour which is met when particular elements of the legal definition are fulfilled (loyalty, good faith, appropriate information, and justifiable interest

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22 FLEISCHER, *c. d.*, p. 841.

23 BARON, J. – HERSHEY, J. C. Outcome Bias in Decision of Evaluation. *Journal of Personality and Social Psychology*. 1988, Vol. 54, No. 4, pp. 569–579.

24 ŠTENGLOVÁ, I. – HAVEL, B. in: ŠTENGLOVÁ – HAVEL – CILEČEK – KUHN – ŠUK, *c. d.*, p. 166; LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 362; ČECH – ŠUK, *c. d.*, p. 160.

25 LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 368.

26 On the other hand, it is obvious that foreign legal orders also deal with the same problem as only small part of the lawmakers has dared to formulate BJR in their statutes and instead prefer to leave this issue to the judicature and literature (GERNER-BEUERLE, C. – PAECH, P. – SCHUSTER, E. P. *Study on Directors' Duties and Liability*. London: European Commission – LSE Enterprise, 2013, p. 108 ff). More on the situation in Germany, which was inspiration for Czech law, see OTT, N. Anwendungsbereich der Business Judgment Rule aus Sicht der Praxis – Unternehmerische Entscheidungen und Organisationsermessen des Vorstands. *Zeitschrift für Unternehmens- und Gesellschaftsrecht*. 2017, Vol. 46, No. 2, p. 150.

27 BORSÍK, D. Péče řádného hospodáře a pravidlo podnikatelského úsudku bez legend [Duty of care and business judgement rule without myths]. *Obchodněprávní revue*. 2015, Vol. 7, No. 7–8, pp. 193–205.

of the company).[28] In my opinion, it is not possible to concentrate either on the definition or source of inspiration, it is necessary to prefer the purpose of the BJR by its interpretation.

The purpose of the BJR is to enable a director to adopt business decisions without fear of being liable for a possible negative outcome and thus protect the company from business failure due to risk-avoidance by the director and excessive costs. This purpose can be fulfilled only in the case that director knows, at the moment of decision making, whether they are in a "safe harbour". Therefore, pre-requisites of its fulfilment must be formulated so clearly that the directors are able to easily recognize whether they are in a "safe harbour" at the moment of the decision-making process or not. In a situation where the courts would concentrate on the evaluation of the process rather than on the decision itself, the director might feel themselves to be in a safe harbour when they know that decision was adopted in due process. Furthermore, as the BJR protects the interest of the company as well, should there be any doubts, they should be resolved in favour of the director. For "[…] *shareholders may stand to lose more from such 'defensive management' than they stand to gain from deterring occasional negligence"*.[29]

Let's briefly have a look at the particular aspects of the BJR-test.

5.1 BUSINESS DECISION

The first pre-requisite for the application of the BJR is the existence of a business decision. The BJR should protect business decisions exclusively. The idea of this restriction is obvious – only business decisions are implicitly connected with risk and uncertainty and thus deserve special treatment. However, it is not easy to specify, which decision can be considered a business decision, and which does not fulfil the definition and is therefore not protected by the BJR.[30] Moreover, according to Czech law, it is also possible to establish a business corporation for a non-entrepreneurial purpose.[31] Does it mean that the directors of these corporations cannot benefit from the benefit of the BJR at all?

It is also universally agreed that the decision must be a result of purposeful activity or passivity; pure inactivity does not have the nature of a decision.[32]

A decision can be considered a business decision when it is (more or less) connected with the entrepreneurial activity of the company. So, for instance, the choice of roofer that is to repair the roof of the company's headquarters is not part of the business and does not represent a business decision. Furthermore, a business decision is also a decision which is typically connected with uncertainty – when the outcome is evident, there

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[28] E.g., LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, pp. 362–368.

[29] ENRIQUES, L. – HANSMANN, H. – KRAAKMAN, R. in: KRAAKMAN – ARMOUR – DAVIES – ENRIQUES – HANSMANN – HERTIG – HOPT – KANDA – ROCK, *c. d.*, p. 79.

[30] There are more ways to interpret a business decision. For details, see OTT, *c. d.*, p. 151 ff.

[31] Unlimited partnership (*veřejná obchodní společnost*) and a limited partnership (*komanditní společnost*) can be established for the purpose of doing business or for the purpose of managing company's own assets. Limited-liability company (*společnost s ručením omezeným*) and a joint-stock company (*akciová společnost*) can be established for any purpose.

[32] E.g., LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 364.

is no need for protection from a potentially wrong choice. After all, the uncertainty of the future development of a business is one of the main reasons for adoption of the BJR. Finally, a business decision is not a decision whether to follow law or statutes of the company. Both law and statutes of the company must be obeyed. There are many cases, though, where the law is unclear. Whereas foreign authors pay great attention to so-called legal judgment rule,[33] in the Czech Republic, this aspect has not been researched enough.

It is clear from the above-mentioned that a great number of decisions can fall into the shadow zone. In such cases, the rule "*in dubio pro* director" should be applied, i.e., if there are any doubts, they should be resolved in favour of the director and the decision should be considered a business decision for the purpose of the BJR.

To be complete – even though the BJR is related to business decisions exclusively, it is not disputable that the directors are entitled to discretion while adopting non-business decisions. So, in the case of reparation of the roof mentioned above, the directors have to decide for one of more roofers and it can appear afterwards that the choice was wrong. This does not automatically mean that directors breached their duties. However, such decisions outside the BJR could be reviewed in their entirety.[34]

5.2 GOOD FAITH

Furthermore, the director must have acted in a good faith. Since good faith is a subjective relationship of the director to the adopted decision (a director believed that their decision was right), it has to be evaluated according to its manifestation in the real word.[35] Thus, in the case of a decision making process, the decision has to be evaluated according to whether (i) the director has acted in the interest of the company (i.e., being loyal) and (ii) their decision was made on the basis of appropriate information.[36] Moreover, (iii) the decision cannot be irrational.[37] Only these parts of the decision-making process are "visible" to third persons.

It is disputed whether the good faith of the director is presumed by Czech law (according to § 7 of Civil Code)[38] or whether it must be proven by the director (as says the § 52(2) of the Business Corporations Act). Part of the literature concludes that the director has to prove their good faith, another authors are of the opinion that proof of good faith is necessary only in the case where there are facts in the procedure which indicate the breach of good faith.[39] In my opinion, good faith must be proven by the director. Only this conclusion is in accordance with the concept of a reverse burden of

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33 In Germany e.g., VERSE, D. A. Organhaftung bei unklarer Rechtslage – Raum für eine Legal Judgment Rule. *Zeitschrift für Unternehmens- und Gesellschaftsrecht*. 2017, Vol. 46, No. 2, pp. 174–196.

34 For another opinion, see P. Čech and P. Šuk who are of the conviction that the decision outside the BJR should be assesed according to the same rules as the business decision. (ČECH – ŠUK, *c. d.*, p. 161).

35 BORSÍK, *c. d.*, p. 200.

36 Ibid., p. 201.

37 LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 365.

38 § 7 of the Civil Code: A person who acted in a certain way is presumed to have acted fairly and in good faith.

39 LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 365.

proof which is characteristic for Czech law as well as the rather benevolent formulation of the BJR (see below).

To conclude, the director's decision is protected by the BJR if they can prove that they could be believed to have acted in the interest of the company and on the basis of adequate information. However, the BJR does not apply in a case where the adopted decision was deemed to have been irrational.

5.2.1 JUSTIFIABLE INTEREST OF THE COMPANY

The director shall act with necessary loyalty and in justifiable interest of the business corporation. The formulation "justifiable interest of the business corporation" means that the decision needn't be in the best interest of the company; a sub-optimal decision is also sufficient. Thus, only decisions (manifestly) in contradiction with the interest of the company are not covered by the BJR. At first glance, this could be considered far too benevolent as another legal regulation that demands acting in the best interest of the company.[40] However, looking for the solution in the best interest of the company can be very tricky.

Despite the fact that the absence of a conflict of interest is not mentioned explicitly in the statute as the pre-requisite of being considered to have acted in the justifiable interest of the company, it can be concluded that a decision cannot be made when a conflict of interest is present.[41] Every conflict of interest casts serious doubts on whether the decision was made (only) in the interest of the company. This also applies to the situation when a company was notified of the conflict in accordance with the § 54 ff. of the Business Corporations Act.[42]

5.2.2 ADEQUATE INFORMATION

Furthermore, the director should act in an informed basis.[43] According to the Czech Supreme Court a director has to use reasonably available information resources.[44] Thus, it is not necessary to be aware of all facts, it is sufficient to be informed of facts which comply with the importance of the decision for the company.[45] At the same time, the Supreme Court emphasised that the fulfilment of this obligation is necessary in order to consider the decision from the *ex ante* perspective and that amount of necessary information differs in respect to the type of decision.[46] In other words, courts have to take into account the information which was known or should have been

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40 E.g., sec. 10.01 (3)(c) EMCA.

41 Absence of conflict of interest is a standard requirement, see e.g., sec. 10.01 (3)(a) EMCA.

42 ČECH, P. Péče řádného hospodáře [Duty of care]. *Auditor*. 2018, roč. 25, No. 6, p. 14.

43 According to H. Fleischer *"*[…] *schütz die Business Judgement Rule also nur den Wagenmutigen, nicht aber den Unbesonnenen, der sich über die Voraussetzungen und Auswirkungen seines Handelns nicht rechtzeitig und sorgfältig Rechenschaft abgelegt hat"*. (FLEISCHER, *c. d.*, p. 840).

44 The Supreme Court stated: *"*[…] *when making concrete decisions, it is necessary to use reasonably available (both factual and legal) information resources and based on them to thoroughly estimate possible advantages and disadvantages (recognizable risks) of the existing possibilities of the business decision."* (Judgment of the Supreme Court of 26 October 2016, case no. 29 Cdo 5036/2015).

45 LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 366.

46 Judgment of the Supreme Court of 26 October 2016, case no. 29 Cdo 5036/2015.

known to the director when making a decision and which was necessary for deciding the specific issue.

Fundamentally, directors can rely on information which has been presented to them by their employees or cooperating professionals (attorneys, tax advisers etc.) and do not need to verify the accuracy of them.[47] This does not apply if they are aware of facts which cast doubts on the verity or complexity of presented information.[48] Moreover, the directors should always be able to evaluate the plausibility of presented information, in particular if they are presented them in the form of an expert opinion.[49]

5.2.3 LACK OF IRATIONALITY

The last requirement which must be fulfilled to conclude that a director acted in good faith is a lack of irrationality of the decision. This requirement reflects the fact that a hazardous decision should not be protected. Also, in such a case it should be an obvious and evident lack of rationality. As the US-experience demonstrates, only a very few business decisions fail due to the lack of rationality.[50]

6. SCOPE OF APPLICATION

The BJR is regulated in the Business Corporations Act and is relevant for business decisions adopted in business corporations (which is a summarizing term for companies and cooperatives).[51] Such decisions are typically adopted by members of the statutory bodies and – as the case may be – also by the members of supervisory bodies, e.g., when they are obliged to obtain prior approval of certain business decisions according to the memorandum of association. On the other hand, application of the BJR on the decisions of managers who are not members of the board (e.g., executive officers) is not allowed. Nevertheless, this does not mean that these managers are not entitled to discretion.

Since the BJR is regulated in the Business Corporations Act, it is disputable whether the rule can also be applied to the decision-making bodies of other legal forms. It seems that the majority of the doctrine refuses this particular conclusion at this moment.[52]

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47 BORSÍK, *c. d.*, p. 203.

48 Ibid., p. 203.

49 BEJČEK, J. Principy odpovědnosti statutárních a dozorčích orgánů kapitálových společností [The principles of liability of directors of capital companies]. *Právní rozhledy*. 2007, Vol. 15, No. 17, p. 613 ff.

50 MERKT, *c. d.*, p. 130.

51 Companies include an unlimited partnership and a limited partnership (partnerships), a limited-liability company and a joint-stock company (capital companies), as well as a European Company and a European Economic Interest Grouping. Cooperatives include a cooperative and a European Cooperative Society. [§ 1(2) and (3) of the Business Corporations Act].

52 E.g., RONOVSKÁ, K. *Lze využít business judgment rule ve světě fundací?* [Is it possible to apply business judgment rule in the world of foundations?]. In: EICHLEROVÁ, K. et al. (eds.). *Rekodifikace obchodního práva – pět let poté: pocta Stanislavě Černé. Svazek I.* [The recodification of the business law after five years: liber amicorum Stanislava Černá. Volume I.]. Praha: Wolters Kluwer ČR, 2019, pp. 49–60.

7. PRACTICAL IMPORTANCE

Relevant data regarding the impact of the introduction of the BJR on behaviour of directors in practice are not available. Therefore, it is not possible to conclude with certainty whether the decisions of directors have been more (or less) risky since the introduction of the new regulation. It can be assumed, though, that at least a part of the directors are aware of the existence of the BJR as the issue was discussed extensively among corporate lawyers after its codification.

Despite the knowledge of the BJR rule, it is rather unlikely that the directors are prepared to adopt more risky decisions. As the pre-requisites of fulfilment of the BJR stay unclear (see above), it can be difficult to say whether the BJR helps directors recognize if they are in a "safe harbour" in the decision-making process or not. Hence, the steering function of the BJR can hardly be realized.

On the other hand, it is presumable that the introduction of the BJR has led to a growth in the number of materials used for decision-making. The literature which deals with the BJR issue emphasises the necessity of the existence of sufficient number of sources utilized for decision-making as well as the need of recording, which materials were used as a base for the decision.[53] Additionally, relevant judicial decisions specify the necessary amount of information.[54] These facts probably result in the accumulation of materials by the deciding bodies. This occurs despite the fact that it is emphasised, that a formal accumulation of materials is not sufficient to fulfil the requirement of sufficient information.

What can be concluded with certainty is that the courts apply the BJR when reviewing business decisions.[55] Furthermore, according to the actual decision of the Supreme Court, the BJR must also be applied to decisions adopted before the BJR became statutory law.[56]

8. CONCLUSION

The BJR became part of the Czech statutory law on 1 January 2014. However, even prior to this date, there were already some courts reluctant to interfere with business decisions and current case law reminds us that the BJR should also be applied on decisions adopted before 2014. It seems that judicature, literature, as well as practice have been unanimously in agreement that there are many good reasons to prevent courts from reviewing business decisions. The BJR is usually understood as a device used to protect directors against liability. However, it is necessary to be aware of the fact that

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[53] LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 367.

[54] Judgment of the Supreme Court of 19 July 2018, case no. 29 Cdo 3770/2016.

[55] The BJR was repeatedly applied by the Supreme Court of the Czech Republic, e.g., judgment of the Supreme Court of 26 October 2016, case no. 29 Cdo 5036/2015, resolution of the Supreme Court of 23 October 2019, case no. 27 Cdo 5003/2017-II, as well as the High Courts, e.g., judgment of the High Court of Olomouc of 10 October 2019, case no. 5 Cmo 14/2019.

[56] Judgment of the Supreme Court of 19 July 2018, case no. 29 Cdo 3770/2016.

the BJR has extraordinary importance for companies as well. Directors' risk aversion can lead to business failure.

The BJR shall "lock" business decisions so they cannot be reviewed by the court. This could allow directors to feel safe (i.e., out of danger of being found liable for an outcome they cannot influence) while adopting business decisions. On the other hand, there must be a way to protect the company from hazardous and insane decisions. The suitable device seems to be the differentiation between the review of the material content of a business decision and the review of the process of adopting it. Whereas the material substance of the decision cannot be reviewed by the court, compliance with due process can and is. Nevertheless, no matter how tempting this might sound, in reality it is necessary to admit that the courts also deal with the material content of the decision. The review of due process requires an evaluation of the amount of information needed as well as compliance with the interest of the company which is not possible without looking at the material aspects of the decision.

The formulation of the BJR in Czech law is not optimal. However, the interpretation of the rule should follow neither the accurate wording of the law nor the inspiration sources. The purpose of the BJR should always prevail. At the same time, it is necessary to interpret the rule in a way that allows directors to be able to recognize, in the moment of decision-making, whether they are safe or not. When there are doubts about whether a certain decision is "covered" by the BJR, it is necessary to prefer interpretation favourable to directors. The author of this article suggests that business decisions, which were adopted in good faith, i.e., in the justifiable interest of the company (including absence of conflict of interest), based on sufficient information, and not being irrational, should be protected. If all pre-requisites are met, process can be described as proper, and the director (and subsequently the court) can conclude that decision was adopted with due care. The formulation of the BJR can thus serve as "the best practice" for directors to specify, which elements shall be included.[57]

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[57] MERKT, *c. d.*, p. 143.

THE SOLUTION OF HUNGARIAN COMPANY LAW IN CONNECTION WITH DUTY OF CARE AND DUTY OF LOYALTY[1]

ÁDÁM AUER, TEKLA PAPP

Abstract: The tasks and duties of a company's directors are diverse and varied in companies. Among these, the duty of care and duty of loyalty is generally widespread in European company law. Our contribution to this topic focuses on company law provisions, legal practice, and professional opinions in Hungary. We do not deal with the sanctioning harmful activity of the director in bankruptcy and compelled cancellation procedures.

Keywords: liability for breach of contract; piercing of the corporate veil; acting with care and diligence; responsibility for internal governance

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1. INTRODUCTION

Companies (business associations) are classic examples of principal-agent situations. During the life of a company, special attention should be paid to whose interests are the primary consideration.[2] The executive officer[3] (director) is the agent in the company who's careful diligent action is expected.[4] Towards whom is this care directed? Can the law guarantee that a director will put the interests of the company first? Monetary compensation paid by the director is an *ex post* type of legal strategy to agency problems.[5] The paper presents the Hungarian corporate law solution to the ge-

[1] The paper is published within the framework of the ELKH-PTE-NKE Research Group of Comparative and European Employment Policy and Labour Law.

[2] KRAAKMAN, R. et al. Consider delegated management with a board structure as a key element of the company. In: KRAAKMAN, R. et al. *The Anatomy of Corporate Law*. 3rd ed. Oxford: Oxford University Press, 2017, p. 11.

[3] Resulting from the general rules on legal person of the Hungarian Civil Code the Hungarian company law uses the phrase of executive officer for the managing organ of legal person, and the expressions managing director at general and limited partnerships, also at limited liability company, and board of directors at private company limited by shares, and also board of directors at two-tier system and management board at uniform management system at public companies limited by shares.

[4] The general issue of duty of care see DAVIES, P. *Introduction to Company Law*. 2nd ed. Oxford: Oxford University Press, 2010, pp. 150–151.

[5] KRAAMAN, *c. d.*, p. 43; see: GERNER-BEUERLE, C. The duty of care and the business judgment rule: a case study in legal transplants and local narratives. In: AFSHARIPOUR, A. – GELTER, M. *Comparative Corporate Governance*. Cheltenham, Northampton: Edward Elgar Publishing, 2021, pp. 220–241;

neral duty of care, the legal context, the legal literature debates, and the judicial practice governing the issue.

2. THE FRAME OF THINKING ABOUT THE DUTY OF CARE AND THE DUTY OF LOYALTY IN HUNGARY

In the meaning of The European Model Company Act (EMCA)[6] and Aktiengesetz in Germany,[7] Hungarian company law regulation does not contain a duty of care requirement, only a general duty[8] and duty of loyalty[9] (but not in its full sense) from the company's director.[10] Hungarian company law has no rules for the duty of care nor for the duty of loyalty, neither *expressis verbis*, nor implicitly, the Hungarian case law does not use these legal terms either. Therefore, we can deduce these legal institutions from the principles of the Hungarian Civil Code and from the liability provisions for directors.

The Hungarian system is based on the incentive for proper behaviour, which has its roots in the general principles of the Hungarian private law: principles of good faith, fair dealing,[11] generally expected standard of conduct,[12] and prohibition of abuse of rights.[13]

HOPT, K. J. Directors' Duties and Shareholders' Rights in the European Union: Mandatory and/or Default Rules? *ECGI – Law Working Papers* [online]. 2016, No. 312, p. 16 [cit. 2021-10-01]. Available at: http://ssrn.com/abstract=2749237.

6 EMCA Section 9.03 Duty of Care: A director of a company must exercise reasonable care, skill and diligence. This means the care, skill and diligence that would be exercised by a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has [online]. [cit. 2021-10-14]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348&download=yes.

7 Aktiengesetz Section 76 Leitung der Aktiengesellschaft: (1) Der Vorstand hat unter eigener Verantwortung die Gesellschaft zu leiten.

8 EMCA Section 9.01 General Duties: (1) The company's directors are responsible for the management of the company's affairs [online]. [cit. 2021-10-14]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348&download=yes.

9 EMCA Section 9.04 Duty of Loyalty: Directors must act in the way they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In doing so the director should have regard to a range of factors such as the long-term interests of the company, the interests of the company's employees, the interest of company's creditors and the impact of the company's operations on the community and the environment [online]. [cit. 2021-10-14]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348&download=yes.

10 Hungarian Civil Code (HCC) Section 3:21(1) Decisions related to the management of a legal person that fall outside the powers of the members or founders shall be adopted by a director or directors or by a body of directors. (2) Directors shall perform their management duties in the interests of the legal person.

11 HCC Section 1:3(1) Parties shall act upon the requirement of good faith and fair dealing when exercising rights and fulfilling obligations. (2) The requirement of good faith and fair dealing is also breached by the person whose exercise of rights is contrary to his previous conduct upon which the other party could reasonably rely on.

12 HCC Section 1:4(1) Unless otherwise provided in this Act, in civil law relations, one shall proceed with the care that is generally expected under the given circumstances. (2) No one can rely on his own fault for gains. (3) A person who is at fault himself may also rely on the fault of the other party.

13 HCC Section 1:5(1) Abuse of rights shall be prohibited by an Act. (2) If the abuse of rights consists of refusing to give a statement required by law, and this conduct harms an overriding public interest or a personal

These principles reflect in the Hungarian Civil Code relating to liability: the legislator distinguishes between the obligation to fulfil commitments and liability. Regarding liability, we can differentiate, in a legal sense, between contractual[14] (liability for a breach of contract) and delictual[15] (tortious liability) liabilities. In both these types of liability the courts do not measure the care of the legal entity, but the measurement is the causality and foreseeability, or the general expectation in the given legal situation.

Also, the outgrowths of these fundamental principles and liabilities can be found in Hungarian company law:

a) for the member of company (at both partnerships and limited companies) with the membership's commitment (for cooperation)[16] and liability (for causing damage to a third party),[17]
b) for all directors of company (at both partnerships and limited companies) with the general duty, the duty of loyalty and the liability.[18]

The legal consequences of a breach of obligations/duties and damages are compensation, the exclusion of member[19] or unilateral termination of membership at the general and limited partnerships,[20] and the dismissal of director.[21]

Among the other Hungarian legal persons[22] a similar provision is located in the regulation of cooperative in the Hungarian Civil Code.[23]

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interest requiring special consideration, this statement may be substituted with the judgment of the court, provided that the harm to interests cannot be averted by other means.

14 HCC Section 6:142 A person causing damage to the other party by breaching the contract shall be required to compensate for it. He shall be exempted from liability if he proves that the breach of contract was caused by a circumstance that was outside of his control and was not foreseeable at the time of concluding the contract, and he could not be expected to have avoided that circumstance or averted the damage.

15 HCC Section 6:519 A person causing unlawfully damage to another shall compensate for the damage caused. The person causing damage shall be exempted from liability if he proves that he was not at fault.

16 HCC Section 3:88(3) Members shall cooperate with each other and with the bodies of the business organisation, and they shall not engage in activities that jeopardise the achievement of the objectives of the company.

17 HCC Section 6:540(2) If a member of a legal person causes damage to a third party in connection with his membership relationship, the legal person shall be liable towards the injured party. (3) The member shall have joint and several liability with the legal person, respectively, if the damage was caused intentionally.

18 HCC Section 3:24(1) The director shall be liable to the legal person for the damage caused to it during his management activities according to the rules on liability for damage caused by breach of contract. (2) The legal person shall be liable for any damage caused to a third party by the director acting in his competence. The director and the legal person shall be jointly and severally liable if the director caused the damage intentionally.

19 HCC Section 3:107(1) The member of a company may be excluded from the company by a court decision based on an action brought by the company against the member concerned if his remaining in the company seriously jeopardised the objectives of the company.

20 HCC Section 3:147(2) Members may unilaterally terminate their membership in writing, indicating its reason if any other member of the partnership seriously breaches the memorandum of association or engages in a conduct that seriously jeopardises further cooperation between him and the other members or the achievement of the objectives of the partnership.

21 HCC Section 3.25(1)(c).

22 Association, cooperative, grouping and foundation.

23 HCC Section 3:347(1) Directors shall manage the operations of cooperatives autonomously, complying with the overriding priority of the interests of the cooperative. In this capacity, the director shall be bound by the law, the articles of association and the resolutions of the general meeting. Directors shall not be instructed by the members of the cooperative and the general meeting shall not relieve him of his powers.

2.1 THE LIABILITY OF A DIRECTOR[24]

In Hungarian company law, the liability of a director is regulated by several acts and in several ways; for this reason, we shall classify the respective established facts in accordance with a number of criteria in the following.

2.1.1 THE GENERAL LEGAL GROUNDS FOR THE LIABILITY OF A DIRECTOR TOWARDS THE COMPANY AND THE CREDITORS

A director must be held liable for the damages caused to the company[25] by their management activities, in accordance with the provisions on the liability for damages caused by a breach of a contractual obligation.[26]

The legal person shall be liable for any damage caused to a third party by a director acting in their competence. A director and legal person shall be jointly and severally liable if the director caused the damage intentionally.[27]

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(2) After the termination without succession of the cooperative, those who were members at the time of deleting the cooperative from the register ma enforce their claim for damages with respect to any damage caused to the cooperative by the directors acting in that capacity within a term of preclusion of one year from the deletion. Members may assert their claim for damages in proportion to their rightful share of the assets distributed upon termination of the cooperative. (3) In the event of a cooperative terminating without succession, creditors may bring action for damages up to the amount of their outstanding claims against the director of the cooperative according to the rules on extra-contractual liability if the director concerned failed to take the interests of the creditors into account when a condition threatening to cause insolvency in the cooperative emerged. This provision shall not apply to termination by winding up.

[24] AUER, Á. Vezető tisztségviselő felelőssége [Liability of director]. In: DÚL, J. – LEHOCZKI, Z. Z. – PAPP, T. – VERESS, E. (eds.). *On the basis of Társasági jogi lexikon* [Company law encyclopedia]. Budapest: Dialóg Campus Kiadó, 2019, pp. 315–319; see more in: NOCHTA, T. A polgári jogi felelősség változásairól a társasági jogban [On changes of private law liability in company law]. *Gazdaság és Jog*. 2019, No. 7–8, pp. 12–18; NOCHTA, T. A vezető tisztségviselők magánjogi felelősségének mércéjéről és irányairól az új Ptk. alapján [The standard and direction of the private law liability of directors are set out in the new Civil Code]. *Gazdaság és Jog*. 2013, No. 6, pp. 3–8; BODZÁSI, B. A jogi személyek körében felmerülő felelősségi kérdésekről, különös tekintettel a vezető tisztségviselőkre [On liability issues among legal persons, in particular to directors]. *Gazdaság és Jog*. 2013, No. 6, pp. 8–14; GÁL, J. A vezető tisztségviselő felelősségének egyes kérdései a gazdasági társaságoknál [Certain issues of the liability of director in companies]. *Céghírnök*. 2014, No. 6, pp. 3–6; GÁL, J. A vezető tisztségviselő felelősségének egyes kérdései a gazdasági társaságoknál [Certain issues of the liability of director in companies]. *Céghírnök*. 2014, No. 7, pp. 3–4; BARTA, J. A gazdasági társaság vezető tisztségviselőjének felelősségi rendszere és a vezetői felelősségbiztosítás [Liability system of the company's director and the liability insurance]. In: HOMICSKÓ, Á. O. – SZUCHY, R. (eds.). *60 studia in honorem Péter Miskolczi-Bodnár, de iuris peritorum meritis 11*. Budapest: KRE ÁJK, 2017, pp. 25–37; BARTA, J. – MAJOROS, T. A vezető tisztségviselő gazdasági társasággal szembeni és harmadik személyeknek okozott károkért való felelősségének neuralgikus kérdései [Neuralgical issues of the liability of an director for damages to a company and to third parties]. *Miskolci Jogi Szemle*. 2015, No. 2, pp. 5–16; KISFALUDI, A. Anyagi és eljárási szabályok a gazdasági társaságok vezető tisztségviselőinek hitelezőkkel szembeni felelőssége körében [Substantive and procedural rules on the liability of company's directors towards creditors]. In: HOMICSKÓ, Á. O. – SZUCHY, R. (eds.). *60 studia in honorem Péter Miskolczi-Bodnár, de iuris peritorum meritis 11*. Budapest: KRE ÁJK, 2017, pp. 321–336.

[25] The threat of the damage does not establish the director's liability, the damage must occur; BDT 2020. 4253. (Casebook of the Courts).

[26] HCC Section 3:24(1) and 6:142; BDT 2019. 3994.; BDT 2019. 4011. (Casebook of the Courts).

[27] HCC Section 3:24(2); see in: MISKOLCZI-BODNÁR, P. A társasági jog egyes problémái [Some problems of company law]. *Gazdaság és Jog*. 2019. No. 3, pp. 7–14.

When making a judgement upon the damage caused by a director, the membership of the director in the company does not count, for it is not the fact of the membership, but the fact of having violated the duties of a director and what carries the liability.[28]

2.1.2 SPECIAL LIABILITY OF A DIRECTOR TOWARDS THE COMPANY AND THE CREDITORS IN RESPECT TO THE FOUNDATION, OPERATION, AND THE TERMINATION OF THE COMPANY

The person appointed to represent the legal person shall be responsible[29] for submitting the request for the registration of the legal person to be established, so the representative shall be liable to the founders according to the provisions on the liability for damages caused by breaching a contractual obligation for damage caused by their failure to either submit the request or the submission thereof in due time, or if they did it in a deficient or erroneous form.[30]

In case the registration of the company (at the pre-company period) has been rejected by virtue of a decision with binding force, the company under registration must terminate its operation without delay, having gained knowledge about the decision. For damage caused by a breach of this obligation, the directors of a registered company are liable, according to the provisions on the liability for damage caused by breaching a contractual obligation.[31] If the operation of a registered company (at the pre-company period) shall become terminated, the obligations undertaken until that time shall be settled from the assets made available to the pre-company; if the liability of the members of the pre-company for the obligations of the company was limited, and if certain claims have still remained unsettled despite the proper fulfilment of the members, then the directors of the pre-company shall bear unlimited responsibility (fiduciary duty) as joint and several, against third parties.[32] These provisions are also applicable if the company shall withdraw its request for registration.[33]

During the operation of company, in case the supreme body of the company shall grant the director a certificate of discharge from the compliance of their management activities realized in the previous financial year at the same time with their approving of the financial report upon the request from the managing director. The company may only enforce its claim against a director for damage they have caused by the violation of their director's obligations, if the facts and data that served as the basis for the granting a discharge were false or defective.[34]

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28 BDT 2018. 3959.; BDT 2019. 4011. (Casebook of the Courts).

29 For the responsibility and liability of the director see: MISKOLCZI-BODNÁR, P. Felelősség és helytállás [Liability and responsibility]. *Glossa Iuridica*. 2017, No. 1–2, pp. 111–145; MISKOLCZI-BODNÁR, P. Helytállás a társaság tartozásaiért [Responsibility for the debts of company]. In: BENKE, J. – FABÓ, T. (eds.). *A puro pura defluit aqua, Ünnepi tanulmányok Nochta Tibor professzor 60. születésnapja tiszteletére* [Festive studies in honor of Professor Tibor Nochta's 60th birthday]. Pécs: PTE ÁJK, 2018, pp. 197–209.

30 HCC Section 3:12.

31 HCC Section 3:101(4); A pre-company which may enter into contracts and carry out an economic activity (other than an activity subject to official authorization) shall be represented by a director who has an agency or employment relationship with the pre-company.

32 HCC Section 3:101(5).

33 HCC Section 3:101(6).

34 HCC Section 3:117.

In a group of companies, a director of a controlled company shall manage the controlled company in accordance with the controlling contract, under the governance of the dominant company, based on the primacy of the business policy of the group of corporations as a whole. The director shall be exempt from the liability of members if their conduct is found to be in compliance with the provisions set out in the relevant legislation and in the controlling contract.[35]

After the termination of the company without succession, those who were members at the date of the deletion of the company, may enforce their claim for the damages against the directors within a term of preclusion of one year from the date of dissolution of the company; the members are entitled to lay such claims for such damages to the extent of their rightful share in the assets distributed.[36]

If the company is terminated without succession, the creditors may enforce their claims for damages up to the amount of their unsettled claims against the directors of the company, based on the rules on the liability to be borne for the damages caused under extra-contractual obligations,[37] if the director involved did fail to take into account the interests of the creditors when the circumstance endangering the company with insolvency did set in;[38] this provision is non-applicable in the event of termination by winding-up.[39]

2.1.3 SUMMARY REMARKS

The legal grounds for the liability of a director can be

- objective: under the scope of an objective liability, there is no exculpation for the director (full and unconditional liability),[40] or
- subjective: regarding the subjective liability, the director may exculpate their conduct on the basis of legislative means (they proceeded with the care that is generally expected under the given circumstances at director's position ≈ no fault). But the legislature is not consistent: the equiponderant acts of the director, nevertheless, are judged differently.

The next factors create more difficulties in respect to the qualification of the liability that falls upon a director: the managing directors can act either on the grounds of their

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35 HCC Section 3:5 (4).
36 HCC Section 3:117(1), (3).
37 HCC Section 6:519.
38 BH 2022. 50. (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia): In a situation threatened with insolvency, the management of the debtor and the consequent reduction of their assets do not automatically lead to a finding of liability on the part of a director; this is only possible in the event of a reduction in assets due to the reprehensible conduct of the director. Such reprehensible conduct is if the director makes an unreasonable decision or a reduction in assets that is economically unreasonable occurs.
39 HCC Section 3:118.
40 For example: if the liability of the members of the pre-company for the obligations of the company was limited, and if certain claims have still remained unsettled despite the proper fulfilment of the members, then the directors of the pre-company shall bear responsibility against the creditors.

employment[41] relationship[42] (mixed obligation: diligence, and achieving certain results) or their agency relationship[43] (diligence obligation: duty of care as agent), and they can exercise their acts together or independently. Lastly, the jurisprudence is not unified in the matter of joint and several liability (can it also apply to the director's independent actions?).[44]

3. THE DUTY OF CARE IN CONNECTION WITH A DIRECTOR'S LIABILITY IN THE HUNGARIAN LEGAL LITERATURE

After presenting the legal environment in which the liability of directors is addressed, we briefly review the legal literature on the subject. In the Hungarian legal literature, the issue of director's liability has been extensively discussed, resulting in both comprehensive works and sources interpreting current legislative changes.[45] The latter is the most relevant for our topic. There have been two sources of debate in the literature, as the provisions governing the liability of a director have been significantly modified on two points in the last decade. It can be concluded that the literature debate has contributed to a rethinking of the fundamental issues related to the liability of directors.

3.1 THE POTENTIAL CONSEQUENCES OF THE NEW PARADIGM OF CONTRACTUAL LIABILITY

The first amendment, which was a general civil law amendment, was a change to the liability provisions of HCC, which separated the tort, non-contractual (delictual) liability rules from the contractual, breach of contract liability rules. This situation arises when a company is damaged by a director and the company wants to claim against said director. The general exculpatory rule for liability for breach of contract has been tightened and made objective, which can be summarised as the foreseeability rule.[46] There has been a heated debate in the legal literature as to the element of the

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41 HCC Section 3:112 [Autonomy of executive officers] (1) The executive officer shall manage the operations of the company under an agency contract or an employment contract, according to his agreement with the company.

42 Section 6:540(1) of the HCC: If an employee causes damage to a third party in connection with his employment relationship, his employer shall be liable towards the injured party. (3) The employee [...] shall bear joint and several liability with the employer…, respectively, if the damage was caused intentionally.

43 Section 6:542(1) of the HCC: If an agent causes damage to a third party in his capacity as an agent, the agent and the principal shall have joint and several liability towards the injured party. The principal shall be exempted from liability if he proves that he cannot be at fault with respect to selecting the agent, providing him with instructions and supervising him. (2) In the case of an agentive relationship of permanent nature, the injured party may also enforce his claim for the reparation of his damages in accordance with the rules on liability for damages caused by employees.

44 SZÍT Gf. III.30.185/2017/4. (Decision of the High Court of Appeal of Szeged).

45 TÖRÖK, T. *Felelősség a társasági jogban* [Liability in company law]. Budapest: HVGORAC, 2015; and FUGLINSZKY, Á. *Kártérítési jog* [Tort law]. Budapest: HVGORAC, 2015.

46 See above Point 2.

foreseeability rule in which the date of conclusion of the contract is considered to be the relevant date for the purposes of exculpation: the contract between the company and the director or the contract on which the damage is based. As regards the other conditions, there was general disagreement, since it is not only applicable to the legal relationship of a director but is also applied in general in the case of breach of contract. A transaction (contract) entered into in the course of a director's activity, or a transaction entered into at the time of the creation of a director's relationship, or possibly a combination of the two. Several solutions to this situation have been put forward in the literature. The central issue being from what point in time, in the case of a possible wrongful act, can a director be expected to have foreseen the harmful consequences of the wrongful act. The obvious one is the date when the contract is concluded between a director and the company giving the mandate of directorship; it has also been suggested that, beyond that date, the relevant criterion in the case of continuous activity is whether the interests of the company were taken into account, i.e., whether this is a precondition for the specific tort, and, somewhat similarly but differently from the wording of the law, the date the contract concluded during the course of the director's specific activity.[47] However, this debate is not yet settled, as there is no consensus in the literature on this issue due to a lack of current case law.

In our view, the debate has revealed an opinion that is a prerequisite for the potential exculpation: whether there has been a breach of contract at all. The first thing to be examined when considering the liability of a director is the fact of a breach of director's duty. In other words, it is necessary to prove whether a breach of contract has occurred before the exculpation. If so, the other conditions can be examined; if not, this in itself prevents liability.[48] However, this latter view has been presented in several places.[49] The essence of this position is that the first question to be proved is the fact of a breach of contract and the breach is caused by the conduct or failure of a director. This would appear to avoid the problem of foreseeability, but provides an answer to the question of how the new contractual liability rule should be applied to the liability of the director.

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47 BARTA – MAJOROS, *c. d.*, p. 12; BODZÁSI, *c. d.*; and in summary: FUGLINSZKY, Á. Az előreláthatósági klauzula értelmezésének újabb dilemmái [New dilemmas in the interpretation of the foreseeability clause]. *Gazdaság és Jog*. 2019, No. 7–8, pp. 1–7; TERCSÁK, T. Vezető tisztségviselő jogállása, felelőssége [The legal status and liability of director]. In: LŐRINCZ, G. (ed.). *A vezető tisztségviselő jogállása és felelőssége* [The legal status and liability of directors]. Budapest: HVG-ORAC, 2017, pp. 105–106.

48 KEMENES, I. A kontraktuális kártérítés egyes kérdései [Certain issues of contractual liability]. *Magyar Jog*. 2017, No. 1, pp. 1–10.

49 KISFALUDI, A. 3:24. § kommentárja [Commentary on § 3:24]. In: VÉKÁS, L. – GÁRDOS, P. (eds.). *Kommentár a Polgári Törvénykönyvhöz* [Commentary to the Civil Code]. Budapest: Wolters Kluwer, 2021 [via database]; TÖRÖK, G. 3:24. § kommentárja [Commentary on § 3:24]. In: GADÓ, G. (ed.). *Az új Ptk. magyarázata* [Explanation of the new CC]. Budapest: HVGORAC, 2021 [via database]; KEMENES, *c. d.*, p. 9; FUGLINSZKY, *Az előreláthatósági klauzula értelmezésének újabb dilemmái*, p. 5; Opinion of the Advisory Board of the Curia on the interpretation of the Civil Code HCC § 3:24.

3.2 THE (UN)LIMITED LIABILITY TO THIRD PARTIES

The other issue was the institution of the transfer of liability to a director (piercing of the corporate veil, Haftungsdurchgriff).[50] The text of HCC, in force until 2016, was regulated as a delictual form (extra contractual) of compensation that a director is jointly and severally liable with the company if they cause damage to a third party in the context of this legal relationship. The literature has kept this issue constantly on the agenda, the main question being whether there is then any independent liability of the company and whether this rule does not mean that any action of a director gives rise to a creditor suing the director directly.[51] Thus, this would result in an inadequate number of suited directors, because they would not be able to take such a position due to liability risks. The issue was finally clarified by the legislature in 2016, and the above-quoted HCC 3:24 states that the possibility of liability shifting is only possible if the damage was caused intentionally by the director of company. No new point of contention has subsequently emerged in the literature, this amendment has clarified the original legislative objective and therefore does not provide grounds to question the basis of the liability of a director.[52]

4. THE JUDICIAL PRACTICE OF THE DUTY OF CARE OF A DIRECTOR

4.1 THE NATURE OF THE LEGAL RELATIONSHIP

Judicial practice has been faced with the question of whether the difference in the legal status of a director: employment contract or agency contract, makes any difference to liability. The two normative regimes differ in a number of respects, but the case law shows that there is no difference in the standard of liability, and that the company law regime, as described in the first part of this study, applies to any relationship. Liability is *sui generis* corporate liability the legal relationship has no influence on it.

The question of whether the breach of the legal relationship of a director constitutes a situation which results in said director being held liable has already been touched upon in the legal literature discussion. According to the view expressed in the literature and in judicial practice, the legal relationship of a director is most similar to that of a diligent agent under an agency contract. A director is expected by civil law to act with care and

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50 Piercing of the corporate veil doctrine can apply both to the conduct of the member and to the conduct of a director in Hungary.

51 SÁRKÖZY, T. Még egyszer a vezető tisztségviselők kártérítési felelősségéről [Once again on the liability of directors]. *Gazdaság és Jog*. 2015, No. 2, pp. 3–11; KISFALUDI, A. A jogi személy vezető tisztségviselőinek felelőssége az új Polgári Törvénykönyvben [The liability of the directors of the legal person in the new Hungarian Civil Code]. In: CSEHI, Z. – KOLTAY, A. – LANDI, B. – POGÁCSÁS, A. (eds.). *(L) ex Cathedra et Praxis – Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából* [Festive volume on the occasion of the 70th birthday of Tamás Lábady]. Budapest: Pázmány Press, 2014, pp. 307–338; TÖRÖK, *3:24. § kommentárja*.

52 In the Hungarian legal literature, evaluations of the liability of directors are currently focused on the insolvency proceedings, which are not the subject of this study.

diligence (duty of care) in the management of the company. The main rule for such due diligence of the director is laid down in the HCC 1:4 of the general duty of care and its variation that a director must perform the director's duties diligently and with the care expected of a person holding in a such position.[53]

4.2 THE REASONABLE BUSINESS RISK (BUSINESS JUDGEMENT RULE)

In the case of business decisions, Hungarian judicial practice also applies the business judgement rule. In making their decisions, a director must, as stated above, act in the course of their management activities based on the primacy of the interests of the company, with the care expected of directors and in accordance with the requirements of what is generally to be expected. According to the case law, a wrong decision does not in itself give rise to liability on the part of a director, even if the company suffers damage as a result.[54] Nor is the civil liability of a director based on their criminal conduct *per se*. Thus, judicial practice emphasises the need to take reasonable decisions and to give priority to the interests of the company.[55] In this context, in a case law decision, the reconstructibility and traceability of decisions was also identified as an aspect that proves that a director acted diligently, while its absence may give rise to liability.[56]

The Hungarian judicial practice has established the liability of a director towards a company in cases where there was no justification behind the director's decision to take a potentially wrong decision in the context of business risk.

In one of decision of the Curia, which is still authoritative today, Hungarian case law set out three criteria in relation to the liability of a director.[57] The court must examine whether (a) the economic situation of the company justified the risk they took, (b) the market environment justified the risk, and (c) the risk was foreseeable and manifestly unreasonable. The Curia stated that *"the liability of a director may be established if the director took a foreseeable and manifestly unreasonable risk, having made a wholly erroneous assessment of the situation of the company and the market environment"*. The Curia underlined that a director cannot claim to be exempt from liability if they conclude a contract in a foreign language with which they are not familiar and therefore they were insecure in the content of the contract. The liability of a director is established as well, if they transfer money to a contracting party without requesting any security in the event of performance or impossibility of performance, or they did not take any necessary measures to enforce its claim for breach of contract, without taking the necessary measures to recover its receivables.[58]

In another case, the court found that there was an unjustified risk in concluding a loan transaction in which the company had granted a loan at an interest rate equal to the rate of inflation, with a negative balance sheet and without any additional security.

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53 KISFALUDI, *3:24. § kommentárja*; TÖRÖK, *3:24. § kommentárja*.
54 BH 2004. 372. (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia).
55 BDT 2004. 959. (Casebook of the Courts); BDT 2017. 3718. (Casebook of the Courts).
56 BDT 2004. 959. (Casebook of the Courts).
57 EBH 2011. 1417. (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia).
58 Ibid.

The director did not take any action to recover the debt when the loan fell due. According to the court, the conduct of a director is not compatible with the duty of care expected of a director and the primacy of the interests of a company.[59]

5. LIABILITY TO THIRD PARTIES (PIERCING OF THE CORPORATE VEIL)

In the course of the operation of a company, there are several types of conflicts of interest, the legal consequences of which must be created by the legal system. In company law, there is an increased demand for compensation from creditors for unsatisfied debts that have been created by abusive behaviour on the part of directors. The legislature can only introduce this instrument with due caution, since it is a matter of applying rules which break with the separate legal personality of the company. These rules may block the assumption of business risks by management and members during its operation: liability rules must therefore be drawn up which deter and repair wrongful conduct and do not reduce the assumption of risks. Following the solutions examined in foreign legal systems (Haftungsdurchgriff, piercing of the corporate veil), the Hungarian legislature has created different rules to sanction such conduct. Under Hungarian law, piercing of the corporate veil can apply both to the conduct of the shareholder[60] and to the conduct of the director.[61] However, the determination of the liability of a director during the operation of a company has become the civil law norm in force today, primarily as a result of a principle developed by judicial practice.[62] The model of judicial reasoning was the following: the essence of the breach of liability was that such conduct of the member (for example, using the company to commit a crime or to organise a pyramid scheme) so grossly offended the requirements of good faith and fair dealing of civil law that it constituted an abuse of rights. In this case, the possibility of a direct action against the director is applicable.[63] The HCC defines intent as a ground for the liability of a director.

In the judicial practice, the court examined the conduct of a director and found that his conduct – under the cover of legal personality – constituted a deliberate abuse for the benefit of his own individual interests and property. Without any justification, the director had handed over a verbal promise of approximately HUF 100 million (approximately EUR 380,000) to obtain a bank guarantee for the company from the other party. He gave the false bank guarantee certificate to the contracting party, from whom he resold a large quantity of goods at a substantial loss and deducted the proceeds for himself. The court held that the company, under the guise of its separate legal personality

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[59] BDT 2021. 4321. (Casebook of the Courts).
[60] HCC Section 3:2.
[61] HCC Section 3:24.
[62] BH 1999. 465. (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia); BDT 2012. 2727. (Casebook of the Courts); BDT 2012. 2707. (Casebook of the Courts).
[63] Where appropriate, against the member as well.

and in abuse of its separate liability, had engaged in conduct which had caused loss to the contracting third party.

6. SOMETHING NEW UNDER THE SUN?

In Hungarian judicial practice, for the time being, this in cases with financial institutions, but a decision of the Curia (Hungarian Supreme Court) has added new elements to the practice regarding the liability of the director in several aspects.[64]

According to a case of Hungarian Supreme Court, Curia, at a financial company, the organ to exercise the activity of financial supervision (the Hungarian National Bank) conducted an *ex officio* proceeding, as the result of which identified several instances of malpractice and, after the permit of the company was withdrawn, liquidation of the company was initiated.

The company intended to enforce the fine as damages caused by the director against the company. During the lawsuit, the court determined that the liability of a member of the board should prevail both in the case of having committed the breach of law directly (the breach of law is the direct result of their own decision, their own instruction), or indirectly (the breach of law is realized by the fault, deficiency of the control system being operated by the leadership), likewise. The jurisprudence has so far not defined director's decisions, a new aspect in our view and a way forward.

However, the responsibility of the director is not only constituted by wording and adopting the bylaws, and the organizational units shall exist, they are also responsible for ensuring that the bylaws are *de facto* kept in practice. According to the decision of the Curia, this responsibility *"does not only apply in the case of active involvement, but also due to the fact that as a member of a board entitled with governance rights, he/she failed to take action for establishing such responsible corporate governance, responsible internal governance, and did not operate, nor did he/she establish such internal defense lines, that should prevent the possibility of committing those heavy breaches of law, which are determined as burden to fall on the company"*.[65]

Even though in this decision the court evaluated a special deed, that was a breach of professional governance duties, in a way that it could ground the liability of a director thereon, this decision shall be considered as a shift from the preceding judicial practice.

The case is, of course, only one case, but in our opinion, it contains general findings, and the above is certainly a gateway to a significant improvement in judicial practice, as there are several sectors where the content of director's duties is prescribed by legal or other binding norms.[66] However, the above cannot be considered as specific sectoral features that are unique to the financial sector. The "direct" – "indirect" classification of decisions applies to all organisations that are hierarchical at even just one or least two levels. The creation of bylaws and their enforcement is also a general requirement, the amount of which may vary from one company to another.

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[64] BH 2021. 25. (Periodical collection of the decisions of the Hungarian Supreme Court; the Curia).
[65] Ibid.
[66] Whereas the general company law rules do not contain such a provision.

7. CONCLUSIONS

On the grounds of Hungarian legal literature and case law we can recognise common and consensual corner points in connection with the duty of care of a director

- a director is liable for damages caused to the company in the course of management activities according to the rules of private law even if they are acting in the frame of employment;
- the liability of a director can be established if they breach their management obligations under the contract concluded with the company and this causes damage of a material disadvantage to the company;
- the breach of contract by a director is necessarily careless;
- they shall perform their duties with due diligence expected of persons holding such positions; and
- they may be released from liability if they prove that they were acting as generally expected under the given circumstances (generally expected in a director's position).[67]

In the future, the creation and operation of differentiated internal company bylaws will be important. The judicial practice may investigate the activity of directors in more detail. The results of our research show that a director's liability can be used as a general sanction for decisions or a damaging activity of a director. This is of course not new under the sun. The general clause of a director's liability provides the opportunity to do so and is being fleshed out by the judicial practice on a case-by-case basis. Although the content of the duty of care is not defined in Hungarian company law, it is possible to deduce from liability cases what the duty of care actually means.

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[67] KEMENES, *c. d.*, 8–9; Opinion of the Advisory Board of the Curia on the interpretation of the Civil Code HCC § 3:24.

THE DUTY OF CARE IN COMPANY LAW IN POLAND

BARTŁOMIEJ GLINIECKI

Abstract: The liability of directors for failure to perform their duties in a lawful manner is based on general rules of civil liability, however with some modifications making it suitable for corporate application. The duty of care is considered as one of the major directives that must be followed by directors while executing their corporate duties. Polish company law provides for similar rules of directors' liability for violating duty of care in all types of companies. Over the last two decades, many judgements and authors have strived to determine the content of the duty of care and identify rules that could be useful to declare liability in certain cases. Currently, as amendments of applicable regulations are being processed, liability rules for violations of the duty of care in Polish company law shall become more unambiguous and effortless for application.

Keywords: company; duty of care; directors; management board; directors; liability; professional diligence; business judgement rule

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INTRODUCTION

Because of the division between assets' ownership and management in companies, the primary duty of directors is to manage the business affairs of a company. Company directors are expected to fulfil their duties with respect to the best interest of the company. However, they may not bear consequences of all impacts that would turn out to be negative. Polish company law provides for a special regime of civil liability of directors for a violation of their duty of care featuring a professional level of diligence that has to be performed by company directors. Apparently, Polish regulations in the questioned field are undergoing amendments that are focused on explicitly introducing the duty of care as well as aid to determine a lawful pattern of conducting business affairs by adopting the business judgment rule. This paper presents the legal concept of corporate duty of care in Polish law together with major viewpoints on its understanding that can be found in jurisprudence and legal literature.

PURPOSE AND BENEFICIARIES OF THE DUTY OF CARE

The duty of care in company law sets out the desired standard of performing duties by the directors. Hence, their capacities and role in conducting

a company's business, nature of the duty, and grounds for liability of directors are slightly different from the standard tort and contractual liability rules provided by civil law regulations.

Setting this autonomous specification is essential for at least two reasons. Firstly, provisions of law provide for the desired and expected level of diligence in conducting the business of a company by its managers. Secondly, duty of care is used for distinguishing between lawful and unlawful actions taken by managers, whereas the latter may lead to corporate, civil, and penal liability.

Trying to generally express the essence of the said duty, directors act accordingly with their duty of care if they use the best knowledge and all necessary information, act in good faith, and take actions to achieve the company's interests, especially by avoiding suffering any damages or losses by the company.[1] Failure to comply with the corporate duty of care that would negatively impact a company shall be recognised as a breach of a contractual obligation by directors and may result in consequent claims against them.

In order to maximize the efficiency of managing the assets of shareholders, the corporate duty of care provides for a professional level of diligence for directors, which is definitely above the standard level which is applicable under normal conditions in most legal relations. A professional level of diligence is recognised as having proper knowledge and experience by managers, as well as providing enough time and efforts to conduct company business. Managers shall also be aware of their limitations and weaknesses, therefore they shall seek support in decision-making processes provided by e.g., external experts and analyses. The same professional level of diligence is applicable to entrepreneurs while executing their obligations and assessing their contractual liability.[2]

The duty of care in Polish company law is definitely owed to a company. However, its indirect beneficiaries are shareholders as well as other stakeholders of the company whose interests are related in a derivative way to the interests of the company. Nevertheless, it is basically the company that is entitled to raise claims for a breach of duty of care obligation by its directors. The action may be invoked by the management board, yet it requires approval of shareholders,[3] without which it would be considered null.

If a company would not claim for a compensation against a director who had breached their duty of care, any shareholder may invoke a claim on behalf of a company

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1 OPALSKI, A. et al. *Kodeks spółek handlowych. Tom IIb, Spółka z ograniczoną odpowiedzialnością: komentarz, Art. 227–300* [Commercial Companies Code. Volume IIb, Limited liability company: commentary, Articles 227–300]. Warszawa: C. H. Beck, 2018.

2 Article 355 § 2 of Civil Code (the Act of 23 April 1964, consolidated text: Journal of Laws of 2020, item 1740).

3 Article 228 pt. 2 and Article 393 pt. 2 of the Act of 15 September 2000 Commercial Companies Code (consolidated text: Journal of Laws of 2020, item 1526, further amended), further referred to as CCC, stating that *"*[i]*n addition to other matters stipulated in this Division or in the articles of association, the following matters shall require a resolution of the shareholders: 2) decisions on claims for redress of damage caused upon formation of the company or its management or supervision"*. Judgment of the Appeal Court in Katowice of 7 May 2013, V ACa 44/13; judgment of the Appeal Court in Wrocław of 12 April 2012, I ACa 1024/11; judgment of the Appeal Court in Warsaw of 30 August 2011, VI ACa 1273/10.

by means of an *actio pro socio* claim.[4] In general, there are no provisions that would indicate the obligations of directors directly towards shareholders or other third parties, which would constitute the basis of their liability against company stakeholders. A minor exception may be where the insolvency law regulation that that constitutes liability of managers against company creditors for omission to fill for insolvency as soon as the company becomes incapable of repaying its outstanding debts.[5]

A COMPARISON OF DUTY OF CARE IN COMPANY LAW WITH SIMILAR DUTIES IN CIVIL LAW

The legal roots of the duty of care in Polish company law are of a similar nature to other European legal systems that have been based on fundamentals of the Roman legal culture. The corporate duty of care concept is based on the liability of persons who manage entrusted assets that are owned by third parties. Historically, it was developed in the Roman concept of *mandatum* and fiduciary legal relations (*pactum fiduciae*), where confidence in exceptional and professional capabilities as well as the reasonable decisioning of a person who would perform their obligations have major meaning. Moreover, usually no strict outcomes of performance may be anticipated at the time of establishing the obligation.

Currently the duty of care may be compared to other legal relations in two ways. The first one is related to legal institutions with common roots reaching back to Roman law and which are present currently in civil law. These include the relationship of mandate or carrying out someone else's affairs without a mandate (*negotorium gestio*). Their adaptation took place, among others, in inheritance law (executor of the will,[6] curator of the estate)[7] and family law (management of child's property by parents).[8]

In a narrower sense, the problem of liability of persons managing foreign property for damage caused in connection with the wrongful performance of their duties is characteristic for other legal relationships in which a third party has the right (and obligation) to direct an entity or property related to conducting the business activity, which does not have legal capacity. Examples here include partners who manage the business affairs of partnerships,[9] directors in cooperatives,[10] succession manager of a natural

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4 Article 295 § 1, Article 300^{127} § 1 and Article 486 § 1 of CCC.

5 Article 21 sec. 3 of the Act Insolvency law of 28 February 2003 (consolidated text: Journal of Laws of 2020, item 1228).

6 Article 986 § 1 of the Civil code (act of 23 April 1964, consolidated text: Journal of Laws of 2020, item 1740).

7 Article 667 § 1 of the Code of civil procedure (act of 17 November 1964, consolidated text: Journal of Laws of 2021, item 1805).

8 Article 101 § 1 of the Family and guardianship code (act of 25 February 1964, consolidated text: Journal of Laws of 2020, item 1359).

9 Article 45 of the CCC.

10 Article 58 of the Act Cooperative law of 16 September 1982 (consolidated text: Journal of Laws of 2021, item 648).

person's enterprise,[11] administrative receiver in insolvency law,[12] and restructuring administrator in restructuring law.[13]

In case of company directors, the diligence standard is the highest and always remains at the professional level. In other cases of the above regulations, they do not indicate the measure of diligence, which may be ordinary or professional for succession manager, partners in partnerships, and managers of cooperatives. Administrative receivers and the restructuring administrators must provide for a professional measure of diligence, determined by the provisions on the competence requirements of persons performing these functions.

THE LEGAL GROUNDS OF CIVIL LIABILITY FOR VIOLATING CORPORATE DUTY OF CARE

As of February 2022, the legal concept of the corporate duty of care in Poland is undergoing slight changes which are focused on introducing an explicit obligation to perform duties with professional care by directors as well as a general pattern of their proper behaviour in the decision-making process. The traditional and current provisions of Polish company law that are applicable to a limited liability company and joint-stock company do not express explicitly the duty of care.[14] Instead, this obligation is stated indirectly by the wording of provisions that set out civil liability of directors for damages caused to the company.[15]

Newly introduced in 2021, provisions on a simple joint-stock company expressly state the duty of care and duty of loyalty of directors[16] as well as slightly modify their grounds of liability by introducing the business judgment rule, as explained further.[17] Consequent changes to provisions of the Commercial Companies Code (CCC) on limited liability companies and joint-stock companies are being processed by the parliament and are supposed to come into force in Q3 2022. Hence, within a short-term, the duty of care regulations referring to all three types of companies (four types including European company) available in Polish law shall become unified and updated.

According to the most common opinion presented in legal doctrine and jurisprudence, the company law provisions on directors' liability are not standalone liability grounds, but they are based on and complete civil law regulations on contractual

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[11] Article 33 of the act of 5 July 2018 on succession management of a natural person's enterprise and other facilities related to the succession of enterprises (consolidated text: Journal of Laws of 2021, item 170).

[12] Article 160 sec. 3 of the Act Insolvency law of 28 February 2003 (consolidated text: Journal of Laws of 2020, item 1228).

[13] Article 25 sec. 1 of the Act Restructuring law of 15 May 2015 (consolidated text: Journal of Laws of 2021, item 1588).

[14] OPALSKI, A. – OPLUSTIL, K. Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych [Failure to exercise due diligence as a premise of civil liability of managers of companies]. *Przegląd Prawa Handlowego*. 2013, No. 3, pp. 11–23. This is supposed to change as Article 209^1 § 1 and Article 3771 § 1 of the CCC will come into force on 13 October 2022.

[15] Article 293 § 2 and Article 483 § 2 of the CCC, will come into force on 13 October 2022.

[16] Article 300^{54} of the CCC.

[17] Article 300^{125} of the CCC.

liability.[18] Hence, legal elements of this liability are constituted of a behaviour (action or omission) of a director that was contrary to provision of legal norms or company statutes, losses suffered by a company, and adequate causal relationship between the unlawful behaviour and the losses. All the elements must be evidenced by the company claiming compensation, while the duty of care liability regulations of Commercial Companies Code provide for a presumption of fault.[19] Therefore, a director must deliver proof that they have acted with professional diligence in case of an alleged violence of duty of care (reversed burden of proof).

THE PATTERN OF CONSIDERING BEHAVIOUR OF DIRECTORS UNLAWFUL

Primarily, unlawful behaviour of company directors may originate from a failure to comply with obligations (orders, prohibitions) expressed in legal acts aimed both at the company (e.g., tax, accounting, environmental, consumer, competition regulations) and the directors (e.g., duty of loyalty). Definitely the pattern of proper behaviour in question is not limited to company law regulations, but it comprises all regulations of applicable law.

Secondly, directors' behaviour leading to their liability against the company may be a violation of corporate regulations. They include not only company statutes, but also other internal regulations such as e.g., board's rules of operation, company's policies, or compliance regulations – if a duty to comply with them has been included in a company's statutes.[20] A common example of such may be executing a business decision

[18] DUMKIEWICZ, M. – KIDYBA, A. *Komentarz aktualizowany do art. 1–300 ustawy z dnia 15 września 2000 r. Kodeks spółek handlowych* [Updated commentary to Art. 1–300 of the Act of September 15, 2000, Commercial Companies Code]. Warszawa: LEX/el. – Wolters Kluwer Polska, 2022, commentary on Article 293, pt. 2; OPALSKI, A. Commentary on Article 293, pt. I.A.3. In: OPALSKI, A. et al. *Kodeks spółek handlowych. Tom IIb, Spółka z ograniczoną odpowiedzialnością: komentarz, Art. 227–300* [Commercial Companies Code. Volume IIb, Limited liability company: commentary, Articles 227–300]. Warszawa: C. H. Beck, 2018; STRZELCZYK, K. in: SIEMIĄTKOWSKI, T. – POTRZESZCZ, R. et al. *Kodeks spółek handlowych: komentarz. Tytuł III, Spółki kapitałowe* [Commercial Companies Code: Commentary. Title III, Companies]. Warszawa: Wolters Kluwer Polska, 2011; NOWACKI, A. *Spółka z ograniczoną odpowiedzialnością. Tom II, Komentarz: Art. 227–300 KSH* [Limited liability company. Volume II, Commentary: Articles 22–300 of the Commercial Companies Code]. Warszawa: C. H. Beck, 2021, commentary on Article 293, pt. I.4; SZCZUROWSKI, T. Commentary on Article 293, pt. III.B. In: JARA, Z. et al. *Kodeks spółek handlowych: komentarz* [Commercial Companies Code: Commentary]. 3rd ed. Warszawa: C. H. Beck, 2020; POPIOŁEK, W. in: STRZĘPKA, J. et al. *Kodeks spółek handlowych: komentarz* [Commercial Companies Code: Commentary]. 7th ed. Warszawa: C. H. Beck, 2015, pp. 1177–1178; OPLUSTIL, K. *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* [Instruments of corporate governance in a joint-stock company]. Warszawa: C. H. Beck, 2010, pp. 757–758; judgement of the Supreme Court of 10 November 2004, II CK 186/04; judgement of the Supreme Court of 24 September 2008, II CSK 118/08; judgement of the Supreme Court of 15 June 2005, IV CK 731/04; judgement of the Appeal Court in Warsaw of 19 April 2013, VI ACa 1342/12.

[19] Article 293 § 1 *in fine* and Article 483 § 1 *in fine* of CCC.

[20] NOWACKI, *c. d.*, commentary on Article 293, pt. III; OPALSKI, A. Commentary on Article 293, pt. II.B. In: OPALSKI, A. et al. *Kodeks spółek handlowych. Tom IIb, Spółka z ograniczoną odpowiedzialnością: komentarz, Art. 227–300* [Commercial Companies Code. Volume IIb, Limited liability company: commentary, Articles 227–300]. Warszawa: C. H. Beck, 2018. A contrary view was presented by SZCZUROWSKI, T.

taken without shareholders' or supervisory board approval if such corporate governance requirement had been provided for in company statutes.

Directors of a limited liability company and a simple joint-stock company must additionally follow and execute resolutions of shareholders.[21] They may include soft suggestions, expectations, or strict orders to take certain business decisions. Unless shareholders' resolutions would not include an order (expectation) that would be contrary to the regulations of applicable law, failure of directors to comply with the resolution may result in their liability. However, until a court verdict would declare a resolution to be void as contrary to applicable law, directors have to assume its validity and execute it.[22] To avoid potential liability for breach of the duty of care, directors may claim for declaring a shareholders' resolution void.[23] Directors cannot only be obedient contractors, but must independently ensure that their activities are legal, thus following the shareholders' instructions or striving to meet their expectations does not exculpate directors from breaching the duty of care if they would consequently behave unlawfully.[24]

On the contrary, a supervisory board may not express orders to directors on conducting business affairs of a company, neither in a limited liability company,[25] joint-stock company[26] nor in a simple joint-stock company.[27] A similar limitation applies to expressing orders by shareholders in a joint-stock company and European company.[28] Thus, directors do not have to follow such orders expressed in resolutions and would not be liable for a breach of duty of care in such case.

For a correct judgement of potential liability of directors, it may be relevant to analyse the allocation of duties between them that may be determined by company statutes.[29] A director shall act unlawful if they would fail to take care of company's business only within the field of assigned competence (e.g., financial affairs, technical issues, risk management etc.) – if such an assignment has been agreed in the company statutes or e.g., in a resolution on director's nomination. In the latter case, a director would behave unlawfully by violating a legal norm that orders directors to follow the resolutions of shareholders.[30] Directors may not decide themselves on the field of their competence and accordingly on the scope of their potential liability.

Commentary on Article 293, pt. V.B.d. In: JARA, Z. et al. *Kodeks spółek handlowych: komentarz* [Commercial Companies Code: Commentary]. 3rd ed. Warszawa: C. H. Beck, 2020. See also judgement of the Appeal Court in Szczecin of 30 March 2015, I ACa 825/14.

21 Article 207 and Article 300^{53} of the CCC.

22 Resolution of the Supreme Court of 18 September 2013, III CZP 13/13.

23 Article 252 § 1 in connection with Article 250 pt. 1 and Article 425 § 1 in connection with Article 422 § 2 pt. 1 of the CCC.

24 SIWIAK, T. Instytucja miernika staranności w przepisach regulujących odpowiedzialność członków zarządu wobec spółki z ograniczoną odpowiedzialnością w prawie niemieckim i polskim [Institution of a diligence measure in the provisions regulating the liability of management board members towards a limited liability company in German and Polish law]. *Folia Iuridica Universitatis Wratislaviensis*. 2016, Vol. 5, No. 1, p. 113.

25 Article 219 § 2 of the CCC.

26 Article 375^{1} of the CCC.

27 Article 300^{69} § 2 of the CCC.

28 Article 375^{1} of the CCC.

29 Judgement of the Supreme Court of 9 February 2006, V CSK 128/05.

30 Valid for limited liability companies and simple joint-stock companies only – Article 207 and Article 300^{53} of the CCC.

FAILURE TO ACT WITH PROFESSIONAL DILIGENCE

A professional level of diligence constitutes the element of fault, however, further unlawful behaviour of a manager has to be proved in order to determine civil liability. Hence, if a director fails to act with professional diligence, such omission itself may not be recognised as sufficient grounds for their liability. Also, acting with no professional diligence shall not be considered *per se* unlawful.

However, here we must recognise a distinction, which may be hard to see. Without conflicting the abovementioned consideration of a professional diligence standard for the duty of care concept, reckless conducting business affairs of the company may be recognised as unlawful by virtue of a dereliction of management duties originating from directors' role as company's board members. This issue is however troublesome on grounds of the Polish CCC and results in different opinions.

On one hand some authors believe that the duty of care should be perceived as a statutory element of the organizational relationship between directors and the company.[31] Provisions of the CCC that define the basic competences of corporate bodies – and thus the obligations of the members of these organs – contain the implicit requirement of exercising them with due diligence at a professional level. The essence of the organizational relationship is to impose an order to proceed on the mandate with due diligence, which allows for the satisfaction of the company's interest as a creditor.[32] Therefore, a breach of obligation to perform directors' duties with professional diligence is considered as unlawful and as such may constitute an independent basis for liability. The duties of a director result from Article 201 § 1 of the CCC and when deciding on the conduct of company's affairs, the manager should be guided solely by its interests, and culpable actions exceeding the limits of economic risk are contrary to the company's interest and violate the general order specified in Article 201 that justify the liability of a director pursuant to Article 293 § 1 of the CCC.[33] In other words, according to this concept, all activities of directors shall be executed with professional care – even though until Q3 2022 it had not been explicitly stated in the provisions of the CCC – and failure to execute a certain obligation with due care may be recognised as leading to a director's liability against the company. This viewpoint will be sustained after the completion of undergoing amendments of the CCC provisions on civil liability of directors for violation of duty of care.

On the other hand, there is another view shared by most of the Polish jurisprudence claiming that failure to act with due diligence *"resulting from the professional nature of*

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[31] OPALSKI, A. – OPLUSTIL, K. Niedochowanie należytej staranności jako przesłanka odpowiedzialności cywilnoprawnej zarządców spółek kapitałowych [Failure to exercise due diligence as a premise of civil liability of managers of companies]. *Przegląd Prawa Handlowego*. 2013, No. 3, pp. 11 and further; OPLUSTIL, *c. d.*, pp. 763–767; POPIOŁEK, W. in: STRZĘPKA, *c. d.*, p. 1178; NOWACKI, *c. d.*, commentary on Article 293, pt. V.

[32] OPALSKI, A. Commentary on the Article 293, pt. II.C.1. In: OPALSKI, A. et al. *Kodeks spółek handlowych. Tom IIb, Spółka z ograniczoną odpowiedzialnością: komentarz, Art. 227–300* [Commercial Companies Code. Volume IIb, Limited liability company: commentary, Articles 227–300]. Warszawa: C. H. Beck, 2018.

[33] Judgement of the Supreme Court of 24 July 2014, II CSK 627/13. A similar view was presented in the judgement of the Supreme Court of 14 April 2016, II CSK 430/15.

his activity" (Article 293 § 2 of the CCC[34]) does not qualify as an act contrary to the law or provisions of the company statutes. The measure of diligence indicated in Article 293 § 2 of the CCC is the fault criterion and its fulfilment is not a release from the obligation to separately establish the unlawfulness of the actions of a director. Thus, unlawfulness should be demonstrated by indicating a specific legal provision or company statutes that have been violated.[35]

FACTORS DETERMINING PROFESSIONAL DILIGENCE OF DIRECTORS

Due to complexity and variety of cases it is impossible to precisely determine a desired way of managing business affairs of a company in a way that could serve as a valid pattern of professional diligence. Also, specific circumstances regarding the company in question such as e.g., its size or scope of business activity may influence the issue. Hence, only some typical and general guidelines applicable in some cases have been provided here by the Polish jurisprudence and authors. Furthermore, it has to be underlined that a partial solution for determining the proper attitude of company directors may be a business judgement doctrine which will be presented further in this paper.

The duty of company directors to act with professional diligence includes a presumption that they are considered as professionals in the field of managing business affairs of a company, even though they would not actually have proper education nor experience. Thus, taking up the duties of a director in the absence of appropriate education and knowledge or experience needed to conduct the company's affairs should qualify as a breach of the required diligence.[36] The fact that a director does not have the necessary education or does not have sufficient knowledge of legal regulations may not exclude their liability for damages caused to the company. By agreeing to be appointed to the management board of a limited liability company, the director guaranteed having necessary skills to perform the entrusted post.[37]

The Polish jurisprudence emphasises that although a lack of education, skills, or experience may not release directors from bearing fault and liability against the company, a precise description of their desired level and shape of education, skills, or experience

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[34] Repealed since 13 October 2022 and substituted by newly introduced Article 2091 § 1 and Article 3771 § 1 of the CCC.

[35] Judgement of the Supreme Court of 9 February 2006, V CSK 128/05; judgement of the Appeal Court in Warsaw of 18 August 2011, I ACa 54/11; judgement of the Appeal Court in Łódź of 19 December 2012, I ACa 946/12; judgement of the Appeal Court in Białystok of 22 October 2014, I ACa 375/14; judgement of the Appeal Court in Kraków of 12 January 2016, I ACa 1413/15; DUMKIEWICZ – KIDYBA, *c. d.*, commentary on Article 293, pt. 6; SZCZUROWSKI, T. Commentary on Article 293, pt. V.B. In: JARA, Z. et al. *Kodeks spółek handlowych: komentarz* [Commercial Companies Code: Commentary]. 3rd ed. Warszawa: C. H. Beck, 2020; SIEMIĄTKOWSKI, T. *Odpowiedzialność cywilnoprawna w spółkach kapitałowych* [Civil liability in companies]. Warszawa: C. H. Beck, 2007, pp. 177–179.

[36] Judgement of the Supreme Court of 6 June 1997, III CKN 65/97; judgement of the Appeal Court in Łódź of 16 April 2014, I ACa 1157/13; judgement of the Appeal Court in Łódź of 15 January 2016, I ACa 1003/15; judgement of the District Administrative Court in Szczecin of 12 October 2017, I SA/Sz 471/17.

[37] Judgement of the District Administrative Court in Warsaw of 15 February 2021, VII AGa 763/19.

that would be valid universally or in the most common circumstances cannot be provided here. As a matter of fact, allegations of improper competence to deal with the business affairs of a company have to be confronted with a desired model of knowledge and skills *ad casum*.

Assuming that no one possess absolute and comprehensive knowledge – and also directors have to be aware of their limitations in that field – company directors shall seek professional advice provided by experts.[38] Failing to do so would be recognised as an inability to recognise circumstances correctly that would reveal a lack of professional diligence.[39] At the same time, it has to be also accentuated that the mere fact of entrusting a problem to a person dealing with it professionally and having an appropriate education is not tantamount to exercising professional diligence by directors. Possessing the competence to manage a company's affairs, they cannot shift responsibility for decisions made to a person subordinate to directors or acting on their behalf.[40] This concept remains true both for business decisions made on the basis of internal analyses drafted by a company's employees as well as opinions provided to company managers by external experts. Accordingly, opinions and analyses shall only be recognised as desired support measures in a properly conducted decision-making process and cannot substitute own assessment made by directors.[41]

BUSINESS JUDGEMENT RULE IN POLISH COMPANY LAW

Conducting business affairs of a company by its managers is associated with a possible risk of causing damage. From the point of view of their responsibility, it is of key importance to determine the scope of acceptable risk – bearing the amount of risk which is justified considering the diligence measure applicable to managers. Excessive protective measures against bearing potential liability would not be beneficial for a company and its economic owners as the company most likely would be less competitive compared to other enterprises, thus its profits would be lower. On the other hand, excessive risk would also not be appropriate – of course when, as a result of unwise overestimation of opportunities, the company's outcome on the business decision made would be different from the one assumed.[42]

Because of the legal nature of duty of care, it is impossible to precisely describe the correct and lawful behaviour of directors in a certain case. In other words, application

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38 Judgement of the Supreme Court of 17 May 2016, II UK 246/15.

39 Judgement of the Supreme Court of 2 April 2014, IV CSK 404/13.

40 Judgement of the Appeal Court in Poznań of 11 October 2012, I ACa 336/12; judgement of the Appeal Court in Gdańsk of 29 July 2014, V ACa 781/13.

41 WAJDA, D. Jeszcze o należytej staranności członków zarządów spółek kapitałowych [More about the due diligence of members of management boards of companies]. In: BILEWSKA, K. – KREKORA-ZAJĄC, D. (eds.). *Wykonanie zobowiązań: księga jubileuszowa dedykowana profesorowi Adamowi Brzozowskiemu*. Warszawa: C. H. Beck, 2021, pp. 575–577.

42 OKOLSKI, J. – MODRZEJEWSKI, J. – GASIŃSKI, Ł. Odpowiedzialność członków zarządu w spółkach kapitałowych – miernik staranności [Liability of directors in companies – a measure of diligence]. In: NOWICKA, A. (ed.). *Prawo prywatne czasu przemian: księga Pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*. Poznań: Wydawnictwo Naukowe UAM, 2005, p. 503.

of generally phrased legal norms in actual circumstances actually may not lead to unambiguous results and strict answers. As a result, directors are uncertain of the accuracy of their decisions in legal perspective and prone to bear future liability as the decisions would turn out to be unlawful and detrimental for the company. In order to protect directors against an excessive and unaccepted risk of bearing liability for damages caused to the company as a result of business decisions that have been made reasonably, a concept referred to as business judgement rule appeared in the legal doctrine and jurisprudence. It may be considered as "safe harbour" or "safe pattern" for directors in a business decision-making process, saving them from potential accusations of violating the corporate duty of care they should have obeyed.

When analysing the business judgment rule, it is clearly indicated that the centre of gravity of the assessment should be shifted from the effect of a decision to the process of reaching it. For example, we shall not assess the very fact of concluding the contract, which turned out to be unfavourable, but examine the process that brought the management board to signing the contract, i.e., proper analysis of financial situation of the contractor or introduced collaterals against non-performance of a contract.[43]

Focusing on Polish company law, the business judgment rule concept initially appeared in 2005 in a soft-law recommendation of the Warsaw Stock Exchange titled *Best practices code for public listed companies*.[44] Also, company law doctrine raised interest on this approach and started to promote it. It has been acclaimed as compliant with in-force regulations and therefore many authors argued that it may be possible to use the concept even without its direct adoption into the CCC provisions.[45] Finally, the concept of business judgment was explicitly introduced in 2021, together with newly regulations of a simple joint-stock company. Consequently, parallel amendments have been adopted to provisions applicable to limited liability and joint-stock companies in February 2022.[46]

The newly adopted provisions in question provide that a member of the management board, supervisory board, audit committee, and liquidators do not violate the obligation to exercise due diligence resulting from the professional nature of their activity, if, acting loyally to the company, they act within the limits of justified economic risk, including on the basis of information, analyses, and opinions that should have been taken into

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43 SIEMIĄTKOWSKI, *c. d.*, p. 183; FLESZER, D. Należyta staranność członków organu zarządzającego spółki kapitałowej [Due diligence of members of the management body of a company]. *Studia z Zakresu Prawa Pracy i Polityki Społecznej*. 2019, Vol. 26, No. 3, p. 286.

44 *"When taking decisions on the company's matters, directors should act within the limits of justified economic risk, i.e., after considering all information, analyzes and opinions that – in the reasonable judgment of the management board – they should, in a given case, be taken into account in the interests of the company."* (Komitet Dobrych Praktyk, Forum – Corporate Governance. *Dobre praktyki w spółkach publicznych 2005* [Good Practices in Public Companies 2005] [online]. Warszawa: Komitet Dobrych Praktyk, 2004, practice no. 33 [cit. 2022-05-20]. Available at: https://www.gpw.pl/pub/GPW/files/PDF/dobre_praktyki/dp2005.pdf).

45 OPLUSTIL, *c. d.*, p. 786 and further; NOWACKI, *c. d.*, commentary on Article 293, pt. VII; OKOLSKI – MODRZEJEWSKI – GASIŃSKI, *c. d.*, pp. 505–506; SIEMIĄTKOWSKI, *c. d.*, p. 183; HOTEL, M. Modyfikacja zasad odpowiedzialności członków organów wobec spółki kapitałowej [Modification of the rules of liability of board members towards a company]. *Przegląd Sądowy*. 2015, No. 9, p. 85.

46 The amendments will come into force on 13 October 2022 (the act of on amendments to the Commercial Companies Code and other acts of 9 February 2022, Journal of Laws of 2022, item 807).

account in making a careful appraisal under the circumstances.[47] This can be identified as a pattern of behaviour which is considered as compliant with the duty of acting with professional diligence, even though the aftermath may result in a loss to the company.

It can be clearly seen here that obeying the duty of loyalty constitutes a prerequisite of acting with professional diligence. Moreover, the legal norm is based on the general phrase of "justified economic risk", which can be flexibly interpreted according to actual circumstances. However, the provisions in question also provide a kind of a guideline by considering gathering proper information, analyses, and opinions used for making a decision as proofs of acting with professional diligence and a desired pattern of a decision-making process. Nevertheless, their deployment *per se* may not be recognized as relieving directors from liability, as explained earlier.

So far, the Polish jurisprudence has rarely analysed opportunities to apply the business judgement rule in proceedings focusing on violating the corporate duty of care. In the Supreme Court verdict made in 2014, the court noticed that making decisions which are beyond normal and acceptable business risk violates the company's interest and directors ' duties expressed in the Article 201 of the CCC, thus justify their liability against a company based on the Article 293 of the CCC.[48]

A similar viewpoint has been expressed in a judgement of the Supreme Court made in 2018 claiming that it is possible that – when assessing the behaviour of a director who, in accordance with the Article 201 of the CCC, is obliged to behave in such a way that would not cause damage to the company – to recognize that in a specific situation it has exceeded the acceptable business risk and, therefore, violated the law.[49]

In another judgment of 2018, the court also presented some arguments originating from the business judgement approach which also touched on the hindsight bias issue. On one hand, a director should strive to minimize costs and expenses of a company, in particular to avoid losses. On the other hand, they are obliged to use the company's development opportunities as much as possible, in particular to use any marketing and image benefits, which gave real opportunities for a measurable increase in the demand for the products of the claimant's enterprise. Thus, a director may be liable only if the decisions taken – assessed in the context of the entirety of management actions taken – were undoubtedly flawed, i.e., they were associated with the risk of disproportionately high damages and more probable damages in relation to the amount and probability of obtaining the expected benefits. A potential violation of professional diligence shall be assessed *ex ante*, i.e., taking into account the state of affairs existing at the time when the decisions was made and directors' state of consciousness at that time, not taking into account the events that took place later.[50]

Amendments of the CCC made in 2021 and 2022 that have introduced the business judgement rule as a pattern of professional diligence will raise further discussion on its exact meaning for determining the boundaries of civil liability of directors under provisions of the Polish company law.

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47 Article 293 § 3, Article 300^{125} § 2, Article 483 § 3 of CCC.
48 Judgement of the Supreme Court of 24 July 2014, II CSK 627/13.
49 Judgement of the Supreme Court of 9 February 2018, I CSK 246/17.
50 Judgement of the Appeal Court in Kraków of 29 May 2018, I AGa 192/18.

SUMMARY

The corporate duty of care in Polish company law has not been explicitly provided for by earlier regulations of the CCC. Although its validity has not been denied, its legal source was questionable and seen partially in general provisions related to directors' duties and partially in provisions related to their liability for acting without professional diligence. The latter definitely have to be linked with the general rules of contractual liability as they share basically the same legal concept. Major differences include an elevated level of diligence which is expected from directors while executing their duties and a shifted burden of proof which facilitates company claims in cases of an alleged violence of duty of care. In most cases determining whether a director has acted lawful or unlawful does not raise problems. However, to find grounds of their liability, lack of professional diligence must be further evidenced. Although it is not feasible to provide an exact manner of proper behaviour that would constitute a positive wording of duty of care, Polish jurisprudence and legal authors have managed to develop some general guides that may be used for understanding professional diligence. Hopefully amendments to the CCC newly adopted in 2021 and 2022 will contribute to a clearer perception of duty of care and professional diligence in Polish company law.

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THE DUTY OF CARE IN ROMANIAN COMPANY LAW

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Abstract: An enduring problem in company law is the liability of directors to the company for damage caused by wrongful acts. On the one hand, levers must be created whereby this liability exists, is effective, and plays a preventive role: a director is discouraged from carrying out damaging activities. On the other hand, the business world involves taking risks. It is sometimes regular for companies to suffer losses, not because of a mistake by a director but because of factors external to the director's conduct. The director should therefore be encouraged to take certain risks. It all comes down to a question of balance between responsibility and risk-taking. How this balance has been created in Romanian law, what dilemmas exist, and how the courts apply the rules: the article proposes to analyse these issues.

Keywords: joint-stock company; directors' liability; duty of care; duty of loyalty; business judgment rule; Romania

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1. REGULATION

In a state of intermission for approximately four decades, Romanian company law was recreated after the collapse of the Soviet-style dictatorship. During totalitarianism, the Commercial Code (*Codul comercial*) of 1887 was never repealed but affected by desuetude. Revived after the change of regime in 1989, the code's regulations on companies were considered obsolete, and a new Act no. 31/1990 (Act on Companies), primarily based on the 1940 project of a new Commercial Code, was adopted. The other provisions of the Commercial Code of 1887 (the law of commercial obligations) were in force in 2011 when the new Civil Code (*Codul civil*) entered into force marking the transition of Romanian private law from a dualist to a monist system.[1] This transition also affected the Act on Companies: initially entitled act on "commercial companies," in 2011 the term "commercial" was eliminated from the title of this norm, and the name simply became the "Act on Companies," mirroring the monist approach in Romanian private law.

[1] For details, see VERESS, E. The Romanian Civil Code: ten years of application. *Jahrbuch für Ostrecht*. 2021, Vol. 62, pp. 387–401.

Since its adoption, the Act on Companies, was reformed several times, but still forms the basis of company regulation in Romania. There are five forms of companies, regulated by the Act on Companies, all legal persons: a general partnership (*societate în nume colectiv*); limited partnership (*societate în comandită simplă*); joint-stock company (*societate pe acţiuni*); partnership limited by shares (*societate în comandită pe acţiuni*); and limited liability company (*societate cu răspundere limitată*).[2] The present analysis will concentrate on the joint-stock company and limited liability company, which are the most frequent company forms. Act no. 223/2020 eliminated minimal capital requirements in the case of limited liability companies therefore no more incentives are in force for the establishment of general or limited partnerships.[3] The last two company forms are unpopular because they involve the unlimited responsibility of members (or of the full/acting partners in case of limited partnerships) towards the creditor. Limited liability is effortlessly reachable, so in Romania general or limited partnerships tend to become a curiosity; the partnership limited by shares was from the start a company form for which the business practice showed no interest.

Between the company and its directors[4] (*administratori*), there is a contractual relationship governed by the rules regarding the mandate. Article 72 from the Act on Companies expressly states that the duties and liability of directors are governed by the provisions relating to the mandate and those specifically provided for in the special rules included in the Law on companies. Therefore, the applicable rules form several layers, which follow in order of their priority:

a) special rules on the director's mandate from the Act on Companies;
b) rules from the Civil Code:
b1) general rules on the mandate from the Civil Code, which are not derogated by specific norms from the Act on Companies;
b2) general norms on the responsibility of heads of legal persons;[5]
b3) and finally, the rules on the administration of the property of another from the same act.

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2 The English terminology is imprecise since the terms describe other structural realities in the continental systems of law than suggested by using these legal terms in a common law context. Simple partnership and the so-called "association in participation" are included in the Civil Code, economic interest grouping is regulated separately (Act no. 161/2003), and co-operatives form the object of separate legislation (Act. no. 1/2005, Act no. 566/2004) etc.

3 For the recent development of the limited liability company regulation in Romania, see VERESS, E. Limited Liability Companies in Romania: De Lege Lata Clarifications and De Lege Ferenda Proposals in Regard to the Forced Execution of 'Social Parts' for the Personal Debts of an Associate. *Central European Journal of Comparative Law*. 2020, No. 1, pp. 195–208; VERESS, E. Observaţii critice privind Legea nr. 223/2020: societatea cu răspundere limitată ca subiect de experimentare legislative [Critical remarks on Law no. 223/2020: limited liability company as a subject of legislative experimentation]. *Dreptul*. 2021, No. 5, pp. 85–96.

4 I use the term "director" for a member of the management body or of the supervisory body of a company, in a sense shown in the European Model Company Act. However, the term director in Romanian law can be used for several other purposes; therefore, in this article, the term director is in the meaning shown above.

5 Art. 220 from the Civil Code regulates in general terms the liability of heads of legal persons and of other persons who have acted as members of the bodies of the legal person for damages caused to the entity by them through breach of their duties.

In this context, directors are liable to the company and not to the shareholders because the legal relationship of a mandate exists between the company and the director. A director, in general, has no obligations of result,[6] but obligations of means (of conduct): a director is bound to use all means necessary to achieve the promised result. Logically the director's obligations include a complex of duties, and the nature of the obligation breached must be considered on a case-by-case basis. In determining whether an obligation is an obligation of means or an obligation of result, regard shall be had in particular to:

a) the manner in which the obligation is stated in the contract;
b) the existence and nature of the consideration and the other elements of the contract;
c) the degree of risk involved in achieving the result;
d) the influence which the other party has over the performance of the obligation.[7]

Of course, there can be several obligations of result arising from the law (keeping the records required by law, keeping the accounts, preparing the financial statement, convening general meetings in the cases laid down by law etc.) or from the management contract. In the context of Article 73 from the Act on Companies, the directors are jointly and severally liable to the company, among others, for the existence of the registers required by law and their correct keeping, the exact implementation of the resolutions in general and the strict performance of the duties imposed by law and the articles of association.

There is still a debate on the nature of a director's responsibility in Romania. The dominant opinion is that if a director is liable for failure to comply with the obligations arising from its mandate, they have a contractual liability. However, if the obligations laid down by the Act on Companies are breached, the responsibility has a tortuous (delictual) character.[8] Nevertheless, some opinions considered a director's liability in all the cases tortuous (because they cause damage as an organ of a legal person)[9] and ideas were also formulated that this responsibility is a special one (corporate liability).[10] This problem does not form the subject of the present article. Nevertheless, in my opinion, there are not enough distinctive elements to characterize a special corporate liability besides the classic division of liability into tortuous and contractual responsibility. I am more inclined to think that directors' liability towards the company is always contractual. Obligations arising directly from the law still form duties that become integral parts of the mandate, which has a contractual origin. In the case of any contract, it binds not only what is expressly laid down in the contract but also what the law imposes on the contractual debtor. Thus, there is no need to distinguish from case to case whether the director has a contractual or a tortious liability, with the differences in a legal regime that would arise from this qualification. This interpretation is also underlined by

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6 According to the Art. 1481 of the Civil Code, in the case of an obligation of result, the debtor is bound to provide the creditor with the promised result.

7 Art. 1481 of the Civil Code.

8 GEORGESCU, I. L. *Drept comercial român. Vol. II, Societăţile comerciale* [Romanian commercial law. Vol. II, Commercial Companies]. Bucureşti: Socec & Co, 1948, p. 541.

9 TURCU, I. *Teoria şi practica dreptului comercial român. Vol. I* [Theory and practice of Romanian commercial law. Vol. I]. Bucureşti: Socec & Co, 1998, p. 339.

10 DANIL, M. Câteva probleme ale funcţionării şi administrării societăţilor comerciale [Some problems with the operation and administration of companies]. *Revista de Drept Comercial*. 1993, No. 3, pp. 89–91.

the provisions of Article 1272 of the Civil Code. The Civil Code expressly states that a valid contract concluded is binding not only on what is expressly stipulated but also on all the consequences which established practices between the parties, custom, *law*, or equity given to the contract, according to its nature. Consequently, the breach of any of these entails contractual liability.[11]

2. SPECIFIC RULES ON JOINT-STOCK COMPANIES: DUTY OF CARE AND OF LOYALTY

In the case of joint-stock companies (*societăți pe acțiuni*), specific rules were introduced in 2006 in a significant modernization attempt of Romanian company law through Act no. 441/2006. At that moment, the "business judgment rule" was introduced, as indicated in the (very short) explanatory memorandum of the law, to bring the legislation in line with OECD corporate governance standards. According to the OECD standards, *"board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders"*.[12]

In the context of Article 144-1 of the Act on Companies, introduced in 2006, the directors shall exercise their mandate with the prudence and diligence of a "good director". Directors are not in violation of this obligation if, at the time of making a business decision, they are reasonably entitled to believe that they are acting in the company's best interests and based on adequate information. According to the law, a business decision is any decision to take or not to take certain action concerning the company's management. Practically, through these norms, the Romanian legislature created specific rules on the duty of care.

In 2006, elements which also materialize the duty of loyalty where introduced. For example, directors shall exercise their office faithfully in the company's best interests. They shall not disclose confidential information and trade secrets of the company to which they have access in their capacity. This obligation shall also continue to apply to them after they cease to be directors. According to the law, the content and duration of these obligations shall be stipulated in the management contract.

These rules are also applicable in case of a dualist management system, to members of the directorate, and of the supervisory board.

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[11] The distinction presents practical importance because in Romanian law the legal regime of tortuous and contractual liability differs in certain issues.

[12] G20/OEDC Principles of Corporate Governance, OECD Publishing, Paris, 2015, 45. For details in the Romanian legal literature, see CATANĂ, R. N. *Dreptul societăţilor comerciale: probleme actuale privind societăţile pe acţiuni: democraţia acţionarială* [Company law: current issues regarding joint stock companies: shareholder democracy]. Cluj-Napoca: Sfera Juridică, 2007, pp. 191–194; BERCEA, L. Regula judecăţii de afaceri: un transplant legal imposibil [The rule of business judgment: an impossible legal transplant]. *Pandectele Române*. 2006, No. 3, pp. 201–208; BERCEA, L. Regula judecăţii de afaceri: despre involuţia instituţiei înainte de naşterea sa [The rule of business judgment: about the involution of the institution before its birth]. *Pandectele Române*. 2006, No. 6, pp. 159–166; BERCEA, L. Regula judecăţii de afaceri: despre noul regim al răspunderii administratorilor societăţilor pe acţiuni [Rule of business judgment: on the new regime of liability of directors of joint stock companies]. *Pandectele Române*. 2007, No. 8, pp. 26–38; etc.

Practically, in favour of the director, operates a presumption that they acted in good faith, in the context of the duty of care, and the company – the applicant requesting the court the award of damages – must prove that the conditions for the business judgment rule were not met. However, this regulation must be integrated into the system of contractual liability in Romanian law. Given that, in the area of contractual liability, Romanian law operates with a presumption of fault,[13] the mere fact of the existence of the damage means that the director acted culpably unless they prove otherwise. In reality the burden of proof is shared: the applicant (the company) must prove the existence of the damage, and the defendant (the director) must prove that they acted without fault.

In order to exclude fault, a director may prove that they acted with the prudence and diligence of a good director and was reasonably entitled to consider that they were acting in the best interests of the company and based on adequate information. The business judgment rule thus is a shield recognized by law to favour a director, a protection from liability if specific conditions are met. The general criterion of contractual liability is not appropriate in the area of the mandate regarding the management of a company's businesses. Compared to the classic contractual model, a management contract has specific content: sailing the company's ship on the stormy sea of the market. A director is obliged to take risks, and fault is assessed differently than in the case of a contract such as a contract of sale, a works contract, or a lease. Risk-taking must be made possible. But it cannot be irresponsible, without limits, and criteria of assessment. Thus, limits are drawn by law, and the valuation of whether the legal requirements on adequate information, prudence, and diligence are met, as must be the guiding idea (the interest of the company), will be made on a case-by-case basis. Thus, even if damage is caused to the company, a director may be absolved of liability if they have acted properly.

Under these circumstances, in Romanian law, the system of burden of proof is not perfectly adapted and is not clearly determined. The presumption of good faith, diligence, and prudence enters into conflict with the general presumption of fault. But even this ambiguous situation entails certain advantages over a clear but rigid system. If the burden of proof were clearly placed on directors, then they would be discouraged from taking risks, would seek justification, and provide evidence in advance even if the risk taken was reasonable, otherwise, their position in court would be precarious. If the burden of proof were placed solely on the company, the result would be that the company alone would have to prove a lack of diligence, prudence, and information, and adequate proof would be made difficult. Thus, the litigants are forced to produce evidence to find out the truth, which serves the judge to get the most accurate picture of reality.

The hazards of using general standards (prudence and diligence of a good director, adequate information, best interest of the company etc.) by the legislature were underlined in the Romanian legal literature: *"The judge establishes ex post the conduct, which the recipients of the standard can then use as indicators to anticipate the behavior that the standard requires, establishing the de facto content of a de jure standard. In this way, the ideal content of the standard, the one envisaged by the legislator, will be replaced by*

[13] According to Article 1548 from the Civil Code, the debtor's fault of a contractual obligation is presumed by the mere fact of non-performance.

concrete content created by court judgments. In this context, it should be noted that the legislator runs the risk of misusing the content of the standard by establishing standards rather than rules. Although the premise on which the law is based in establishing the standard is the perfect identity between its legal content and its judicial content, this premise often proves to be unrealistic, given the court judgments results from applying standards. These results contain deviations from the conduct contained in the standard, which goes beyond the limits of the space for manoeuvre, which a standard itself implies (tendencies to over-simplify the mechanism established by the standard, to ignore the economic reasons behind the standard, etc.)."[14]

3. AN ANALYSIS OF THE ROMANIAN LEGISLATION FROM THE POINT OF VIEW OF THE COURT JUDGMENTS

3.1 AFFIRMATION OF THE PRINCIPLE

The High Court of Cassation stated in a case that the duty of prudence and diligence referred to in Article 144-1 of the Act on Companies is not breached if, when making a business decision, the director is reasonably entitled to believe that they are acting in the company's interest. Thus, if a director's judgment is not affected by a personal stake, they are properly informed about the nature of the business and is convinced that the decisions taken are in the company's interest, then the director is exonerated from liability.[15]

3.2 ROLE OF COURTS

According to another judgment, directors are often faced with choices in exercising their directorial duties. They are obliged to lean toward the solution or decision which, according to the information in their possession and on the basis of their judgement, appears to be the most profitable for the company. The business judgment rule is a concept according to which the courts cannot be called upon to rule on the actions and directorial activity of a company's directors as long as there are no allegations and, in particular, no evidence that the directors have breached their duties of care and loyalty or have acted in bad faith or without rational basis.

Thus, the court should not substitute its own notions as to whether or not a particular business decision is appropriate, as long as the company's management acted based on adequate information, in good faith, and with an honest belief that the action taken was entirely in the best interests of the legal entity, without involving any personal interest of the director.

The court concluded that these conditions were not met in the case: *"Without any hesitation, cannot be said of the legal transaction whereby the director of a joint-stock*

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[14] BERCEA, L. Noi standarde de comportament în afaceri? *Business judgment rule* și răspunderea administratorilor pentru insolvenţa societăţilor comerciale [New standards of business behavior? *Business judgment rule* and the liability of the administrators for the insolvency of the companies]. *Curierul Judiciar*. 2014, No. 7, p. 412.

[15] High Court of Cassation and Justice, 2nd Civil Chamber, Decision no. 2827 of 27 September 2011.

company acknowledges and even undertakes to pay an amount exceeding not only the share capital of the legal person but also the total capital, to another company, owned by the same person, together with a first-degree relative, and whose director also was for approximatively ten years."[16]

The court confronted the standard and the facts, reaching the rational conclusion that the legal requirements of director protection in such a setting are not met.

3.3 CONFIRMATION OF A CONDUCT BY THE GENERAL MEETING

In regulating the exercise of the mandate, the provisions of Article 144-1 para. (1) of the Act on Companies provides that the directors shall exercise their mandate with the prudence and diligence of a good director by behaving like a reasonable person, a good director would behave in similar circumstances in relation to their own affairs.

Directors are liable to the company for failure to comply with the legal provisions relating to their duties and for failure to comply with the obligations laid down in the mandate given by the shareholders, in the articles of association, or by a resolution of the general meeting. According to the High Court of Cassation and Justice, liability cannot arise where, even after they have carried out certain acts or taken certain decisions, the general meeting of shareholders adopts a resolution confirming, even implicitly, those acts or decisions. In such cases, the will of the company itself is entirely consistent with the actions of the directors. According to the highest court of Romania, it is evident that under such circumstances, the director's actions are in accordance with the company's will, which excludes the possibility of their liability towards the company.[17] This exclusion of a director's liability due to the shareholders will is applicable in relations between the director and the company itself. The shareholders in such a case are acting at their own risk.[18]

3.4 BREACH OF THE DUTY OF CARE

In a case, the Romanian court stated that the provisions of the management contract, respectively Article 12 of this contract governing the liability of a director for *"damage caused to the company by any act contrary to the interests of the company, by acts of imprudent management, by the improper and negligent use of the company's funds"* are supplemented by the corresponding rules from the Act on Companies.

By their conduct of paying the sum of 820,000 lei by way of an advance to a company with which they have not concluded a (written) contract of sale and purchase for building materials, and which already had payment obligations to the applicant company, the directors carried out an act of imprudent administration, demonstrating negligence contrary to the interests of the company. Given their capacity as director, under a management

[16] Timișoara Court of Appeals, Commercial Chamber, Decision no. 64 of 30 March 2010.

[17] High Court of Cassation and Justice, 2nd Civil Chamber, Decision no. 326 of 28 February 2017.

[18] Concerning third persons, other rules are applicable. In general, lawful or illicit acts of the organs of the company shall affect only the company itself. But this is true only if the acts are related to the powers or purpose of the functions entrusted to the company organs. *Per a contrario*, in other cases, the liability of the director or even of the shareholder can be raised. Illicit acts also render the committers personally, jointly, and severally liable both towards the company and towards third parties on a delictual basis.

contract of a commercial nature, the liability is all the greater since, in commercial matters, the director is liable for the lesser fault. Since it is a remunerated mandate, according to Article 1540 of the Civil Code,[19] fault is assessed according to the abstract type – *culpa levis in abstracto*, of the prudent and diligent man (*bonus pater familias*).

The court found, regarding the conditions relating to the damage caused to the company and the causal link, they are met. It follows implicitly that by their imprudent act, showing negligence and a lack of diligence, a director caused damage to the company.

The director submitted that the amount paid by way of an advance might be interpreted as a preliminary contract of sale and purchase, the conclusion of which is not subject to any special formal condition. Regardless, that submission is not such as removing or diminishing the seriousness of their conduct. However, it merely demonstrates their lack of diligence in the company's management, which they were required to protect from the risks inherent in carrying on business precisely by concluding a contract.

As regards to the analysis made by the defendant on the legal nature of the director's obligations (obligations of result and obligations of means) in the assessment which the court had to make of the director's fault (*in abstracto*) – also taking into account the elements *in concreto* – established that the objective criterion – supplemented by certain subjective elements relating to the specific circumstances arising from the place, time, and circumstances in which the conduct was committed, and the qualities and training of the subject – is generally adopted as the criteria for assessing fault.

The objective, abstract criterion means that the court adopts the reference type of a normal, prudent man: a *bonus pater familias*. The court stated that this criterion applies even more rigorously in commercial matters and in the case of a remunerated mandate. The application of this objective criterion also takes account of the specific conditions in which the director is acting, in which case the level of requirements will be higher since the person concerned is a professionally trained specialist in the field of business, as compared with a non-professional, as is the nature of the activity in the course of which the harmful act occurred (commercial activity carried out by a professional).

In conclusion, the court found that the conditions for contractual liability were met. There was a management contract between the parties (as a precondition for liability). There was a breach consisting of a violation of a contractual obligation, a pecuniary loss, and a causal link between the breach of contract and the loss. There was fault (guilt) on the part of the person who committed the breach.[20]

In the context of this judgment, we can also refer to the problem of the conflict between the duty of care, practically a legal transplant, and the Roman tradition of *bonus pater familias*. The court considered that the *bonus pater familias* standard must be applied more rigorously in the case of directors. On the contrary, the major Romanian commentary on the company law considers that the business judgment rule originating from the

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[19] This judgment refers to the ancient Civil Code of 1864, in force until 1 October 2011, which stated that *"for fault, when the mandate is without payment, liability is applied less rigorously than otherwise"*. The legal text in force, Article 2018 from the Civil Code, states that *"if the mandate is for a pecuniary consideration, the mandatary shall execute the mandate with the diligence of a good owner. However, if the mandate is gratuitous, the mandatary is bound to execute it with the diligence he/she shows in his/her own business."*

[20] Bucharest Court of Appeals, 5th commercial chamber, Decision no. 167 of 13 April 2011.

United States and introduced into Romanian law in 2006 is practically a watered-down version of the *bonus pater familias* rule. As stated, *"*[t]*he American business judgment rule, which was adopted in 2006 in our legislation, exempts directors from liability if the failure of a company's business is due to the risk of the business and is not the consequence of negligent or fraudulent management judgment. In any business, inherent risk can turn decisions made in good faith into failures. As long as the directors' judgment is not impaired by a personal stake, as long as they are properly informed about the nature of the business and are convinced that decisions are made in the best interests of the company, then they are absolved of liability. The business judgment rule test means that decisions are taken with speed, based on reasonable information, do not attract liability on the part of directors, however great the damage to the company."*[21]

In my opinion, there are two different standards, each with its own field of application. There is no need to reconcile these two standards: the business judgment rule can be applied independently from its correspondent from the Civil Code. In the case of joint-stock companies, the conduct of the directors must be assessed under the provisions of Article 144-1 from the Act on Companies since these norms have a special character compared to the norms of the Civil Code.

4. IS THE DUTY OF CARE TEST APPLICABLE FOR LIMITED LIABILITY COMPANIES?

Keeping in mind that the Romanian limited liability company has a relatively short regulation in the Act on Companies, it was raised several times that some rules regarding the management of the joint-stock company can be applied by analogy for a limited liability company. Finally, the High Court of Cassation and Justice stated that the management rules laid down by the law for joint-stock companies should not be applicable to limited liability companies unless there are expressly and restrictively provided for in the Act on Companies. The absence of such rules of reference, which are, as it was stated, restrictive and of a strict interpretation, undoubtedly leads to the conclusion that different rules govern the management of a limited liability company from those laid down for the joint-stock companies.[22] In this circumstance, the responsibility of a director in a limited liability company is governed not by the business judgment and duty of care rules, but by the legal norms on mandates. Two approaches can be considered:

a) Article 213 of the Civil Code, according to which members of the management bodies of a legal person must act in its interest with the prudence and diligence required of a good owner.
b) Article 2018 of the Civil Code, which states that *"if the mandate is for a pecuniary consideration, the mandatary shall execute the mandate with the diligence of a good*

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[21] CĂRPENARU, S. D. – PIPEREA, GH. – DAVID, S. *Legea societăţilor: comentariu pe articole* [Company law: commentary on articles]. 5th ed. Bucureşti: C. H. Beck, 2014, p. 529.

[22] High Court of Cassation and Justice, 2nd Civil Chamber, Decision no. 3679 of 31 October 2013. The Act on Companies in Article 197 also states that the provisions relating to the management of joint-stock companies are not applicable to limited liability companies, whether or not they are subject to the audit obligation.

owner. However, if the mandate is gratuitous, the mandatary is bound to execute it with the diligence he/she shows in his/her own business."

We can observe that Article 2018 differentiates between mandates for pecuniary consideration and gratuitous mandates, with effects on the responsibility. Liability in the case of a gratuitous mandate is less severe. Article 213, however, makes no such difference. Two interpretations are possible:

a) We must apply Article 213 from the Civil Code, as a general rule for legal persons. Therefore, we cannot differentiate based on the nature of the mandate (for consideration or gratuitous). The director of a limited liability company has the more severe responsibility of the "good owner" irrespective if the mandate is gratuitous.
b) Keeping in mind that Article 72 from the Act on Companies states that the liability of directors is governed by the provisions relating to a mandate, Article 213 Civil Code, as a general norm for legal persons, is not an applicable rule for companies. There is an express legal text that requires applying the rules on the mandate. Therefore, the gratuitous or for consideration character of the mandate influences the responsibility of the directors to the company.

The High Court of Cassation and Justice, when there was a special norm in the Act on Companies, granted the priority of that regulation in comparison to norms included into the Civil Code. For example, in the case of a simple partnership (without legal personality, in Romanian *societate simplă*), Article 1928 Civil code states that at the request of a partner, the court may exclude any partner (contracting party) for a good cause from a simple partnership. Article 222 of the Act on Companies, on the contrary, in the case of a limited liability company, permits the exclusion of a member who is also a director and commits fraud to the detriment of the company or uses the company's signature or capital for their own benefit or that of others. The sanction of exclusion may be applied when revocation of the management mandate is considered insufficient not only for abuse of power and breach of the limits of the management mandate, but for any fraudulent action or inaction to the detriment of the company, i.e., not only for fraud which they are in a situation to commit given their position as director but for any intentional offense committed to the detriment of the limited liability company. The regulation, in this way, protects, in a distinct manner, the trust that the holder of the position of director must enjoy. Therefore, a limited liability company member who is not a director cannot be excluded for fraud against the company: the specific rules from the Act on Companies exclude the application of the Civil Code. The arguments presented above lead to the conclusion that the situations of exclusion of the associate provided for in Article 222 of the Act on Companies, republished, as subsequently amended and supplemented, do not complement the provisions of Article 1928 of the Civil Code. Of course, within the limits of contractual autonomy, following the legislature's thinking and the institution's rationale, the parties have the right to multiply or contractually restrict the grounds for exclusion in company law.[23]

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[23] For details, see High Court of Cassation and Justice, Chamber for Solving Legal Interpretation Issues (*Completul pentru dezlegarea unor chestiuni de drept*), Decision no. 28 of 10 May 2021.

Analysing our paradigm, in my view, the express reference to the rules of the mandate does not exclude the application of another general rule, which complements the regulation of the limited liability company. The Act on Companies does not itself contain rules derogating from the Civil Code in this situation. In consequence, not only do the rules of the mandate apply but also those of Article 213 of the Civil Code. While, generally speaking, a gratuitous mandate entails less severe liability, this rule is not applicable to limited liability companies due to the effects of Article 213 of the Civil Code. The liability of the directors of a limited liability company has a unitary character, regardless of whether the mandate is gratuitous or for consideration. The director will be liable according to the objective criterion of the good owner in all cases. The distinction between gratuitous and a mandate for consideration, which is absolutely logical in typical cases of a mandate, is not reasonable to characterize the director's mandate. If, in general, the members of the governing bodies of legal persons are held liable according to the abstract type of good owner, for example, in the case of non-profit entities, then it would be quite strange to have different rules for a limited liability company. This issue remains to be clarified by the courts soon.

The courts also significantly contributed to the interpretation of director's responsibility in case of a limited liability company. A director – a natural person – of a company represents the company in relations with third parties and engaging the company's liability towards them. The director is liable to the company for any damage caused by exceeding the powers given by the mandate contract concluded, or by not properly fulfilling that mandate or the obligations incumbent on them under the provisions of the Act on Companies.[24] The same law regulating the liability of directors aims to protect the limited liability company associates' interests and implicitly of the company, establishing the presumption of liability of the company's management bodies – in this case of the director – even after the end of their mandate for acts and actions detrimental to the company during the exercise of the mandate.[25]

5. CONCLUSIONS

The confirmed interest in importing the business judgment rule into Romanian law is given by the specificity of the agency relationship between the company and its directors. In fact, the criterion of the good owner is also adequate to offer a standard of appreciation to the judge, who can solve a case practically with an identical result to that of the one given by the business judgment rule, without creating, in reality, a gap in the applicable standards between directors of a joint-stock company and of a limited liability company. Nevertheless, the legal transplant of the business judgement rule for joint-stock companies chisels the regulation, principally sending a message to directors: risk-taking is permissible, it may be in the company's best interests, and it is expected that in some cases, risk will lead to losses. Romanian law is currently characterized by the

[24] High Court of Cassation and Justice, Commercial Chamber, Decision no. 1246 of 27 March 2008.
[25] High Court of Cassation and Justice, Commercial Chamber, Decision no. 1603 of 13 May 2008.

parallel application of the two standards: the duty of care and business judgment for joint-stock companies, and the good owner standard in the case of limited liability companies.

Managing a company, without a doubt, means making quick decisions in an incomplete informational context. Sometimes complete information is not possible due to insufficient time, but the decision must still be taken. Thus, the standard of diligence and prudence in case of a joint-stock company, is not an abstract one, but is assessed in the concrete context in which the director acted: whether in that context they did everything necessary to act as a good director, whether within the limits of their possibilities they tried to do everything possible to have all the information necessary to fundament an accurate decision, whether concerning all the concrete circumstances they acted with prudence and diligence. Everything relates to the moment when the business decision was taken, and knowledge of subsequent developments does not justify any approach other than what is possible by reference to the decision-making minute already past. *"Business decisions seldom concern unambiguous questions; on the contrary, they are usually prudential judgments of choice among several plausible alternatives. Moreover, given the nature of commercial activity, in which even diligently made choices can be wrong, whether a business decision has produced harm, the quality of the decision and the process of making it, and the consequences produced are analyzed contextually, ex ante, by reference to the knowledge and information reasonably available to the director at the time the decision was made, rather than ex post, by taking into account information available at the time of judicial review."*[26]

The business judgment rule added contextuality and flexibility to the abstract good owner (*bonus pater familias*) rule that is needed in a business context, adapting the legal and moral standards to the specificity of a director's mandate. Finally, justified risk-taking does not involve recklessness, lack of diligence, lack of information, or violation of the corporate interest. In the latter situations, the director cannot be protected from liability.

The fact that the regulation requires periodic adjustments is underlined by the recent completion of the legislation. By Act no. 216/2022, a new text was introduced in the Romanian legislation, referring to the company in difficulty. In the case of such a company, the directors in their activity must take into account at least the following:

a) the interests of creditors, equity holders and other stakeholders;
b) the need to take reasonable and appropriate steps to avoid insolvency and to minimise losses to creditors, employees, equity holders and other stakeholders;
c) the need to avoid engaging intentionally or with gross negligence in conduct that threatens the viability of the enterprise.

Again, these are general criteria. It will be for the judges to measure a specific conduct in the light of this legal text.

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[26] BERCEA, L. O analiză a leziunii în contractele de afaceri [An analysis of the injury in business contracts]. *Revista Română de Drept Privat*. 2019, No. 1, p. 262.

THE LEGAL BASIS AND CONTEXTUAL INTERPRETATION OF THE DUTY OF CARE IN COMPANY LAW IN THE SLOVAK REPUBLIC: FROM A "GENTLEMANLY AMATEUR" TO A PROFESSIONAL DIRECTOR?[1]

MÁRIA PATAKYOVÁ, BARBORA GRAMBLIČKOVÁ, JANA DURAČINSKÁ

Abstract: A director may slip into the fulfilment of their own (opportunistic) interests due to the separation of management and ownership in companies and the fact that the director does not bear the risk of the possible failure of the company. Because there is a tension between the company (and its shareholders) and the director due to differences in their interests and information asymmetry, their relationship is based on trust, which is the core essence of a relationship between these entities (fiduciary relationship). The study focuses on the principal aspects of how Slovak company law deals with the tension between the interests of the company, its shareholders, and directors, especially from the point of view of compliance with the duty of care.

Keywords: due care; duty of care; duty of loyalty; duty of confidentiality; business management; business judgment rule

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1. INTRODUCTION

A characteristic feature of company law is that when the management of a property is entrusted to a person (agent) other than the owner of this property (principal), it is required that such an agent proceeds with due care while managing this property or respectively complies with the duty of care. The above-described also applies to members of an elected company's bodies, to which the management or control of the company has been delegated and these members are obliged to observe the duty of care in the performance of their office.

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Due to the separation of management and ownership in companies[2] and the fact that a director does not bear the risk of a possible failure of the company, they may slip into the fulfilment of their own (opportunistic) interests. Because there is tension between a company (and its shareholders) and the director due to differences in their interests and information asymmetry, their relationship is based on trust, which is the core essence of the relationship between these entities (fiduciary relationship).

The study focuses on the principal aspects of how Slovak company law deals with the tension between the interests of the company, its shareholders, and members of the bodies, especially from the point of view of compliance with the duty of care.

The company, as a legal person, is separate from its founders and shareholders, it has its private law basis in the Civil Code,[3] which defines the general framework for companies as legal persons, with the central concept of a statutory body to which the Commercial Code[4] assigns competence in matters of the decision-making process (creation of will) and management of the company. The very core of this study seeks an answer to the question of how the directors, as members of the bodies (either statutory or controlling), shall perform their competencies and the evaluation of the possible interventions to the decision-making process in the company's affairs by the general meeting or some of the shareholders, with a link to the emerging liability relations.

2. COMPANY AS LEGAL PERSON

Legal persons have their private law basis in the Slovak legal system in the Civil Code, which according to the *de lege lata* regulation is based on the so-called realist theory[5] of legal persons.[6] Legal persons have the capacity to have rights and

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2 The term "company" is used in the study in connection with limited liability company, joint stock company and simple joint stock company.

3 Act No. 40/1964 Coll. Civil Code as amended (Civil Code).

4 Act No. 513/1991 Coll. Commercial Code as amended (Commercial Code).

5 Section 18 Subsection 1 and Section 19a of the Civil Code. In the context of the legislative intention to recodify the company law inclination in favour of fiction theory might be detected. Legislative intention to recodify company law, Working group for recodification of the company law, Ministry of Justice of the Slovak Republic, May 2021 and Section 1 of the proposal for the Civil Code available at: https://www.justice.gov.sk/Stranky/Ministerstvo/Rekodifikacia-OZ/Navrhy.aspx.

6 On the other hand, Csach states that the theory of legal persons in the Slovak legal system is based on both theories (realist theory and fiction theory) and at the same time on none of those. Csach stipulates in detail: *"Legal personality is granted to a certain organized unit only by law, not by social reality, even in relation to foreign entities. At the same time, it is assumed that a legal entity can act on its own through its bodies (rather reality theory), but the principles of representation also apply – position of the distinction between the existing entity and another entity acting on behalf of the legal entity (rather fiction theory). A possible inclination to the realist theory is relativized by the fact that the law avoids the terminological conclusion that legal persons are capable of legal or illegal acts."* (CSACH, K. in: ŠTEVČEK, M. – DULAK, A. – BAJÁNKOVÁ, J. – FEČÍK, M. – SEDLAČKO, F. – TOMAŠOVIČ, M. a kol. *Občiansky zákonník. I, § 1–450: komentár* [Civil Code. I, § 1–450: commentary]. Bratislava: C. H. Beck, 2015, pp. 100–101). For more information on the realist theory and the fiction theory in the context of Slovak business companies, see: PATAKYOVÁ, M. – GRAMBLIČKOVÁ, B. – LACKO, P. Legal personality of companies. In: *Company Law and Law on Cooperatives – General introduction to the topic and definition of basic terms*. Bratislava: Právnická fakulta UK, 2019, pp. 50–52; and for more general information on the realist theory and fiction theory of legal persons in the context of company law and also with regard to the rulings of the

obligations (legal personality) as well as the capacity to acquire rights and obligations (capacity to perform legal acts). The ability of a legal person to acquire rights and obligations through its own acts may be limited under the Slovak legal system only by law.[7] The *ultra vires* doctrine, which binds the validity of legal acts of the company to the scope of its activity specified in the founding documents, has not been applied in the Slovak legal system since 1991. From the *de lege lata* legislation stems the conclusion that even if the scope of the activity specified in the founding documents is exceeded, the legal acts will be binding on the legal person, unless these legal acts violated a prohibition resulting from special legal regulations.

2.1 THE BOARD OF DIRECTORS AS STATUTORY BODY

The above-defined capacity of the legal persons – companies – for legal acts is followed by the determination of who will express the will of this legal person in a legally relevant manner on behalf of it. The Civil Code designates persons who are entitled to act directly on behalf of a legal person in all matters as "statutory bodies"[8] with a link to the general definition of legal capacity of a legal person. This term, which is by its nature a legislative abbreviation defined in the Civil Code, is taken over by the Commercial Code[9], which stipulates that a legal person acts by its statutory body or a representative.[10] The Commercial Code specifies the designation of a statutory body for each type of company[11] and cooperative, defines its essence as a collective or individual body, and, as a default, stipulates the manner of acting on behalf of the company.

An action of the statutory body is therefore directly an action of the company as a legal person and the statutory body is not the company's representative in relation to third parties.[12]

A company as a legal person is a complex entity and it is necessary to make a strict distinction between (i) the expression of its will towards third parties (actions), which may be conducted by a statutory body or a representative[13] and (ii) decision-making

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Court of Justice of the European Union, see: PATAKYOVÁ, M. – CZÓKOLYOVÁ, B. Teória spoločnosti v triáde rozhodnutí Daily Mail, Cartesio a VALE – spoločnosť ako fikcia, nexus kontraktov alebo reálna osoba? [Theory of the companies in triad of decisions Daily Mail, Cartesio and VALE – company as a fiction, nexus of contracts or real person?]. *Právny obzor*. 2015, Vol. 98, No. 1, pp. 3–21.

7 For example, the Act on state-owned enterprises (Act No. 111/1990 Coll.) stipulates that a state-owned enterprise may not secure the liabilities of third parties with its assets.

8 Section 20 Subsection 1 of the Civil Code.

9 Section 13 Subsection 1 of the Commercial Code.

10 Section 13 Subsection 1 of the Commercial Code.

11 For the purposes of this study, we use a term "statutory body" and "director" as a general term and specifically terms "managing director" for a statutory body in a limited liability company and "board of directors" in a joint-stock company. In the study, we abstract from a more detailed specification of directors, e.g., in the position of independent directors.

12 Within the presented concept of legal persons in the process of recodification, it is proposed to change the actions of the statutory body of a legal person from direct action to representation. Section 32 of the proposal for the Civil Code available at: https://www.justice.gov.sk/Stranky/Ministerstvo/Rekodifikacia-OZ/Navrhy.aspx.

13 The Supreme Court of the Slovak Republic in the judgment from 27 November 2019, file no. 3 Obdo 57/2019 addressed the question of whether the supervisory board of a joint-stock company is authorized to

(creation of its will), which may or may not transform to the company's external actions. The decision-making depends on the internal administration and management of the company in accordance with the Commercial Code, as well as special arrangements in the articles of association and bylaws.

3. THE DECISION-MAKING AND MANAGERIAL COMPETENCE OF A DIRECTOR – THE CONCEPT OF BUSINESS MANAGEMENT

3.1 ABSENCE OF A LEGAL DEFINITION OF A BUSINES MANGEMENT

Business management is a term related to the overall management and control model of a company. This term does not and cannot have a single "shape", because it depends on the scope of business activity, size of a company's enterprise, and the legal form of the company, as well as the "determination" in basic corporate documents.

By business management we mean the management of a company and decision-making on all its matters with intra-corporate effects. In relations with third parties, the conclusions of these decisions will be reflected in the actions of the directors or the company's representatives. The Supreme Court of the Slovak Republic also characterized the business management as *"decisions of any kind on the affairs of a particular company, except for acting externally as a statutory body (director)"*.[14]

The Commercial Code uses *expressis verbis* the term business management for an unlimited company, a limited partnership, and a limited liability company, but does not define the scope of this term. The Commercial Code uses various terms to define the competence of a board of directors of a joint stock company, a simple joint stock company, a cooperative, and directors of a limited liability company. In connection with the board of directors in the joint stock company, simple joint stock company, and cooperative the law defines the competence of a statutory body as the power to manage and make decisions; on the contrary, in a limited liability company, the decision-making power is more diversified among bodies, as a general meeting can take on powers from

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act on behalf of the company externally. In its decision, the Supreme Court of the Slovak Republic stated that: *"The right of the members of the Supervisory Board to bind the joint-stock company by its own actions does not follow from the wording of the provisions of Section 15 Subsection 1 of the Commercial Code regulating the legal representation of an entrepreneur, as the members of the Supervisory Board cannot be considered as persons who would be entrusted with a certain activity in the operation of the company."*

[14] Judgment of the Supreme Court of the Slovak Republic from 1 December 2015, file no. 1 Sža 27/2015, for comparison, the Supreme Court of the Czech Republic defines business management as *"company management in particular the organization and management of its business activities, including decisions on business plans"*. (Judgment of the Supreme Court of the Czech Republic from 25 August 2004, file no. 29 Odo 479/2003, R 80/2005) Business management is recently interpreted in Czech Republic in the Judgement of the Supreme Court of the Czech Republic, Judgement from 11 September 2019, file no. 31 Cdo 1993/2019, R 24/2020 as: *"The business management of a joint-stock company is the organization and management of its normal business activities, especially decisions on the operation of the company's enterprise and related internal affairs, regardless of whether they are performed by the company's board of directors or a member of the board or a third person."*

other bodies of the company, thus the question is complex and we cannot perceive it as binary.

3.2 THE JUDICIAL DEFINITION OF THE BUSINESS MANAGEMENT

Due to the fact that the Commercial Code does not contain a definition of the term "business management", it is not possible to determine the exact legal enumeration of which decisions fall within the scope of the business management of the company. In this view, the courts have to deal with this intentional loophole in the law within their decisions in corporate litigations.

In a recent decision of the Supreme Court of the Slovak Republic, an organizational change within the company's enterprise was considered as a decision on the company's business management affairs. The court came to the legal conclusion that there were *de facto* collective redundancies in the company, even though the legal requirements for collective redundancies under the Labour Code[15] were not met. The Supreme Court of the Slovak Republic stated that the decision was within the business management of the limited liability company and therefore should be taken with the consent of the majority of directors.[16, 17]

The Constitutional Court of the Slovak Republic,[18] with regard to the complainant's (as defendant) complaint in this case, annulled the judgment of the Supreme Court of the Slovak Republic and returned it to the court for further proceedings. The Constitutional Court of the Slovak Republic assessed the above-mentioned legal conclusion of the Supreme Court of the Slovak Republic as incorrect. In its ruling, the Constitutional Court of the Slovak Republic reasons in its statement that the Commercial Code is not in relation of subsidiarity to the Labour Code. According to the Constitutional Court of the Slovak Republic: *"It is not possible to assess the protection of an employee through a company law institute, which is to serve a completely different purpose – internal protection of a limited liability company, protection of its shareholders from its directors."*[19] Furthermore, in its ruling, the Constitutional Court of the Slovak Republic refers to the legal theory: *"*[…] *a decision on an organizational change, which results in a redundancy of an employee shall be taken on behalf of the employer by a person who is authorized to perform legal acts on behalf of the employer without any connection to the adoption of this decision within the company's management."*[20]

In the context of the above stated arguments, we do perceive a fundamental difference between the conclusions of the Supreme Court of the Slovak Republic and the Constitutional Court of the Slovak Republic in an answer to the question *Cui prodest?* (*Who benefits?*). In our opinion, the Constitutional Court's reasoning gives the correct answer, it is the company itself and its shareholders whose protection is reflected in

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15 Act No. 311/2001 Coll. Labour Code as amended (Labour Code).
16 This rule is stipulated in Section 134 of the Commercial Code.
17 Judgment of the Supreme Court of the Slovak Republic from 27 May 2020, file no. 4 Cdo/60/2019.
18 Judgment of the Constitutional Court of the Slovak Republic, file no. IV. ÚS 512/2020.
19 Ibid.
20 Ibid.

the legal requirement. Management and decision-making processes are the basis for external legal actions, however, the legal effects of these actions do not depend on compliance with these internal processes, but on compliance with the disclosed manner of "representation" of the company entered into the Commercial Register. In the event of a breach of the internally set decision-making processes, such breach is linked to the obligation of the directors to compensate the damage caused to the company and not to the third parties (this obligation may occur exceptionally).

3.3 THE (NON)BINDING NATURE OF THE GENERAL MEETING'S INSTRUCTIONS TO THE DIRECTORS

Instructions to directors are undoubtedly a way of interfering with its decision-making competence. The Commercial Code does not explicitly address the issue of the binding or non-binding nature of the instructions to business management, therefore the opinions and the answers to this question vary and the legal doctrine is inconsistent on this issue.[21] Opinions of the legal doctrine differ in two areas. The first area is the question of a possible transfer of competencies, respectively, their partial transfer in the area of management and business management from the directors to the general meeting. The second area is then the evaluation of the consequences of the decision (binding/non-binding) of the general meeting within the transferred competence. In order to answer the question of competence, it is necessary to distinguish between a limited liability company and a joint stock company. This difference is not justified by different standards of care and loyalty of the managing director and board of directors, as these standards are the same.[22] The difference lies in the possibility of transferring the business management, respectively, transferring certain issues within the business management between the managing director and the general meeting of a limited liability company and the board of directors and general meeting of a joint stock company. The general meeting of a limited liability company may *ad hoc* appropriate a decision power in a matter which otherwise falls within the competence of another body.[23] In principle, in the case of a limited liability company, it is accepted (or it is not denied) that the Commercial Code allows the general meeting of the company to instruct the managing director, which could also concern the business management. Differences in approaches then vary in whether the Commercial Code allows a complete emptying of the competence of the managing director's business management and transfer it to the general meeting, or such a transfer is possible only in some issues not to deny the

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[21] See MAŠUROVÁ, A. in: MAMOJKA, M. et al. *Obchodné právo. I, Všeobecná časť, súťažné právo, právo obchodných spoločností a družstva* [Commercial law I, General part, competition law, company law and cooperatives]. Bratislava: C. H. Beck, 2021, p. 614; and CSACH, K. Člen orgánu ako zamestnanec – obchodnoprávne odpovede na pracovnoprávne otázky? [Member of the body as an employee – commercial law answers to labor law questions?]. In: KRIŽAN, V. (ed.). *Opus laudat artificem: pocta prof. JUDr. Helene Barancovej, DrSc*. Trnava: Trnavská univerzita v Trnave, 2019, p. 107.

[22] More specifically, DURAČINSKÁ, J. Povinnosť starostlivosti riadneho hospodára alebo povinnosť odbornej starostlivosti z pohľadu právnej komparatistiky [The duty of care of a proper manager or the duty of professional care from the point of view of comparative law]. In: *Dny práva 2012 – Days of law 2012*. Brno: Masarykova univerzita, 2013, pp. 1791–1804.

[23] Section 125 Subsection 3 of the Commercial Code.

mandatory structure of the company's bodies.[24] The instruction of the general meeting addressed to the managing director interferes with their independent discretion and the utilization of their professional care.[25] The decision of the general meeting (in accordance with the law, articles of association, and bylaws) represents an exoneration from the damage of the managing director[26] (also a member of the board of directors).[27] This exoneration does not apply to the duty to file for bankruptcy nor in the case of a breach of the director's ban on competition.[28] However, such a decision of the general meeting does not constitute an excuse in relation to the duty of care[29] or the duty of loyalty of the director.[30] The director must always monitor the benefit of the company and disobey any instruction that would be contrary to the interests of the company, even at the cost of the threat of their dismissal.[31] In our opinion, the managing director is not bound by the instructions of the general meeting precisely because of the possibility to bear

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[24] See PATAKYOVÁ, M. – GRAMBLIČKOVÁ, B. – BARKOCI, S. Obchodné vedenie a jeho (potenciálne?) vplyvy na právne úkony v mene spoločnosti [Business management and its (potential?) influences on legal acts on behalf of the company]. In: *2017: Vybrané výzvy v slovenskom práve obchodných korporácií*. Olomouc: Iuridicum Olomoucense, 2017, p. 8; CSACH, *Člen orgánu ako zamestnanec*…, p. 107; MAMOJKA, M. jr. in: MAMOJKA, M. et al. *Obchodný zákonník: veľký komentár. 1. zväzok* [Commercial Code: Big commentary. Volume I]. Bratislava: Eurokódex, 2016, p. 541; and PALA, R. et al. in: OVEČKOVÁ O. et al. *Obchodný zákonník: veľký komentár. Zväzok I* [Commercial Code: big commentary. Volume I]. Bratislava: Wolters Kluwer, 2017, p. 972.

[25] SMALÍK, M. Niekoľko úvah k povinnosti lojality konateľa spoločnosti s ručením obmedzeným [Some thoughts on the duty of loyalty of the managing director of a limited liability company]. *Projustice* [online]. 5. 6. 2014 [cit. 2022-05-10]. Available at: https://www.projustice.sk/obchodne-pravo/niekolko-uvah-k-povinnosti-lojality-konatela-spolocnosti-s-rucenim-obmedzenym.

[26] Section 135a Subsection 3 of the Commercial Code: *"A managing director shall not bear liability for damage if they can prove that they proceeded in exercising their powers with professional care and in good faith that they were acting in the company's interest. Managing directors shall not bear liability for any damage caused to the company by their conduct in executing a decision of the general meeting; this shall not apply if the general meeting's decision is contrary to legal regulations, the articles of association or bylaws or if it concerns the obligation to file the petition in bankruptcy. If the company has established a supervisory board, approval of the managing directors' conduct by the supervisory board shall not relieve them of liability."*

[27] Section 194 Subsection 7 of the Commercial Code: *"A member of the board of directors shall bear no liability for damage if they prove that they proceeded in exercising their powers with professional care and in good faith that they were acting in the company's interest. Members of the board of directors shall bear no liability for any damage caused to the company by their conduct in executing a decision of the general meeting or if it concerns the obligation to file the petition in bankruptcy; this shall not apply if the general meeting's decision is contrary to legal regulations or bylaws. Members of the board of directors are not relieved of liability if their conduct was approved by the supervisory board."*

[28] CSACH, K. Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia (1. časť) [Obligations of members of the company's bodies and private law consequences of their violation (Part 1)]. *Súkromné právo*. 2019, Vol. 5, No. 5, p. 192.

[29] *"The duty of care of the managing director will be reflected especially in the preparation of documents and the formulation of the resolution of the general meeting."* (PATAKYOVÁ, M. in: PATAKYOVÁ, *Komentár...*, p. 792); *"The law does not accept unprofessionalism in the execution of resolutions of the general meeting by managing director."* (MAMOJKA, M. jr. in: MAMOJKA, *Obchodný zákonník*…, p. 542).

[30] PALA, R. et al. in: OVEČKOVÁ, *c. d.*, p. 972.

[31] Contrary LUKÁČKA, P. *Kategória zodpovednosti a zodpovedné podnikanie v právnom prostredí Slovenskej republiky* [Category of responsibility and responsible business conduct in the legal environment of the Slovak Republic]. Bratislava: Wolters Kluwer, 2019, p. 64, states that *"the director is obliged to respect the will of the shareholders, who have a majority of votes in the company, but provided that such a decision of the majority of shareholders does not abuse the rights of a majority of votes under Section 56a of the Commercial Code"*.

their liability, especially due to the duty of loyalty to the company.[32, 33] If the managing director acted disloyally, even though they would implement the decision of the general meeting, their compliance with the duty of care is questionable as well. The managing director, bound by a duty of loyalty is, in principle, able to fulfil their obligation to proceed with the required standard of care only if they act in the interest of the company.[34] The obligation of the managing director to monitor the interests of the company cannot be exempted under Slovak law through the instruction of the general meeting.[35]

Unlike the general meeting of a limited liability company, the general meeting of a joint-stock company cannot *ad hoc* appropriate a decision on a matter which otherwise falls within the competence of another body. If the general meeting of a joint-stock company has such competence, it must be included in the bylaws of the joint-stock company. In the case of a joint-stock company, there are also opinions that completely exclude any transfer of the business management from the board of directors to the general meeting.[36] We agree, that interventions to the business management of a joint-stock company would be counterproductive and, in essence, endanger the functioning of the joint stock company due to its nature (especially public joint stock company), but we do not completely exclude the possibility of such interventions in individual cases through amendments to the bylaws. In our opinion however, even the board of directors of a joint-stock company is not bound by such instructions from the general meeting. In the case of instructions that do not interfere with the company's business management, we may also encounter views which consider such instructions to be binding, provided that they comply with the law and the company's bylaws.[37]

3.4 FACTUAL INTERVENTIONS TO THE MANAGEMENT OF THE COMPANY

Interventions to the company's management do not have to be in a way of a formal decision of the general meeting, or other elected body of the company, these may also be based on *de facto* interference to the management or actual exercise of the powers of the director, without the formal appointment of such a person to the office. It is not necessary for such a *de facto* director to act externally towards the third parties, the decisive factor is whether the company's business management is constantly

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[32] For a different opinion, see the judgment of the Supreme Court of the Slovak Republic, file no. zn. 4 Obdo 22/98 *"the resolution of the general meeting is the result of the process of creating the collective will of the company and is binding to other bodies of the company"* (authors' note – the decision was based on the Commercial Code before its amendment, which introduced Section 135a to the Commercial Code).

[33] DURAČINSKÁ J. Povinnosť lojality člena štatutárneho orgánu verzus jeho povinnosť riadiť sa pokynmi [The duty of loyalty of a member of the statutory body versus their duty to follow the instructions]. In: HURYCHOVÁ, K. – BORSÍK B. *Corporate Governance*. Praha: Wolters Kluwer, 2015, p. 144.

[34] JOSKOVÁ, L. Je rozdíl mezi povinností loajality a povinností postupovat s péčí řádného hospodáře? [Is there a difference between the duty of loyalty and the duty to proceed with due care?]. *Obchodněprávní revue*. 2019, Vol. 11, No. 11–12, p. 285.

[35] See for example judgment of the District Court Zvolen from 20 March 2017, file no. 13C202/2011.

[36] MAŠUROVÁ, A. in: MAMOJKA, *Obchodné pravo*…, p. 615; and LYSINA, T. – ZELENÁKOVÁ, M. in: MAMOJKA, *Obchodný zákonník*…, p. 751.

[37] MAŠUROVÁ, A. in: MAMOJKA, *Obchodné pravo*…, p. 615; and LYSINA, T. – ZELENÁKOVÁ, M. in: MAMOJKA, *Obchodný zákonník*…, p. 751.

performed by the *de facto* director,[38] a one-off intervention is not sufficient. The *de facto* director is also subject to the fiduciary duties and thus also to the duty of loyalty.[39] Such a duty of loyalty is a delegated duty in the standard required from a director who is obliged to suppress their own interests and follow the interests of the company and all of its shareholders exclusively. The persons in the position of the *de facto* directors are also subject to other obligations belonging to them, such as the director's ban on competition, which is a manifestation of the duty of loyalty, but also the regulation of self-dealing or related parties' transactions.[40]

The liability for damage of the *de facto* director will be governed by the provisions on liability for damage of directors, including the reversed burden of proof, which lies on the *de facto* director.[41] However, it is questionable whether it is possible to invoke the exoneration in the form of a decision of the general meeting, especially if the *de facto* director would be the single shareholder of the company or a majority shareholder or shareholder with a majority of voting rights. Discrepancy in the conduct of such a shareholder with its own decision is unlikely. The exoneration in the form of a resolution of the general meeting is inapplicable in such a case, because, in principle, the shareholder would exonerate themselves.[42] The exercise of further liability claims against the *de facto* director will depend on the real possibility to fulfil the obligation to which the breach is bound. Csach stipulates that, as an example of an obligation which will not be enforceable by a *de facto* director, is the obligation to file for bankruptcy.[43]

4. HOW TO PERFORM THE DIRECTOR'S DUTIES?

The duty of care and the duty of loyalty are general legal obligations which directors are obliged to comply with. As general clauses, they represent standards for a director's behaviour. Compliance with these general clauses as legal criteria is left to the discretion of the court in the specific circumstances *ex post*.

The duty of care and loyalty are aimed at ensuring different standards of behaviour (awareness and motive). If the duty of care is directed towards decisions with good

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[38] MAŠUROVÁ, A. Zodpovednosť štatutárov, faktických štatutárov a tieňových štatutárov kapitálových spoločností voči veriteľom spoločností podľa novej úpravy Obchodného zákonníka a zákona o konkurze a reštrukturalizácii [Liability of statutory bodies, de facto statutory bodies and shadow statutory bodies of capital companies towards the creditors of companies according to the new regulation of the Commercial Code and the Act on Bankruptcy and Restructuring]. In: ANDRAŠKO, J. – HAMUĽÁK, J. (eds.). *Míľniky práva v stredoeurópskom priestore 2018: zborník z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov organizovanej Univerzitou Komenského v Bratislave, Právnickou fakultou*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2018, p. 177.

[39] Section 66 Subsection 7 of the Commercial Code.

[40] CSACH, K. Faktický orgán obchodnej spoločnosti a jeho zodpovednosť podľa § 66 ods. 7 Obchodného zákonníka [The factual body of the company and its responsibility according to Section 66 Subsection 7 of the Commercial Code]. *Bulletin slovenskej advokácie*. 2018, Vol. 24, No. 7–8, p. 17.

[41] Section 66 Subsection 7 of the Commercial Code in connection with Sections 135a and 194 of the Commercial Code.

[42] Identically PALA, R. et al. in: OVEČKOVÁ, *c. d.*, p. 971.

[43] CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 188.

intentions and sufficient information, the duty of loyalty, unlike the duty of care, focuses on motive.[44] This focus on the motive means that it is not the outcome of the action or inaction of the director that is decisive, but in whose favour or in whom interest the director acted or did not act. In the case of a duty of loyalty, it must be a matter of adhering to a standard of conduct in the form of maintaining the right motive, i.e., pursuing the right interest. The duty of care and the duty of loyalty are interconnected, because in the performance of the office of the director one conditions the other, i.e., the duty of loyalty ensures that the duty of care is met. The violation of the duty of loyalty also violates the duty of care, because it lacks the right motive (simply the path that must be followed when providing care), in the case of violation of the duty of care, it is difficult to admit adherence to the duty of loyalty, respectively, if so, only with (reasonable) good faith.[45] However, other factors also enter into this premise, namely the regime concerning the binding nature of shareholders' instructions to the director, where there may be a conflict between what is in favour of the company and all of its shareholders, and a director's obligation to follow instructions, which do not comply with such an interest.

The legal regulation of a breach of duties of directors has a uniform phase for business and non-business decision-making. The question of compliance with the interests of the company and its shareholders is not relevant in matters of compliance with the obligations imposed by law. "*The law is not for deliberation*",[46] but in some contexts of decision-making process on the fulfilment of a legal obligation, we can also recognize a certain, sometimes significant element of uncertainty, e.g., an assessment of legality in competition law,[47] growing relevance of international human rights conventions and documents,[48] etc.

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[44] ANABTAWI, I. – STOUT, L. Fiduciary Duties for Activist Shareholders. UCLA School of Law, Law-Econ Research Paper No. 08-02. *Stanford Law Review*. 2008, Vol. 60, No. 5, p. 12. Online available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089606.

[45] See also HAVEL, B. *Obchodní korporace ve světle proměn* [Corporations in the light of change]. Praha: Auditorium, 2010, p. 156; and JOSKOVÁ, *c. d.*, p. 286.

[46] ŽITŇANSKÁ, L. Zodpovednosť člena štatutárneho orgánu kapitálovej obchodnej spoločnosti a návrh zmeny zodpovednostného systému v súkromnom práve [The responsibility of a member of the statutory body of a company and a proposal to change the liability system in private law]. *Právny obzor*. 2019, Vol. 102, No. 3, p. 278.

[47] In relation to the target vertical agreements see PATAKYOVÁ, M. T. Cieľové vertikálne dohody [Target verical agreements]. In: *Aktuálne otázky súťažného práva v Európskej únii a na Slovensku* [Current issues of competition law in the European Union and in Slovakia]. Bratislava: Univerzita Komenského, Právnická fakulta, 2015, p. 59. Target agreements in the European area are often perceived as per se restrictions of competition in which it is superfluous to carry out an economic analysis of the relevant market and the impact of the agreement on it. However, a closer examination of the targeted agreements reveals the existence of reasons why the application of the concept per target restrictions may be questioned per se. Doubts are deepened by the current case law of the Court of Justice of the European Union, which in several of its decisions indicates the obligation to carry out a limited analysis of the effects of the agreement on the relevant market.

[48] BLAŽO, O. – PATAKYOVÁ, M. T. International responsibility of business for violation of human rights – customers perspective. *Bialostockie Studia Prawnicze*. 2019, No. 2, pp. 101–122.

4.1 DUTY OF CARE

The duty of care is reflected in the Commercial Code in the duty to perform the office with professional care. At the same time, professional care is a term used in the Commercial Code especially for procurement contracts, within which the exercise of the mandate or commission requires performance at a professional level in the subject matter of the contract. This legislative solution is related to the fact that the Commercial Code contains legal norms for company law as well as business contract law. For this reason, the interpretation of the concept of professional care was initially uniform and only subsequently emancipated to the notion that the duty of care requires a certain quality of procedure and competence in the performance of the relevant activity.[49] As Csach points out, the term professional care is used in Slovak corporate law differently from this term in contract law, as in contract law, it contains a requirement for a higher quality of professional care in a given area of business (construction, transport, medicine, law, etc.).[50] In company law, this level of professional care within the framework of corporate governance is moderated by a doctrinal interpretation[51] towards the competent performance of the office (at a mandatory level of care legitimately expected from a director – level of a proper caring manager).

The Commercial Code does not require a certain completed level of education or proof of experience in the field in order to fulfil the ability to perform the office and maintain professionalism. However, if a director has special knowledge or experience, they are obliged to use it for the benefit of the company (lawyer, auditor). According to *Csach*, *"the required quality of behaviour is therefore assessed objectively, but subjective conditions may strengthen it"*.[52] However, general conditions, as well as special conditions relating to education or training, may be required by other regulations. An example is the professional performance of an activity ensured through a director.[53] The conditions for the performance of the office may also be stipulated in the company's articles of association or bylaws and should also determine the consequences of the termination of the preconditions required by the articles of association or bylaws for the performance of the office.[54]

The duty of care requires the establishment of an information system for strategic decision-making in order for the directors to be able to make decisions with such knowledge in the subject of company's business activities,[55] which will be considered sufficient in an objective test. Based on the created system, it is possible to subsequently delegate the performance of some decision-making components to lower levels of

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[49] JOSKOVÁ, *c. d.*, p. 285.
[50] CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 183.
[51] OVEČKOVÁ, O. – CSACH, K. – ŽITŇANSKÁ, L. *Obchodné pravo 2: obchodné spoločnosti a družstvo* [Commercial Law 2: companies and cooperative]. Bratislava: Wolters Kluwer, 2020, p. 265.
[52] CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 183.
[53] Section 11 of the Act No. 455/1991 Coll. on Trade Licensing (Trade Licensing Act) as amended.
[54] PATAKYOVÁ, M. in: PATAKYOVÁ, *Komentár*…, p. 784.
[55] Judgment of the Supreme Court of the Slovak Republic from 19 February 2009, file no. 1 Obo 16/2008.

management, however liability for the proper performance of the office remains with the director.

From the point of view of assessing compliance with the duty of care of directors, the subjective test is not applied in principle and personal prerequisites are not important (e.g., age, experience, knowledge are not decisive), but an objective test is applied – a professional approach to the performance of the office is decisive.[56] However, the core of the performance of the office lies in the management of foreign assets, which undoubtedly requires knowledge, experience, and skills, but if the legislator does not specify them (e.g., for banks, insurance companies, etc.), then it is at the discretion of the director, whether they are able to recognize and evaluate information obtained, or *"recognize their own incompetence"*[57] and subsequently use the professional assistance of a third party. The choice of this third party must be made competently, with proper care (*culpa in eligendo*), together with a proper evaluation of the results of this professional assistance.

In defining professional care, it is necessary to separately state the obligations of directors related to bankruptcy proceedings, as in these proceedings the creditors of the company become the entities entitled to the company's assets instead of shareholders. The regulation of bankruptcy law explicitly defines the obligation of the debtor to prevent bankruptcy. If the debtor is in danger of bankruptcy, they are obliged to take appropriate and sufficient measures to avert it without undue delay. At the same time, continuous monitoring of the development of the financial situation as well as the state of assets and liabilities is required in order to identify a threat of bankruptcy in a timely manner and take the necessary measures. The directors are responsible for fulfilling these obligations, however, due to the content of the defined obligation (monitoring the development of the financial situation), the members of the supervisory board are also addressees of this standard.

The current legislation in Slovakia has a valid concept of *"vicinity of insolvency"* through the institution of a company in crisis.[58] This amendment also linked the provisions of the Act on Bankruptcy and Restructuring as a *lex concursus* with the provisions of the Commercial Code as a *lex societatis*,[59] when it specifically stated the obligation to file for bankruptcy, and when violated, the exoneration of business judgment rule does apply in a restricted manner. The debtor is obliged to file a petition for bankruptcy if the company is heavily indebted within 30 days from which they learned or, while maintaining proper care, could learn of this situation. The provisions of the Act on Bankruptcy and Restructuring are also followed by provisions on disqualification.

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[56] CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 183.

[57] HAVEL, *c. d.*, p. 155.

[58] See PATAKYOVÁ, M. – GRAMBLIČKOVÁ, B. – KISELY, I. Current changes in the capital doctrine report from the Slovak Republic. In: *Festschrift für Theodor Baums zum siebzigsten Geburstag. Band 2*. Tübingen: Mohr Siebeck, 2017, pp. 885–902.

[59] PATAKYOVÁ, M. – GRAMBLIČKOVÁ, B. Slovakia. In: *The private international law of companies in Europe*. München: C. H. Beck, 2019, p. 671.

4.2 DUTY OF LOYALTY

The duty of care is not isolated, and the director is also bound by the duty of loyalty. In the case of a duty of loyalty, it must be a matter of adhering to a standard of conduct in the form of maintaining the right motive, i.e., pursuing the right interest. The director is obliged to monitor the interests of the company and all of its shareholders,[60] it must not follow their own personal or business interests or the interests of third parties.[61] The core of the duty of loyalty of the director is the ban on the use of business opportunities of the company, the director's ban on competition, as well as the ban on the misuse of inside information. The duty of loyalty is a general concept (general clause) and includes several obligations that resolve the conflict between duty and interest.

The duty of loyalty obliges the director to act in the interest of the company and all of its shareholders. The Commercial Code itself does not specify the company's interest and in fact it cannot specify it.[62] The interest of a company ultimately depends on its ownership structure and is the result of the projection of the interest of all of its shareholders as a product of shareholders' democracy or a reflection of the interest of the controlling shareholder. When assessing the interest of the shareholders, it is not "any" interest, but this interest is limited by the purpose of the company. The conflict between the interests of the shareholders and the company must be resolved in favour of the company.[63] Of course, an interest that is contrary to the law is not protected by the duty of loyalty.

The duty of loyalty requires from a director to pursue the interests of the company and all of its shareholders. At the same time, however, other legislations imply that the director should also take into account the interests of consumers (regulations governing the quality of products and services), the public (environment), and the interests of employees. In case of violation of special regulations, the company will be directly liable. Subsequently, only after an assessment of all circumstances, will the company be able to claim damages (or other sanctions) against a director.

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[60] Section 135a Subsection 1 stipulates: *"Managing directors are obliged to exercise their powers with professional care and in accordance with the interests of the company and all of its shareholders. In particular, they are obliged to obtain and take into account in their decision-making all available information relating to the subject of their decision, to keep in confidence confidential information and facts whose disclosure to third parties could cause harm to the company or endanger its interests or the interests of the company's shareholders, and while exercising their powers, must not give priority to their own interests, the interests of only certain shareholders or the interests of third parties over the company's interests."*

[61] JOSKOVÁ, *c. d.*, pp. 281–282.

[62] PATAKYOVÁ, M. in: PATAKYOVÁ, *Komentár…*, p. 787.

[63] Identically PALA, R. et al. in: OVEČKOVÁ, *c. d.*, p. 1273; similarly, MAMOJKA, M. jr. in: MAMOJKA, *Obchodný zákonník…*, p. 540, states that the director acts primarily for the benefit of the company; Csach states that in the event of a conflict of interests, action in the interests of the company is given priority. (CSACH, *Povinnosti členov orgánov obchodnej spoločnosti a súkromnoprávne následky ich porušenia*, p. 191).

4.3 DUTY OF CONFIDENTIALITY

The professional and loyal performances of the office of a director are united in the duty of confidentiality.[64] Assessment of the professional aspect, which information shall be subsumed under the duty of confidentiality[65] (protection of confidential information and facts), is associated with the proper care of the director. Disclosure of confidential information and facts could not only harm the company itself, but also endanger its interests and the interests of its shareholders. The law prohibits such conduct by directors, which, in addition to causing damage to the company, may *lead to* damage to the company (without the consequence of actual damage or lost profit – potential threat is sufficient) or jeopardize the interests of the company and its shareholders (i.e., tort). In a joint-stock company, this element is amplified in assessing shareholders' requests for information at the general meeting, where the board of directors is obliged to subsume the request for information and explanations under the factual connection of the general meeting's program and identify possible harm to the company or the controlled entity. Identification of the potential threat to the company already reflects an effect of the director's duty of loyalty to the company and all of its shareholders. It is due to the fact, that information available to the directors from the performance of their office is taken into account and applied in relation to the potential threat of damage and threats to interests.[66]

4.4 BUSINESS JUDGMENT RULE

Despite the competent performance of the office of directors, the expected correctness of a decision may not be confirmed in practice. This principle is an expression of the nature of the business judgment rule (BJR), which works with predictable risk, and therefore in assessing whether a director has acted with professional care. The result of the action is not examined, but the activity leading to this result (collection and evaluation of all relevant information, decision-making, and subsequent implementation of decision in good faith that the chosen procedure is in the interest of the company).

The principle of BJR is based on court decisions in the United States[67] and provides protection to directors if they acted in good faith with care that would be maintained by a reasonably prudent person in a similar position under similar circumstances and in the interest of the company.

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64 Moscow stipulates: *"The corporate statutes and cases do not establish a separate duty of confidentiality. The obligation of a corporate director to protect material corporate information is part of the overall duty to act reasonably in what the director believes are the corporation's best interests, which includes the general categories of care and loyalty."* (MOSCOW, C. Director Confidentiality. *Law and Contemporary Problems*. 2011, Vol. 74, No. 1, p. 208).

65 Judgment of the Supreme Court of the Slovak Republic from 19 February 2009, file no. 1 Obo 16/2008.

66 The specific separation of conflicts of interest from the duty of care and the duty of loyalty is reflected in the European Model Company Act (EMCA), Chapter 9, p. 201 and following. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348.

67 *Otis & Co. v. Pennsylvania R. Co.*, 61 F. Supp. 905 (D.C. Pa. 1945), *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. Super. 1985), *Smith v. Van Gorkom*, 488 2d 858, 864 Del. 1985.

It is a fact, that this rule is also undergoing a certain development in its country of origin, while its fundamental feature, created and completed by the courts, causes its characterization as the *"least understood concept in the company law"*.[68] The BJR is characterized in this way, because it balances between regulation and free market, between public interest and private autonomy.[69] If we are to evaluate the regulation of this rule in the Commercial Code and the consequences thereof, it is necessary to briefly state in which way one could interpret the performance of the competence of directors within the BJR in the *"country of origin"*.[70]

The BJR is defined in particular by reference to the jurisdiction of the state of Delaware as the legal presumption that directors have acted with due care on the basis of sufficient information, in good and sincere faith, and in the best interests of the company.[71] The essence of this rule is, that the decision itself is not examined, what is examined is the decision-making process, even if it turns out over time that the decision itself was not in the best interest of the company. Not every bad decision means a breach of directors' duties.[72] The BJR can be interpreted as a standard of performance of the office, requiring a preliminary judicial inquiry to establish whether there are any elements of *"disqualifying"* behaviour, the burden of proof on these elements lies with the plaintiff.[73]

The BJR as a doctrine of refraining from interfering into the decision-making processes of directors is applied automatically, this rule applies as a rebuttable presumption. Judicial inquiry is used as an exception, when this presumption has been contested (fraud, illegality, self-dealing, etc.).

The BJR, as a qualified immunity (safe harbour) for directors, means that in cases where directors have taken a rational approach and considered all available information, the expertise of their decision-making process is not assessed. The court will respect the decision until a conflict of interest in their decision-making or a loss of decision-making independence is established, or if they have not acted in good faith, or if they have acted in a manner that cannot be attributed to a reasonable business purpose. The decision must be made in the scope of directors' duties and the court will determine whether immunity will be applied, the burden of proof lies with the director. The BJR protects error, but does not protect negligence, lack of good faith, conflict of interest, or irrational or uneconomical decision, nor does it protect fraud or illegal decisions.[74]

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68 MC MILLAN, L. The Business Judgment Rule as an Immunity Doctrine. *William & Mary Business Law Review*. 2013, Vol. 4, No. 2, p. 526.

69 Ibid, p. 526.

70 Business judgment rule as a standard of responsibility for the performance of the function, as a doctrine of abstention and the doctrine of immunity will be presented below according to the work. MC MILLAN, *c. d.*, p. 521–574.

71 ANABTAWI – STOUT, *c. d.*, p. 11.

72 SMITH, L. The Motive, Not the Deed. In: GETZLER, J. (ed.). *Rationalizing Property, Equity and Trusts*. London: NexisLexis, 2003, p. 18.

73 This is how this rule is evaluated in the official commentary to the Model Business Company Act, Section 8.31. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929348.

74 PINTO, A. T. – BRANSON, D. M. *Understanding corporate law*. 5th ed. South Carolina: Carolina Academic Press, 2018, p. 225.

The Commercial Code contains a BJR,[75] but it is applied differently than in the state of Delaware. According to the Commercial Code, the burden of proof lies with the defendant to prove, that they acted with professional (proper) care and in good faith and in the interests of the company. Proving that it was possibly only a wrong assessment in decision-making while fulfilling their duties burden a director.[76]

The BJR frees the obliged person from the accidental failure associated with business risk, but it frees them only from an honest error. This rule does not in itself constitute an exemption from the duty of care (they must always act reasonably well informed) nor does it release the obliged person from their duty of loyalty (they must always follow the interests of the company in good faith). In the event of a breach of duty of care or breach of duty of loyalty, the right to error will not be exercised, as it does not protect disloyalty, lack of care, and dishonesty.

The BJR does not constitute a reason to exonerate from liability for damage of the director.[77] The BJR is based on non-violation of fiduciary duties. A precondition for liability for damage of a director is a breach of their duties. If the BJR is applied, there will be no breach of duty (there is no breach of law). The director's liability for damage will not even occur, therefore it is not necessary to release them from this liability or to exonerate them from it. Therefore, in the Slovak legislation, the BJR is not a reason for exoneration from director's liability for damage, but a test for an absence of breach of law.[78]

In the context of the above-described categorization, given the determining elements, in our opinion, it is correct to conclude that the Slovak solution is attributable to the understanding of the BJR as qualified immunity.

5. CONCLUSION

In 2022 the Slovak company law entered into the fourth decade of its development in the conditions of a free market economy. It is therefore not surprising that there is still a way to discover the basic framework and rules of company law. If Paul Davies mentioned in his monograph Introduction to Company Law in 2002: *"We also suggested that the nineteenth-century starting point was one which displayed the director as a 'gentlemanly amateur', not expected to be very skilled but expected to observe the highest punctilio of honour, especially in avoiding apparent conflict of interests.* […] *Over the past twenty years or so the courts have begun to demand standards of skill and care of directors which are much more closely attuned to those required of people in other walks of life... No longer a set of figureheads, the board claims its legitimacy, not only against the shareholders but also against other stakeholders in the company, on*

[75] Section 135a Subsection 3 first sentence, Section 194 Subsection 7 first sentence, Section 243a Subsection 2 second sentence of the Commercial Code.

[76] DURAČINSKÁ, J. *Povinnosť lojality (fiduciárne povinnosti) spoločníkov kapitálových spoločností* [Duty of loyalty (fiduciary duties) of shareholders of companies]. Bratislava: Wolters Kluwer, 2020, p. 29.

[77] Different opinion: PALA, R. et al. in: OVEČKOVÁ, *c. d.*, p. 970; and LYSINA T. – ZELENÁKOVÁ, M. in: MAMOJKA, *Obchodný zákonník*…, p. 766.

[78] Same opinion: OVEČKOVÁ – CSACH – ŽITŇANSKÁ, *c. d.*, p. 282.

the basis of expertise, which indeed can be studied and enhanced in the business schools of the universities."[79] Then it is clear that, together with the acquisition of knowledge and experience from the operation of companies in social relations, there will be conflicting views on the doctrine and case law, which must be confronted with current developments not only at national level but also at the European and global framework. However, the "compression" associated with this requires not only a rational legislature, a thoughtful judge, but also a demanding addressee of legal norms. This study discussed the following questions: *what is the current position of the Slovak company law in the central issues of companies as legal entities, what is the decision-making and its expression to the third parties, and who is entitled and under what conditions to manage the company and what standard must be observed* and addressed them from a position of demanding user, including the context of some proposed changes related to the recodification of private law in Slovakia.

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[79] DAVIES, P. *Introduction to Company Law*. New York: Oxford University Press, 2002, pp. 196–197.

VARIA

JSOU ROZDÍLNÉ LHŮTY PRO PODÁNÍ JEDNOTLIVÝCH TYPŮ SPRÁVNÍCH ŽALOB PŘEKÁŽKOU NA CESTĚ K JEDNOTNÉ SPRÁVNÍ ŽALOBĚ?

DANIEL CODL

Abstract: **Are Different Time Limits for Bringing Different Types of Administrative Legal Actions an Obstacle to a Universal Administrative Legal Action?**
The thesis first deals with the current state of legal regulation of procedural time limits for filing lawsuits against a decision of an administrative body, for protection against inactivity of an administrative body and for protection against illegal intervention, instruction, or coercion of an administrative body. The issue of measures of a general nature is left aside, as they are rather similar to judicial review of legislation. The author concludes that although the issue of time limits is one of the key obstacles in examining the (im)possibility of introducing a universal administrative legal action, as it is not the only problem and therefore this question remains open. However, the current state of the legal deadlines *de lege ferenda* requires some improvements, in particular, the possibility of waiving a missed deadline and introducing more permeability between different types of actions by making the deadlines more standardized.

Keywords: administrative judicial review; procedural time limits; administrative legal action; type of lawsuits

Klíčová slova: soudní řízení správní; procesní lhůty; správní žaloba; žalobní typy

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1. ÚVOD

Vděčným tématem současné diskuze o soudním řízení správním jsou úvahy nad tím, jak by mohl vypadat jednotný žalobní typ,[1] přičemž stěžejní překážka pro jeho vytvoření je vždy shledána v rozdílné délce lhůt pro podání obecných správních

[1] Viz např. kolokvium pořádané dne 15. 3. 2019 Katedrou správního práva a SV PF UK ve spolupráci s NSS (videozáznam Právnická fakulta UK. Kolokvium Správní soudnictví. In: *Youtube* [online]. 15. 3. 2019 [cit. 2021-09-20]. Dostupné na: https://www.youtube.com/watch?v=n1vlc7awcmw); STAŠA, J. Zpochybnitelnost rudimentální triády správních žalob. In: FRUMAROVÁ, K. (ed.). *Správní soudnictví – 15 let existence Soudního řádu správního vs. Prvotní zkušenosti s aplikací nového Správneho súdneho poriadku: sborník z konference a společného zasedání kateder správního práva ČR a SR konaného ve dnech 22. až 23. března 2018 na Právnické fakultě UP v Olomouci*. Olomouc: Iuridicum Olomoucense, 2018, s. 309–317; ŠIMKA, K. Soudní řád správní – co funguje a co by bylo vhodné změnit? *Bulletin Komory daňových poradců*. 2018, roč. 25, č. 2, s. 26–35; CODL, D. Zamyšlení nad nálezem Ústavního soudu II. ÚS 2398/18. In: GERLOCH, A. – KRZYŽANKOVÁ ŽÁK, K. (eds.). *Právo v měnícím se světě*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2020, s. 423–432.

žalob (proti rozhodnutí správního orgánu, proti nečinnosti správního orgánu a proti nezákonnému zásahu správního orgánu; otázku přezkumu opatření obecné povahy ponechme stranou, neboť má blíže spíše k přezkumu právního předpisu). Bez „jednotné lhůty" nejenom že nelze mít jednotný žalobní typ, nýbrž má tento stav za následek i určité nespravedlnosti v návaznosti na to, zda je ten který rozporovaný úkon správního orgánu klasifikován jako rozhodnutí, nečinnost, nebo zásah.

Naším cílem je proto nejprve analyzovat slabiny současné právní úpravy s. ř. s. a hledat jejich řešení, kterým by v ideálním případě měla být taková konstrukce lhůty pro podání správní žaloby, jež bez dalšího umožní pokračování úvah na cestě k jednotnému žalobnímu typu. V minimalistickém případě však postačí i nalezení dílčích řešení, která pomohou odstranit nedostatky stávající právní úpravy, k nimž nutno předestřít, že tkví v detailech, jež zpravidla nejsou v praxi příliš časté, ale o to jsou poutavější.

2. STÁVAJÍCÍ PRÁVNÍ ÚPRAVA

Z **historické právní úpravy** § 14 až § 16 zákona č. 36/1876 Ř. z., o zřízení správního soudu, nelze čerpat inspiraci, neboť znala pouze žalobu, resp. stížnost, proti správnímu rozhodnutí. Lhůtu 60 dnů nebylo možno prominout, avšak výjimečně bylo možné po uplynutí lhůty opravit vady podání. Z dobového komentáře[2] lze alespoň zmínit, že i neformální doručení rozhodnutí mohlo být počátkem lhůty. Naopak, vejitím rozhodnutí jiným způsobem ve známost nemohla lhůta začít běžet, nicméně přesto bylo možné podat stížnost a po dodatečném formálním doručení napadeného rozhodnutí bylo možné stížnost podat po druhé, byť hrozilo uložení pokuty proti svévoli.[3] Budeme se proto věnovat pouze soudobé právní úpravě.

2.1 ROZDÍLNOST LHŮT PRO JEDNOTLIVÉ ŽALOBNÍ TYPY

Zajisté netřeba blíže popisovat, že s. ř. s. stanovuje subjektivní lhůtu dvou měsíců pro podání žaloby proti rozhodnutí (§ 72 odst. 1 s. ř. s.), objektivní lhůtu jednoho roku pro podání žaloby proti nečinnosti (§ 80 odst. 1 s. ř. s.) a kombinaci objektivní lhůty dvou let a subjektivní lhůty dvou měsíců pro podání žaloby proti nezákonnému zásahu (§ 84 odst. 1 s. ř. s.). Ačkoliv se tyto lhůty jeví být jasné, Kühn správně zdůraznil,[4] že otázka klasifikace forem činnosti veřejné správy může ve vztahu ke lhůtě pro podání správní žaloby žalobce z(ne)výhodňovat podle toho, o jaký se jedná žalobní typ.

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[2] Viz HÁCHA, E. – RÁDL, Z. (eds.). *Nejvyšší správní soud: normy o jeho zřízení a působnosti, komentované podle judikatury býv. správního soudního dvora a nejvyššího správního soudu s použitím materiálií a písemnictví*. Praha: Československý Kompas, 1933, s. 347–361.

[3] Viz HOETZEL, J. *Československé správní právo: část všeobecná*. Praha: Wolters Kluwer ČR, 2018 [reprint původního vydání z roku 1934], s. 408. Pokuta proti svévoli podle § 41 zákona č. 36/1876 Ř. z. ve výši od 10 Kč do 2 000 Kč umožňovala stěžovatele trestat za to, že brojí proti jasnému znění zákona či překrucuje-li fakta. Viz též HÁCHA – RÁDL, *c. d.*, s. 445–447.

[4] Viz KÜHN, Z. § 84. In: KÜHN, Z. – KOCOUREK, T. a kol. *Soudní řád správní: komentář*. Praha: Wolters Kluwer ČR, 2019, s. 713–719.

Jsem toho názoru, že nejvíce velkorysou je **lhůta pro podání žaloby proti rozhodnutí správního orgánu** podle § 72 odst. 1 s. ř. s. Příkladem budiž problematika různých souhlasů a ohlášení v režimu stavebního zákona, které nyní judikatura považuje za rozhodnutí,[5] nicméně předtím je považovala za zásah[6] a ještě předtím za rozhodnutí![7] Uvážíme-li příklad územního souhlasu, který nebyl oznámen dotčeným sousedům,[8] pak takovýto územní souhlas je pravomocný a coby jednorázový zásah s trvajícím účinkem mohl být žalován pouze v objektivní lhůtě do 2 let od okamžiku, kdy k němu došlo.[9] V případě jeho posouzení jakožto správního rozhodnutí je však situace delikátnější. Podle rozšířeného senátu NSS[10] totiž opomenutému účastníku řízení nastává fikce doručení rozhodnutí okamžikem jeho faktického oznámení, a nikdy neoznámené rozhodnutí tak lze žalovat i s odstupem několika let.[11] Obdobně v případě osoby dotčené správním rozhodnutím, která však nebyla a nemohla být účastníkem řízení, a proto jí rozhodnutí nemohlo být oznámeno, počíná běžet lhůta dnem, kdy se o *„rozhodnutí kvalifikovaným způsobem dozvěděla“*,[12] přičemž je nutné seznat obsah rozhodnutí, nikoliv být o něm toliko zprostředkovaně informován od třetích osob.[13] Tento rozsudek lze bez dalšího vztáhnout i na neoznámený souhlas stavebního úřadu, který lze díky jeho překlasifikování ze zásahu na rozhodnutí rázem žalovat! Nikdy nedoručené rozhodnutí lze rovněž

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5 Viz usnesení rozšířeného senátu NSS ze dne 17. 9. 2019, č. j. 1 As 436/2017-43.

6 Viz usnesení rozšířeného senátu NSS ze dne 18. 9. 2012, č. j. 2 As 86/2010-76.

7 Viz rozsudek NSS ze dne 22. 1. 2009, č. j. 1 As 92/2008-76.

8 Inspirace viz usnesení NS ze dne 10. 10. 2017, sp. zn. 4 Tdo 1145/2017. Známá trestní kauza pracovníků stavebního úřadu ve Frýdku-Místku. Opomenutí dotčených sousedů a vydání souhlasu je způsob, jak může úředník prosazovat zájmy stavebníka. Zajímavé i z hlediska prokazování úmyslu úřední osoby spáchat trestný čin.

9 Viz rozsudek NSS ze dne 18. 4. 2013, č. j. 4 Aps 1/2013-25: „[…] *objektivní (dvouletá) lhůta pro podání žaloby* […] *běží ode dne, kdy byl územní souhlas vydán. Subjektivní dvouměsíční lhůta pak začíná běžet ode dne, kdy se žalobce dozvěděl o vydání územního souhlasu. V případě uplynutí lhůt nelze argumentovat tím, že důsledky takového zásahu v podobě oprávnění žadatele realizovat záměr povolený územním souhlasem nadále trvají.*“

10 Viz rozsudek rozšířeného senátu NSS ze dne 17. 2. 2009, č. j. 2 As 25/2007-118: *„Je-li účastník řízení, jehož práva, právem chráněné zájmy či povinnosti byly rozhodnutím dotčeny (§ 14 odst. 1 správního řádu z roku 1967), opomenut při oznámení rozhodnutí, nastane fikce oznámení rozhodnutí k okamžiku, k němuž je bezpečně a bez rozumných pochyb zjištěno, že opomenutý účastník seznal úplný obsah rozhodnutí co do jeho identifikačních znaků i věcného obsahu, zásadně tedy rovnocenně tomu, jako by mu bylo rozhodnutí řádně oznámeno.*“ Viz též rozsudek NSS ze dne 26. 8. 2014, č. j. 6 As 96/2014-31: *„Lhůta pro podání žaloby (§ 72 odst. 1 s. ř. s.) namítající nicotnost správního rozhodnutí, které nebylo formálně žalobci správním orgánem oznámeno, začíná běžet ode dne, k němuž byl žalobce prokazatelně seznámen s obsahem napadeného rozhodnutí.*“

11 Viz rozsudek NSS ze dne 18. 2. 2015, č. j. 1 As 220/2014-150. Pouhý přípis úřadu o tom, že již dříve vydal rozhodnutí, nebyl shledán dostatečným, protože z něj nebyl seznatelný jeho obsah.

12 Viz rozsudek NSS ze dne 17. 6. 2011, č. j. 5 Afs 10/2011-94: *„Neumožňovala-li právní úprava obsažená v § 42 zákona č. 353/2003 Sb., o spotřebních daních, ve znění účinném do 30. 4. 2011, aby vlastník zajištěných vybraných výrobků mohl podat proti rozhodnutí o zajištění řádný opravný prostředek (neboť nebyl účastníkem řízení), lhůta pro podání žaloby dle § 72 s. ř. s. mu počíná běžet ode dne, kdy se kvalifikovaným způsobem o rozhodnutí o zajištění vybraných výrobků dozvěděl (zpravidla v řízení o propadnutí výrobků). Novelou zákona o spotřebních daních provedenou zákonem č. 95/2011 Sb. byl již tento deficit právní úpravy s účinností od 1. 5. 2011 odstraněn; dle nového § 42a odst. 1 zákona o spotřebních daních je vlastník zajišťovaných výrobků účastníkem řízení o zajištění.*“

13 Viz rozsudek NSS ze dne 25. 6. 2014, č. j. 1 Afs 52/2014-38.

žalovat (pokud jej ovšem dokážeme řádně identifikovat), ačkoliv ještě nepočala běžet žalobní lhůta.[14]

Dodejme, že objektivní odvolací lhůta při neoznámení rozhodnutí v případě tzv. dotčených účastníků ve smyslu § 27 odst. 2 správního řádu činí podle § 84 odst. 1 správního řádu 1 rok od oznámení rozhodnutí poslednímu z účastníků. Takový účastník tedy nemůže podat žalobu proti rozhodnutí, neboť nevyčerpal řádné opravné prostředky (§ 68 písm. a) s. ř. s.). Ačkoliv dle komentáře od Jemelky, Pondělíčkové a Bohadla[15] tato nová úprava odstraňuje problém správního řádu z roku 1967, kdy opomenutí byť jediného účastníka znamenalo nenabytí právní moci rozhodnutí[16] a hrozbu podání odvolání i po mnoha dlouhých letech,[17] přetrvává hrozba po dlouhých letech podané správní žaloby proti rozhodnutí odvolacího orgánu nebo proti rozhodnutí vydanému v prvním a posledním stupni (typicky různé souhlasy dle stavebního zákona), čemuž se budeme věnovat později.

Podotkněme, že v případě **fiktivního rozhodnutí** (zpravidla o žádosti), ať již souhlasného, nebo zamítavého, počíná lhůta pro podání žaloby běžet dnem následujícím po dni, kdy marně uplynula lhůta pro vydání rozhodnutí.[18] V případě **nicotného rozhodnutí**[19] pak platí standardní lhůta dvou měsíců ode dne doručení, jelikož prohlášení nicotnosti podle § 77 správního řádu je dozorčím prostředkem, na který není právní nárok.

Co se týče žaloby proti nečinnosti správního orgánu, ÚS se na návrh NSS zabýval **otázkou, zda je existence lhůty** pro její podání ústavně konformní, a shledal, že ano.[20] NSS argumentoval tím, že po jejím uplynutí stále trvá protiprávní stav (nečinnost), který již nelze nijak korigovat, čímž je nepřípustně zvýhodňován nečinný správní orgán. Krom toho podle nálezu ÚS ze dne 15. 5. 2018, sp. zn. II. ÚS 635/18, platí, že o trvajícím zásahu správního orgánu se žalobce dozvídá „každý den znovu", a proto lhůta pro podání žaloby počíná běžet každý den nanovo, což ve vztahu k žalobě proti nečinnosti znamená, že není dán rovný přístup k soudní ochraně. ÚS se s tímto neztotožnil a konstatoval legitimnost omezení žalobního práva lhůtou z důvodu prevence entropie práv a vedení sporů třeba i po 50 letech. Předestřené srovnání mezi zásahovou a nečinnostní žalobou neobstálo proto, že se jedná o zcela odlišné koncepty.[21] Z odlišného stanoviska

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[14] Viz rozsudek rozšířeného senátu NSS ze dne 12. 10. 2004, č. j. 2 As 27/2004-78: *„Nedostatek řádného doručení napadeného správního rozhodnutí žalobci spočívající v tom, že rozhodnutí bylo v rozporu s ustanovením § 25 odst. 3 správního řádu doručeno přímo jemu, a nikoli jeho zástupci, brání bez dalšího projednání žaloby; takový nedostatek je však odstranitelný. Soud proto nejprve uloží správnímu orgánu řádně doručit napadené rozhodnutí a teprve po jeho doručení pokračuje v řízení o žalobě. Samotná vada doručení není důvodem k odmítnutí žaloby pro předčasnost."*

[15] Viz JEMELKA, L. – PONDĚLÍČKOVÁ, K. – BOHADLO, D. *Správní řád: komentář*. 6. vyd. Praha: C. H. Beck, 2019, s. 547–550.

[16] Viz rozsudek rozšířeného senátu NSS ze dne 17. 2. 2009, č. j. 2 As 25/2017-118.

[17] Viz rozsudek NSS ze dne 12. 5. 2011, č. j. 5 As 75/2010-79 (odvolání opomenutého účastníka po 20 letech, kdy se teprve dozvěděl, že přes jeho pozemek vede plynovod, protože s ním stavební úřad nejednal).

[18] Viz rozsudek NSS ze dne 21. 5. 2003, č. j. 7 A 130/2001-39.

[19] Viz usnesení rozšířeného senátu NSS ze dne 12. 3. 2003, č. j. 7 As 100/2010-65.

[20] Viz nález ÚS ze dne 14. 7. 2020, sp. zn. Pl. ÚS 25/19.

[21] Viz bod 41 odůvodnění nálezu ÚS ze dne 14. 7. 2020, sp. zn. Pl. ÚS 25/19: *„K zásadě bezrozpornosti právního řádu se dále sluší dodat, že z ní neplyne požadavek dokonalé harmonie právních předpisů. Upravují-li zákony určité byť obdobné otázky rozdílně, neznamená to, že je upravují rozporně. Právě lhůty jsou typickou ukázkou, že rozdílná právní úprava podobných institutů nezpůsobuje vnitřní rozpornost právního řádu, a to i když pro dílčí odlišnosti není na první pohled žádný důvod. Pohled napříč procesními předpisy*

Jaromíra Jirsy a Kateřiny Šimáčkové, kteří byli pro zrušení této lhůty, se naopak podává praktické zamyšlení nad tím, že účastník řízení zpravidla není motivován ihned na správní orgán útočit žádostí o opatření proti nečinnosti nebo žalobou, aby si jej „nerozhněval". Nadto po uplynutí lhůty nastává procesní nerovnováha, kdy správní orgán může v řízení pokračovat libovolnou cestou, zatímco účastník je ponechán bez ochrany.

Osobně souhlasím s nálezem ÚS pouze proto, že takto zásadní změna právního institutu soudem by měla být až *ultima ratione*. Argumentace NSS nápadně připomíná švýcarský spolkový model správního soudnictví,[22] kdy je ochrana proti nezákonnému zásahu „zprocesněna" tím, že je nutné nejprve žádat jeho odstranění žádostí o vydání „správního rozhodnutí o ochraně před nezákonným zásahem" (lhůta není stanovena), které lze následně napadnout stížností ke Spolkovému správnímu soudu ve lhůtě do 30 dnů jako jakékoliv jiné správní rozhodnutí. V případě nečinnosti lze stížnost podat *kdykoliv*. Nutno zdůraznit, že švýcarské správní řízení[23] není (až na zvláštní právní úpravy) svázáno procesními lhůtami a celkově je tamní přístup k právu méně formální a je kladen velký důraz na základní zásady a jejich důslednou aplikaci v právní praxi. Českým ÚS zmiňované hypotetické „žaloby proti nečinnosti po 50 letech" by narazily na doktrínu nabytých práv (*droits acquis* neboli *wohlerworbene Rechte*)[24] nebo na absenci zájmu hodného ochrany (obdoba „našeho" veřejného subjektivního práva), který musí být *actuel et pratique*.[25]

Dalším nedostatkem nečinnostní žaloby je dvojí způsob běhu objektivní lhůty, kdy při absenci pořádkové lhůty pro vydání rozhodnutí nebo osvědčení počíná běžet lhůta od posledního úkonu v řízení[26] a lze ji prodloužit podáním žádosti o opatření proti nečinnosti ve smyslu § 80 správního řádu,[27] což je v případě existence pořádkové lhůty pro vydání rozhodnutí zhola nemožné.[28]

Z hlediska procesních lhůt je problematické stávající rozlišení mezi nečinností a zásahovou žalobou, jelikož podle § 79 odst. 1 s. ř. s. se nečinnostní žaloba týká pouze povinnosti správního orgánu vydat rozhodnutí ve věci samé (tj. musí být zahájeno řízení) nebo osvědčení. Jakákoliv jiná nečinnost v širším chápání tohoto pojmu je nezákonným zásahem ve smyslu § 82 s. ř. s., pokud zasahuje do žalobcových veřejných subjektivních práv (§ 2 s. ř. s.). Podáme-li odvolání proti rozhodnutí či usnesení

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tak např. odhaluje, že jsou v nich zakotveny lhůty pro podání opravných prostředků o různých délkách, aniž by byl patrný jasný systém jejich určování a aniž by z toho důvodu vyvstávaly pochybnosti o jejich ústavnosti."

22 Blíže viz CODL, D. *Srovnání českého správního řádu se správními řády Švýcarské konfederace a kantonu Fribourg*. Diplomová práce. Praha: Právnická fakulta Univerzity Karlovy [datum obhajoby 22. 6. 2018]. Ze švýcarské literatury lze doporučit BOVAY, B. *Procédure administrative*. 2ème éd. Bern: Stämpfli Editions, 2015. Totožný přístup zvolily i jednotlivé kantony.

23 Švýcaři označují jako správní řízení i soudní řízení správní.

24 Viz DUBEY, J. – ZUFFEREY, J.-B. *Droit administratif général*. Basilej: Helbing Lichtenhahn, 2014, s. 465–476. Jedná se o pestrou kategorii práv vniklých ať již na základě zaniklých právních titulů (např. odběr vody pro mlýn na základě svolení feudální vrchnosti), nebo přechodných ustanovení novely zákona apod.

25 Viz BOVAY, *c. d.*, s. 497.

26 Kritický pohled na toto téma viz KADLEC, O. § 80. In: KÜHN, Z. – KOCOUREK, T. a kol. *Soudní řád správní: komentář*. Praha: Wolters Kluwer ČR, 2019, s. 676–678.

27 Viz rozsudek NSS ze dne 26. 6. 2013, č. j. 6 Ans 5/2013-47.

28 Viz rozsudek NSS ze dne 28. 6. 2017, č. j. 10 Azs 99/2017-33.

prvostupňového orgánu, podle § 88 odst. 1 správního řádu je prvostupňový orgán povinen jej ve lhůtě do 30 dnů ode dne doručení předat odvolacímu orgánu. Je přitom znám problém, že někdy mohou mít správní orgány „úzkost" z odvolacího řízení a spis nechtějí předat. Pokud se jedná o odvolání proti rozhodnutí ve věci samé, je přípustnou nečinnostní žaloba a lhůta pro její podání je omezena,[29] zatímco v případě odvolání proti procesnímu usnesení je přípustná žaloba zásahová.[30] Vůbec nevydání jakéhokoliv nemeritorního rozhodnutí[31] či opatření je žalovatelné jako zásah, není-li dána výluka ze soudního přezkumu,[32] přičemž se jedná o zásah trvající a lhůta pro podání žaloby neběží.[33]

Nezákonným zásahem může být[34] např. nevydání rozhodnutí o prominutí daně ve smyslu § 260 daňového řádu[35] ze strany ministra financí,[36] nevydání regulačního plánu předpokládaného územním plánem coby podmínky pro zrušení stavební uzávěry[37] nebo průtahy při daňové kontrole.[38] Takováto nečinnost je přitom nečinností „privilegovanou", protože se jedná o trvající zásah. V případě uplatnění prostředku ochrany práv ve smyslu § 85 s. ř. s. pak lhůta pro podání zásahové žaloby běží teprve od okamžiku marného uplynutí lhůty pro vyřízení příslušného podání správním orgánem.[39] Pro běh lhůty je naopak irelevantní okamžik, kdy žalobce nabyl přesvědčení, že se jedná o nezákonný zásah.[40]

Obdobně je problém, že dle judikatury se žalobou proti nečinnosti lze domáhat vydání osvědčení o určitém obsahu.[41] Oproti žalobě proti zásahu nebo rozhodnutí je však roční lhůta výrazně delší, byť se prakticky jedná o napadení konkrétního úkonu. Za vhodnější považuji zásahovou žalobu,[42] neboť dvouměsíční subjektivní lhůta je v přípa-

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29 Viz rozsudek NSS ze dne 4. 11. 2015, č. j. 2 As 198/2015-20.

30 Viz rozsudek NSS ze dne 14. 1. 2016, č. j. 9 As 244/2015-47.

31 Viz rozsudek NSS ze dne 15. 12. 2004, č. j. 2 Ans 4/2004-116: *„Žalobou na nečinnost podle § 79 a násl. s. ř. s. se lze domáhat toliko toho, aby soud uložil správnímu orgánu, který je nečinný, povinnost vydat rozhodnutí ve věci samé nebo osvědčení a stanovil k tomu přiměřenou lhůtu. Není tak možné požadovat vydání procesního rozhodnutí (zde: rozhodnutí o přerušení správního řízení podle § 29 odst. 1 správního řádu). Stejně tak není možné požadovat, aby soud uložil správnímu orgánu pouze povinnost pokračovat v řízení s tím, že bude záležet na správním orgánu, zda řízení přeruší nebo zda rozhodne ve věci samé."*

32 Viz např. usnesení rozšířeného senátu NSS ze dne 31. 8. 2005, č. j. 2 Afs 144/2004-110, ve vztahu k nečinnosti při vyřizování námitek proti průběhu daňové kontroly.

33 Viz již zmiňovaný nález ÚS ze dne 15. 5. 2018, sp. zn. II. ÚS 635/18.

34 Blíže viz např. CODL, D. Zamyšlení nad stávajícím pojetím veřejných subjektivních práv jakožto základu aktivní žalobní legitimace v soudním řízení správní. *Právník*. 2021, roč. 160, č. 1, s. 51–64.

35 Podle § 260 odst. 1 daňového řádu: *„Ministr financí může z moci úřední, pokud jde o daně, které spravují jím řízené správní orgány, zcela nebo částečně prominout daň nebo příslušenství daně a) z důvodu nesrovnalostí vyplývajících z uplatňování daňových zákonů, nebo b) při mimořádných, zejména živelných událostech."*

36 Viz rozsudek NSS ze dne 27. 8. 2015, č. j. 1 Afs 171/2015-41. Jakkoliv je výklad NSS restriktivní, dle mého názoru se jedná o hrubý judikaturní exces – nelze souhlasit, že správní soud vůbec takto uvažuje o své možnosti zasahovat do daňové politiky státu (např. má nižší demokratickou legitimitu nežli ÚS).

37 Viz rozsudek NSS ze dne 21. 6. 2018, č. j. 2 As 132/2016-86.

38 Viz usnesení rozšířeného senátu NSS ze dne 16. 11. 2016, č. j. 1 Afs 183/2014-55.

39 Viz usnesení rozšířeného senátu NSS ze dne 31. 8. 2005, č. j. 2 Afs 144/2004-110.

40 Viz rozsudek NSS ze dne 29. 6. 2011, č. j. 5 Aps 5/2010-293.

41 Viz rozsudky NSS ze dne 22. 1. 2010, č. j. 5 Ans 4/2009-63, a ze dne 16. 11. 2010, č. j. 7 Aps 3/2008-98.

42 Viz odlišné stanovisko V. Šimíčka k nálezu ÚS ze dne 14. 8. 2019, sp. zn. II. ÚS 2398/18: *„Jakkoliv totiž rozumím důvodům, pro které se starší judikatura přiklonila k závěru, že nečinnostní žaloba je použitelná i na případy, kdy je vydáno jiné než požadované osvědčení, nemyslím si, že takto komplikovaná konstrukce*

dě doručovaného úkonu správního orgánu racionálnější (obdobná situace jako v případě rozhodnutí) nehledě na to, že se nejedná o nečinnost a dikce § 87 odst. 2 s. ř. s. je proto mnohem přiléhavější, neboť umožňuje soudu správnímu orgánu nařídit konkrétní činnost nebo zdržet se konkrétního zásahu, nikoliv toliko vydání rozhodnutí ve věci samé nebo osvědčení (§ 81 odst. 2 s. ř. s.).

V případě **zásahové žaloby** platí, že dozví-li se žalobce o hrozícím zásahu,[43] např. o hrozící nemožnosti vykonávat práva a povinnosti akademického senátora, nelze takovéto oznámení pokládat za nezákonný zásah, od něhož se odvíjí počátek běhu žalobní lhůty. **Jinak platí, že je nutné odlišit zásahy jednorázové (např. úkon policejního orgánu), jednorázové s trvajícím následkem (typicky non-rozhodnutí, např. připuštění k profesní zkoušce) a zásahy trvající (zabavení dokumentů).** Jak již bylo vysvětleno, v případě trvajícího zásahu počíná běžet žalobní lhůta každý den znovu. K nálezu ÚS ze dne 15. 5. 2018, sp. zn. II. ÚS 635/18, se nicméně sluší připomenout jím zrušený rozsudek rozšířeného senátu NSS.[44] NSS zdůraznil, že efektivita soudní ochrany by měla být pro všechny typy správních žalob srovnatelná. Jako zvláštní kategorii z hlediska včasnosti pominul omisivní jednání veřejné správy na úseku životního prostředí a jiných specifických agendách, ale v obecné rovině seznal koncepci trvajícího zásahu, u něhož lze podat správní žalobu kdykoliv, za neudržitelnou. V případě, že správní orgán provede místní šetření, při kterém zadrží žalobcovy dokumenty, nejedná se o trvající zásah, nýbrž o konkrétní úkon, o kterém se žalobce dozvěděl ke konkrétnímu dni, a proto měl podat žalobu v subjektivní lhůtě 2 měsíců. S tímto ÚS nesouhlasil, neboť dokumenty byly i ke dni podání žaloby stále v držení správního orgánu, a proto zásah trval. V případě rozšířeného senátu NSS v odlišném stanovisku Karel Šimka varoval, že restriktivní výklad lhůty povede k udržování protiprávního stavu, a nadto jednotlivci udržujícímu protiprávní stav neběží lhůta pro promlčení přestupku – proč by tedy na veřejnou správu mělo být pohlíženo jinak? Na něj navázal Aleš Roztočil se zdůrazněním, že v právu civilním a trestním je delikt také promlčen až poté, co dotyčná osoba ustane v jeho konání a následně uplyne promlčecí lhůta. Nadto i v případě ústavní stížnosti podané proti zásahu orgánu veřejné moci (před vstupem s. ř. s. v účinnost) počíná běžet lhůta teprve po jeho skončení.[45]

Do problematiky procesních lhůt vnáší nové světlo nedávné rozhodnutí rozšířeného senátu NSS,[46] že se dotčený soused může bránit zásahovou žalobou proti nečinnosti spočívající v nezahájení řízení z moci úřední o odstranění stavby. NSS dovodil, že obdobné veřejné subjektivní právo lze nalézt i v jiných případech, kdy nevykonávání dozorčích činností veřejnou správou zasahuje do žalobcových veřejných subjektivních hmotných práv.[47] To znamená, že takovouto nečinnost, resp. omisivní jednání správ-

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je s ohledem na zmíněnou legislativní změnu i nadále potřeba. Zjevným smyslem žaloby proti nečinnosti je totiž ‚rozpohybovat' správní orgán, aby vydal vůbec nějaké osvědčení, nikoliv aby byl přinucen vydat osvědčení s konkrétním vyzněním (zde: ‚čistého' výpisu z trestního rejstříku)."

43 Viz rozsudek KS v Plzni ze dne 27. 2. 2013, č. j. 57 A 94/2012-65.

44 Viz rozsudek rozšířeného senátu NSS ze dne 21. 11. 2017, č. j. 7 Af 155/2015-160.

45 Viz nález ÚS ze dne 23. 11. 2004, sp. zn. II. ÚS 599/02.

46 Viz rozsudek rozšířeného senátu NSS ze dne 26. 3. 2021, č. j. 6 As 108/2019-39.

47 Viz též CODL, *Zamyšlení nad stávajícím pojetím veřejných subjektivních práv…*, s. 51–64.

ního orgánu,[48] lze na rozdíl od „čistokrevné“ nečinnosti ve smyslu § 79 odst. 1 s. ř. s. s ohledem na nález ÚS ze dne 15. 5. 2018, sp. zn. II. ÚS 635/18, žalovat kdykoli, a proto rozšířený senát upozornil, že žaloba podaná po dlouhodobém pokojném akceptování stavu může být zneužitím práva.

2.2 PROBLÉM ŽALOB PODANÝCH AŽ PO UPLYNUTÍ MNOHA LET

Z uvedeného vyplývá, že v případě žalob proti rozhodnutí a proti zásahu výjimečně hrozí, že budou podávány i po mnoha dlouhých letech. Totéž by hrozilo i u nečinnostní žaloby v případě zrušení žalobní lhůty.

Jelikož nález ÚS ze dne 15. 5. 2018, sp. zn. II. ÚS 635/18, s možností zneužití práva podat žalobu ve vztahu k běhu lhůty pro podání žaloby proti trvajícímu zásahu nijak neoperuje, bude zajímavé sledovat další vývoj judikatury. Inspiraci lze nalézt v rozhodnutí rozšířeného senátu NSS pojednávajícím o právní moci rozhodnutí v případě, kdy řízení bylo vedeno podle správního řádu z roku 1967 a opomenutý účastník se ozval až po letech. NSS shledal, že nelze favorizovat účastníka, který o své újmě na právech věděl, avšak dlouhodobě ji neřešil,[49] nicméně možnost podání odvolání nebo žaloby nevyloučil. Též je podstatné, že k odmítnutí žaloby podle § 46 odst. 1 písm. d) s. ř. s. z důvodu zneužití práva přistupují soudy jen v nejvýjimečnějších případech, doposud se jednalo snad jen o notorické kverulanty.[50] Co se týče judikatury k zásadě legitimního očekávání, jíž jsem se zabýval jinde,[51] lze v ní nalézt toliko inspiraci k tomu, aby se soud vždy zabýval subjektivní stránkou žalobce i žalovaného, případně osoby zúčastněné na řízení (např. stavebníka), neboť praxe je pestrá a vše nelze exaktně „zaškatulkovat“.

Přístup současného pozitivního práva (zvl. správního řádu), že rozhodnutí správního orgánu či obdobný úkon lze dodatečně přezkoumat či změnit pouze v určité pevně stanovené lhůtě (vyjma prohlášení nicotnosti rozhodnutí podle § 77 správního řádu nebo opravu vyjádření, osvědčení či sdělení podle § 156 správního řádu), je pouze jedním

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48 Viz BAHÝĽOVÁ, L. Judikatura NSS: ochrana před nezákonným zásahem. *Soudní rozhledy*. 2016, roč. 11, č. 3, s. 74 a násl.

49 Viz rozsudek rozšířeného senátu NSS ze dne 17. 2. 2009, č. j. 2 As 25/2007-118: *„[49] Nebude tedy na místě favorizovat účastníka, který – ač prokazatelně a v dostatečném rozsahu věděl, že se mu stala újma na právech vydáním rozhodnutí v řízení, v němž byl opomenut – proti tomu včas nezasáhl (z liknavosti, z důvodů spekulačních, pro zamýšlenou budoucí šikanu třetích osob), nebo prostě proto, že se zásahem do svých vlastních práv původně souhlasil (má tu místo zásada klasické římské jurisprudence volenti not fit iniuria, neboli ‚svolnému se neděje bezpráví‘).“*

50 Viz např. usnesení NSS ze dne 13. 11. 2014, č. j. 10 As 226/2014-16.

51 Viz CODL, D. Zásada legitimního očekávání ve správním právu. *Právní rozhledy*. 2019, roč. 27, č. 23–24, s. 828–836.

z možných řešení.[52] Správní řád z roku 1928[53] umožňoval již vydané pravomocné rozhodnutí z moci úřední změnit, aniž by k tomuto stanovil lhůtu. Hoetzel[54] takovouto materiální právní moc označil za *„hotovou sfingu“*, o níž v tehdejší nauce panoval *„názorový chaos“*, z něhož vyzdvihl pnutí mezi právní jistotou a veřejným zájmem na nápravě nezákonnosti nebo nesprávnosti správního aktu. S takovýmto uchopením pravomoci správního orgánu měnit nebo zrušit pravomocné správní rozhodnutí nadále operuje správní právo švýcarské.[55] Z výkladu Dubeye a Zuffereye se podává,[56] že rozdíl oproti našemu prvorepublikovému právu je ten, že švýcarská judikatura zformulovala přesný *„test zrušitelnosti“* správního rozhodnutí.[57] Neexistuje tak právní nejistota, ba naopak, i po mnoha letech je možné odstranit vadný správní akt zakládající dlouhotrvající protiprávní stav.

Uvážíme-li, že nezákonné správní rozhodnutí může založit protiprávní stav na hodně dlouhou dobu, jeví se mi přijatelnějším řešení, kdy není dána lhůta pro provedení přezkumného řízení a současně lze, nejedná-li se o zneužití práva, podat žalobu proti neoznámenému správnímu rozhodnutí i po mnoha letech, pokud protiprávní stav a zájem na jeho odstranění trvá.

Dle mého názoru je odmítnutí žaloby z důvodu zneužití práva spočívajícím v jejím pozdním podání něco, co by mělo být aplikováno, jen je-li žaloba zjevně šikanózní. Vždyť protiprávní stavy mají tu vlastnost, že nám mohou být úkorné až teprve ve chvíli, kdy se je někdo jiný rozhodne zneužít. Typicky se může jednat o různé způsoby užívání nepovolených či „zvláštně povolených“ staveb, kdy po mnoha desítkách let může stále existovat legitimní zájem na tom, aby byla v sousedství sjednána zákonnost, a současně nelze hovořit o dobré víře stavebníka. Ostatně nepovolené stavby se nepromlčují, jedná se o protiprávní stav.[58] NSS v případě zásahové žaloby dovodil, že intenzita zásahu je

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[52] Viz též CODL, D. Jaká je budoucnost správní žaloby ve veřejném zájmu? In: KNOLL, V. – HABLOVIČ, J. – VNENK, V. (eds.). *Naděje právní vědy 2020: sborník příspěvků ze stejnojmenné mezinárodní konference pořádané Fakultou právnickou Západočeské univerzity v Plzni on-line dne 27. listopadu 2020*. Plzeň: Západočeská univerzita v Plzni, 2021, s. 356–365. Domnívám se, že pevně daná lhůta pro provedení přezkumného řízení nejenom znemožňuje po letech přezkoumat správní rozhodnutí zakládající závažný protiprávní stav, ale je též nesystémová ve vztahu ke lhůtám pro podání žaloby ve veřejném zájmu (v kauze fotovoltaických elektráren musel ERÚ požádat NSZ o žalování svých vlastních rozhodnutí) či vůči rozhodnutí, které bylo oznámeno až po mnoha letech.

[53] Viz § 83 vládního nařízení č. 8/1928 Sb. z. a n., o řízení ve věcech náležejících do působnosti politických úřadů (správní řízení): *„Dosavadní právo úřadu rušiti nebo měniti právoplatné rozhodnutí z úřední moci zůstává nezměněno.“* Obdobně viz § 39 až § 41 vládního nařízení č. 20/1955 Sb., o řízení ve věcech správních (správní řád); § 24 nařízení vlády č. 91/1960 Sb., o správním řízení. Lhůtu poprvé zavedl § 68 odst. 1 správního řádu z roku 1967, a to objektivní tříletou od právní moci napadeného rozhodnutí.

[54] Viz HOETZEL, *c. d.*, s. 339–344.

[55] K tomuto blíže viz má diplomová práce *Srovnání českého správního řádu se správními řády Švýcarské konfederace a kantonu Fribourg*.

[56] Viz DUBEY – ZUFFEREY, *c. d.*, s. 347, 352, 353, 356–368.

[57] Viz tamtéž, s. 367. Správní rozhodnutí lze změnit nebo zrušit, pokud tak stanoví zákon nebo pokud převáží zásada zákonnosti nad ochranou právní jistoty. Ve druhém případě zpravidla nelze správní rozhodnutí zrušit, pokud na něj navazují další správní akty, adresát v dobré víře něco významného učinil (postavil dům, učinil závažné životní rozhodnutí apod.) nebo vzniklo legitimní očekávání. Z této výjimky je však výjimka v případě nutnosti ochrany závažného veřejného zájmu, nebo pokud bylo správní rozhodnutí založeno na věcném omylu nebo se jedná o dlouhodobě trvající protiprávní stav.

[58] Viz rozsudek NSS ze dne 20. 2. 2012, č. j. 2 As 102/2011-112, nebo usnesení ÚS ze dne 21. 2. 2012, sp. zn. IV. ÚS 3140/11.

vnímána v různé době různě intenzivně, a proto i po mnoha letech podaná zásahová žaloba může být zcela namístě.[59] Taktéž správní řízení může být dokončeno i po mnoha desítkách let, mj. řízení v režimu ústavního dekretu presidenta republiky č. 33/1945 Sb., o úpravě československého státního občanství osob národnosti německé a maďarské,[60] totéž platí pro „zapomenuté" odkladné účinky přiznané stížnostem podaným k tehdejšímu NSS.[61]

Možnost legitimního podání správní žaloby i po mnoha letech lze opřít o závěr NSS,[62] že žalobu proti nečinnosti v řízení zahájeném v roce 1945 bylo možné podat nejdříve k 1. 1. 2003 a nejpozději do 31. 12. 2003. Tentýž závěr NSS učinil i ve vztahu k zásahové žalobě.[63] Jinými slovy lhůta pro podání správní žaloby začíná běžet teprve v okamžiku, kdy je žaloba k dispozici, ačkoliv i zde dochází k prolomení právní jistoty.

Lze tedy uzavřít, že v případě žalob podaných po mnoha dlouhých letech je nutné zohlednit konkrétní okolnosti případu. Pro přípustnost takovéto žaloby (ať již proti rozhodnutí, nečinnosti, nebo zásahu) si dovoluji navrhnout následující podmínky: 1) předmět sporu zakotvený v dávné minulosti musí být stále aktuální, aby jeho vyřešení mohlo mít vůbec nějaký praktický smysl (např. dodatečně „odhalené" správní rozhodnutí zakládá pro žalobce úkorný protiprávní stav); 2) žalobce musí mít legitimní důvod, proč žalobu nepodal již dříve (např. o úkonu správního orgánu nemohl při vší péči vůbec vědět nebo došlo k podstatné změně okolností, která jej přinutila upustit od původně poklidné akceptace stavu věci); 3) oprávněné zájmy žalobce (včetně s nimi souznící veřejné zájmy) musí převážit nad právní jistotou jiných adresátů úkonu veřejné správy a jejich dobrou vírou; 4) žalobou nesmí být z jakéhokoliv jiného důvodu zneužíváno právo nebo hojena dřívější nedbalost žalobce.

Zajisté nelze tolerovat náhlé a šikanózní žaloby, současně však nelze popřít, že po mnoha letech může vyvstat legitimní důvod pro podání žaloby, jejíž lhůta ještě formálně neuplynula a stále trvá zájem na řešení protiprávního stavu.

2.3 JE SPRÁVNÉ, ŽE NIKDY NELZE PROMINOUT ZMEŠKÁNÍ LHŮTY?

Netřeba zdůrazňovat, že v případě všech žalobních typů s. ř. s. nepřipouští prominutí zmeškání lhůty, a proto soudy důvody opožděného podání žaloby nezkoumají.[64] Šimka však správně upozornil,[65] že si lze představit případy, kdy žalobce z ob-

[59] Viz rozsudek NSS ze dne 19. 2. 2015, č. j. 1 As 151/2014-23, výmaz přestupků z registru řidičů až po mnoha letech (záznamy z let 1992 a 1994). Obdobný případ viz rozsudek NSS ze dne 31. 10. 2013, č. j. 8 Aps 8/2012-28, kdy se jednalo o opakované provádění zkoušek těsnosti žumpy, které začalo být žalobci na obtíž až po uplynutí delšího času. Viz též rozsudek NSS ze dne 26. 6. 2013, č. j. 6 Aps 1/2013-51. Naopak neaktuální je rozsudek rozšířeného senátu NSS ze dne 21. 11. 2017, č. j. 7 Af 155/2015-160, takovouto tezi popírající, neboť byl zrušen nálezem ÚS ze dne 15. 5. 2018, sp. zn. II. ÚS 635/18, důsledně razícím doktrínu trvajícího zásahu.

[60] Viz např. rozsudek MS v Praze ze dne 16. 4. 2019, č. j. 3 A 48/2017-105.

[61] Viz rozsudek NSS ze dne 18. 12. 2013, č. j. 2 As 53/2013-111.

[62] Viz rozsudek NSS ze dne 12. 6. 2006, č. j. 8 Ans 3/2005-107.

[63] Viz rozsudek NSS ze dne 21. 12. 2004, č. j. 4 Afs 22/2003-96. V tamním případě se jednalo o daňové kontroly prováděné finanční správou v devadesátých letech.

[64] Viz rozsudek NSS ze dne 18. 3. 2004, č. j. 1 Ads 4/2004-57.

[65] Viz odlišné stanovisko K. Šimky k rozsudku rozšířeného senátu NSS ze dne 21. 11. 2017, č. j. 7 As 155/2015-160.

jektivních důvodů nemohl podat včas zásahovou žalobu, a proto by v těchto případech měly být soudy vstřícnější. Domnívám se, že toto lze vztáhnout na všechny žalobní typy.

Dle judikatury výjimku představují případy, kdy žalobce nebyl odvolacím orgánem řádně poučen o kratší žalobní lhůtě (např. 30denní lhůtě v cizinecké agendě).[66] Totéž se vztahuje na jakékoliv jiné chybné poučení ze strany správního orgánu.[67] Platí též zásada, že v pochybnostech je třeba zákon vyložit tak, aby lhůta pro podání žaloby byla spíše delší nežli kratší.[68] Ostatně ÚS v nálezu ze dne 1. 12. 2009, sp. zn. Pl. ÚS 17/09, shledal protiústavní sedmidenní lhůtu pro podání žaloby proti rozhodnutí Ministerstva vnitra o žádosti o udělení azylu. V případě pochybností o včasnosti podané žaloby je nutné poskytnout stranám prostor k vyjádření se, nikoliv žalobu ihned odmítnout.[69]

Problematickým se jeví závěr NSS, že **změna judikatury neomlouvá opožděné podání žaloby**,[70] ačkoliv *ex post* umožní žalovat správní rozhodnutí, které dříve považovala za vyloučená z přezkumu. Dle mého názoru nelze po žalobci spravedlivě požadovat „žalování nežalovatelného" v naději, že se snad judikatura změní (v tamním případě ještě nebyly konstantní závěry MS v Praze o nepřípustnosti žaloby ani částečně potvrzeny nejednotnou judikaturou NSS, kterou následně popřel rozšířený senát, a shledal přípustnost žaloby). Závěr NSS však nelze paušálně odmítnout, neboť je v souladu s dikcí § 72 odst. 4 s. ř. s. (*Zmeškání lhůty pro podání žaloby nelze prominout*.). V jiném případě NSS neshledal jako omluvu pro pozdní podání žaloby ani to, že výluka ze soudního přezkumu napadeného rozhodnutí byla později zrušena nálezem ÚS,[71] neboť by se jednalo o retroaktivní působení nálezu, jež působí zásadně do budoucna. Naopak, KS v Praze[72] ve vztahu k nečinnostní žalobě shledal, že je-li příčinnou uplynutí žalobní lhůty porušení povinnosti správního orgánu, pak to nesmí být žalobci na újmu. V tamním případě nebyl žalobce vyzván k opravě vad žádosti a správní orgán nepřerušil řízení. Lhůta pro vydání rozhodnutí proto nemohla začít běžet. Žalobce nebyl zastoupen advokátem, a proto si tohoto pochybení správního orgánu nevšiml.

Možnost prominutí zmeškání žalobní lhůty výjimečně připouští § 3 zákona č. 191/2020 Sb., o některých opatřeních ke zmírnění dopadů epidemie koronaviru SARS CoV-2 na osoby účastnící se soudního řízení, poškozené, oběti trestných činů a právnické osoby a o změně insolvenčního zákona a občanského soudního řádu, a to pro případy, kdy zmeškání lhůty zapříčinila krizová a mimořádná opatření orgánů veřejné moci. Nelze nezmínit, že švýcarská[73] právní úprava s možností prominutí lhůty počítá, a to i v případě veřejnoprávní stížnosti či subsidiární ústavní stížnosti ke Spolkovému soudu.

Domnívám se tedy, že možnost prominutí zmeškání žalobní lhůty by měla být v s. ř. s. zakotvena pro všechny žalobní typy, neboť nejen v době koronavirové si lze

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66 Viz rozsudek rozšířeného senátu NSS ze dne 27. 10. 2009, č. j. 4 Ads 39/2008-83.
67 Viz nález ÚS ze dne 31. 1. 2012, sp. zn. IV. ÚS 3476/11.
68 Viz rozsudek NSS ze dne 14. 8. 2003, č. j. 2 As 19/2003-58.
69 Viz rozsudek NSS ze dne 12. 8. 2010, č. j. 7 Afs 63/2010-65.
70 Viz rozsudek NSS ze dne 23. 6. 2011, č. j. 5 Afs 11/2011-79.
71 Viz rozsudek NSS ze dne 14. 12. 2017, č. j. 4 Afs 157/2017-37.
72 Viz rozsudek KS v Praze ze dne 1. 4. 2014, č. j. 45 A 10/2014-51.
73 Viz Loi du 17 juin 2005 sur le Tribunal fédéral (RS 173.110); Loi du 17 juin 2005 sur le Tribunal administratif fédéral (RS 173.32); Loi fédérale du 20 décembre 1968 sur la procédure administrative (RS 172.021).

představit případy, kdy neprominutí lhůty může být nespravedlivé z důvodu jiné nečekané události. Také nelze po žalobci spravedlivě požadovat podání žaloby v době, kdy judikatura považuje žalobu za nepřípustnou. Zde je navíc judikatura NSS vnitřně rozporná, neboť v případě nečinnosti či zásahu před 1. 1. 2003 dovodila, že lhůta počala běžet až vstupem s. ř. s. v účinnost. Promíjení zmeškání lhůty by samozřejmě vyžadovalo restriktivní přístup, aby nedocházelo k jeho zneužívání.

3. JAK BY (NE)MOHLA VYPADAT „JEDNOTNÁ" LHŮTA PRO PODÁNÍ „JEDNOTNÉ" SPRÁVNÍ ŽALOBY?

K otázce konstrukce jednotného žalobního typu je nutné přistoupit s pokorou, neboť něco takového vlastně dosud v žádném právním řádu neexistuje.[74]

3.1 STRUČNÝ ZAHRANIČNÍ EXKURZ

Francouzský *Code de justice administrative* vychází v čl. R421-2 z fikce, že nečinnost je vlastně negativní správní rozhodnutí, a proto je nutné žalobu podat ve lhůtě do 2 měsíců od uplynutí lhůty pro vydání rozhodnutí. V případě pozdějšího vydání správního rozhodnutí je v této lhůtě nutno napadnout právě toto nové rozhodnutí. Nezákonný zásah je „zprocesněn" vedením řízení o žádosti o jeho odstranění, jehož výsledkem je opět správní rozhodnutí. Neschůdnost této cesty je pro české právo zjevná již z důvodu, že Francie má podstatně početnější sbor správních soudců nežli Česko. Podávání žalob proti nečinnosti v krátké lhůtě 2 měsíců by se zcela jistě ukázalo disfunkčním.

Německý *Verwaltungsgerichtsordnung* (VwGO) obdobně jako s. ř. s. vychází ze systému několika správních žalob a, jak vysvětlil Kühn,[75] i zde existuje problém s volbou žalobního typu obdobně jako v s. ř. s. Judikatura o „přepoučení" na správný žalobní typ zohledňuje subjektivní stránku žalobce (v případě zastoupení advokátem zpravidla není změna volby žalobního typu možná). Nový **slovenský *správný súdný poriadok*** z roku 2015 v třetí části odlišuje tyto správní žaloby: všeobecnou správní žalobu (tj. proti rozhodnutí), správní žalobu ve věcech správního trestání, správní žalobu v sociáních věcech, správní žalobu ve věcech azylu, zajištění a správního vyhoštění. Ve čtvrté části pak jako zvláštní řízení žalobu proti nečinnosti a proti zásahu. Z něj rovněž nelze čerpat inspiraci.

Rovněž řízení před Soudním dvorem Evropské unie odlišuje žalobu na neplatnost právního aktu, ať již abstraktního (právního či interního předpisu), či konkrétního (rozhodnutí nebo opatření); nebo žalobu proti nečinnosti.[76] Jedná se o dvě různé správní

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[74] Viz přehled systémů správního soudnictví v evropských zemích – PÍTROVÁ, L. – POMAHAČ, R. *Evropské správní soudnictví*. Praha: C. H. Beck, 1998.

[75] Blíže viz KÜHN, Z. § 4. In: KÜHN, Z. – KOCOUREK, T. a kol. *Soudní řád správní: komentář*. Praha: Wolters Kluwer ČR, 2019, s. 17–20.

[76] Viz LENAERTS, K. – MASELIS, I. – GUTMAN, K. – NOWAK, J. T. (eds.). *EU procedural law*. Oxford: Oxford University Press, 2014. Oxford EU law library, s. 739–868.

žaloby, přičemž lhůta vždy činí dva měsíce. V případě žaloby proti nečinnosti je nutné nejprve vyzvat orgán EU, aby jednal, a pokud ve lhůtě do dvou měsíců nic neučiní, tak ve lhůtě dalších dvou měsíců je nutné podat žalobu.

I ve švýcarském případě **spolkového správního řádu** (dále jen „PA"),[77] který si na základě své zahraniční zkušenosti dovoluji blíže komentovat,[78] lze „dvojjedinost" stížnosti ke správnímu soudu (proti rozhodnutí / proti nečinnosti) *via facti* rozčlenit na obdobu české žalobní triády. Např. může vyvstat spor, zda se jedná o zásah (*acte matériel* / *Realakte*), a pak je třeba žádat o vydání rozhodnutí o jeho odstranění podle čl. 25a PA, tj. aby se správní orgán zdržel určitého jednání / odstranil následky nezákonného zásahu / deklaroval nezákonnost zásahu; nebo o rozhodnutí či nečinnost, a pak je nutné rovnou podat stížnost ke správnímu soudu (podle čl. 50 PA činí lhůta 30 dnů od oznámení rozhodnutí, proti nečinnosti lze stížnost podat kdykoliv, je-li na tom zájem hodný ochrany).

K čl. 25a PA z pojednání Largeye[79] dovozuji, že se *de facto* jedná o obdobu české zásahové žaloby, byť ochranu nejprve poskytuje veřejná správa tak, aby se soud posléze mohl zabývat jejím rozhodnutím či nečinností. Ze švýcarské judikatury je pro nás podstatné, že podle *Tribunal fédéral* (*Budesgericht*, Nejvyšší soud)[80] je nutné odmítnout stížnost podanou proti zásahu, pokud předtím nebyla podána žádost podle čl. 25a PA. V takovémto případě lze bez dalšího podat žádost podle čl. 25a PA. Obdobně žádost podanou podle čl. 25a PA, jíž se ve skutečnosti napadá správní rozhodnutí, lze podle čl. 52 odst. 2 PA opravit na plnohodnotnou stížnost proti správnímu rozhodnutí. A pokud jde o nečinnost, lze důvodně předpokládat, že proti jakékoliv úřední písemnosti bude bdělý účastník řízení brojit stížností ve lhůtě 30 dnů. Pokud se nejedná o správní rozhodnutí, soud z moci úřední posoudí, zda se nejedná o nečinnost, aniž by žalobu rovnou odmítal.[81]

Výhodou švýcarského modelu je, že v případě dodržení 30denní lhůty ode dne doručení úkonu správního orgánu se nemusíme bát omylu, zda žalujeme nečinnost či rozhodnutí. Soud si žalobu sám překvalifikuje a totéž může učinit i soud vyšší instance. Pokud se však jedná o zásah, soud stížnost odmítne a zbývá možnost proti zásahu brojit postupem podle čl. 25a PA. Je však otázkou, co se stane, pokud se zásah později v řízení „ukáže" být rozhodnutím. Patrně by se jednalo o zhojitelné procesní pochybení, ale nejsem si tím jist. Z mého studijního pobytu ve Švýcarsku je mi známo, že švýcarská doktrína se ničím, co by připomínalo naše problémy se „strefováním se do správného žalobního typu", nezabývá. Tento problém je marginální. Symbióza lhůty pro napadení správního rozhodnutí a „nelhůty" pro napadení nečinnosti nebo zásahu je tedy procesně přátelské řešení.

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[77] Loi fédérale du 20 décembre 1968 sur la procédure administrative (RS 172.021).

[78] Jiné zahraniční právní úpravy zmiňuji stručně pro ilustraci, neboť jsem neměl přístup k zahraniční literatuře, a navíc mi chybí jakékoliv byť i zprostředkované zkušenosti s tamními právními systémy.

[79] Viz LARGEY, T. Le contrôle juridictionnel des actes matériels. *Aktuelle juristiche Praxis* / *Practique juridique actuelle*. 2019, No. 1, s. 67–77.

[80] Viz rozsudek TF ze dne 1. 3. 2018, sp. zn. 8 C 596/2017.

[81] Viz rozsudek TF ze dne 28. 11. 2017, sp. zn. 2 C 518/2017.

Jakkoliv nauka věnuje důslednou pozornost problémům při volbě žalobního typu,[82] přesný nástin „univerzální" správní žaloby doposud neexistuje.

Svoboda[83] správně zdůraznil jako hlavní problém existenci „řízení o určení žalobního typu", kdy v případě hraničního úkonu správního orgánu musí soudy nejprve řešit, o jaký žalobní typ se vlastně jedná, aniž by projednávaly meritum věci. Volbě žalobního typu přitom odpovídá i efektivita soudní ochrany. Ze závěrů Svobody je nutné převzít konstatování, že i případný „jednotný" žalobní typ by musel být vnitřně diferencován dle toho, jaká forma činnosti veřejné správy je žalobou napadena, neboť pestrost forem činnosti veřejné správy nelze „kouzlem" odhodit, a proto bude správní právo procesní vždy bohatší na různé formalistické „zádrhele" nežli třeba právo občanské či trestní. Jsem toho názoru, že z hlediska spravedlivosti a rozumnosti procesu nelze stírat rozdíl mezi jednorázovým úkonem (rozhodnutím, osvědčením či zásahem) a trvajícím protiprávním stavem (zásahem nebo nečinností), protože by došlo ke zvláštní anomálii ve vztahu ke zbytku právního řádu – trvající přestupky, trestné činy a protiprávní stavy v občanském právu se totiž nepromlčují (občanský zákoník však zná institut vydržení, který správní právo nezná).

Pomahač[84] ve své úvaze nad *„soudním řádem správním 2.0."* ve vztahu k již zmíněnému rozsudku rozšířeného senátu NSS ze dne 21. 11. 2017, č. j. 7 Afs 155/2015-160, správně poukázal na účelovost pozdního podání žaloby, tj. až 30 měsíců po odnětí dokumentů správcem daně, přičemž důvodem žaloby byl nepříznivý vývoj daňového řízení pro žalující společnost. Tento závěr potvrzuje můj názor, že při absenci lhůty pro podání žaloby je vždy nutné posoudit, zda se nejedná o zneužití práva, nicméně současně poukazuje na jeho slabinu – vzniká zde rázem „měkké" kritérium soudcovského uvážení oslabující právní jistotu, jež klade zvýšené nároky na právní cit. V obdobném duchu **Staša**[85] zdůraznil slabiny stávajícího systému žalob s důrazem na to, že různé žalobní typy poskytují různě účinnou ochranu a na první pohled logický systém vytváří při detailním pohledu různé nedostatky v procesní ochraně, přičemž řešením by mohl být jednotný žalobní typ.

Nad možností univerzální žaloby nebo alespoň lépe prostupných žalobních typů se zamyslel též Šimka.[86] Uvedl, že žalobce by měl nejprve uvést, proti jakému jednání veřejné správy brojí a v čem spatřuje porušení svých práv. Žalobním lhůtám, které jsou

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[82] Stručný a jasný přehled viz ŠTENCEL, V. – VOMÁČKA, V. Volba žalobního typu ve správním soudnictví. *Soudní rozhledy*. 2017, roč. 22, č. 5, s. 146–151.

[83] Viz SVOBODA, T. – CHAMRÁTHOVÁ, A. Nad (nejasnými) hranicemi mezi žalobními typy podle soudního řádu správního (1. část). *Právní rozhledy*. 2019, roč. 27, č. 11, s. 388 a násl.; SVOBODA, T. Nad (nejasnými) hranicemi mezi žalobními typy podle soudního řádu správního (2. část). *Právní rozhledy*. 2019, roč. 27, č. 12, s. 435 a násl.; SVOBODA, T. Nad (nejasnými) hranicemi mezi žalobními typy podle soudního řádu správního (3. část). *Právní rozhledy*. 2019, roč. 27, č. 13–14, s. 477 a násl.

[84] Viz POMAHAČ, R. Soudní řád správní 2.0. In: FRUMAROVÁ, K. (ed.). *Správní soudnictví – 15 let existence Soudního řádu správního vs. Prvotní zkušenosti s aplikací nového Správneho súdneho poriadku: sborník z konference a společného zasedání kateder správního práva ČR a SR konaného ve dnech 22. až 23. března 2018 na Právnické fakultě UP v Olomouci*. Olomouc: Iuridicum Olomoucense, 2018, s. 205–219.

[85] Viz STAŠA, *c. d.*, s. 309–317.

[86] Viz ŠIMKA, *c. d.*, s. 26–35.

nyní striktně odděleny, by dle něj bylo lepší dát jednotný rámec. V případě trvajícího zásahu nebo nečinnosti je třeba, aby byla soudní ochrana dostupná po celou dobu jeho trvání, nicméně v protikladu k tomu je nutné zohlednit i právní jistotu. Současně jednorázové úkony, ať již rozhodnutí, či zásahy, mohou mít následky trvající desítky let, zatímco trvající zásah může skončit okamžitě např. vrácením zabavených dokumentů (trvá však vědomost úřadu o jejich obsahu). Dle Šimky by proto bylo vhodné počátek lhůty fixovat k okamžiku, kdy se o jednání veřejné správy žalobce dozvěděl, přičemž nesmí začít běžet dříve, nežli je dokonáno. V některých případech se však mohou účinky některého jednání veřejné správy projevit až s odstupem, např. nasazení povinné léčebné metody, hygienického opatření apod. Podle Šimky by tak v případě doručovaných správních aktů měla začít běžet žalobní lhůta od okamžiku jejich doručení. U dalších jednání veřejné správy by bylo nutné zkoumat, kdy se žalobce dozvěděl o právním jednání a i o všech jeho důsledcích.

K úvahám Šimkovým nutno zopakovat, že v případě doručovaných správních aktů by bylo nutné též změnit přístup k přezkumnému řízení a zrušit lhůtu pro jeho zahájení a vydání rozhodnutí. Šimka a Staša ve svých úvahách též poukazují na to, že problém s volbou žalobního typu potažmo se lhůtou může mít i celou řadu dalších procesních souvislostí. Např. žalobní body v řízení o žalobě proti rozhodnutí lze vznášet pouze ve lhůtě pro podání žaloby, zatímco v případě žaloby proti nečinnosti či zásahu lze uplatnit novou argumentaci prakticky kdykoliv. Jednotlivé žalobní typy mají též rozdílné petity či podmínky řízení a co do „vnitřního obsahu" jednotlivých žalob existují úvahy *de lege ferenda* o jejich možné modifikaci, např. ve vztahu ke správnímu trestání.[87]

V případě podmínek řízení může snadno nastat procesní situace, kdy žalobce přímo u soudu napadne neformální přípis jako zásah, ale krajský soud jej bude považovat za rozhodnutí a věc podle § 46 odst. 5 s. ř. s. předá odvolacímu orgánu, který o věci rozhodne a v pozdějším sporu bude přípis NSS považovat za nezákonný zásah! V případě nezákonných zásahů přitom správní řád nepočítá s opravným prostředkem, zatímco v případě rozhodnutí či nečinnosti ano. V řízení o kasační stížnosti podle § 110 s. ř. s. lze přitom toliko rušit rozhodnutí či opatření obecné povahy, nikoliv poskytovat ochranu proti nečinnosti či nezákonnému zásahu. Stejně tak obnova řízení je podle § 114 odst. 1 písm. a) s. ř. s. možná pouze u zásahové žaloby. Pro vylíčení jiných obdobných problémů zde již nezbývá místa.

4. ZÁVĚR

Z uvedeného vyplývá, že spíše nežli nástin pro cestu k jednotnému žalobnímu typu je možné učinit následující závěry *de lege ferenda* ve vztahu k základní žalobní triádě:

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[87] Viz např. PRÁŠKOVÁ, H. Funkčnost soudního přezkumu rozhodnutí o přestupku. In: FRUMAROVÁ, K. (ed.). *Správní soudnictví – 15 let existence Soudního řádu správního vs. Prvotní zkušenosti s aplikací nového Správneho súdneho poriadku: sborník z konference a společného zasedání kateder správního práva ČR a SR konaného ve dnech 22. až 23. března 2018 na Právnické fakultě UP v Olomouci*. Olomouc: Iuridicum Olomoucense, 2018, s. 243–255.

- v případě nečinnostní žaloby je nutné odstranit zákonnou lhůtu pro její podání;
- v případě trvajícího zásahu (např. zabavení dokumentů, nezahájení řízení z moci úřední) je nutné setrvat na tom, že se jedná o protiprávní stav, který lze žalovat kdykoliv;
- v případě jednorázového zásahu, který se žalobci doručuje, je vhodné ponechat toliko subjektivní lhůtu dvou měsíců (obdobně jako u správního rozhodnutí);
- v případě ostatních jednorázových zásahů je vhodné ponechat subjektivní lhůtu dvou měsíců a objektivní lhůtu tří (nikoliv dvou) let (obdobně jako u promlčení přestupku) prolomitelnou ve výjimečném případě, kdy se až po déle než třech letech objeví do té doby objektivně nezjistitelné účinky zásahu (např. na životním prostředí);
- v případě žalob podaných až po mnoha letech (ať již proti nečinnosti, rozhodnutí, nebo zásahu) je nutné dodržení lhůty přísně posoudit dle těchto kritérií: 1) předmět sporu zakotvený v dávné minulosti musí být stále aktuální, aby jeho vyřešení mohlo mít praktický smysl; 2) žalobce musí mít legitimní důvod, proč žalobu nepodal již dříve; 3) oprávněné zájmy žalobce (včetně s nimi souznící veřejné zájmy) musí převážit nad právní jistotou jiných adresátů úkonu veřejné správy a jejich dobrou vírou; 4) žalobou nesmí být zneužíváno právo nebo hojena dřívější nedbalost žalobce.
- umožnit prominutí zmeškání žalobní lhůty (včetně lhůty pro podání kasační stížnosti) ve výjimečném případě, kdy jej žalobce nezavinil.

Současně jsem si pokorně vědom toho, že se jedná spíše o podnět k diskuzi, a to zvláště v případě podávání žalob po mnoha letech, kde proti volnému uvážení soudu lze vznést pádný protiargument – různí soudci mají různý cit pro právo a různé životní zkušenosti, k podané žalobě budou přistupovat různě. Za stávající právní úpravy by měl žalobce proto důsledně prokazovat, že žaloba je stále legitimní a účelná. Ze švýcarského příkladu však vyplývá, že ani takovýto přístup ke správnímu právu nemusí být nutně disfunkční.

Co se týče jednotného žalobního typu, jakkoliv jsem se ztotožnil se Šimkovým nástinem jakési „trojjediné“ žalobní lhůty, jedná se o nápad, který je nutné dále prozkoumat ve vztahu k vnitřnímu obsahu hypotetického jednotného žalobního typu a souvislostem se správním řízením, neboť z prozatímního velice povrchního nástinu vyplývá, že zde mohou vzniknout nové a nečekané problémy. Realističtější cestou se mi jeví hledání způsobů, jak rozdíly mezi žalobními typy stírat a v případě sporné povahy činnosti veřejné správy umožnit pružné procesní řešení. Ostatně rozmanitost forem činností veřejné správy nelze žádným myslitelným způsobem eliminovat a procesní potíže z ní plynoucí se jeví být do jisté míry přirozenou vlastností správního práva.

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INTERNATIONAL COMMERCIAL ARBITRATION AS A MODERN SELF-REGULATION TOOL IN HYBRID WAR

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Abstract: One of the tools of self-regulation, which helps to settle a dispute between commercial counterparties from different states is international commercial arbitration. International commercial arbitration is an alternative to the dispute resolution process in state courts, that is – it is an alternative to the mechanisms of the state process. The problem of considering international commercial arbitration through the prism of self-regulation has not been studied from all perspectives and diversity. This issue is especially relevant when businesses seek protection of their violated rights to international commercial arbitration in a hybrid war. It is important to examine: how a self-regulatory instrument is able to implement protection when war is waged. The question arises whether private jurisdiction can provide adequate protection to commercial entities. What is the role of international commercial arbitration? How the public authorities will implement the decisions made by the arbitration against the aggressor state (the state violating investment obligations). Settlement of disputes in a hybrid war can be called "hybrid investment disputes" or "hybrid commercial disputes" depending on the object of the dispute.

Keywords: international arbitration; hybrid investment disputes; commercial disputes; businesses seek protection; international chambers of commerce

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1. INTRODUCTION

International commercial arbitration is a special "pseudo-judicial" dispute settlement mechanism, which is applied exclusively by the agreement of the parties. An exception to this rule is a special category of investment disputes, which is regulated on the basis of the so-called "umbrella agreements", that is, special international treaties in which the state agrees to be bound by arbitration. Thus, international commercial arbitration is the main institutional mechanism for the settlement of disputes between the parties, and cannot be additional to the state judicial process or precede it. Mediation, negotiation, and other alternative dispute resolution methods may be a mandatory preliminary basis for resolving a dispute between the parties if agreed upon. In the case of no possibility of settling disputes with their help, the parties can turn to the main mechanisms: state court litigation or international commercial arbitration.

Transnational trade law is an alternative normative system of substantive law with respect to the rules created by the state. At the same time, the *lex mercatoria* rules can be a supplement to the substantive law in the settlement of the conflict, as well as be applied as the main source of law by agreement of the parties. International commercial arbitration courts are established mainly under self-regulatory organizations. Self-regulatory organizations vary according to different criteria according to: industry (sphere, market or cross-industry), level (international, national, local), name, organizational form, etc. Typically, the major self-regulatory organization in its structure include the organs of dispute settlement, including arbitration courts. Powerful international chambers of commerce, chambers of commerce and industry, foreign trade commissions, and specialized business associations as a self-regulatory organization create in their structure international commercial arbitration courts, with the aim of qualified and objective settlement of disputes between participants of commercial disputes. Because of the importance and role played by international commercial arbitration courts, they are generally registered as a separate legal entity from the chamber of commerce.

The essence of the self-regulation is the potential and real possibility for the subjects to create their own rules of the behaviour and act without any external influence.[1] International commercial arbitration is an instrument of self-regulation. It is noted that public private partnership covers four different types: cooptation, delegation, co-regulation, and self-regulation in the shadow of hierarchy;[2] if there is a choice between state and alternative regulation to solve regulatory problems, self and co-regulation are chosen as an "ideal solution" that are supposed to have certain advantages over state regulation.[3] The existence of international commercial arbitration is explained by the factor of international Barberic.[4] V. Haufler examines the self-regulation of the industry in the globalization dimension through a republic role for the private sector.[5] It should be noted that one of the effective tools for self-regulation of the industry will be the construction of a dispute settlement system, which includes international commercial arbitration. International commercial arbitration is also referred to as international private justice, delegated justice, or paralegal justice, that is, private justice. Yves Dezalay and Bryant G. Garth refer to international commercial arbitration as private arbitration, an autonomous legal field.[6] Therefore, international commercial arbitration is a tool of self-regulation, through which private legal regulation can be carried out. Today there is a tendency that the rate of change, which is attributed to self-regulatory processes, will

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1 GONCHARENKO, O. – NESKORODZHENA, L. Self-regulation of culture: the role of public associations and electronic communication. *Herald National Academy of Managerial Staff of Culture and Arts*. 2018, Vol. 4, pp. 121–126.

2 SOWMAN, M. – SUNDE, J. Social impacts of marine protected areas in South Africa on coastal fishing communities. *Ocean and Coastal Management*. 2018, Vol. 157, pp. 168–179.

3 PIASNA, A. – BURCHELL, B. – SEHNBRUCH, K. Job quality in European employment policy: one step forward, two steps back? *Transfer*. 2019, Vol. 25, No. 2, pp. 165–180.

4 APPELBAUM, R. P. – FELSTINER, W. L. F. – GESSNER, V. *Rules and networks: the legal culture of global business transactions*. Portland: Hart Pub, 2001.

5 HAUFLER, V. *A public role for the private sector: industry self-regulation in a global economy*. Washington: Carnegie Endowment for International Peace, 2001.

6 DEZALAY, Y. – GARTH, B. G. *Dealing in virtue: international commercial arbitration and the construction of a transnational legal order*. Chicago: University of Chicago Press, 1996.

only increase and state regulation will lag behind.[7] Consequently, businesses can defend their interests in the event of a modern hybrid war using a variety of jurisdictions, including private international arbitration as a means of self-regulation at the global level.

2. A HISTORICAL ASPECT OF INTERNATIONAL COMMERCIAL ARBITRATION AS A SELF-REGULATORY INSTRUMENT

Self-regulation is a property of a complex social system, which is a society that is personified by specific individuals.[8] Self-regulation can be viewed through the prism of an epistemological understanding of all its manifestations, synergetic-dialectical relationship with close, related legal phenomena. Counterparties who seek to arbitrate a dispute may exercise their ability to self-regulate through choice. The choice is a moment of mutual determination of the type, place of arbitration, language, number of arbitrators, etc. The parties shall enter into an arbitration agreement in writing or orally, depending on the legislature's perception of the origin of the counterparties. And this manifests the functional purpose of self-regulation as a regulator of social relations: to carry out activities at its own discretion and using its own forces to resolve a commercial dispute.

Interaction between counterparties in arbitration is based on the principle of optional equality within the limits defined by law and international treaties, the rules of the relevant arbitration institution. The agreement between the parties to the arbitration process, which is the primary source of relations between the parties, plays a key role. All subjects of commercial relations have the potential for self-regulation. The initiative and independence of doing business are the key to that. The entrepreneur at the initial stage of self-regulation chooses a counterparty, determines the terms of the contract, and determines the procedure for dispute settlement. At the secondary level the subjects of commercial activity create the appropriate self-regulatory organization for representation and protection of their interests. Under such self-regulatory organizations, the relevant arbitration courts are established. International commercial arbitration is an element of the institutional system of self-regulation. It operates within the peremptory norms of the state and on the basis of international treaties. At the same time, international commercial arbitration is an autonomous, unique system with special laws of origin, formation, and development. This tool was created as a unified dispute settlement mechanism, which is understandable and convenient for representatives of the business environment of all states. The objectivity of the consideration of disputes and the independence of arbitrators is a clear advantage. International commercial arbitration has a sign of adaptability, which is emphasized by the speed and flexibility of improving the legal regulation of its activities by the relevant self-regulatory organizations.

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[7] VINNYK, O. M. – SHAPOVALOVA, O. V. – PATSURIIA, N. B. – HONCHARENKO, O. M. – YEFREMOVA, K. V. Problem of ensuring the social direction of the legislation of Ukraine on the digital economy. *Asia Life Sciences*. 2020, Vol. 22, No. 1, pp. 142–145.

[8] Decision of the Supreme Arbitration Court of the Russian Federation No. A40-169144/17 [online]. 2013 [cit. 2021-09-03]. Available at: https://cisgw3.law.pace.edu/cases/980715r1.html.

Business entities need an effective dispute resolution procedure in a rapidly changing environment. Arbitration is a mechanism that will take into account the needs of the business community and defines a special procedure for protecting their interests. This shows the functional purpose of international commercial arbitration as a self-regulatory organization: to change quickly and at the same time to be a universal and understandable procedure for business that comes from different countries. Therefore, despite the flexibility of the procedure, the basic principles for arbitration remain unchanged: the conclusion of an autonomous arbitration agreement, the choice of elements of the arbitration procedure, the credibility of the arbitration, and the admissibility of enforcement of the arbitral award, in case of refusal of voluntary execution. According to the Interinstitutional agreement on better law-making (2003/C 321/01) self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations, or associations to adopt amongst themselves and for themselves common guidelines at the European level (particularly codes of practice or sectoral agreements) (Interinstitutional agreement 2003/C 321/01).[9] Elements of such joint practices and sectoral agreements are the ability of the parties to settle the dispute through international commercial arbitration.

Institutionalizing self-regulation is not a new phenomenon. A. Fiadjoe studied the problem of alternative dispute resolution. In his book, he notes that traditional societies, without the trappings and paraphernalia of the modern state, had no coercive means of resolving disputes.[10] Alternative dispute resolution methods arose earlier than the judicial system, and it is through self-regulatory properties that are now used as effective methods. F. Kellor also argues that people turned to arbitration to resolve disputes long before the right appeared, or courts were created.[11] Arbitration, as well as other methods for resolving a dispute, where an intermediary appears, was a precursor to the judicial system, and it is thanks to him that later the state court appears, that is, a procedure that resembles arbitration. Homer cites such an example of a dispute over blood vengeance through a public arbiter process in the 8th century BC: the parties to the dispute, by mutual agreement, turned to a man who "has experience in law" to preside over the elders' trial. Similar situations were described in the historical chronicles of Ancient Rome, Asia, Africa, Kievan Rus, and other ancient countries.

Medieval guilds practiced self-regulation in the form of establishing trade rules, checking markets, assessing the quality of goods, and determining the methods by which the dispute was settled. The courts of markets, fairs, and ports, courts of merchant guilds of cities and their unions tried to make their decisions in accordance with the principles of *ex aequo et bono* (that is, as "friendly mediator", in fairness) and in the shortest possible time. In Ukraine, the first associations of artisans were formed during the times of Kievan Rus and were called "hundreds" or "hundred".

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[9] Interinstitutional agreement on better law-making (2003/C 321/01). The European Parliament, the Council of the European Union and the Commission of the European Communities [online]. 2003 [cit. 2021-09-03]. Available at: www.legislationline.org/.../EU%20Interinstitutional%20Agre.

[10] FIADJOE, A. *Alternative dispute resolution: a developing world perspective*. Abingdon: Routledge Cavendish, 2013.

[11] KELLOR, F. *American arbitration: its history, functions and achievements*. Washington: BeardBooks, 1999.

Prototypes of self-regulatory organizations in the states of the European region existed for quite some time. The resolution of such disputes has remained an inheritance for us. The adaptation of certain systems of self-regulation to historical conditions gave rise to a variety of its historical forms and instruments. As part of contemporary self-regulatory organizations, arbitral tribunals are formed. As you can see, this became an inherited tradition from medieval self-regulating organizations. During the Soviet era, the activities of self-regulating institutions were suppressed. With the restoration of independence, processes of revival of the mechanism of self-regulation, including the creation of self-regulatory organizations and arbitration courts, are taking place. An International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine is being set up in Ukraine.[12]

It should be noted that the structure of self-regulatory organizations may include not only arbitration courts, which regulate issues solely with regard to disputes residents. International commercial arbitration courts that settle disputes with a foreign element are a sign of a contemporary understanding of the establishment of a dispute settlement system, which also includes mediation, expertise, conciliation, business ombudsman, and others. Alternative ways of resolving disputes are a combination of various procedures aimed at overcoming a legal conflict, are carried out, as a rule, by a non-state body or a private individual based on the principles of voluntariness, neutrality, confidentiality, discretion, and equality.[13] Whether their dispute can be resolved by agreement (directly or with the help of a third party) or by judicial proceedings,[14] the parties should be able to decide on the legal basis of any state. A common feature of alternative dispute resolution methods is the presence of the obligatory consent of the parties to the dispute about resolving it in this way, the confidentiality, and the flexibility of the proceedings.[15] Arbitral tribunals can be created with appropriate self-regulatory organizations. What they consider as internal disputes and disputes with a foreign element. The role of arbitral tribunals that are created by non-state organizations is of paramount importance in settling disputes, where the need for specialized knowledge arises. Therefore, arbitration courts arise not only in trade, chambers of commerce and industry, representing the interests of the entire business community, but also in specialized non-state organizations.

For example, the Arbitration Court under the Association of Grain and Fodder Trade (GAFTA), the Arbitration Court at the Federation of Wool Trade in Gdynia, the Arbitration Court at the Federation trade in oilseed crops and fats (FOSFA), Arbitration at the Committee on Trade in Grains in Rotterdam, Arbitration at the Exchange for Leather and Leather Products in Genoa, International Association of Consultants Engineers

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12 INCHAKOVA, A. – KAZACHENOK, S. To principles in the jurisprudence of international commercial arbitration: a comparative study of the London Court of international arbitration and the international commercial arbitration court at the chamber of commerce and industry of the Russian Federation. *Journal of Legal, Ethical and Regulatory Issues*. 2018, Vol. 21, No. 3, article number 12.

13 JEMIELNIAK, J. Comparative analysis as an autonomization strategy in international commercial arbitration. *International Journal for the Semiotics of Law*. 2018, Vol. 31, No. 1, pp. 155–173.

14 MAZARAKI, N. A. Effective system of commercial disputes resolution as a prerequisite of economic progress. *Scientific Bulletin of Polissia*. 2018, Vol. 2, pp. 181–187.

15 HONCHARENKO, O. M. *International commercial arbitration*. Nizhyn: Nizhyn Mykola Gogol State University Publishing House, 2014.

(FIDIC), and Arbitration at the Dutch Coffee Trade Association. Despite the fact that these institutions are created with non-governmental organizations and actually are part of them, they are usually registered as separate legal entities. For example, the SCC (Stockholm Chamber of Commerce) was established in 1917 and is a part of the Stockholm Chamber of Commerce,[16] but independent of it.[17] However, there may be other situations. For example, the American Arbitration Association (AAA), a non-profit organization with offices throughout the U.S.[18] The AAA provides administrative services in the U.S. as well as abroad through its International Center for Dispute Resolution (ICDR).[19] In this example, we are witnessing a situation in which a separate arbitration centre was set up to settle disputes outside the self-regulatory organization.

It is the arbitral tribunals that have received separate international approval and recognition at the level of international treaties, as compared with other structural elements of self-regulatory organizations. The importance of improving and unification of the legal regulation of international commercial arbitration has attracted the attention of the United Nations. This largest international organization has mandated the Commission on International Trade Law to develop rules on international trade in general and international commercial arbitration, in particular. The most well-known in the field of international commercial arbitration are the following UNCITRAL (United Nations Commission on International Trade Law) documents: Arbitration Rules of UNCITRAL (1976); UNCITRAL Model Law on International commercial arbitration (1985) with amendments and supplements.

The decision of the arbitral tribunal can be recognized and enforced in accordance with the Convention on the recognition and enforcement of foreign arbitral awards of 1958, a universal international treaty. There is no international treaty that recognizes the power of decisions of state courts at the global level. Consequently, the international community has reaffirmed confidence in non-state self-regulating institutions. The arbitral tribunal, which is part of the system of institutionalization of self-regulatory mechanisms, has taken an important place and points to the ability of business to resolve disputes on its own, without resorting to state instruments. Such international assistance to the work of arbitration courts has led to the fact that they are perceived as separate from self-regulatory organizations and at the national level of an individual state. Consequently, arbitral tribunals can be recognized as an independent mechanism for settling disputes between economic entities. Appeals against decisions of international commercial arbitration courts are possible only on the grounds clearly defined by the New York Convention in state courts. Therefore, in essence, these decisions are not disputed.

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16 About the SCC [online]. 2020 [cit. 2021-09-03]. Available at: https://sccinstitute.com/about-the-scc/.

17 Decision No. A41-15132/2018 [online]. 2019 [cit. 2021-09-05]. Available at: https://sudact.ru/vsrf/doc/QDufuquWk15u/?vsrf-txt=международный+коммерческий+арбитраж&vsrf-case_doc=&vsrf-lawchunkinfo=&vsrf-doc_type=&vsrf-date_from=&vsrf-date_to=&.

18 American Arbitration Association International Centre for Dispute Resolution [online]. 2020 [cit. 2021-09-04]. Available at: https://www.adr.org/about.

19 Ibid.

3. THE ROLE OF INTERNATIONAL COMMERCIAL ARBITRATION IN PROTECTING OF INVESTMENTS

The activities of international commercial arbitration as an institutional form of self-regulation are often associated with the use of *lex mercatoria* to settle the dispute. It can be said that in many cases, in the settlement of commercial disputes with a foreign element, *lex mercatoria* is used as a normative self-regulation tool. In this case, there is a combination of two means of self-regulation: institutional and normative. This is the highest degree of self-regulation development: when the choice of international commercial arbitration, both institution and type of self-regulatory process, is based on a self-regulating regulatory system, an international commercial dispute is settled. The laws of *lex mercatoria* (foreign trade law) include the Principles of International Commercial Agreements UNIDROIT (International Institute for the Unification of Private Law), the Principles of European Contract Law, the Acts of the International Chamber of Commerce, the Code of Principles, Rules and Requirements of *lex mercatoria* CENTRAL (Center for Transnational Law), etc. Despite the informal and advisory nature of these codifications, they have high authority and widespread use in the contractual practice of international commercial relations, as well as in the resolution of disputes by international commercial arbitrations and judicial authorities of states.

Historically, trade arbitration courts emerged and functioned as a quick means of resolving disputes that used trading practices. For example, such courts also called "pepoudrous cours" or "piepowder courts", "from day to day", "from tidal to tidal" (maritime arbitration courts). In most cases, disputes were settled through the customary rules of *lex mercatoria*, or the parties could use the principle of *ex aequo et bono*, that is, in good and kind conscience. The judge was empowered to settle the dispute on the basis of evidence and an understanding of justice without using the rules of law. Today *lex mercatoria* is a globalized system of self-regulatory norms (trade practices), codified at the level of well-known international governmental and non-governmental organizations and research institutes. A self-regulatory norm is a rule created independently by subjects of certain relations outside state influence. Business entities can choose and apply self-regulatory norms in the form of *Lex mercatoria*. It is an opportunity to realize the potential of self-regulation. In this case, the self-regulatory norms from the potential-soft ones become rigidly binding for the parties that have chosen them.

The issue of criminal responsibility in conditions of modern wars was considered by Lara Barberić, Davorka Čolak, and Jasmina Dolmagić: criminal prosecution as one of the elements of transitional justice is essential not only for establishing the accountability of war crime perpetrators, but also as a warning that such violations shall not be tolerated in the future.[20] New manifestations of the hybrid war have their peculiarities on the territory of Ukraine. Yevhen Pysmenskyi pays attention to the factors affecting the dynamics and development of crimes in the area of professional activity of

[20] BARBERIĆ, L. – ČOLAK, D. – DOLMAGIĆ, J. Prosecuting war crimes and meeting obligations under the convention for the protection of human rights and fundamental freedoms at the same time – the case of Croatia. *Croatian International Relations Review*. 2015, Vol. 21, pp. 41–46.

journalists, which mainly includes the environment on hybrid war.[21] A hybrid war is inherently transnational, featuring transnational crime networks, migrant warriors, transnational diaspora links, legitimate international trade, and foreign intervention.[22]

A hybrid war encompasses a set of hostile actions whereby, instead of a classical large-scale military invasion, an attacking power seeks to undermine its opponent through a variety of acts including subversive intelligence operations, sabotage, hacking, and empowering proxy insurgent groups. It can also spread disinformation (in target and third countries), exert economic pressure, and threaten energy supplies.[23] Moscow seeks to use hybrid war to ensure compliance with a number of specific policy issues; to divide and weaken NATO (North Atlantic Treaty Organization); to subvert pro-Western governments; to create pretexts for war; to annex the territory; and to ensure access to European markets on its own terms. Studying the issue of counteraction and defence against hybrid war with the help of international commercial arbitration is an important direction of modern scientific research. It differs from other remedies in conditions of hybrid war which have already become as "traditional": informational, organizational, and purely military. International commercial arbitration is in fact a private remedy, which, however, has an important political and public effect. This direction is rather multidimensional and conventional by the peculiarities of international commercial arbitration.

In particular, the following features:

1) The object of the relations which are protected. Under the conditions of Russia's hybrid war against Ukraine, investment disputes will be the object of consideration by arbitration, first of all. An investment dispute is a special category of disputes between the state and legal entities and individuals of other states regarding investment relations. Such disputes may occur in the case of nationalization, expropriation of foreign private property, unilateral termination of treaties between state and foreign company, and so on. However, the category of commercial disputes between subjects of economic activity of the aggressor state on the one hand and the subjects of economic activity of the state against which there is a hybrid war on the other side is not excluded.
2) The legal basis of protection. Investment relations will be protected by international commercial arbitration with the help of so-called "umbrella agreements" (international agreements in which the state and the recipient have agreed to arbitration and therefore it is not necessary to conclude separate arbitration agreements within a separate dispute). Commercial relations on the basis of international treaties, national legislation, and an arbitration agreement concluded between contractors on transferring the dispute to international commercial arbitration.

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[21] BANTEKAS, I. Equal treatment of parties in international commercial arbitration. *International and Comparative Law Quarterly*. 2020, Vol. 69, No. 4, pp. 991–1011.

[22] FARAH, A. Q. – HATTAB, R. M. The application of shariah finance rules in international commercial arbitration. *Utrecht Law Review*. 2020, Vol. 16, No. 1, pp. 117–139.

[23] CAMERON, P. *International energy investment law: the pursuit of stability*. Oxford: Oxford University Press, 2017.

3) Participants of the dispute. The defendant in investment disputes is always a state--recipient of investments. Participants in "hybrid investment disputes" are subjects of the economy of the state-aggressor and the state that is suffering from aggression.
4) Global recognition and enforcement of decisions made by international commercial arbitration. The Convention on the recognition and enforcement of foreign arbitral awards of 1958 is a guaranteed opportunity of the enforcement of an international commercial arbitration, regardless of the state place of arbitration award and the place of execution.

The competence and independence of arbitrators, the possibility of arbitration courts being established at self-regulatory organizations, which are trade, chambers of commerce, and industry, have facilitated the consideration of investment disputes. In addition, in the case of arbitration an ad hoc dispute can be administered by the Permanent Court of Arbitration (International public arbitration) in accordance with the UNCITRAL Arbitration Rules. Protecting investors are being tried as arbitrators to develop new notions of legitimate expectations and to provide content to fair and equitable treatment while more precisely mapping the duties which investors have to host states.[24] It is important to focus on the adoption of so-called "umbrella agreements" between the states that actually certify the consent of the state to arbitration. Umbrella clauses have become a regular feature of international investment agreements and have been included to provide additional protection for investors by covering contractual obligations in investment agreements between host countries and foreign investors.[25]

For Ukraine and the states of the European Union, indicative cases are the consideration of arbitration disputes aimed at protecting investments in which the respondent is the Russian Federation. The legal basis for the jurisdiction of international commercial arbitration in cases of nationalization and expropriation of property in Crimea is an agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on encouragement and mutual protection of investments from 27.11.1998. This international treaty provides for such a mechanism. Initially, the parties to the dispute will try to resolve the dispute through negotiation if possible. In the event the dispute cannot be resolved through negotiations within six months from the date of the written notification as we mentioned in paragraph 1 of this agreement, then the dispute will be handed over for consideration to: a) a competent court or arbitration court of the Contracting Party on whose territory the investments were carried out; b) the Arbitration Institute of the Chamber of Commerce in Stockholm; c) an "ad hoc" arbitration court, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).[26]

This international agreement allows the party to choose a dispute resolution procedure: an institutional arbitration in the form of the Arbitration Institute of the Stockholm

[24] FERREIRA, A. Intertwined paths of globalization and international investment law. *Journal of International Trade Law and Policy*. 2020, Vol. 19, No. 2, pp. 85–99.

[25] Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement Mutual Protection of Investments [online]. 1998 [cit. 2021-09-05]. Available at: https://zakon.rada.gov.ua/laws/show/643_101.

[26] The Administration of Investment Disputes. SCC [online]. 2019 [cit. 2021-09-04]. Available at: https://sccinstitute.com/dispute-resolution/investment-disputes/.

Chamber of Commerce or an ad hoc one-time arbitration. In cases where the defendant is the Russian Federation, consideration of disputes before the competent court or arbitration of the Contracting Party in whose territory the investments are made is absolutely inappropriate in view of the legislation adopted and the negative practice in recognition and enforcement of decisions of international commercial arbitration and even of the European Court of Justice. Quite frequently, investment disputes involving the Ukrainian side are considered by the Arbitration Institute of the Stockholm Chamber of Commerce. According to the statistics of this arbitration institution: *"Sweden and the SCC serve as a forum for disputes between investors and states in at least 120 BITs and in the ECT. Of the 120 BITs, 61 agreements stipulate that the SCC Arbitration Rules will apply to disputes arising out of the agreement. The remaining 60 BITs, stipulate that the SCC shall act as Appointing Authority under the UNCITRAL Arbitration Rules or that Sweden shall be the legal seat of the dispute."*[27]

Proceedings concerning nationalization and expropriation of property in Crimea, which are considered by arbitration courts ad hoc, established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) and administered by the Permanent Court of Arbitration, are as follows Aeroport Belbek LLC (Limited Liability Company) and Mr. Kolomoisky, LLC Lugzor, Stabil LLC, JSC Oschadbank, *PJSC Ukrnafta v. The Russian Federation*. Other cases are considered by arbitration in accordance with the Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments dated 27 November 1998 (the Russia-Ukraine BIT or BIT) is: Everest Estate LLC, Liberty, Aberon LTD, Kirovograd-Oil, Pirsan, Crimea-Petrol, Trade-Trust, VKF Satek, Eleftheria, Rustel, Stemv Group, Rubenor, Novel – Estate *"Ukrinterinvest", "Dneproazotom" v. the Russian Federation*; NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, *PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukraiiny v the Russian Federation*;[28] *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21.[29] In a number of cases, final positive decisions have already been taken in favour of Ukrainian companies by different arbitrations:

1) In the arbitration case *Everest Estate LLC and others v. The Russian Federation Arbitration Tribunal* in The Hague, the Netherlands, decided to charge Russia US $159 million for the benefit of Ukrainian investors for the confiscation of their real estate in Crimea (Decision of 2 May 2018).[30]

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27 NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukraiiny v the Russian Federation [online]. 1998 [cit. 2021-09-03]. Available at: https://www.italaw.com/cases/4381.

28 Arbitration Between JSC CB Privatbank and the Financial Company Finillon LLC as Claimants by The Russian Federation [online]. 2019 [cit. 2021-09-04]. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10354.pdf.

29 BERMANN, G. A. *Recognition and enforcement of foreign arbitral awards: the interpretation and application of the New York convention by national courts*. New York: Springer International Publishing, 2017.

30 PERRY, S. *Enforcement of Crimea award upheld in Ukraine* [online]. 2019 [cit. 2021-09-04]. Available at: https://globalarbitrationreview.com/article/1180117/enforcement-of-crimea-award-upheld-in-ukraine.

The Ukrainian Supreme Court has enforced an investment treaty award that requires Russia to pay US $159 million to Ukrainian investors in Crimea – while limiting the scope of attachments previously granted against the assets of three Russian state-owned banks.[31]

2) The decision to satisfy the claim for compensation of the losses suffered by the Oschadbank through the annexation of Crimea by the Russian Federation was adopted by the Arbitration Court in Paris on 26 November 2018. The amount of compensation will be US $1.3 billion plus interest, which will accrue from the moment the decision is made up to the moment of actual compensation.[32]
3) The Permanent Court of Arbitration in Hague, the Netherlands, has ruled that Russia should compensate for the Ukrainian oil monopoly Naftogaz for the assets that the company has lost control since the beginning of the Russian occupation of the Ukrainian territory of Crimea in 2014.[33]
4) A tribunal seated in The Hague has found Russia liable in a billion dollar claim over the seizure of banking operations in Crimea, as well as in a separate case over an airport connected with Ukrainian businessman Igor Kolomoisky.[34]

The list of investment cases which are considered by international commercial arbitration, plaintiffs with Ukrainian companies v. the Russian Federation is quite large. It can be predicted that as a result of decisions already made in favour of Ukrainian companies, such a list will be significantly supplemented by claims from other Ukrainian companies as well as individuals. In addition, such a positive experience of Ukrainian companies is indicative for other states that lost part of the territory as a result of contemporary Russian aggression. In particular, companies from Georgia, Moldova, and other countries, based on positive precedents, as well as international treaties, can apply to international commercial courts. Thus, there is an agreement between the Government of the Russian Federation and the Government of the Republic of Moldova on the promotion and mutual protection of investments of 17 March 1998.[35] The agreement provides for a similar mechanism for choosing an arbitration court as in an international treaty where the party is Ukrainian state. The main issues that unite all these disputes are the need to prove that: 1) the dispute concerns investments; 2) there was a violation of the agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Promotion and Mutual Protection of Investments of 27 November 1998; 3) international

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[31] Oschadbank Wins in International Arbitration USD 1.3 Billion from Russia as Compensation of Losses from Crimea Annexation [online]. 2018 [cit. 2021-09-05]. Available at: https://ukranews.com/en/news/598200-oschadbank-wins-in-international-arbitration-usd-13-billion-from-russia-as-compensation-of-losses.

[32] Naftogaz Wins Case in Hague Arbitration over Property Lost due to Crimea Occupation [online]. 2019 [cit. 2021-09-03]. Available at: https://www.kyivpost.com/ukraine-politics/naftogaz-wins-hague-arbitration-over-property-lost-in-crimea-annexation.html.

[33] JONES, T. *Russia held liable again over Crimean assets* [online]. 2019 [cit. 2021-09-05]. Available at: https://globalarbitrationreview.com/article/1180413/russia-held-liable-again-over-crimean-assets.

[34] Agreement between the Government of the Russian Federation and the Government of the Republic of Moldova on the Encouragement and Mutual Protection of Investments [online]. 1998 [cit. 2021-09-04]. Available at: http://docs.cntd.ru/document/901788244.

[35] ORLOV, M. *Protecting investments in the occupied territories* [online]. 2018 [cit. 2021-09-06]. Available at: http://yur-gazeta.com/publications/practice/inshe/zahist-investiciy-na-okupovanih-teritoriyah.html.

commercial arbitration which is competent to consider the dispute (issues of jurisdiction of the International Commercial Court); 4) the Russian Federation as a state is solely responsible for the loss of investment by Ukrainian enterprises in annexed Crimea.

The peculiarity of these investment disputes is precisely the proof of Russia's responsibility for the loss of investment by Ukrainian enterprises, as the territory of Crimea is occupied, on one hand, and at the same time, the territory of Ukraine in the international sense, on the other. Therefore, the establishment of a precedent for recognition by international commercial arbitration of that Russia temporarily carries out "effective control" over the territory of Crimea and grossly violates the rights of investors, their absolute right to inviolability of property rights is fundamental in the process. The normative grounds for the recognition of "effective control", "change of effective sovereign" over the territory of Crimea is a federal constitutional law on the admission of Crimea to the RF, which was approved by the Federation Council of the Russian Federation. Also, on 30 April 2014, the State Council of the Republic of Crimea adopted a resolution "On the management of the property of the Republic of Crimea", according to which all property of the state of Ukraine, as well as other property, provided for in the annex to the decree, became property of the Republic of Crimea until the time of its distribution between Russia, Republic of Crimea itself, and territorial communities. As a result of such a decision, illegitimate authority of the Crimea carries out nationalization of the property of Ukrainian enterprises.

In addition, questions remain unsolved regarding of the determination of time limits of loss of investments. That is, from what moment investments have become not from within Ukraine, but foreign ones. And in this case, for the confirmation of certain time limits, the normative background may be the documents specified above. M. Orlov argues: *"In their letters to the certificate of title for a vehicle, the Russian Federation denied the temporal jurisdiction of the arbitral tribunal because investments in the Crimea were implemented before it became a territory of the Russian Federation."* However, according to the Article 12 BIT, it applies to *"all investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party since 01.01.1992"*.[36] So, taken into account that in BIT there is no requirement that an investment was made in the territory of another state *ab initio* (from the beginning), the arbitration courts have concluded that the plaintiffs meet the *ratione temporis* criteria. Therefore, today we have some positive solutions for Ukrainian enterprises.

4. THE PROBLEM OF CHALLENGE, RECOGNITION, AND ENFORCEMENT OF DECISIONS

Decisions made by international commercial arbitration may be challenged at the place of removal, as well as enforcement. In all these cases, the mechanism of state courts is involved. The reaction to the positive decisions of the arbitration courts

[36] Russia Refuses to Recognize the Hague Arbitration Court Decision on Ukraine's Assets in Crimea [online]. 2019 [cit. 2021-09-04]. Available at: https://uawire.org/russia-refuses-to-recognize-the-hague-arbitration-court-ruling-on-ukraine-s-assets-in-crimea#.

for Ukrainian enterprises from the side of the Russian Federation is rather predictable: Russia does not recognize the decision for the loss in annexed Crimea, and also points out the lack of jurisdiction of the arbitral tribunal over these disputes. However, the Ukrainian side in the *Naftogaz of Ukraine* case states that the Permanent Court of Arbitration in The Hague acknowledged that Russia had violated the agreement on investment protection by seizing assets of Naftogaz of Ukraine and its subsidiaries in annexed Crimea,[37] and also that that Russia, as a state, is liable.[38] Therefore, Russia will initially try to cancel the decision of international commercial arbitration. For example, in the national courts of state of the seat of each arbitration, it will be argued that the arbitral tribunal has exceeded its jurisdiction and was not entitled to consider the dispute. According to P. Sanders, in case of cancellation of the arbitral award, the courts must refuse to execute, because there is no longer an arbitral award, and the execution of a non-existent arbitral award is impossible or contrary to the public policy of the country of the place of performance.[39]

Russian companies have also opposed Ukraine on the basis of the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the promotion and mutual protection of investments (signed 27 November 1998). This is the well-known case of *Public-Joint Stock Company Tatneft v Ukraine*. Judgment was entered against Ukraine for US $112 million (the total amount awarded against Ukraine by the Merits Award) plus interest. Ukraine wanted to cancel that order on two grounds: (1) That Ukraine has not lost the state immunity to which it is otherwise entitled under §1 of the State Immunity Act 1978 (the SIA) by virtue of § 9 of the SIA, because it did not agree to submit the disputes (alternatively, all the disputes) in respect of which the Merits Award was made, to arbitration. The Ukrainian side further concludes that this court has no jurisdiction over Ukraine in this matter (alternatively, no jurisdiction over it in relation to the part of the Merits Award).[40]

However, a cancellation decision can even be implemented due to an ambiguous interpretation of Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. For example, the courts of France (the *Hilmarton* case), the US (the *Chromalloy* case) allowed the execution of such decisions. In this regard, you can also recall the *Yukos* case. Thus, the decisions of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, which were repealed in Russia, were recognized, and enforced in the Netherlands and the United States on the grounds of the impartiality of the judges who considered the question of the abolition and mistrust of the judicial system of

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[37] Ukraine's Naftogaz Achieves Interim Victory in the Crimean Asset's Lawsuit against Russia [online]. 2019 [cit. 2021-09-06]. Available at: http://uawire.org/ukraine-s-naftogaz-achieves-interim-victory-in-the-crimean-assets-lawsuit-against-russia.

[38] SANDERS, P. New York convention on the recognition and enforcement of foreign arbitral awards. *Arbitration*. 1959, Vol. XXV, No. 3, pp. 109–110.

[39] England and Wales High Court (Commercial Court) Decisions [online]. 2018 [cit. 2021-09-06]. Available at: https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2018/1797.html&query=(Ukraine-Russia)+AND+(BIT).

[40] HELLERSTEIN, J. *United states district court southern district of New York* [online]. 2009 [cit. 2021-09-04]. Available at: http://www.pravo.ru/store/interdoc/doc/131/Yukos.pdf.

the Russian Federation.[41] In addition, the court's discretion in some countries is quite a broad category. So, recognition and enforcement of cancelled arbitration awards can also take place at the discretion of the court. Thus, the UK court found that even if the grounds for refusal were established, the court retains the right to discretion in executing the decision. The United States' courts hold the same position. The party requesting the recognition and enforcement of an international commercial court judgment may justify the impossibility of refusing to issue the latter. This capability is supported by the States Parties to the New York Convention.

In case of a refusal to cancel the decision of the International Commercial Arbitration Court, it is possible to recognize and enforce decisions in all participating states of the New York Convention. Of course, it is not about enforcing decisions on the territory of Russia itself. The practice of recognition and enforcement of decisions made by international commercial arbitration in favour of Ukrainian companies in Russia is negative in recent years. Russian courts, referring, as a rule, to non-compliance with public order, refuse recognition and enforcement of arbitration awards. For example, in the case of a LLC "Agroprodeksport" (Ukraine) to LLC "Vikate Plus" in execution of the decision was denied on the grounds of non-compliance with public order, which did not indicate what this mismatch was. Another case of a JSC (Joint-Stock Company) Termolife (Ukraine) to Termolife RUS was also denied recognition and enforcement of the decision of the International Commercial Arbitration Court at the Chamber of Commerce of Ukraine on the grounds of non-compliance with public order. However, from the point of view of international and national law, the argument about understanding the content of "public order" is interesting.

At first, the court refused to satisfy the application for the enforcement of a foreign commercial arbitration court at the CCI (Chamber of Commerce and Industry) of Ukraine. The Moscow Arbitration Court has been argued that the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG or the Vienna Convention), which was agreed to by the parties in paragraph 6.12 of the contract, was used, but the substantive law of Ukraine was not used, as well as the lack of evidence of proper notification to the defendant at his current address. Although, this convention is a part of Ukraine's national legislation. Then the Supreme Court of the Russian Federation did not agree with this argument and presented a new, no less absurd: *"According to the decision of the foreign arbitration court, the claimant has submitted a letter (28 September 2016) signed by the General Director of Termolife RUS and addressed to this arbitration court in which the defendant confirmed the existence of the debt, to the ICAC (International Commercial Arbitration Court) at the CCI of Ukraine.*

These circumstances indicate that there is no actual dispute between the above parties. Such behavior of participants in civil turnover is a way to illegally use arbitration proceedings, because they are not aimed at appealing to an arbitration court as a means of resolving a dispute according to its legal nature, but at using arbitration

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[41] England and Wales High Court (Commercial Court) Decisions [online]. 2011 [cit. 2021-09-06]. Available at: http://www.bailii.org/ew/cases/EWHC/Comm/2011/1957.html.

proceedings for the purpose of abuse of the right. Such interests violate the public order of the Russian Federation and are not subject to judicial protection."

Such examples have become the usual practice of Russian courts regarding enterprises from Ukraine. Furthermore, they are a part of hybrid warfare in private law, in which the state authorities (courts) are involved. Consequently, taking into account the peculiarity of international commercial arbitration as a global self-regulatory institution, whose implementation is based on a universal international treaty, the exequatur of decisions in investment disputes is possible in different countries of the world.

5. CONCLUSIONS

In fact, international commercial arbitration in certain categories of disputes is the only real instrument for protecting the rights of economic entities affected by hybrid warfare. The obvious benefits are the availability of international "umbrella" agreements on mutual protection of investments and a universal mechanism for ensuring the enforcement of decisions. In accordance with this mechanism, decisions can be made in any state where there is property of the guilty party. This allows you not to limit execution in any state, but to look for the property of the defendant all over the world. This is as long as the international community is considering protecting the interests of victims (both individual and legal) from hybrid warfare through the system of international public law, in international commercial arbitration as a self-regulating system of private justice, investment disputes, to which the aggressor state is party, are being resolved.

The aggressor state is being prosecuted for conducting hybrid warfare in private law, which is very closely interwoven with public law. Therefore, the resolution of such disputes under the hybrid war can be called "hybrid investment disputes" or "hybrid commercial disputes". International commercial arbitration as a private remedy, that has an important political and public effect, has the following peculiarities: 1) the object of protected relations (investment and other commercial disputes between the subjects of economic activity of the state-aggressor, on the one hand, and the subjects of economic activity of the state against which is hybrid warfare, on the other hand); 2) the legal basis for the protection (the presence of "umbrella agreements" is in most cases); 3) parties to the dispute (the respondent in investment disputes is always the recipient state of investment); and 4) global recognition and enforcement of decisions made by international commercial arbitration.

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RECENZE

GREGÁREK, MATĚJ. STÁT OBĚMA NOHAMA NA ZEMI: SYMETRICKÉ PŘÍSTUPY K LEGITIMITĚ STÁTU. PRAHA: LEGES, 2018, 200 S.

Kniha Matěje Gregárka *Stát oběma nohama na zemi* s podtitulem *Symetrické přístupy k legitimitě státu* je významným příspěvkem do soudobé diskuse o stavu a budoucnosti státu. Ta se rozvinula v návaznosti na článek P. Holländera *Soumrak moderního státu*, který byl v r. 2013 otištěn časopisem Právník, a běží za účasti řady odborníků z okruhu společenských věd až do dnešních dní. Tato debata ukázala podstatnou neshodu v diskutované problematice, nemožnost vyslovení definitivního stanoviska s ohledem na značnou dynamiku společenského vývoje a potřebu komplexnosti výzkumu s využitím různých perspektiv, ze kterých lze stát zkoumat.

V reakci na to se Gregárkova práce zabývá postavením, úlohou, a hlavně legitimizací státu v době globalizace a dalších společenských proměn v celkovém pohledu. Autor, diagnostikující pohyb směrem od moderního státu, se snaží odpovědět na otázku, *„jakým směrem se chceme ubírat, neb ne všechny alternativy jsou stejně žádoucí, ať již jsou polycentrické nebo naopak centralizované na vyšší úrovni, než je národní stát“*. Hlavní pozornost však věnuje teoretickým analýzám reflektujícím transformaci státu dneška, jeho legitimity a postižení kontextu, ve kterém ke změnám dochází. Řeší tedy problém soudobého státu poměrně širokospektrálně, s ambicí nenechat žádný dílčí aspekt problematiky bez odpovědi.

Kvalitní zpracování tématu vyžaduje mezioborový přístup a slušnou orientaci v řadě společenských věd – v sociologii, politologii, ekonomii, historii, právní vědě a státovědě. Zvládnuty musí být na solidní úrovni také dějiny myšlení a autor by měl být patřičně kritický, aby nepodléhal okouzlení různými „populárními“ myšlenkovými směry a vlivu ideologií. V tomto případě musel autor bojovat i s působením vlastních fixních idejí – se svým trvalým a hlubokým přesvědčením o nelegitimitě, možná i o škodlivosti, státu, které má původ v jeho libertariánsko-anarchistické orientaci, jakož i s příchylností k ekonomickým metodám a ekonomizujícímu vidění světa. Nakonec právě tato jeho předpojatost předurčila optiku nahlížení tématu a metody zpracování, ovšem nevygenerovala předem dané řešení. To je výsledkem kriticky vedených úvah.

Práce je rozdělena do čtyř částí. Úvod je vstupem do problematiky legitimizace státu. Autor v něm slibuje zamyšlení nad soudobým legitimizačním diskursem týkajícím se státu a zejména nad impulzy anglosaské debaty o politickém anarchismu a nad přínosem politické ekonomie (zvláště teorie veřejné volby). První část pléduje pro využití *„politickoekonomického instrumentária* […] *při analýze státu“*. Autor se zde přihlašuje k jednomu proudu teorie veřejné volby, který je podle něj paradigmatem obecnějším než klasická státověda a umožňuje lépe vysvětlit soudobé proměny státu. V druhé části autor definuje pojem legitimity *„jako morální vlastnost (ospravedlnění) státu, která zakládá jeho politickou autoritu“* a tomu odpovídající závazek bezpodmínečné poslušnosti občanů. Toto své „vnější“ pojetí legitimity konfrontuje s odlišnými přístupy, především

s tradičním konceptem systémově-imanentním, a snáší také argumenty pro svou koncepci symetrického chápání legitimity *„jako ospravedlnění autority v termínech obecné normativity“*. Posléze, v třetí části, se autor věnuje praktické relevanci legitimizačních teorií v globalizovaném světě. V závěru jsou sumarizovány důsledky nabízených řešení jako údajně smysluplná alternativa tradičních státovědných konceptů. Z tohoto stručného přehledu je tedy patrné, že má práce přehlednou a promyšlenou strukturu. Hlavní výkladovou linii vhodně doplňují exkurzy k souvisejícím tématům, aniž by čtenář ztrácel orientaci ve složité problematice.

Autor ve své práci pohlíží na stát a jeho legitimitu značně kriticky. Stát je pro něj těžko akceptovatelným přisvojitelem mocenského monopolu, který dává lidem pravidla, vynucuje absolutní poslušnost, a ještě si nárokuje legitimitu. Nerespektuje přitom to, co všichni, a není ani příliš funkční jak v minulosti, tak v současnosti. To všechno může být i pravda, ale pořád to nestačí na úplné zavržení státu. V dějinách lidstva totiž státní uspořádání jednoznačně dominuje, nepočítáme-li archaické společnosti. Toto uspořádání společnosti vykazuje přes svoji nedokonalost pozoruhodnou životaschopnost a v podstatě nemá smysluplnou alternativu – vždyť ani soudobé integrace se nemohou států zcela zbavit. Jak mnoho je stát potřeba, naplno dokazují teritoria tzv. zhroucených států. Od toho všeho se odvíjí legitimita státu jako společenské instituce. Je potvrzena společenskou a historickou praxí. Tváří v tvář těmto skutečnostem působí autorův pokus legitimizovat stát z „morálních“ pozic poněkud idealisticky. Stát je mocenskou institucí, která zajišťuje, aby lidé vůbec mohli žít spolu, kterou nemá smysl testovat prizmatem „morálních“ imperativů platných pro každého. I stát, který nedostojí „morálně“ založené legitimitě, může dobře plnit své funkce. Ani „morálně“ legitimizovaný stát pak nemůže vynucovat na lidech absolutně všechno, protože lidé jsou svobodní, a ne automaty. Stát zůstane legitimní, i když se neposlechne úplně všechno. Není ani žádná „morální“ povinnost poslechnout jakýkoli státní příkaz, maximálně povinnost dodržovat právo, pokud není extrémně nespravedlivé.

Jinak než autor mohou zkoumanou problematiku traktovat odpůrci individualismu – vyznavači kolektivistických a solidaristických doktrín. Stát bude u nich zaujímat jedno z čelných míst na žebříčku hodnot a budou mu připisovány významné sociální funkce. S představou krize státu se nebudou chtít smířit. Ani většinou nebudou ochotni stát obětovat ve prospěch integrací nebo polycentrického uspořádání. Mnoho lidí se dnes obrací k národnímu státu, jinými zpochybňovanému, jako k poslední naději, jak čelit některým nežádoucím změnám, které přináší globalizace.

Jak bylo uvedeno výše, připomínky lze vznést ke koncepci pojmu legitimity státu a důsledkům, které z ní jsou dovozovány. V rámci autorova přístupu je však práce koherentním dílem zpracovaným se značnou akribií a čtenáře určitě obohatí. Autor se snaží prolomit nedůvěru právníků k ekonomickým metodám, která je mezi nimi tradiční. Jako člověk s právnickým a ekonomickým vzděláním nepovažuje diference mezi právnickými a ekonomickými přístupy za nepřekonatelné. Fakt, že více straní ekonomickým metodám, je ale z práce poznatelný. Není to vidět jen z výsledku, k němuž dospívá, nýbrž i z použité literatury. Její seznam je úctyhodný. Zahrnuje převážně díla cizojazyčná, právnická i ekonomická. Nicméně prokazatelně v něm chybí některé klasické

státovědné práce – např. Jellinekova *Všeobecná státověda* nebo Neubauerova *Státověda a theorie politiky*. Nenajdeme zde ani knihy Z. Pešky nebo V. Pavlíčka. A to je ke škodě jinak kvalitní práci.

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