# ARTICLES

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## CIVIL LAW AND BUSINESS JUDGMENT RULE

*The author analyzes the relationship between traditional civil law notions of "care of prudent business person" and "care of prudent expert", "good faith and fairness" and a new "business judgment rule" concept of company law. Although legal tradition standardizes the meanings of these civil law notions, important for legal certainty, the author suggests that all attempts at their substitution or fitting into the concept of business judgment rule, originating from the legal culture of com mon law, have basically failed. The reasons are manifold: first, differences in legal traditions; second, the routine of courts and business of following the usual princi ples of legal thinking and practice; third, legal transplants were not made by replac ing one concept with another rather by fitting one into another and combining their rules which has proved wrong.*

*The author concludes, after the analysis of all constitutive elements of the new concept of company law "the business judgment rule", that the civil law no tion of "care of prudent business person" or "care of prudent expert" remain the backbone of this new concept and that all other elements thereof may, through care ful analysis be reduced to these notions. In itself, it ruins the credibility of the concept of "business judgment rule" and supports the authority of traditional "due care" notion of civil law.*

Key words: *Business judgment rule. Care of prudent business person. Care of prudent expert. Good faith. Loyalty. Director. Liability. Conflict of interest. Fault.*

## 1. STATING THE PROBLEM

Liability in civil law theory and legal regulation, both contractual and non contractual, is traditionally based on the concept of fault (proven

or assumed, determined *in concreto* or *in abstracto*) – liability based on fault or irrespective of fault – strict liability. Under the influence of case law and the rules based on it in common law legal systems, the continental law adopted the concept of business judgment rule (legal transplant), which questions the concept of fault in civil law as a basis for contractual or non contractual liability defined in traditional terms. Such development is also inherent in Serbian civil law (solutions in the Law on Obligations) and company law (solutions in the Law on Commercial Companies).

"In carrying out his obligation, a party to obligation relations shall be bound to act with the care required in legal transactions of the kind of obligation relations involved (the care of a good businessman, or respectively the care of a good master of the house).

In carrying out obligations relating to his professional activity, a party to obligation relations shall be bound to act, with increased care, according to professional rules and usage (the standard of care of a good expert)".[1]

"Whoever causes injury or loss to another shall be liable to redress it, unless he proves that the damage was caused without his fault".[2]

"Fault shall exist after a tort-feasor has caused injury or loss intentionally or out of negligence".[3]

As far as the concept of fault is concerned, namely "due care" under civil law, the Law on Commercial Companies of Serbia stipulates that the directors, supervisory board members, agents, proxies and administrators ("persons who have special duties towards the company") "shall perform their duties as such in good faith, with due care and in reasonable belief that they act in the best interest of the company".

Care of good businessman in terms of par. 1 of the same Article means the standard of care, which should be exercised by a reasonably careful person, knowledgeable, skillful and experienced to a reasonable extent, in the conduct of his duties on behalf of the company.

If the "persons having special duties towards the company" ... "have some specific knowledge, skills or experience, these will be taken into account when judging the standard of care".

"The persons having special duties towards the company" are also deemed "to be able to act on the information and opinion of professionals in relevant areas, who are reasonably believed to have acted in good faith in the case".

[1] Law on Obligations – LOO, *Official Gazette of SFRY*, No. 29/78, *Official Gazette of FRY*, No. 31/93, Article 18 (1–2).

[2] LOO, Article 154 (1).

[3] LOO, Article 158.

“The person having special duties towards the company”... who shall prove to have acted in compliance with that Article shall not be liable for the damage made to the company as a consequence of such an act”.[4]

## 2. CONCEPT OF FAULT IN THE CIVIL LAW

The Serbian civil law makes the concept of fault a core issue of civil law liability (“fault”, “care”, “intention and negligence”) leaving the dilemma of legal interpretation of fault (*in concreto* – subjective notion or *in abstracto* – objective notion). A better grounded definition to this issue, omitted in the text of LOO, is contained in the Sketch of the Law of Obligation and Contracts:

“In judging a person who caused the damage faulty or non faulty, i.e. whether he acted as he should, the court takes into account the normal course of actions and what could have been realistically expected from a reasonable and careful person under the circumstances”.[5]

The Pre-Draft of Law of Obligations and Contracts, in the part dealing with the civil law understanding of fault resorted to objective legal standards (“regular course of action”, “under the circumstances”, “reasonable and careful person”, “grounded expectation”) and unequivocally departed from criminal law understanding of personalized fault (*in concreto* – subjective notion) and accepted standard objective depersonalized fault (*in abstracto* – objective notion), the fault of the tortfeasor abstractly imagined as “a reasonable and careful person” independently of the individual attributes and characteristics.[6] Moreover, leading Serbian legal theory understands the Law on Obligations in this sense, despite the absence of clear legislative statement to that end; hence fault is objectified and depersonalized.[7] Understanding fault in objective and abstract

[4] Law on Commercial Companies of Serbia LCCS, *Official Gazette of RS,* No. 36/2011, Article 63 with reference to Article 61. Compare with the Law on Commercial Companies of Serbia, *Official Gazette of RS*, No. 125/2004, Article 32 with reference to Article 31.

[5] M. Konstantinović, *Obligacije i ugovori Skica za Zakonik o obligacijama i ugovorima* [*Obligations and Contracts Pre Draft of Code of Obligations and Con tracts*], Beograd 1969, Article 127.

[6] See V. Kapor, “Komentar člana 18. Zakona o obligacionim odnosima”, *Komen tar Zakona o obligacionim odnosima* (red. B. Blagojević, B. Krulj) [“Commentary of Law on Obligations” (eds. by B. Blagojevic, B. Krulj)], Beograd 1980, 88 89; M. Orlić, “Esej o krivici” [“Essay on Fault”], *Pravni život* [*Legal Life*] 1 2/2009, 182 188; M. Karanikić Mirić, *Krivica kao osnov deliktne odgovornosti u građanskom pravu* [*Fault as Basis of Tort Liability in the Civil Law*], Beograd 2009, 326 328.

[7] See M. Konstantinović, “Osnov odgovornosti za prouzrokovanu štetu” [“Grounds of Liability for the Damage Caused”], *Arhiv za pravne i društvene nauke* [*Ar chives for Legal and Social* Sciencies] 3/1952, 90; M. Orlić, 194 197.

terms is a prevailing solution in comparative law, too (French law, English law, German law). An exception is Austrian law, which still considers fault a subjective notion (individualization and personalization).[8]

The question arises whether even in the case where fault is depersonalized and not linked to personal characteristics (judgment *in abstracto*), in civil law, which is undoubtedly the leading comparative legal solution and the position of legislation and legal theory, the personal characteristics do bear some significance. It seems that grading of fault ("intention and negligence") speaks in itself of legal relevance of personal characteristics and capabilities of the tortfeasor also in the case when fault is judged according to the objective standard of "reasonable and careful person" (judgment *in abstracto*). This is particularly so if the highest degree of fault is at stake – intention (and its civil law equivalent of gross negligence – *culpa lata dolus aequiparatur*). It is traditionally upheld that the existence of intention (and thereby gross negligence) could be ascertained only by subjective method that is judgment *in concreto*. Although this view was later abandoned in favor of determining the intention and negligence by means of objective (abstract) criteria, it seems that grading of fault still points to certain legal importance of the subjective element of a given context within which the fault is judged (intimate psychological, mental state under the circumstances). This is independent of the fact that the establishment of subjective liability based on fault supposedly requires no more than the mildest negligence (ordinary negligence). Nevertheless, the Law on Obligations itself and other regulations of contract law make the grading of fault legally relevant, sometimes on the issue of existence of liability (it is impossible to exclude liability for intention and gross negligence in advance from a contract, but for example there is a possibility of exclusion of ordinary negligence), and sometimes on the issue of the level of indemnity (liability for integral damage only for intention and gross negligence, but limited in the case of ordinary negligence – for instance in transportation law) or the burden of proof (assumption of subjective liability and existence of ordinary negligence, and proving the intention or gross negligence, all in transportation law).[9]

[8] A. Lucas, *Code civil*, Paris 2004[23], Article 1382 1383; *BGB,* §276 (2); M. Orlić, 188; M. Karanikić Mirić, 70 74. Vagueness of our LOO provoked some interpreta tions and some authors to judge fault in civil law in a personalized manner according to the individual characteristics and possibilities of the harmful person (no fault and conse quently no liability if the damage is caused by a person who according to its individual attributes could not have behaved otherwise, although according to the standard of "rea sonable and careful person he would be obliged to"). See D. Pop Georgijev, *Obligaciono pravo, Opšti deo* [*Law of Obligations, General*], Skoplje 1976, 154.

[9] Compare M. Karanikić Mirić, 166 183.

## 3. "PRUDENT BUSINESS PERSON" AND "PRUDENT EXPERT" STANDARDS (DUE CARE)

A legal issue arises when in terms of civil law fault as the ground for subjective liability does or does not exist. The answer is provided in the Law on Obligations, which promotes the legal standard of "prudent business person" and legal standard of "prudent expert" and the Law on Commercial Companies, which promotes the legal standard of "prudent business person". Both cases require fulfillment of a certain degree of "due care" ("care which is expected in legal transactions in a given type of obligation relations"), that is "duty of care". The notion "duty of care" in company law – "persons having duties towards company"– has been developed in American theory and case law to define its substance and limits. The English law analyses the notion, more subtly than the French, and makes the distinction between pure care and the notion of competence – skill. Thus, the two notions *care* and *skill* in English law correspond to the French term *diligance* (diligence).[10] "Duty of care" ("due care") called "the obligation of care" by the civilists implies the obligation of performing to within the maximum of one's own power to achieve a certain result (aleatory). Hence, "persons with obligations towards the company" cannot guarantee the accomplishment of a result (obligation of result), but only undertaking with "due care" and best of effort (the obligation of effort), according to an abstract standard of "reasonable person" or "diligent person".[11] The difficulties of judging "due care" stem from the fact that there are no objective criteria for its evaluation in corporate governance, further complicated by different categories of directors who are generally affected by this rule.

It is an open question (for theory and particularly case law) whether to apply the standard of "due care of prudent business person" or the "care of prudent expert" to the liability of those persons. This is especially relevant in Serbian law where the Law on Obligations recognizes both legal standards, while the Law on Commercial Companies only the standard of "care of prudent business person". In purely formal legal sense the Law on Commercial Companies has the character of special

[10] See E. Scholastique, *Le devoir de diligence des administrateurs de sociétés droit français et anglais*, Paris 1998, 7. *American Revised Model Business Corporation Act RMBCA* (2005), practically rejects the segment of skill in the standard of care, § 8.30 (3).

[11] A. Tunc, "La distinction des obligations de résultat et des obligations de dili gence", *JCP* 1945, I 449. The Corporation Law of Pennsylvania defines this standard as "care expected to be demonstrated by usually diligent person in a similar position, under similar circumstances". Similarly, in: *RMBCA*, § 8.30 (a) (2). See D. Branson, *Corporate Governance,* Washington 1993, 253 254, 262 264; C.A. Riley, "The Company Director's Duty of Care and Skill: The Case for an Onerous but Subjective Standard", *The Modern Law Review* 62/1999, 704 706.

law, as far as this form of liability of "persons with duties towards the company" is concerned, hence the only valid legal standard would be "care of prudent business person". The constitutive elements of that standard in terms of this Law are: 1) reasonably careful person, 2) person of knowledge, skill and experience (cumulative of all three attributes) to do a given job, 3) possession, according to grounded expectations, of those three attributes. Constitutive elements of this standard so specified in this Law demonstrate that the "care of prudent business person" is judged *in abstracto*. Nevertheless, the Law goes further and prescribes that if the "persons with certain obligations towards the company have certain specific knowledge, skills and experience the same will be taken into account in judging their degree of care". It seems an exception to the stated rule and standard, because on the one hand the objectification of care by "persons with obligations towards the commercial company" is rendered subjective in certain sense (judgment according to the standard *in concreto*), and on the other tightens the degree of care towards the standard of "due care of prudent expert"[12] (it particularly applies to the directors of financial organizations).[13]

On the other hand, the answer to this question may be traced in the context of the character of the function held by such persons – do such persons pursue professional activity, which has its specific "rules of profession and practice"? In a situation where the market economy is still under development in Serbia and when a profession of a director is yet to be shaped in the new ownership structures, which is the basis for "the rules of the profession", it seems difficult to plead that the abstract degree of the diligence of a director may be understood as the "care of prudent expert". In addition, the responsibilities "of persons with special duties towards a commercial company" can not be qualified by "professional activity" at the general level, like for instance, the activities of the self employed individuals (lawyers, auditors, notaries, designers, medical doctors, brokers, investment advisors, etc),[14] in the pursuit of these activities and liability of these persons standard of prudent expert is applicable, which is rather an exception in the light of Serbian Law on Commercial Companies. Bearing in mind for the time being the main characteristics

[12] See V. Kapor, 89.

[13] Opinion developed in American case law is that directors of corporations with quasi public functions, first of all banks and other financial institutions, should have high er degree of care compared to the directors of other corporations. In present day circum stances such opinions are abandoned in the case law and legislation, alike. The standards of equivalence of standards of care of trustees and directors are abandoned, as their func tions differ (*trustee* is a guardian of assets entrusted, while a director is tasked with profit earning and assets increase for a corporation). See D. Branson, (1993), 252 254.

[14] See A. Lee, "Business Judgment Rule: Should South African Corporate Law Follow the King Report's Recommendation?", *University of Botswana Law Journal* 1/2005, 63 64.

of our market environment, it seems that the right standard of care of a director is “care of prudent business person”,[15] in an expectation that the standard of “care of a prudent expert” in the right market ambient will also progressively establish itself, by way of exception to the rule if not otherwise.[16]

## 4. BUSINESS JUDGMENT RULE

### 4.1. Persons Involved

One of the major issues in the business judgment rule is who is protected. It is generally upheld that this rule is applicable to both the directors (members of the board of directors) and managers (executive directors, officers). In American case law the application of this rule has been extended to trustees, chief accountants in the capacity of temporary directors and the controlling shareholder, when carrying out managerial functions normally performed by directors or managers. On the other hand, the minority shareholders and employees have not been covered by this rule. Hence, the directors who want to protect employees holding key functions in a corporation may formally nominate them as a sort of manager (officers).[17]

Our Law on Commercial Companies refers to the “persons with duties towards the company”[18] meaning, in terms of application of this rule: the directors, supervisory board members, agents and proxies and liquidation administrators. Thus, all the directors irrespective of their classification, are covered by this rule (directors under the law and *de facto* directors,[19] executive and non executive directors, internal and ex-

[15] In our opinion, The Swiss Civil Code (1911, 2008) shares the same view, be cause it stipulates “due care” of the individuals managing a company, Article 717 (1).

[16] See M. Vasiljević, *Korporativno upravljanje pravni aspekti* [*Corporate gov ernance legal aspects*], Beograd 2007, 155 162; M. Vasiljević, “The Serbian Law on Commercial Companies”, *Private Law in Eastern Europe* (eds. Ch. Jessel Holst, R. Kulms, A. Trunk), Tubinghen 2010, 284 285. Contrary, pleading for the standard “care of a prudent expert” in the German law, Croatian law and Macedonian law, See J. Barbić, *Pravo društava društva kapitala* [*The Law of Companies Capital Companies*], Zagreb 2000, 381 383; German Law on Shares *AktG* (2005), § 93 (1); G. Koevski, “Američka poslovna doktrina i njena moguća primena u evropsko kontinentalnom korporativnom kontekstu (*Business Judgment Rule*)” [“American Business Doctrine and its Possible Ap plication in Continental European Corporative Context (Business Judgment Rule)”], *Pravni život* [*Legal Life*] 12/2009, 350.

[17] Quoted according to: D. Branson, (1993), 333. See RMBCA, § 8.30 and § 8.42.

[18] LCCS, Article 61 (1) (4 5) with reference to Article 63. Compare G. Koevski, 353 355.

[19] Directors, under the law, are members of the management board in the conti nental practice or the board of directors in the Anglo Saxon practice (plus executive direc

ternal directors, independent directors and directors who have no interest in a contract, directors and administrative senior staff – officers, administrators, directors attending the board meeting or not, the "so-called directors or dummy directors" and similar).[20]

### 4.2. Notion and Background of the Rule

The rule of business judgment emerged almost two centuries ago in the precedent practice of American Courts[21] and has been codified

tors the management, involved in business activities of daily management), either inde pendently (or non executive) or executive. The notion of "*de facto* directors" (continental school) and/or shadow directors Anglo Saxon legal tradition (*les dirigeants occultes, shadow directors*) remains rather vague. In any case, these are not the persons who are directors under the law and who formally hold such positions in the company, based on which they have formal responsibilities, irrespective of their designation (directors, man agers, managing board members, BoD members, officers, trustees, etc.). It is usually up held in the case law and business practice that the persons in this position are directly or through another person exercising a continued influence on how a company is managed and independently, either under the shield of the director under the law or openly instead of him. In such a position, not automatically but at a great risk to be so characterized, is a controlling company and its management vis a vis a subsidiary and its management. A bank may find itself in such a position (or another major creditor), when setting condi tions for credit approval to a company, which may be qualified with such a character of influence. See E. Scholastique, 9 16; R.P. Austin, I.M. Ramsay, *Ford's Principles of Cor porations Law,* Sydney 2007[13], 341 350.

[20] In terms of company law all the directors, irrespective of the category, have the same duty of care while delineations like technical, specialized, part time, absent, semi retired director or the similar, in terms of this duty are not recognized. The directors who want such a status may resign or not accept the designation, but there is also the possibil ity of the existence of technical or advisory board of directors, which is no board of direc tors under the company law nor in terms of the obligation of due care. In the case of *Francis v. United Jersey Bank*, a special status was required for a wife of a deceased di rector founder of the corporation. After her husband's death, she did nothing in her capac ity of director but became drunkard to death. During the time her son systematically looted the corporation. The Supreme Court of New Jersey made it clear that the director may not find remedy in a special status of refugee, even temporarily: "the director is no ornament but a crucial component of corporate governance. Consequently, the director may not protect himself under the veil of a paper under the motto of "*dummy director*". *New Jersey* Corporate Law imposes standards of ordinary care on all the directors, con firming that "*dummy directors*", "figuring directors" and the similar are anachronisms, without a place in the law of New Jersey". See D. Branson, (1993), 279 283.

[21] The Supreme Court of Delaware first formulated this rule (which is often used both in that state and outside USA) in the precedent case *Aronson v. Lewis*: "the presump tion that at the time of taking business decision the directors of the corporation were suf ficiently informed, acted in good faith and in sincere (reasonable) belief that they acted in the best company interest". See D. Branson, (1993), 329. See P. V. Letson, "Implications of Shareholders Diversification on Corporate Law and Organization: the Case of the Busi ness Judgment Rule", *Chicago Kent Law Review* 77/2001 2002, 209 210.

since. Later, it was accepted in Australia (common law)[22] and as of lately in the legislation of continental legal tradition (civil law).[23]

The rule of business judgment emerged because of the need to protect persons owing duties to commercial companies (company, corporation), and in some instances has been treated as a "safe haven" for such persons, provided some requirements are fulfilled. Namely, business decisions taken by these persons requires assumption of serious risk due to impossibility of foreseeing all commercial consequences, which in a legal aspect may result in damages to the company and its shareholders (members), because persons who make decisions can be held liable. In the ultimate instance the commercial risk of business decisions of persons who owe duties to the company are born by the shareholders (owners), who appointed such persons and if dissatisfied with commercial effects on their business decisions may dismiss them. On the other hand, business decisions are also taken ex officio by the persons with duties to the company (directors, members of supervisory boards, agents, proxies). In the case of possible liability actions instituted by the company or minority shareholders for damages caused in connection with business decisions the question arises about the powers of the court to judge merit of such decisions. Legal theory and case law today are almost unanimous in that the "director's office" is the only place to judge merit of business decisions, not the courtroom (*theory of abstention of court from interfering in the convenience of business decisions*),[24] but in formal terms it is (ex-

[22] USA RMBCA, § 8.30 and §8.42; M.J. Staab, "Business Judgment Rule in Kansas: From Black and White to Gray", *Washburn Law Journal*, 1/2001 2002, 234 235; *Australian Corporation Act* (2005), § 180 (2) See R.P. Austin, I.M. Ramsay, 395 400.

[23] *AktG,* § 93 (1) 2; LCCS, Article 63.

[24] One of the best examples is the case law of the Supreme Court of Delaware in: *Shlensky v. Wringley* (237 N. E. 2d 776, III App. Ct. 1968). The Plaintiff *Shlensky* sued *Wringley's* because the latter refused to install lights on *Chicago's Wringley Field* baseball stadium. At the time, the defendant *Wringley* was the majority owner and president of the corporation which owned Chicago Cubs. *Shlensky* was a minority shareholder of the company. *Chicago Cubs* in the period from 1961 1965, the period subject to charges, operated with a loss, due to low visiting rate, and the Plaintiff claimed that the reason was the denial of the Defendant to install lights at *Wringley Field* where matches took place, but not during the night. The Plaintiff stated that the reasons for denial were dual: *Wringley* felt that baseball was a daylight sport and that it would negatively affect the surroundings, if played by night. The Defendant *Wringley* and other directors (dominated by *Wringley* as a majority owner) invoked the business judgment rule, according to which no court may interfere in business decisions (theory of abstention), except for fraud, illegality and conflict of interest. The court reasoned that it was the matter of business policy in the competence of the board of directors, not the court. This is an absolute power of the board of directors and the court has no powers to substitute the judgment of the director so it must apply the theory of restraint. The more so, as the plaintiff failed to prove fraud, illegality or conflict of interest. By ruling this, the court did not say that such a business policy was correct, because it is beyond its competence and capability. See S.M. Bainbridge, "The Business Judgment Rule as Abstention Doctrine", *Vanderbilt Law Review* 57/2004, 94 96; G. Ko

amination of legality of the procedure of taking business decisions and legality of the decision itself). In commercial terms the rule bestows economic freedoms and freedom of entrepreneurship to directors guided, in any case, by “the best interest of the company”.[25] For the shareholders, who ultimately bear the risk of business decisions, the director’s misconception is more acceptable (they always have a possibility to replace them since they appoint them and should bear the risks of their appointment) then that of the court.

American Legal Institute (ALI, Corporate Governance Project) was the first (1992) to recommend a codification of the rule, with a definition, which caused much controversy:

“Director or manager (officer) who takes a business decision in *good faith fulfills his duty of care,* provided he is:

(1) No stakeholder in the subject of the business decision,

(2) Informed on the subject of the business decision to the extent he reasonably believes adequate under the circumstances, and

(3) Reasonably believes that the decision is in the best interest of the corporation.”[26]

evski, 342 349. In another case, however, the theory of abstention of the court from inter fering in the business policy of a corporation was not applied (*Dodge v. Ford Motor Co*, 170 N. W. 668 Mich. 1919). In that case the court ordered to the majority owner of *Ford* to change the decision rendered on nonpayment of dividends to the shareholders in favor of investment into development and capital projects, by ordering him to pay the dividends to shareholders, because any corporation is organized primarily in the interest of sharehold ers. The decision was taken further to the action by minority shareholders brothers *Dodge*. The decision was criticized in theory as the corporation knows better than the court what was its interest. In the given case several years prior to this action brothers *Dodge* sus pended the delivery of spare parts to the corporation *Ford* and started construction of their own factory for the same production in competition to *Ford*. At the same time *John Dodge* withdrew from the board of directors of *Ford*, where he had been member for ten years. Hence, *Ford* seriously worried that brothers *Dodge* would use dividend to compete and develop their own corporation, reducing the profit in future for the shareholders of his corporation. That is why, this is the very situation where the theory of abstention by the court from interfering in the convenience of business decisions of a corporation should come to the forefront, because *Ford* was justly concerned about the business plan of the corporation and its future and decided to pay no dividends but to invest in the development. See D.A. Jeremy Telman, “The Business Judgment Rule, Disclosure and Executive Com pensation”, *Tulane Law Review* 81/2006 2007, 866 869.

[25] All American commentators agree that courts should be capable of examining the decisions of directors, if they are irrational or taken in bad faith and that this is no enrochment into their merit, but if they were passed in such a way the duty of loyalty to the company is violated (fiduciary duty of good faith or due care for the company) or loyalty due to the company when there is conflict of interest. See D. Rosenberg: “Galactic Stupidity and the Business Judgment Rule”, *The Journal of Corporation Law* 25/2006 2007, 313 314.

[26] ALI, Corporate Governance Project (1992), §4.01 (c). See D. Branson, (1993), 328; E. Scholastique, 207 211; R.P. Austin, I.M. Ramsay, 397 398.

The US Revised Model Business Corporation Act (RMBCA) set out the constitutive elements of this rule in a somewhat different manner:

"The director performs his duties as a director, including the duty of a committee member, if he acts:

(1) In good faith,

(2) With care of a normally diligent person in such a position under similar circumstances, and

(3) In the manner which he reasonably believes to be in the best interest of the corporation".[27]

The German *AktG* formulates four assumptions for this rule, which if met on cumulative basis constitute the immunity of the directors (sovereignty), who made the subject decision, which resulted in the damage, and which protect them from liability, provided the board of directors:

(1) Passed the business decision,

(2) Acted in good faith,

(3) Acted on the basis of being adequately informed, and

(4) Acted in the best interest of the corporation.[28]

The Law on Commercial Companies of Serbia, having adopted this concept, also determined its constitutive elements through the "persons having duties to the company" that should perform their tasks:

(1) In good faith,

(2) With due care of prudent business person,

(3) In a reasonable belief of acting in the best interest of the company.

### 4.3. Constitutive Elements of the Rule

#### *4.3.1. Business Decision*

The first constitutive element of this rule is a business decision. "Persons with duties towards the company" (subjects of the rule) according to the rules of corporate governance (legal, self-regulatory, autonomous – hard law and the rules of "soft law" and best corporate practice) make business decisions within the scope of their authority (explicitly proscribed or presumed under these rules). Almost all sources that codify the concept of "business judgment rule" explicitly or otherwise provide for *the principle of business decision* as the first constitutive element,

[27] RMBCA, § 8.30. The same rule applies to managers (§ 8.42).

[28] J.J. du Plessis *et al.*, *German Corporate Governance in International and Euro pean Context*, Berlin 2007, 60 61.

which can be contested (causative link with the damage caused to the company directly and indirectly to other stakeholders in the company).

However, the attention of legal theory and case law has been on the issue of whether only action (approval of a business decision) or also non-action (lack of a business decision) may be covered by this rule. Sometimes in business life, and consequently in legal life, non-action may cause even greater damage than action, but the fact that there is no business decision means it is not covered by this rule. Seemingly, in legal terms, both action (business decision approval) and non-action (non approval) must have the same legal consequences,[29] irrespective of whether some sources regulating this rule explicitly say so or not (application of general rules of contract law). This applies only when other constitutive elements of this rule exist.

### *4.3.2. Due Care and Informed Decision-Maker*

The second constitutive element of this rule is: "due (reasonable) care". "Persons with duties towards the company" (subjects of the rule) while making business decisions (decision making process) should apply the proscribed "due (reasonable) care".

Depending on the legislator or court practice[30] in the absence of regulations, the care may be "care of prudent business person" or "care of prudent expert".

Several relevant, separate legal issues exist in the context of corporate liability of subjects of the rule, in addition to general legal issues within the theory of contractual law, discussed here.

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[29] See K.B. Davis, "Once More the Business Judgment Rule", *Wisconsin Law Review* 3/2000, 575 576; R.T. Miller, "Wrongful Omissions by Corporate Directors: Stone v. Ritter and Adapting the Process Model of the Delaware Business Judgment Rule", *Journal of Business and Employment Law* 4/2008, 951 954; J. Barbić, 385.

[30] In the classical English case law it was not necessary to establish the rule of business judgment. Starting from the provisions concerning care of the common law the courts simply declared incompetence to judge convenience of business decisions. In recent times, however under the influence of new bankruptcy regulations and the regulations of the so called disqualification of directors, the court practice necessarily changes in the di rection of recognition of this American doctrine of *business judgment rule* (E. Ferran, *Company Law and Corporate Finance,* Oxford 1999, 206 217). In France, to the contrary, the court has always declared competence in judging the convenience of business decisions literally applying provisions, according to which directors were rendered liable for "mana gerial fault". Still, it does not mean that the court denied the possibility to render directors not responsible ("the right to make mistake the right of erroneous belief"), providing for protection of some conduct, although the failure of the company could not have been ulti mately avoided, since the function of company management does not exclude the right to mistake fallacy and that the obligations of directors are not "result but of effort". See. A. Guengant, P. Troussière, S. de Vendeuil, *Le role des juges dans la vie des sociétés,* Paris 1993; C. Lefeuvre, *Le réfère en droit des sociétés*, Paris 2006.

First, the issue of relevant "point of connection" of care. Apparently, the general attitude that "due (reasonable) care" is connected to director being adequately informed about the subject of the decision.[31] Some legislations expressly specify it, either by proscribing as a constitutive element of the rule that subjects of the rule in the process of business decision-making are being adequately informed, in addition to the constitutive element of "due (reasonable) care"; or by joining those two constitutive elements into one, or by interpreting the leading legal theory or court practice. In any case, the component of "due care" which is an integral part of this rule is connected to the element of being informed – business decision (or absence of decision) must be based on being adequately informed (which requires certain care, both in collecting and selecting information and its assessment).

In business decision making process or the decision (explicit or tacit) not to make a decision (action or non-action) the subject to this rule may use different methods, techniques and concepts (being self-informed, being mutually informed, being informed by auxiliary bodies – committees and commissions, decisions proposed by corresponding bodies, information obtained from the chairman of the board of directors, based on his duty to inform other members of the board, opinion of professionals in specific areas – auditors, accountants, legal advisors, investment advisors, financial advisors and others). In any case, the question of how much and what type of information is sufficient for a business decision in terms of application of the business judgment rule is more a matter for the subjects of the rule than for a judgment of the court.[32]

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[31] See E.E. Cassell, "Applying the Business Judgment Rule Fairly: A Clarification for Kansas Courts", *Kansas Law Review* 52/2003 04, 1121 1125.

[32] In the precedent case *Smith v. Van Gorkom* (Delaware) the board of directors of a public corporation approved merger, within two hour meeting, without having the pro posed merger agreement at hand. The Board so decided at the insistence of the CEO, Van Gorkom. Applying the standard of business judgment rule, the Supreme Court of Dela ware found that the "presumption that the directors have to act on an informed basis, fairly and in the belief that the act is in the best interest of the company". The court found, also, that the *concept of gross negligence* is an appropriate standard for determination whether the business decision of directors was approved on the basis of whether they were sufficiently informed. The way of conduct of the board of directors is a key road sign to the court in judging its care. The court could or should not investigate whether reasonable or necessary care had preceded the decision of the board meeting. On the merit of this standard the court found the board of directors liable, as it passed the decision on the basis of being insufficiently informed, thus acting in gross negligence (both in terms of the reasons for urging the merger on the part of *Van Gorkom*, and in terms of the value of corporation). That decision caused numerous commentaries, mostly negative, allowing the possibility that the board of directors acted with ordinary rather than gross negligence. This decision was followed by legislative response, which allowed under certain condi tions, limitation or exclusion from liability of some for material consequences of the vio lation of "duty of care". See D. Branson, (1993), 258 259.

The meaning of the standard of “due (reasonable) care” is questionable regarding different grades of fault (intent, gross negligence, ordinary negligence). Namely, what standard of care (fault) is necessary for it? However it is not disputable, that it does include the intention and gross negligence but the question is whether it covers ordinary neglect. The answer to this question is unanimous neither in legal theory and legislation nor in case law. One part of the legal theory is convinced that the standard of “due (reasonable) care” hence the standard of fault as a basis of subjective liability, presumes ordinary negligence unless explicitly stipulated to the contrary in the law, and since this is not the case with the corporate liability of the subjects of this rule, it means that ordinary negligence suffices for their liability.[33] Thus, the protection under the rule of business judgment does not cover any degree of negligence including ordinary negligence, let alone intention or gross negligence. This is the view taken mainly in civil law tradition, starting from the premise that even if only ordinary negligence exists, there is no “due (reasonable) care”.[34] On the other hand, in common law tradition the view that the business judgment rule includes ordinary negligence is more frequent, so that it enjoys its protection, while the scope of this rule does not protect the intent and gross negligence.[35]

The case law, particularly rich in some US states, differs on this issue but the view that the business judgment rule covers ordinary negligence (in the process of making or non-making business decisions) is still predominant; so in any case the intent and gross negligence remain out-

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In the French case law it was ruled that the “decisions of the board of directors were null and void, unless the members were sufficiently informed”. Nullity is optional and calls for evidence that the rejection of the company (board chairman) to inform its mem bers prevented them to take the decision in “full knowledge about the matter”. In the same vein, the breach of the right of a board member to be informed cannot lead to the nullity of the decision, if in the concrete circumstances of the case were such right not infringed and were such a member correctly informed it would not have impacted the decision since he is in a large minority. See E. Scholastique, 216 222, 259 263.

[33] *In lege aquilia et levissima culpa venit*, Ulpianus, 42 ad sab., *Digestae* 9.2.44 (M. Karanikić Mirić, 174).

[34] See V. Breskovski, “Duty of Care in Eastern Europe”, *The International Law yer,* 1995, 80 90.

[35] R.S. Sergent, “The Corporate Director’ s Duty of Care in Maryland: Section 2 405.1 and the Business Judgment Rule”, *Howard Law Journal* 2/2000 2001, 192 193, 243 244; D. Branson, “The Indiana Supreme Court Lecture: The Rule That isn’t a Rule The Business Judgment Rule”, *Valparaiso University Law Review* 36/2002, 639 640; M.J. Staab, 244; W.O. Hanawicz, “When Silence is Golden: Why the Business Judgment Rule Should Apply to No Shops in Stock for Stock Merger Agreements”, *The Journal of Corporations Law* 28/2002 03, 217 218; E.S. Miller, Th.E. Rutlendge, “The Duty of Fin est Loyalty and Reasonable Decisions The Business Judgment Rule in Unincorporated Business Organizations?”, *Delaware Journal of Corporate Law* 30/2005, 347, 352 353.

side the protection of this rule.[36] Therefore, the standard of "due care" is more strict in continental Western Europe (includes ordinary negligence and the rule of business judgment is not applied to any degree of negligence), than in USA (includes no ordinary negligence in the corporate liability, which is covered by the business judgment rule).[37] Finally, discussing the countries of Eastern Europe, instability of legal provisions and a high degree of uncertainty render a clear answer about the legal regime of ordinary negligence impossible in terms of corporate liability (coverage by the business judgment rule and non liability or non-coverage and liability). Some feel that by stricter standard of care (non-coverage by the business judgment rule and liability on the grounds of ordinary negligence) would perhaps encourage foreign investment in those countries.[38]

The answer to the coverage of ordinary negligence (in the process of making or non-making business decisions) by the business judgment rule, and nonexistence of liability of the subject of this rule in this case seemingly should depend on the legislature's view about the nature of applicable standards to corporate decisions of the subject of this rule – be it the standard of "duty of care of prudent business person" or the standard of the "duty of care of prudent expert". If however, this is a higher "care of prudent expert" standard of professional liability (exception in Serbian company law) there is no room to exculpate the subject of this rule on the grounds of ordinary negligence.[39] On the other hand, if we think of the standard of "due care of prudent business person" (the rule of Serbian company law), than it seems that due to the nature of business of the subject of the rule, which involves the principle of impossibility to foresee all business risks when (non) making business decisions, as well as out of the need to spur up the entrepreneurship of the subjects of the rule (taking the risk with "due – reasonable care"), it is possible to defend the view that ordinary negligence exculpates the liability (except in the

[36] In principle, the US courts express this principle in the formula "regularly either directors or other corporate managers are accountable for ordinary mistakes or beliefs when they assess (business decision making), be it legal or factual mistake". As a declara tion of business decision making policies, these courts often use the formula that the "di rectors of commercial undertakings may take commitments of the same kind as one may take in own business". In the case *Smith v. Van Gorkom* The Supreme Court of Delaware stated "we are of the view that the concept of gross negligence is appropriate standard for judging whether the standard of directors being informed in terms of applicability of the business judgment rule has been achieved." See. D. Branson, (1993), 344.

[37] See D. Ping Lee, "The Business Judgment Rule: Shoud it Protect Nonprofit Directors?", *Columbia Law Review* 103/2003, 926 928.

[38] See V. Breskovski, 95 96.

[39] Subjectivisation of due care through relevance of knowledge and skills of direc tors who have them is the standard also in the English law and theory. See. J. Charles worth and G. Morse, *Company Law,* London 1999, 277.

case of conflict of interest)[40], and that it is covered by the protection of business judgment rule,[41] while it can under no circumstances be considered the regime for intention and ultimate-gross negligence. This is irrespective of the fact that according to an otherwise acceptable dominant view of legal theory, the standard of "due – reasonable" care includes ordinary negligence (the need and grounds for exception from corporate liability). This is in accordance with case law of Delaware, although this is not entirely clear from their legislation.[42]

### *4.3.3. Good Faith*

Third constitutive element of this rule is the principle of good faith,[43] recognized by company laws and civil laws of contracts.[44] The rule of "good faith" is a sort of umbrella for the application of business judgment rule,[45] as well as the rule of "due care", which poses the question of their relationship. American legal theory argues that the standard of "due care" applies to this rule in the case when directors are in no conflict of interest (individually or in connection to related persons) with the interest of the company to asses whether the standard is violated. In the case of a conflict of interest which binds the director to loyalty to the company, when the presumption of directors' good faith under the business judgment rule is eliminated, the standard of good faith is applied to determine if the director violated the duty of loyalty to his company (the

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[40] Thus E.E. Cassell, 1131 1135.

[41] The view of the authors who argue that the standard of conduct of the corpora tion directors must be less burdensome than the standard for a corporation in general seems acceptable whatever the reality might be. Thus, one court ruling of US courts states: "It has been often alleged that the corporation directors and managers are liable for negli gence in carrying out corporate duties, but apparently all agree that such allegation is wrong. While a car driver who makes a wrong assessment of speed and distance and in jures a pedestrian will be called to compensate the damage, a corporate manager who makes wrong judgment about economic conditions, consumers; taste or efficiency of a production line will be rarely if ever liable for the damage to the corporation. Any termi nology, any fact that the liability of corporate directors or managers has been rarely im posed on the grounds of wrong judgment, only......". See D. Branson, (1993), 372 373.

[42] See D. Branson, (1993), 256.

[43] For this principle more in: J. Beatson, D. Friedmann (eds.), *Good Faith and Fault in Contract Law*, Oxford 1995.

[44] The Uniform Commercial Code of USA (1962) provides (Articles 1 203) that "each contract or obligation in terms of this Law requires applying or performing in good faith". The Serbian Law on Obligations (Article 12) postulates "good faith and fairness" as general principles of law of contracts and torts.

[45] The American legal authors are of the view that "the requirement of good faith is something encompassing everything" but that this "umbrella" is especially important in the case when illicit motives underlie the business decision, and in the case of ratification of forbidden conduct of the subject of the Rule. See D. Branson, (2002), 643 645.

duty to act in its interest).[46] In the same vein, the standard of good faith is relevant when there is a conflict of interest between the director and the company, and there is a likelihood of the breach of the principle of loyalty to the company (work in the best interest of the company), that the director can prove a given legal transaction is fair (honest) for the company (corporation) despite possible absence of a proscribed approval for such a transaction.[47]

The rule of "good faith" is one of the most controversial elements of the business judgment rule due to more reasons than one. First, is it an independent element of this rule, irrespective of others? There is tacit understanding of good faith is not a duty which could be defined separately without reference to other duties. Namely, the duty of good faith requires the directors to make a serious effort to fulfill their duty of "reasonable care" and the duty of loyalty towards the company (act in the best interest of a corporation).[48] Second, is this standard specifically, as it seems to be, in the function of presumption of "reasonable belief of acting in the (best) interest of the company", and therefore has no specific *ratio* of its own in terms of the business judgment rule?[49] The answer to both questions leads to the conclusion that duty of good faith is no specific duty as regards the rule of business judgment, but covers other obligations (duties) of directors in the same way as contracting parties have duty of good faith (and honesty).[50] In case law and American legal theory the principle of good faith is replaced with the principle of rationality or reasoning.[51] According to them, "irrationality" or "lack of reason" of a

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[46] E.E. Cassell, 1121.

[47] Thus E.E. Cassell, 1136 1137.

[48] Some look at this duty of good faith as a bridge between duty of care and duty of loyalty. In any case, be it taken as an independent duty or as subsidiary duty of duty of loyalty to the company (*it is not possible to act in bad faith and be loyal to the company)*, the duty of good faith is considered as an amorphous concept. See A.S. Gold, "A Decision Theory Approach to the Business Judgment Rule: Reflections on Disney, Good Faith and Judicial Uncertainty", *Maryland Law Review* 66/2006 2007, 404 408, 417.

[49] Thus E.E. Cassell, 1131 1135; D. Rosenberg, 304 306; R.P. Austin, I.M. Ram say, 351 354.

[50] D. Rosenberg, 307.

[51] The American Legal Institute in the *Principles of Corporate Governance* sug gests at the same time a ridiculous example of irrational decision: company A needs a big quantity of ball bearings for its production; it has a possibility of procuring them and of the same quality from two companies B and C, where those from C cost 30% more. Com pany C is the company of the university colleagues of the most members of the BoD of company A, which nevertheless decides to buy those bearings and for three years in run, wishing to favor it, expecting no reciprocity. Whoever wants to question the liability of director of company A in the given case, must prove that their decision is not rationally (reasonably) grounded. See E. Scholastique, 209; M.A. Eisenberg, "The Duty of Care of Corporate Directors and Officers", *University of Pittsburgh Law Review* 50/1990, 970 972.

business decision shows that the decision is not taken in good faith and not based in the best interest of the corporation. In any case, it is pointed out that applying the test based on rationality, as a test of court examination of lack of good faith, helps avoid *Van Gorkom* style of liability[52].

Historically, most case law dealing with the issue of good faith with reference to the business judgment rule were about financial or other conflict of interest (duty of loyalty to the company). It is upheld today that "the majority of independent directors have proven that the board of directors acted in good faith", which as the Supreme Court of Delaware put it, "substantively reinforced it".[53]

### *4.3.4. Company Interest (Duty to Act in the "Best Interest of Company")*

Fourth element of this rule is "reasonable belief of having acted in the best interest of the company". Legal position of the "persons with duties to the company" (directors) although originally tied to the legal form of a trust is still not fully analogous to it.[54] Duties of company directors are not identical to duties of trustees or other agents (that have a heightened obligation of preserving the entrusted assets, while the position of the director is to run an entrepreneur's risk to increase the assets and maximize profit for development and for shareholders' benefit). The legal position of the director is therefore specific, although based in a sort of *fiducia* (trust).[55] Consequently, the directors are required to act in "the best interest of the company" (identified by some as shareholders' interest).[56] Moreover, the directors must not in exercising their duties put themselves in a position of conflict of interest between themselves (direct

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"Sincere mistake (fallacy) of judgment is permitted. But a judgment which cannot be viable on the rational basis is beyond protection of business judgment rule". Some court decisions of the American courts argue in favor of application of the business judg ment rule that the decisions of directors must be "reasonable" or grounded on "rational grounds" or "legitimate business ends" not to represent "big abuse of discretionary pow ers". See D. Branson, (1993), 358 361.

[52] See A.S. Gold, 428 431. Some American legal authors suggest that the direc tors are acting in good faith when they: 1) take the decision rationally, and 2) if their deci sion is reasonable, even if they did not reach the decision in a rational manner See B.S. Sharman, "Understanding Maryland's Business Judgment Rule", *Duquesne Business Law Journal* 8/2006, 320 322.

[53] See D. Branson, (1993), 364.

[54] See R.P. Austin, I.M. Ramsay, 349 350.

[55] *Ibid.*, 338 339.

[56] About the company interest, see: D. Schmidt, *Les conflits d' intérets dans la société anonyme,* Paris 1999, 7 25; M. Vasiljević "Korporativno upravljanje i agencijski problemi", II deo ["Corporate Governance and Agency Problems", Part II], *Anali Pravnog fakulteta Univerziteta u Beogradu* [*Annals of the Faculty of Law in Belgrade*] 2/2009, 5 28.

or indirect) and the company – the duty that stems from the conflict of interest clause *(duty of loyalty to the company when such a conflict exists)*. According to long standing tradition, fiduciary duty is owed to the company[57] and not to individual shareholders, although some recent case law and theory question this view.[58]

In USA the fiduciary duty rule, although originally created on equity principles, continued to evolve in the corporate context, where it was particularly perfected in the most famous court for corporations – Delaware's Court of Chancery. As a general rule, fiduciary duty extends further than honesty and good faith. The courts and legal authors agree that the directors have to subject their individual interest to the duties they owe to the corporation.[59] In English case law it is deemed that a member of the board of directors is in fiduciary duty to the company only when he decides and acts in such a capacity, but not when he votes in the general meeting in his capacity of shareholder.[60]

Fiduciary duty of a director has been taken from common law by way of "legal transplants" into continental law, both in general terms of fiduciary duty (*work in the company interest*),[61] and in a special terms in the clause of conflict of interest of directors (directly or via connected persons) and the company, where again there is a duty to act in the interest of the company (*duty of loyalty to the company*). Thus, in France,

[57] Directors have duties towards the company, particularly to act in good faith in the company interest thus A. Hicks, S.H. Goo, *Company Law*, Oxford 2004, 310 325; E. Ferran, 154 170.

[58] H. Fleischer, "The Responsibility of the Management and of the Board and Its Enforcement", *Reforming Company and Takeover Law in Europe* (eds. G. Ferrarini *et al.*), Oxford 2004, 373 375.

[59] The direct cases of breach of fiduciary duty encompass: own usage of corporate chances (possibilities), appropriation of the company assets (theory of assets), and bene fits from third parties related to the company, competition to the company, prohibition of ungrounded enrichment. The indirect cases of the breach of fiduciary duty in the case of conflict of interest with the company (direct or indirect though related persons) are: the contract with itself, the existence of conflict of interest (direct or indirect), as well as the existence of certain post contractual duty (no competition with the company for a contrac tual period). See K.J. Hopt, "Trusteeship and Conflicts of Interest in Corporate, Banking, and Agency Law: Toward Common Legal Principles for Intermediaries in the Modern Service Oriented Society", *Reforming Company and Takeover Law in Europe* (eds. G. Ferrarini *et al.*), Oxford, 2004, 57 62; *Corporate Director's Guidebook*, (Committee on Corporate Laws and Corporate Governance, Section of Business Law, ABA Annual Meet ing), 2003$^4$, 16 18; B. Kasolowsky, *Fiduciary Duties in Company Law,* Hamburg 2002, 94 103, 139 151; A. Bohrer, *Corporate Governance and Capital Market Transactions in Switzerland*, Schulthess 2005, 173 181; M. Vasiljević, *Company Law,* Belgrade 2006, 409 412; M. Vasiljević, (2007), 145 150;

[60] *Case*: *Northern Countries Securities Ltd. v. Jackson & Steeple Ltd Chancery division*, in L. S. Sealy, *Cases and Materials in Company Law*, London 1992, 174 176.

[61] See R.P. Austin, I. M. Ramsay, 355 368.

Court de cassation explicitly recognized *devoir de loyauté* (duty of loyalty) of directors.[62] Legal authors characterize almost unanimously the position of director as fiduciary, provided that "duty of loyalty" requires, they point out, stronger application standards than the general obligation which stems from the principles of good faith and honesty.[63]

*4.3.5. Absence of Conflict of Personal Interest and Company Interest*

The American Legal Institute (ALI) in its definition of the business judgment rule includes as a constitutive element also absence of conflict of interest (direct or indirect) of persons concerned (with the company). Namely, the business judgment rule presumes that directors are not in conflict of interest, or if they are, that they are loyal to the company.[64] Some case law in America suggests that directors who approve a transaction out of conflict of interest must be both independent and informed in order to invoke the application of some rules of business judgment (good faith, loyalty)[65] by their decision to approve the transaction out of conflict of interest.

Certain links exist between the rule of business judgment and the rule of loyalty to company. In broad terms, if directors being sued invoke the application of business judgment, and the court finds a presence of conflict of interest which invalidates its application, loyalty and inherent honesty will be assessed. Practically, in all cases of conflict of interest with a company (and related persons) loyalty to the company shall be examined (eliminating the application of the rule of business judgment and its presumption) applying the most stringent criteria (even ordinary negligence alone is sufficient). Even if directors who have no interest in a given transaction (or only independent directors) do not approve a transaction, director who is in conflict of interest can "prove that at the time of contract signing or its performance it was in the interest of the company" or "fair for the corporation" (interest of the company) and the transaction would be legally valid.

The inclusion of conflict of interest into constitutive elements of business judgment rule is legally wrong, because these are two different

[62] In one case the director resigned in the previous company and established a new one. However, he persuaded the key employees of the former company to join the new one. Unlike the Appellation court, the Cassation court granted compensation for damages to the previous company, the plaintiff, founding that director violated the duty of loyalty to the previous company. See H. Fleischer, 377.

[63] *Ibid.*, 378 379.

[64] Some case law defines the "director having the conflict of interest": 1) when he appears on both sides of a transaction or 2) if he has or expects material benefit which is not equal to the one which shareholders have from the transaction. See D. Branson, (1993), 348 350.

[65] D. Branson, (1993), 352.

concepts (business judgment rule is applied only in absence of conflict of interest between the director and the company, direct or indirect). Hence, no legal sources governing those concepts act in this manner. Still, whether conflict of interest exists or not, it is the duty of directors to act in rational (reasonable) belief in "the best interest of the company" (company loyalty, fiduciary duty of loyalty to the company).

The legal regime of the clause of conflict of interest of directors (personal interest with company interest) and redress (disclosure – prevention of the consequences of conflict of interest, approval by persons without voting rights in the given transaction, proof that the legal transaction is in the interest of the company)[66] is one of the paradigms of corporate governance. Nevertheless, it defies conventional logic: interest of the company must prevail under the duty of loyalty in the case of conflict of personal interest of a director. Is it normal to expect of a director to put the (general) interest of the company before his personal interest unless he is personally interested to put another interest (in this case the interest of the company) before his interest (or that of related persons)?! Without diminishing positive achievements of contemporary company law in redressing this issue,[67] it seems that a solution rests in the instruments of personal interest (or that of related persons) of directors to promote the company interest above his interest (or the interest of related persons). That instrument of harmonization of both interests, so that the "another's" interest (company interest) would have primacy over the private (personal) interest of the director (or the interest of related persons) is found primarily in the (variable and fixed) remuneration regime for directors. Only then the law should serve the needs of economy and vice versa, the economy would help the law justify its mission.

## 5. BURDEN OF PROOF PROCEDURAL AND/OR SUBSTANTIVE RULE

The nature of the rule of business judgment can be either procedural and/or substantive. A part of American legal theory as its origin, argues that this is just a legal procedural rule (refutable legal procedural presumption[68] of good faith and /or "due care" on the side of the subjects affected by the rule),[69] while the other part of legal theory suggests that

[66] See D. Schmidt, 29 86.

[67] *Ibid.*, 87 180.

[68] This presumption at the side of directors (good faith, due care, conduct on the informed basis) is practically difficult to refute, except in the case of conflict of interest, so that in Delaware all business decisions of directors where no conflict of interest existed practically remained in force, while in other USA states the protection of directors was not so strong. See P.V. Letson, 179 180.

[69] See L. Stout (suggests that "courts, unequipped to judge the substance remain in the secondary solution to rule the procedural issues" and finds that "from the angle of

this is both a legal procedural rule and substantive legal rule (constitutive elements of this rule, the proof of existence of which activates its application, which is already a substantive legal rule).[70] Exceptionally, if there is a conflict of interest between a director and the corporation (direct or indirect) then there is no presumption (refutable) on the side of the director but it is deemed to be refuted and it is up to directors to prove that they did not violate the duty of loyalty to the corporation acting in good faith and with "due care".[71]

One of the most frequently quoted cases concerning this aspect of the rule in the Supreme Court of Delaware is *Warshaw v. Calhoun*: "In the absence of proof of bad faith on the part of directors or gross misuse of powers in business judgment the directors shall not be involved in the court procedure. The burden of proof of bad faith or abuse of powers remains on the Plaintiff. The acts of directors are deemed presumably faithful and motivated by the best corporate interest and the minority shareholders disputing their good faith should shoulder the burden of proof."[72]

Many court cases in the USA suggest that business judgment rule means "presumption that in making business decision, corporate directors acted on the basis of being sufficiently informed, in good faith and sincere belief that the action had been taken in the best of its interest." Thus, this is the presumption of regularity linked to all actions taken by the elected corporate directors. This is a refutable presumption[73] standing "above routine presumption of regularity"[74], with the effect of shifting the burden of proof onto the Plaintiff for violation of duty by a director.

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rationality, it seems counter productive to focus on the of being informed procedure and of being informed as the basis for responsibility"), "In Praise of Procedure: An Economic and Behavioral Defense of Smith v. Van Gorkom and The Business Judgment Rule", *Northwestern University Law Review* 2/2001 2002, 691 694; B.C. Brantley, "Deal Pro tection or Deal Preclusion? A Business Judgment Rule Approach to M&A Lockups", *Texas Law Review* 81/2002 2003, 371 372, 374 380; W.O. Hanawicz, 217 218.

[70] See S.M. Bainbridge (writing that it is not the point that under the theory of restraint, the court can not even ask whether the accused directors violated the rule of due care, good faith or loyalty, as substantive constitutive elements of the *business judgment rule*, rather that when those presumptions were not refuted by the Plaintiff, and the Defen dant failed to prove to the contrary, hence when all those presumptions for the application of this rule are present, then the court has no room to enter the merit substantive legal aspect of business judgment of the directors), 93 99; F. Shu Acquaye, "The Taxonomy of the Director's Fiduciary Duty of Care: United States and Cameroon", *New York Law School Journal of International and Comparative Law* 22/2003, 591 593.

[71] See E.E. Cassell, 1121, 1134 1135.

[72] Quotation according to: D. Branson, (1993), 330; E. Scholastique, 212 225.

[73] See S. Graić Stepanović, "Pravilo (adekvatne) poslovne procene" ["The Rule of (adequate) Business Judgment"], *Pravo i privreda* [*Law and Economy*] 5 8/2008, 306 309; G. Koevski, 338 340.

[74] D. Branson, (1993), 365.

Still, to attract the presumption of this rule and shift the burden of proof on the Plaintiff, a certain quantum of evidence of the presence of preconditions necessary for the business judgment rule (its elements) must be provided to "move from presumption to preconditions" (each presumption has preconditions). Hence, to apply the presumption of this rule, its elements must be proven ("the stronger the proof the stronger the effect"). The effect could be only the presumption of presence of the elements or so convincing a proof of existence of all elements of the rule that the rule may appear as an irrefutable presumption, "safe haven" for corporate decisions and their makers. If not, the less proof the more questionable the presumption is, instead of being the "safe haven".[75]

General substantive rule of the laws of contract on subjective liability (as a rule and strict liability as an exception) with presumed fault is that "whoever causes damage to another shall be liable for its compensation, unless he proves that the damage was caused without his fault"[76] hence, liability is presumed pending proof to the contrary by the tortfeasor. The Law on Commercial Companies of Serbia, however, constitutes the opposite rule that person with duties to the company "who prove to have acted in compliance with this rule ... is not liable for the damage inflicted on the company due to such act"[77] (substantive legal presumption of liability, that is the presumption of bad faith and action without "due care" in the interest of the commercial company), pending the proof of the tortfeasor to the contrary[78] (in practical legal terms the proof of presence of constitutive elements of this rule and action in compliance with them). Thereby the substantive legal presumption does not coincide with the traditional legal procedural presumption further to which the Plaintiff (the presumed injured person: company, shareholders and possibly creditors) proves the harmful conduct of the defendant[79] (loss, fault and causative link between the fault of the tortfeasor and the damage inflicted). Although new Serbian procedural laws have changed this traditional procedural rule in terms of a more equitable distribution of the burden of proof to both litigation parties (each party, the Plaintiff and Defendant, present their evidence in the process, and it is up to the court to judge their relevance from the view point of existence or nonexistence of liability),[80] the gap in Serbian law still remains between substantive

[75] *Ibid.*, 368 370.

[76] LOO, Article 154 (1).

[77] LCCS, Article 63 (5).

[78] Thus the Croatian law ("members of the management shall be liable for any fault. It is presumed, and the burden of proof is on them that there is no fault for the dam age incurred"). See J. Barbić, 381.

[79] Compare M. Orlić, 198.

[80] Law on Litigation Procedure, *Official Gazette of the Republic of Serbia*, No. 125/04 and 111/09, Article 220.

and procedural burden of proof. In the context of the rule of business judgment presumed subjective liability of directors in company law, as a substantive legal rule, cannot be taken as an improvement for the need of entrepreneurs risk and initiative of directors, which shall slow down business decision-making and render it more cautious and noncompetitive.

## 6. RATIFICATION IN THE CASE OF BREACH OF BUSINESS JUDGMENT RULE

The question is whether the company general meeting or board of directors or supervisory board may ratify a breach of fiduciary duty of directors, including the violation of the duty of care. As a rule, the courts and legal theory point out that the company's general meeting may not ratify acts of directors which constitute fraud that are contrary to law or lead to a company property loss, that affords them immunity from liability, while other acts may be ratified under the general principles of contract law on the relationship of the principal and the client (the contract of the order-mandate) and special rules of the company law.[81] American and Australian courts distinguish between transactions, which are not made null and void by ratification by a majority vote, transactions which are null and void by law (which cannot be subject to ratification) and the transaction which constitutes a loss or gift of corporate property (which are also null and void and may not be ratified).[82] The transactions in violation of duty of loyalty, which are contained in the clause on conflict of interest or the clause on ban on competition, could be ratified by the board of directors (if the majority has no interest in the given transaction) or the company general meeting. In principle, ratification is taken as one of the internal corporate remedies, another mean of alternative dispute resolution.[83]

[81] LOO, Article 752. "Director shall be liable to the company for the damage caused to it in breach of the provisions of this law, statutes or general meeting decision. Exceptionally, the director shall not be liable for the damage caused if he acted in compli ance with the general meeting's decision" LCCS, Article 415 (1 2).

"Liability of the managing board is excluded if the action is taken on the merit of a valid decision of the general meeting. This excludes the liability for damage to the com pany, but not to the company creditors. The decision must not be annulled or refuted." Thus J. Barbić, 386.

[82] See R.P. Austin, I.M. Ramsay, 816 831.

[83] D. Branson, (1993), 298 301.

## 7. LEGAL REGIME OF THE RULE (POSSIBILITY OF LIMITATION OR EXCLUSION)

An open question is the legal nature of regulation of business judgment. Is it a question about *ius cogens* concept or of dispositive norms? Common law accepts the view that it is possible, in whole or in part, to exculpate the director from liability if he acted "honestly and reasonably and who, under the circumstances, deserves fair acquittal". These three conditions are cumulative and are judged subjectively by the court. However, all provisions of the articles of association or other agreements or contracts aimed at exculpating or compensating directors for any judgment for negligence or violation of duty are null and void.[84] Force major, a bylaw of the company (ratification of decision of the board of directors by the company general meeting, except in case of fraud and violation of law), as well as when there is proof of absence of fault, namely proof that they acted with due care[85] can also be cause for acquittal of directors.

Corporate Law of Delaware enables also limitation or exclusion of directors liability on an autonomous basis (it is deemed that the market – loss of reputation of directors, is more efficient in terms of directors' liability than sanctions of the court) for a loss (except: 1) in the case of any breach of the duty of loyalty to the company or its shareholders, 2) for action in bad faith, non action, willful mismanagement or deliberate violation of law, or 3) for any transactions inappropriately benefiting the director – conflict of interest), which is considered more acceptable than codification of different standards of due care.[86] The other states in USA followed suit in their corporate legislation, allowing the corporations to limit or eliminate the liability of directors also in the case of minor and often gross negligence.[87] Also RMBCA in USA enables exculpation of directors from liability for violation of duty of loyalty also for actions that are not taken in good faith and which do not include the financial benefit of directors (conflict of interest) or intentional impairment to the corporation.[88]

Unlike USA in Germany "due care" of directors cannot be diminished by company's articles of association. Additionally the directors can-

[84] Company Act (1985), § 310.

[85] Unlike *duty of care* the only aim of which is prevention of making damage to the company, *the violation of duty of loyalty* and thus the liability of directors exists even if the company did not incur damage by the doings of the directors, but suffices that they earned the profit by making such a violation (e.g. breach of the clause of conflict of inter est). See D. Branson, (1993), 293.

[86] Delaware General Corporation Law (1953, 1973, 1974), § 102 (b) (7), *Dela ware Laws*, 2000; A.S. Gold, 413 414.

[87] D. Branson, (1993), 257 260; D.A.J. Telman, 844 847.

[88] RMBCA, § 2.02 (b) (4).

not be exculpated from liability by ratification of their decisions by a general meeting of the company or the supervisory board.[89] Serbian contract law allows exclusion (or limitation) of contract (in company law in terms of corporate liability of directors the same could be analogous under the articles of association or another company bylaw) liability of the debtor for ordinary negligence (unless there is equality of the contractual parties) in advance, but not for intention and gross negligence.[90]

## 8. APPLICATION OF MODIFIED RULE OF BUSINESS JUDGMENT INSTEAD OF THE CONFLICT OF INTEREST RULE

### 8.1. Duty of Care or Conflict of Interest of Directors (Loyalty to Company) and Takeovers

In the case of takeover of joint-stock companies under takeover bid, the directors are as a rule reproached for being in the conflict of interest if they take any measures of defense (they are interested that the target company in which they hold a position, is not taken over by a hostile party, to avoid being replaced after takeover – action in own interest, while not protecting the interest of company and its shareholders – bound by law). In such cases, American courts, generally do not automatically apply concept of loyalty to the company (conflict of interest), rather duty of care of directors (business judgment). As a result *business judgment rule* is not applied, since *duty of care is used instead of duty of loyalty*. Application of the principle of due loyalty in the case of takeover could lead to quite another result (the rules of conflict of interest) than the application of the principle of duty of care (duty of decision making on the basis of being fully informed, duty of investigation, when appropriate etc.).

The Supreme Court of Delaware first adopted duty of care, giving it primacy over the test of loyalty to the company in the cases of defense measures against takeover. In the case of *Cheff v. Mathes*, when the material interest of each director was found to be minimal or non existent, the court applied the principle of due care to the acquisition of a significant block of shares in the target company. The court found, after an investigation, professional advice and personal observations that the directors acting with due care and in good faith came to believe that the takeover was a threat to the going concern of the company. Many commentators of that decision found that it can be shocking and unfair for the shareholders of the target company. Other commentators found that the application of due

[89] See V. Breskovski, 90 91.

[90] LOO, Article 265.

care in such cases leads to the collapse of the concept of conflict of interest and it's folding into the business judgment rule.[91]

In the context of takeover of joint stock companies, both hostile (without management consent) and non hostile (with management consent), application of the business judgment rule concerning defense measures is contentious. In this case the court has two options: first to apply the usual rule of business judgment (shortened inquiry), which practically means allowing management to take all defense measures under the guidance of this rule – *the first generation of the rule of business judgment* in the context of takeover; and second, to apply the *modified rule of business judgment* applicable as a reply to the takeover bid (examination of full due care, analysis of due loyalty or analysis of modified duty of loyalty under the national law for the needs of a takeover)[92].

The Supreme Court of Delaware specified, in more than one case, some modifications of the usual rule of business judgment – *the second generation of the business judgment* rule in the takeover context. Thus, in the case of *Unocal Corp. v. Mesa Petroleum Co*, guided by the fact that the board of directors may primarily act in own interest in takeover before consideration of the application of the rule of *business judgment*, that the court should separately review two issues: first, whether the conduct of directors is only or primarily motivated by the wish to ensure their survival on the positions held, and second, whether the defense measures are proportionate to the threat of acquisition (reasonable proportionality of the measures of defense is at the very heart of the modified business judgment rule in the context of takeover).[93]

Finally, the Supreme Court of Delaware developed in the case *Revlon, Inc. v. MacAndrew & Forbes Holdings*, the *third generation of the rule of business judgment* in the context of a takeover (so called bidding phase). Namely, when it becomes clear that a bid is imminent the role of directors changes from defenders of the corporate bastion into auctioneers tasked with getting the best price for shareholders – the rule *just say no defense*. In the bidding phase, any defense measure which target company management takes must be "rationally connected with the interest (benefit) of shareholders". Interestingly, Serbian Law on Takeover of Joint Stock Companies generally (applied in all takeover cases) changes the general rule of duty of management (which is rather debatable in legal

[91] See D. Branson, (1993), 301 303.

[92] In the state of Ohio Corporation law provided that the director must keep in mind the interest of "employees, creditors and consumers, economy, state and nation" and "the long term like short term interest of corporation, including the possibility that those interests may be best protected by ongoing independence of the corporation". See D. Branson, (1993), 383; R. Hamilton, *The Law of Corporations,* Minnesota 1991, 317 318.

[93] See D. Branson, (1993), 384.

theory) of loyalty to the company (and its multi interested constituents),[94] which in the context of takeover (from the moment management is unable to take defense measures) must be loyal to shareholders only, ("the management of target company is bound to act, during the period of takeover in the best interest of the shareholders of target company").[95] The Supreme Court of Delaware, however, in some subsequent cases partly revised its approach. Thus, in the case of *Paramount, Inc. v. Time, Inc.*, *inter alia* concluded: "...we have said that directors must consider inadequacy of the price offer, the nature and the time of offer, the question of illegality, the range of other interest constituents in addition to the shareholders and other factors...".[96] It all shows that the development of the rule of business judgment in the context of takeover of joint stock companies is not linearly progressing, but modifications to the general business judgment rule in the context of takeover are necessary to cast more light on this general rule.

### 8.2. Due Care or Conflict of Interest (Loyalty to Company) and Derivative Suit

In the case of derivative suits instituted on behalf of a joint-stock company (*actio pro socio*) against one or more directors who should represent the company as plaintiff, the directors are in a specific conflict of interest and cannot practically represent the company in such litigations. Therefore, American practice is to form a special *Directors Disputes Committee* (which is not beyond criticism),[97] composed of persons who are in no conflict of interest and who may participate in the dispute. In this way conflict of interest is eliminated and the rule of *business judgment* may be applied in compliance with recommendations of the Disputes Committee, which most frequently recommends to dismiss the dispute, because "it is not in the best corporate interest". Whether Disputes Committee acts with certain care or due care is usually determined via an independent board through establishment of facts by interviews or questionnaires and other reports analyzing the support of the Disputes Committee to dismiss the proceedings before the court, because the require-

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[94] The rule that the company management must perform its duties "in the best interest of the company" bearing in mind the interests of the shareholders, investors, em ployees, creditors, consumers and public interests, is generally a sort of universal (with specific and dominant single interest in some cases of takeover like the interest of share holders, for instance) and accepted both as a general principle of the EU Thirteenth Direc tive, Article 3 (1) (c). It is accepted by LCCS (Article 63) and Code of Corporate Gover nance of Serbia, *Official Gazette of the Republic of Serbia*, No. 1/06, Article 113.

[95] Law on Takeover of Joint Stock Companies LTJSC, *Official Gazette of the Republic of Serbia,* No. 46/06, Article 3 (1) (4) with reference to: LCCS, Article 63 and Article 61.

[96] See D. Branson, (1993), 387.

[97] *Ibid.*, 303 305, 378 379.

ments are met for the application of the rule of business judgment (Disputes Committee acting rationally in issuing its recommendation).

Unlike earlier practice that accepted Disputes Committees, which according to some was a unilateral application of the rule of business judgment, as of recently the case law particularly of the Supreme Court of Delaware started modifying the application of the rule of business judgment in the context of disputes in derivative suits.[98] Thus, it promotes a practice that the court may in its own discretion, consider Disputes Committee recommendations also from the view point of merit, along with the application of own independent assessments in some cases.

## 9. (UN) JUSTIFIABILITY OF BUSINESS JUDGMENT RULE?!

A question remains about real justifiability of business judgment in civil law countries, in legal cultures which do not practice common law. Namely, civil law countries have always used the legal standard of "due care" ("care of prudent business person" or "care of prudent expert"), and the legal standard of "good faith and fairness" and "loyalty to company". Three unavoidable elements of business judgment are these three standards in all legislations which codify it (either continental or common law legal tradition). Still, the promotion of those three standards (*due care, good faith, loyalty to the company*) leaves a dilemma about the sort of conduct which may constitute a breach of good faith, but not a violation of "due care" or loyalty. It seems acceptable that good faith cannot be viewed as a separate legal standard, which may be defined without reference to other duties, because the "duty of good faith" requires the director to make a sincere (fair) effort to act "with due care" and "due loyalty". It has been rightly concluded that duty of good faith is not a separate duty but covers other obligations of directors in the same way contractual parties are bound to good faith.[99] Legally and logically it is not possible that the director as a fiduciary acts (loyalty – fiduciary duty of acting in the interest of the company) simultaneously in bad faith and loyally to the company and shareholders, thus the duty of good faith cannot be an independent duty but accessory to the duty of loyalty. Analogously, the duty

[98] Modified is the regular rule, the rule of *business judgment* by presumption of good faith in derivative suit; the possibility of forming the Dispute Committee of corpora tions when majority of directors are sued is being denied; court review of the findings of the Corporate Disputes Committee is requested. See D. Branson, (1993), 380; R. Hamil ton, 319 321.

[99] "Duty of good faith could be best apprehended from the reply to the question 'whether the directors do their best when working for someone else'? This includes the conduct which breaches either the duty of loyalty or the duty of care or perhaps another behavior". See B.S. Sharman, 307 309.

of good faith is an indirect way to impose responsibility on the grounds of due loyalty.[100]

The rule of "due care" ("care of prudent business person" or "care of prudent expert") is therefore the most important segment of the rule of business judgment.[101] The rule of business judgment, in itself is not a separate legal standard and is inseparably linked to the rule of due care. Factually and legally, the rule of business judgment as a standard of corporate director's conduct presupposes some care on the part of director as a rational basis for taking business decisions. Basically, special doctrine of business judgment is unnecessary and provides no special protection to the directors not already accorded by the standard of "duty of care".[102] This is because the rule has never been a "safe haven" for directors when acting in gross negligence in making business decisions. If the rule of business judgment constitutes a refutable presumption (principle of common law) of existence of its constitutive elements at the side of the directors pending the plaintiff's proof to the opposite (in common law regime), then the question arises what this presumption means provided the evidence is secured or provided that the director obviously violated duty of care? Hence, it should be concluded that the rule of business judgment is unnecessary and constitutes no independent legal standard but is practically inherent part of "due care".[103]

Practically the rule of business judgment is a standard of directors' behavior, which is applied when there is no conflict of interest between the interest of directors and company and includes, measured by the standard of "due care" an assessment of performance of their duty to supervise, duty to investigate, duty to make a reasonable decision and duty to reasonable procedure in business decision making. Hence, the rule of business judgment and the standard of court deliberation in ruling whether the directors violated the standard of behavior is dictated by due care.[104]

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[100] See A.S. Gold, 407 409 and 426 427. In the American theory there are argu ments in favor of the standards of good faith, in an honest belief that it is in the best inter est of the corporation, be replaced with the standard of rationality, which offers more maneuvering to the directors. See M.A. Eisenberg, 969 971.

[101] See D. Branson, (1993), 334 337.

[102] R.S. Sergent, 194 195.

[103] *Ibid.*, 247 248.

[104] See E.E. Cassell, 1126 1127. "It is not the point that the court under the theory of restraint may not even ask: has BoD violated the duty of care?" See S.M. Bainbridge, 93 94. American legal theory argues "if the judges are not qualified to judge whether the conduct of directors violated duty of care then they are not qualified to judge if their con duct crossed the line of ordinary negligence and entered the zone of gross negligence or another such standard." See D.A.J. Telman, 864 865.

The standard of "due care" (according to the rule "care of prudent business person", and exceptionally "care of prudent expert"), as an intention and gross negligence (exceptionally in application of the standard of "care of prudent expert" and when conflict of interest exists, direct or indirect, between directors and companies, and ordinary negligence), determined, as a rule, on the standard of objectification – *in abstracto* (with the elements of subjectivization – *in concreto*, in professional care or existence of special skills of some directors – *skills*, in common law terms), with a refutable presumption of its existence on the side of directors pending opposite proof by the plaintiff (except when conflict of interest exists when this presumption should not exist on the side of directors, unless the directors then prove the existence of "good faith and loyalty to the company"), as a classical concept of civil law, with standardized meaning in the court and business practice, is the only and acceptable concept of liability (contractual and non contractual) of directors in company (corporate) law.

The attempt at partial substitution of "due care" for the liability of directors under the company (corporate) law by non critical "legal transplants" of a common law business judgment rule into the civil law culture, failed in our view, as completely artificial, contrary to continental legal tradition, and unnecessary. Legal certainty has not increased. On the contrary, it caused complete legal confusion in courts and in business practice in the domain of liability of the company. The replacement of a proven and standardized legal concept of "due care" failed, but contrary to the saying that the operation was successful however the patient died, here the patient itself (legal system) survived, although in reality it is about to die.

Legal practice, both court and business practice, is still, according to our knowledge in civil law tradition true to its good old standard of "care of prudent business person" as the rule and standard of the "care of prudent expert" as an exception (with dilemmas whether in the circumstances of corporate scandals it is to accept the need of being more stringent as to corporate liability of directors by replacing the rule with the exception or at least by non exculpating the directors from liability when applying the standard of "care of prudent business person" for ordinary negligence[105]). Finally, objectification of the standard of "due care"[106] (which should in return affect better selection of more successful directors), with small ingredients of subjectivism, is in itself a hint of possibility of embarking along this path. Sooner or later it will come. There is a

[105] About the advancement of the Macedonian law (in our view too early) to that end, see G. Koevski, 349 352.

[106] Thus the Australian law. See R.P. Austin, I.M. Ramsay, 387 395 and 406 410; for Croatian law see J. Barbić, 382.

need for wisdom rather than haste (before the existence of general awareness that being a director is a profession), or delay (that the risk of their erroneous beliefs shifts to the shareholders, which are still less risky than those of court misleading notions). Until then, let us hope courts are wise (restraint in interfering with the convenience of business decisions of directors), along with legislators, directors and lawyers.