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THE INTEREST OF A COMMERCIAL COMPANY AND THE LIABILITY OF ITS MANAGEMENT IN SERBIA

There are three main questions that are analyzed in this article. Firstly, what can be understood to be the interest of a commercial company? There are two ap proaches to this question that need to be considered: one, according to which the interest of a company is the interest of an enterprise involving not only the interests of members, but also those of personnel, creditors, clients and the state as well; and another, traditional approach, according to which the interest of a company should be understood as an own company's interest established in the interests of members, but in such way that overcomes their individual interests. Secondly, who are the per sons liable for obligations to act in the interest of a company and what are their duties in this context? The primary liability for acting in the interest of a company rests upon management that in this context has a duty of care, a duty to notify about transactions and activities where personal interest exists, a duty to avoid a conflict of interest,a duty not to compete with the company's business interests and a duty to keep business secrets. Thirdly, what are the consequences for managers who breach these fiduciary duties in terms of status law, property law and penal law.

Key words: *Interest of a commercial company. The care of a prudent business man. Management. Duty. Liability.*

1. INTRODUCTORY REMARKS

According to the Law on Commercial Companies[1] (LCC), which was in force until 1 February 2012, partners of a business partnership and general partners of a limited partnership, controlling members of a limited

[1] Law on Commercial Companies LCC, *Official Gazette of the Republic of Serbia,* No. 125/04.

liability company and controlling shareholders of a joint stock company; representatives of a company; members of boards (board of directors, executive board, members of a supervisory board, members of an audit committee and internal auditors of a limited company or a joint stock company); other indviduals who are authorized by contract to exercise management authority in a commercial company and liquidator of a company, are obliged to act in the interest of a commercial company.[2] The common law concept of duties of persons listed above, was thereby introduced into Serbian law. According to that concept the interest of a commercial company is the only immediate interest for whose account these persons must work.[3] However, in the rules of so-called "soft law" found in the Codex of Corporate Governance,[4] emerges to the fore the Continental multi-interest orientated model that promotes social responsibility as a standard for a company,[5] which means that during the process of making business decisions, many interests should be taken into consideration. In this regard, the Codex determines that a board of directors should strive to make a company profitable while having respect for the interests of shareholders, investors[6], employees, creditors, consumers and the public interest.[7]

The newly introduced LCC[8] (henceforth referred to as N-LCC) also contains laws that regulate issues related to the interests of company, but in slightly different manner in relation to the foregoing rules. Hence, in the light of solutions offered by the LCC and N-LCC, this article will analyze the following questions. Firstly, what is considered as the interest of a company? Secondly, who are the individuals who are obliged to act in the interest of a company; what are their duties in that respect and which criteria should be used to determine whether someone acts in the interest of a company? Finally, in relatation to the management's duty to act in the interest of a company, this article will also consider the issue of management's liability in the case of a breach of a duty.

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[2] Article 31.

[3] M. Vasiljević, *Kompanijsko pravo* [*Company Law*]*,* Pravni fakultet Univerziteta u Beogradu Službeni glasnik, Beograd 2007a, 142.

[4] Codex of Corporate Governance, *Official Gazette of the Republic of Serbia,* No. 1/06

[5] See M. Vasiljević, "Korporativno upravljanje (od problema do rešenja)" [*Corporate Governance from problem to Solution*], *Pravo i privreda* [*Law and Economy*] 5 8/2008, 14; N. Petrović Tomić, "Poslovna etika i OECD principi korporativnog upravljanja", ["Business ethics and OECD Corporate Governance Code"] *Pravo i privreda* 5 8/2008, 384; V. Savković, "Društvena odgovornost kompanija" ["Corporate social responsibility"]. *Pravni život* [*Legal life*] 12/2009, 425.

[6] In order to clarify the difference between the shareholders and investors, the term "investors" in this context should be understood as "participants who have not yet invested in the company.

[7] Article 113.

[8] Law on Commercial Companies LCC, *Official Gazette of the Republic of Serbia,* No. 36/11 and 99/11.

2. THE INTEREST OF A COMMERCIAL COMPANY

The term "interest of a commercial company" has appeared among Serbian Commercial Law rules for the last twenty years. Since then, there has always been a controversy in the legal theory about the definition of that term, determination of its content and determination of the persons who are obliged to act in the interest of a company. The basic reason for such theoretical dilemmas lies in the fact that analysis on interest matters spreads from a commercial company, as a legal entity founded to perform activities in order to make a profit,[9] to an enterprise, as a means of company in order to realize profit, but also as a means to satisfy other interests on the grounds of invested work (employees, management) or some other grounds (creditors, state, consumers). That is why it is still necessary to emphasize the need to protect the rights belonging to an enterprise as a social institution that has and carries a special responsibility in a society[10] and that a company's interest cannot be considered only in the light of making profit.[11] At the end of this extended analysis, we may come to the conclusion that company's management cannot be only concerned with the interests of shareholders, but also must take into account the existence and balance of many conflicting interests.[12] To achieve that, the management of a company should be, to the greatest posible extent, dislocated from the reach of shareholders[13] with the assistance of a bicameral management system and powers given to the supervisory board to appoint company's directors.[14]

The authors of the analysis mentioned above argue that the interest of a company is the interest of an enterprise and that it involves not only the interests of its members, but also the interests of employees, creditors, cli-

[9] Article 2 N LCC.

[10] On interests of commercial companies and enterprises: Š. Ivanjko, "Suprotni ili jedinstveni interesi u trgovačkom društvu" ["Converging or diverging interests in commercial companies"], *Zbornik radova Pravnog fakulteta u Zagrebu* [Annals of the Faculty of Law in Zagreb], special edition 2006, 170.

[11] N. Petrović Tomić, 384.

[12] M. Vasiljević, "Razvoj regulative upravljanja kompanijama u uporednom pravu i pozitivno pravo Srbije", ["Corporate governance regulation development in comparative law and Serbian law"] *Pravni život* 11/2010a, 41.

[13] Z. Arsić, "Interes akcionarskog društva" ["Limited liability company's interest"], *Pravo i privreda* 5 8/1998, 54.

[14] In recent times, the idea of a bicameral management system has been largely abandoned because a unicameral system has proved to be more efficient; it has been shown in practice that when an enterpise was doing well then supervisory board was not needed, and when enterprise was going doing badly a supervisory board could not do a lot to help. See Š. Ivanjko, 173.

ents, state.[15] "The interest of a company" is therefore a synthesis of all individual interests. A problem with this approach, however, is that the interest defined in this way is not well determined. That allows the management to make unprincipled coalitions with particular interests that prevail at a certain moment, and because the company's interest is not clearly defined it is hard to argue that directors did not act in the interest of the company.[16]

By contrast, proponents of the so-called traditional concept emphasize that under the interest of a company it should be understood the own interest of a company, one that is established in the interest of its members, but that is going beyond their own personal interests. A company is established in the common interest of members who contribute to the social wealth in proportion to their individual rights.[17] The interest of every company is to provide a stable and prosperous business.[18] All other interest groups associated with a commercial company are interested in achieving this goal. Otherwise, in the case of an unsuccessful business, the interest of a company will not be achieved, nor the interest of other interest groups. Bringing the interest of a company to the fore enables also the protection of interests of other interest groups related to an entreprise as an organizational tool of a company, even though their (partial or personal) interests are often opposed to the interest of a company itself (for example, the interest of employees may be to improve working conditions or to increase wages).[19] Legislators acknowledge the existence of such interests and provide protection to some extent using certain legal mechanisms and rules.

The mode of corporate governance depends on the choice between those two concepts. Namely, that choice determines who sets the interest of a company (management or assembly), as well as the scope of authorization and liability of persons who are obliged to act in certain interest.[20] In any case, in order to avoid disputes and dilemmas, if preference is given to the first concept, then instead of "interest of a company", we should use the term "interest of an enterprise".

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[15] J. Paillusseau, "Les fondements du droit moderne des sociétés", *J.C.P. éd E.* 1/1995, 488.

[16] M. Vasiljević, (2010a), 43.

[17] Ph. Merle, *Droit Commercial,* Dalloz, Paris 2000, 73.

[18] D. Martin, "L'interêt social dans le contentieux des ordonnances sur requête, en référé et en la forme des référés", *RTD com* 3/2010, 485.

[19] Š. Ivanjko, 170.

[20] A. Couret *et al.,* "Actionnaires et dirigeants: où se situera demain le puvoir dans les sociétés cotées?"*Revue de droit bancaire et de la bourse* 55/196, 72.

3. THE RESPONSIBLE PERSONS AND LEGAL FRAMEWORK FOR ACTING IN THE INTEREST OF A COMPANY

Unlike the LCC which lists a wider range of persons who are obliged to act in the interest of a commercial company,[21] under the N-LCC this duty belongs to the directors, the members of supervisory board, representatives, the procurator and the liquidator of a company.[22] This change in the law bring us closer to the solution that was contained in the earlier Law on Enterprises,[23] or in numerous laws on companies of other countries where the management has a fiduciary duty, i.e., an obligation to act in the interest of a company.[24] The difference is that representatives were placed at the same level with company's management (directors and members of the supervisory board, if the management of the company is bicameral).

Besides the legal obligation to act in the interest of a company it is necessary to consider whether management has such an obligation regarding other interests, especially the interests of shareholders, creditors and employees. With regard to shareholders, there are different views: positively, that management has direct a fiduciary duty towards shareholders,[25] as suggested in set of rules (shareholders' complaint for damages caused by corporate decisions of the director, collective action which protects the rights of all shareholders who find themselves in the same position, minority shareholders;[26] and negatively, that management does not have a fiduciary duty towards shareholders, because such a duty would often lead management to face a conflict between its duty to act in the interest of a company and any duty to act in the interest of sharehold-

[21] Similar to LCC, in the Code of Business Ethics, *Official Gazette of the Republic of Serbia,* No. 1/06 it is stated that duty to act in the best interests of business entities at taches to directors, members of management, executive and supervisory board, persons authorized to represent business entities, members of a commercial company (partners, general and limited partners, members of limited liability company and shareholders) Article 32.

[22] Article 63 (1).

[23] Members of management and of the executive board of directors must perform their functions in the interests of joint stock company and in conducting business must act with the care of a good businessman Article 268.

[24] See M. Vasiljević, *Korporativno upravljanje* [Corporate Governance], Pravni fakultet Univerziteta u Beogradu and Profinvest, Beograd 2007b, 144; D. Jurić, "Pravo manjinskih deoničara na podnošenje tužbe u ime deoničkog društva protiv članova uprave i nadzornog odbora" [Minority shareholders' right to litigate on behalf of the company against management and supervisory board members], *Zbornik Pravnog fakulteta u Rijeci* 1/2007, 554; J.S. Heckles, "Obaveze i dužnosti direktora u engleskom pravu" [Director's duties and liabilities in UK law], *Pravni život* 11/2000, 71; Ph. Merle, 71.

[25] Such view is also expressed in the Code of Corporate Governance: the board of directors has fiduciary duty to a company and to all shareholders including all minority shareholders Article 114.

[26] M. Vasiljević, (2010a), 44.

ers.[27] In exceptional cases, such a fiduciary duty towards shareholders does exist, but only in cases when members of management act akin to shareholders' agents.[28] When it comes to the creditors, although Company Law contains a set of rules on their protection,[29] the prevailing view is that management does not have a fiduciary duty towards them, except in the case of company bankruptcy. Then management's fiduciary duty towards the company ends and there is instead a duty towards the company's creditors.[30] Furthermore, in legal theory is also argued that management does not have a fiduciary duty towards employees.[31]

Regarding the scope of management's fiduciary duties, we may conclude as follows. Firstly, if management performs its fiduciary duty to act in the interest of a company, it acts at the same time for the benefit of other special interests. If a company conducts its business successfully and makes profit within the relevant legal framework, that means that under such conditions other special interests of management will also be satisfied. Secondly, management's fiduciary duty to a company should be analyzed separately from legal rules that protect other special interests. Judging by its content, the fiduciary duty of management is always the same, regardless to the existence and number of rules that protect special interests. Of course, the legal position of shareholders or creditors depends on the existence of those rules and the question of management's liability could arise if it does not act pursuant to legal rules.

The full analysis of fiduciary duty, separate from issues concerning individuals and the determination of who owes a fiduciary duty and who is a beneficiary, imposes the obligation to determine the content, scope and legal framework of fiduciary activities. As in the previous issue, there is no consensus on this matter. Therefore, many scholars consider that fiduciary duty includes a duty of loyalty, a duty of care (business judgement) and a duty to inform.[32] According to common law practice, a fidu-

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[27] D. Vujisić, "Dužnosti direktora u zakonodavstvu, poslovnoj i sudskoj praksi" [Duties of directors in law, business life and case law], *Pravo i privreda* [Law and Economy] 1 4/2009, 186.

[28] M. Vasiljević, (2007b), 144.

[29] Those rules serve to: prevent reduction of basic capital of a company that does not conduct its business with losses, without securing the interests of creditors; protect the interest of creditors in case of a company's status change; keep the value of basic capital as a general "pledge" for securing creditors; limit distributions from a company's assets to the shareholders if that will lead a company to insolvency; establish directors' liability for unlawful distributions and bad decisions. See *Ibid.,* 151.

[30] M. Vasiljević, "Privreda i pravna odgovornost" [Economy and legal responsibil ity], *Pravo i privreda* [Law and Economics] 4 6/2010b, 38.

[31] M. Vasiljević, (2007b), 151; D. Vujisić, 187.

[32] D. Jurić, 544; S. Bunčić, "Mogući sukobi interesa članova uprave i njihova odgovornost" ["Potential conflict of interest of management board and their responsibili ty], *Pravo i privreda* [Law and Economics] 1 4/2009, 176.

ciary duty involves:a duty of professional care, a duty not to create competition for a company, a duty to act in a good faith and to deal fairly; a duty of loyalty; a duty not to extract profit on information available to the management, a duty not to gain an advantage to the detriment of a company; and conflict of interests prevention.[33] Many scholars argue that an interest cannot be generally determined because the term represents a legal standard which should be determined through the decision making process of a competent authority.[34] There are also opinions that duty of care should not fall under fiduciary duty and that distinction needs to be made[35] because in order to determine negligence in the interest of a company (fiduciary duty), it is not necessary to determine a lack of proscribed level of care, unlike in the case where duty of care exists.[36]

If we take the above mentioned Article 268 of the former Law on Enterprises as a valid starting point for addressing the question of legal framework for fiduciary activity, it could be said that fiduciary activity shall be performed in frameworks which are, on the one hand, determined by the principle of loyalty and, on the other hand, by the standard of a prudent businessman. The mentioned principle and standard shows that fiduciary activity has two dimensions: an internal one, activity towards company; and an external one, the procedure of conducting business and representing the company.

When exercising their functions, members of management are obliged to act loyally[37] to a company (Article 33 (1) LCC).[38] From the need to protect the interests of a company and in order to create conditions for its successful development, derives an obligation for members of management to act loyally to a company. That means they must not act in their own interests, but should take care about the interests of a company and obey to certain limitations in terms of exercising their authority. These limitations can be divided into two groups. One group of limitations, indirectly, through the authorizations of management's members, enables the protection of a company's interest, by predicting that members of management can perform their functions only in the interest of a company[39] and that

[33] M. Vasiljević, (2007a), 145.

[34] Z. Arsić, 53.

[35] M. Vasiljević, (2007b), 144; N. Petrović Tomić.

[36] *Ibid.,* 145.

[37] Loyalty means a state of faithfullness, fairness, legality (and in addition to that, under that term is understood loyalty, devotion, honour, and sincerity). For more see M. Vujaklija, *Leksikon stranih reči i izraza* [Dictionary of foreign words and expressions], Prosveta, Beograd 1975, 524.

[38] This "crown" rule, which is of importance for defining one aspect of fiduciary activity was not involved in N LCC, which is an omission that removes the possibility to finally and clearly determine fiduciary duty.

[39] In the Law on Commercial Companies of the Republic of Montenegro, *Official Gazette of the Republic of Montenegro,* No. 6/02, 17/07 and 80/08 it is determined that the

they must not perform them in their own interest or in the interest of persons associated with them (duty to avoid conflict of interests).[40] In respect of that duty they must not: improperly use the property of a company; use information they have gained in that capacity, and that is not otherwise publicly available; abuse their position in a company; take business opportunities of a company for their personal gains.[41] Another category involves limitations that directly serve to protect the interests of a company by putting a company to the fore. In this case protection is based on preventive measures by prescribing three special duties. These are: a duty of non-competition, a duty to disclose business and activities where there is personal interest (in both of the mentioned duties one person cannot have certain positions in other company; for example, to enter a transaction or undertake any legal activity without previous authorization)[42] and a duty to keep business secrets (information that is determined by law, by-laws or by company agreement as business secret).[43] In addition to these duties, the LCC allowed commercial companies to determine other duties on an autonomous basis (such a possibility is not offered by the N-LCC), as well as the restrictions in terms of exercising their authority.[44]

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members of the board of directors are obliged to perform their functions only in the inter est of a company. including: not to use property of a company for their pesonal needs as if it was their own property; not to use confidential information of a company in order to achieve personal gain; not to abuse their function for personal enrichment causing damage to a company; not to use possibilities acquired by a company for entering in their own personal transactions Article 44 (5).

[40] The conflict of interests can be defined as a situation when the interests of one person are opposed to his duties. Generally, this conflict should be solved in favor of du ties. For more about conflict of interests see P. F. Cuif, "Le conflit d'intérêts", *RTD com* 1/2005, 1.

[41] Article 69 (1) N LCC.

[42] In terms of diclosure of business and activities where there are personal interests, N LCC (Atricle 65 66) brings several innovations concerning determination of: who should submit a report (board of directors or assembly, if a company has one director or to supervisory board, if it there is bicameral management of a company), majority that gives the authorization (in this case, the decision is made by the majority of voters by the persons who do not have personal interests), the cases when authorization is not needed (that is: the existence of personal interest of one company member; the existence of personal interest of all company's members; registration or buying of shares or contributions on the ground of preemptive right to acquire new shares, acquiring own contributions or shares if that is per formed according to rules that governing own contributions or shares).

[43] In N LCC (Articles 72 and 74) a business secret is defined for the first time; it is a proposed time limitation for keeping business secrets for a period of at least two and a half years, starting from the moment when someone has lost the capacity that imposed such a duty onto him; it is proposed that a company in the case of a breach of the duty, besides damages compensation, has the right to demand exclusion from the company if that person is a member of a company and termination of employment if the person is employed in a company.

[44] Article 39 (1) LCC.

In terms of external dimensions of fiduciary duty, which come to the fore when conducting business and representing a company to third parties, members of management are obliged to perform their duties in a good faith, with the care of a prudent businessman[45] and with reasonable belief that they act in the best interest of a company.[46] Such a solution is also adopted in some other legislations,[47] and it is supported by theory with the explanation that the business conduct of every business entity is connected with many business risks, so overly strict liabilty (it would be the case when liability was regulated pursuant the legal standard of good expert) could reduce business initiative of authorized persons.[48]

Members of management loyally perform their duty of care if their judgements are based on information and opinions of professionals in certain areas (the case when they lack needed average knowledge) or if they act pursuant to specific knowledge, skills and experience they possess.[49]

The legal standard of a prudent businessman can be found in the Law on Obligations (Article 18), and in General Trade Customs as well (no. 60). It is used to determine how a party in a commercial contractual relation should act during the performance of its contractual obligation. Since the object of conducting business and representation may go beyond commercial affairs, in the Commercial Code of Kingdom of Yugoslavia from 1937, instead of acting pursuant to the standard of a prudent businessman, it was predicted that a member of management is due to act with the accuracy of a responsible businessman (par. 300), which was judged by the object of company's business conduct.[50]

4. THE LIABILITY OF A COMPANY'S MANAGEMENT FOR THE BREACH OF FIDUCIARY DUTY

If members of management do not act with due care, in accordance with the interests of a company and if they do not perform their duties in

[45] In N LCC, the standard of a prudent businessman is defined as a level of care according to which a reasonably careful person would act and that is the person who would possess knowledge, skills and experience that would reasonably be expected for performing that duty in a company Article 63 (2).

[46] Article 63 (1) N LCC.

[47] Par. 93 (1) of the German Law of Joint Stock Companies; Article 252 (1) of the Croatian Law on Trade Companies; Article 263 (1) of the Slovenian Law on Commercial Companies.

[48] M. Vasiljević, (2007b), 156; M. Mićović, *Privredno pravo* [Commercial law], Pravni fakultet Kragujevac, Kragujevac 2010, 51.

[49] Article 63 (3) N LCC.

[50] D. Godina (ed.), *Commentary on the Trade Law*, Svetlost, Beograd 1937, 240.

that respect or if they cause damage to a company when performing their duties, then we can speak about management's liability for a breach of fiduciary duty. That liability may be status liability, civil and criminal liability.

Status liability[51] for the breach of fiduciary duty makes a legal ground for dismissal of management's members i.e., for the termination of employment if a person is employed in a company or exclusion from a company if such person is company's member. Otherwise, according to the dominant position which is accepted in Serbian law as well, members of management can be dismissed by the competent body of a company at any time, even without the existence of a valid reason.[52]

Civil liability is liability for damage. It has long been challenged,[53] but today it is a widely accepted form of liability for the breach of the duties that management members owe to a company. Pursuant to the general rules on liability for damage, there are three requirements to be met cumulatively: the existence of fault, damage caused, and a causal relation between fault and damage. Proving of these requirements in practice is very difficult, at least when it comes to business decisions made by management. More rigorous assessments of the mentioned requirements would actually lead to a court intervention for the evaluation of reasonableness of business activities and could undermine the relationship between the owners and management of a company, which are based upon control and freedom of appointment and dismissal.[54]

In connection with the aforementioned, the LCC does not contain any explicit rule in order to determine which party has the burden of proof i.e., which party has a duty to prove that the requirements for establishing liability for damages have been met. There is an opinion in theory that burden of proof rests upon plaintiff[55] as well as the opinion according to which every party is supposed to submit its own evidence so the court could assess it and determine the existance of liability.[56] In N-LCC, similar to the solution that was adopted in the Croatian Law on Commercial Companies, the burden of proof is shifted to the members of manage-

[51] M. Velimirović, "Traktat o odgovornosti u kompanijskom pravu" [Treaties on responsibility in Company Law], *Pravni život* [Legal life] 11/2001, 19.

[52] M. Vasiljević, (2007b), 219; Ph. Merle, 502; G. Ripert, R. Roblot, *Traité de droit commercial,* t. I, Dalloz, Paris 1998, 1221.

[53] It was considered that management's members perform their functions on be half of the company, so every consequence of their activities or non activities should go in favor or to the detriment of a company. Besides that, the amount of damage can be so large that members of management cannot compensate it. About that: M. Velimirović, 20.

[54] D. Radonjić, *Organi društva kapitala* [Organs in limited liability companies], CID, Podgorica 1998, 138; Ph. Merle, 458.

[55] M. Velimirović, 20: Ph. Merle, 458; G. Ripert, R. Roblot, 1304.

[56] M. Vasiljević, (2010b), 69.

ment. It is adopted the system of assumed guilt, so the members of management will not be liable for damage if they prove that they were conducting business with due care.[57]

If members of management conduct business with due care, they will not be liable to a company for the success of their business decisions.[58] They do not guarantee the achievement of certain results, which means that they, within the scope of their duties, carry out the obligations that fall into the category of obligation of means (method), and not the obligation of results (goal).[59] If members of management were exposed to the risk of personal liability for the negative concequences of their business decisions, they would hesitate to make business decisions, which would reduce good business decisions as well.[60]

Members of management who breach their duty are to be severally or jointly liable for the damage they cause to a company. Several liability exists if the breach of duty was made by a specified member of management, because other members do not have their part in this (for example, where a business activity was individually carried out or when a decision was prepared and performed by an individual). Generally, members of management have the joint liability, which is a consequence of collective corporate governance.[61] However, mistakes are personal, which means that the one who did not made them should not be liable.[62] Because of that, in instances of co-liablity, the court should determine what is the contribution of every management member in compensation to a company.[63] A member of management who wants to be relieved from liability for damages incurred as a result of a decision by a body in which work he took part, must explicitly express his disagreement with the decision (it is not enough to abstain from voting). And if he was not present when the decision was made nor voted for it in another way, it is necessary to oppose this decision in writing within eight days after becoming aware of its passing.[64]

In addition to the foregoing, members of management can be relieved from liability if they conducted business on the grounds of (lawful)[65]

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[57] Article 63 (5).

[58] It is necessary that they believed they acted in the best interests of a company making that that decision, that they had available necessary information and opinions of the experts, that they were not in the conflict of interests and that they had no financial benefit on which they did not have right. See D. Jurić, 583.

[59] About that: M. Vasiljević, (2007b), 155; F. Lemeunier, 217.

[60] D. Jurić, 548.

[61] D. Radonjić, 140.

[62] G. Ripert, R. Roblot, 1304.

[63] Ph. Merle, 461.

[64] Article 415 (4) (5) N LCC.

[65] Article 263 (3) of Slovenian Law on Commercial Companies.

decisions by a company's assembly[66] (the fact that they were acting on the ground of a risky assembly decision is irrelevant for the determination of their liability)[67] or if the assembly confirms their decisions afterwards. An assembly cannot confirm the decisions and thus relieve management's members from liability if the decisions were misleading, unlawful or if they led to a loss of company's property.[68] In any case, a standard rule has developed according to which a company cannot confirm a decision afterwards and renounce the right to compensation if the shareholders who possess or represent at least 10% of a company's basic capital oppose that decision.[69]

Along with the compensation, a company can demand the transfer of benefits that a person who owes a fiduciary duty (in case of breach of duty of non-competition and duty to avoid conflict of interest) or people associated with him achieved by breach of the duty.

Members of a board are subject to criminal liability as well. This liability can have different legal forms (economic offence, regulatory offence, fine, criminal offence). The LCC solely regulates liability for economic offences (in the case of a breach of a duty of non-competition) and liability for regulatory offences (in the case of an existence of conflict of interests and the breach of keeping business secrets).

In contrast to Serbian law, some other legislations prescribe criminal liability for management's members, as well. For example, the Croatian Law on Trade Companies determines that members of management will be sentenced to one or two years of imprisonment if they reveal business secrets without authorization in order to obtain a benefit for themselves or for others.[70] In addition to this, French law determines a penalty of imprisonment up to five years and a fine up to € 345 000 for management's members who contrary to the interests of a company abused the company's property and authority they have in their own interest or favored other companies they were directly or indirectly connected with.[71] Justification for such solutions can be found in the fact that damage caused to a company can be rarely compensated by personal property. Because of that fact, property liability should be followed by criminal liability, which has dual functions at the same time: a repressive one, but also a preventive one (deterrence from doing a damage).[72]

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66 Article 415 (2) N LCC.

67 F. Lemeunier, *Société anonyme,* Dalloz, Paris 2002, 207.

68 M. Vasiljević, (2007b), 161.

69 Article 263 (3) of Slovenian Law on Commercial Companies; Article 252 (4) of Croatian Law on Trade Companies; Article 415 (7) N LCC.

70 Article 629.

71 Article 242 6 (3) (4).

72 Ph. Merle, 468; G. Ripert, R. Roblot, 1298.

The need for introducing criminal liability has also been recognized by the N-LCC in terms of concluding legal transactions or taking legal actions in the case where personal interest exists, as well as regarding the breach of duty to avoid conflict of interests. In both cases, a penalty of imprisonment up to one year is perscribed, i.e., from six months to five years if the damage exceeds the amount of 10 million dinars.[73]

5. CONCLUSION

In between the two approaches about the interest of a commercial company, as a solution for avoiding conflict situations, it has been imposed the so-called traditional concept, according to which the interest of a company should be understood as a own company's interest, the one that is established in the interests of members, but that goes beyond their personal interests.

Acting in the interest of a company or fiduciary activity must be carried out inside the limits which are determined, on the one hand, by the principle of loyalty and, on the other hand, by the standard of a prudent businessman. The mentioned principle and standard indicate that a fiduciary activity has two dimensions: an internal one, acting toward a company and, an external one, the procedure of conducting business and representing the company.

In relation to a company, during the decision making process, management's members are obliged to act loyally to the company. That means they are obliged to: disclose to a company all legal transactions and legal activities where they have personal interest; to avoid a conflict of interests; to respect the rules on non-competition; to keep business secrets. Regarding the procedure of conducting business and representing the company, management members are obliged to conduct their business in good faith, with the care of a prudent businessman and with the reasonable belief that they act in the company's best interests.

If members of management do not act with due care, in accordance with the interests of a company, if they do not perform the duties connected with that or they perform them causing damage to a company, they have liability that can be of status, property and criminal nature. It can be noticed that in the rules that are adopted or will be adopted in Serbian or in other legislations, management's liability becomes more strict. That is achieved by accepting that management is liable for damage in accordance with the principle of assumed guilt, as well as by introducing criminal liability for certain breaches of fiduciary duty.

[73] Articles 582 583.