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## **The Scope of the Business Judgment Rule and its Relation to the Fiduciary Duties of Company Directors**

*Due to the dynamic and ever-changing nature of the corporate field, it is impossible to consistently ensure that the business entity will get guaranteed income from its business activities and that all corporate decisions made by the director will be beneficial to the company.*

*If the company directors were to be held responsible for any decision that did not result in a profit for the company, this would limit their freedom of action and discourage them from taking risky steps.*

*The main subject of this article is the Business Judgment Rule, which stipulates that a company director has the authority to make bad (unprofitable) decisions within specific legal limits without being held accountable for them.*

*Furthermore, an appropriate balance must be maintained in the legal system between the freedom of the corporate directors under the business judgment rule and the risk of being held accountable for dishonest activities and unreasonable steps taken by them.*

**Keywords:** *Business Judgment Rule, Corporate Governance, Entrepreneurial Judgment, Fiduciary Duties, Abstention Doctrine, Conflict of Interest, Outside Directorship, Liability of Directors, Immunity Doctrine.*

### **1. Introduction**

Entrepreneurial activities are legitimate and recurring business activities carried out by an entrepreneurial entity in an organized and independent manner, with the primary purpose of gaining financial profit. Entrepreneurship represents a dynamic and ever-changing process that is frequently influenced by external economic and financial factors. In most cases every enterprise goes through cycles of economic growth and decay. This is a regular occurrence in the corporate field. Furthermore, all business activities are accompanied with the danger that the entrepreneurial decisions made by company directors, including the contracts signed by them, may not always bring profit to the enterprise and will turn out to be unproductive. Due to the dynamism and variability of the economic and entrepreneurial field, it cannot be guaranteed that the company will receive stable income from entrepreneurial activities or that the transactions concluded by the directors will always be profitable for the enterprise.

If the company directors were legally held responsible for any decision that did not bring profit to the enterprise and turned out to be unprofitable, their freedom of action would be limited,

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preventing them from taking quick and bold steps. All of this, in turn, would be detrimental to the company, because without the directors taking certain risks and making bold decisions, the entrepreneurial entity would not be able to generate a substantial profit from its business activities and become an economically strong company. Due to the risk of personal liability, company directors would be more passive in the performance of their functions and refrain from making bold and risky decisions, which could inadvertently lead to the loss of profitable business opportunities for the enterprise.

At the same time, if corporate law did not provide a legal basis for holding company directors accountable in circumstances where their business actions harm the enterprise, the risk of them making arbitrary and wrong decisions would increase significantly. Therefore, it is important to keep the golden mean in a legal system and maintain a balance between the freedom of entrepreneurial decision-making of company directors and the imposition of responsibility for their unreasonable and dishonest actions.

The main topic of the present article is the Business Judgment Rule, according to which corporate directors have the right to make certain mistakes in their business judgment and make wrong entrepreneurial decisions without being held accountable for them. This article will examine the substance, legal conditions, and scope of application of the aforementioned principle in light of US corporate law. Furthermore, the aim and intent of the Business Judgment Rule, as well as its legal regulation in the United States, Germany, and Georgia, will be discussed. The article will also examine the theories and relevant case law related to the mentioned doctrine. The discussions in the article will place special emphasis on US case law due to the fact that the Business Judgment Rule was created at its core.

## **2. Fiduciary Duties of Corporate Directors**

In order to carry out its managerial functions, an entrepreneurial entity needs to have a management body, which is an essential component of its corporate governance structure.<sup>1</sup> The articles of incorporation of the company may provide for the managerial authority to be exercised in different forms, namely, by one person solely, by several directors jointly or individually, or by all directors jointly.<sup>2</sup> The managerial authority of the director of the enterprise includes the representative authority as well, unless otherwise determined by the agreement of the partners. However, it is important to clearly distinguish between the two types of authorities. Managerial authority refers to the power to make decisions on behalf of the enterprise, while representative authority refers to the power to enter into relations with third parties on behalf of the company and conclude transactions with them.

Unlike partnerships, which are characterized by inside directorship (Prinzip der Selbstorganschaft) and are primarily managed by the partners themselves, corporations are characterized by the concept of outside directorship (Prinzip der Fremdorganschaft), and therefore, as a rule, the

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<sup>1</sup> *Clarkson K.W, Miller R. L., Business Law: Text and Cases, 15<sup>th</sup> ed., 2021, Chapter 40, 762.*

<sup>2</sup> See Article 41 para. 3 of the Law of Georgia “On Entrepreneurs”.

company is managed by independent persons that are invited as directors.<sup>3</sup> Due to the fact that such directors are outsiders and not members of the company, there is a higher risk that they would hurt the corporation by improper actions and judgments. The danger of arbitrariness of the directors and the chance of taking unjustified risks when making decisions is much lower in personified partnerships with joint liability, where the partners themselves manage the company while also being personally responsible for the partnership's obligations, than in a corporation. This is due to the fact that in partnership-like companies, if the directors take incorrect actions that harm the enterprise, a lot of challenges may occur. For example, the company may be unable to meet its obligations on time and may be forced to satisfy creditors' demands from the partners' personal assets.

In any case, the director of the entrepreneurial entity is required to manage the company lawfully and to carry out its business activities with the diligence of a manager in good faith.<sup>4</sup> The director is considered to be the fiduciary of the business entity and its relationship with the company and the company partners is based on trust and loyalty.<sup>5</sup> Based on this relationship, the corporate director has fiduciary duties towards the company and its partners, which include the duty of care and the duty of loyalty in the first place.<sup>6</sup> In addition, the company director is obligated to adhere to the duty of good faith, the legal nature of which is debated in the legal doctrine (this issue will be discussed in the present article in the subsection of the duty of good faith). According to one point of view, the duty of good faith is part of the aforementioned fiduciary duties,<sup>7</sup> while the second point of view regards the duty of good faith as an independent fiduciary duty with its unique meaning.<sup>8</sup>

### **2.1. Duty of Care**

Under the fiduciary duty of care the directors of a business entity must exercise due care and diligence while making business decisions on behalf of the company. They must exhibit reasonable care in carrying out their tasks in order to fulfill the company's goals while also protecting its best interests. The duty of care that the directors must demonstrate when carrying out entrepreneurial judgments and making business decisions is closely related to the Business Judgment Rule, which states that the directors' fiduciary liability can be reduced (if the relevant requirements are met) when they carry out their functions in good faith, despite the fact that their entrepreneurial decision caused harm to the company.<sup>9</sup>

The directors are obligated to care for the company in the same way that an ordinary, sane person would care for and behave in similar circumstances, with the belief that their actions are the

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<sup>3</sup> *Fleischer H.*, in: *Münchener Kommentar zum HGB*, 5. Auflage 2022, Band 2, Vorb. (vor §105), Rn. 37-40.

<sup>4</sup> See Article 50 para. 1 of the Law of Georgia "On Entrepreneurs".

<sup>5</sup> *Clarkson K.W, Miller R. L.*, *Business Law: Text and Cases*, 15<sup>th</sup> ed., 2021, Chapter 40, 762.

<sup>6</sup> *Miller R. L.*, *Business Law Today*, 11<sup>th</sup> ed., 2017, Chapter 29-4c, 731.

<sup>7</sup> *Strine L. E. Jr., Hamermesh L. A., Balotti R. F., Gorris, J. M.*, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, in: *The Georgetown Law Journal*, 2010, Vol. 98, 629.

<sup>8</sup> *Couri v. Couri*, 95 Ill. 2d 91, 447 N.E.2d 334 (Ill. 1983).

<sup>9</sup> *Hansen C.*, *The Duty of Care, the Business Judgment Rule, and the American Law Institute Corporate Governance Project*, in: *The Business Lawyer*, Vol. 48, no. 4, 1993, 1356.

most economically beneficial to the entrepreneurial entity.<sup>10</sup> The standard for evaluating the acts of the director within the scope of the duty of care is the level of care and diligence that an average reasonable person would apply in the given circumstances. The directors must act with the conviction that the decisions they make and the transactions they enter into with the third parties will benefit the business entity and serve its best interests.

The director is obligated under the duty of care to make reasonable judgments of the circumstances based on trustworthy and sufficient information and to make business decisions accordingly. If necessary, the director can consult with experts to gather relevant information and advice in order to be as informed as possible and make appropriate business decisions based on this knowledge. If the information acquired from another person turns out to be inaccurate or untrustworthy, directors will be freed from liability only if they acted in good faith.<sup>11</sup>

As a fiduciary, the company's director is responsible for researching the necessary information needed to make a business decision and is required to properly understand the risks involved. As a result, while evaluating a potential breach of the duty of care in making an entrepreneurial decision, the emphasis is placed primarily on the evaluation of the decision-making process<sup>12</sup> and the examination of the question of whether the director took appropriate steps to be sufficiently informed before making the business decision.<sup>13</sup> Furthermore, as part of the duty of care, it is crucial to establish how efficiently the director controls the company, particularly when delegating powers to managers and employees of the enterprise.<sup>14</sup>

If the company directors fail to exercise their due care and diligence and the business decisions made by them harm the company, they may be held personally liable, among others, as a result of the derivative claim filed by the shareholders, unless the director enjoys a liability privilege and is protected by the Business Judgment Rule as an exception rule.<sup>15</sup>

## **2.2. Duty of Loyalty**

The duty of loyalty is a fundamental concept determining the actions of the corporate directors, which requires them to prioritize the interests of the business entity over anything else, even above their personal interests. The directors have the duty to apply their powers in good faith and to use them with the purpose of advancing the corporate goals of the company.<sup>16</sup>

Within the scope of the duty of loyalty, the corporate director is prohibited from engaging in various types of actions that are detrimental to the interests of the company, such as competing with the company by doing business activities in another entrepreneurial entity (without the consent of the

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<sup>10</sup> See Article 50 para. 1 of the Law of Georgia “On Entrepreneurs”.

<sup>11</sup> *Clarkson K.W., Miller R. L.*, Business Law: Text and Cases, 15<sup>th</sup> ed., 2021, Chapter 40, 763.

<sup>12</sup> *Smith v. Brown-Borhek Co.*, 414 Pa. 325, 333, 200 A.2d 398, 401 (1964).

<sup>13</sup> *Hansen C.*, The Duty of Care, the Business Judgment Rule, and the American Law Institute Corporate Governance Project, in: *The Business Lawyer*, Vol. 48, no. 4, 1993, 1358.

<sup>14</sup> *In re Caremark Int'l Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

<sup>15</sup> *Clarkson K.W., Miller R. L.*, Business Law: Text and Cases, 15<sup>th</sup> ed., 2021, Chapter 40, 763.

<sup>16</sup> *Allen W.T., Kraakman R., Vikramaditya S. K.*, Commentaries and Cases on the Law of Business Organization, 6<sup>th</sup> ed., Wolters Kluwer, 2021, Par. 259, Ch.7.1.

company), usurpating the corporate opportunities of the company, and concluding deals despite the existence of a conflict of interest.<sup>17</sup>

### **2.2.1. Non-Competition Restriction**

The corporate directors are not permitted to engage in the same business activities as the company without the company's consent, nor are they permitted to serve as directors of another company in the same industry.<sup>18</sup> Consent to the execution of such activities is deemed granted if the authorized body of the entrepreneurial entity expresses explicit consent or if the partners of the company, when appointing the director, did not ask the director to stop the activity despite being aware that the person was carrying out the mentioned activity.<sup>19</sup> The non-competition clause in the service contract with the director may stay in effect for some time even after that person is discharged; nonetheless, it is crucial that the parties reach Only in exceptional cases, without a specific agreement, may it be determined that the restriction on competition should continue even after the director's resignation.<sup>20</sup> Because the entrepreneurial entity normally has a strong economic interest in prohibiting its former director from participating in business activities that might compete with it for a certain period of time after the director leaves office, the company and the former director may enter into an indemnity agreement.<sup>21</sup>

### **2.2.2. The Usurpation of Corporate Opportunities**

The corporate directors have no right to exploit the corporate opportunities related to the field of business activities of the entrepreneurial entity for their personal benefit or for the benefit of other persons other than this entity, without the prior consent of the entrepreneurial entity, provided that these opportunities became available to them while carrying out their official duties or as a result of their official position in the company and these opportunities could have been a subject of interest for the company from a reasonable viewpoint. If the general meeting or the supervisory board has already considered and rejected the use of the corporate opportunity, the prior consent of the entrepreneurial entity is not necessary.<sup>22</sup> This concept is known as the Corporate Opportunity Doctrine, which emanates from the fiduciary duty of loyalty and limits the capacity of company directors to exploit and pursue new business prospects personally unless they first offer the opportunities to the company.<sup>23</sup>

The courts take a number of factors into account when deciding whether or not there has been a case of the usurpation of corporate opportunities. For this purpose it should be determined: 1) whether the corporation will be able to use the corporate opportunity financially; 2) whether a specific business

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<sup>17</sup> Ibid.

<sup>18</sup> See Article 53 para. 1 of the Law of Georgia “On Entrepreneurs”.

<sup>19</sup> Ibid, para. 3.

<sup>20</sup> *Roth M.* in: *Hopt K. J.* (ed.), *Handelsgesetzbuch (Kommentar)*, 41. Auflage 2022, §112 Rn. 14.

<sup>21</sup> *Fleischer H.* in: *Münchener Kommentar zum HGB*, 5. Auflage 2022, Band 2, §112, Rn. 32.

<sup>22</sup> See Article 54 para. 1 of the Law of Georgia “On Entrepreneurs”.

<sup>23</sup> *Talley E., Hashmall M.*, *The Corporate Opportunity Doctrine*, California: USC Gould School of Law, February 2001, 1.

opportunity falls within the same field of business as the company's activity; 3) whether the business entity has an interest or expectation regarding this opportunity; 4) whether the use of the opportunity would lead to a breach of fiduciary duties by directors or a conflict of interest between the director and the managers.<sup>24</sup>

### **2.2.3. Conflict of Interest**

When a corporate director has personal interest in a transaction that is being performed or has already been concluded, a conflict of interest arises. The director could be the other party to the agreement (this is known as “self-dealing”) or own a significant stake in a company that is attempting to enter into a contract with the business entity. The directors are required to notify the general meeting or the supervisory board of the joint-stock company, or in the case of a monistic (one-tier) management system, the general meeting or the management body of the joint-stock company, of the relevant information regarding their personal stake as soon as they become aware of it and to specify the nature of their interest in the transaction that has been concluded or is about to be concluded.<sup>25</sup>

These requirements do not apply to joint-stock companies with a single partner who also serves as the company's director, nor do they apply to transactions made between a joint-stock company and its 100% subsidiary or 100% partner.<sup>26</sup> It is important to note that the joint-stock company has the right to contest a contract if the contracting party was aware of the presence of a conflict of interest and the absence of a consent from the joint-stock company at the time the contract was concluded.<sup>27</sup> If directors do not disclose a conflict of interest or engage in self-dealing (known as „Insichgeschäft” in German law), they might face legal action and may be held liable for the damage of the business entity. Based on the duty of loyalty, all fiduciaries must always and in all matters put the interests of the company above their own interests, and this duty naturally includes the prevention of conflicts of interest.

It is important to note that the presence of a conflict of interest does not mean that the directors have to resign immediately or that they are not entitled to profit from such a transaction. The most important thing is that they are committed to the business entity and transparent in their actions. They must take the necessary steps proactively to disclose the existing conflict of interest and obtain required approval from the company. In this case, the duty of loyalty will not be considered violated by them.<sup>28</sup> A transaction with oneself (Germ. “Insichgeschäft”) could be regarded as a provisionally ineffective transaction, the validity of which depends on the consent of the company.<sup>29</sup>

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<sup>24</sup> *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939).

<sup>25</sup> See Article 208 para. 1 of the Law of Georgia “On Entrepreneurs”.

<sup>26</sup> *Ibid*, para. 7.

<sup>27</sup> *Ibid*, para. 8.

<sup>28</sup> *Shishido Z.*, Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture, Vol. 39 Hastings L.J. 63, 1987, 83.

<sup>29</sup> *Sethe R.*, Die Regelung von Interessenkonflikten im Aktienrecht de lege lata und de lege ferenda, in: SZW/RSDA (Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht), 4/2018, 378.

### **2.3. Duty of Good Faith**

Company directors owe fiduciary duties of care and loyalty to the business entity, which means that they must act in the best interests of the company and not in their own personal interests. They are also obliged to observe the duty of good faith. Whether this duty constitutes a stand-alone, independent fiduciary duty or is part of other fiduciary duties is a subject of constant debate.<sup>30</sup> On the one hand, it is recognized that if a fiduciary relationship exists, all participants are bound to exercise the utmost good faith and honesty in all dealings or transactions involving the enterprise.<sup>31</sup> On the other hand, it is also recognized by various jurisdictions that corporate partners must exercise good faith in their dealings with other partners and must act in such a way that prevents them from obtaining any personal benefit without the knowledge of their corporate partners.<sup>32</sup>

Some people think that a key aspect of the duty of loyalty is the duty to act in good faith. According to this perspective, the duty of loyalty has traditionally been viewed as being much more extensive than the duty to refrain from behaving in a manner that might benefit one's own financial gain.<sup>33</sup> This view argues that the duty of loyalty forbids acting for improper purposes and requires that directors of the company supervise the company's adherence to the law while upholding the duty of good faith.<sup>34</sup> Another viewpoint holds that the content of the duty of good faith should be covered by a separate fiduciary duty since it is not sufficiently covered by the fiduciary duties of care and loyalty.<sup>35</sup> According to this view, the duties of care and loyalty do not cover all types of misconduct by company directors, because certain types of managerial misconduct fall outside the scope of these duties, and there are also various rules that limit a director's accountability within the scope of the duties of care and loyalty, while these limiting rules do not apply to the violation of the duty of good faith.<sup>36</sup>

### **3. The Essence and Significance of the Business Judgment Rule and the Related Theories**

The Business Judgment Rule is a legal doctrine according to which a company director has the right to make mistakes and make wrong business judgments within certain legal limits, without being held responsible for it. The Business Judgment Rule is a legal principle derived from the American case law that protects corporate directors from fiduciary liability for the decisions they make on behalf of the enterprise.

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<sup>30</sup> *Dickerson C. M.*, From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm, 22 Fla. St. U. L. Rev. 955, 1995, 956.

<sup>31</sup> *Couri v. Couri* (95 Ill.2d 91 (1983)).

<sup>32</sup> *Hill C. A., McDonnell, B. H.*, Stone v. Ritter and the Expanding Duty of Loyalty, 76 Fordham L. Rev., 1769, 2007, 1773.

<sup>33</sup> *Strine L. E. Jr., Hamermesh L. A., Balotti R. F., Gorris, J. M.*, Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law, in: The Georgetown Law Journal, 2010, Vol. 98, 629.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Eisenberg M. A.*, The Duty of Good Faith in Corporate Law, in: Delaware Journal of Corporate Law, Vol. 31, No. 1, 1-75, 2005, 1.

<sup>36</sup> *Ibid.*

The Business Judgment Rule shields the directors of the company from accountability for the mistakes in their entrepreneurial judgment if they acted in accordance with the duties of care and loyalty when making the corporate decision. Unless it is clear that the directors have broken the law or acted against the interests of the business entity, the courts will not question or review their decisions, as the courts often lack the ability to reasonably assess whether the director's decision was reasonable and whether an impermissible risk was taken in the entrepreneurial judgment process.

In general, there is no unified notion regarding the Business Judgment Rule in corporate law. However, the existing opinions in this direction share a common idea that, based on the Business Judgment Rule, the courts should not question the entrepreneurial decisions made by the conscientious and disinterested company directors.<sup>37</sup>

### **3.1. Significance of the Business Judgment Rule**

Several factors contribute to the need for the Business Judgment Rule in corporate law. First, the court does not have enough knowledge and experience to assess the validity and reasonableness of a specific business decision, so it should not be allowed to examine the corporate decisions made by the directors.<sup>38</sup> Because the company directors are involved in the enterprise's business activities and have detailed knowledge of the corporate processes taking place within the business entity, they are far more capable than the court to assess how reasonable it is to make an entrepreneurial decision based on the specific situation. It is in the interest of an entrepreneurial entity to have a qualified and experienced director, because such a person is less likely to make mistakes when managing the enterprise. However, it is impossible for a company director to foresee all circumstances and completely examine every relevant risk in advance.<sup>39</sup>

In case the decision made by the director turns out to be damaging to the company, he/she should not be held responsible for such a decision, the negative effect of which could not be predicted by any reasonable and diligent person in his/her position. The mere fact that a particular business decision ultimately did not result in a desirable outcome for the company and was unprofitable to the enterprise is insufficient to impose liability on the directors acting in good faith, since they are protected by the Business Judgment Rule, provided that the relevant preconditions are met. If the company directors did not have this privilege, it would limit their activities because, due to the risk of personal legal responsibility, they would take fewer risks when making business decisions and would not take bold and innovative steps, which are required for the enterprise's development and its establishment as a strong and competitive entity in the market.

Entrepreneurial activities are typically associated with some level of risk, the outcome of which is unpredictable due to internal and external factors. As a result, based on the Business Judgment Rule,

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<sup>37</sup> *Allen W.T., Kraakman R., Vikramaditya S. K.*, Commentaries and Cases on the Law of Business Organization, 6<sup>th</sup> ed., Wolters Kluwer, 2021, Par. 269, Ch.7.4.

<sup>38</sup> *Giraldo C. A. L.*, Factors Affecting the Application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU, in: Vicepresidencia Juridica, 2006, Bogotá (Colombia), 121.

<sup>39</sup> *Bainbridge S. M.*, The Bishops and the Corporate Stakeholder Debate, in: Villanova Journal of Law and Investment Management, Vol. 4, Issue 1, 2002, Art. 2, 20.



the company directors have the discretion to take bold actions and make risky judgments. The main thing is that there should be no room for imprudent, uninformed and arbitrary actions on their part that will harm the company. The Business Judgment Rule is not applied if the company director permits the business entity to violate the law and arbitrariness occurs.<sup>40</sup> On the one hand, restricting the director's freedom of action too much and imposing rigid liability standards would be damaging to the effectiveness of the company's activities and would hinder the director from expanding the company and accomplishing its corporate goals. On the other hand, in order for the director's scope of action in the process of entrepreneurial judgment not to be overly broad and therefore promote his/her arbitrary actions, there must be a legal framework that ensures the proper application of the Business Judgment Rule so that there is no free space for making unreasonable and uninformed decisions, which would allow unscrupulous director to make decisions detrimental to the company and avoid responsibility.

### **3.2. Theories Related to the Business Judgment Rule**

There are various viewpoints in the field of corporate law concerning the exact nature of the Business Judgment Rule.

#### **3.2.1. Business Judgment Rule as a Standard of Conduct**

According to one view, the Business Judgment Rule is a standard of prudence (behavior) that the company director should follow when making entrepreneurial decisions.<sup>41</sup> When employing this approach, it is first determined whether there are sufficient legal requirements for applying the Business Judgment Rule in the particular instance, in which case the plaintiff has the burden of proof.<sup>42</sup> Only when all prerequisites are met, the Business Judgment Rule will be applied to release the company director from fiduciary liability.<sup>43</sup>

Under this theory, the plaintiff challenging the business decision of the director bears the burden of proof,<sup>44</sup> as to whether the company directors, in making the disputed corporate decision, breached any fiduciary duties.<sup>45</sup> If the plaintiff fails to meet the burden of proof, the court will apply the Business Judgment Rule to protect the directors.<sup>46</sup>

It should be noted that the decisions adopted as a result of the gross negligence of the director fall outside of the scope of the privilege of the Business Judgment Rule.<sup>47</sup> However, in this context, it is difficult to determine exactly when there is gross negligence present and how the latter should be

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<sup>40</sup> *Miller v. American Telephone & Telegraph Co.*, 507 F.2d 759 (3d Cir. 1974).

<sup>41</sup> *Fuhrmann L., Heinen A., Schilz L.*, Gesetzliche Beurteilungs- und Ermessensspielräume als „spezial-gesetzliche Business Judgement Rule, NZG 2020, 1368, 1377.

<sup>42</sup> *Bainbridge S. M.*, The Business Judgment Rule as Abstention Doctrine, in: *Vanderbilt Law Review*, Vol. 57, Issue 1, 2004, 94.

<sup>43</sup> *Cede & Co. v. Technicolor*, 634 A.2d 346, 361 (Del. 1993).

<sup>44</sup> *Smith vs. Van Gorkom*, 488, A.2d 858 Delaware 1985.

<sup>45</sup> *Cede & Co vs. Technicolor Inc*, 13, Delaware, 1987, A 2d 1182.

<sup>46</sup> *McMillan L.*, The Business Judgment Rule as an Immunity Doctrine, 4 *Wm. & Mary Bus. L. Rev.*, 2013, 529.

<sup>47</sup> *Ibid*, 530.

distinguished from ordinary negligence. It is uncertain if the extent of the damage caused to the company by the director's entrepreneurial judgment or the scale of the director's unreasonableness should be utilized as an assessment factor in this situation.

Critics of this theory argue that the possibility of the courts to examine whether a breach of fiduciary duty has occurred should represent an exception, which is contrary to the aforementioned approach, since it allows the courts to over-interfere in business decisions and usurp the power of the directors, due to the fact that the court will only apply the Business Judgment Rule to the directors if it is determined from the facts of the case that there was no violation on the part of the directors.<sup>48</sup>

### **3.2.2. Business Judgment Rule as an Abstention Doctrine**

In the case of applying the second approach in the context of the Business Judgment Rule, namely, the Abstention Doctrine, the privilege of the Business Judgment Rule automatically applies from the very beginning for the directors, and it is the plaintiff's obligation to rebut the presumption of the validity of the director's entrepreneurial decision.<sup>49</sup> The Abstention Doctrine is an expression of the reluctance of the courts to scrutinize the business decisions made by the company directors.

According to one viewpoint regarding the Abstention Doctrine,<sup>50</sup> the primary function of the Business Judgment Rule is to preclude court judgments on the breach of the fiduciary duties by the company directors.<sup>51</sup> The Abstention Doctrine is based on the Director Primacy model, in which the governing body of the company (Board of Directors) is not an agent, but acts as the principal of the company, which directs and manages the entrepreneurial entity through an effective and centralized decision-making process.<sup>52</sup> When applying the Director Primacy model, the tension between the power of the directors and their accountability (responsibility) is highlighted, with the application of the Business Judgment Rule offered as a possible solution.<sup>53</sup>

The Business Judgment Rule, as an Abstention Doctrine, means that in the absence of relevant preconditions, the courts should not be able to assess the content of the corporate decision or its reasonableness.<sup>54</sup> According to the Abstention Doctrine, the conditions in the presence of which the court might evaluate the content of the challenged corporate decision include self-dealing or conflict of interest, fraud, etc.<sup>55</sup>

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<sup>48</sup> *Bainbridge S. M.*, The Business Judgment Rule as Abstention Doctrine, in: *Vanderbilt Law Review*, Vol. 57, Issue 1, 2004, 94.

<sup>49</sup> *McMillan L.*, The Business Judgment Rule as an Immunity Doctrine, 4 *Wm. & Mary Bus. L. Rev.*, 2013, 524.

<sup>50</sup> *Bainbridge S. M.*, The Business Judgment Rule as Abstention Doctrine, in: *Vanderbilt Law Review*, Vol. 57, Issue 1, 2004, 101.

<sup>51</sup> *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>52</sup> *Bainbridge S. M.*, The Business Judgment Rule as Abstention Doctrine, in: *Vanderbilt Law Review*, Vol. 57, Issue 1, 2004, 86.

<sup>53</sup> *Ibid*, 87.

<sup>54</sup> *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>55</sup> *Bainbridge S. M.*, The Business Judgment Rule as Abstention Doctrine, in: *Vanderbilt Law Review*, Vol. 57, Issue 1, 2004, 97, 99.

The Business Judgment Rule, as an Abstention Doctrine, implies a legal presumption that must be rebutted by the plaintiffs, otherwise, the courts should not review the content of the business decisions made by the company directors.<sup>56</sup> The behavior of the courts in such cases reflects their role, which does not include the resolution of internal issues of entrepreneurial entities and the administration of business; These tasks are performed by a person specially appointed for this purpose, whose business judgment is to be considered decisive and final, unless it is proven that the person is motivated by fraudulent interests and acts in bad faith.<sup>57</sup>

In accordance with the Abstention Doctrine, the authority of the company directors of in the process of conducting business must be considered absolute if they act within the law and in good faith, and the court has no power to change the business decisions made as a result of the entrepreneurial judgment of the directors.<sup>58</sup>

### **3.2.3. Business Judgment Rule as an Immunity Doctrine**

According to the third opinion, the Business Judgment Rule should be regarded as an Immunity Doctrine, because the effect of implementing the Business Judgment Rule is similar to the immunity and it exempts the company director from civil responsibility for such business decisions that he/she made within the scope of his/her corporate powers as the director of the enterprise.<sup>59</sup> This viewpoint holds that the Business Judgment Rule has the same foundation, procedure and effect as the immunity.<sup>60</sup> Under the Immunity Doctrine, the defendant bears the burden of proving that he or she is entitled to immunity.<sup>61</sup>

The Business Judgment Rule creates a certain type of “safe harbor” under the Immunity Doctrine<sup>62</sup> in order to protect the company directors from liability,<sup>63</sup> which is important to ensure the entrepreneurial freedom and the immunity of company directors when making risky business decisions. There are different approaches regarding the allocation of the burden of proof when applying the “safe harbor” concept. According to one view, the burden of proof is on the company director, who must prove the existence of the elements of the Business Judgment Rule, before moving into an “impenetrable harbor” and being shielded from legal disputes arising from an unprofitable entrepreneurial decision.<sup>64</sup> On the other hand, some argue that there is a presumption of validity in

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<sup>56</sup> *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000).

<sup>57</sup> *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>58</sup> *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>59</sup> *McMillan L.*, *The Business Judgment Rule as an Immunity Doctrine*, 4 *Wm. & Mary Bus. L. Rev.*, 2013, 542.

<sup>60</sup> *Ibid*, 574.

<sup>61</sup> *Giraldo C. A. L.*, *Factors Affecting the Application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU*, in: *Vicepresidencia Juridica*, 2006, Bogotá (Colombia), 130.

*Giraldo C. A. L.*, *Factors Affecting the Application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU (2006)*, *Vicepresidencia Juridica*, 130.

<sup>62</sup> *Paefgen W.G.*, *Die Darlegungs- und Beweislast bei der Business Judgment Rule*, in: *NZG* 2009, 891 (892).

<sup>63</sup> *Cassim M. F.*, *Contemporary Company Law*, 2<sup>nd</sup> ed., 2012, 563.

<sup>64</sup> *Branson D. M.*, *The Rule That Isn't a Rule – The Business Judgment Rule*, 36 *Valparaiso University Law Review*, 2002, 636.

relation to the entrepreneurial decision of the director, which can be rebutted; thus, the defendants (directors) may be required to justify their decisions within the framework of the litigation; however, it is important to note that the burden of proof initially falls on the plaintiff.<sup>65</sup> At this point, the plaintiff must prove that the company director violated some form of fiduciary duty – good faith, loyalty or care – in making the disputed entrepreneurial decision, and if the plaintiff (shareholder) cannot meet the evidentiary standard, the Business Judgment Rule will be applied in favor of the company director and the court cannot question the entrepreneurial decision made by him/her.<sup>66</sup>

If the plaintiff successfully rebuts the presumption of the validity of the entrepreneurial decision of the director, the burden of proof shifts to the defendant (company director), who must demonstrate that the specific transaction is fair to both the company and its partners and is in accordance with the so-called Entire Fairness Doctrine, which states that the transaction should be achieved as a result of fair price and fair dealing.<sup>67</sup>

#### **4. Standards of the Business Judgment Rule in USA**

The Business Judgment Rule is a corporate law doctrine originating from the American case law, the purpose of which is the exemption the directors of business entities from civil liability for the entrepreneurial decisions they make on behalf of the company.<sup>68</sup> This doctrine is a legal mechanism that shields directors from liability when they make business decisions and enter into transactions on behalf of the company while acting in good faith and based on sufficient information. The key consideration is that the actions of the directors are in the best interests of the business entity, and the decision-maker has no personal stake (conflict of interest) in the transaction or decision that is about to be made or has already been concluded.

##### **4.1. Historic Development of the Business Judgment Rule in USA**

The first application of the Business Judgment Rule in USA is associated with the 1829 decision by the Louisiana State Supreme Court,<sup>69</sup> in which it was recognized that the choice of a strategy of decision-making that would bring financial loss to the company cannot become the basis of the liability of the director, if there is such an error that would have occurred in the case of any prudent and considerate person's actions.<sup>70</sup> In 1847, the Supreme Court of the State of Alabama provided an important clarification regarding the circumstances under which the application of the Business Judgment Rule may be justified.<sup>71</sup> The court explained that the directors do not and cannot have

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<sup>65</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 260-6 1 (Del.1993).

<sup>66</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 260-6 1 (Del.1993).

<sup>67</sup> *Krasner v. Moffet*, 826 A.2d 277, 287 (Del. 2003).

<sup>68</sup> *Bainbridge S. M.*, The Business Judgment Rule as Abstention Doctrine, in: *Vanderbilt Law Review*, Vol. 57, Issue 1, 2004, 89.

<sup>69</sup> *Percy v. Millaudon* 8 Mart (n.s.) 68, (La. 1829).

<sup>70</sup> *Percy v. Millaudon* 8 Mart (n.s.) 68, (La. 1829).

<sup>71</sup> *Godbold v. Branch Bank*, 11 Ala. 191 (1847).

exhaustive knowledge of all the issues related to the activities of the business entity.<sup>72</sup> Accordingly, imposing an obligation on them to never make a mistake while adapting business decisions would be excessively severe and a condition that no ordinary prudent person could meet.<sup>73</sup> Later, the Supreme Court of Rhode Island recognized the Business Judgment Rule even more clearly and explained that a company director who acts in good faith and with diligence and makes a mistake while making an entrepreneurial decision should not be held liable for the negative consequences of such a decision.<sup>74</sup>

The establishment of the Business Judgment Rule in the United States was particularly facilitated by the case law of the state of Delaware in the 20th century. The Delaware Supreme Court clarified in its 1927 decision that an inadvertent error in business judgment cannot be subject to court review unless there is evidence in a particular case showing that the directors did not act with the belief that their actions were in the best interests of the enterprise.<sup>75</sup> Later, in another case, it was confirmed that an inadvertent mistake made by a company director in the process of making an entrepreneurial decision is not subject to judicial control.<sup>76</sup>

Regarding the scope of action of the corporate directors in the performance of their functions in the enterprise, the Supreme Court of the State of Delaware has held that the directors of a corporation are bound to act with the standard of care that an ordinarily prudent person would exercise in similar circumstances when managing corporate affairs.<sup>77</sup> Concerning the nature of the Business Judgment Rule, it has been widely accepted in the case law of the state of Delaware that the aforementioned doctrine represents a presumption, according to which, when making an entrepreneurial decision, it is presumed that, as a general rule, the company director makes corporate decisions based on sufficient information and acts in the belief that his/her actions are in the best interests of the enterprise.<sup>78</sup>

The Delaware Supreme Court rendered an important ruling regarding the Business Judgment Rule in 1985.<sup>79</sup> The court explained in this decision that the board of directors has the duty to make an informed decision on important matters, such as a merger with another company, and argued that it cannot circumvent liability by demonstrating the fact that the decision was also approved by the shareholders. The court noted that the directors are protected from liability if they relied in good faith on the reports submitted by managers, which was not the case in the aforementioned decision. Directors cannot rely on the share price when it differs from the market value. If the board of directors fails to disclose the lack of value-related information to the shareholders, the board is in breach of its fiduciary duty to disclose all material facts to the company.<sup>80</sup> The court observed that a director's duty to exercise informed business judgment is part of the duty of care, not the duty of loyalty; therefore, in

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<sup>72</sup> *Flom J. H., Ward R.*, *The Business Lawyer* 42, no. 3 (1987), 995.

<sup>73</sup> *Godbold v. Branch Bank*, 11 Ala. 191 (1847).

<sup>74</sup> *Hodges v. New England Screw Co.*, 3 R.I. 9, 18 (1853).

<sup>75</sup> *Bodell v. Gen. Gas & Elec. Corp.*, 140 A. 264, 267 (Del. 1927).

<sup>76</sup> *Krasnick v. Pac. E. Corp.*, 180 A. 604, 607 (Del. Ch. 1935).

<sup>77</sup> *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

<sup>78</sup> *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

<sup>79</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

<sup>80</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

such cases, the motivation behind the director's action can be deemed irrelevant. Accordingly, there is no need to prove fraud, conflict of interest or bad faith in a particular case.<sup>81</sup>

The case law of the Delaware State Supreme Court is also associated with the recognition of the triad of fiduciary duties, which include the duty of care, the duty of loyalty, and the duty of good faith.<sup>82</sup> Although the same court dismissed the existence of the duty of good faith as an independent fiduciary duty a few years later,<sup>83</sup> and the courts disbanded the discussion of the triad of fiduciary duties, the duty of good faith still remains an essential component of any consideration on fiduciary duties.<sup>84</sup>

#### **4.2. The Standards and Preconditions for the Application of the Business Judgment Rule**

The Business Judgment Rule protects directors from liability if they have made decisions in good faith and in accordance with the appropriate procedures, even if those decisions turn out to be unprofitable for the company. Under the Business Judgment Rule corporate directors are not liable for the breach of the duty of care merely because they made certain mistakes. However, in order to enjoy this privilege, directors must meet certain standards of conduct.

Due to the fact that the corporate duties of directors are generally regulated at the state level in USA, there is no common definition of the Business Judgment Rule and no uniform standards that are applicable in this context. There are also different viewpoints regarding the nature of the Business Judgment Rule itself.<sup>85</sup> According to one view, the Business Judgment Rule represents a presumption of the legitimacy of a business decision, where the plaintiff has the burden of rebutting the presumption.<sup>86</sup> On the other hand, the Business Judgment Rule is considered a standard of care and should not be applied in cases of gross negligence.<sup>87</sup> There is also a different viewpoint, which regards the Business Judgment Rule as an Abstention Doctrine,<sup>88</sup> within the scope of which, the reluctance of the courts to exercise judicial control over business decisions and to examine their content is crucial, when the prerequisites for the application of this doctrine are present.<sup>89</sup> Furthermore, it is argued that the Business Judgment Rule represents a substantive rule that protects certain types of decisions in case of the presence of the legal prerequisites for the Business Judgment Rule.<sup>90</sup>

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<sup>81</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

<sup>82</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

<sup>83</sup> *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

<sup>84</sup> *Smith D. G.*, The Modern Business Judgment Rule, Research Handbook on Mergers and Acquisitions, Forthcoming, in: BYU Law Research Paper Series No. 15-09, June 19, 2015, 2.

<sup>85</sup> *Smith D. G.*, The Modern Business Judgment Rule, Research Handbook on Mergers and Acquisitions, Forthcoming, in: BYU Law Research Paper Series No. 15-09, June 19, 2015, 5-9.

<sup>86</sup> *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

<sup>87</sup> *Smith D. G.*, The Modern Business Judgment Rule, Research Handbook on Mergers and Acquisitions, Forthcoming, in: BYU Law Research Paper Series No. 15-09, June 19, 2015, 6-7.

<sup>88</sup> *Bainbridge S. M.*, The Business Judgment Rule as Abstention Doctrine, in: *Vanderbilt Law Review*, Vol. 57, Issue 1, 2004, 90.

<sup>89</sup> *Ibid*, 99.

<sup>90</sup> *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051-52 (Del. Ch. 1996).

According to the model rules of the American Law Institute (ALI), corporate directors fulfill their duty of care if they act in good faith and with a reasonable belief that their actions are in the best interests of the corporation, and if they act as diligently as a reasonable prudent person would in similar circumstances.<sup>91</sup>

Corporate directors exercising business judgment are subject to the Business Judgment Rule if they are not personally interested in the decision to be made, if they are informed regarding the decision to be made in such a manner and to such an extent which they believe is reasonable in the given situation, and if they reasonably believe that they are acting in the best interests of the corporation.<sup>92</sup> As for the prerequisites for the application of the Business Judgment Rule, first and foremost, it is necessary to have a business decision made as a result of the entrepreneurial judgment, which must be distinguished from mere inaction, which, unlike active actions and conscious inaction,<sup>93</sup> does not fall under the protection of the Business Judgment Rule.<sup>94</sup> On the other hand, in order for a company director to be able to justify an error made in a business judgment and a decision that is detrimental to the company by using the Business Judgment Rule, it is not permitted to have a conflict of interest, which is the subject of discussion in most cases of litigation related to the Business Judgment Rule.<sup>95</sup> It is necessary for the company director to be a disinterested person (disinterested director) who has no economic interests in the concluded transaction or in the transaction to be concluded, in which case not only formal but also economic aspects should be taken into account.<sup>96</sup> The directors may not be an interested party, but their relative or family member may have financial interests in the particular transaction. If the company director acts based on such an interest, he/she should be deemed an interested person who has breached the fiduciary duty of loyalty.<sup>97</sup>

If the plaintiff presents sufficient evidence confirming that the decision-making process was conducted by the company director without collecting and analyzing the appropriate information, it will be assumed that the director made no informed judgment in the case, which is why the Business Judgment Rule will not be applied.<sup>98</sup> In addition, it is necessary for the application of the Business Judgment Rule that the business decision of the company director is based on a rational belief.<sup>99</sup>

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<sup>91</sup> ALI's Principles of Corporate Governance §4.01 (a); American Law Institute, Principles of Corporate Governance: Analysis and Recommendations, Tentative Draft No. 4, 1985, 4.01.a.

<sup>92</sup> Ibid (c).

<sup>93</sup> Schima G., Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichischem Recht, in: Baudenbacher C., Kokott J., Speitler P. (eds.), Aktuelle Entwicklungen des Europäischen und Internationalen Rechts, Helbing Lichtenhahn Verlag, Basel, 2010, 379.

<sup>94</sup> *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

<sup>95</sup> Schima G., Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichischem Recht, in: Baudenbacher C., Kokott J., Speitler P. (eds.), Aktuelle Entwicklungen des Europäischen und Internationalen Rechts, Helbing Lichtenhahn Verlag, Basel, 2010, 380.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, 380f.

<sup>98</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

<sup>99</sup> *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

During the entrepreneurial judgment process, the directors should act in such a way that they believe that the business decision they make is aimed at the best interests of company and its partners.<sup>100</sup>

In some cases, it is examined additionally whether the company directors have abused the discretion granted to them for making entrepreneurial decisions, which is closely related to good faith.<sup>101</sup> However, it should be noted that the application of this criterion to determine whether or not the Business Judgment Rule should be applied in a given situation is debatable. According to one viewpoint, giving such controlling powers to the courts would turn them into so-called “super-directors” who would enjoy excessively broad discretion when making judgments on the entrepreneurial decisions of corporate directors.<sup>102</sup> Another opinion holds that the element of the abuse of discretion could be considered as a theoretical exception.<sup>103</sup>

### **4.3. The Scope and Exceptions of the Business Judgment Rule**

In addition, it is crucial to determine to what extent the Business Judgment Rule operates in favor of the directors and in which cases it is unjustified to apply the doctrine to shield the directors from liability for the damage caused to the company by their mistakes.

According to one point of view, the Business Judgment Rule constitutes a presumption that the directors of the company acted on an informed basis, in good faith, and with the honest conviction that their action was in the best interests of the business when making the entrepreneurial decision.<sup>104</sup> Therefore, if the corporation has a properly functioning governing body, the decisions made by it will not be challenged by the courts (unless the directors abuse their discretionary powers); in such a case, the courts will respect their business decisions and will not review them.<sup>105</sup> Since the director's decision is considered presumptively valid, the burden of proof rests with the party challenging the decision, who must rebut the presumption regarding the business decision of the director.<sup>106</sup>

It is not permissible for the courts to exercise judicial control over the business decisions made by company directors in good faith, since business decisions imply a presumption of due care.<sup>107</sup> But if the director demonstrates fraud, bad faith or self-dealing, the presumption of due care is rebutted and the burden of proof shifts to the defendant, who must prove that the disputed business decision was fair to the corporation.<sup>108</sup> In such a case, the company directors have the obligation to prove that they observed the so-called Entire Fairness Doctrine and that the disputed business transaction was

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<sup>100</sup> *Schima G.*, Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichischem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), *Aktuelle Entwicklungen des Europäischen und Internationalen Rechts*, Helbing Lichtenhahn Verlag, Basel, 2010, 385.

<sup>101</sup> *Ibid.*

<sup>102</sup> *RJR Nabisco, Inc. Shareholders Litig.*, No. 10389, 1989 WL 7036 (Del. Ch. Jan. 31, 1989).

<sup>103</sup> *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051-52 (Del. Ch. 1996).

<sup>104</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

<sup>105</sup> *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

<sup>106</sup> *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984).

<sup>107</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 260-6 1 (Del.1993).

<sup>108</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 260-6 1 (Del.1993).



achieved by both fair price and fair dealing.<sup>109</sup> In order for a plaintiff to rebut the presumption of validity applicable to business decisions, he/she must present the relevant evidence that the company directors, in making the disputed business decision, breached their fiduciary duties to the company, and if he/she fails to meet this initial burden, the Business Judgment Rule comes into effect in favor of the directors in order to ensure the substantive protection of their decisions.<sup>110</sup>

The entrepreneurial decisions made by company directors are respected by the courts, unless the directors have an interest in the decision, act in bad faith, behave irrationally or make the business decision with gross negligence without considering the relevant facts and information in a reasonable manner.<sup>111</sup> When a conflict of interest arises in a case, the Business Judgment Rule does not apply to protect the directors of an enterprise.<sup>112</sup> The Business Judgment Rule does not shield corporate directors from liability for the breach of fiduciary duty if they involve the company in a business transaction that results in a conflict of interest or in case they unlawfully appropriate a corporate opportunity of the business entity.<sup>113</sup>

A prerequisite for the application of the Business Judgment Rule is that the corporate directors exercise due care in the performance of their corporate duties; if they do not exercise due care, they cannot use the Business Judgment Rule as a protective shield.<sup>114</sup> A plaintiff may prevent the application of the Business Judgment Rule in favor of the company directors if he/she has sufficient evidence that the director's business decision-making was fraudulent, was motivated by bad faith, or was not justified by any rational basis.<sup>115</sup>

The Business Judgment Rule is based on the assumption that a director has acted with reasonable diligence when making a business decision. Accordingly, various factors may be considered when rebutting this presumption, such as whether the director was an interested party in the transaction, whether the director had the assistance of an attorney or expert, whether the governing body prepared a written report, whether the governing body acted independently, and whether it conducted adequate investigation before making a decision; it is also important to determine whether the director acted within a reasonable assumption that his/her decision was in the best interests of the corporation.<sup>116</sup>

The application of the Business Judgment Rule may depend on an alleged breach of any fiduciary duty.<sup>117</sup> Errors that can be classified as ordinary negligence do not give rise to liability under the Business Judgment Rule.<sup>118</sup> A court will not question a director's judgment, except in rare cases where the transaction is so negligently executed that the director fails to meet the prerequisites of the

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<sup>109</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 260-6 1 (Del.1993).

<sup>110</sup> *Mann v. GTCR Golder Rauner, L.L.C.*, 483 F.Supp.2d 884 (D.Ariz.2007).

<sup>111</sup> *Mann v. GTCR Golder Rauner, L.L.C.*, 483 F.Supp.2d 884 (D.Ariz.2007).

<sup>112</sup> *Davis v. Dorsey*, 495 F.Supp.2d 1162 (M.D.Ala.2007).

<sup>113</sup> *Davis v. Dorsey*, 495 F.Supp.2d 1162, 1176 (M.D.Ala.2007).

<sup>114</sup> *Davis v. Dyson*, 900 N.E. 2d 698 (Ill.App.1 Dist.2008).

<sup>115</sup> *In re Farmland Industries, Inc.*, 335 B.R. 398, 411 (Bankr.W.D.Mo.2005).

<sup>116</sup> *In re Lemington Home for Aged*, 659 F.3d 282 (3rd Cir.2011).

<sup>117</sup> *In re Fleming Packaging Corp.*, 351 B.R. 626 (Bankr.C.D.Ill.2006).

<sup>118</sup> *In re Fleming Packaging Corp.*, 351 B.R. 626, 634 (Bankr.C.D.Ill.2006).

Business Judgment Rule.<sup>119</sup> Such a circumstance might arise when the director makes a decision with gross negligence, for example, when the information required to make a decision is not properly evaluated and the director acts completely uninformed.<sup>120</sup>

If the company directors violate their fiduciary duty of loyalty, the Business Judgment Rule should not be applied to protect them.<sup>121</sup> When the directors fail to fulfill their duties and demonstrate purposeful disregard of their responsibilities, they are in breach of their fiduciary duty of loyalty and they expose bad faith regarding their corporate duties.<sup>122</sup> The deliberate neglect of duties by a company director constitutes an unrighteous conduct resulting in a breach of fiduciary duty.<sup>123</sup>

## **5. The Legal Regulation of the Business Judgment Rule in Germany**

The principle that the directors of a capital company enjoy the privilege of the Business Judgment Rule when conducting their entrepreneurial judgment is recognized in the modern German company law.<sup>124</sup> The introduction of this principle in German law is related to the decision made by the Federal Supreme Court of Germany in 1997 that was adopted as a result of the influence of the American corporate law,<sup>125</sup> which came into effect at the legislative level in 2005 through its establishment in the first paragraph of Article 93 of the German Stock Corporation Act (Aktiengesetz). The German Federal Supreme Court (BGH) ruled in 1997 that a company's directors have certain freedom when making business decisions and are not personally liable if they are sufficiently well informed and have made an entrepreneurial decision that is clearly in the best interests of the company.<sup>126</sup>

The Business Judgment Rule was acknowledged as a concept for the directors of the joint stock corporation with this ruling.<sup>127</sup> The need to introduce the Business Judgment Rule in the law of the German joint-stock companies was justified by two factors: on the one hand, it was considered difficult to evaluate an entrepreneurial decision ex post, when the decision itself was implemented from an ex ante perspective, and on the other hand, it was considered unthinkable to perform successful entrepreneurial activities without taking reasonable risks.<sup>128</sup>

It should be noted that, according to the prevailing opinion in legal theory, the Business Judgment Rule applicable to the directors of a joint-stock company can also be extended to the director of a limited liability company (GmbH), even though the aforementioned principle is not

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<sup>119</sup> In re Fleming Packaging Corp., 351 B.R. 626, 634 (Bankr.C.D.Ill.2006).

<sup>120</sup> In re Fleming Packaging Corp., 351 B.R. 626, 634 (Bankr.C.D.Ill.2006).

<sup>121</sup> *Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson*, 727 F.3d 719 (7th Cir.2013).

<sup>122</sup> *Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson*, 727 F.3d 719 (7th Cir.2013).

<sup>123</sup> *Stone v. Ritter*, 911 A.2d 362, 370 (Del.2006)

<sup>124</sup> BGH Urt. v. 4.11.2002 – II ZR 224/00, BGHZ 152, 280 (282) = NJW 2003, 358.

<sup>125</sup> BGH Urt. v. 21.4.1997 – II ZR 175/95, BGHZ 135, 244 = NJW 1997, 1926.

<sup>126</sup> *Romeike F.* in: *Bannenber B., Inderst C., Poppe S.* (eds.), *Compliance*, 2. Auflage 2013, Kapitel 4, Rn. 319.

<sup>127</sup> *Fleischer H.* in: *Münchener Kommentar GmbHG*, 3. Auflage 2019, §43, Rn. 68.

<sup>128</sup> *Kocher D.* Zur Reichweite der Business Judgment Rule, in: *CCZ* 2009, 215 (216).

explicitly codified in the German Limited Liability Companies Act (GmbHG).<sup>129</sup> However, it is also argued by others that the application of Business Judgment Rule may be restricted in case of limited liability companies in certain circumstances,<sup>130</sup> for example, when the director of the limited liability company has a double function and represents a partner with the majority of votes in the business entity.<sup>131</sup>

### **5.1. The Regulation of Article 93 of the German Stock Corporation Act**

Under the German Stock Corporation Act (Aktengesetz – AktG), particularly, according to the first sentence of the first paragraph of Article 93, the members of the board of directors have the obligation to demonstrate the diligence of a prudent and conscientious director when managing the business entity. There is no breach of duty if, in making the entrepreneurial decision, the member of the board of directors could have reasonably assumed that he/she was acting on the basis of adequate information in favor of the company.

Based on the second sentence of the first paragraph of Article 93 of the Stock Corporation Act, five legal prerequisites can be identified, the existence of which is necessary to apply the Business Judgment Rule in favor of the company directors in German law. These prerequisites are as follows: an entrepreneurial decision, acting on the basis of adequate information, acting without conflict of interest and undue influence, acting for the benefit of the company and acting with good faith. If at least one of these legal conditions is not met, the court examines the content of the business decision that caused damage to the enterprise, at which point the standard of prudence of a conscientious and diligent director should be used as the evaluation criterion. If the company directors fail to justify their entrepreneurial decision, they must compensate the enterprise for the damage caused and must restore the condition that would have existed if the corporate duty had not been violated by the director, at which point not only the property damage actually sustained by the entrepreneurial entity, but also its loss of profit, must be compensated.<sup>132</sup>

### **5.2. The Prerequisites of Article 93 of the German Stock Corporation Act**

In order to implement the Business Judgment Rule in a specific case, there must be an entrepreneurial decision (*Unternehmerische Entscheidung*) of the director in the first place. Entrepreneurial decisions depend on unpredictable external influences and are characterized by a strong connection with future events.<sup>133</sup> An entrepreneurial decision is based on projections and evaluations, at which point the director chooses one of several possible alternatives and makes a business decision through entrepreneurial judgment.<sup>134</sup> Only active actions and deliberate inaction, i.e.

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<sup>129</sup> *Fleischer H.* in: Münchener Kommentar GmbHG, 3. Auflage 2019, §43, Rn. 71.

<sup>130</sup> *Easterbrook F. H., Fischel D. R.*, *The Economic Structure of Corporate Law*, 1991, 244 f.

<sup>131</sup> *Fleischer H.* in: Münchener Kommentar GmbHG, 3. Auflage 2019, §43, Rn. 72.

<sup>132</sup> *Willen M.* *Die Business Judgment Rule – Auslegung der Legalitätspflicht bei unklarer Rechtslage*, 30.

<sup>133</sup> *Fleischer H.* in: Münchener Kommentar GmbHG, 3. Auflage 2019, §43, Rn. 82.

<sup>134</sup> *Spindler G.* in: Münchener Kommentar zum Aktiengesetz, 5. Auflage 2019, §93, Rn. 48.

making a conscious decision not to perform a specific action, may be considered an entrepreneurial decision; merely the failure to act (nonaction) is not protected by the Business Judgment Rule.<sup>135</sup>

The entrepreneurial decision should be made by the company director on the basis of adequate information. In this context, the method and manner of obtaining information by the director is important, as it should ensure an extensive examination of the bases required for making an entrepreneurial decision.<sup>136</sup> The information used must be reliable.

The next aspect to consider within the Business Judgment Rule is acting without conflict of interest and outside (undue) influence. It is worth noting that the absence of a conflict of interest as a prerequisite is not directly mentioned in Article 93, but it can be found in the governmental justification of this norm, according to which the decision-making body must act without conflict of interest, external influence and without gaining personal profit.<sup>137</sup> In addition, it is necessary for the director to act in favor of the entrepreneurial entity. The action of the director should be considered beneficial for the company when it is aimed at increasing the income of the company in the long run, as well as at strengthening the competitiveness of the products produced by the company or the services provided by it.<sup>138</sup> In this context, the requirements of Article 93 are met by any rational business decision made by the director.<sup>139</sup>

Moreover, in order to benefit from the Business Judgment Rule, the company director must act in compliance with the duty of good faith. If the company directors do not believe in the rightness of their decision when making it, it is assumed that they are not acting in good faith and the Business Judgment Rule will not apply to them.<sup>140</sup> A company director will not be considered conscientious if he/she behaves irresponsibly and misjudges the risk associated with an entrepreneurial decision.<sup>141</sup> In this context, the mere existence of subjective good faith is not sufficient, and good faith, like obtaining adequate information, must be based on the interests of the company and the diligence of a prudent director.<sup>142</sup>

### 5.3. The Burden of Proof

Germany deliberately avoided the adoption of the US model of the burden of proof when implementing the American Business Judgment Rule, which is considered to be beneficial for

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<sup>135</sup> *Schima G.* Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichischem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), *Aktuelle Entwicklungen des Europäischen und Internationalen Rechts*, Helbing Lichtenhahn Verlag, Basel, 2010, 395.

<sup>136</sup> BGH Urt. v. 21.4.1997 – II ZR 175/95, BGHZ 135, 244 (253) = NJW 1997, 1926.

<sup>137</sup> *Schima G.*, Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichischem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), *Aktuelle Entwicklungen des Europäischen und Internationalen Rechts*, Helbing Lichtenhahn Verlag, Basel, 2010, 394.

<sup>138</sup> *Fleischer H.* in: *Münchener Kommentar GmbHG*, 3. Auflage 2019, §43, Rn. 88.

<sup>139</sup> *Ibid.*, Rn. 88a.

<sup>140</sup> *Altmeppen H.* in: *GmbHG (Kommentar)*, 10. Auflage 2021, §43, Rn. 12.

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

company directors.<sup>143</sup> According to the German model, when applying the Business Judgment Rule, the directors are obliged to prove that their actions were justified or that they were not responsible for the harm caused to the company.<sup>144</sup> As to the existence and the extent of the damage, as well as the causal connection between the actions of the company director and the damage sustained by the company, the burden of proof rests with the company,<sup>145</sup> and in case of a derivative claim – with an individual partner of the company or a group of partners.<sup>146</sup>

Similarly to the American corporate law, the plaintiff bears the initial burden of proof in German law, and must provide tangible evidence that there is a potentially improper action and breach of fiduciary duty on the part of the director, for example, in case the director of the company acted and made the decision regardless of the existence of a conflict of interest.<sup>147</sup> If sufficient evidence is presented to support the assumption that the company director violated his/her fiduciary duty when making the entrepreneurial decision, the burden of proof will shift to the director, who must dispel the doubts against him/her.<sup>148</sup>

Company directors may use the Business Judgment Rule to justify their entrepreneurial decisions, but they must carry the burden of providing proof of the extent to which the legal criteria of the Business Judgment Rule exist in a given situation.<sup>149</sup> Furthermore, the director can excuse an incorrect business decision by claiming that the same outcome would almost certainly occur if a different action had been taken, and the company would still be damaged.<sup>150</sup> Simply making an abstract assumption that a similar result would have occurred even if an alternative course of action had been taken is insufficient for justifying the acts of the director of the entrepreneurial entity.<sup>151</sup>

## **6. The Business Judgment Rule in Georgian Law**

The Business Judgment Rule was codified in Georgian corporate law for the first time with the adoption of the new edition of the Law “On Entrepreneurs” in 2021. In relation to the Business Judgment Rule, Article 52 of the mentioned law specified that the duty of care is not violated and the director is not obligated to compensate the entrepreneurial entity for the damage caused by the entrepreneurial decision made by him/her if the company director could reasonably have assumed that he/she made the entrepreneurial decision on the basis of sufficient and reliable information, in accordance with the interests of the entrepreneurial entity, independently and without the conflict of interest or the influence of others.

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<sup>143</sup> *Schima G.*, Business Judgment Rule und Beweislastverteilung bei der Vorstandshaftung nach US., deutschem und österreichischem Recht, in: *Baudenbacher C., Kokott J., Speitler P.* (eds.), *Aktuelle Entwicklungen des Europäischen und Internationalen Rechts*, Helbing Lichtenhahn Verlag, Basel, 2010, 402.

<sup>144</sup> *Jickeli J.* in: *Münchener Handbuch des Gesellschaftsrechts* Bd. 4, 5. Auflage 2020, §114, Rn. 69.

<sup>145</sup> *Spindler G.* in: *Münchener Kommentar zum Aktiengesetz*, 5. Auflage 2019, §93, Rn. 208.

<sup>146</sup> *Jickeli J.* in: *Münchener Handbuch des Gesellschaftsrechts* Bd. 4, 5. Auflage 2020, §114, Rn. 69.

<sup>147</sup> *Paefgen W.G.*, Die Darlegungs- und Beweislast bei der Business Judgment Rule, in: *NZG* 2009, 891 (894).

<sup>148</sup> *Ibid.*

<sup>149</sup> *OLG München NZG* 2013, 742 (743).

<sup>150</sup> *BGH NJW* 2018, 3574 Rn. 39 ff.

<sup>151</sup> *BGH NJW* 2018, 3574 Rn. 45.

Therefore, when evaluating the actions of the director of the company, it should be taken into account whether he/she made a business decision based on sufficient and accurate information and whether he/she acted in the best interests of the enterprise. In addition, it is necessary to establish whether the company director had any kind of personal interest towards the particular business decision and whether his/her actions were in good faith.

If any of the aforementioned elements are not present in the given case, the company director cannot justify his/her action with the Business Judgment Rule and he/she will have to pay damages for breach of fiduciary duty. If the actions of the director comply with the relevant requirements of the law (being informed, acting in the interest of the company, acting without a conflict of interest), then there will be no breach of fiduciary duty, namely, the breach of the duty of care. According to the second paragraph of Article 52 of the Law “On Entrepreneurs”, the Business Judgment Rule does not apply if the entrepreneurial decision made by the company director is made in violation of the duties established either by the law or by the statute of the company.

### **6.1. The Scope of Liability**

According to paragraph 2 of Article 50 of the Law “On Entrepreneurs”, the company director is liable to the entrepreneurial entity for the damage caused by the culpable failure to fulfill the duty of care, and it is not permitted to limit the responsibility of the director for the intentional failure to fulfill this duty by the founding agreement or the decision of the partners. Such an entry in the statute of the company will be invalid, although it is possible to release the director of the company from the obligation to pay damages in cases where the damage was caused by his/her negligent act.<sup>152</sup>

It should be noted that the company directors are released from legal responsibility if he/she carried out the decision of the general meeting by his/her actions. This rule does not, however, apply if the director contributed to the general meeting's decision by giving false information or if the director knew the decision would be harmful but failed to tell the general meeting before the decision was made or executed.<sup>153</sup> The corporate directors are not eligible to use the Business Judgment Rule in their favor in this situation.

In regards to the breach of the duty of loyalty by the company director (competition restriction, usurpation of corporate opportunities, conflict of interest), the entrepreneurial entity can demand from the offending director, along with a compensation for the damage caused to the company, the payment of the agreed contractual penalty.

In addition, the entrepreneurial entity may require the infringing company directors, instead of the payment of a compensation, to either transfer the benefits received by the company directors from the transaction concluded for the benefit of themselves or a third party to the entrepreneurial entity or to cede the right to receive such benefits.<sup>154</sup>

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<sup>152</sup> See Article 50 para. 2 of the Law of Georgia “On Entrepreneurs”.

<sup>153</sup> See Article 50 para. 4 of the Law of Georgia “On Entrepreneurs”.

<sup>154</sup> See *ibid*, Article 53 para. 1, Article 54 para. 3, Article 208 para. 9 .

## **6.2. Joint Liability of Directors**

In the event that the entrepreneurial entity is managed by several directors and the fiduciary duties are violated by the actions or inaction of several directors, they are accountable to the entrepreneurial entity jointly.<sup>155</sup> It is also worth noting that the general meeting of the entrepreneurial entity may make the decision to refuse the request for a compensation of the damage caused to the entrepreneurial entity by the director or to settle with him/her, only if such a decision is not opposed by the company partners owning at least 10 percent of the votes.

The company directors could also be released from the obligation to compensate the damage caused to the entrepreneurial entity, if the directors fulfilled the decision of the general meeting of the company by their corporate actions.<sup>156</sup> It should also be mentioned that the director of the entrepreneurial entity, who is being considered for the release from the responsibility to reimburse the entrepreneurial entity, is barred from voting on this matter.<sup>157</sup>

## **6.3. Derivative Claims of Shareholders**

Based on the director's breach of fiduciary duty, the governing body, another company director, the supervisory board, and – in the cases provided by law – an individual partner has the right to seek compensation for the damage caused to the entrepreneurial entity. One or more shareholders have the right to file a lawsuit in their own name and in favor of the joint-stock company to enforce a claim belonging to the joint-stock company, including the claims against the company directors, for the compensation of the damage caused to the joint-stock company by the directors' failure to fulfill their duties, or for the transfer of the benefits received by the directors to the joint-stock company instead of the compensation of the joint-stock company's damage or for the request that the directors cede the right to receive such benefits.<sup>158</sup> It is crucial to note that when bringing a derivative (indirect) action, the company shareholder files the lawsuit in his/her own name and appears as a plaintiff in the case. At that time he/she does not participate in the lawsuit as the representative of the company. However, it must be emphasized that his/her claim within the derivative action is intended to satisfy the claim of the entrepreneurial entity rather than his/her own legal claim.

If 90 days have passed since his/her written appeal to the joint-stock company with the request to file a lawsuit with no result, and the court determines that satisfying the shareholder's request does not conflict with the predominant interest of the joint-stock company, the specific shareholder (or a group of shareholders) will be considered a proper plaintiff in a derivative lawsuit.<sup>159</sup> In this context it is also crucial to highlight that compliance with the abovementioned deadline is not required if the joint-stock company expressly declines to file a lawsuit before the period expires, or if compliance with this deadline would cause irreparable harm to the joint-stock company.

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<sup>155</sup> See *ibid*, Article 55 para. 1.

<sup>156</sup> See *ibid*, Article 55 para. 2.

<sup>157</sup> See *ibid*, Article 55 para. 3.

<sup>158</sup> See Article 222 para. 1 of the Law of Georgia “On Entrepreneurs”.

<sup>159</sup> See *ibid*, para. 2.

## **7. Conclusion**

Many countries have yet to codify the Business Judgment Rule. Nonetheless, this principle is nowadays a widely recognized doctrine in corporate law, both in the common law system and in the civil law countries. Considering the freedom of entrepreneurial decision-making, it is acknowledged that the day-to-day functioning of a company, as well as its long-term strategy, sometimes even requires company directors to adopt risky decisions that may ultimately harm the entrepreneurial entity.

All entrepreneurial decisions of a company director involve some level of risk, whether it is starting a new type of business activity or acquiring another company. The higher the profits that the entrepreneurial entity seeks, the greater the risk that the company directors must take in making decisions. If directors do not take bold and risky steps, this will hurt the company in the long run, because there is a high chance that an overly cautious and restrained director will miss out on business opportunities that might benefit the business entity.

It is impossible for the company's partners to ensure that the company director always makes correct calculations and that his/her decisions are always profitable for the business entity, because in many cases this depends on various external factors that are beyond the control of the partners and the directors. Holding the director of the entrepreneurial entity liable for any mistakes and decisions that result in financial losses for the company would be a significant deterrent and would severely limit the freedom of action of the director, whose innovative and bold decisions frequently determine the enterprise's market success.

Therefore, the recognition of the Business Judgment Rule in a legal system, including in Georgia, is critically important, because the establishment of this doctrine in corporate law creates guarantees of protection for the directors so that the honest and diligent director is not held responsible for the failure of the enterprise in all instances and enjoys freedom in making entrepreneurial decisions. The doctrine of the Business Judgment Rule is equally important in terms of exerting appropriate judicial control over business decisions made by directors. The director of the entrepreneurial entity has more comprehensive professional expertise and awareness of the company's internal operations. In general, the director is more capable than a judge when it comes to evaluating solutions to solve serious challenges of the company and their practicality. As a result, based on the Business Judgment Rule, it is reasonable to argue that the courts should only be able to review entrepreneurial decisions in exceptional cases.

The Business Judgment Rule, which serves as the foundation for the exemption from responsibility for the conscientious and diligent director, also guarantees that the company's directorship does not actually fall into the hands of the company's partners. If the partners could contest the decision of the director at any time and then go to court to have him/her held liable, this would strengthen the actual power of the individual partners over the director in the entrepreneurial entity, which would be contrary to the principles of corporate governance.

As the volume and complexity of entrepreneurial activity grows over time, including cross-border operations as well as cooperation between different industries, so do the demands on corporate management, in particular directors, to ensure the implementation and effective enforcement of the



appropriate corporate governance standards. Entrepreneurial entities should be allowed to perform their business activities freely within the context of fair competition, entrepreneurial freedom, and statutory autonomy, and to take the steps necessary for achieving their established entrepreneurial goals. Company directors must be able to operate the company with care, loyalty, and good faith, without the risk of excessive judicial oversight and strict liability, which does not rule out the possibility of the directors making unprofitable entrepreneurial decisions.

It is critical to ensure the freedom of action in the process of making business decisions for the governing body of the business entity since the capacity to freely make corporate decisions is an essential aspect of the enterprise's successful economic development. The applicable criteria should be explicitly established in law and interpreted by judicial decisions. In order to achieve a reasonable balance, it is also necessary to have precisely defined bases of responsibility that will influence the behavior of the directors and will ensure the prevention of arbitrary and inconsiderate actions, because such actions pose a significant threat to the effective functioning of the companies.

In the context of Georgia, it is crucial that following the codification in the Law “On Entrepreneurs” implemented in 2021, Georgian judicial practice be developed and the scope and standards of the freedom of entrepreneurial decisions be clearly established. This would provide more clarity on Georgia's current approaches and be an essential basis for legal stability. In the case of a lawsuit involving a breach of fiduciary duties, it is essential to make it apparent how the burden of proof should be fairly balanced between the plaintiff and the defendant in light of the Business Judgment Rule. In order for the Business Judgment Rule to become more widely accepted in the legal consciousness, it would also be desirable to create a unified notion in Georgian corporate law regarding the aforementioned principle. The Law of Georgia “On Entrepreneurs” uses the term “freedom of an entrepreneurial decision” to refer to the Business Judgment Rule, whereas the Georgian legal literature and judicial practice use different notions, such as, for example, the “presumption of validity of business decisions”, the “entrepreneurial judgment rule”, the “presumption of a valid business decision” etc.

In any case, it is of the utmost importance that there be an adequate legal framework in corporate law that guarantees the proper application of the Business Judgment Rule and grants company directors enough discretion to act in the process of entrepreneurial judgment in order to accomplish the objectives of the company and fulfill its best interests. It is true that taking risks and non-profitable steps on the part of a company director is an essential part of civil turnover and the entrepreneurial field; however, it is also important to ensure that, as a result of the Business Judgment Rule, there is not too much room for making unreasonable and arbitrary decisions, so that the individuals acting in bad faith do not have the opportunity to make decisions that are harmful to the company and to commit fraudulent acts, and are also not allowed to evade responsibility by circumventing the fiduciary duties imposed on them.

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