THE DISQUALIFICATION OF COMPANY DIRECTORS AND ITS EFFECT ON ENTREPRENEURSHIP

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Abstract

The disqualification of directors or members of the management of a company, expressed as a prohibition for these persons to manage or take part in the management of the companies, is a highly significant Act of Company Law, which is implemented in many legislatures around the world. Utterly restrictive in its nature, it applies to the directors and members of the management team, and in some legislation systems even to the capital owners of the companies whose illegal actions initiate its application. The activation of this institution in precisely determined situations most often results in the prohibition of a particular person to manage a company for a definite period of time.

These restrictive measures are effected with the purpose of establishing certain control in trading, while imposing limitations to a certain focus group. In its nature, these measures differ from those brought into effect in order to instigate entrepreneurship. For entrepreneurship in a given country to flourish would necessitate the realization of a liberalized regulation of the market.

This paper focuses on the impact that this restrictive institution has in practice, and whether it is in fact achieving the objective(s) for which it was legally established. Particular attention is given to the adverse consequences that directors' disqualification may bring on entrepreneurial freedom and innovation, and how this in turn could influence directly or indirectly economic growth or in weathering the recessional storm(s).

Keywords: Disqualification Act, directors, management, entrepreneurship

Introduction

The disqualification of mangers or management structures in trade companies is an institute with which the European and other legislatures around the world are familiar with. The extent of its application depends primarily upon the traditions in the understanding of certain institutes in the field of the Company Law, Bankruptcy Law and Insolvency.

It is an act which entails prohibition, most often by court order, for members of management in companies whose conduct met certain legal conditions, which entails disqualification. We use the term ‘members of management’ because this disqualification or exclusion from the market may encompass a wider circle of people beside directors who took part in the management of a particular company and who, whilst managing the company, violated in some way or other the respective legal norms to determine prohibition.

In accordance with the legislation, the disqualification in most cases involves prohibition for the persons to take part in the establishment, management and organization of the existing and/or other companies. Thus, persons that are under such constraint, become disengaged from the management positions of the companies for a certain period of time, and they are banned from that position in new companies. The duration of this exclusion is in proportion to the degree of illegal conduct and it is estimated by the institution that enacts it. To record the persons who have been disqualified from managing positions in the companies, a list is produced, and it is kept by some of the administrative bodies in charge of companies’ records. That list is at the disposal (with or without a certain fee) of the public, with sufficient transparency for the prospective creditors and investors.

As with every other prohibition, the restrictions imposed by the disqualification regime aims at achieving specific purposes. Historically, the main objective of directors’ disqualification has been to seek out those who abuse of the privilege of Limited Liability for their personal benefit at the expense of investors and the general public at large. They are sanctioned from trading for a period of time as determined by the Court. The restriction also acts as a warning to raise standards of commercial scrupulousness, discourages unfit conduct and gives irresponsible directors the chance of rehabilitation. Williams (2005) argued that it is now potentially developing into another means of control, with the onerous obligations of governance facing directors constantly increasing.

Aims of Study

Firstly, this study provides a succinct overview of the literature on entrepreneurship and enterprise; namely on the meaning of the terms ‘entrepreneur’, ‘entrepreneurship’ and ‘entrepreneurial process’. Secondly, it reviews the disqualification regime in relation to company directors and members of the management team in the United Kingdom, Germany and the Balkans (comprising the Republic of Macedonia and Croatia). Thirdly, the study focuses on the consequences of the disqualification of members of management on the entrepreneurial orientation of firms. More specifically, the study provides seven hypotheised facts relating to the disqualification regime that could directly or indirectly impact negatively on entrepreneurship, and consequently on the economic growth or revival of countries. One question looms in this regard: Is the disqualification regime the best course of action in a time of economic recession?

Entrepreneurship and Enterprise

This section provides an overview of the literature on the meaning of the term 'entrepreneur', 'entrepreneurship' and 'the entrepreneurial process'.

The Entrepreneur

Entrepreneurs are those individuals that through their drive to do good for themselves in terms of material gain and social status, contribute significantly to material progress in society, and act as change agents for economic growth (Hurley, 1999). Through their energy, committed undertaking, and innovative behavior, their embeddedness in society helps to transform industry and society by injecting money in the economy and providing a vital source of employment for many. Various bodies of literature provide an insight on the typical characteristics of a successful entrepreneur. Four main components are central; strong innovativeness, a good knowledge of how the market functions, an ability to take risks, and the willingness to grasp opportunities (Yamada, 2004)

The entrepreneur paradigm which can be traced back to Schumpeter (1934) is underpinned by the innovation process. Innovation has many facets. Cooper (1998) lists three prominent innovation dimensions: (i) radical versus incremental, (ii) product versus process, and (iii) administrative versus technological.

The literature affirms the importance of the role played by the entrepreneur in the creation and early development of a firm (Van de Ven, 1980). In this role the individual influences the firm's direction, and contributes to the choice of strategy. This is more pronounced in small entrepreneurial firms. Studies attest that strategic decision making is affected by the entrepreneur's personality and management style. This is also evident in firms where entrepreneurs do not use formal techniques or specialized knowledge in strategic management, but implement 'realized strategies' (Mintzberg, 1978) which are formed from decisions made gradually, and sometimes unintentionally.

Entrepreneurship

Analogous to other concepts in the social sciences there exist no unanimity of a universally accepted definition of entrepreneurship. Researchers agree that it is about creating something that has previously not existed. The dynamic process leads to a change of state and is characterized by innovation, venturing orientation, and strategic renewal (Covin & Slevin, 1991) after the identification of opportunities (Shane & Venkatraman, 2000). Three main streams of research provide knowledge on this subject. The first stream (e.g. Norburn & Birley, 1986) concern the examination of socioeconomic background factors, such as age, gender, social class, marital status, education, and ethnicity. The second examines the personal characteristics of owner-managers (e.g. Beaver, 2002); among which their attitudes, traits, and preferences. The situational and contextual factors comprise the third stream (e.g. Stanworth & Curran, 1976).

The subject has been researched through the examination of attitudes, traits, background, contextual circumstances, economic factors, gender, and geography. An accepted definition of entrepreneurship is that it is a process of creating and building something of value (Timmons, 1994) through the pursuit of opportunity without regard to resources currently controlled (Stevenson & Sahlman, 1987). The behavior of the individual within this process results in outcomes that energize the industry and the economy, and provide long-term sustainable benefits for society in general.

Entrepreneurship is viewed as having a functional, and an occupational character in the economics literature (e.g. Peneder, 2009; Harper, 2003). The functional element of entrepreneurship contributes to our understanding of the functions of the entrepreneur in the context of economic development and growth. Entrepreneurship contributes to employment. It enhances social and political stability, and it furnishes competitive power (Wennekers & Thurik, 1999). Econometric evidence suggests that entrepreneurship is a vital determinant of economic growth, and a cost in terms of foregone economic growth will be incurred from its absence (Audretsch et al., 2002). Policy makers across the world promote entrepreneurship as a means of creating jobs, improving international competitiveness, countering rising unemployment, and sustaining economic growth. The high unemployment and stalled growth in most European countries has reinforced the determination of policy makers to use entrepreneurship as a vehicle for personal development in order to resolve social issues and strengthen economic growth.

The occupational aspect studies the person performing the entrepreneurial process as someone who starts and grows a business venture through innovation. Schumpeter (1952) acknowledged that entrepreneurs transform static equilibrium into a dynamic process of economic development through the exploitation of an innovation. The entrepreneur contributes substantially to such economic progress and technological advances through the process of innovation. This is an important determinant in the competitive challenges of enterprises and nation states. The complexity of the innovation process requires not only an eclectic base of thinking and individual management skills, but also requires the appropriate fiscal and regulatory framework with which it can flourish. Herbig et al. (1994) contend that innovation "requires three basic components: infrastructure, capital, and the entrepreneurial capacity to make the first two work". It is now accepted that policy makers encourage firms to progressively adopt an entrepreneurial culture. This can only be achieved through a business support infrastructure that embraces innovation.

Central to the study of entrepreneurship are the concepts of the entrepreneurial process and that of opportunity. The former focuses on the patterns of economic activity that arise from the interaction of a multidimensional, complex and dynamic set of factors and circumstances. This manifests itself in the start-up and growth of businesses. The latter focuses on the behavior of the entrepreneur. Entrepreneurial processes change over time and exist in different formats depending on the type of firm (Schwartz et al, 2005).

Entrepreneurial Process

The Austrian School of thought views the entrepreneur as a person with three propensities: (i) risk-averseness (Knight, 1921); (ii) alertness to opportunities for economic profit (Kirzner, 1973); and (iii) innovativeness and creativity when exploiting opportunities (Schumpeter, 1934). The entrepreneurial process of is embedded in market functioning. It disrupts market equilibrium through the introduction of new combinations or successful innovations of goods and services in the economy. During the process the new product/service combinations fuel economic development and growth and move the economy towards a newer equilibrium. Schumpeter (1942) coined the term 'creative destruction' to denote a "process of industrial mutation that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one."

A large body of research views the entrepreneurial process as an emergent phenomenon made up of individual and environmental components (e.g. Lumpkin & Dess, 1996). The central argument is contingency thinking which binds the entrepreneur's characteristics with the firm's context. Other researchers (e.g. Timmons & Spinelli, 2003) remove environmental factors from their models and focus specifically on the characteristics of the entrepreneur, individual or team; resources; and opportunity perception. This school of thought investigates the traits manifested by entrepreneurs. In these studies the characteristics and attitudes of individuals, their genetic predisposition, and the social development in their culture lends themselves inclined towards entrepreneurship.

In all models the individual plays a central role in the entrepreneurial process which gives rise to the emergence of new opportunities. The exploitation of the opportunity progresses into the creation of a new product or service which the market will accept as novel. The ongoing presence of the entrepreneur is central for success because he or she alone has the capacity to materialize and continually shape the organization so that value is created. In this view entrepreneurship is a long and complex emergent process comprising of repeated interaction which gives new meaning in the light of the sense that the entrepreneur makes on the market. An opportunity is therefore objective in the sense that it exists outside of the firm, but it is also socially constructed through activity interaction. The entrepreneurial process is thus "dynamic and constant emerging, being realized, shaped and constructed through social processes" (Fletcher, 2003).

It is the stream of social networks, structures and environments that an entrepreneur engages in that makes up the entrepreneurial process. Chang (2004) states that opportunities are dependent on the nature of interaction and the pre-existing conditions that underlie such interaction. These are captured by the entrepreneur, who through a long and complex emergent process of sense-making provides value in the market. The process has therefore no specific end, and there is actually no pre-defined goal taking the entrepreneur towards unforeseen directions.

Review of Disqualification in the U.K., Germany and the Balkans

United Kingdom

The establishment of the Act "disqualification of managers" and its implementation in the Common Law system is based upon the notion of insolvency not only as a private legal creditor/debtor relation but also as an Act which is significant for Public Law as well as the whole community.

The liberal acts on the Island for establishment of a company, primarily the exclusion of the minimal capital as a prerequisite for founding a company, have certainly been a reason for introducing acts that will serve the purpose of protecting the company creditors. Legal provisions which entail institutes as "disqualification of managers" together with "piercing the corporate veil"- or the personal responsibility of the managers for the company debts (in particular cases) are exact such measures.

The Company Directors Disqualification Act 1986 seeks to protect the general public against abuses of the corporate form. The effect of a disqualification order is that a person shall not, without the leave of the court: [2]

> Be a director of a company, or a liquidator or administrator of a company, or be a receiver or manager of a company's property or, in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company, for a specified period beginning with the date of the order. [3] (Section 1(1)).

A disqualified person cannot, therefore, act in any of the alternative capacities listed. For example, a disqualified director cannot participate in the promotion of a new company during the disqualification period, nor can he be 'concerned' or 'take part in' the management of a company by virtue of acting in some other capacity, such as a management consultant.[4]

The Disqualified Directors Register is a register of persons who have either been disqualified through a court order or by an undertaking of the Insolvency Service from being directors of companies or members of LLPs. The register shows the length of time the director or member has been disqualified. It also shows the section of the Company Directors Disqualification Act 1986 that the director has been disqualified under.

The duration of the disqualification is between 2 to 15 years. In determining the duration of disqualification, previous disqualification orders of the individuals in question must be considered as well as the degree of guilt and the measure of incompetence[5]. Violations of the disqualification order are punished by up to two years in prison or fines.

When can disqualification occur?

Undischarged bankrupts and persons whose orders are revoked by the Court due to a default in payment under a county court administration order are automatically disqualified by the Court.

In practice, most of disqualifications are ordered on the basis of unfitness. According to this section, the court is obliged to issue a disqualification of legal or natural persons if this person is or was a director or shadow director of a company which has become insolvent. Additionally, the Court must be convinced that the conduct of this person as a director

[2] A.J. Dignam, J.P. Lowry, "Corporate Finance and management issues in company law", section c: Corporate management I, revised edition, University of London Press, London 2009

[3] Ibid

[4] Ibid

[5] Marcus Lutter, Legal Capital in Europe, Special volume 1, p. 264, De Gruyter Rechtswissenschaften Verlags-Gmbh, Berlin 2006

"makes him unfit to be concerned in the management of a company". A director can be disqualified upon conviction for an indictable offense in connection with the promotion, formation, management, or liquidation of a company, or in connection with the receivership or management of a company's property, including the conducting of business without legal authorization - *company law regulations are violated*.[6] A director can also be disqualified for persistently failing to comply with the provisions of companies' legislation requiring document filing with the registrar of companies. A disqualification order can be issued if it appears that, in the course of the winding up of the company, a person has engaged in *wrongful and fraudulent trading*, whether or not convicted or has otherwise been guilty of other fraud in relation to the company or of any breach of duty as an officer, liquidator, receiver, or manager[7]. A disqualification on the basis of *violations of competition law* occurs when a company violates competition law and the court holds the director to be unfit to be concerned in the management of a company. "*Capital Market disqualification"*occurs whenever someone buys or sells stocks on the regulated market and uses insider information to his benefit and so is criminally liable. Whoever is sentenced for such a criminal act can be disqualified pursuant, assuming that the carrying out of the criminal act can be linked to the management of the company in question[8]

Moreover, when a company has failed, the OR (or IP in a creditors' voluntary liquidation, an administrative receivership or an administration) has to send the Secretary of State a report on the conduct of all directors who were in office in the last 3 years of the company's trading. The Secretary of State has to decide whether it is in the public interest to seek a disqualification order. Any application is heard and decided by the court. Examples of conduct which may lead to disqualification include:

- Continuing to trade to the detriment of creditors at a time when the company was insolvent.
- Failure to keep proper accounting records.
- Failure to prepare and file accounts or make returns to Companies House.
- Failure to submit tax returns or pay over to the Crown tax or other money due.
- Failure to co-operate with the OR/IP.

[6] Andrew Hicks, *Disqualification of Directors: No Hiding Place for the Unfit?*, Association of Chartered Certified Accountants Research Report (London: Certified Accountants Educational Trust, 1998) at 35.
[7] *CDDA, supra* note 7, s. 2(1)
[8] Marcus Lutter, Legal Capital in Europe, Special volume 1, p. 263-264, De Gruyter Rechtswissenschaften Verlags-Gmbh, Berlin 2006

Germany

Directors` disqualification is already used in certain fields of German Law. Corporate Law goes beyond the mere requirement that managers and the board members have such ordinary attributes such as legal capacity. For example, pursuant to s. 6 (2) s. 3, 4 GmbHG and s. 76 (3) s. 3, 4 AktG, a manager must also be free of any sentences related to insolvency criminality or of professional or occupational disqualification or any other form of civil legal disqualification[9].

Insolvency criminality leading to a directors` disqualification under German law is exclusively connected to Chapter 24 of the Criminal Code. Therefore, this only involves bankruptcy (s 283 c StGB - Bankrott) *grievous bankruptcy* (s 283a StGB – Besonders Schwerer Fall des Bankrotts), *violation of proper accounting* (s 283b StGB – Verletzung der Buchfuhrungspflicht), the *preferential treatment of creditors* (s 283 c StGB - Glaubugerbegunstigung), and the *preferential treatment of debtors* (s 283d StGB- Schuldnerbegunstigung). Nevertheless, criminal act committed abroad may also be of consequence, though such acts must also be considered criminal by the foreign legal regime. The committed crime must be related to the commercial objective or occupation of the corporate entity in question. Other criminal acts are not penalized by s. 6 (2) 3 GmBHG and s 76 (3) 3 AktG.

The Balkans

The Balkans, from a legal aspect, have always been inclined towards the German legal circle, adopting and adapting decisions characteristic of this legal system, which is rather different from the common law system. In the area of the Company Law, the same practice has been followed, so that the countries like Croatia and the Republic of Macedonia, in their company laws have included a number of laws which originate from and are applied to the German laws which regulate that field.

When such regulations as directors disqualification are concerned, it seems that in the Republic of Macedonia and Croatia, the approach is much more restrictive towards the circle of persons and the reasons for which such restrictive measures as directors’ disqualification are imposed.

Republic of Macedonia

In the *Republic of Macedonia,* a novelty has been introduced with the amendments to the law on companies from April 9, 2010, (Official Gazette no. 48) by which a prohibition for founding companies is introduced if certain conditions are met, as well as prohibition in

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[9] Ibid, p.257

certain occasions for persons to be members of management and supervision bodies of companies.

Thus it is stated that:

A company cannot be founded by:

1. *Legal entities* whose bank account opened at any of the carriers of the financial trade (the banks) is blocked[10] and the *persons* who are members of the management or supervision bodies of these companies, for the period of time the account is blocked, or until it undergoes the procedure of bankruptcy.
2. Companies which undergo the bankruptcy procedure, for the time of the duration of the procedure.
3. A person who is a member (capital owner) of a Company with Limited Liability (only Ltd. not public company) the account of which has been blocked, for the period of time the account is blocked, or until it undergoes the procedure of bankruptcy.
4. Persons for whom the court has decided to have committed a criminal offense of false bankruptcy, causing bankruptcy by improper management, misapplication of the bankruptcy procedure, damage or preference of creditors.

   The persons under 1, 3 and 4 are not allowed to be managers, member of a managing body or a supervising body of a company for the period of time that these restrictions are present.

   For the persons who are under prohibition for founding a company and for those who are not allowed to take part in the company management and supervising bodies, there is a separate register within the Central Registry Office.

It is a fact that these acts are rather extensively set and plan prohibitions not only for the managers/supervisors of the companies but also for the members of the companies of limited liability, which represent the most common mode of the business organization in the country.

Apparently, a number of rather restrictive acts are imposed, that go further in their attempt to provide certain market safety and protection of the creditors. The justification is questionable, especially in a period of a world economic crisis during which the legislatures prefer acts which are liberal and motivating for the prospective entrepreneurs. For instance,

[10] Company`s bank account could be blocked (by the creditor, who has already provided a legal document which confirms the debt) due to the inability to pay its debts. It will be blocked until new finances arrive, so that the creditor can withdraw his amount.

recently, the Macedonian government introduced numerous measures in order to encourage the potential entrepreneurs in their business realizations.

In addition to this, in a time when the state itself as a result of the economic crises is late with its payments (debts) towards the private sector, such acts that impose prohibition to the managers or the capital owners because of the company insolvency and the block of its account, a consequence of temporary insolvency, look pretty severe.

Croatia

The legislation in *Croatia* had even previously imposed upon the founder/s of companies when founding the company, to submit a signed statement (in addition to the other documents) by which they confirm that they are not owners or co-owners of a company that has a blocked bank account (insolvent company).

Apart from referring to the founders, the new legal regulations impose a prohibition on the members of the family of the person in possession of insolvent companies in founding a company. Thus, the Croatian legislature imposes prohibitions that sanction persons that may have not previously participated in the market.[11] It is hard to imagine being forbidden to establish a company because of a previous business failure of a member of your family!

Thus, the legislature decidedly imposes prohibition on establishment of new companies for those entrepreneurs who have had at least unsuccessful business venture and as a result have an insolvent company, which has still not undergone the adequate procedure for deletion from the register. This undoubtedly represents an obstruction to entrepreneurship and sanctions the entrepreneur who for certain reasons has not managed in the successful realization of the business venture.

The authorities in the previously mentioned legislatures (U.K., Germany and Macedonia) focus most of these restrictive measures on the members of the management of the company. Unlike them, the Croatian legal decisions contain restrictions mainly referring to the capital owners.

Moreover, according to the new provisions, the institute "*piercing the corporate veil*", with the forthcoming alterations, would mean that if the legal person is not able to clear the debts, the creditors in order to collect the debts, apart from the personal assets of the founders, can also use the other legal entities owned by the same founder. Furthermore, the managing directors of the insolvent company are liable to the creditors with their personal assets.

[11] Tax Law amends, Official Gazette, no. 78/12

The new alterations also plan the so called “shortened administrative procedure” with which the Inland Revenue Department is authorized, if they discover irregularities in the functioning of the company, (namely a procedure not conducted by the Court) to appropriate not only the property of the legal entity, but also the personal property of the founder.

Needless to say, these regulations generate insecurity for the entrepreneur. They significantly capacitate the state and its discretionary right in the decisions concerning the private property of the company holders. As a logical result of that, these regulations are demotivating for the present or prospective entrepreneur.

Impact of Directors’ disqualification on entrepreneurship

Although delinquent directors and/or members of the management team who are guilty of misconduct deserve to be disciplined, there have been cases where honest persons have been disqualified “in a bid to save jobs by keeping the company trading” or because of what they might consider to be “quite small matters, such as errors in paperwork” (Damon Watt, as cited in Moules, 2012). There are also cases where businesses go bankrupt because of bad luck or unexpected circumstances (e.g. economic downturn), and not because of irresponsible risk taking. In decision theory, a good decision is one that uses all the available information, considers all possible alternatives and is rational. In the same sense, directors of companies are required to be prudent in their decisions, to consider all the risks involved and to avoid reckless and speculative trades and/or investments. Apart from this, a director cannot be passive. When a director feels that the Board is taking the wrong decision, especially in the case of trading in the prospect of insolvency, the director is responsible to take a stand and to protest against the implementation of the decision s/he does not support. The director is also expected to resign in such circumstances, rather than staying on board for fees and status associated with his position. However, if the director decides not to resign, his/her conduct will be considered independently, not collectively.

Good decisions can be affected by unexpected or unfavorable circumstances, resulting in bad outcomes. In such cases, that original decision remains a good decision just the same. However, outcome-based decisions cannot be entirely avoided and good managers can suffer from bad outcomes, not of their own making. For instance, Ariely (2010) gives an example of a chain that lost money when the stock went down, and the good manager incurs financial penalties or is fired, so that Board saves face and appears to be taking action. The founders of McDonalds (Ray Kroc) and Walmart (Sam Walton) failed in at least one entrepreneurial venture before making a success. What would have happened to these established world-renowned entrepreneurs if this Act was in place back then? What would have been the impact on entrepreneurship and the economy if they were disqualified? Isn't this proof that **failure** is only the stepping stone to greater heights?

Entrepreneurs take calculated risks while investors and creditors take financial risks in support of these enterprises. Laws and regulation are there to promote legal activities and to discourage illegal activities. With the exception of the illegal act, the market must remain free. In the long-run, capital moves away from the less efficient decision makers to the smart ones. Those who make bad decisions become victims of their own decision making. This is how the free market operates. As Lee and Gladstone (1997) put it: "It is an unusual 'enterprise' culture that protects investors from such individuals through heavy-handed legal insensitivity to the wisdom of economic forces" (p. 134). They add that it is clear that the Act can effectively criminalize decision-making mistakes made by directors. Thus, the same laws primarily aimed at protecting the general public from directors who have contributed to the insolvency by negligence, misappropriation or misconduct of company assets, are also likely to stifle entrepreneurship and damage the health of our economy (Lee & Gladstone, 1997). The following are a few examples of how the shortcomings and the consequences of directors' disqualification could impact negatively on entrepreneurship:

1. They disallow experienced entrepreneurs and founders of failed firms from re-entering the market due to various factors such as long-term or permanent disqualification, or due to the lack of available credit, in cases where the entrepreneur becomes personally bankrupt after the insolvency.
2. After suffering disqualification procedures, some entrepreneurs may experience a loss of perceived ability or become risk averse to own or manage future companies after the disqualification. Hence, when these entrepreneurs take decisions based on calculated risks, they may choose not to the risk ever again, thus depriving the "economy of an experienced and vital force for innovation" (Gladstone & Lee, 1995, p. 55).
3. They might potentially discourage innovative individuals with valid enterprise from entering the market for the first time, resulting in a loss of new engines which are crucial for economic revival and/or growth.
4. There are multiple reasons why a business can go bankrupt. However, with business failure becoming more and more stigmatized, a number of honest bankrupts continue to be stigmatized due to association with dishonesty.

5. When an honest director is asked to justify his/her actions in the Court, acknowledging that the Court may not be the best place to appreciate risk-taking and enterprise, may tend to lead him/her to act in an overly protective manner to avoid disqualification, thereby discouraging genuine risk-taking and entrepreneurship (Kennedy, 2002).
6. The process of disqualification is generally lengthy and not a very cost-effective way of establishing misconduct, since the exercise used does not determine whether the director is currently unfit but whether the he/she infringed some particular detail in the past (Hicks, 1999). With the rise in harsh economic conditions, there has been a rise in disqualification orders (Moules, 2012). This means that the governments are spending more and possibly with limited benefit in protecting the public. It would be more appropriate if more cost-effective procedures are found and the money saved is invested in educational programs for potential entrepreneurs and/or to support struggling businesses to cope with tough times.
7. The negative effect of directors' disqualification on entrepreneurship may be further extenuated when disqualification orders in other countries may lead to disqualification in a given country. The freedom of establishment principle of the Treaty which is set out in Article 49 enables an economic operator to carry an activity in more than one member state. The principle of the freedom to provide services, a set out in Article 56, gives the economic provider the freedom to provide services in more than one state without having to be established. These two principles are central to the effective functioning of the EU internal Market (European Commission, 2011). It is a known fact that entrepreneurs in a given country strategically take advantage of inexpensive and faster incorporation facilities in other countries and extend their services to other countries. The provisions to extend disqualification to those directors who have been disqualified overseas is legitimate, in the sense that it will help to prevent rogue directors from taking advantage of incorporation facilities in other countries such as the UK . However, what about those cases where the honest director has been unjustly disqualified? Omar (2009) pointed out that there is the difficulty of obtaining reliable information from foreign authorities and "whether the automatic disqualification would infringe the right to a fair trial under Article 6 of the European convention on Human Rights" (p. 41). This is a clearly major concern for directors who operate on a global basis and impacts entrepreneurial migration.

Conclusion

The fact that the Disqualification Act originally targeted only directors and singled them out for legal control has been described in the literature as illogical (Lee & Gladstone, 1997). This criticism might explain why new disclosure regimes go beyond the directors and include members of the management of a company, as in the case of the U.K., Germany and the Balkans, which we reviewed in this paper. In the case of the Balkans, the new legislation on disqualification incorporates restrictions even for founders of the companies in particular situations. More specifically, we saw that Croatians have provisions where "Due to current insolvency, if the firm has it's bank account blocked, the founder(s) is not allowed to establish new firms during the insolvency, and even his family members are subjected to these constraints". In our opinion, these restrictions go beyond providing market safety and protection to investors, and stifle further entrepreneuship in the Balkans; clearly not the right course of action in a time of harsh economic recession.

The government might see effective enforcement of the disqualification regime as a vital in its quest to support entrepreneurship and enterprise. However, the disqualification regime runs counter to the concept of free enterprise, where investors are free to take the risks with minimal government control, and can operate in an economic system that rewards on the basis of the investors' keen insight in their investment decisions.

We believe that the disqualification regime might inhibit genuine entrepreneurship, resulting in a significant drag on economic growth and prosperity, at a time when all governments should be findings measures in order to encourage potential entrepreneurs in their business realizations and to stimulate the economy in their country and to weather/overcome the recessional storm(s).

In conclusion, most of the points we raised in this paper are not backed with empirical evidence. We believe that there is a need for more focused empirical and inductive research that attempts to support or contradict our hypotheses. Such research would better inform policy makers in their quest to protect investors and the public at large from dishonest company directors and members of management, without stifling entrepreneurship in their country.

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