BUSINESS JUDGMENT RULE - EXONERATION OF LIABILITY CAUSE OF THE ADMINISTRATOR. COMPARATIVE LAW STUDY

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Abstract
Starting from the origin system- the American law, and from the principles of corporate governance which establishes it expressly, the study reveals the regulatory manner in Company law and also the implication of legal practice, of the "business judgment" rule. Seen from a double perspective: as a ground for exclusion of liability clause from civil liability of the administrator, but also as a counterweight to the diligence and prudence duty, the business judgment rule is analyzed in accordance with the legal liability falling within the administrator's duties, both by Law no.31/1990 and the New Civil Code. Discussing also by the standard for appreciating the prudence and diligence- the criterion of the good administrator- imposed by the Romanian legislation, compared with other countries, the paper approaches the manner for regulating the business judgment rule in American law, and the manner in which it has been transposed into the Romanian legislation, its application realm, the invocation method and the consequences of this rule on the civil liability of the administrator. This paper constantly refers to the legal practice solutions in common-law states, where the rule stems.

Keywords: *duty of diligence, duty of prudence, business decisions, no-reliance, duty to inform, duty to care in decision making.*

Introduction

Given the legislative reform in business law and adequacy to the European Union standards, the Romanian lawmaker amended the Law no. 31/1990 on trading companies, including the principles of corporate governance. In this context, the regulations on the administrator's status were revised, instituting a series of legal duties of prudence and diligence toward the company, by applying the business judgment rule.

The study focuses mainly on the role of the business judgment rule within the decision making process in which the administrator is involved and its effects regarding the civil obligations for the adopted decision. Thus for the exercise of the administrative duties of the trading company, the administrator is often faced with options, having to make that decision which, according to the information it holds and based on his own judgment appears to be more profitable for the company. If such a decision is made with the prudence and diligence consistent with the standards set by the Law on trading companies and the New Civil Code, the administrator will not be held liable. In this context the business judgment rule can be seen as a cause for exoneration of liability of the administrator, establishing a type of common error in which all the persons with the same status might find themselves, acting in similar circumstances.

For a better understanding of the operating mechanism of the business judgment rule, within the approach taken, the starting point was represented by the analysis of the content the duties of diligence and prudence, a legal obligation falling upon the administrator, according both to Law no. 31/1990 and to the New Civil Code. Such an analysis is required, firstly, because from the lawmaker point of view the business judgment rule is a counterpart for the duties of diligence and prudence, and secondly, whereas the duties of diligence and prudence require also a new objective evaluation criterion of the administrator, by reference to the standard of behavior of the "good administrator", criterion established both by law no. 31/1990 and by the New Civil code.

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Starting from the American dogma[1] according to which the duty of diligence holds three constituents: duty to monitor the business's activity, in general and of managers in particular, duty of inquiry and care required for decision making, we've tried to define the prudence and diligence concept, by identifying some correspondence of these three obligations in the Romanian legislation. At the same time, while bearing in mind that, currently, the Romanian jurisprudence hasn't offered many cases for the administrator's accountability for breaches regarding the duties of prudence and diligence, context in which the business judgment rule could be invoked as a cause of exoneration of liability, the study presents comparative jurisprudential examples of the common-law states. In an adjacent manner to this issue, the means by which can be claimed the business judgment rule as a cause for exclusion of liability in an eventual proceeding based on the liability of the administrator of the trading company for breaching the diligence and prudence duty evokes interest. The problem arises in the context of the system of origin (common law), the business judgment rule establishes a presumption of good faith when making a business decision, the tendency of the court being not to censor the merits of the latter. In Romanian literature, the problem has been subject to some doctrinal differences, being outlined two opinions. According to one opinion, the rule establishes the presumption of good faith of the administrator in the decision making process[2], in a contrary view[3], the rule doesn't impose in favor of the administrator a defense presumption with consequences in the probative plan. Although we believe that the business judgment rule imposes in favor of the administrator a defense presumption which can be rebutted by the corporate claimant, we believe however that the court should not supersede the administrators' decision and to examine the opportunity of the business decision, but only to verify the fulfillment of the requirements imposed by the business judgment rule, which means to verify if the decision was adopted after a preliminary inquiry and with the belief that the undertaken action was in the company's best interest.

1. Duty of prudence and diligence

Long disputed in the legislative forum[4], the duty of diligence and prudence of the administrator in a trading company has found a well deserved regulation, both within the body of the Law on trading companies no. 31/1990[5] and also in the New Civil Code[6]. Thus according to art. 144^1 paragraph 1 from the Law "*The members of the board of directors shall exercise their term of office with loyalty, in the company's interest*". The regulation, however, is not limited only to the members of the board of directors, but, it also considers the managers, respectively the management and the supervisory board from the dual system[7] of the joint-stock company, as well as any other

[1] M. Eisenberg, *The duty of care of corporate directors and officers*, (University of Pittsburgh Riview, 1990): 945.

[2] Radu N. Catana*, "*The diligence and prudence duty of the administrators in the context of law reform regarding the trading companies", *Pandectele Române* 3 (2006): 195-196.

[3] Lucian Bercea, " The business judgment rule: on the new regime of accountability of the joint stock company administrators*", Pandectele Române* 8 (2007): 47-48

[4] We say much disputed due to the inconsistency of the lawmaker who oscillated between legislative establishment or to suppress. Chamber of Deputies amended the provisions of the article, by removing the obligation of prudence and diligence so that on the date of enactment of Law no. 441/2006 during the meeting of October 31st, 2006, art. 144^1 paragraph 1, contained the following provisions "The members of the board of directors shall exercise their term of office with loyalty, in the company's interest". Through OUG no. 82/2007 the Government intervened, establishing the duty of diligence and prudence in its current form of the analyzed article.

[5] Law on trading companies republished in the Official Gazette no. 1066/17.11.2004, including subsequent amendments.

[6] Law no. 287/2009 on the Civil Code, republished in the Official Gazette. no. 505/15 July 2011 pursuant to Art. 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code (Official Gazette. No. 409/10 June 2011).

[7] According to art152, art. 153^2 paragraph 6 and art. 153^8 paragraph 3, that provide that art. 144^1 shall apply accordingly.

administrator, regardless of the company type where he exercises his duties which their position involves. With general applicability to any legal person, the new Civil Code provides the duties of diligence and prudence of the administrator of the legal person in accordance with art. 213 ("the members of the management of a legal person must act in its interest, with prudence and diligence required for a good owner").

1.1. The concept duties of prudence and diligence. The texts above mentioned have a dual role: as an establishment, as a source for the duties of prudence and diligence, but also as an objective criterion for evaluating the administrator in question, with specific reference to a standard conduct as a "good administrator".

Under the first aspect of the concept duties of prudence and diligence, in theory[8] it has been defined by reference to the obligation of loyalty, being considered as bipolar obligations. The loyalty duty implies the exercise of the mandate, without the involvement of the personal interest of the manager; on the contrary, by virtue of the prudence and diligence duty, the administrator must be involved in the activities of the company and must manage them as a good professional and based on profitability criteria.

In the American law, the duty of diligence concerns the administrator task to fulfill his mandate in good faith in a manner in which he considers to be appropriate for the company's interests and with prudence which would reasonably be expected from a good owner acting under similar conditions. The Spanish law establishes as falling in the administrator's duties the general duty of diligence, under which he performs his duty with the care of a tidy entrepreneur and a loyal representative.[9]

In terms of evaluation criteria the US law envisages the prudent owner, while the Spanish law envisaged the tidy entrepreneur. The English law[10] relates the standard of duty of diligence to the conduct a person that has the knowledge, the skills and experience should reasonably have from the moment it holds the position as an administrator.

Under the Romanian law, the standard for appreciating the manner of implementation of the duty of diligence is the one of the "*good administrator*". Until the amendment of the Law on trading companies, and the establishment of the *"good administrator"* criterion, the principle of aggravation of responsibility of the administrator was based on art. 1540 Civil Code from 1864 (currently repealed), under which the representative with pecuniary interest was responsible for failure of the mandate for any fault, negligence or imprudence, which was assessed in abtracto, in relation to the conduct of a good owner, honest and diligent, found under the same circumstances as the one incumbed upon the concerned administrator, criterion also undertaken by the New Civil Code. In art. 213 of the New Civil Code *"the members of the management of a legal person must act in its interest, with prudence and diligence required for a good owner"*. Thus we can state that: the criterion of the good owner used by the New Civil Code is similar to the criterion of the good administrator provided by the Law on trading companies.

This criterion for assessing the fault. according to art. 144^1 para.1 from the afore mentioned law, and also according to art. 213 of the New Civil Code, is nothing more but the lawmaker's desire to regulate the accountability of the administrator for the slightest fault – imprudence and negligence. But the accountability of the administrator for the duties of diligence and prudence is engaged in accordance with the predictability of the consequences of the administration act. Thus predictability is analyzed in relation to the good administrator model, respectively to an abstract person who has

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[8] Radu Catană, *quated work*, p. 189.

[9] M. Eisenberg, „The duty of care and the business judgement rule in american corporate law*"*, *Company, Financial and Insolvensy Review*, (1997): 185. ; L.F. De La Gandara, „Le regime de la responsabilite civil de l' administrateur selon la loi espanole sur les societes anonymes*"*, *Gazette du Paris*, (2000): 165.

[10] Art. 158 of Companies Law Reform Bill, November 2005, on www.dti.gov.uk/bbf/co-law-reform-bill/.

the knowledge, the experience and the skills of a good administrator under the same circumstances. If the abstract model of the good administrator should or could have foreseen the injurious effects of the management actions, then the liability of the administrator concerned shall be engaged[11].

1.2. The content of the prudence and diligence duty. The law on trading companies, as is the law of other states, limits itself to establishing the duties of prudence and diligence, without giving any details. Thus, the doctrine has the task to analyze the elements which constitute these duties.

According to the German doctrine[12], the duty of prudence and diligence provided by art. &93 para.1 AktG[13], contains three obligations. Therefore, the requirement determines the administrators to act in accordance to the legal norms and on the provisions of the constitutive act (legal obligation) and to exercise their mandate with conscientiousness and professionalism, based on adequate information (duties of prudence and diligence in the narrow sense) and to make sure that the other administrators or staff are fulfilling their own obligations (duty to monitor).

In the US[14] doctrine it is assessed that **the diligence has three constitutive elements: the duty to monitor the company's activity, in general and of the directors in particular (duty to monitor/oversight), duty to inquiry and the care required to make decisions**.

The same three requirements can be found in the Romanian legislation, as it will be shown in the following, and it outlines as we believe, a broader outline for the duties of diligence and prudence of the company's administrator. Thus, the duty to monitor the directors and the staff is established in several legal provisions. In this sense, art. 142 letter d) lists among the basic skills of the administrators' board, "duty to monitor the directors".

The duty to monitor doesn't necessarily involve a review of daily activities in a detailed manner, only a periodic inquiry being sufficient in order to indentify the significant issues related to the company's management.

Similarly the duty of monitoring must also span to the management bodies of the dual system of management of a joint-stock company. Thus, according to art.153^9 letter a) *"the supervisory board has the following main attributions : a) exercise the permanent control over the leadership". In agreement with this provision, art. 153^1 para.3 expressly establishes that "the management shall exercise their powers under the control of the supervisory board*". And according to art. 153^4, paragraph 3 of the Law " *the supervisory board may request to the management any information that it deems necessary for the exercise of its control attributions and may carry out appropriate check-ups and investigations".* At the same time, the law establishes also the responsibility of the administrators towards the company for the acts of the managers or of the staff. According to art. 144^2 paragraph 2 " the administrators shall be liable towards the company for the prejudices caused by the acts of the managers or of the staff, where the damage would have occurred if they had exercised the supervision by virtue of the duties which their position involve. The liability for failing to comply with the supervision of the managers and of the staff rests solely with the administrators from the unitary system for the joint-stock company management. In doctrine[15] it has been argued that such a liability is based on the administrator's fault regarding the duty to monitor (culpa in

[11] Radu N. Catană, *quoted work,* p. 193. The author lists several cases of Belgian jurisprudence where the administrator hasn't been held responsible. Thus, the administrators couldn't be held responsible even though their acts lead effectively to the cessation of payment of the company because at the moment when the decisions were made, the prospect of their catastrophic effect could not be foreseen by a prudent and vigilant individual. To the same extent, the act of the administrator can't be held culpable if the shareholders claim that he was supposed to take all the necessary precautions to avoid the harmful effects, but the effects could not be normally and rationally established before.

[12] H. Fleischer, *Handbuch des Vorstandsrechts*, (Munchen: C.H. Beck 2006): 237.

[13] Under the German law, &93 paragraph 1AktG applies both to the administrators from the unitary system and leadership (vorstand) and to the supervisory board (aufsichtsrat) from the dual system, according to &114 AktG.

[14] M. Eisenberg, *quoted work*, 945.

[15] Radu N. Catană, *quoted work*, 196.

vigilando), and not on the warranty idea, so that the plaintiff company must prove the fact that the administrators haven't fulfilled the supervision duties that were likely to avoid the harm brought to the company through the staff's acts.

Closely related to the duty to monitor, the administrator must be well informed also about the progress of the company. The duty to inquiry is mandatory and prior to taking any decision. The administrator's duty to inquire is also established in art. 143^1 paragraph 3 and art. 153^4, paragraph 3 of the Law. According to the afore mentioned texts, by virtue to the exercised control, as noted above, the administrators/members of the supervisory board are obliged to request to the management the information that it deems necessary. According to art. 143^1 paragraph 3 *" any administrator may ask from the manager information with regard to the operational management of the company. The manager shall inform the board of directors of the operations undertaken and on those had in view, on a regular and comprehensive basis"*. According to art. 153^4, paragraph 3 "*the supervisory board may request to the management any information that it deems necessary for the exercise of its control attributions and may carry out appropriate check-ups and investigations*".

At the same time, the directors/leadership members also have the correlative duty to inform regularly the board of directors/supervisory board regarding the company's activity. Therefore according to art. 144^2 paragraph 3 "*the managers shall notify the board of directors of all incongruities established while meeting their attributions"*. Correlatively art 153^4 paragraph 1 and 2 regulates the duty to inquiry of the supervisory board by the leadership on all the activities of the company and the modalities by which this information is made. Consequently, " *at least once in 3 months, the management shall submit a written report to the supervisory board with regard to the company's management, to its activity and its possible evolution"*. Besides the periodical information, *"the management shall communicate in due time to the supervisory board any information with regard to the events that might have a significant influence over the company's condition"*.

The lack of information or insufficient inquiry of the administrators for the undertaken management acts can seriously injure the company, engaging their liability for the lack or prudence[16].

Another obligation of the company's administrator is the duty to show care in decision making. By virtue of this obligation, the management decision must be motivated and preceded by effective discussions and debates within the management board respectively the supervisory board.

Also in the decision making process the corporate interest is most important, in the sense that it must be favorable, useful to the company and therefore to the shareholders. In other words, before adopting a decision regarding the company's management, the administrator must allow sufficient time and must have access to all relevant information, which should be provided in due time. Also at the time of the adoption of the decision, he must have acted in good faith, respectively with the belief that the actions are taken in the company's interest without entailing his personal interest[17].

Considering the relatively recent introduction in the legislation of the duty of diligence and prudence to which the administrators and directors are held against, respectively the management and

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[16] In the case of Smith v. Van Gorkom, the Supreme Court of Delaware found the directors' negligence – general manager who contracted the credit despite the reservations, given over the telephone, of the rest of the board members, on the possibilities of repaying the loan on time, and took the decision to commit in less than three hours, during a representation at the Chicago Lyric Opera. R.W. Duesenber „Duty of care, duty of loyalty and the business judgment rule", *Company Financial and Insolvency, Review* (1997): 486.

[17] Timisoara Court of Appeal, Commercial Division, decision no. 64/30 March 2010, the Judicial Courier 11 (2010): p 613, with note by C.B. Nasz. In this case, the corporate interest is not met, while the judicial transaction by which the chairman of the board of directors of a joint-stock company acknowledges and undertakes the obligation to pay an amount that exceeds not only the social capital of the legal person, but also the total capital, to another trading company, owned by him together with a 1st degree relative and whose manager is for approximately 10 years.

supervisory members, currently, the Romanian law hasn't given us case laws for the breach of the administrator's duty of diligence and prudence. Instead, theory jurisprudential examples were cited from the common-law states. Thus, it is considered to be a breach of the administrator's duty of diligence and prudence the action where the administrators concludes contracts under unfavorable conditions for the company without a prior inquiry regarding the market demand; engages the company in an unprofitable operation, operation which is instead profitable for a third party[18]; allows withdrawals from the liquid assets of the company, in order to pay for a contract which clearly was no longer carried out by the contracting partner[19], or confides the liquid assets to a bank whose bankruptcy is imminent. In the same context, of breaching the duty of prudence and diligence lies also the action o f the administrator which carries out groundless investments, concludes credit sales contracts, for long periods, bringing the company to cessation of payments, or doesn't take part in the company's activities (doesn't participate to the board of directors meetings, fails to act in case of nonpayment of a debt by a debtor, doesn't improve the services provided by the company).

However, even if a decision turns out to have negative consequences for the company, the administrator can't be held responsible for the prejudices, if he made the business decision after a prior inquiry and with the justified confidence that he acted in the company's interest. In this case operates the exemption case provided by art 144^1 paragraph 2 according to which the administrator doesn't breach the duty of prudence "if at the time he made that decision, he is reasonably entitled to consider that he acts in the company's interest and based on certain adequate information". This makes it possible for the administrators to adopt business decision, subject to certain conditions, without the fear of being held responsible towards the company.

Through such a regulation the lawmaker has implemented in the Romania law a rule "imported" from the English and American law – the business judgment rule.

2. The juridical nature of the "business judgment "rule in the American law and in the Romanian law.

Currently the business judgment rule is considered to be an integral part of the corporate governance principles, in the sense that the White Paper on corporate governance in South East, drafted under the aegis of the Organization for Economic Cooperation and Development (OECD) provides at pct.250 that : "*the notion of business judgment or an equivalent provision in the respective legal systems should be introduced in order to protect board members from being held liable for wrong business decisions".* "*The business judgment rule aims at granting board members and senior management wide latitude in deciding the business affairs of the company. They should not be held liable for the consequences of their exercise of business judgment – even for obvious mistakes – unless certain exceptions apply. These exceptions include fraud, conflicts of interest, acting outside the corporate purpose and failure to be sufficiently diligent and exercise due care in the basic activities of the board member's role (such as attending meetings, seeking to inform oneself and deliberating meaningfully before making important decisions".*

In the American law[20], where in fact it has its source, the position of the business judgment rule has been outlined in the sense that "*the business judgment rule which began as a minor exception, it is now a defense so consistent, that the only remaining challenge is to try to prove that*

[18] In this case, the liability of the directors has been held for negligence, given that they incurred a report on the securities which they bought giving the seller the possibility to repurchase them within 6 months at the original sale price, without any gain in the favor of the company from this transaction (case law Litwin v. Allen, 1940 New York Supreme Court, in R. Duesenberg, quoted work, p.200).

[19] O. Caprasse , *La responsabilite civile profesionnelle des administrateurs. Actualite du Droit*, (Liege, 1997): 486.

[20] D. Bazelon, „Client Aginst Lawyers*"*, *Harper`s Magazin* (1967): 104.

(it) doesn't cover quite all forms or corporate fraud". But even in this context, the juridical nature of the business judgment rule is controversial, facing two trends[21].

According to the first opinion, the business judgment rules is qualified as a standard for the administrator's liability, which requires an analysis, on behalf of the judge , of the business decision from two perspectives good faith and rational decision. Initially the rule could be rebutted only for cases such as fraud or self-interest, but currently, are accepted also the cases where duty of prudence and diligence are breached in a conscious manner. Thus, the plaintiff must demonstrate the breach of any one of the duties of the administrator (diligence, prudence and loyalty), and the judge may censure the administrator's decision through the triad imposed by the rule.

According to the other current, named the **abstention doctrine** the administrator's decisions are protected against judge censorship. Therefore, the authority of the administrators in corporate governance is absolute, and the court doesn't have the competence to impose its own decision to the administrator. The court may not rule on the merits of the decision, but can only review if the decision was made in bad faith or in the context of conflict of interests or failure to inform. Under this trend the business judgment rule establishes a presumption of good faith in decision making, without giving the courts the possibility to censure the background of the decision.

In the Romanian legal system, business judgment rule has a twofold purpose: exoneration of liability causes of the administrator/ manager of the trading company, and also a limit to the duty of diligence and prudence which incumbed upon them.

Mainly, it has the juridical nature of an exemption from liability cause of the administrators and directors for any decisions that may have harmed the company. Even if he adopted a harmful decision for the company the administrator, respectively the director shall not be held responsible for the harm done if he adopted the decision in the honest belief and excusable that he acted in the company's best interest and based on an informed basis. Consequently the rule doesn't impose in the favor of the administrator a presumption in defense, to be rebutted by the plaintiff (the trading company). On the contrary in the Romanian law, the administrator's position is opposite to that of the base system, having the obligation of proving effectively all the constitutive elements of this rule. In an eventual action for damages exerted by the company or by the shareholders, the administrator is the one claiming in its defense the business judgment rule, however proving that he acted on an informed basis and deemed to be in accordance with the social interest.[22]

Pursuant to art. 144[1], paragraph 2 of the law: *"the administrator, does not breach this obligation if ...."* the business judgment rule would be, more of a cause that relieves the illicit nature of the act. In other words, as a result for applying the rule, the administrator, respectively the director is not liable for adopting a bad decision that resulted in harm for the company, if the conditions provided by the legal text are met, namely: when adopting the decision, he considers that he acted in the company's interest and on an informed basis.

In an adverse opinion[23], was claimed that only in appearance, the rule relieves the illicit nature of the act and that in reality it has the value of cause acting on the subjective level, removing fault (guilt). Therefore, the text should be read as follows "the administrator does not culpably violate this obligation, if ...".

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[21] S.M. Bainbridge, „The Bussines Judgement Rule as Abstention Doctrine*"*, *Vanderbilt Law Review* 57, (2004): 102.

[22] On the contrary, Radu N Catana, *quoted work*, p. 195-195. The rule establishes the presumption that administrators have acted, or performed a physical act of management, only after an prior inquiry, and with the rational belief that the he act in the company's interests. To the extent to which, the company (shareholders) fail to prove the failure to meet one of the conditions for applying the presumption, the administrator shall not be held responsible, regardless of the finding of an injury suffered by the company or its shareholders.

[23] Motica I. Radu, Lucian Bercea, "From the business Judgment Rule to the business judgment rule: in search of a link", in *Ad. Honorem S. D. Cărpenaru. Selected legal studies*, (Bucharest: Publishing CH Beck, 2006): 119.

We believe that the subjective element plays an important role in applying the business judgment rule, so that when making a decision, the administrator should have only the **honest belief** that he acted in the company's best interest and based on an informed basis. He doesn't have to act effectively in the company's best interest, neither on an informed basis. In order to free itself from the liability, it is sufficient for the administrator to believe that he acted for the company's best interest and that the information on which his decision is based is real. From this point of view, applying this rule excludes making a decision which is deliberately erroneous which, through its gravity, can't characterize a person as diligent and prudent, so that it can't be regarded as a cause which excludes guilt. The rule and its exonerating effects are applied only in the case of culpa of levis and levissima when the administrator makes a decision.

Secondly, in the Romanian legislation, the business judgment rule was introduced as a counterweight to the administrator's duty to act with prudence and diligence provided by art 144^1 paragraph 1 from the Law on trading company and respectively art. 213 of the New Civil Code, and also for the settlement of the action for responsibility against the administrator and directors for the harm caused to the company (art. 155 Law no 31/1990, and art.220 New Civil Code). Thus, the administrator/director must not be absolutely prudent and diligent but, as diligent and as prudent necessary, such that when making a decision to be reasonably entitled to believe that he acted in the company's best interest and based on an informed basis. On the contrary, the administrator's prudence and diligence must be related to "measures concerning the company's management", that is, to the business management process in relation to which the business decision will be made. In this context, the administrator will be liable for the achievement of the duty of prudence and diligence both under common and special conditions of the business judgment rule.

3. The applicability of the business judgment rule under Romanian law

3.1. ***Application***. The scope of the business judgment rule, focuses on two issues, namely whether it is strictly limited to the joint-stock company, and which would be the persons that can claim the cause of exemption from liability.

Regarding the first issue, compared to including analyzed legal text in Chapter IV of Law no. 31/1990 on "Joint stock companies", the conclusion that the business judgment rule found its implications only in the field of joint stock companies, may be required. Related to the effect of the exemption from liability, we could say, with good reason that the company's administrators in a joint stock company are highly privileged in comparison to the administrators of the other type of trading companies. We believe however that the business judgment rule should benefit to the administrators of all trading companies, equally, without discrimination. Given the position of the administrator in a joint-stock company, net differentiated in terms of the legal regime of the liability, compared to the administrator of a general partnership or a limited liability company, *de lege ferenda* it is required the express settlement of the business judgment rule as a reason for exemption of liability also for the administrators of all the other types of companies.

With regards to the protected persons, the law itself solves this dilemma, stating explicitly who takes advantage of the business judgment rule. Thus, for the unitary system of management, the rule has effects on both on both the management, pursuant art. 144^1 paragraph 2, and on the directors pursuant the legal standard with reference to art. 152 which extend the implementation of the business judgment rule also on the latter ("the provisions ...art. 144^1 .... will apply also to the managers which are under the same situation as the administrators"). For the dual management system, by the legal standards with reference of art.153^2 paragraph 6 and art 153^8 paragraph 3 and the provisions of art. 144^1 the management board and the supervisory board are protected by this rule. In other words, from the exonerator effects of the business judgment rule can benefit both individual invested with executive and non-executive positions.

3.2. Conditions of applicability. The effect of exemption from liability of the rule occurs only to the extent to which the conditions provided by art 144^1 paragraph 2 from the Law are met, namely, when taking a business decision the administrator should have been entitled to consider that he acts in the company's benefit and based on an informed basis. The text examined establishes only the main criteria that are to be considered. In concrete, the requirements shall be assessed on a case by case basis, meaning any evidence can be considered as proof.

Firstly, there has to be a business decision, consisting in adopting or failure to adopt certain measures related to the administration of the company. For the concept of business decision a legislative definition can be found under art. 144^1 paragraph 3 "*a business decision shall be any decision to take or not take certain measures with regard to the administration of the company*".

When adopting a business decision, the managers must act within their given powers by law and by the constitutive act, the rule and its exonerating effect, not applying if the decision is made by exceeding the legal and statutory powers.

The business decision envisages "*measures regarding the administration of the company"*, namely the company management activities in the sense of ordinary measures, management, with which administrators are usually vested with. Thus, the question that arises is whether the decisions regarding the delegated powers under art. 114 of the law, fall within the provisions of the business judgment rule? Specifically, will the administrator be exonerated as a result of invoking the rule, when taking a wrong decision like changing the location of the registered office , changing the object of activity and increasing the registered capital? We, along with other authors[24], believe that for the case where the board of directors is empowered, by the constitutive act or by decision of the extraordinary general assembly, the powers regarding the revision of the company, the decisions made with the purpose of carrying out these duties, are not subject to the business judgment rule, and don't constitute decisions in the sense of art. 144^1 paragraph 3, because they go beyond the strict duty of administration of the company.

Also the rule finds no application in respect to the administrators who have not consented to the adoption of that certain decision, and who written down their objection in the register of the board of directors and notified the censors or the internal auditor and financial auditor, pursuant art. 144^2 of the Law. Their objection of these individuals to adopt a certain decision is equivalent with the absence of an unlawful act, which eliminates, *ab initio*, the application of the rule.

Secondly, the administrator, respectively the director, must adopt the decision with the excusable belief that he acted in the company's interest. Stating that " at the time of making the business decision, he (the administrator) is reasonably entitled to believe that he is action in the company's interest...", the business judgment rule establishes a common fault in which all persons with the same statute would find themselves, under the same or similar circumstances.

The rule claims that the administrator should be of good faith, respectively to honestly believe that he acts in the company's interest. Thus, the condition is not fulfilled of the administrator in question pursues a personal interest when making or omitting to make a business decision. In other words, the conflict of interest eliminates the applicability of the business judgment rule.

Thirdly, there should be an inquiry of the administrator, respectively director, appropriate and prior to the adoption of the decision. The rule is preceded by the establishment of the duty of prudence and diligence, which contains the duty of the administrator to inquiry and to request certain relevant information, to consult experts, to assign a preliminary term necessary for the decision making process, depending on the complexity of the decision.

At the same time, the inquiry must be sufficient so that it will give the administrator the possibility to appreciate if he acts in the company's benefit. Whenever there is an insufficient inquiry or the information was obtained from individual who do not have the necessary competence for

[24] Lucian Bercea, *quoted work*, 47-48.

offering that information, the rule finds no application, and the exonerating effect from liability doesn't occur[25].

Once those three conditions are met, the administrator, respectively the director, is not held liable for the harmful effects his decision has towards the company. In this sense a distinction should be made: for the decisions that are harmful for the company, but based on a proper prior inquiry and which are the result of a rational judgment, the administrator shall not be held liable, instead, he will be held responsible for any other harmful decision, taken without prior inquiry and judgment.

3.3. Juridical effects. The main effect the business judgment rule causes is the exemption from liability of the administrator, respectively of the director for any damages caused to the company through the adopted business decision. The rule is based on the common error mechanism where the administrator/director is found, when adopting a harmful decision, believing that he is action in the company's interest and basted on an informed basis.

Alternatively, the business decision cannot be censored, specifically judicially annulled. Therefore, the prejudice will be supported by the company on whose behalf the business decision was made, as loss caused by errors in management not imputable to the administrator. And in particular the shareholders are those who bear the losses caused by the business decision, because, by empowering the administrator, they assumed the risks involved with this choice.

Although the administrator is free from the liability for the harm caused to the company which he managed, the possibility to be dismissed, ad nutum, from his current position with the consequent impossibility of reintegrating in the same position.

Conclusions

However, although much disputed in theory[26], in terms of its regulatory purpose[27], the business judgment rule has established itself in the Romanian legislation, being essential for the business environment. In the absence of such a cause of exemption, if the administrator, you see experienced in any situation, with the possibility to taking personal responsibility for the damages the company, his activity and consequently the company's activity would be blocked.

In this sense, in theory[28] it has been stated that the meaning of "business judgment rule" is to allow the administrators to make decisions and to run affairs without the constant fear that he risks civil liability towards the company. Indeed, by virtue of this institution, the courts may be called rule upon the activities and managerial acts of the trading companies' administrators as long as there is no evidence that they have breached their duty of prudence and diligence or that they have acted in bad faith, in self-interest or on a groundless basis, without any rational support.

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[25] See the case Trans Union Corp. v. Jerome Van Gorkom, 488 A.2d 858 (Del. 1985), the Delaware Supreme Court. In this case, the Chairman of the Board has been charged with the fault that he limited himself, in a negligent manner, in achieving information only from an employee, about who knew or should have known, that he had interests in the transactions on which the administration was to decide (presented by R. Catana, *work quoted*, footnote 50).

[26] Lucian Bercea "business judgment rule: an impossible legal transplant" *Pandectele Române* 3 (2006): 201-208. The rule was described as incompatible with the Civil Code in force at that time, which instituted the principle of aggregation of damnum emergens with lucrum cessans (Art. 1084) and the principle of limitation of liability to the foreseeable harm (art. 1085), context in which the harmful outcomes of a business decision should be seen as predictable, and therefore as avoidable. It was also argued that it was difficult to accept the rule as an exemption of liability cause in a system where the administrators are responsible for culpa levis in abstracto.

[27] Within a year, both in the state of draft law as well as subsequently to its entry into force, the legal provision enshrining the business judgment rule has overlaid until final form, four regulatory options.

[28] Radu. N. Catana, *work quoted,* 198. The author concludes that without this protection, considered of common sense in the business environment, the companies would be unable to attract competent and motivated administrators.

Related however to the regulatory methods of the business judgment rule only in Company Law no. 31/1990, even though the duty of prudence and diligence is, as noted above, given a general term of applicability by the New Civil Code, we wonder to what extent, invoking this rule as a cause of exemption of liability would exceed the strict framework of a trading company. This is because the New Civil Code, even though it governs the duty of prudence and diligence as a legal obligation incumbed upon the administrator of any legal person, doesn't cover the situation of his exoneration of liability, art. 214 of the New Civil Code being incomplete in this matter. De *lege ferenda*, an express regulation it is required of the business judgment in the New Civil Code legal text, the more so since it represents a special law with general applicability in relation to the Law on trading companies which is a special law.

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