THE DUTY OF CARE AND BUSINESS JUDGMENT RULE IN AUSTRIAN COMPANY LAW

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Abstract: The duty of care is a core instrument to incentivise managers to act diligently and in the best interest of the company. The following article highlights some key points under Austrian law and puts special emphasis on the business judgment rule, which aims to limit the liability risk of board members arising from the problem of judicial hindsight bias.

Keywords: duty of care; business judgment rule; principal–agent conflict; directors' liability

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1. INTRODUCTION

Directors' duties are an instrument designed to ameliorate principal––agent conflicts. Such conflicts exist when one person's welfare (the principal's) depends on actions taken by another (the agent). Obviously, there is a danger that the agent acts in its own interest and not in the best interest of its principal, either by employing less time and thus being less diligent (e.g., via shirking), by diverting part of the proceeds of its actions directly into its own pockets or via other forms of rent-seeking. The conflict is even more dangerous to the principal in case of a situation of asymmetry of information, where the principal may find it difficult to assess the agent's performance due to a lack of information.[1] To overcome that problem, principals must spend money on monitoring the agent ('agency costs') or else factor in their expectations regarding the agent's self-serving behaviour into the remuneration they are willing to provide.

The most obvious principal–agent relationship exists between the shareholders and management.[2] Shareholder wealth is directly affected by the manager's actions. Under most legal systems, managers are bound by fiduciary duties to the company, i.e., they are obligated by law to act in the company's best interests, which indirectly protects

[1] For the company law context see ARMOUR, J. – ENRIQUES, L. – HANSMANN, H. – KRAAKMAN, R. The Basic Governance Structure: the Interest of Shareholders as a Class. In: ARMOUR, J. – ENRIQUES, L. et al. *The Anatomy of Corporate Law*. 3rd ed. Oxford: Oxford University Press, 2017, p. 52.

[2] ARMOUR, J. – HANSMANN, H. – KRAAKMAN, R. Agency Problems and Legal Strategies. In: ARMOUR, J. – ENRIQUES, L. et al. *The Anatomy of Corporate Law*. 3rd ed. Oxford: Oxford University Press, 2017, pp. 29 et seq.

shareholders as well. That is the core issue of directors' fiduciary duties, among them the duty of care.[3] The latter is the main subject of this contribution. Of course, the main problem for shareholders, however, is to ascertain whether managers actually comply with this duty as information asymmetries are especially strong in this setting – an issue we cannot deal with in this article.

Of course, the duty of care is not a precise rule, but something that law and economics scholars call a standard, that is a general principle, which has to be specified according to the precise circumstances of the case.[4] Company law makes use of such standards since it is impossible to determine the appropriate handling of each and every one of the myriad different situations that may arise during a company's lifetime by precise legal rules or even in the contract setting up the company, that is its statute. Such statutes are always incomplete contracts. If the law uses a standard, the courts will have to determine its correct application *ex post*.

As a matter of statutory law, the duty of care is laid down for both Austrian company types, the *Aktiengesellschaft* or *AG* (the public company form)[5] and the *Gesellschaft mit beschränkter Haftung* or *GmbH* (the private company form)[6] in a very similar manner, although differences exist especially as far as the rules on liability for a violation of the duty is concerned. Similarly, the rule, in principle, applies to all types of board members, i.e., to members of the board of directors and – where it exists – to members of the board of supervisors.

Quite clearly, this type of principal–agent conflict is not only an issue of company law. The situation is very similar in partnerships or even in (private) foundations, which are of considerable importance in Austria. But even outside the law of business organisations the issue is known, even if the specific issues of monitoring resulting from a large number of principals do not exist to the same extent. Hence, in Austrian literature the parallel to the mandate, already regulated in Article 1009 Civil Code from 1812 is emphasized.[7] One can find other parallels, e.g., in the rules for commission agents or commercial agents.

2. PURPOSE AND DISTINCTIONS

The main purpose of the duty of care is to incentivise managers to act diligently and in the best interest of the company but also to avoid shirking. As a rule, Austrian practice emphasises this forward-looking approach.

Of course, the duty also serves as an anchoring point for various consequences if it is violated. First, managers may become liable for damages, which helps in providing redress to the damaged parties. However, one has to be aware that, in most cases,

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[3] See ARMOUR – ENRIQUES – HANSMANN – KRAAKMAN, *The Basic Governance Structure…*

[4] For the distinction between standards and rules see, e.g., POSNER, R. *Economic Analysis of Law*. 7th ed. New York: Wolters Kluwer, 2007, pp. 586 et seq.

[5] See Art. 84 Austrian Aktiengesetz („AktG").

[6] See Art. 25 Austrian Gesetz über die Gesellschaft mit beschränkter Haftung („GmbHG").

[7] See (albeit for the duty of loyalty) TORGGLER, U. Zivilrechtliche Grundlagen der Treuepflichten. In: KALSS, S. – TORGGLER, U. *Treuepflichten*. Wien: Manz, 2018, pp. 1 et seq.

no liability rule can achieve full compensation due to the typically existing mismatch between the damage sustained by the company and the director's personal property, although the company can address this, at least partially, by adequate D&O insurance. In any case, the threat of liability supports the forward-looking aspect of the duty by focussing managers' minds on its proper fulfilment. Second, a violation of the duty of care may be grounds for the removal of a director.[8] This issue is especially important for the *Aktiengesellschaft*, as directors can only be removed for cause,[9] but may also become crucial for directors in a *GmbH*, at least as far as the termination of their employment contract is concerned.[10]

In any case, this duty of care must be sharply distinguished from the duty of loyalty.[11] The former is designed to ensure, as far as possible, careful behaviour, managerial diligence, and proper decision taking, while the purpose of the duty of loyalty is to align the actions of board members with the interests of the company, in particular, but not only, by managing conflicts of interest. In the case of the duty of care, the actions of board members are covered by the Austrian-style business judgment rule (BJR; see in detail below 6.), whereas the BJR is not applicable to the duty of loyalty.[12]

The demarcation between these two duties is not completely clear. This can be demonstrated by the example of donations, which lie, as it were, on the borderline between the duty of care and the duty of loyalty. Such donations can of course be in the interest of the company, but excessive donations are clearly not. Hence, one can understand excessive donations as a problem of the duty of loyalty, as that duty is designed to align managerial actions with the interests of the company or enterprise. This focus also corresponds to the fact that the duty of confidentiality is generally classified as one manifestation of the duty of loyalty – here, too, it is less about a conflict of interest, but rather about the alignment of actions with the interests of society.

However, this would mean that donations as such are not protected by the BJR. This, however, would not be appropriate. Whether or not to donate is a business decision that should, as a rule, only be open to rough judicial scrutiny. Hence, donations are an issue of the duty of care – at least if there is no conflict of interest involved. If, however, a director has a personal interest in the recipient of the donation, the duty of loyalty should apply. This does not mean that excessive donations without such conflict of interest are not open to judicial scrutiny, as excessive donations mean that the member of the executive board may not assume in good faith that they are acting in the best interests of the company; cases of clear abuse of discretion by a director are not privileged by the BJR.

In any case, the following will only deal with issues of the duty of care, not the duty of loyalty.

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[8] See Judgment of the OGH (Austrian Supreme Court) of 23 February 2016, 6 Ob 160/15w.

[9] See Art. 75 para 4 AktG.

[10] Under Austrian law, the employment or service contract is separate from the appointment as such. The former regulates the remuneration and other employment issues, while the latter as a matter of company law results in the power to manage and represent the legal entity.

[11] See WINNER, M. Die organschaftliche Treuepflicht. In: KALSS, S. – TORGGLER, U. *Treuepflichten*. Wien: Manz, 2018, pp. 137 et seq.

[12] Ibid., p. 139.

3. THE BENEFICIARY

Under Austrian doctrine it is clear, who benefits from the duty of care: the company itself. Hence, directors owe the duty to the company and only to the company, not directly to the shareholders or other stakeholders in the company. This does not mean that the duty of care ultimately is not designed to ameliorate the principal–agent conflicts between managers and shareholders, but rather that the company as a legal entity is put between the company and the shareholders – with the effect that creditors are protected by the duty of care as well.

This is important to underline, because the current international discussion tends to go further and to postulate that the directors owe their duty to a much broader set of beneficiaries, namely besides the shareholders also to other stakeholders, such as employees or communities affected by the company's activities. Austrian doctrine does not follow this trend.

Of course, this is closely connected to the issue of corporate purpose and the old discussion of shareholder or stakeholder centric systems of company law. In Austria, Article 70 AktG postulates for the public limited company that the *"board shall, under its own responsibility, manage the company in such a manner as the best interests of the enterprise require, taking into account the interests of the shareholders and employees as well as the public interest"*. This clearly is a pluralistic approach as to corporate purpose but does not change the fact that the directors owe their duties only to the legal entity itself, which, via the "interests of the enterprise" is also given priority in the above-mentioned company law provision.[13]

Hence, violations of the duty of care (and other directors' duties, such as the duty of loyalty) only give rise to legal remedies of the company itself. Thus, any compensation must be made at the company level and not directly to the shareholders. This helps in avoiding many small payments to individual shareholders and concentrates the proceedings at the level of the company. In addition, payment of damages to the company indirectly compensates shareholders via the increase in value of their shares. Quite clearly, damage suffered by other stakeholders cannot be compensated in this way. Hence, it is clear that – even in light of the stakeholder approach stipulated by Article 70 AktG – the interests of other stakeholders than shareholders are not protected by the threat of suits for damages being brought against the directors.

In line with this crucial decision – which, however, is common to most company laws – only the company has, at least as a starting point, standing to sue in the case of violations of the duty of care. Such suits must be brought by the supervisory board (see Article 97 para 1 AktG and Article 30l para 1 GmbHG) or, in the private limited company, by a special representative (see Article 35 para 1 no. 6 GmbHG). Under special circumstances, a minority of shareholders holding 10 percent can raise a liability claim

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[13] Of course, legislation may introduce specific duties of the directors directly against third parties. We will not deal with this issue and, in any case, such provisions are uncommon (see, e.g., Art. 9 and 80 Federal Tax Code or Art. 69 Insolvency Code). Additionally, the application of general rules of private law may result in a direct claim by third parties; see, for example, KRAUS, S.-F. – TORGGLER, U. Commentary § 25 GmbHG. In: TORGGLER, U. (ed.). *GmbHG*. Wien: Manz, 2014, mn. 39.

on behalf of the company (see, e.g., Article 134 et seq. AktG), but even in this case the verdict will order payment of damages to the company, not to the shareholders that have brought the claim. Special interest groups, such as NGOs, do not have standing unless they hold shares in the company.

This situation may lead to underenforcement especially if the company is widely held, as in such situations shareholders often lack the requisite information about the company's affairs necessary to unearth cases of mismanagement or are unwilling to take the cost risks involved with bringing a lawsuit – they may be rationally apathetic. In this situation, it is especially important that the supervisory board fulfils its monitoring function on behalf of the shareholders and claims damages against members of the board of directors. For that reason, Austrian legal scholarship postulates an obligation of the supervisory board to pursue[14] such claims, unless specific reasons, such as the potential unenforceability of the claim, exist. This is in line with a seminal decision by the German Bundesgerichtshof, the supreme court for, inter alia, matters of company law.[15]

Additionally, as long as the shareholders or at least the major shareholder support the directors, they are not exposed to liability in practice. This is especially important if the directors have acted for the benefit of a large shareholder but to the company's detriment. In such situations, liability lawsuits pose threats in two distinct circumstances: first, if the former dominant shareholder sells the shares and the new incumbent discovers what has happened and second, if the company becomes insolvent, as such claims will then be brought by the insolvency administrator on behalf of the creditors.

4. PERSONS SUBJECT TO THE DUTY OF CARE

The duty of care is applicable to both members of the board of directors and members of the board of supervisors, the latter being mandatory in public limited companies and in private ones with more than 300 employees.

As far as the board of supervisors is concerned, it is clear that the standards for the members of that board must be different from those for the directors: First, the board of supervisors has a different task, namely supervision and not management; hence, the requisite knowledge and capabilities of the members of the boards differ. Second, the members of the board of supervisors are not working full-time for the company; hence, they cannot be expected to be as knowledgeable of the company's affairs as directors are. However, in times of crisis, members of the board of supervisors must intensify their involvement in the company's affairs.[16] Apart from that, in substance, the standard is the same for all members of the board of supervisors, irrespective of whether they

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[14] Specifically, the supervisory board has to try getting the general meeting's approval necessary (see Art. 97 para 2 AktG) for bringing such claims; see KALSS, S. Aktiengesellschaft. In: KALSS, S. – NOWOTNY, C. – SCHAUER, M. *Österreichisches Gesellschaftsrecht*. Wien: Manz, 2017, mn. 3/666.

[15] Judgment of the German BGH of 21 April 1997, II ZR 175/95. *Juristenzeitung*. 1997, pp. 1071 et seq.

[16] KALSS, *c. d.*, mn. 3/645.

have been elected by the shareholders or, under the system of board level employee representation, delegated by the works council.

Under Austrian company law, managers have to act with the "due care of a proper and conscientious manager". This means that there is an objective standard of care, which does not depend on the skills of the individual manager but is determined by the objective requirements of the business.[17] Of course, the precise contents of the duty depend on the company's size and its line of business or, more generally, on the circumstances of the case. Hence, the details of the duty are hard to specify on a general level, which is typical of legal standards.[18]

This duty of care is determined by two factors: first, the requisite knowledge and personal capabilities of board members and, second, the proper diligence itself, i.e., the level of care necessary.[19] Apart from clear cases of carelessness, where the director does not get involved with an issue due to lack of interest, the former aspect is often central: If the director had had the necessary knowledge, they would have realised that action would have been necessary or would not have taken an unfortunate decision. This necessary knowledge depends on the industry and director's position in the company, but always is an objective standard. Hence, the argument that the manager did not know better will not help.

Finally, the duty also depends on the director's role on the board. Typically, the board's internal regulations assign specific duties to each board member, e.g., finance to the CFO or operations to the COO. Under Austrian law, this results in a primary responsibility of this member. However, the other members of the board still must monitor this field,[20] apart from the fact that certain core decisions cannot be delegated to single directors. Hence, management mistakes in finance may result in the COO becoming liable if this director did not properly supervise the CFO.

5. BURDEN OF PROOF

Generally, normal civil law rules apply with regard to the burden of proof. Hence, the company has to prove damage and causality. However, Article 84 para 2 AktG contains a reversal of the burden of proof, which is applied to the GmbH as well.[21] According to its wording, this reversal covers fault, i.e., personal reproachability. For the question of whether the director objectively acted in breach of the duty of care or

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17 See KALSS, *c. d.*, mn. 3/508.

18 For standards see above 1. In theory, superior individual knowledge would lead to a higher level of the standard of care; in practice, according to my knowledge this has not been an issue so far.

19 KALSS, *c. d.*, mn. 3/508.

20 See NOWOTNY, C. Commentary § 84 AktG. In: DORALT, P. – NOWOTNY, C. – KALSS, S. *Aktiengesetz Kommentar*. 3rd ed. Wien: Linde Verlag, 2021, mn. 4.

21 Either by analogy or by applying a similar rule of general tort law (Art. 1298 Civil Code).

otherwise unlawfully, the prevailing doctrine[22] and (most) case law[23] differentiate. The company must first present facts that suggest that the actions of the board members were in breach of duty ("prima facie evidence"), which is less than full proof. As a result, the members of the executive board (or the supervisory board) must prove that their conduct in the specific situation was not in breach of duty.

In order to discharge themselves from liability, the board member may also argue that the damage would also have occurred in the case of lawful conduct.[24] The corresponding burden of proof lies with the board member, particularly if the unlawful conduct increased the risk that the damage occurred in comparison to the alternative conduct that would have been in accordance with the duty of care.[25]

6. THE AUSTRIAN BUSINESS JUDGMENT RULE[26]

6.1 DEVELOPMENT AND JUSTIFICATION

Article 84 para 1a of the Austrian Aktiengesetz (AktG), in the version[27] applicable since 1 January 2016, stipulates the following in direct connection with the duty of care: *"A member of the executive board shall in any case act in accordance with the duty of care of a prudent and conscientious manager if, in making a business decision, he or she is not guided by extraneous interests and may assume, on the basis of appropriate information, that he or she is acting in the best interests of the company."*

According to the report of the judiciary committee,[28] the legislature wanted also to promote the Business Judgment Rule (BJR) for Austria, whereby (despite different wording in detail) the model of Article 93 para 1 sentence 2 German Stock Corporation Act was largely followed. Article 25 para 1a Austrian GmbHG contains a corresponding provision for the Austrian private limited company.

The norm is related to liability law and is intended to limit the liability risk of board members. Executive board members are not responsible for the success of the measures they take; these opportunities and risks are borne by the shareholders. Rather, executive board members are only liable if the economically disadvantageous measure in the result was also contrary to due care *ex ante* (Article 84 para 1 and 2 AktG). However, there is a danger that in liability proceedings an excessively strict assessment by the judge

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22 KALSS, *c. d.*, mn. 3/532; NOWOTNY, *Commentary § 84 AktG*, mn. 27; RATKA, T. – RAUTER, R. A. Zivil- und unternehmensrechtliche Haftung des Geschäftsführers. In: RATKA, T. – RAUTER, R. A. *Handbuch Geschäftsführerhaftung*. 2nd ed. Wien: facultas.wuv, 2011, mn. 239 et seq.

23 See judgment of the OGH of 16 March 2007, 6 Ob 34/07d; cf., however, judgment of the OGH of 21 December 2010, 8 Ob 6/10f.

24 See RATKA – RAUTER, *c. d.*, mn. 2/243.

25 Judgment of the OGH of 16 March 2007, 6 Ob 34/07d.

26 This part draws on WINNER, M. Busines Judgment Rule. In: KALSS, S. – SCHÖRGHOFER, P. *Handbuch für den Vorstand*. Wien: facultas, 2017, pp. 1239 et seq.

27 Austrian Official Journal Part I, no. 2015/112.

28 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12.

will not do justice to the prognostic character of every entrepreneurial decision. This is because, first, judges are not entrepreneurial and may therefore emphasise, above all, the risks of every decision. Second, there is a tendency to set requirements too strictly for the standard of care when assessing *ex post* whether a measure was in breach of due diligence from an *ex ante* perspective, because in retrospect the actual events are known, which leads to the conclusion that these circumstances should also have been taken into account from an *ex ante* perspective (so-called hindsight bias).[29] In order to avoid this, corporate decisions are to be exempted by the BJR from full scrutiny under the due diligence standard if they meet certain, above all procedural, requirements (the safe harbour rule). For this reason, the parliamentary committee also states: *"Whoever acts as described in the* [legal] *text acts in any case in accordance with due diligence and does not have to fear any adverse legal consequences, in particular also no criminal prosecution."*[30]

However, in view of the case law on liability, which always showed restraint, it is doubtful whether it was necessary to stipulate the BJR in the wording of the law.[31] It was already generally recognised in case law that there is entrepreneurial discretion, which also allows taking risks; only downright unjustifiable decisions could lead to liability.[32] Whether this is called the BJR is, in contrast, secondary. In any case, the criteria that are part of today's BJR were often regarded as decisive for a waiver of full substantive review even before the 2015 amendment.[33] Today, the courts also apply the BJR to bodies for which it has not been formally enacted, especially to the directors of private foundations.[34]

6.2 PRECONDITIONS

First, according to Article 84 para 1a AktG, the directors must take a "business decision". The decision can lead to action or non-action, whereby it is particularly important in the case of the latter that it must be based on a conscious decision.[35] Mere passivity thus leads to liability in the event of a breach of due diligence.[36] However, not any decision is protected, only a business decision, which is any decision taken under

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29 On this see FLEISCHER, H. Commentary § 93 AktG. In: HENSSLER, M. *beck-online.Großkommentar* [online]. mn. 80 [cit. 2022-03-15]. Available at: https://beck-online.beck.de/?vpath=bibdata/komm/BeckOGK/cont/BeckOGK.htm.

30 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12.

31 NOWOTNY, C. Unternehmerische Entscheidung und Organhaftung. In: *Festschrift für Georg Koppensteiner II*. Wien: LexisNexis, 2016, p. 197.

32 See, e.g., judgment of the OGH of 26 February 2002, 1 Ob 144/01k; judgment of the OGH of 22 May 2003, 8 Ob 262/02s; judgment of the OGH of 11 June 2008, 7 Ob 58/08t (although all decisions refer to members of the supervisory board, nothing else applies to members of the executive board).

33 See KALSS, *c. d.*, mn. 3/389.

34 Judgment of the OGH of 23 February 2016, 6 Ob 160/15w.

35 Ibid.

36 NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 198; SPINDLER, G. Commentary § 93 AktG. In: GOETTE, W. – HABERSACK, M. *Münchener Kommentar zum Aktiengesetz*. 5th ed. München: C. H. Beck, 2019, mn. 51.

uncertainty, i.e., with a prognostic character, and with which a risk is associated.[37] As a rule, this will involve decisions relating to the future. Those who pay out unpromised bonuses for periods that have passed are indeed deciding to voluntarily reward past behaviour, but they are also doing so in order to provide incentives for managers in the future.[38] Similarly, the decision on profit distributions is a business decision.[39]

However, a decision is not entrepreneurial if the board member is required by law[40] or official order to perform a certain act or omission.[41] In principle, this is undisputed and also covers, for example, the prohibition of the return of contributions pursuant to Article 52 AktG. But the course of action necessary to comply with legal norms often is uncertain. When is an internal control system sufficiently sophisticated to meet the legal requirement to establish such a system according to Article 82 AktG? Comparable considerations apply in other areas (accounting, compliance, etc.). According to case law[42] and prevailing opinions,[43] these decisions are not covered by the BJR. But since the issues are similar many scholars argue that the principles of the BJR should be applied (directly or by analogy) (*"legal judgment rule"*), which is why careful and appropriate preparation of decisions is required in such cases.[44] This has to be distinguished from the compliance with contractual obligations of the company against third parties; here, the BJR applies directly as a decision to fulfil a contract is a business decision.[45] This is particularly important if the exact scope of the contractual duties is not clear.

Second, pursuant to Article 84 para 1a AktG, a decision must be made "on the basis of adequate information". Decisions without sufficient factual basis are not privileged by the BJR. Of course, the standard does not require that the board obtains all available information;[46] what is "adequate" depends on the specific decision-making situation.

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37 NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 200; LUTTER, M. Die Business Judgment Rule in Deutschland und Österreich. *Zeitschrift für Gesellschafts und Unternehmensrecht*. 2007, No. 2, p. 82; HÜFFER, U. – KOCH, J. *Aktiengesetz*. 14th ed. München: C. H. Beck, 2020, § 93 mn. 18; see also judgment of the OGH of 23 February 2016, 6 Ob 160/15w (on the private foundation).

38 SPINDLER, *c. d.*, § 93 mn. 49; see also HÜFFER – KOCH, *c. d.*, § 93 mn. 18.

39 Judgment of the OGH of 23 February 2016, 6 Ob 160/15w.

40 This probably also covers foreign law; HÜFFER – KOCH, *c. d.*, § 93 mn. 16; SPINDLER, *c. d.*, mn. 94 et seq. is cautious.

41 Judgment of the OGH of 23 February 2016, 6 Ob 160/15w; NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 201; REICH-ROHRWIG, J. Commentary § 25 GmbHG. In: STRAUBE, M. – RATKA, T. – RAUTER, R. A. *Wiener Kommentar zum GmbH-Gesetz* [online]. 2015, mn. 39 et seq. [cit. 2022-03-15]. Available at: https://rdb.manz.at/document/1125_1_gmbhg_p0025.

42 Judgment of the OGH of 23 February 2016, 6 Ob 160/15w (on the right of inspection under Art. 30 Act on Private Foundations).

43 See KAROLLUS, M. Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen – zugleich ein Beitrag zur Business Judgment Rule. *Österreichisches Bankarchiv*. 2016, p. 257; HÜFFER – KOCH, *c. d.*, § 93 mn. 11 mwN; SPINDLER, *c. d.*, mn. 75.

44 NOWOTNY, Unternehmerische Entscheidung und Organhaftung, pp. 201 et seq.; for Germany SPINDLER, *c. d.*, mn. 76 et seq. However, HÜFFER – KOCH, *c. d.*, § 93 mn. 19, is critical; KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 257, is also cautious.

45 FELTL, C. – TOLD, J. Commentary § 25 GmbHG. In: GRUBER, M. – HARRER, F. *GmbHG*. 2nd ed. Vienna: Linde Verlag, 2018, mn. 31; in principle also SPINDLER, *c. d.*, mn. 88; but HÜFFER – KOCH, *c. d.*, § 93 mn. 17 mwN.

46 See SCHIMA, G. Reform des Untreuetatbestands und Business Judgment Rule im Aktien- und GmbH-Recht. *Zeitschrift für Gesellschafts und Unternehmensrecht*. 2015, Vol. 44, No. 5, p. 292; KAROLLUS, M. Unternehmerische Ermessensentscheidungen und Business Judgment Rule aus primär

Important factors to be weighed by the board are, above all, the time available to obtain information,[47] the scope of the decision, and the expected benefit of further information gathering as well as its cost.[48] Here, too, it is ultimately a case-by-case assessment that relates both to the selection of information in the narrower sense and to the method of obtaining information. Hence, in the case of particularly high risks, careful preparation of information is required; this applies in particular to strategic decisions. If sufficient, i.e., careful, information processing is not possible due to time pressure, the board must refrain from the transaction.

The wording of the Austrian standard states that the information basis must be adequate from an objective point of view.[49] Nevertheless, as with the German AktG[50], it is argued that the board of directors is also protected by the BJR when deciding on the amount and type of information to be obtained, which is why only serious misjudgements about the required information can lead to liability.[51] Given that the decision as to which information basis is appropriate involves in turn weighing up the costs and benefits, taking into account the risks associated with the decision,[52] the board is able to benefit from the BJR in the event of any misjudgement. As a result, there is no detailed control as to whether the basis for the decision was appropriately prepared; rather, it is merely (roughly) examined whether the selection or procurement of information was essentially appropriate.[53]

Of course, this may mean that it becomes necessary to obtain external advice, although this should not be sought as a matter of principle,[54] but only if the knowledge within the company is not sufficient to adequately assess the problem. In practice, the involvement of external advisors is considered an indication of particularly high diligence;[55] additionally, it helps in documenting that the necessary steps have been taken. What is worrying about this is that the focus of those responsible for the decision can shift away from the content and towards the procedure, which amounts, in particular, to external expertise being called in to prepare the basis for the decision in order to at least partially transfer the responsibility for the correctness of the decision to third parties.

Third, according to Article 84 para 1a AktG, in order for the BJR to apply, a member of the executive board must not be guided by extraneous interests. A look at the

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gesellschaftsrechtlicher Sicht mit besonderem Blick auf Versicherungsunternehmen. *Die Versicherungsrundschau*. 2015, No. 10, p. 26.

47 On time pressure as an element of the BJR see already judgment of the OGH of 11 June 2008, 7 Ob 58/08t (on a golden handshake for members of the executive board and thus on a decision of the supervisory board).

48 See KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 258; HÜFFER – KOCH, *c. d.*, § 93 mn. 20.

49 So apparently also KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, p. 26; KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 258.

50 See HÜFFER – KOCH, *c. d.*, § 93 mn. 21.

51 Thus SCHIMA, *c. d.*, p. 292.

52 SPINDLER, *c. d.*, mn. 48.

53 Comparable SCHIMA, *c. d.*, p. 292: no gross negligence.

54 SPINDLER, *c. d.*, mn. 50.

55 See also judgment of the OGH of 23 February 2016, 6 Ob 160/15w.

explanatory memorandum[56] clarifies that this refers to the freedom from conflicts of interest. Here, the duty of care meets the duty of loyalty.

It it is not clear from the law what the intensity of this conflict of interest must be in order not to apply the BJR. This depends on whether, when viewed objectively, the conflict of interest can influence the decision-making behaviour of the board member.[57] However, proof of concrete causality is not required.[58] Thus, in my opinion, despite the unfortunate wording, the board members cannot argue that their decision was not influenced despite the existence of a conflict of interest;[59] rather, the suspect decision must then be examined in terms of content, which does not *per se* lead to liability. Apart from this, a more detailed abstract specification is difficult; rather, a case-by-case assessment must be made.[60] In any case, having an economic interest in the transaction is a clear case of conflicts of interest. The conflict of interest can also be mediated by related natural or legal persons, such as contracts with a manager's spouse or a company in which they are invested.[61]

Fourth, it is necessary that the members of the executive board may assume on this basis that they are acting in the best interest of the company. Hence, the board must actually assume this[62] and this assumption must also be justifiable ("may" assume). This sets objective limits to a subjective standard.[63] However, this also means that courts under the BJR do not exclusively examine the procedure,[64] although the substantive component is limited to a justifiability test. Hence, it is possible to sanction serious misjudgements under liability law even if the procedural requirements have been complied with. This is to be welcomed because (1) an appropriate procedure cannot justify every result, no matter how absurd and (2) it can be assumed that case law would find ways to sanction "completely unjustifiable" decisions anyway. However, not every misjudgement about the suitability of the measure to promote the welfare of the company already leads to the loss of the benefits of the BJR; for then little would be gained by it. The misjudgement must be serious;[65] it is a matter of cases in which the decision was completely unjustifiable, or where the risk was misjudged in a completely irresponsible

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56 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12; also SCHIMA, *c. d.*, p. 291.

57 For all SPINDLER, *c. d.*, mn. 62.

58 Cf., however, KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, p. 27; KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 258. Misleadingly also judgment of the OGH of 23 February 2016, 6 Ob 160/15w: *"does not necessarily mean that they (note: the board members of a private foundation) were guided by extraneous interests"*. In my opinion, however, it is sufficient that the influence can have an impact when viewed objectively.

59 As here SCHIMA, *c. d.*, p. 291.

60 HÜFFER – KOCH, *c. d.*, § 93 mn. 25.

61 For all KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, *c. d.*, p. 258.

62 For all HÜFFER – KOCH, *c. d.*, § 93 mn. 24.

63 See ibid., § 93 mn. 23.

64 NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, pp. 195, 202; KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, pp. 25 et seq.

65 See KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 257. See on the legal situation before the codification of the BJR judgment of the OGH of 11 June 2008, 7 Ob 58/08t.

manner. Thus, the discretionary powers of board members have been expanded without being extended without limits. The proximity to (particularly) gross negligence is rightly emphasised for this rough "health check" for the decision.

Of course, many issues are contested in this context, such as whether or under which circumstances sponsoring and donations can benefit the company's interest.[66] In this context, I just want to mention one additional issue: Can particularly risky decisions – entrepreneurial decisions are always risky – serve the good of the company? Obviously, such decisions need a particularly careful determination of the information basis. Risks customary in the industry may be taken in any case,[67] even if they are high. I think that even taking risks that could jeopardise the company's existence is not *per se* a breach of duty, but only if a failure has more than a low probability of occurrence.[68] Some authors even postulate that the board has a duty to take risks that could jeopardise the company's existence if this is the only possibility for the company to survive;[69] this goes too far because of the danger that managing directors and shareholders act in a particularly risky manner in the vicinity of insolvency (*gambling out of debt*).

Finally, it is not completely clear how the burden of proof is distributed. Who must show that the requirements of the BJR are met? Some place this burden of proof on the member of the executive body;[70] this corresponds to the prevailing opinion[71] in Germany, but not to the US model, which places the burden of proof for the non-existence of the prerequisite of the BJR on the plaintiff.[72] At least to some extent, the prevailing opinion in Austria is problematic as the board members cannot reasonably be expected to prove that they were not guided by extraneous interests. Rather, the plaintiff must present facts from which a conflict of interest can arise; then it is incumbent on the board member to prove that the conflict of interest does not actually exist. With regard to the sufficient basis of information, the burden of proof lies with the board member, who can also provide proof more easily.[73] The burden of proof also lies with the board members as to whether they were entitled to assume that they were acting in the best interests of the company.[74] This must also apply to the question of whether an entrepreneurial decision has been made at all, but this is likely to be a question of legal assessment in most cases anyway.

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66 See e.g., KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, p. 29; SPINDLER, *c. d.*, mn. 71.

67 REICH-ROHRWIG, *c. d.*, mn. 175.

68 Similarly SPINDLER, *c. d.*, mn. 55; HÜFFER – KOCH, *c. d.*, § 93 mn. 27.

69 HOPT, K. – ROTH, M. Commentary § 93 AktG. In: HIRTE, H. – MÜLBERT, P. – ROTH, M. *Großkommentar zum Aktiengesetz*. 5th ed. Berlin: De Gruyter, 2015, mn. 88, 195.

70 KAROLLUS, *Unternehmerische Ermessensentscheidungen und Business Judgment Rule…*, p. 27; NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 202.

71 HÜFFER – KOCH, *c. d.*, § 93 mn. 54.

72 MERKT, H. *US-amerikanisches Gesellschaftsrecht*. 3rd ed. Frankfurt: Deutscher Fachverlag, 2013, mn. 923; TOLD, J. Business Judgment Rule: a Generally Applicable Principle? *European Business Law Review*. 2015, Vol. 26, No. 5, p. 718.

73 For details SCHIMA, *c. d.*, p. 293.

74 KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 259.

6.3 CONSEQUENCES

If the requirements of the BJR are met, the board member *"shall in any case act in accordance with the duty of care of a prudent and conscientious manager"*. This "safe harbour" provision[75] further specifies the legal standard of care.[76] If the safe harbour applies, a breach of duty is thus ruled out without further examination. This is not a lack of fault, but a lack of a violation of the objective duty.[77]

However, this does not mean that actions not covered by the BJR are automatically a breach of duty.[78] Rather, the issue must be examined separately. In my opinion, this no longer involves a plausibility check of the decision; Article 84 para 1a AktG conclusively stipulates when such a rough check is sufficient.[79] Rather, the decision is checked in detail, which means that liability does not only arise in the case of decisions that are completely unjustifiable; rather, a "simple" lack of due diligence is sufficient. The fact that, in such cases, there is a particular danger of hindsight bias underlines the importance of the BJR.

If the BJR does not apply, the issue of the burden of proof pursuant to § 84 para 2 sentence 2 AktG arises. One has to distinguish: Insofar as decisions were made under a conflict of interest or with insufficient information, case law varies,[80] but the correct view is that the company must present facts which at least suggest that the actions of the board members violated their duty of care, whereupon the board member must prove that the conduct was not contrary to the duty in the specific situation.[81] If, on the other hand, the board could not reasonably assume that its actions were in the best interests of the company, it has breached its duty of care and liability can at most be excluded due to lack of fault.

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75 See the explanatory memorandum to the amendments: 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12.

76 NOWOTNY, *Unternehmerische Entscheidung und Organhaftung*, p. 203; SPINDLER, *c. d.*, mn. 39. Differently for Germany HÜFFER – KOCH, *c. d.*, § 93 mn. 12, 14: irrebuttable presumption.

77 OGH 23.2.2016, 6 Ob 160/15w; SCHIMA, *c. d.*, p. 290.

78 See 728 Beilagen zum Nationalrat (Parliamentary Supplement) 25th Gesetzgebungsperiode (legislative session), p. 12; judgment of the OGH of 23 February 2016, 6 Ob 160/15w; SCHIMA, *c. d.*, p. 290; KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 255. Also for Germany almost unanimous opinion; for all HÜFFER – KOCH, *c. d.*, § 93 mn. 12.

79 KAROLLUS, *Gesellschaftsrechtliche Verantwortlichkeit von Bankorganen bei Kredit- und Sanierungsentscheidungen…*, p. 255.

80 As in the text e.g., judgment of the OGH of 9 January 1985, 3 Ob 521/94; judgment of the OGH of 24 June 1998, 3 Ob 34/97i; judgment of the OGH of 22 October 2003, 3 Ob 287/02f; probably also judgment of the OGH of 26 February 2002, 1 Ob 144/01k; different (full burden of proof for breach of duty of care on board member) judgment of the OGH of 16 March 2007, 6 Ob 34/07d (so also KRAUS – TORGGLER, *c. d.*, mn. 20); again different (full burden of proof for breach of due diligence on complaining company) judgment of the OGH of 21 December 2010, 8 Ob 6/10f.

81 KALSS, *c. d.*, mn. 3/410.

7. CONCLUSIONS

This article has dealt with some key points of the duty of care under Austrian law. Largely, this follows the situation in Germany, which is no surprise given the German roots of the Austrian provisions. It is another issue whether these rules are also effective in practice, especially as far as directors' liability is concerned.

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