

THE BUSINESS JUDGMENT RULE IN THE CZECH REPUBLIC¹

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Abstract: Business Judgment Rule has been part of the Czech written law since 2014. Nevertheless, there are many controversies regarding its formulation as well as interpretation. The objective of this paper is to analyse the purpose of BJR and based on this to suggest pre-requisites which must be fulfilled to apply BJR. At the same time the impact of the introduction of BJR into written law is examined.

Keywords: business judgment rule; duty of care; duty of loyalty; director; company

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1. INTRODUCTION

Entrepreneurship is inevitably accompanied by risk. Without taking risks there would often be no profit (or less profit). This applies everywhere in the world. Legal orders (at least in the western part of the world) deal with this fact through set of rules which serve to protect a director from being found responsible for outcomes of their decision that they cannot influence. These rules became known as the Business Judgment Rule (BJR). However, a more detailed survey makes it clear that these rules differ significantly. Sometimes they are law-in-books, sometimes they are case law. Sometimes they are constructed as standards of judicial review, other times as specification of the conditions under which the standard of care is met.² BJR rules also differ in the aspect of proof – in some legal orders the burden of proof lays with the plaintiff (typically a company), in another on the defending director. Moreover, lawyers of the same jurisdiction are not unanimous in interpreting “their” regulation. In any case – in this article, BJR is understood as every rule which enables a director of a company to take business decisions without danger of being found liable for the outcome of these decisions they cannot influence.

¹ This contribution was prepared as a part of the grant project of GAČR No. 18-04757S “Fiduciary Duties (Primary duties of the administrators of matters of others)”.

² For the difference between these concepts see MERKT, H. *Rechtliche Grundlagen der Business Judgment Rule im internationalen Vergleich zwischen Divergenz und Konvergenz. Zeitschrift für Unternehmens- und Gesellschaftsrecht*. 2017, Vol. 46, No. 2, pp. 134–136.

2. REGULATION

Before 2014, there was no explicit regulation of BJR in the Czech Republic. However, judicature respected that a director is responsible for due performance of the function, not for its outcome: when the director performed the function with due care, they were not obliged to compensate any loss incurred by the company as a result of their actions as a director.³ This means that there were already signals that the courts were reluctant to interfere in business decisions prior to the incorporation of the BJR.⁴

Since 1 January 2014 § 51(1) of the Business Corporations Act (zákon o obchodních korporacích)⁵ says: “A person shall be deemed to act with due care and the necessary knowledge where, in business-related decisions, he or she could in good faith and reasonably assume to be acting on an informed basis and in justifiable interest of the business corporation. The foregoing shall not apply in cases where such decision-making was carried out without the necessary loyalty.” This regulation was inspired by § 93(1) sentence 2 of the German Stock Corporation Act (Aktiengesetz)^{6, 7} and according to the explanatory report to the Business Corporations Act, it was here where the BJR has become part of Czech law. The rule was introduced with the aim of protecting the directors from liability for decisions whose outcomes they cannot influence.⁸

In order to properly illustrate the situation, it is necessary to specify that Czech law works with reverse burden of proof.⁹ Where, in proceedings before court, it is to be assessed whether a director acted with due care, the burden of proof shall be upon such director, unless the court decides that the same cannot be reasonably required from them [§ 52(2) Business Corporations Act].

Despite the fact that the regulation was explicitly described as BJR in the explanatory report to the Business Corporations Act, parts of the Czech literature cast doubts upon this characterisation and consider the rule a description of the manner of performing of the director’s function when taking business decisions, i.e., specification of the duty of care.¹⁰ However, as stated above, there is no generally accepted definition of BJR and the aforementioned doubts are based on the formulation of BJR characteristics from

³ Stable judicature, e.g., see judgment of the Supreme Court of 29 April 2013, case no. 29 Cdo 2363/2011; judgment of the Supreme Court of 19 December 2013, case no. 29 Cdo 935/2012; resolution of the Supreme Court of 18 September 2014, case no. 29 Cdo 662/2013.

⁴ To the situation before the adoption of Business Corporations Act see BROULÍK, J. Pravidlo podnikatelského úsudku a riziko [Business judgment rule and risk]. *Obchodněprávní revue*. 2012, No. 6, p. 166 ff.

⁵ Act No. 90/2012 Sb., on Commercial Companies and Cooperatives (Business Corporations Act).

⁶ See explanatory report to the Business Corporations Act (From § 44 to 75).

⁷ § 93(1) sentence 2 of German Stock Corporation Act says: “They shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company.” German regulation was inspired by the US law (MERKT, c. d., p. 130).

⁸ See explanatory report to the Business Corporations Act.

⁹ In this case, the inspiration also came from German law.

¹⁰ ČECH, P. – ŠUK, P. *Právo obchodních společností: v praxi a pro praxi (nejen soudní)*. [Law of Business Corporations: in practice and for practice (not judicial only)]. Praha: BOVA POLYGON, 2016, p. 160; CILEČEK, F. – RUBAN, R. Remark to the judgement of the Supreme Court of 26 October 2016, case no. 29 Cdo 5036/2015. *Obchodněprávní revue*. 2017, Vol. 9, No. 4, p. 113 ff.

Anglo-Saxon countries.¹¹ Moreover, the formulation corresponds to structure of BJR which can be described as typical for countries of continental Europe.¹² Therefore, there can be no doubts that BJR is part of the Czech corporation law.

3. PURPOSE

It is generally accepted – both in literature and judicature – that (i) risk-taking is a typical characteristic for entrepreneurship and that business decisions are usually made under conditions of uncertainty¹³ and that (ii) directors are not liable for the outcome.¹⁴ Additionally, there is also (iii) the danger of the *hindsight bias* of deciding judges as well as the fact that (iv) judges are not experts in the management of the companies – these facts are well known.¹⁵ Nevertheless, the danger that, in a civil proceeding, the director’s act will be considered a breach of duty with all its negative consequences, remains. Therefore, it is universally agreed that judges shall not interfere in business decisions and take over the role of managers.¹⁶

The BJR should be a solution to the above-mentioned issues. It should fulfil two purposes.

Firstly, as mentioned above, the BJR was introduced to the Czech law with the aim of protecting directors from liability for decisions whose results they cannot influence.¹⁷ This aim is also emphasised in literature: the foreign doctrine states that the BJR should ensure “safe harbour” for directors.¹⁸

Secondly, it is necessary to add that the BJR protects the company as well. In fact, directors are able to deal with the danger of the wrong assessment of their decisions. Firstly, they can avoid risk completely (but no risk often means no profit). Secondly, they can accumulate various materials supporting their decision and formalize the

¹¹ MERKT, *c. d.*, 134–136.

¹² As J. Kožíak concludes, for BJR of continental European countries it is typical that (i) BJR is codified, (ii) it is formulated as rule of behaviour not standard in judicial review and that (iii) burden of proof lies on the director. (KOŽIAK, J. *Vzestup pravidla podnikatelského úsudku v evropských jurisdikcích* [Rise of business judgment rule in European jurisdictions]. In: EICHLEROVÁ, K. et al. (eds.). *Rekodifikace obchodního práva – pět let poté: pocta Stanislavě Černé. Svazek I.* [The recodification of the business law – five years later: liber amicorum Stanislava Černá. Volume I.]. Praha: Wolters Kluwer ČR, 2019, s. 47).

¹³ Judgment of the Supreme Court of 19 July 2018, case no. 29 Cdo 3770/2016.

¹⁴ Judgment of the Supreme Court of 29 April 2013, case no. 29 Cdo 2363/2011.

¹⁵ E.g., LASÁK, J. in: LASÁK, J. – DĚDÍČ, J. – POKORNÁ, J. – ČÁP, Z. et al. *Zákon o obchodních korporacích: komentář* [Business Corporations Act. Commentary]. 2nd ed. Praha: Wolters Kluwer ČR, 2021, pp. 362–363.

¹⁶ FLEISCHER, H. Die “Business Judgment Rule” im Spiegel von Rechtsvergleichung und Rechtsökonomie In: WANK, R. – HIRTE, H. – FREY, K. (eds.). *Festschrift für Herbert Wiedemann zum 70. Geburtstag.* München: C. H. Beck, 2002, p. 832.

¹⁷ See explanatory report to the Business Corporations Act (From § 44 to 75).

¹⁸ E.g., ŠTENGLOVÁ, I. – HAVEL, B. in: ŠTENGLOVÁ, I. – HAVEL, B. – CILEČEK, F. – KUHN, P. – ŠUK, P. *Zákon o obchodních korporacích: komentář.* [Business Corporations Act: Commentary]. 3rd ed. Praha: C. H. Beck, 2020, p. 166; LASÁK, J. in: LASÁK – DĚDÍČ – POKORNÁ – ČÁP, *c. d.*, p. 362.

decision-making process¹⁹ which is both ineffective and expensive. Thirdly, they can initiate the conclusion of the most advantageous (and the most expensive) D&O-insurance at the expense of the company.²⁰ And finally, there is always the danger of the pool of potential candidates being limited as many suitable persons would not be willing to take over the function due to eventual liability. Therefore, while it seems that BJR primarily protects directors, it is not true – BJR is far more important for the company and its shareholders.²¹

On the other hand, the company (and thus its creditors) must be protected from manifestly faulty management. Mismanagement can endanger the economic situation (and subsequently, the existence) of the company. This might have negative consequences not only for shareholders as the “ultimate owners” of the company, but also for its creditors (including employees) and society as a whole. Thus, the BJR must not enable hazardous or insane decisions: such decisions do not deserve protection. Therefore, it is necessary to establish a boundary between acceptable and unacceptable risk. However, this could be very tricky as the attitude to the risk is very personal.

To fulfil these purposes the BJR has to be able to influence behaviour of the director at the time of decision making so they are, on one hand, not afraid of taking a risk, but on the other hand are not, at the same time, making a hazardous decision. In another words, directors have to be able to recognize if they are in the “safe harbour” at the time of the decision-making process or not. I call this the steering function.

4. ROLE OF THE COURTS

As settled above, there are many good reasons why judges should not evaluate management decisions. Therefore, the BJR should ensure that business decisions of the directors will be “locked” so they cannot be reviewed by the courts. On the other hand, it is also necessary to protect the company and, by extension, its creditors (and society as a whole) from insane and hazardous management decisions. So, there should remain a possibility of the court’s interference in cases of apparent management failure.

The way to reconcile these contradictory aims seems to lie in the division between judicial review of the material content of the decision and the process of its adopting. While the courts are not allowed to review the material rightness of the directors’ decisions, they do evaluate the process of the decision-making. If the process is found to have been conducted properly, the review the material rightness is not allowed.

¹⁹ According to the Czech law, a director may request instructions from the supreme body of the business corporation regarding the management of its business [§ 51(1) of the Business Corporations Act].

²⁰ In a case where D&O-insurance is taken by the company, directors are not obliged to pay the part of the damage arising from their work for the company [for different solution see § 93(2) of the German Stock Corporation Act which requires that such insurance should provide for a deductible of no less than 10 per cent of the damage up to at least an amount equal to 1.5 times the fixed annual compensation of the director].

²¹ ENRIQUES, L. – HANSMANN, H. – KRAAKMAN, R. in: KRAAKMAN, R. – ARMOUR, J. – DAVIES, P. – ENRIQUES, L. – HANSMANN, H. – HERTIG, G. – HOPT, K. – KANDA, H. – ROCK, E. *The Anatomy of Corporate Law: a Comparative and Functional Approach*. 2nd ed. New York: Oxford University Press, 2009, p. 79.

Nonetheless, it is necessary to re-emphasize that the court should also exercise restraint in reviewing the process. It is necessary to ensure that the hindsight bias is not replaced by the outcome bias,²² i.e., mistake made in the evaluation of the decision in a case where the outcome of the decision is already known. The issue is that in a case where the judge is aware of all relevant information available to the director as well as the outcome of the decision, they tend to evaluate decision better when its outcome was favourable than in a case where it was unfavourable.²³ In other words, an evaluation of the decision is not distorted by the inclusion of information which was not known to a director at the time of decision-making (which is typical for hindsight bias), but by the outlook on the outcome of the decision. Outcome bias can therefore influence the evaluation of the decision-making process.

It seems that the Czech doctrine unanimously concludes that the courts should only review the process of the decision-making, not content of the decision itself.²⁴ This means that if the court comes to the conclusion that the decision has been made through due process, it should conclude that the duty of care was not breached. Therefore, the BJR can also be described as the “rule of due process”.²⁵

However, it is important to keep in mind that to ensure that the process was conducted in a proper manner, it is absolutely necessary to deal with the material content of the decision as well. While inspecting, whether the amount of information was sufficient (see below), the courts unavoidably confront the importance of the decision for the company with reliance on the sufficiency of information gathered. The substance of the decision is also touched upon while reviewing whether the decision made was in the interest of the company and whether it was or was not irrational.

5. PRE-REQUISITIES

As mentioned above, the formulation of the BJR in the Czech law is not optimal and it remains unclear how to interpret it.²⁶ There are attempts to expound the BJR with the help of the US doctrine²⁷ as well as to consider the BJR a specification of director’s proper behaviour which is met when particular elements of the legal definition are fulfilled (loyalty, good faith, appropriate information, and justifiable interest

²² FLEISCHER, *c. d.*, p. 841.

²³ BARON, J. – HERSHEY, J. C. Outcome Bias in Decision of Evaluation. *Journal of Personality and Social Psychology*. 1988, Vol. 54, No. 4, pp. 569–579.

²⁴ ŠTENGLOVÁ, I. – HAVEL, B. in: ŠTENGLOVÁ – HAVEL – CILEČEK – KUHN – ŠUK, *c. d.*, p. 166; LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 362; ČECH – ŠUK, *c. d.*, p. 160.

²⁵ LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 368.

²⁶ On the other hand, it is obvious that foreign legal orders also deal with the same problem as only small part of the lawmakers has dared to formulate BJR in their statutes and instead prefer to leave this issue to the judicature and literature (GERNER-BEUERLE, C. – PAECH, P. – SCHUSTER, E. P. *Study on Directors’ Duties and Liability*. London: European Commission – LSE Enterprise, 2013, p. 108 ff). More on the situation in Germany, which was inspiration for Czech law, see OTT, N. Anwendungsbereich der Business Judgment Rule aus Sicht der Praxis – Unternehmerische Entscheidungen und Organisationsmessungen des Vorstands. *Zeitschrift für Unternehmens- und Gesellschaftsrecht*. 2017, Vol. 46, No. 2, p. 150.

²⁷ BORSÍK, D. Péče řádného hospodáře a pravidlo podnikatelského úsudku bez legend [Duty of care and business judgement rule without myths]. *Obchodněprávní revue*. 2015, Vol. 7, No. 7–8, pp. 193–205.

of the company).²⁸ In my opinion, it is not possible to concentrate either on the definition or source of inspiration, it is necessary to prefer the purpose of the BJR by its interpretation.

The purpose of the BJR is to enable a director to adopt business decisions without fear of being liable for a possible negative outcome and thus protect the company from business failure due to risk-avoidance by the director and excessive costs. This purpose can be fulfilled only in the case that director knows, at the moment of decision making, whether they are in a “safe harbour”. Therefore, pre-requisites of its fulfilment must be formulated so clearly that the directors are able to easily recognize whether they are in a “safe harbour” at the moment of the decision-making process or not. In a situation where the courts would concentrate on the evaluation of the process rather than on the decision itself, the director might feel themselves to be in a safe harbour when they know that decision was adopted in due process. Furthermore, as the BJR protects the interest of the company as well, should there be any doubts, they should be resolved in favour of the director. For “[...] *shareholders may stand to lose more from such ‘defensive management’ than they stand to gain from deterring occasional negligence*”.²⁹

Let’s briefly have a look at the particular aspects of the BJR-test.

5.1 BUSINESS DECISION

The first pre-requisite for the application of the BJR is the existence of a business decision. The BJR should protect business decisions exclusively. The idea of this restriction is obvious – only business decisions are implicitly connected with risk and uncertainty and thus deserve special treatment. However, it is not easy to specify, which decision can be considered a business decision, and which does not fulfil the definition and is therefore not protected by the BJR.³⁰ Moreover, according to Czech law, it is also possible to establish a business corporation for a non-entrepreneurial purpose.³¹ Does it mean that the directors of these corporations cannot benefit from the benefit of the BJR at all?

It is also universally agreed that the decision must be a result of purposeful activity or passivity; pure inactivity does not have the nature of a decision.³²

A decision can be considered a business decision when it is (more or less) connected with the entrepreneurial activity of the company. So, for instance, the choice of roofer that is to repair the roof of the company’s headquarters is not part of the business and does not represent a business decision. Furthermore, a business decision is also a decision which is typically connected with uncertainty – when the outcome is evident, there

²⁸ E.g., LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, pp. 362–368.

²⁹ ENRIQUES, L. – HANSMANN, H. – KRAAKMAN, R. in: KRAAKMAN – ARMOUR – DAVIES – ENRIQUES – HANSMANN – HERTIG – HOPT – KANDA – ROCK, *c. d.*, p. 79.

³⁰ There are more ways to interpret a business decision. For details, see OTT, *c. d.*, p. 151 ff.

³¹ Unlimited partnership (*veřejná obchodní společnost*) and a limited partnership (*komanditní společnost*) can be established for the purpose of doing business or for the purpose of managing company’s own assets. Limited-liability company (*společnost s ručením omezeným*) and a joint-stock company (*akciová společnost*) can be established for any purpose.

³² E.g., LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 364.

is no need for protection from a potentially wrong choice. After all, the uncertainty of the future development of a business is one of the main reasons for adoption of the BJR. Finally, a business decision is not a decision whether to follow law or statutes of the company. Both law and statutes of the company must be obeyed. There are many cases, though, where the law is unclear. Whereas foreign authors pay great attention to so-called legal judgment rule,³³ in the Czech Republic, this aspect has not been researched enough.

It is clear from the above-mentioned that a great number of decisions can fall into the shadow zone. In such cases, the rule “*in dubio pro director*” should be applied, i.e., if there are any doubts, they should be resolved in favour of the director and the decision should be considered a business decision for the purpose of the BJR.

To be complete – even though the BJR is related to business decisions exclusively, it is not disputable that the directors are entitled to discretion while adopting non-business decisions. So, in the case of reparation of the roof mentioned above, the directors have to decide for one of more roofers and it can appear afterwards that the choice was wrong. This does not automatically mean that directors breached their duties. However, such decisions outside the BJR could be reviewed in their entirety.³⁴

5.2 GOOD FAITH

Furthermore, the director must have acted in a good faith. Since good faith is a subjective relationship of the director to the adopted decision (a director believed that their decision was right), it has to be evaluated according to its manifestation in the real world.³⁵ Thus, in the case of a decision making process, the decision has to be evaluated according to whether (i) the director has acted in the interest of the company (i.e., being loyal) and (ii) their decision was made on the basis of appropriate information.³⁶ Moreover, (iii) the decision cannot be irrational.³⁷ Only these parts of the decision-making process are “visible” to third persons.

It is disputed whether the good faith of the director is presumed by Czech law (according to § 7 of Civil Code)³⁸ or whether it must be proven by the director (as says the § 52(2) of the Business Corporations Act). Part of the literature concludes that the director has to prove their good faith, another authors are of the opinion that proof of good faith is necessary only in the case where there are facts in the procedure which indicate the breach of good faith.³⁹ In my opinion, good faith must be proven by the director. Only this conclusion is in accordance with the concept of a reverse burden of

³³ In Germany e.g., VERSE, D. A. Organhaftung bei unklarer Rechtslage – Raum für eine Legal Judgment Rule. *Zeitschrift für Unternehmens- und Gesellschaftsrecht*. 2017, Vol. 46, No. 2, pp. 174–196.

³⁴ For another opinion, see P. Čech and P. Šuk who are of the conviction that the decision outside the BJR should be assessed according to the same rules as the business decision. (ČECH – ŠUK, *c. d.*, p. 161).

³⁵ BORSÍK, *c. d.*, p. 200.

³⁶ *Ibid.*, p. 201.

³⁷ LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 365.

³⁸ § 7 of the Civil Code: A person who acted in a certain way is presumed to have acted fairly and in good faith.

³⁹ LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 365.

proof which is characteristic for Czech law as well as the rather benevolent formulation of the BJR (see below).

To conclude, the director's decision is protected by the BJR if they can prove that they could be believed to have acted in the interest of the company and on the basis of adequate information. However, the BJR does not apply in a case where the adopted decision was deemed to have been irrational.

5.2.1 JUSTIFIABLE INTEREST OF THE COMPANY

The director shall act with necessary loyalty and in justifiable interest of the business corporation. The formulation "justifiable interest of the business corporation" means that the decision needn't be in the best interest of the company; a sub-optimal decision is also sufficient. Thus, only decisions (manifestly) in contradiction with the interest of the company are not covered by the BJR. At first glance, this could be considered far too benevolent as another legal regulation that demands acting in the best interest of the company.⁴⁰ However, looking for the solution in the best interest of the company can be very tricky.

Despite the fact that the absence of a conflict of interest is not mentioned explicitly in the statute as the pre-requisite of being considered to have acted in the justifiable interest of the company, it can be concluded that a decision cannot be made when a conflict of interest is present.⁴¹ Every conflict of interest casts serious doubts on whether the decision was made (only) in the interest of the company. This also applies to the situation when a company was notified of the conflict in accordance with the § 54 ff. of the Business Corporations Act.⁴²

5.2.2 ADEQUATE INFORMATION

Furthermore, the director should act in an informed basis.⁴³ According to the Czech Supreme Court a director has to use reasonably available information resources.⁴⁴ Thus, it is not necessary to be aware of all facts, it is sufficient to be informed of facts which comply with the importance of the decision for the company.⁴⁵ At the same time, the Supreme Court emphasised that the fulfilment of this obligation is necessary in order to consider the decision from the *ex ante* perspective and that amount of necessary information differs in respect to the type of decision.⁴⁶ In other words, courts have to take into account the information which was known or should have been

⁴⁰ E.g., sec. 10.01 (3)(c) EMCA.

⁴¹ Absence of conflict of interest is a standard requirement, see e.g., sec. 10.01 (3)(a) EMCA.

⁴² ČECH, P. Péče řádného hospodáře [Duty of care]. *Auditor*. 2018, roč. 25, No. 6, p. 14.

⁴³ According to H. Fleischer "[...] *schützt die Business Judgement Rule also nur den Wagenmutigen, nicht aber den Unbesonnenen, der sich über die Voraussetzungen und Auswirkungen seines Handelns nicht rechtzeitig und sorgfältig Rechenschaft abgelegt hat*". (FLEISCHER, c. d., p. 840).

⁴⁴ The Supreme Court stated: "[...] *when making concrete decisions, it is necessary to use reasonably available (both factual and legal) information resources and based on them to thoroughly estimate possible advantages and disadvantages (recognizable risks) of the existing possibilities of the business decision.*" (Judgment of the Supreme Court of 26 October 2016, case no. 29 Cdo 5036/2015).

⁴⁵ LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, c. d., p. 366.

⁴⁶ Judgment of the Supreme Court of 26 October 2016, case no. 29 Cdo 5036/2015.

known to the director when making a decision and which was necessary for deciding the specific issue.

Fundamentally, directors can rely on information which has been presented to them by their employees or cooperating professionals (attorneys, tax advisers etc.) and do not need to verify the accuracy of them.⁴⁷ This does not apply if they are aware of facts which cast doubts on the verity or complexity of presented information.⁴⁸ Moreover, the directors should always be able to evaluate the plausibility of presented information, in particular if they are presented them in the form of an expert opinion.⁴⁹

5.2.3 LACK OF IRRATIONALITY

The last requirement which must be fulfilled to conclude that a director acted in good faith is a lack of irrationality of the decision. This requirement reflects the fact that a hazardous decision should not be protected. Also, in such a case it should be an obvious and evident lack of rationality. As the US-experience demonstrates, only a very few business decisions fail due to the lack of rationality.⁵⁰

6. SCOPE OF APPLICATION

The BJR is regulated in the Business Corporations Act and is relevant for business decisions adopted in business corporations (which is a summarizing term for companies and cooperatives).⁵¹ Such decisions are typically adopted by members of the statutory bodies and – as the case may be – also by the members of supervisory bodies, e.g., when they are obliged to obtain prior approval of certain business decisions according to the memorandum of association. On the other hand, application of the BJR on the decisions of managers who are not members of the board (e.g., executive officers) is not allowed. Nevertheless, this does not mean that these managers are not entitled to discretion.

Since the BJR is regulated in the Business Corporations Act, it is disputable whether the rule can also be applied to the decision-making bodies of other legal forms. It seems that the majority of the doctrine refuses this particular conclusion at this moment.⁵²

⁴⁷ BORSÍK, *c. d.*, p. 203.

⁴⁸ *Ibid.*, p. 203.

⁴⁹ BEJČEK, J. Principy odpovědnosti statutárních a dozorčích orgánů kapitálových společností [The principles of liability of directors of capital companies]. *Právní rozhledy*. 2007, Vol. 15, No. 17, p. 613 ff.

⁵⁰ MERKT, *c. d.*, p. 130.

⁵¹ Companies include an unlimited partnership and a limited partnership (partnerships), a limited-liability company and a joint-stock company (capital companies), as well as a European Company and a European Economic Interest Grouping. Cooperatives include a cooperative and a European Cooperative Society. [§ 1(2) and (3) of the Business Corporations Act].

⁵² E.g., RONOVSÁ, K. *Lze využít business judgment rule ve světě fundací?* [Is it possible to apply business judgment rule in the world of foundations?]. In: EICHLEROVÁ, K. et al. (eds.). *Rekodifikace obchodního práva – pět let poté: pocta Stanislavě Černé. Svazek I.* [The recodification of the business law after five years: liber amicorum Stanislava Černá. Volume I.]. Praha: Wolters Kluwer ČR, 2019, pp. 49–60.

7. PRACTICAL IMPORTANCE

Relevant data regarding the impact of the introduction of the BJR on behaviour of directors in practice are not available. Therefore, it is not possible to conclude with certainty whether the decisions of directors have been more (or less) risky since the introduction of the new regulation. It can be assumed, though, that at least a part of the directors are aware of the existence of the BJR as the issue was discussed extensively among corporate lawyers after its codification.

Despite the knowledge of the BJR rule, it is rather unlikely that the directors are prepared to adopt more risky decisions. As the pre-requisites of fulfilment of the BJR stay unclear (see above), it can be difficult to say whether the BJR helps directors recognize if they are in a “safe harbour” in the decision-making process or not. Hence, the steering function of the BJR can hardly be realized.

On the other hand, it is presumable that the introduction of the BJR has led to a growth in the number of materials used for decision-making. The literature which deals with the BJR issue emphasises the necessity of the existence of sufficient number of sources utilized for decision-making as well as the need of recording, which materials were used as a base for the decision.⁵³ Additionally, relevant judicial decisions specify the necessary amount of information.⁵⁴ These facts probably result in the accumulation of materials by the deciding bodies. This occurs despite the fact that it is emphasised, that a formal accumulation of materials is not sufficient to fulfil the requirement of sufficient information.

What can be concluded with certainty is that the courts apply the BJR when reviewing business decisions.⁵⁵ Furthermore, according to the actual decision of the Supreme Court, the BJR must also be applied to decisions adopted before the BJR became statutory law.⁵⁶

8. CONCLUSION

The BJR became part of the Czech statutory law on 1 January 2014. However, even prior to this date, there were already some courts reluctant to interfere with business decisions and current case law reminds us that the BJR should also be applied on decisions adopted before 2014. It seems that judiciary, literature, as well as practice have been unanimously in agreement that there are many good reasons to prevent courts from reviewing business decisions. The BJR is usually understood as a device used to protect directors against liability. However, it is necessary to be aware of the fact that

⁵³ LASÁK, J. in: LASÁK – DĚDIČ – POKORNÁ – ČÁP, *c. d.*, p. 367.

⁵⁴ Judgment of the Supreme Court of 19 July 2018, case no. 29 Cdo 3770/2016.

⁵⁵ The BJR was repeatedly applied by the Supreme Court of the Czech Republic, e.g., judgment of the Supreme Court of 26 October 2016, case no. 29 Cdo 5036/2015, resolution of the Supreme Court of 23 October 2019, case no. 27 Cdo 5003/2017-II, as well as the High Courts, e.g., judgment of the High Court of Olomouc of 10 October 2019, case no. 5 Cmo 14/2019.

⁵⁶ Judgment of the Supreme Court of 19 July 2018, case no. 29 Cdo 3770/2016.

the BJR has extraordinary importance for companies as well. Directors' risk aversion can lead to business failure.

The BJR shall "lock" business decisions so they cannot be reviewed by the court. This could allow directors to feel safe (i.e., out of danger of being found liable for an outcome they cannot influence) while adopting business decisions. On the other hand, there must be a way to protect the company from hazardous and insane decisions. The suitable device seems to be the differentiation between the review of the material content of a business decision and the review of the process of adopting it. Whereas the material substance of the decision cannot be reviewed by the court, compliance with due process can and is. Nevertheless, no matter how tempting this might sound, in reality it is necessary to admit that the courts also deal with the material content of the decision. The review of due process requires an evaluation of the amount of information needed as well as compliance with the interest of the company which is not possible without looking at the material aspects of the decision.

The formulation of the BJR in Czech law is not optimal. However, the interpretation of the rule should follow neither the accurate wording of the law nor the inspiration sources. The purpose of the BJR should always prevail. At the same time, it is necessary to interpret the rule in a way that allows directors to be able to recognize, in the moment of decision-making, whether they are safe or not. When there are doubts about whether a certain decision is "covered" by the BJR, it is necessary to prefer interpretation favourable to directors. The author of this article suggests that business decisions, which were adopted in good faith, i.e., in the justifiable interest of the company (including absence of conflict of interest), based on sufficient information, and not being irrational, should be protected. If all pre-requisites are met, process can be described as proper, and the director (and subsequently the court) can conclude that decision was adopted with due care. The formulation of the BJR can thus serve as "the best practice" for directors to specify, which elements shall be included.⁵⁷

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⁵⁷ MERKT, *c. d.*, p. 143.