2022 ACTA UNIVERSITATIS CAROLINAE – IURIDICA 3 PAG. 75–86

THE DUTY OF CARE IN ROMANIAN COMPANY LAW

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Abstract: An enduring problem in company law is the liability of directors to the company for damage caused by wrongful acts. On the one hand, levers must be created whereby this liability exists, is effective, and plays a preventive role: a director is discouraged from carrying out damaging activities. On the other hand, the business world involves taking risks. It is sometimes regular for companies to suffer losses, not because of a mistake by a director but because of factors external to the director's conduct. The director should therefore be encouraged to take certain risks. It all comes down to a question of balance between responsibility and risk-taking. How this balance has been created in Romanian law, what dilemmas exist, and how the courts apply the rules: the article proposes to analyse these issues.

Keywords: joint-stock company; directors' liability; duty of care; duty of loyalty; business judgment rule; Romania

DOI: 10.14712/23366478.2022.37

1. REGULATION

In a state of intermission for approximately four decades, Romanian company law was recreated after the collapse of the Soviet-style dictatorship. During totalitarianism, the Commercial Code (*Codul comercial*) of 1887 was never repealed but affected by desuetude. Revived after the change of regime in 1989, the code's regulations on companies were considered obsolete, and a new Act no. 31/1990 (Act on Companies), primarily based on the 1940 project of a new Commercial Code, was adopted. The other provisions of the Commercial Code of 1887 (the law of commercial obligations) were in force in 2011 when the new Civil Code (*Codul civil*) entered into force marking the transition of Romanian private law from a dualist to a monist system.[1] This transition also affected the Act on Companies: initially entitled act on "commercial companies," in 2011 the term "commercial" was eliminated from the title of this norm, and the name simply became the "Act on Companies," mirroring the monist approach in Romanian private law.

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1 For details, see VERESS, E. The Romanian Civil Code: ten years of application. *Jahrbuch für Ostrecht*. 2021, Vol. 62, pp. 387–401.

Since its adoption, the Act on Companies, was reformed several times, but still forms the basis of company regulation in Romania. There are five forms of companies, regulated by the Act on Companies, all legal persons: a general partnership (*societate în nume colectiv*); limited partnership (*societate în comandită simplă*); joint-stock company (*societate pe acţiuni*); partnership limited by shares (*societate în comandită pe acţiuni*); and limited liability company (*societate cu răspundere limitată*).[2] The present analysis will concentrate on the joint-stock company and limited liability company, which are the most frequent company forms. Act no. 223/2020 eliminated minimal capital requirements in the case of limited liability companies therefore no more incentives are in force for the establishment of general or limited partnerships.[3] The last two company forms are unpopular because they involve the unlimited responsibility of members (or of the full/acting partners in case of limited partnerships) towards the creditor. Limited liability is effortlessly reachable, so in Romania general or limited partnerships tend to become a curiosity; the partnership limited by shares was from the start a company form for which the business practice showed no interest.

Between the company and its directors[4] (*administratori*), there is a contractual relationship governed by the rules regarding the mandate. Article 72 from the Act on Companies expressly states that the duties and liability of directors are governed by the provisions relating to the mandate and those specifically provided for in the special rules included in the Law on companies. Therefore, the applicable rules form several layers, which follow in order of their priority:

a) special rules on the director's mandate from the Act on Companies;
b) rules from the Civil Code:
b1) general rules on the mandate from the Civil Code, which are not derogated by specific norms from the Act on Companies;
b2) general norms on the responsibility of heads of legal persons;[5]
b3) and finally, the rules on the administration of the property of another from the same act.

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2 The English terminology is imprecise since the terms describe other structural realities in the continental systems of law than suggested by using these legal terms in a common law context. Simple partnership and the so-called "association in participation" are included in the Civil Code, economic interest grouping is regulated separately (Act no. 161/2003), and co-operatives form the object of separate legislation (Act. no. 1/2005, Act no. 566/2004) etc.

3 For the recent development of the limited liability company regulation in Romania, see VERESS, E. Limited Liability Companies in Romania: De Lege Lata Clarifications and De Lege Ferenda Proposals in Regard to the Forced Execution of 'Social Parts' for the Personal Debts of an Associate. *Central European Journal of Comparative Law*. 2020, No. 1, pp. 195–208; VERESS, E. Observații critice privind Legea nr. 223/2020: societatea cu răspundere limitată ca subiect de experimentare legislative [Critical remarks on Law no. 223/2020: limited liability company as a subject of legislative experimentation]. *Dreptul*. 2021, No. 5, pp. 85–96.

4 I use the term "director" for a member of the management body or of the supervisory body of a company, in a sense shown in the European Model Company Act. However, the term director in Romanian law can be used for several other purposes; therefore, in this article, the term director is in the meaning shown above.

5 Art. 220 from the Civil Code regulates in general terms the liability of heads of legal persons and of other persons who have acted as members of the bodies of the legal person for damages caused to the entity by them through breach of their duties.

In this context, directors are liable to the company and not to the shareholders because the legal relationship of a mandate exists between the company and the director. A director, in general, has no obligations of result,[6] but obligations of means (of conduct): a director is bound to use all means necessary to achieve the promised result. Logically the director's obligations include a complex of duties, and the nature of the obligation breached must be considered on a case-by-case basis. In determining whether an obligation is an obligation of means or an obligation of result, regard shall be had in particular to:

a) the manner in which the obligation is stated in the contract;
b) the existence and nature of the consideration and the other elements of the contract;
c) the degree of risk involved in achieving the result;
d) the influence which the other party has over the performance of the obligation.[7]

Of course, there can be several obligations of result arising from the law (keeping the records required by law, keeping the accounts, preparing the financial statement, convening general meetings in the cases laid down by law etc.) or from the management contract. In the context of Article 73 from the Act on Companies, the directors are jointly and severally liable to the company, among others, for the existence of the registers required by law and their correct keeping, the exact implementation of the resolutions in general and the strict performance of the duties imposed by law and the articles of association.

There is still a debate on the nature of a director's responsibility in Romania. The dominant opinion is that if a director is liable for failure to comply with the obligations arising from its mandate, they have a contractual liability. However, if the obligations laid down by the Act on Companies are breached, the responsibility has a tortuous (delictual) character.[8] Nevertheless, some opinions considered a director's liability in all the cases tortuous (because they cause damage as an organ of a legal person)[9] and ideas were also formulated that this responsibility is a special one (corporate liability).[10] This problem does not form the subject of the present article. Nevertheless, in my opinion, there are not enough distinctive elements to characterize a special corporate liability besides the classic division of liability into tortuous and contractual responsibility. I am more inclined to think that directors' liability towards the company is always contractual. Obligations arising directly from the law still form duties that become integral parts of the mandate, which has a contractual origin. In the case of any contract, it binds not only what is expressly laid down in the contract but also what the law imposes on the contractual debtor. Thus, there is no need to distinguish from case to case whether the director has a contractual or a tortious liability, with the differences in a legal regime that would arise from this qualification. This interpretation is also underlined by

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[6] According to the Art. 1481 of the Civil Code, in the case of an obligation of result, the debtor is bound to provide the creditor with the promised result.
[7] Art. 1481 of the Civil Code.
[8] GEORGESCU, I. L. *Drept comercial român. Vol. II, Societăţile comerciale* [Romanian commercial law. Vol. II, Commercial Companies]. București: Socec & Co, 1948, p. 541.
[9] TURCU, I. *Teoria şi practica dreptului comercial român. Vol. I* [Theory and practice of Romanian commercial law. Vol. I]. Bucureşti: Socec & Co, 1998, p. 339.
[10] DANIL, M. Câteva probleme ale funcţionării şi administrării societăţilor comerciale [Some problems with the operation and administration of companies]. *Revista de Drept Comercial*. 1993, No. 3, pp. 89–91.

the provisions of Article 1272 of the Civil Code. The Civil Code expressly states that a valid contract concluded is binding not only on what is expressly stipulated but also on all the consequences which established practices between the parties, custom, *law*, or equity given to the contract, according to its nature. Consequently, the breach of any of these entails contractual liability.[11]

2. SPECIFIC RULES ON JOINT-STOCK COMPANIES: DUTY OF CARE AND OF LOYALTY

In the case of joint-stock companies (*societăți pe acțiuni*), specific rules were introduced in 2006 in a significant modernization attempt of Romanian company law through Act no. 441/2006. At that moment, the "business judgment rule" was introduced, as indicated in the (very short) explanatory memorandum of the law, to bring the legislation in line with OECD corporate governance standards. According to the OECD standards, *"board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders"*.[12]

In the context of Article 144-1 of the Act on Companies, introduced in 2006, the directors shall exercise their mandate with the prudence and diligence of a "good director". Directors are not in violation of this obligation if, at the time of making a business decision, they are reasonably entitled to believe that they are acting in the company's best interests and based on adequate information. According to the law, a business decision is any decision to take or not to take certain action concerning the company's management. Practically, through these norms, the Romanian legislature created specific rules on the duty of care.

In 2006, elements which also materialize the duty of loyalty where introduced. For example, directors shall exercise their office faithfully in the company's best interests. They shall not disclose confidential information and trade secrets of the company to which they have access in their capacity. This obligation shall also continue to apply to them after they cease to be directors. According to the law, the content and duration of these obligations shall be stipulated in the management contract.

These rules are also applicable in case of a dualist management system, to members of the directorate, and of the supervisory board.

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[11] The distinction presents practical importance because in Romanian law the legal regime of tortuous and contractual liability differs in certain issues.

[12] G20/OEDC Principles of Corporate Governance, OECD Publishing, Paris, 2015, 45. For details in the Romanian legal literature, see CATANĂ, R. N. *Dreptul societăţilor comerciale: probleme actuale privind societăţile pe acţiuni: democraţia acţionarial*ă [Company law: current issues regarding joint stock companies: shareholder democracy]. Cluj-Napoca: Sfera Juridică, 2007, pp. 191–194; BERCEA, L. Regula judecăţii de afaceri: un transplant legal imposibil [The rule of business judgment: an impossible legal transplant]. *Pandectele Române*. 2006, No. 3, pp. 201–208; BERCEA, L. Regula judecăţii de afaceri: despre involuţia instituţiei înainte de naşterea sa [The rule of business judgment: about the involution of the institution before its birth]. *Pandectele Române*. 2006, No. 6, pp. 159–166; BERCEA, L. Regula judecăţii de afaceri: despre noul regim al răspunderii administratorilor societăţilor pe acţiuni [Rule of business judgment: on the new regime of liability of directors of joint stock companies]. *Pandectele Române*. 2007, No. 8, pp. 26–38; etc.

Practically, in favour of the director, operates a presumption that they acted in good faith, in the context of the duty of care, and the company – the applicant requesting the court the award of damages – must prove that the conditions for the business judgment rule were not met. However, this regulation must be integrated into the system of contractual liability in Romanian law. Given that, in the area of contractual liability, Romanian law operates with a presumption of fault,[13] the mere fact of the existence of the damage means that the director acted culpably unless they prove otherwise. In reality the burden of proof is shared: the applicant (the company) must prove the existence of the damage, and the defendant (the director) must prove that they acted without fault.

In order to exclude fault, a director may prove that they acted with the prudence and diligence of a good director and was reasonably entitled to consider that they were acting in the best interests of the company and based on adequate information. The business judgment rule thus is a shield recognized by law to favour a director, a protection from liability if specific conditions are met. The general criterion of contractual liability is not appropriate in the area of the mandate regarding the management of a company's businesses. Compared to the classic contractual model, a management contract has specific content: sailing the company's ship on the stormy sea of the market. A director is obliged to take risks, and fault is assessed differently than in the case of a contract such as a contract of sale, a works contract, or a lease. Risk-taking must be made possible. But it cannot be irresponsible, without limits, and criteria of assessment. Thus, limits are drawn by law, and the valuation of whether the legal requirements on adequate information, prudence, and diligence are met, as must be the guiding idea (the interest of the company), will be made on a case-by-case basis. Thus, even if damage is caused to the company, a director may be absolved of liability if they have acted properly.

Under these circumstances, in Romanian law, the system of burden of proof is not perfectly adapted and is not clearly determined. The presumption of good faith, diligence, and prudence enters into conflict with the general presumption of fault. But even this ambiguous situation entails certain advantages over a clear but rigid system. If the burden of proof were clearly placed on directors, then they would be discouraged from taking risks, would seek justification, and provide evidence in advance even if the risk taken was reasonable, otherwise, their position in court would be precarious. If the burden of proof were placed solely on the company, the result would be that the company alone would have to prove a lack of diligence, prudence, and information, and adequate proof would be made difficult. Thus, the litigants are forced to produce evidence to find out the truth, which serves the judge to get the most accurate picture of reality.

The hazards of using general standards (prudence and diligence of a good director, adequate information, best interest of the company etc.) by the legislature were underlined in the Romanian legal literature: *"The judge establishes ex post the conduct, which the recipients of the standard can then use as indicators to anticipate the behavior that the standard requires, establishing the de facto content of a de jure standard. In this way, the ideal content of the standard, the one envisaged by the legislator, will be replaced by*

[13] According to Article 1548 from the Civil Code, the debtor's fault of a contractual obligation is presumed by the mere fact of non-performance.

concrete content created by court judgments. In this context, it should be noted that the legislator runs the risk of misusing the content of the standard by establishing standards rather than rules. Although the premise on which the law is based in establishing the standard is the perfect identity between its legal content and its judicial content, this premise often proves to be unrealistic, given the court judgments results from applying standards. These results contain deviations from the conduct contained in the standard, which goes beyond the limits of the space for manoeuvre, which a standard itself implies (tendencies to over-simplify the mechanism established by the standard, to ignore the economic reasons behind the standard, etc.).”[14]

3. AN ANALYSIS OF THE ROMANIAN LEGISLATION FROM THE POINT OF VIEW OF THE COURT JUDGMENTS

3.1 AFFIRMATION OF THE PRINCIPLE

The High Court of Cassation stated in a case that the duty of prudence and diligence referred to in Article 144-1 of the Act on Companies is not breached if, when making a business decision, the director is reasonably entitled to believe that they are acting in the company’s interest. Thus, if a director’s judgment is not affected by a personal stake, they are properly informed about the nature of the business and is convinced that the decisions taken are in the company’s interest, then the director is exonerated from liability.[15]

3.2 ROLE OF COURTS

According to another judgment, directors are often faced with choices in exercising their directorial duties. They are obliged to lean toward the solution or decision which, according to the information in their possession and on the basis of their judgement, appears to be the most profitable for the company. The business judgment rule is a concept according to which the courts cannot be called upon to rule on the actions and directorial activity of a company’s directors as long as there are no allegations and, in particular, no evidence that the directors have breached their duties of care and loyalty or have acted in bad faith or without rational basis.

Thus, the court should not substitute its own notions as to whether or not a particular business decision is appropriate, as long as the company’s management acted based on adequate information, in good faith, and with an honest belief that the action taken was entirely in the best interests of the legal entity, without involving any personal interest of the director.

The court concluded that these conditions were not met in the case: *“Without any hesitation, cannot be said of the legal transaction whereby the director of a joint-stock*

[14] BERCEA, L. Noi standarde de comportament în afaceri? *Business judgment rule* și răspunderea administratorilor pentru insolvenţa societăţilor comerciale [New standards of business behavior? *Business judgment rule* and the liability of the administrators for the insolvency of the companies]. *Curierul Judiciar*. 2014, No. 7, p. 412.

[15] High Court of Cassation and Justice, 2nd Civil Chamber, Decision no. 2827 of 27 September 2011.

company acknowledges and even undertakes to pay an amount exceeding not only the share capital of the legal person but also the total capital, to another company, owned by the same person, together with a first-degree relative, and whose director also was for approximatively ten years."[16]

The court confronted the standard and the facts, reaching the rational conclusion that the legal requirements of director protection in such a setting are not met.

3.3 CONFIRMATION OF A CONDUCT BY THE GENERAL MEETING

In regulating the exercise of the mandate, the provisions of Article 144-1 para. (1) of the Act on Companies provides that the directors shall exercise their mandate with the prudence and diligence of a good director by behaving like a reasonable person, a good director would behave in similar circumstances in relation to their own affairs.

Directors are liable to the company for failure to comply with the legal provisions relating to their duties and for failure to comply with the obligations laid down in the mandate given by the shareholders, in the articles of association, or by a resolution of the general meeting. According to the High Court of Cassation and Justice, liability cannot arise where, even after they have carried out certain acts or taken certain decisions, the general meeting of shareholders adopts a resolution confirming, even implicitly, those acts or decisions. In such cases, the will of the company itself is entirely consistent with the actions of the directors. According to the highest court of Romania, it is evident that under such circumstances, the director's actions are in accordance with the company's will, which excludes the possibility of their liability towards the company.[17] This exclusion of a director's liability due to the shareholders will is applicable in relations between the director and the company itself. The shareholders in such a case are acting at their own risk.[18]

3.4 BREACH OF THE DUTY OF CARE

In a case, the Romanian court stated that the provisions of the management contract, respectively Article 12 of this contract governing the liability of a director for *"damage caused to the company by any act contrary to the interests of the company, by acts of imprudent management, by the improper and negligent use of the company's funds"* are supplemented by the corresponding rules from the Act on Companies.

By their conduct of paying the sum of 820,000 lei by way of an advance to a company with which they have not concluded a (written) contract of sale and purchase for building materials, and which already had payment obligations to the applicant company, the directors carried out an act of imprudent administration, demonstrating negligence contrary to the interests of the company. Given their capacity as director, under a management

[16] Timișoara Court of Appeals, Commercial Chamber, Decision no. 64 of 30 March 2010.
[17] High Court of Cassation and Justice, 2nd Civil Chamber, Decision no. 326 of 28 February 2017.
[18] Concerning third persons, other rules are applicable. In general, lawful or illicit acts of the organs of the company shall affect only the company itself. But this is true only if the acts are related to the powers or purpose of the functions entrusted to the company organs. *Per a contrario*, in other cases, the liability of the director or even of the shareholder can be raised. Illicit acts also render the committers personally, jointly, and severally liable both towards the company and towards third parties on a delictual basis.

contract of a commercial nature, the liability is all the greater since, in commercial matters, the director is liable for the lesser fault. Since it is a remunerated mandate, according to Article 1540 of the Civil Code,[19] fault is assessed according to the abstract type – *culpa levis in abstracto*, of the prudent and diligent man (*bonus pater familias*).

The court found, regarding the conditions relating to the damage caused to the company and the causal link, they are met. It follows implicitly that by their imprudent act, showing negligence and a lack of diligence, a director caused damage to the company.

The director submitted that the amount paid by way of an advance might be interpreted as a preliminary contract of sale and purchase, the conclusion of which is not subject to any special formal condition. Regardless, that submission is not such as removing or diminishing the seriousness of their conduct. However, it merely demonstrates their lack of diligence in the company's management, which they were required to protect from the risks inherent in carrying on business precisely by concluding a contract.

As regards to the analysis made by the defendant on the legal nature of the director's obligations (obligations of result and obligations of means) in the assessment which the court had to make of the director's fault (*in abstracto*) – also taking into account the elements *in concreto* – established that the objective criterion – supplemented by certain subjective elements relating to the specific circumstances arising from the place, time, and circumstances in which the conduct was committed, and the qualities and training of the subject – is generally adopted as the criteria for assessing fault.

The objective, abstract criterion means that the court adopts the reference type of a normal, prudent man: a *bonus pater familias*. The court stated that this criterion applies even more rigorously in commercial matters and in the case of a remunerated mandate. The application of this objective criterion also takes account of the specific conditions in which the director is acting, in which case the level of requirements will be higher since the person concerned is a professionally trained specialist in the field of business, as compared with a non-professional, as is the nature of the activity in the course of which the harmful act occurred (commercial activity carried out by a professional).

In conclusion, the court found that the conditions for contractual liability were met. There was a management contract between the parties (as a precondition for liability). There was a breach consisting of a violation of a contractual obligation, a pecuniary loss, and a causal link between the breach of contract and the loss. There was fault (guilt) on the part of the person who committed the breach.[20]

In the context of this judgment, we can also refer to the problem of the conflict between the duty of care, practically a legal transplant, and the Roman tradition of *bonus pater familias*. The court considered that the *bonus pater familias* standard must be applied more rigorously in the case of directors. On the contrary, the major Romanian commentary on the company law considers that the business judgment rule originating from the

[19] This judgment refers to the ancient Civil Code of 1864, in force until 1 October 2011, which stated that *"for fault, when the mandate is without payment, liability is applied less rigorously than otherwise"*. The legal text in force, Article 2018 from the Civil Code, states that *"if the mandate is for a pecuniary consideration, the mandatary shall execute the mandate with the diligence of a good owner. However, if the mandate is gratuitous, the mandatary is bound to execute it with the diligence he/she shows in his/her own business."*

[20] Bucharest Court of Appeals, 5th commercial chamber, Decision no. 167 of 13 April 2011.

United States and introduced into Romanian law in 2006 is practically a watered-down version of the *bonus pater familias* rule. As stated, "[t]*he American business judgment rule, which was adopted in 2006 in our legislation, exempts directors from liability if the failure of a company's business is due to the risk of the business and is not the consequence of negligent or fraudulent management judgment. In any business, inherent risk can turn decisions made in good faith into failures. As long as the directors' judgment is not impaired by a personal stake, as long as they are properly informed about the nature of the business and are convinced that decisions are made in the best interests of the company, then they are absolved of liability. The business judgment rule test means that decisions are taken with speed, based on reasonable information, do not attract liability on the part of directors, however great the damage to the company."*[21]

In my opinion, there are two different standards, each with its own field of application. There is no need to reconcile these two standards: the business judgment rule can be applied independently from its correspondent from the Civil Code. In the case of joint-stock companies, the conduct of the directors must be assessed under the provisions of Article 144-1 from the Act on Companies since these norms have a special character compared to the norms of the Civil Code.

4. IS THE DUTY OF CARE TEST APPLICABLE FOR LIMITED LIABILITY COMPANIES?

Keeping in mind that the Romanian limited liability company has a relatively short regulation in the Act on Companies, it was raised several times that some rules regarding the management of the joint-stock company can be applied by analogy for a limited liability company. Finally, the High Court of Cassation and Justice stated that the management rules laid down by the law for joint-stock companies should not be applicable to limited liability companies unless there are expressly and restrictively provided for in the Act on Companies. The absence of such rules of reference, which are, as it was stated, restrictive and of a strict interpretation, undoubtedly leads to the conclusion that different rules govern the management of a limited liability company from those laid down for the joint-stock companies.[22] In this circumstance, the responsibility of a director in a limited liability company is governed not by the business judgment and duty of care rules, but by the legal norms on mandates. Two approaches can be considered:

a) Article 213 of the Civil Code, according to which members of the management bodies of a legal person must act in its interest with the prudence and diligence required of a good owner.
b) Article 2018 of the Civil Code, which states that *"if the mandate is for a pecuniary consideration, the mandatary shall execute the mandate with the diligence of a good*

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[21] CĂRPENARU, S. D. – PIPEREA, GH. – DAVID, S. *Legea societăților: comentariu pe articole* [Company law: commentary on articles]. 5th ed. București: C. H. Beck, 2014, p. 529.

[22] High Court of Cassation and Justice, 2nd Civil Chamber, Decision no. 3679 of 31 October 2013. The Act on Companies in Article 197 also states that the provisions relating to the management of joint-stock companies are not applicable to limited liability companies, whether or not they are subject to the audit obligation.

owner. However, if the mandate is gratuitous, the mandatary is bound to execute it with the diligence he/she shows in his/her own business."

We can observe that Article 2018 differentiates between mandates for pecuniary consideration and gratuitous mandates, with effects on the responsibility. Liability in the case of a gratuitous mandate is less severe. Article 213, however, makes no such difference. Two interpretations are possible:

a) We must apply Article 213 from the Civil Code, as a general rule for legal persons. Therefore, we cannot differentiate based on the nature of the mandate (for consideration or gratuitous). The director of a limited liability company has the more severe responsibility of the "good owner" irrespective if the mandate is gratuitous.
b) Keeping in mind that Article 72 from the Act on Companies states that the liability of directors is governed by the provisions relating to a mandate, Article 213 Civil Code, as a general norm for legal persons, is not an applicable rule for companies. There is an express legal text that requires applying the rules on the mandate. Therefore, the gratuitous or for consideration character of the mandate influences the responsibility of the directors to the company.

The High Court of Cassation and Justice, when there was a special norm in the Act on Companies, granted the priority of that regulation in comparison to norms included into the Civil Code. For example, in the case of a simple partnership (without legal personality, in Romanian *societate simplă*), Article 1928 Civil code states that at the request of a partner, the court may exclude any partner (contracting party) for a good cause from a simple partnership. Article 222 of the Act on Companies, on the contrary, in the case of a limited liability company, permits the exclusion of a member who is also a director and commits fraud to the detriment of the company or uses the company's signature or capital for their own benefit or that of others. The sanction of exclusion may be applied when revocation of the management mandate is considered insufficient not only for abuse of power and breach of the limits of the management mandate, but for any fraudulent action or inaction to the detriment of the company, i.e., not only for fraud which they are in a situation to commit given their position as director but for any intentional offense committed to the detriment of the limited liability company. The regulation, in this way, protects, in a distinct manner, the trust that the holder of the position of director must enjoy. Therefore, a limited liability company member who is not a director cannot be excluded for fraud against the company: the specific rules from the Act on Companies exclude the application of the Civil Code. The arguments presented above lead to the conclusion that the situations of exclusion of the associate provided for in Article 222 of the Act on Companies, republished, as subsequently amended and supplemented, do not complement the provisions of Article 1928 of the Civil Code. Of course, within the limits of contractual autonomy, following the legislature's thinking and the institution's rationale, the parties have the right to multiply or contractually restrict the grounds for exclusion in company law.[23]

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[23] For details, see High Court of Cassation and Justice, Chamber for Solving Legal Interpretation Issues (*Completul pentru dezlegarea unor chestiuni de drept*), Decision no. 28 of 10 May 2021.

Analysing our paradigm, in my view, the express reference to the rules of the mandate does not exclude the application of another general rule, which complements the regulation of the limited liability company. The Act on Companies does not itself contain rules derogating from the Civil Code in this situation. In consequence, not only do the rules of the mandate apply but also those of Article 213 of the Civil Code. While, generally speaking, a gratuitous mandate entails less severe liability, this rule is not applicable to limited liability companies due to the effects of Article 213 of the Civil Code. The liability of the directors of a limited liability company has a unitary character, regardless of whether the mandate is gratuitous or for consideration. The director will be liable according to the objective criterion of the good owner in all cases. The distinction between gratuitous and a mandate for consideration, which is absolutely logical in typical cases of a mandate, is not reasonable to characterize the director's mandate. If, in general, the members of the governing bodies of legal persons are held liable according to the abstract type of good owner, for example, in the case of non-profit entities, then it would be quite strange to have different rules for a limited liability company. This issue remains to be clarified by the courts soon.

The courts also significantly contributed to the interpretation of director's responsibility in case of a limited liability company. A director – a natural person – of a company represents the company in relations with third parties and engaging the company's liability towards them. The director is liable to the company for any damage caused by exceeding the powers given by the mandate contract concluded, or by not properly fulfilling that mandate or the obligations incumbent on them under the provisions of the Act on Companies.[24] The same law regulating the liability of directors aims to protect the limited liability company associates' interests and implicitly of the company, establishing the presumption of liability of the company's management bodies – in this case of the director – even after the end of their mandate for acts and actions detrimental to the company during the exercise of the mandate.[25]

5. CONCLUSIONS

The confirmed interest in importing the business judgment rule into Romanian law is given by the specificity of the agency relationship between the company and its directors. In fact, the criterion of the good owner is also adequate to offer a standard of appreciation to the judge, who can solve a case practically with an identical result to that of the one given by the business judgment rule, without creating, in reality, a gap in the applicable standards between directors of a joint-stock company and of a limited liability company. Nevertheless, the legal transplant of the business judgement rule for joint-stock companies chisels the regulation, principally sending a message to directors: risk-taking is permissible, it may be in the company's best interests, and it is expected that in some cases, risk will lead to losses. Romanian law is currently characterized by the

[24] High Court of Cassation and Justice, Commercial Chamber, Decision no. 1246 of 27 March 2008.
[25] High Court of Cassation and Justice, Commercial Chamber, Decision no. 1603 of 13 May 2008.

parallel application of the two standards: the duty of care and business judgment for joint-stock companies, and the good owner standard in the case of limited liability companies.

Managing a company, without a doubt, means making quick decisions in an incomplete informational context. Sometimes complete information is not possible due to insufficient time, but the decision must still be taken. Thus, the standard of diligence and prudence in case of a joint-stock company, is not an abstract one, but is assessed in the concrete context in which the director acted: whether in that context they did everything necessary to act as a good director, whether within the limits of their possibilities they tried to do everything possible to have all the information necessary to fundament an accurate decision, whether concerning all the concrete circumstances they acted with prudence and diligence. Everything relates to the moment when the business decision was taken, and knowledge of subsequent developments does not justify any approach other than what is possible by reference to the decision-making minute already past. *"Business decisions seldom concern unambiguous questions; on the contrary, they are usually prudential judgments of choice among several plausible alternatives. Moreover, given the nature of commercial activity, in which even diligently made choices can be wrong, whether a business decision has produced harm, the quality of the decision and the process of making it, and the consequences produced are analyzed contextually, ex ante, by reference to the knowledge and information reasonably available to the director at the time the decision was made, rather than ex post, by taking into account information available at the time of judicial review."*[26]

The business judgment rule added contextuality and flexibility to the abstract good owner (*bonus pater familias*) rule that is needed in a business context, adapting the legal and moral standards to the specificity of a director's mandate. Finally, justified risk-taking does not involve recklessness, lack of diligence, lack of information, or violation of the corporate interest. In the latter situations, the director cannot be protected from liability.

The fact that the regulation requires periodic adjustments is underlined by the recent completion of the legislation. By Act no. 216/2022, a new text was introduced in the Romanian legislation, referring to the company in difficulty. In the case of such a company, the directors in their activity must take into account at least the following:

a) the interests of creditors, equity holders and other stakeholders;
b) the need to take reasonable and appropriate steps to avoid insolvency and to minimise losses to creditors, employees, equity holders and other stakeholders;
c) the need to avoid engaging intentionally or with gross negligence in conduct that threatens the viability of the enterprise.

Again, these are general criteria. It will be for the judges to measure a specific conduct in the light of this legal text.

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[26] BERCEA, L. O analiză a leziunii în contractele de afaceri [An analysis of the injury in business contracts]. *Revista Română de Drept Privat*. 2019, No. 1, p. 262.