Aspects of Comparative Law with Regard to the Business Decision Rule. Particularities of the Liability of the Administrator of the Company Relating to the Liability for the Insolvency of the Company

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Abstract:

This study analyses the rule of business decision in the laws of several states and focuses on similarities, but also differences between regulations. At the same time, it is a rich source of analysis on the way in which insolvency germs and regulations on the liability of company managers are reflected in the legislation of several states. The elements presented broadly argue essential aspects of the national legislation, but also the legislative regulations of other states, but the peculiarities and similarities mentioned focus on the specificity of our legislation. The terms of comparison reveal important and clear aspects regarding the liability of the natural person with management/management position in a company making an incursion into the Anglo-Saxon legislation and practice of origin, but also in laws and jurisdictions.

Keywords: *business decision rule, comparative law, liability of company administrators/directors, insolvency.*

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1. Brief legislative incursion on the internal regulation of the business decision rule

In addition to the obligation of loyalty and the pursuit of social interest, respectively good faith in administration, gerants must make decisions prudently and with due diligence, as a good administrator[2].

Business judgement rule was introduced into our legislation by Law no. 441/2006, which amends the company law, and art. 1441 mentions, in paragraph 2, that the administrator, the administrator, whose liability is required by the company, will be considered to have acted with the child and diligence of a good administrator if, at the time of taking the decision that caused the damage, the, he was reasonably entitled to believe that he was acting in the interests of society and on the basis of adequate information. In accordance with paragraph (3) of the same article, the business decision is, in the sense of the company law legislator, the, any decision to take or not to take certain measures with regard to the management of the company.

The legislative regulations of the business decision rule have been in our legislation, since the former Decree-Law no. 701/2940, in which it was stipulated, in Article 12 (2), that 'administrators will be protected from liability only if they prove that they have fulfilled their duties with the care of a good administrator and manager'. Thus, this pro-society conception has led to an easier recovery of the damage caused and has completed virtually any debate on the burden of proof[3]. The interwar legislature took over from German law not only the unification of civil liability in the form of

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[2] Sebastian Bodu, *Tratat de drept societar, teorie&practica [Treaty of corporate law, theory & practice],* 2nd edition (Bucharest: Rosetti International Publishing House, 2019), 844. For a comparative view see Taylor, Lynne, and Sulette Lombard. 2024. "Statutory Principles Governing Director Conduct When a Company Is in Financial Distress – a Trans-Tasman Comparison." *Journal of Corporate Law Studies*, September 1–52. doi:10.1080/14735970.2024.2403225.

[3] Ion L. Georgescu, *Drept comercial român, volumul II [Romanian trade law, volume II]* (Bucharest: All Beck Publishing House, 2002), 435.

contractual, but also the overturned model of the burden of proof[4].

The issue of the burden of proof is extremely important when questioning the diligence and prudence of managers, as putting evidence on them would discourage them from taking responsible risks, while placing the burden of proof on the injured party would require the factual situation to be determined[5].

When the administrators have acted against the corporate interest, the claimant must prove the existence of at least one of the following elements: bad faith, reliance on the decision, inadequacy of its purpose, and, an interest contrary to society, the mentioned elements being interdependent. For example, bad faith exists in all three cases (dependence of the decision, inadequacy of purpose or pursuit of an interest contrary to societal interest). The dependence of the decision may also be due to the fact that the administrator pursues the interest of the person whose idea he takes over as an obligation to act. However, in all four of these cases, since the infringement of the duty of loyalty is invoked, the applicant must overturn the presumption of good faith which the administrator enjoys, and therefore not the business character of the decision[6].

A peculiarity, which I understand to mention here, refers to the fact that, when the insolvency proceedings are open against the company, the holders of the civil liability action towards the administrators, become the social creditors, through the judicial administrator, respectively the liquidator who works for the benefit of the credal mass, as stipulated in Article 169 (1) of Law no. 85/2014 on insolvency prevention and insolvency proceedings[7].

2. Analysis of the business decision rule in various legislation

The business decision rule came into being in the U. S., being predominantly a judicial concern that people with reason, intellect and integrity would not accept to be administrators, or, if the law required them a degree of perfection which an ordinary man does not have. Probably the purpose and limits of the business decision were first expressed in 1829 in the Percy vs. files. Millaudon[8].

In the statement of reasons, the court states that 'there is no doubt that if a business involves the exercise of a particular science, a person who would accept the warrant, totally ignorant of the subject matter, would, she could be exonerated for exercising her duties with loyalty and diligence. As long as the appointed trustee has the normal qualities of fulfilling the obligations entrusted to him, we consider that, in the event that difficulties occurred during the exercise, during the course of the exercise, it makes the choice of a solution that has led to losses, unable to hold the trustee responsible, when the error is one that any prudent person would have done. Interpretation to the contrary would imply the possession and exercise of perfect wisdom for a man subject to error. No one would accept to exercise a mandate for another under such severe conditions. The test of responsibility should not be the certainty of the wisdom of others, but the possession of normal knowledge; and showing that the error is so serious that a rational man with normal attention would not have done it[9].

In Australia, 'business justice' was introduced in March 2000 in the following form (section 180 paragraph (2), Corporation Law): 'an administrator or other manager of a corporation makes a business decision if the following conditions are met cumulatively:

1) make the decision in good faith and for an appropriate purpose;

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[4] Paul I. Demetrescu, *Întreprinderile comerciale, cu notă introductivă de Ioan C. Marinescu [Commercial enterprises, with an introductory note by Ioan C. Marinescu]* (Bucharest: Cercetări Juridice Publishing House, Ministry of Justice, 1943).

[5] Michael Legg, Dean Jordan, 'The Australian Business Judgement Rule After *Asic* v. *Rich*: Balancing Director Authority and Accountability', *Adelaide Law review* 34 (2014).

[6] Dragoș-Mihail Daghie, *Administratrea societății pe acțiuni [Management of the joint-stock company]* (Bucharest: Universul Juridic, 2016), 314.

[7] Decision no. 1134/2003, Supreme Court of Justice, Commercial Section in Cristina Cucu, Marilena Veronica Gavriș, Cătălin Gabriel Bădoiu, Cristian Haraga, *Legea societăților comerciale adnotată, repere bibiliografice, practică judiciară, decizii ale Curții Constituționale, adnotări [Law of companies annotated, biographical landmarks, judicial practice, decisions of the Constitutional Court, annotations]* (Bucharest: Hamangiu, 2007), 139.

[8] 8 Mart. 68 the Louisiana Supreme Court.

[9] Solomon Samuel Arscht, 'The Business Judgement Rule Revisited', *Hofstra Law Review,* vol. 8, Issue 1, 1979, 97–98.

2) has no material personal interest in the matter subject to the decision;

3) inform themselves about the matter which is the subject of the decision, so that they reasonably believe that it is appropriate;

4) rationally believe that the decision is the best for the corporation. This belief of the administrator or director that the decision is best for the corporation is rational unless no reasonable person in that position would have had it'.

The Explanatory Memorandum of Corporate Law Economic Reform, 1998 program, the Australian legislator has shown that the fundamental 'purpose of the business decision rule (business judgement) is to protect the authority of the administrators in the exercise of their duties, not to absolve them of liability', as well as to 'clarify and confirm the position of jurisprudential law (common law), according to which courts rarely review commercial decisions taken in good faith', so that administrators have the explicit certainty that courts will not review these decisions with the regulation.'[10]

The British courts consider whether the administrator who made a decision prejudicial to the company acted in its interest, that is, whether he sincerely believed at the time of its adoption, the decision is a good one for society. Judges are not limited, of course, to asking the defendant whether he honestly believed in the decision, because the answer would inevitably be a positive one, but, given that no one can know what was in his mind, it is analysed whether he believed plausibly in that decision[11].

The diligence or lack thereof in the adoption of a commercial decision is something other than the quality of the decision. An administrator can act negligently, but be lucky that the decision made is a good one. If the decision had been taken on the basis of adequate diligence and had been taken in any way, the injurious outcome is not due to lack of diligence. Consequently, if there has been a breach of due diligence, the decision must be assessed on the basis of an objective criterion such as the degree of reasonableness expected from a good, that is common, administrator.

Compared to English law, American law requires an assessment of the entire standard of fairness, which includes, for example, an analysis of the price received for corporate shares from a third party bidder, to assess the possible loss suffered by the company, as in the *Smith vs. Case. Gorkam*, where the court established serious negligence[12].

American doctrine[13] noted that 'the prudence due to simple logic is not as unclear as it seems: it must pass the test of reasonableness in the context of membership of the management body. For this, administrators are required to use sufficient information when making decisions, research this information judiciously and act when circumstances are appropriate for an acceptably prudent person to use it. The business decision rule protects it from liability and admits that the failures of a company are not necessarily the result of negligence or fraud: in any transaction the inherent risk can turn decisions taken in good faith into failures'.

In the case of *Gagliardi vs. TriFoodsIntl Inc*[14], the American court determined that 'taking into account the scale of operations of a listed modern corporation, this staggering proportionality between risk and gain threatens with undesirable effects. Given this reduced proportionality, the likelihood of the administrator's liability for negligence, lack of attention, laxity, will only to a small extent cause the board to disapprove of investment projects, no matter how risky. Obviously, it is in the economic interest of shareholders to provide managers with sufficient protection against liability for negligence, so that they conclude in good faith and follow the minimum procedural standards of attention. This presumption can be overturned by proving that administrators have breached one of their loyalty obligations in the operation that is the subject of the dispute, in which case the burden of proof is transferred to them, they must demonstrate that the operation was entirely honest with the

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[10] Michael Legg, Dean Jordan, idem supra.

[11] David Kershaw, *Company law in context, 2nd edition* (Oxford, United Kingdom: Oxford University Press, 2012), 345.

[12] Ibidem, 474.

[13] Jonathan Charkham, Marek Hessel, Jay Lorsch; Colin Mayer; James Sailer, *Administrarea societăților pe acțiuni în economia de piață și de tranziție [Management of joint stock companies in the market economy and transition]* (Bucharest: All Publishing House, 1997), 45.

[14] 683 A.2d 1049, 1052, Court of Chancery of Delaware, New Castle County, 1996.

corporation and its shareholders'[15].

A company unable to pay determines the insolvency, which could be remedied by a restructuring of its business, recapitalisation or even liquidation. The Council, with the help of a committee specifically set up for this purpose, meets and, with all the necessary information, decides on the best action plan to remedy the situation.

Usually, the management has the role to establish this insolvency management plan, including how to report to the bank with which the company works and to its creditors.

Of course, it is necessary to approve the board for all major decisions taken for the recovery of the company, and the board and the special commission can also call on the services of a financial consultancy specialist, outside the company.

The good-faith obligation of the director remains towards the company and in its state of insolvency and is not transmitted to creditors, as the supreme court has stated, with the mention that the latter have at hand the remedy by oppression to sanction any prejudicial conduct of the director[16]. Thus, the director continues to perform his duties with the related liability for the benefit of the company, unless the court appoints a judicial administrator, in which case the powers and responsibilities of the director are suspended, and the, until the administrator is released from office.

The personal liability of the director is also incurred if the company does not pay or refund certain amounts provided by law.

The most significant sources for potential liability in case of insolvency refer to the failure to make contributions to the pension plans on the due date, to the non-compliance with the provisions of the environmental legislation, and legal obligations to pay employees' salaries and withholding obligations for taxes and other deductions from sources associated with wages and leave allowances.

The obligation to apply for insolvency proceedings at the request of the debtor and the prohibition to conduct injurious business is also included ***in the law of the countries of the European Union as well as the United Kingdom.***

Thus, the member states that provide in their legislation, in case of impending insolvency, the prohibition to conduct commercial operations with potentially prejudicial (operational and/or financial restructuring of the debtor) are: **Cyprus, Ireland, the Netherlands, Romania as well as the United Kingdom.** In all other countries, the rule of application for opening insolvency proceedings applies. ***A special case is presented by Denmark, which has a hybrid system regarding the emergence of insolvency.*** These measures are mainly aimed at protecting the interests of the creditors of the company in difficulty.

As mentioned, in most of the states, the director is required to introduce the application for opening insolvency proceedings within the time limit provided by law, this has the consequence of a consistent liability of the directors for any diminution of the company's assets resulting from the late submission of the application. In this case, this type of liability can only be implemented by the judicial liquidator, and thus results in a proportionate compensation of all creditors' claims.

The second insolvency prevention strategy implies the obligation to cease commercial operations when they jeopardize the interests of creditors.

The introduction of the application for opening insolvency proceedings is conditional on the occurrence of the insolvency state and not on its imminence, while the application of the prohibition provides companies for a fixed period of time, the possibility to continue their activity, even in insolvency. So, this measure can be implemented even before the company is formally declared insolvent, provided a realistic assessment of the company's prospects. Thus, the directors of an insolvent company, which has real chances of economic recovery, have an adequate basis to continue operations, as well as, while directors of a company not yet insolvent may be subject to the obligation to cease all business activity when insolvency appears to be unavoidable.

The similarity between the two measures lies in the similar effects they produce on the expectations of conduct towards directors, in situations preceding the emergence of insolvency.

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[15] David Kershaw, *op. cit.,* 456–457.

[16] SCC 69/2008, SCR 3 560/2008, Supreme Court of Canada, BCE Inc. v. 1976 Debentureholders, case 32,647/2008; 2004 SCC 68, SCR 3 461 Supreme Court of Canada, People's Department Stores Inc. (Trustee of) v. Wise, case 29,682/2004.

The differences arise in practice and relate to the time of the application of the two measures[17].

Thus, since the courts are predominantly prohibiting the conduct of business operations, companies already in insolvency, too, we can infer that this measure is applied at a time after the occurrence of insolvency to the immediate obligation to introduce the application for opening insolvency proceedings. We mention, for example, that the chances of economic recovery of a company are higher in the United Kingdom, where the measure of prohibition operates, than in France or Germany, as well, where the rule to introduce an application for opening insolvency proceedings is applicable.

In states where the obligation to initiate insolvency proceedings is established, their legislation allows the continuation of business activity, even if the company is insolvent. Another difference between the Community states takes into account the rules governing the occurrence of insolvency.

Regarding **the duties of directors in case of insolvency,** we mention that the fundamental obligations of a director change in the following states: *Cyprus, Denmark, Estonia, Hungary, Ireland, Latvia, Hungary, Malta* and the *United Kingdom*. In general, this involves a redirection of the company's objectives, from the interests of the shareholders to those of the creditors, or a change in the application of the general standard of diligence.

An additional strategy to regulate a company on the verge of insolvency refers to the duty to recapitalise (corporate restructuring by changing the structure of share capital) or liquidate. Directive 2012/30/EU also imposes on the Member States the obligation to convene the general meeting, in the case of 'significant losses' that are defined as a decrease of half of the subscribed share capital (such as a reduction of the net assets of the company to less than half of the share capital). Thus, the situation is as follows:

- the obligation to convene the general meeting exists in: Austria, Belgium, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia, Slovenia, as well as the United Kingdom;
- the recapitalisation obligation is found in the legislation in: Bulgaria, Czech Republic, Estonia, France, Italy, Latvia, Lithuania, Luxembourg, Portugal, Spain and Sweden.

Also, the decrease by 50% of the subscribed share capital should not, in itself, constitute a triggering factor for the insolvency state, because this threshold does not reveal anything about the assets and capital needs of the company, nor is it a strong argument for shareholder intervention, especially since the limited liability of the company often means that an increase in the risk profile is accompanied by an increase in the value of the shares.

However, one third of the member states are not limited to the minimum requirement of the subscribed capital value threshold and require companies to opt, in this case (loss of half of the subscribed share capital), **either for the recapitalisation of the company, or for the restriction of the activity and liquidation of the company.** The Czech Republic, Estonia, France, Italy, Latvia, Lithuania, Portugal, Spain and Sweden have turned to this measure, which has two objectives: on the one hand, the, the restriction of companies with significant nominal share capital to trade with diminished capital and, on the other hand, the non-compliance with the obligation to ensure that adequate capital measures are taken, at a very early stage, it attracts the responsibility of board members.

The four measures presented (request to open insolvency proceedings, prohibition to conduct business, modification of the content of the obligations of the director of a company in the process of insolvency and recapitalisation or liquidation) are accompanied by, in all jurisdictions, additional items.

Thus, during the period preceding the insolvency or on the threshold of insolvency, the duties of the director/administrator, the criteria for assessing the fulfillment of professional obligations, their related liability, and, as well as the causes of liability removal, including the rule 'business decision' remain unchanged.

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[17] Gurrea-Martínez, Aurelio. 2021. "Towards an Optimal Model of Directors' Duties in the Zone of Insolvency: An Economic and Comparative Approach." *Journal of Corporate Law Studies* 21 (2): 365–95. doi:10.1080/14735970.2021.1943934.

In case of insolvency or when the company is on the verge of insolvency, in addition to the liability derived from the provisions of the articles of incorporation and the Companies Law, the directors may be held liable, by virtue of the rules governing tort liability, such as France, Belgium, Luxembourg, where the obligation to remedy the damage caused to another by an unlawful act operates. These are states with similar provisions, but which at the same time provide a broader and flexible framework for interpretation and application, such as the Netherlands, Germany and Austria.

In addition, tort liability rules may correlate with corporate law rules with respect to legal remedies applicable in the event of insolvency.

Alongside these, the criminal matters also operate, when they reflect or are closely related to the provisions of the Companies Law and those of the insolvency law.

For example, in Poland, failure to lodge an application for insolvency proceedings is a crime. In France, the combination of criminal investigation and the subsequent private application of the duties of directors has high practical relevance in small and medium-sized enterprises.

In the case of the latter, it has been proven, in some jurisdictions, necessary and effective for the intervention of a competent administrator or liquidator to examine the claims of the insolvent company, which is, to his directors.

The manner of the implementation of remedies, in case of imminent insolvency, differs depending on the insolvency law adopted by each member state, and the triggering moment of insolvency is very difficult to establish in practice.

What can be ascertained with certainty is that the obligations of the director of a company on the verge of insolvency remain unchanged, and the decisions taken during this time do not entail the responsibility of the director, the, especially when operating and the presumption of diligence, provided by the rule of "business decision'.

Also, the precise moment of the occurrence of the insolvency state is difficult to identify, and the causes of the insolvency must be determined on a case-by-case basis. These provisions also apply if a director decides to conclude a high-risk transaction for the diminished equity of the company he manages.

Regarding *the duties of the director, there are three states that are distinguished in this regard. Finland and France* state that *due diligence is a priority,* but necessarily accompanied by a careful risk assessment, given the sensitive financial situation of the company. *The United Kingdom, on its own, notes* that when the company approaches the insolvency of the cash flow, the obligations of the director owed to the company, according to s. 172 of the Companies Act 2006, it must be applied in the interests of both creditors and shareholders until economic recovery. If this objective is not achieved and the company becomes insolvent, the duties of the director shall concern only creditors.

The efficiency of these remedies is affected by the mobility of companies within the European Union and thus by the applicability of the rules of corporate law. It is clear from the case-law of the European Court of Justice that the applicable law is that of the State where the company is registered and that it also includes the obligations and liability of the director/administrator.

Thus, as the Court of Justice of the European Union has ruled in the Cartesio case, member states are free to restrict the applicability of their company law, undertakings which operate principally or wholly outside their territory. Member States are therefore free to restrict the transfer of the central management of a company established in accordance with its legislation.

This right of a member state is recognised to the extent that all member states, regardless of their rules of private international law, are required to allow the transfer of registration office (head office) to another jurisdiction.

Consequently, a company may decide to comply with the company law of another member state, and the one of origin (originating) must not prevent or restrict such a transfer, which thus leads to an amendment of the applicable legislation (in principle, the registered office may be transferred, not the central leadership)[18].

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[18] Kristin van Zwieten, „Director Liability in Insolvency and Its Vicinity" (March 2018). Later published in *Oxford Journal of Legal Studies*, Volume 38, Issue 2, 1 June 2018, pp. 382–409, *Oxford Legal Studies Research Paper* No. 38/2017, Available at SSRN: https://ssrn.com/abstract=2970913 or http://dx.doi.org/10.2139/ssrn.2970913.

In essence, the distinction between the registered office and the real office and, implicitly, the applicable law must be taken into account. On the one hand, there are those States which consider the law of the company of the State where the legal entity has its registered office to be applicable and, on the other hand, the law of the company of the State where the legal entity has its registered office, these are the states that claim that the provisions of the commercial law of the country of the real headquarters operate, that is, the territory where the central management exercises its duties and where the commercial activity is carried out.

At present, it is noted that the states adhering to the real headquarters allow the transfer of the central management to another jurisdiction, especially since the jurisprudence of the Court of Justice requires all member states to accept, on their territory, the central administration of a company registered in another country. Within the European Union, the situation is as follows:

- states adhering to the real-estate theory are: Austria, Belgium, Estonia, Germany, Greece, Latvia, Lithuania, Luxembourg, Portugal and Slovenia;
- the countries applying the theory of registered offices are: Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, Hungary, Ireland, Malta, Netherlands, Romania, Slovakia, Sweden and United Kingdom;
- states with a hybrid system are France, Italy and Spain;
- Poland is the only country where it is unclear which legislation is applicable, depending on the two theories.

Analyzing the legislation of the member states, it can identify a number of potential conflicts between it and the subject of the duties and liability of the directors.

Member states' national law applies, in some cases, special labour law rules to directors, sometimes designed to mitigate the liability of such employees. While the responsibility of the director must be determined, in fact, on the basis of the law of the member state where the registration of the company was carried out, the applicable labour law must be determined by applying Article 8 of the Rome I Regulation[19].

Article 1 (2) (f) of the Rome I Regulation generally excludes from its scope issues related to the liability of administrators, but some member states seem to allow, in certain circumstances, the application of less stringent employment legislation with a view to mitigating managers' liability. From the opinions of the experts consulted in this regard, it appears that this issue (the right of work and the responsibility of the directors) does not raise any particular problems. This is mainly due to the fact that, if the reduction of liability is accepted, such a decrease seems to apply mainly, with regard to claims based on important employment or service contracts concluded with the relevant directors.

There is a significant variation among member states on the legal mechanisms for holding directors accountable. Not all member states rely solely on the mechanisms of company law in this regard. Thus, rules which, in a national context, only function as functional substitutes for liability provisions under company law may have the effect of subjecting managers to multiple and conflicting obligations. Where, for example, a member state contains provisions on liability for damage to the interests of creditors in its general civil law, these rules may expose the administrator to liability, including, both under applicable company law and general civil law 'strain'.

3. Particularities of the administrator's liability for insolvency

We can consider a classification of the regulation of the duties of the administrator of a company in the threshold of insolvency, within the meaning of private international law.

In Austria, *the Companies Act applies, but it is disputed about the obligation to apply for the opening of insolvency proceedings*.

In Belgium, the Insolvency Act governs the conduct of those in management positions, which aggravates or contributes to the occurrence of insolvency, is not, it is clear whether and for the late

[19] Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008.

introduction of the application for the opening of insolvency proceedings; moreover, the general duty of diligence in relation to tort liability may also be imposed on foreign companies.

In Bulgaria, the main duty is *'recapitalisation or liquidation',* which operates only in the case of companies registered/registered in Bulgaria; the obligation to introduce the application for opening insolvency proceedings does not appear to play an important role in practice and may thus be governed by insolvency law, provision also applicable to companies that have the centre of main interests in Bulgaria ('COMI' = *term defined by the EU Insolvency Regulation 848/2015, used to determine the member state where a debtor can open insolvency proceedings*).

In Croatia, the regulation is mainly the Companies Act.

In Cyprus, we have mainly the Companies Act, including the criminal sanctions provided for by the same Cypriot law.

In the Czech Republic, this area is currently governed by insolvency law, but recent changes show a re-establishment of company law-specific rules; with the entry into force of the legislative amendments made, the, it appears that companies incorporated outside the Czech Republic and their directors will also be subject to the main obligations under Czech law in relation to the period before the insolvency occurred.

In Denmark, the regulation is the Companies Act.

In Estonia, the classification is unclear, it is probably a combination of company law, insolvency law and provisions on tort liability.

In Finland, the main obligations are laid down in the Companies Act, but important provisions are also contained in criminal law which may also apply to companies registered outside the country.

In France, the insolvency law regulates these issues.

In Germany, a dispute situation, probably insolvency law, for the obligation to file an application for opening insolvency proceedings.

In Greece, it is mainly the insolvency law that provides for the attributions.

In Hungary, this is not entirely clear. It seems that the rules on liability are partly governed by the Companies Act and concern only companies registered in Hungary. However, Hungarian law provides for a particular obligation of loyalty to creditors, under the responsibility of the directors of a company on the verge of insolvency, a duty accompanied by liability for non-compliance. This type of liability for the breach of the obligation of loyalty to creditors may also apply to companies registered outside the country and which are at the heart of the main interests (COMI) in Hungary.

In Ireland, the regulation is mainly the Companies Act of 1963, but the provisions on liability for negligent transactions governed by s. 297 of the above-mentioned laws are not clear.

In Italy, duties are governed mainly by the Companies Act.

In Latvia, unclear classification, this is probably a combination of company law, insolvency law and tort liability provisions.

In Lithuania, unclear classification, this is probably a combination of company law, insolvency law and tort liability provisions.

In Luxembourg, the applicability is mainly of the insolvency law.

In Malta, the regulation is mainly given by insolvency law, but the situation is not entirely clear.

In the Netherlands, we have regulation, mainly, in the Companies Act. However, there are specific rules governing liability addressed to companies having their registered office in the Netherlands.

In Poland, there is a combination of company law and insolvency law rules.

In Portugal, it is unclear, as both provisions of the Companies Act and that of insolvency govern the obligations of a company on the verge of insolvency, however, the regulation is not clear on specific rules such as, in particular, Article 84 of the Portuguese Commercial Code, which provides for an unlimited liability of the shareholder/the sole shareholder of a limited liability company insolvent.

In Slovakia, it is a combination of insolvency law and company law.

In Slovenia, the Companies Act applies in particular, but insolvency law also plays an

important role in the field.

In Spain, we are dealing mainly with the Companies Act.

In Sweden, there is a link between company law and insolvency law.

It follows that all Member States use one or more of the legal instruments below to address issues related to the conduct of those in management positions when a company is on the verge of insolvency or when it becomes insolvent:

- obligations usually laid down by the Companies Act: in particular due diligence and loyalty;
- additional obligations, which operate on the verge of insolvency or insolvency; for example, that of filing an application for insolvency proceedings, prohibitions to conduct injurious commercial transactions;
- general or particular rules of tort liability, applicable in case the director causes or contributes to the insolvency of the company;
- rules of criminal liability, sometimes collaborated with those of tort liability of directors found guilty of prejudicing creditors.

The precise classification of these rules is not of particular importance when their applicability is limited to the national level of a company established and operating in the territory of the State of origin.

However, the situation is different in the case of companies that have chosen to take place under the provisions of Article 54 TFEU[20].

Thus, these states use a combination of the above-mentioned strategies, but the doctrine and jurisprudence could not establish a net classification of the regulatory rules, allowing a distinction between the provisions related to either the Company law or insolvency law or tort liability. *For example, in Germany,* the legal obligation of the director to lodge the application for opening insolvency proceedings (under s. 15a of the insolvency law) and the liability for its non-fulfillment (the liability towards the company is regulated by Article 93 para. Two of the Law on companies listed on the Stock Exchange, and the liability towards creditors, de s. 15a of the insolvency law, in conjunction with Article 823 paragraph 2 of the Civil Code) are classified as insolvency rules within the meaning of private international law (disputed aspect); liability for fraud, and, regulated by Article 263 of the Criminal Code, in conjunction with Article 823 paragraph 2 of the Civil Code, is considered as belonging to the field of tort civil liability; and reclassification of loans obtained by shareholders, when the company is on the threshold of insolvency, in the company's own capital, it belongs to the Companies Law, from the point of view of private international law (disputed aspect). It can be argued that the associated use of these legal instruments constitutes a significant part of the German regime for the protection of creditors and that dissecting them by conflict of laws is neither effective nor effective, nor does it favour legal certainty.

From the analysis of the situation in the Member States, we can conclude that a coherent set of interconnected rules at national law level can be dissected under private international law.

As stated above, the applicable company law is determined essentially according to the State of the Union where the company was registered/registered, **while insolvency law applies to depend on the COMI.** This may lead to the partial application of the provisions of different legal systems, each time a company has COMI on the territory of another state than the one where it was registered/registered. If companies and their managers are subject to other legal regulations, in addition to those in the state where they are registered, which entails the liability of directors, in accordance with the general rules on the obligations of directors, which, this may prevent the exercise of the right to free movement of goods provided for in the Treaty.

Consequently, the likely disadvantages of the current legal situation in many member states are as follows:

1) the uncertain scope of the rules of private international law and the criteria for classifying

[20] "Societies established in accordance with the law of a Member State and having their registered office, central government or principal place of business within the Union shall be assimilated, in application of this Chapter, too, natural persons who are nationals of the Member States. Companies shall mean companies established in accordance with the provisions of civil or commercial law, including cooperative societies and other legal persons governed by public or private law, except for non-profit purposes".

substantive law provisions on the duties of directors of a company on the verge of insolvency create legal uncertainty;

2) where two or more legal instruments have a function of legal additions in a jurisdiction, but these instruments are subject to different liaison points, and these points lead to the application of different national laws, the lack of coordination of conflict-of-law rules can lead to regulatory gaps;

3) it is not clear whether and under what conditions the application of additional provisions on obligations and liability, for example under the *lex loci delicti commissi* (provided by Article 4 para. 1 of Regulation 864/2007[21], with regard to the law applicable to non-contractual obligations), directors of companies registered in another jurisdiction are compatible with Articles 49 and 54 TFEU.

4. Conclusions

Instead of conclusions on comparative law issues, we specify that in most jurisdictions, the obligations of directors of a company on the verge of insolvency, are, regulated by the Company's law and by the insolvency law, they have the character of functional completions.

The degree of protection of shareholders and creditors can only be assessed if the mechanism derived from the Companies Act, insolvency law and possibly tort and contractual liability is taken into account, and the provisions of the laws mentioned complement each other. In this way, shortcomings in one law can be compensated for by a more comprehensive and stricter regulation of another. However, if it is assumed that the general obligations of diligence and loyalty are usually classified as belonging to the Companies Act, and those owed to the company on the verge of insolvency as being governed by insolvency law, which is a simplistic but appropriate characterisation of the two connecting points, represented by the registered office (the state where the registration of the company was made) and by the COMI (the centre of the main interests), it applies, in this case, cumulatively. As mentioned above, these connecting points do not always lead to the same applicable law. This division of applicable law may result in the choice of rules with lower regulatory power, namely, the selection of the two sets of substantive law rules, what are the 'slabe' components of investor protection regimes in those jurisdictions.

Also, in exemplary terms, there are clear differences in the scope and dissuasive effect of the rules on liability for illegal acts on the threshold of insolvency**.** In some member states, where insolvency is declared as having an illicit cause, which is the case, when the intentional or grossly negligent acts of the director have caused or aggravated the insolvency, the, the competent court may require the director to cover all or part of the reduction of the company's assets (see Article 163 of the Spanish Insolvency Act).

Thus, the causal link between the unlawful act of the director and the diminution of the assets of the company must not be proven. In addition, the Director may be deducted from the right to exercise this function for a period ranging from 2 to 15 years (see Art. 172 of the Spanish insolvency law). In other Member States, the liability of the director in a similar case, the failure to enter the application for opening insolvency proceedings, and, it may be limited to the difference between the dividends in the event of insolvency that the creditor could have obtained, if insolvency proceedings had been opened in time and real dividends (see Germany, liability under Article 93 para 2 of the Companies Act listed on the Stock Exchange and s. 15a of the insolvency law, in conjunction with Article 823 paragraph 2 of the Civil Code).

If at the same time, the exercise of the Director's obligations under the Companies Act has lower regulatory power in the first jurisdiction and higher in the second jurisdiction (or if the other Company law or tort civil liability mechanisms have filling function in the second jurisdiction), the choice of the weaker company law of the first jurisdiction, based on the registered office (or registration/company registration) and the insolvency law of the second jurisdiction under the COMI of the company of that member state may lead to regulatory gaps. Such shortcomings can make way

[21] On the law applicable to contractual obligations (Rome II).

for regulatory arbitrage. While no evidence is found in practice that regulatory arbitrage operates, it is theoretically possible to do so and may thus justify a modification of the applicable rules on private international law, so as to avoid the selection of several regimes with low regulatory power.

In most member states, the imposition of duties on the director occurs almost exclusively after the company has become insolvent. The practice also shows that only a small part of the claims made against the directors of an insolvent company is brought forward and taken into account. Usually this is what the court-appointed liquidator or receiver is dealing with. Thus, the following three issues are outlined, regarding the execution of the director's obligations, after the company entered the insolvency procedure:

1) *insufficient motivation on the part of the judicial liquidator to take action against the director, who has violated his duties, determined by the remuneration scale of the insolvency practitioner or by the lack of benefits from restructuring activities, the latter may also lead to a conflict of authority between the liquidator and the creditors;*

2) *most of the insolvent companies are small and medium-sized entities and the director is also the sole shareholder or majority shareholder thereof, this means that the personal assets of the director are part of the assets of the company and are therefore affected by insolvency. For this reason, claims in court are not brought, and the liquidator and creditors prefer the redistribution of the remaining assets. In the Netherlands, the Ministry of Justice can finance the liquidator's proceedings, which has been assessed by practitioners from other countries as an effective strategy to address this issue;*

3) *the costs and duration of legal proceedings, plus legal uncertainties resulting from insufficient case-law in the matter, in most jurisdictions.*

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