

STATUTORY BODY AND THE MANAGEMENT OF THE BUSINESS COMPANY

^aMATEJ SMALIK, ^bPETER LUKÁČKA

*Comenius University in Bratislava, Faculty of law
Šafárikovo námestie no. 6
Bratislava, 810 00, Slovak republic
email: ^amatej.smalik@flaw.uniba.sk,
^bpeter.lukacka@flaw.uniba.sk*

Abstract: The authors focus on the topic of the position and the liability of the companies' statutory bodies in relation to the current trends of the legal science and judiciary. The article is specifically dedicated to the doctrine of business judgment rule that is connected with the evaluation of an admissible risk that is borne by the statutory body when adopting the right and proper decision and the management of the company and also when adopting the decisions on behalf of the company's business plans. The authors also deal with the analysis and the comparison of this institute in other legal orders such as the orders of the United States of America, the Czech republic and the Slovak republic.

Keywords: statutory body, risk capacity, performance of an office, business judgment rule, discretionary power of the statutory body.

1 Introduction

The topic of the position, rights and duties and mostly the questions related to the liability of the statutory bodies of the business companies is one of the mostly frequented topics of the business law and is addressed by many legal practitioners as well as by many legal scholars. The reason for that is the fact that the statutory body (or its members) plays the fundamental role in relation to the operation of the business company, mostly to the economic results and income incurred by the company. We assume that the abovementioned is probably the main reason why the European as well as world legal orders examine these issues. As for the fact that this topic is rather wide we focus on the research of the basic aspects of the liability of the statutory body with regards to the new approaches in this area. Such new approaches try to come up with the trends what would balance the duties of the statutory body and its liability so that strict imposing of the liability of the statutory body was not harsh and endless and did not lead to the situations when the statutory bodies will lack any will to adopt risky decisions necessary for the operation of the business company. Such risky decisions might play the decisive role when seeking for the innovative solution of the day-to-day situations related to the operation of the business company and to the competitiveness of the company.

2 Duties of the statutory body

When defining the liability of the statutory body the terms like reasonable care, due care and professional care are used by the legal scholars and legal practitioners. On the one hand these terms are crucial when reviewing the conditions for imposing the liability against the statutory body of the company. On the other hand the identification of the content of such terms is left for the legal scholars and mostly for the decision making of the courts. The general character of these terms is not the subject matter of this article but we consider it very important to analyze these terms and to bring the added value thereto. Such analysis is necessary for the needs of legal practice, moreover due to the fact that there is a huge debate on this topic recently and there are many legal opinions related to these terms. We assume that the lack of precise and strict definition of these terms shall not be viewed as the mistake or the inconsistency of the legislator. We are of the opinion that strict legal definition would bring the exact terms to the topic of the liability of the statutory body but such definition would probably not affect all the spectrum of the statutory body's actions.¹

Recently there are the rather negative ideas related to the statutory bodies of the company mostly in the context of

tightening of the director's liability and imposing the claims against these persons. The reasons for such ideas are caused by the fact that the person of the statutory body has the decisive impact on the business of the company and the fact that the person of the statutory body profits the most from the company's business activities in the eyes of the shareholders. These persons play the role also in the situation when the company fails to meet the targets stipulated by the shareholders of the company.

In this matter the institute of „golden parachutes“ is mentioned. Such institute represents the situation when certain amount of money representing the „severance pay“ of the statutory body is paid by the company on the basis of the agreement on performance of an Office that also stipulates the amount and maturity of the „golden parachute“. This topic is discussed particularly in the situations when the business company does not succeed in the market.

In such correlation we find it necessary to mention that the position of the statutory body (or its member) is one of the most difficult positions in the corporate world and its performance is linked with the highest demands and expectations. We also presume that imposing of the statutory body's liability shall be linked with the rationality and complexity and such imposing shall reflect the specific conditions of performance of such function. Such specific conditions are linked with the fact that decisions related to the operation of the business company that bear huge amount of risk. We presume that reflection of the „business judgment rule doctrine“ enables to take into account the specific nature of the statutory body's performance. This rule enables the acting authority to exhibit (also when the liability of the statutory body is reviewed by the court) that the statutory body acted „lege artis“. Business judgment rule is sometimes marked as the right of the statutory body to make a mistake. On the other hand, such definition might presume the negativity of the statutory body's actions. Therefore we agree with Broulík² who defines this rule as the „right for an unsuccessful result“.

According to Lasák the basic idea of this doctrine is the reticence of the court when examining the decisions of the statutory body made on behalf of the company. The abovementioned business judgment rule has its roots in the legal system of United States of America and the most important role is played by the courts of Delaware.³ American statutes and precedents stipulate that the statutory bodies of the company are bound to its company by the duty of care and the level of care and knowledge applicable to the reasonably prudent person shall be applied in every situation by the statutory body.⁴ Violation of such duty by the member of the statutory body shall be seen as negligence and represents the liability of the statutory body.⁵ The liability of the statutory body of the company is confronted by the business judgment rule doctrine that says that the decision of the statutory body when operating the business is not subject to the court's review or the review of the shareholder and there shall be no liability of the statutory body provided that the members of the statutory body adopted their decisions on the basis of reliable information and that such decisions are made in good faith and in the interests of the company. The exceptions that are not protected by the business judgment rule are the fraud of the statutory body member or other unlawful acts of the statutory body of the company where the lack of care achieved the level of fraud or the level of gross negligence.⁶ As the last assumption of the business judgment rule there is the requirement of the certain level of rationality of the decisions; the business judgment rule is related to the doctrine of waste that represents an irrational waste

² Broulík, J.: Pravidlo podnikatelského úsudku a riziko. *Obchodněprávní revue* 6/2012, p. 164

³ Lasák, J.: *Akciová společnost* na práhu rekonstrukce: základní novinky. *Obchodněprávní revue* 2/2012, p. 46

⁴ „Reasonably prudent person is the term similar to the professional and rational businessman used in Czech and Slovak terminology.“

⁵ The liability of the statutory body is similar in the legal regulation of Slovak republic..

⁶ Vitek, J.: *Odpovědnost statutárních orgánů obchodních společností*. Praha: Wolters Kluwer ČR, 2012. p. 219

¹ Lukáčka, P.: Vybrané aplikačné problémy uplatňovania zodpovednosti voči konateľom s.r.o. In: Bratislavské právnické fórum 2013 [electronic source] Bratislava : Univerzita Komenského, Právnická fakulta, 2013. p. 846-849

or donation of the company's property.⁷ Particularly in relation to the impact of the decisive impact of the state Delaware in terms of the European legal systems the „Delaware effect“⁸ or „Delaware syndrome“⁹ is mentioned many times. The possible impact of this syndrome might be the fact that the states will decrease the regulative requirements for conducting the business activities in order to attract investors. On the one hand the attractiveness and flexibility of the business environment might be achieved. On the other hand the side effect might be the lack of creditors' or employees' protection. Some authors assume that the „Delaware effect“ is not the subject of the day in Europe and the experiences (with the European joint stock company or Societas Europea) do not signal that there shall be massive transfer of the seats of the companies from one country to the other.¹⁰ In the short term horizon there might be a change that will probably occur as for the „Brexit“, i.e. the situation when the Great Britain leaves the European Union. The actual impact of „Brexit“ might be the subject of the research in the upcoming days, mostly on the number of the business companies transferring their seat or reestablishing their business within the European Union. We can say that many important business companies suggest that they shall undergo the fundamental changes in the upcoming future.

3 Application of the doctrine

As usually when talking about the doctrines and legal opinions the understanding of these terms is not unified and there are two (2) lines of understanding. First line sees the business judgment rule as certain liability standard upon which the courts evaluate the decisions of the statutory body members. This shall be understood as the further definition of the professional care standards and the so-called model of interpretation of the professional care. Second line of these opinions sees the business judgment rule as the waiver of the judicial review. According to the latter way of business judgment rule understanding, if the statutory body member complies with the standards of the business judgment rule, his decisions on behalf of the company will not be reviewed by court at all.¹¹

Legal scholar Broulík¹² argues that even the fundamental stipulation of the business judgment rule standards are not standardized and there still are the disputes regarding the conditions to be met in order to be protected by the business judgment rule doctrine. Referring to the American legal scholar Allen¹³ Broulík states that the fundamentals of the business judgment rule doctrine have its roots in American law, which is disunited and disharmonized within the respective American states. Even the courts themselves cannot reach an argument when it comes to the basic definition characteristics that shall be met so that the business decision was covered by the business judgment rule. The courts agree that the statutory body members shall not be held liable for the honest mistakes in business decisions. Though, most of the judges claim that the negligence of these persons is inadmissible.

Though, most of the judges claim that the negligence of these persons is inadmissible.¹⁴ When evaluating the statutory body liability and applying the business judgment rule doctrine, it is important to note that until the general meeting does not approve the agreement on performance of an office, the relationship between the statutory body and the company is governed by the

respective provisions of the mandate agreement under Slovak law.¹⁵

4 Elements of business judgment rule

Business judgment rule was further researched by Hinsey¹⁶ who published his work in Washington Law Review and defined the fundamental parts of the business judgment rule:¹⁷

- a) absence of its own intent to conduct insider trading or the trading for the purposes of achievement its own interests
- b) informed decision reflecting the rational effort (also when reflecting the professional advice of the third person) and knowledge of the relevant and available facts
- c) rational assumption that this relevant decisions is made in the interests of the business company
- d) good faith

Subject matter of the review according to the business judgment rule is the procedure that precedes the decision adopted by the statutory body. In respect of the fact that the entrepreneurial risk always lies on the entrepreneur's side, the liability of the statutory body is not the liability for unsuccessful results but it shall rather be seen as the liability for the proper and professional performance as the statutory body of the company acting on its behalf. To be more specific and factual, we would like to point out that has been very interesting case from Anglo-American legal environment. The case deals with the liability of the statutory body of the company regardless of economic outcome of the statutory body's business decision. The case „Smith vs. Van Gorkom“¹⁸ has been resolved before the Supreme Court of Delaware.

In this case the subject matter was the sale of the shares of the company Trans-union for the price 55 dollars per share and the members of the administrative council (statutory body) of the company Trans-union have been held liable due to the fact that they were not properly informed about the intention of the Jeronym van Gorkom (chief of the administrative council) that suggested the sale of the shares and also that they did not try to study the conditions of the suggested transaction properly. The members of the administrative council have approved the transaction based upon the twenty minute speech of Mr. Van Gorkom. The members of the statutory body did not question the details of the transaction nor did they get to know the content of the respective contracts. The evidence shows that the members of the administrative council did not even question Mr. Van Gorkom about the rationality of the price for the shares.

According to the abovementioned the business judgment rule did not apply as for the lack of information obtained by the administrative council. The mistake of the members of the administrative council was not related to the decision made. The mistake was in the adequacy of the information that led the members of the administrative council to their decision. The judgment of the Court of Delaware further stipulated that the members of the administrative council represent the interests of the shareholders and shall perform such in accordance with the duty of care. The members of the administrative council were held „inexcusably negligent“ when approving the transaction as for the fact that the whole negotiation of this transaction took only 2 (two) hours. When deciding this case there was very interesting (even though minor) opinion of the judges of the Court of Delaware. Such minor opinion stipulated that the members of the administrative council was informed properly and in adequate manners and therefore its members were

⁷ Petrov, J.: Odpovědnost členů představenstva akciových společností v česko – americko - německém srovnání. Brno: MIKADAPRESS, 2007, p. 41

⁸ McCahery A.J., Vermuelen P.M.E.: Does European Company Prevent The Delaware Effect. European Law journal, 2005, p. 5

⁹ Drury, R.: European Look at the American Experience of the Delaware syndrome. Journal of Corporate law Studies, 2005

¹⁰ Strapáč, P.: Ustanovenie, postavenie a zodpovednosť člena predstavenstva akciovkej spoločnosti. Bratislava: EUROUNION, 2012, p. 141

¹¹ Bainbridge, S. M.: The Business Judgment Rule as Abstention Doctrine. Vanderbilt Law Review, 2004, No.1, p.87

¹² Broulík, J.: Pravidlo podnikateľského úsudku a riziko. Obchodněprávní revue 6/2012, p. 161-167

¹³ Allen, W. T.: The Corporate Director's Fiduciary Duty of Care and The Business Judgment Rule. In HOPT, K. A kol. Comparative Corporate Governance – The State of the Art and Emerging Research. Oxford: Clarendon Press, 1998, p. 315

¹⁴ Clark, R. C.: Firemní právo. VICTORIA PUBLISHING, a. s., Praha, 1998, p. 174

¹⁵ Lukáčka, P.: Aktuálne otázky výkonu funkcie konateľa s.r.o. In Sborník príspevků 5. mezinárodní vědecké konference doktorandů a mladých vědeckých pracovníků Karviná : Obchodně podnikatelská fakulta, 2012, p. 192-198

¹⁶ Hinsey, J.: Business Judgment and the American Law Institute's Corporate Governance Project: the Rule the Doctrine and the Reality. George Washington Law Review, 1984, No. 4&5, p. 610.

¹⁷ In our opinion such characteristics vastly overlap the concept of professional care of the capital business company. Therefore we assume that the business judgment rule is further specification of the professional care of the business company.

¹⁸ Available at : http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2763&context=fss_papers

protected by the business judgment rule doctrine. The business judgment rule doctrine protects those members of the administrative council that act in good faith and are adequately informed and have no separate personal interest on the transaction.

Under these circumstances the member of the administrative council is not responsible for the consequences of his decision in case the proper information base does not miss his decision. The business judgment rule represents the "safe harbor" for the member of the administrative council because it provides to the members of the administrative council relatively wide independence in deciding about the issues on behalf of the company. The judges who had this minority opinion stated that we should not forget the particularities of the "business world" mainly in the USA. They expressed that under adopting the decision they acted as professional experts and not as ordinary types. In addition they argued by the fact that the decision of the administrative council should have been correct.¹⁹ According to their opinion under business transactions in general we are faced by two extremes - perception of the reality through businessmen and entrepreneurs and perception of the reality through lawyers (judges). Businessmen are acting in an uncertain risky business with limited time space within they have to adopt fundamental decisions. They have to decide for the first or the second offered way on the base of the consideration that are not always adequately elaborated as well as not supported by as amount of the information that should be required. The judges consider the reality by different way on the base of proves that are submitted by both parties and it is very difficult to prove real state of matter after the hindsight unless it is in detail mentioned in the respective documentation in written. Finally we can state that balance and complex information on aspects must have been provided to the administrative council which is relevant in such kinds of decisions. In case the members of the administrative council do not have these information to their disposal prior the administrative council's meeting they are obliged to judge them during the meeting of the administrative council and for the purposes of its control time space must be provided to them. The members of the administrative council of the company Transunion were responsible for breaching of their duty to act with professional care despite their decision was correct. In this case the basic matter for making decision is the process of the members of the administrative council also in cases when this process held to the decision that should have been correct in its base. The members of the administrative council (statutory body) are responsible for proper performance of their functions no for the result. Although the decision *Smith vs Van Gorkom* is usually described by Anglo - American legal theorists as controversial its base is that the business judgment rule consists in sufficient decision from the side of the statutory body. Information obligation is one of the aspects of the professional care so the court in Delaware stated that the term "gross negligence" is the correct criteria for determination the decision of the administrative council was not supported. Outside the USA the business judgment rule is applied in the United Kingdom where the doctrinal interpretation is adopted similarly as in the USA the courts apply in practice.²⁰

However the business judgment rule does not result only from common law. Germany²¹, Australia²² as well as the Czech Republic have constituted abovementioned rule in the legal form. Changes in the legal regulation of the Czech Republic constitute one of the newest changes in the commercial regulation that constitute the business judgment rule. Against the aforementioned legal systems which include specific legal regulation of the business judgment rule respectively against countries with common law system defining conditions of this

institute is the legal regulation of commercial corporations and mainly the part of the responsibility of the statutory bodies of the commercial corporations in the conditions of the Slovak Republic that does not contain legal regulation of this institute and is not part of the states with rich common law system.

Under the provisions of the Act No. 513/1991 Coll. Commercial Code the statutory body of the capital commercial corporation is obliged to act in accordance with the interests of the company and all its members/shareholders and is obliged to obtain and to take into account under its decision all available information related to the subject matter of deciding and under the performance of its competence it must not prefer its own interests, interests of some members/shareholders or interests of third parties before the interests of the company.²³ We think that the mentioned legal regulation that constitute the conditions necessary for performance of the function of the statutory body or its member also reflects the business judgment rule despite the fact that this rule is not explicitly in the legal regulation stated mainly for the reason that the mentioned generally determined conditions for execution of the function of the statutory bodies "de facto" contains this rule. We hereby think that it is suitable to ask whether it is necessary for the purposes given by the business judgment rule its explicit regulation in the provisions of the legal regulation. We deem as necessary to consider the constitution of new terms with quite general and no express contain that constitute the part of already existed general terms and its interpretation (as we mentioned above) leads to discussions and under which logical argumentation as well as usage of specific methods of the interpretation allow to obtain different conclusions. A priori (without real application experience) it is not possible to reject arguments²⁴ which support the special regulation of this institute in the legal regulation of commercial law that claim the regulation should contribute to facilitate the activities of courts, improve the position of the statutory bodies and its members with higher sovereignty as well as some economic advantages for commercial corporations. The statutory bodies should have "hands free" and due to this reason they can fully focus on execution of activities that lead to the economic profit of the company and not to be limited by the reflection of its protection in case of responsibility if realized decisions do not bring expected results.

5 Business judgment in the legal regulation of the Czech Republic

The Act No. 90/2012 Coll. on the commercial corporation (hereinafter referred to as the "Act on commercial corporations") has become effective on 1 January 2014 which constitutes in the sections 51-53 the base for judging of business judgment rule within the Czech legal regulation. One of the problems the legislator in the Czech Republic had to deal with were the issues of the business risk under the execution of the function of statutory bodies of the commercial corporations because nowadays there can be no doubt that calculated, rational and informed risk is common practice in the commercial relationships. The Act on commercial corporations²⁵ provides that carefully and with necessary knowledge is acting who could upon business decision in the good faith expect that he is acting under provided information and upon defensible interests of the company unless such decision is executed with necessary loyalty. The explanatory report to this provision provides that the duty of the statutory body to act on behalf of the company is retained. The explanatory report states that in relation with the foreign legal regulation this provision constitutes the business judgment rule that gives possibility to the acting body to prove that within its deciding it was acting "lege artis" and is not responsible for possible damage although it can cause in the economic way. Finally the Czech legislator constitutes that if the concept of the company's function is based on the contracts with an uncertain result it is not possible to ask from the professional management to bear all the risks of its acting mainly it is not

¹⁹ The shares of the company were sold for the price 39% higher than the price on the stock exchange.

²⁰ Smalik, M., Lukáčka, P.: Discretion of the statutory body's decisive powers and its risk capacity. London: Science Publishing, 2016, p. 63-64

²¹ § 93 of the German law on the shares says that the duty of care and loyalty is not violated when the members of the statutory body could rationally assume that they acted in the interest of the company on the basis of the adequate information basis

²² § 180 Corporations Act 2001, available at http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s180.html

²³ § 135a, sec.1; 194 sec. 5 Act No. 513/1991 Coll. Commercial Code

²⁴ Kožíak, J.: Pravidlo podnikateľského úsudku v návrhu zákona o obchodných korporáciách (a zahraničných právnych úpravách). Obchodnéprávi revue. 2012, No.4, p. 112

²⁵ § 51, sec.1 of an Act on commercial corporations

possible to control. In case of the new Czech regulation of the responsibility the statutory bodies the condition of the execution of business judgment related to the duty of loyalty. We can state that the business judgment rule test under the Czech legal regulation contains three (3) elements. Within the test it is examined whether the statutory body acted i) in good faith; ii) could reasonably assume that he acts with informational basis and iii) he could reasonably presume that he acts within the sustainable interest of the business company. The absence of the necessary loyalty shall prevent from the abuse of the business judgment rule. That means that the loyalty serves as the corrective of the business judgment rule. Violation of the duty of loyalty may not be remedied by the defense that the statutory body acted in accordance with the business judgment rule.²⁶

6 Safe harbor

So that the statutory bodies landed in the „safe harbor“ of the business judgment rule and met its criteria, it is necessary so that the members of the statutory bodies did not undergo excessive risk which exceed the maximally admissible amount of risk within their decisive activities.

The theory of the decision uses in this relation the term risk capacity²⁷ that shall be understood as the maximal financial loss that the company might undergo and still survive.²⁸ Admissible risk is stipulated as the amount of loss that the company is willing to undergo in its risk capacity. The decision on the amount of admissible risk is the important strategic decision of the company and will be dependent on the requirements of the company's shareholders.

The negative result for the company does not have to mean that the respective member of the statutory body did not act with professional care. To decide for the conclusion of the certain contract means to decide in the real time and upon the available information. Every „manager“ is obliged to act professionally when adopting decisions. If it is proved that it secured the needed information in the reasonable scope, evaluated them and acted rationally within the business management reflecting the interests of the company and no side intents or its own interests, it is not appropriate to blame the statutory body because of the fact that the company incurred loss.²⁹ As for this correlation it is necessary to stipulated that „ex post“ evaluation of the acts of the statutory body shall be dedicated on the evaluation of meeting the criteria within the adoption of the respective decision (sustainable information basis, acting within the required level of loyalty etc.) and not on the objective evaluation of the nature of this decision, i.e. whether the decision is advantageous for the company or not.

Even if Eliáš³⁰ proclaimed that the business judgment rule doctrine already existed within Czech legal regulation even though it was not legislatively expressed and the judiciary was evolved only upon the few decisions of the Supreme Court of Czech republic. One of such decisions with the aspects of business judgment rule is the decision of the Supreme Court of Czech republic marked 29 Cdo 4276/2009 dated 30 March 2011. In its reasoning the decision stipulates that the sole fact that the statutory body did not enforce the claims of the company may not represent the violation of the statutory body to act with professional care. For the evaluation of the fact whether the statutory body is obliged to enforce the claims is very important also the evaluation of the respective effectivity and success of such proceedings and whether these claims are enforceable. Such situations occur if the debtor is clearly unable to repay its obligations (even partially) or in the situation when the company

itself (the creditor) cannot prove its statements regarding the origin, amount and the existence of the claim provided the fact that such state is not caused by the statutory body itself. In other words, the fact whether the statutory body will or will not enforce the claim of the company is solely within the scope of the business management by the statutory body. Supreme Court of Czech republic reflected the relevant provisions of the Czech Commercial Code but the reasoning contains the realization of the business judgment rule that was not legislatively stipulated and existed only in the doctrine. The decisions with the aspects of the business judgment rule may be seen in the further decisions of the Supreme Court of Czech republic, specifically in the criminal proceedings.³¹ We agree with Bělohávek³² that says the vital part in evaluating the business judgment rule lies in the hands of the courts. The courts will play immanent role at the interpretation of the terms used in the section 55 of Act on commercial corporations that are for example sustainable interest of the company, needed knowledge and information, assume in good faith, etc., as these are not specified by law at all. Bělohávek claims that the legislator rightfully looked for the inspiration in the foreign legal regulations and decisions of the foreign courts but says that the business judgment rule is presented only in sharp features and the key role will again stay at the courts. The business judgment rule is not the matter of law but the matter of doctrine and judiciary.³³ The legal practice showed that it is extremely difficult for the courts to evaluate whether the duty to act with professional care was or was not violated. There is no objective criterion therefor. Acting within the business relationships is always risky and undergoing the certain level of risk is everyday reality.³⁴ Every business brings the certain level of risk and the sole fact of unsuccessful transaction may not evoke that the statutory body caused damage to the company. In other legal areas such acting might be seen as conscious or unconscious negligence of the person and therefore as the violation to perform the actions with due care. In the area of corporate law it is necessary to evaluate whether such risk exceeds the suitable measures or not. Measuring of the statutory body's negligence is relativized.³⁵

In case the courts evaluate the violation of the duty to act with the professional care „ex post“ there often is the view that is biased. Therefore it is needed to evaluate these acts „ex ante“, i.e. in the same way as the executive director decided about that.³⁶ In these cases the statutory body adopts the decision within short time horizon and based upon the bunch of information that is limited. Big hesitance might cause that the transaction does not occur and the income of the company „de facto“ decreases.

Another problem may arise in this manner when some judges are not sufficiently skilled and educated to handle the evaluation of rather economic questions. Separately such fact might occur if the judges with the general legal practice decide such cases without any specialization on the law of business corporations. In Slovak republic if the questions without legal character occur it is generally handled by the expert witness opinions or the opinions of the legal scholars.

We assume that the judges shall be the only persons responsible for the determination whether the statutory body complied with the provisions of the business judgment rule and professional care and met the criteria of „safe harbor“. We hope that the judges exercise their position carefully and use all the experience

²⁶ Koziak, J.: Pravidlo podnikatelského úsudku v návrhu zákona o obchodních korporacích (a zahraničních právních úpravách). *Obchodněprávní revue*. 2012, No. 4, p.108-113.

²⁷ Risk capacity

²⁸ Hnilica, J., Fotr, J.: Aplikovaná analýza rizika ve finančním managementu a investičním rozhodování. Praha: Grada Publishing, a.s., 2009, p. 84

²⁹ Havel, B. Synergie péče řádného hospodáře a podnikatelského úsudku. *Právní rozhledy*, 2007, No.11, p. 416,

³⁰ Eliáš, K.: K některým otázkám odpovědnosti reprezentantů kapitálových společností. *Právník*, 1999, No.4, p. 298,

³¹ See the decision of the Supreme court of Czech republic dated 3 May 2007, sp. zn. S Tdo 433/2007 or the Decision of the Supreme Court of the Czech republic, sp. zn. S Tdo 1412/2007 dated 27 August 2008

³² Bělohávek, A. J. a kol.: Komentář k zákonu o obchodních korporacích. Plzeň: Aleš Čeněk, 2013, p. 344

³³ Further, p. 345

³⁴ Smalik, M.: Doktrína pravidla podnikatelského úsudku v teorii a praxi. In: Mifníky práva v stredoerópskom priestore 2014. Zborník z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov. 1. Vyd. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2014, p. 391

³⁵ Koziak, J.: Pravidlo podnikatelského úsudku v návrhu zákona o obchodních korporacích (a zahraničních právních úpravách). *Obchodněprávní revue*. 2012, č.4, p.109, ISSN: 1213-5313

³⁶ Knepper, W.E., Bailey, D.A.: Liability of corporate Officers and Directors. New York: Lexis Nexis, 8. Vydanie, 2009, § 2.01, p. 2

achieved during the practice. Such determination shall not consist of looking for the “scape goat” and to scare the educated persons from performing as the statutory body of the company that might lead to worsening of the economic results of the business activities within the state.

7 Conclusion

We assume that the institute of the business judgment rule is a progressive part of the company law and its application enables to reflect the extraordinariness and specialties in the specific case. By doing so it is possible to soften the strict rules of the liability of the statutory bodies in the capital business companies. Such strict rules then lower the attractiveness of performance of a position of the statutory body. Then de facto these functions are performed by the persons that lack the professional experience and knowledge in this respective field. On the other hand it is necessary to evaluate how such institute shall be implemented in the legal orders of the state, i.e. whether such institute shall be inserted as the part of the statute or to stipulate such principle as doctrine for the decision making activity of the respective courts that shall reflect the specialties of the case by case. Therefore we assume that if the valid legal regulation enables to achieve the liberation by defining the business judgment rule, it is probably more suitable so that the exact legal norm stipulated in the statutes already reflected the decisions of the courts and the needs of legal practice. Such legal regulations shall not be based only on the principles applicable in the foreign countries that however lack the appropriateness for its usage in the home state.

Literature:

1. ALLEN, W. T.: *The Corporate Director's Fiduciary Duty of Care and The Business Judgment Rule*. In HOPT, K. A kol. *Comparative Corporate Governance – The State of the Art and Emerging Research*. Oxford: Clarendon Press, 1998.
2. BAINBRIDGE, S. M.: *The Business Judgment Rule as Abstention Doctrine*. *Vanderbilt Law Review*. 2004, No.1
3. BĚLOHLÁVEK, A.J. a kol.: *Komentář k zákonu o obchodních korporacích*. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-451-0.
4. BROULÍK, J.: *Pravidlo podnikatelského úsudku a riziko*. *Obchodněprávní revue* 6/2012, ISSN:1213-5313.
5. CLARK, R. C.: *Firemní právo*. Praha: VICTORIA PUBLISHING, a. s., 1998, ISBN 80-85605-16-3.
6. DRURY, R.: *European Look at the American Experience of the Delaware syndrome*. *Journal of Corporate Law Studies*, 2005.
7. ELIÁŠ, K.: *K některým otázkám odpovědnosti reprezentantů kapitálových společností*. *Právník*, 1999, No.4.
8. HAVEL, B.: *Synergie péče řádného hospodáře a podnikatelského úsudku*. *Právní rozhledy*, 2007, No. 11.
9. HINSEY, J.: *Business Judgment and the American Law Institute's Corporate Governance Project: the Rule the Doctrine and the Reality*. *George Washington Law Review*. 1984, No. 4&5.
10. HNILICA, J., FOTR, J.: *Aplikovaná analýza rizika ve finančním managementu a investičním rozhodování*. Praha: Grada Publishing, a.s., 2009.
11. KNEPPER, W.E., BAILEY, D.A.: *Liability of corporate Officers and Directors*. New York: Lexis Nexis, 8. Issuance , 2009.
12. KOŽIAK, J.: *Pravidlo podnikatelského úsudku v návrhu zákona o obchodních korporacích (a zahraničních právních úpravách)*. *Obchodněprávní revue*. 2012, No.4, ISSN: 1213-5313.
13. LASÁK, J.: *Akciová společnost na prahu rekonstrukce: základní novinky*. *Obchodněprávní revue* 2/2012, ISSN: 1213-5313.
14. LUKÁČKA, P.: *Aktuálně otázky výkonu funkce konatele s.r.o.* In: *Sborník příspěvků 5. mezinárodní vědecké konference doktorandů a mladých vědeckých pracovníků Karviná* : Obchodně podnikatelská fakulta, 2012.
15. LUKÁČKA, P.: *Vybrané aplikačné problémy uplatňovania zodpovednosti voči konateľom s.r.o.* In: *Bratislavské právnické fórum 2013 [elektronický zdroj]*. Bratislava : Univerzita Komenského, Právnická fakulta, 2013.
16. McCAHERY A.J., VERMUELEN P.M.E.: *Does European Company Prevent The Delaware Effect*. *European Law Journal*, 2005.
17. PETROV, J.: *Odpovědnost členů představenstva akciových společností v česko – americko - německém srovnání*. Brno: MIKADAPRESS, 2007, ISBN 978-80-210-4386-2.
18. STRAPÁČ, P.: *Ustanovenie, postavenie a zodpovednosť člena predstavenstva akciovej spoločnosti*. Bratislava: EUROUNION, 2012, ISBN 978-80-89374-19-9.
19. VÍTEK, J.: *Odpovědnost statutárních orgánů obchodních společností*. Praha: Wolters Kluwer ČR, 2012. ISBN 978-80-7357-862-6

Primary Paper Section: A

Secondary Paper Section: AG