

Business Judgment Rule: a Legal Theory or a Real Protection for the Board Members in Turkey?

Authors: Gönenç Gürkaynak, Esq., Gülşen Pazarbaşı and Ece İlci, ELIG Gürkaynak Attorneys-at-Law

1. Introduction

Joint-stock companies have become structures that have the power to influence economic life nationally and even internationally. Companies holding such a broad power have responsibilities towards shareholders on the one hand and to the national and international community at the global level on the other hand. Board members who take part in the management and representation of such companies would like take this responsibility within the framework of certain rules.

Business decisions generally require certain amount of risk taking which is necessary for bringing success to the business and involve uncertain outcomes. Certainly, board members, who are responsible for evaluating circumstances and are obliged to protect the best interests of the company, are expected to be careful and attentive while taking business decisions. Having said that, it is not always that effortless for board members to decide on the most adequate option for the company and eventually the company and/or other stakeholders may incur losses due to the implementation of an inadequate business decision. Putting civil liability of the board members in question in each case would result in a number of talented and expert people who foresee a heavy liability system while fulfilling their duties to refrain from taking part in the boards. Therefore, it is of tremendous importance to set forth a fair liability system and balance between the authorities of board members to make decisions on behalf of companies and their personal liabilities arising from such decisions. To a certain extent, business judgment rule ensures this balance as it provides a framework for assessing business decisions of the board of directors.

Business judgment rule had been first created and evaluated by the courts of the U.S. due to the necessity of limiting the liabilities of the board members arising from the duty of care of the board members.¹ Since then, the rule brings a significant improvement in the predictability of the liabilities of the board members arising from their business decisions. In brief, the U.S. courts evaluate whether the duty of care is fulfilled by the board of directors² during the decision-making procedure and if so, the courts do not intervene the business decisions of the board of directors and do not evaluate whether the business decision was the most appropriate and fittest decision for the purpose of the company (in other words, the U.S. courts do not second-guess the merits of these decisions).³

Relatively recently, business judgment rule has also been entered into Turkish corporate law upon entering into force of the Turkish Commercial Code No. 6102 (TCC) and this rule is associated with the duty of care with a reference to such rule in the preamble of the TCC. Since then, very few scholars have

¹ Hasan Pulaşlı, *Türk Ticaret Kanunu Tasarısı'na Göre Anonim Şirket Yönetim Kurulu Üyelerinin Özen Yükümlülüğü ve Mütessesil Sorumluluğu*, 25 BATIDER 27, 58 (2009) [hereinafter Pulaşlı, *Özen Yükümlülüğü*].

² *Id.*

³ Stephan M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004).

analyzed the business judgment rule and its applicability under Turkish law profoundly. This article offers such analysis.

Under Turkish law, board members are not obliged to realize favorable results (mostly it is expected to generate profit) but to perform the tasks diligently (to fulfill the duty of care) and to the best interests of the company as per the contractual relationship with the company.⁴ In case of fulfillment of the duty of care, there will be no negligence in terms of business decisions and hence no personal civil liability of the board members although a loss is incurred.⁵ Thus, board members would be able to decide on making relatively risky investments (by taking into account the components of business judgment rule) and provide companies with great profit potential.

As the business judgment rule is merely linked to and appears when the personal civil liability of the board of directors is in question, in Chapter 2, civil liability of the board members will be explained and analyzed briefly to the extent relevant to the subject matter. Following this chapter, the business judgment rule will be reviewed in Chapter 3. Accordingly, the background and components of the business judgment rule will be focused. The precondition to be a real protection of the business judgment rule for board members in Turkey is its applicability under Turkish law. Therefore, applicability of the business judgment rule under Turkish law will be analyzed through doctrinal views and finally our opinions on the protection function of the business judgment rule will be presented in Chapter 4. Finally, concluding remarks will be mentioned.

2. Civil Liability of the Board Members

2.1. In General

The liability in the joint-stock companies is set out in separate sections of the TCC as civil liability (Articles 549-561 of the TCC) and criminal liability (Articles 562-563 of the TCC). As this article is related to the business judgment rule and applicability of this rule would be in question in case civil liability of board members arises, the criminal liability of board members will not be discussed. Also, civil liability regime applicable for board members will be addressed to the extent that it is relevant to the subject matter of this article to determine the legal framework of the business judgment rule in our law system.

The intention of the lawmaker with the civil liability of board members is to compensate the damage resulting from a conduct which would be attributed to the board member and which is not approved by the rule of law.⁶ Accordingly, as per Article 553/1 of the TCC which stipulates the civil

⁴ Kürşat Göktürk, *Amerikan, Alman, İsviçre ve Türk Hukukunda İşadamı Kararı İlkesi*, 2 İnönü Üniversitesi Hukuk Fakültesi Dergisi 207, 208 (2011).

⁵ *Id.*

⁶ See NECLA AKDAĞ GÜNEY, ANONİM ŞİRKET YÖNETİM KURULU 292 (2nd ed. 2016) [hereinafter GÜNEY, *YÖNETİM KURULU*].

liability of the board members; “[i]f the founders, board members, managers and liquidators violate their duties arising from the law and the articles of association by negligence, they shall be liable to both the company and the shareholders and the creditors of the company for the losses they cause.”

Unlike the preceding articles that regulate special civil liability rules for pre-determined breaches⁷, this Article sets out a general liability rule to be applicable when a breach of duty arising from the law and the articles of associations occurs.⁸ According to the said article, the conditions of the liability of the board members are: (i) contradiction to the law or the articles of association, (ii) loss, (iii) negligence and, (iv) lien of causality. In order for civil liability of the board members to come to the fore, these four conditions should exist in the concrete case. If one of them is missing, then there will be no personal liability of the board members.

2.2. Conditions of the Civil Liability

2.2.1. Contradiction to the Law or the Articles of Association

Article 553/1 of the TCC outlines the limits of the civil liability of the board members only with the breach of the duties arising from the law and the articles of association.⁹ Duties of the board members are stipulated in general in Article 374 of the TCC as follows: “[t]he board of directors shall be authorized to make decisions on any actions and transactions required in order to conduct the business subject-matter of the company except for any matters reserved to the general assembly pursuant to law and the articles of association.” Accordingly, board of directors is entitled to govern and represent the company in all matters except for those that are reserved to the general assembly pursuant to law and the articles of association of the company. Besides, there are also non-transferable and indispensable duties and powers of the board of directors, which are explicitly and in detail listed under Article 375 of the TCC.¹⁰

⁷ Articles 549-552 of the TCC are related to the special liability circumstances and Article 553 of the TCC provides a general liability clause for the board members.

⁸ Sinan Yüksel, *Yönetim Kurulu Üyelerinin Hukuki Sorumluluğunun Şartları ve Yargının Bunlara Yaklaşımı*, İsviçre Borçlar Kanunu’nun İktibasının 80. Yılında İsviçre Borçlar Hukuku’nun Türk Ticaret Hukuku’na Etkileri 355, 360-361 (2009).

⁹ Pulaşlı, *Özen Yükümlülüğü*, *supra* note 1, at 30. Güney affirms that civil liability of board members would also arise due to the breach of the duties of the board members under the agreement executed between the company and board members. *See* GÜNEY, *YÖNETİM KURULU*, *supra* note 6, at 303.

¹⁰ Non-transferable and indispensable duties and powers of the board of directors in Article 375 of the TCC are: (i) management of the company at the highest level and giving instructions about these issues, (ii) determining the company’s management organization, (iii) establishing necessary systems for accounting, financial auditing and financial planning to the extent required for management of the company, (iv) appointment and dismissal of managers and persons having the same function and those who have the authority to sign, (v) supervision as to whether the persons in the management level are acting especially in accordance with laws, the articles of association, the internal regulation and written instructions of the board of directors, (vi) keeping share ledger, board of directors resolution book and general assembly meeting and discussion book, preparing and submitting to the general assembly the annual activity report and the disclosure of corporate governance, arrangement of the general assembly meetings and conducting the general assembly resolutions, and (vii) notifying the court in case of the insolvency. Non-transferable and indispensable duties and powers of the board of directors are not limited to those

It is not a challenge for board members and courts to identify any breach of the law or articles of association by board members where there are concrete rules regarding the duties and responsibilities of the board members. Failure of performance of the duty on conducting the general assembly resolutions or keeping the corporate books or notifying the court in case of the insolvency would be given as examples for the breaches of the concrete rules. In such cases, board members do not exercise the power of discretion but comply with the law or articles of association and courts would easily decide on whether there is a breach of the concrete rule or not.

Unlike the foregoing, there are also general principles that should be taken into account by board members while performing their managerial duties (especially while making business decisions) not clearly regulated under the law or articles of association. Duty of care set forth under Article 369 of the TCC is among such principles and, the content and the limits of such duty are not explicitly revealed in the said article. Therefore, it is quite difficult to determine whether the loss of the company or shareholders is due to the breach of the duty of care or because of an error in judgment or unexpected developments after the implementation of the decision.¹¹ Further, in case such evaluation is made by the courts that are not expert on the management and following realization of the negative results (*ex-post*) of the business decision, board members would highly likely be deemed liable due to the losses of the company or shareholders. However, business decisions should be judged according to the conditions of the time when the decision is taken (*ex-ante*).

Business judgment rule¹² serves a function in drawing the line of duty of care and accordingly the acts and transactions that the board members should do or avoid in the management and realization of the subject-matter of the company and finally would prevent violation of the law or articles of association.¹³

There are different aspects of the duty of care in the management of the company. Board members should be “careful”; (i) while accepting the board membership duty¹⁴, (ii) while performing their duties in general and in particular (iii) in the organization of the company, (iv) in management and representation of the company, (v) in structural changes and investments of the company, (vi) within the scope of the principle of the protection of the share capital, and (vii) in the capital increase and capital decrease.¹⁵ Board members should fulfil such duties and take necessary decisions diligently. Otherwise, board

listed under Article 375 of the TCC. They should be fulfilled by the board of directors, in other words, with the attendance of all board members (Article 367/2 of the TCC). However, this does not mean that each and every single duty within this scope will be fulfilled by the board members. Board of directors may still receive help while performing such duties.

¹¹ SEVGİ BOZKURT YAŞAR, ANONİM ŞİRKETLERDE İŞADAMI KARARI İLKESİNİN (BUSINESS JUDGMENT RULE) UYGULANMASI 193 (2015).

¹² See Chapter 3 below for detailed explanations on the business judgment rule.

¹³ HASAN PULAŞLI, ŞİRKETLER HUKUKU ŞERHİ III 1446 (3rd ed. 2018).

¹⁴ A person who has been elected to the board of directors should have the necessary skills and knowledge and be able to allocate time to this task. Those who do not have the required knowledge, skills and qualifications should not accept this, since the board membership duty is not a mandatory task. See *Id.* at 1447.

¹⁵ For extended explanations on such duties, see *Id.* See also YAŞAR, *supra* note 11, at 141-165.

members may not enjoy the protection of the business judgment rule in the civil liability cases of board members initiated due to the breach of the duty of care.

2.2.2. Negligence

Negligence is another condition that should exist in order for the board members to be held liable as per Article 553 of the TCC. Under Turkish law, negligence would appear as “fault” and “intent”.¹⁶ If the law or articles of association of the company is violated intentionally, we would mention of intent and if there is no conscious breach but a will (attention, care or due diligence) is not shown to avoid unlawful conduct, then this would indicate fault of the board member.¹⁷

Detection of negligence in case of fault is more difficult than detention of intent and depends on whether the board members have fulfilled the duty of care. Accordingly, the main function of the duty of care is to determine the limits of the fault. There is a link between the duty of care and the liabilities of the board members and hence their negligence.¹⁸ The Turkish courts seek whether the duty of care is fulfilled by the board members during the decision making process while assessing existence of the negligence (essentially, existence of fault) of the board members.¹⁹

In light of the above, the duty of care is of paramount significance in terms of determination of existence of the negligence thus civil liability of board members. Therefore, in this section, we will focus on the duty of care of the board members and the relation of the duty of care with the business judgment rule.

Although the terms “care” and “careful” are mentioned under certain articles of the TCC and Turkish Code of Obligation No. 6098, a general definition of the term “care” is not provided.²⁰ The term “care” is defined as “striving for a matter to be as good as possible” under the Actual Turkish Dictionary.²¹

Bearing the definition in mind, the stakeholders would anticipate excessive level of care from the board members in the management of the companies. However, sometimes companies should make a business decision within a very limited period of time without making extended research or evaluation on the issue (e.g. regarding an investment, etc.) due to the competitive market conditions. In case the lawmaker and the Turkish courts would also accept excessive level of care as the care measure of the

¹⁶ NECLA AKDAĞ GÜNEY, ANONİM ŞİRKET YÖNETİM KURULU ÜYELERİNİN HUKUKİ SORUMLULUĞU 61 (2008).

¹⁷ See FİKRET EREN, BORÇLAR HUKUKU GENEL HÜKÜMLER 574-576 (2012).

¹⁸ İsmail Kırca, *Anonim Şirket Yönetim Kurulu Kararlarında Takdir Yetkisi - Özen Borcu*, 22 BATIDER 85, 87 (2004).

¹⁹ PULAŞLI, *supra* note 13, at 1456.

²⁰ YAŞAR, *supra* note 11, at 139.

²¹ Güncel Türkçe Sözlük (*Actual Turkish Dictionary*), (Online) <http://www.tdk.gov.tr> (last visited Mar. 1, 2019). For extended explanations on the term “care”, see *Id.*

board members, this would lead board members not making risky business decisions, the companies losing money and eventually the companies going bankrupt.

However, risk-taking in the business activities does not always mean that board members are negligent and rather such activities require taking risk to a certain extent.²² In such cases, board members will resolve on the business decisions by using their discretion. It is important for the board members to provide them concrete borders of the power of discretion, which eventually brings us to the level of care to be expected from the board members.

The duty of care of the board members is set out in Article 369 of the TCC as follows: “[t]he board of directors shall be under the obligation to perform their duties with due care of a cautious manager and protect the interests of the company in compliance with rules of honesty.”

The TCC introduces in the preamble of Article 369 of the TCC, an objective criterion in determining whether the duty of care of board members is fulfilled or not unlike the former legislation.²³ It sets forth that board members are obliged to fulfil their duties with “due care of a cautious manager”. The preamble of Article 369 of the TCC defines such cautious manager as a manager who has the ability to perform the management task, has the necessary skills and education to evaluate the relevant information, to follow and audit the practices and developments.

The care level that is required from board members in a like position at a similar company under similar circumstances should be taken into account while determining the measure of a cautious manager. Therefore, personal excuses or defenses such as inexperience, lack of information or lack of time of the board members will be disregarded by the Turkish courts while analyzing existence of negligence.²⁴ The measure of a cautious manager is further explained under the preamble of Article 369 of the TCC as follows:

²² See Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 Wm. & Mary Bus. L. Rev. 521, 528 (2013).

²³ As per Article 320 of the former Turkish Commercial Code No. 6762, the measure of the prudent merchant which was linked to the business of the company was accepted in terms of the care level that board members should had reached in order not to be liable while managing the company. This measure of care was abolished upon entering into force of the TCC and the legislation became in compliance with the corporate governance principles. This is explained in the preamble of the TCC as follows: “The measure of a cautious manager is different from the concept of prudent merchant and paragraph 93 of AKTG (German legislation) should not be considered as a source to this measure. Contrary to what is defended in the classical German doctrine, it is not acceptable as the measure of the duty of care to do what is in favour of the company and to avoid from what is not in favour of the company. Because, in that case, board members shall be obliged to identify all risks arising from all the crisis in the economy, changes and uncertainties in market conditions in advance and take necessary measures, otherwise they shall be held liable. The new doctrine that gives inspiration to this article is more realistic.” See GÜNEY, *YÖNETİM KURULU*, *supra* note 6, at 187.

²⁴ YAŞAR, *supra* note 11, at 169.

“The measure of a cautious manager acknowledges that board members may resolve on business judgment rule (business decisions) in accordance with the corporate governance principles and is based on that the board member would not be held liable when the risk arises from such decisions. In accordance with the generally accepted rule, if appropriate research is made, the information is obtained from the relevant people and the decision is taken in a board meeting; although the developments are completely opposite and the company incurred loss, negligence cannot be mentioned. These rules are embodied within the rule of law under the third paragraph of Article 553 of the TCC.”

Accordingly, the measure of a cautious manager accepts that the board member may make business decisions and refers to business judgment rule as a measure of the cautious manager as well as an objective behavior rule for board members while making such business decisions. In case that the respective principles of the business judgment rule are taken into account while board members were making a business decision, the court would deem the board member as a cautious manager and fulfilled the duty of care and therefore negligence and liability of the board member would not come into question although the company, shareholders or creditors incur loss due to the business decisions of the board members.²⁵

2.2.3. Damage

Civil liability of board members would arise only if an unlawful conduct harms other(s). If there is no damage to the company, shareholders or creditors of the company arising from the breach of duties of board members, then no liability can be mentioned.²⁶

Damage can be defined as the decrease in a person’s assets out of his will.²⁷ The company, shareholders and creditors of the company are entitled to initiate a lawsuit against board members and to claim the compensation of the loss they incurred due to the misconduct of the board members. Board members would benefit from the protection of the business judgment rule in such lawsuits if the conditions thereof are satisfied.

2.2.4. Lien of Causality

Lien of causality (*causal link*) is the causal relation between the resulting damage and the incident or behavior that gives rise to the liability (breached duty) in general. Today, it is accepted in Swiss and Turkish doctrines and in practice that an adequate causal link between the damage and the act that is contrary to the law or articles of association should be sought for the board members to be liable.²⁸ According to this theory, in order to accept that there is an adequate causal link between a loss and a conduct, this unlawful conduct must cause such damage according to the experience of life and the

²⁵ Kırca, *supra* note 18, at 87.

²⁶ See 11th Civil Chamber of Court of Cassation, Decision No. 2015/559 E., 2015/8558 K. dated Jun. 16, 2015.

²⁷ See GÜNEY, *YÖNETİM KURULU*, *supra* note 6, at 293.

²⁸ *Id.* at 307.

normal course of events. Indeed, adequate causal link is regulated in Article 557/1 of the TCC²⁹ with the expression “..... to the extent of his fault and as the case may be that the loss may be attributed to him personally.”³⁰

The implementation of the business judgment rule in liability cases does not show any characteristic in relation to the causal link which is a condition of these cases.³¹

3. Business Judgment Rule

3.1. Business Judgment Rule in General

Many duties undertaken by the board of directors and the sanctions to be faced in the event of the violation of these duties are regulated under the respective legislation. In terms of such duties, board members do not resolve by using their discretions and in case of a breach of such duties, no further analysis on the discretion by the court is needed. On the other hand, the business decisions of the board members are not directly subject to any rule of law³² and board members should comply with the duty of care while taking such decisions. As duty of care is a general conduct principle, board members would be liable due to the breach of such duty if the limits of such principle are not set forth objectively in advance.

However, board members should have a prediction as to their nonliability area especially regarding the duty of care in order to carry out business activities of the companies without abstinence. It is possible to say that this area of nonliability is attained by the business judgment rule since this rule does not focus on whether the decision is reasonable or appropriate but rather focuses on the mechanisms and procedures that the board members use in arriving at the decision. It provides a safe harbor that makes board members’ decisions unassailable if certain prerequisites have been met.³³ In other words, the business judgment rule protects board of directors from personal liability for their decisions (to take or not to take action) due to a mere error in judgment³⁴ so long as the components of the rule are in place.³⁵

²⁹ Article 557/1 of the TCC is as follows: “Where more than one person must indemnify the same loss, every one of them shall be jointly liable with the others to the extent of his fault and as the case may be, that the loss may be attributed to him personally.”

³⁰ See YAŞAR, *supra* note 11, at 207.

³¹ *Id.* at 208.

³² Göktürk, *supra* note 4, at 210.

³³ Douglas M. Branson, *The Rule That Isn't a Rule - The Business Judgment Rule*, 36 Val. U. L. Rev. 631, 632 (2002).

³⁴ In *Nursing Home Bldg. Corp. v. DeHart*, the Court of Appeals of Washington likewise opined that: “It is too well settled to admit of controversy that ordinarily neither the directors nor the other officers of a corporation are liable for mere mistake or errors of judgment, either of law or fact. In other words, directors of a commercial corporation may take chances, the same kind of chances that a man would take in his own business. Because they are given this wide latitude, the law will not hold directors liable for honest errors, for mistakes of judgment, when they act without corrupt motive and in good faith, that is, for mistakes which may properly be classified under the head of honest mistakes. And that is true even though the errors may be so gross that they may demonstrate the unfitness of the directors to manage the corporate affairs. This rule is commonly referred to as the “business judgment rule.””

Business judgment rule, which is a product of judge-made law and a multi-faceted rule³⁶, is originated from common-law and it has been developed and applied by the U.S. courts (mainly the Delaware courts) over many years. This is also applicable for the civil law and therefore, there is no definition of this rule in *lex lata*.³⁷ However, there are essential components of the rule which are taken into account by the courts while analyzing whether the duty of care is fulfilled or not in the proceedings initiated against the board members due to the breach of the duty of care while making business decisions. In short, the business judgment rule provides immunity to the board members in cases where a loss occurs if the conduct of the board members are in line with the rule.

The business judgment rule is based on the fact that the business decisions are risky and the results thereof cannot be exactly determined beforehand. In fact, even if the duty of care is fulfilled by the board members, there would be an error in judgment or the loss would arise due to the reasons unpredictable at the time the business decision is taken according to the then conditions.³⁸ Also, there is no time pressure or competition at the time when the business judgment is examined by the courts. Results of the business decisions that are based on expectations and estimates become known to the courts when the case is initiated.³⁹ Therefore, the duty of the judges in the liability cases should not include the examination of the appropriateness of the decisions taken by the board members. In fact, courts should not evaluate the business decisions taken by the board members within the framework of the discretionary power and accordingly should not decide that they are liable because they violated the duty of care.

Business judgment rule plays an important role in preventing courts from considering the appropriateness of substantive decisions made by board members on the basis of business judgment.⁴⁰ It insulates directors from liability for negligence and creates a presumption against judicial review of duty

See Nursing Home Bldg. Corp. v. DeHart, 13 Wn. App. 489, 498-99 (Wash. Ct. App. 1975); *see also* Bodell v. General Gas Electric Corporation, 140 A. 264, 267 (Del. 1927).

³⁵ Elizabeth Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, 30 Delaware Journal of Corporate Law 343, 346 (2005).

³⁶ For extended explanations on different roles of the business judgment rule, see Branson, *supra* note 33, at 632-633.

³⁷ Göktürk, *supra* note 4, at 208.

³⁸ YAŞAR, *supra* note 11, at 5.

³⁹ GÜNEY, *YÖNETİM KURULU*, *supra* note 6, at 191. SITKI ANLAM ALTAY, ANONİM ORTAKLIKTA YÖNETİM YETKİLERİNİN DEVRİNİN SORUMLULUĞA ETKİLERİ 375-376 (2012). For example, when the board of directors decides to invest in a certain area within the scope of the company's activity, this decision is based on the predictions and evaluations of a number of forward-looking economic, technical and political developments from the ex-ante perspective. However, when the company incurred a loss due to such decision and a liability lawsuit against board members is initiated, the risks that cannot be foreseeable and predictable in advance (*ex-ante*) emerges as loss of the company and are also known by the judges. It is not possible for the judges to get rid of the effect of the results (knowledge) that they have learned later (*ex-post*), and to make an acceptable decision about the probability of predictable risks for the board members from the ex-ante perspective. *See* PULAŞLI, *supra* note 13, at 1466.

⁴⁰ R. Franklin Balotti & Joseph Hinsey IV, *Director Care, Conduct and Liability: The Model Business Corporation Act Solution*, 56 BUS. LAW. 35, 44 (2000).

of care claims and substantive merits of the directors' conduct unless the plaintiff rebuts the business judgment rule's presumption.⁴¹ Indeed, courts do not possess the necessary experience, expertise and knowledge to assess complicate business decisions.⁴² They are not educated or capable of controlling resources, financial complexity and specific commercial transactions of the companies.

In light of the above, we think that applicability of the business judgment rule is of paramount significance in our law system due to the following reasons:⁴³

- a. Business judgment rule would provide objective criteria in order for the courts to evaluate whether the loss arising from the business decisions incurred due to a breach of the duty of care or due to an error in judgment or unexpected developments and accordingly embodies the limits of the duty of care of the board members.⁴⁴
- b. Shareholders would not intervene in the management of the company by initiating a liability lawsuit when there is an unfavorable decision for such shareholders as the rule prevents under certain conditions the courts to second-guess the merits of the business decisions and accepts board members as the only body to make business decisions.⁴⁵ This would improve effectiveness of the management of the company as board members would not be concerned about exposure to the potential financial liability and bankruptcy⁴⁶ due to the compensations arising from the liability cases.⁴⁷
- c. Board members would take informed risky business decisions that are essential to the business success⁴⁸ and improvement of the business of the company taking into account of the business judgment rule. In fact, profit expectation of the shareholders entails the board members to take rational risky business decisions. Risky investment decisions would bring higher profits in return.
- d. Talented and expert managers would not refrain from taking part in the board of directors and the management of the companies would be carried out by such competent board members.

⁴¹ See Bainbridge, *supra* note 3, at 88-90.

⁴² Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1288 (1982).

⁴³ YAŞAR, *supra* note 11, at 6-10.

⁴⁴ *Id.* at 193.

⁴⁵ See, e.g., Dodge v. Ford Motor Co., 240 Mich. 459, 508 (Mich. 1919). Michigan Supreme Court refused to interfere in the business decision of Mr. Henry Ford stating that “judges are not business experts.”

⁴⁶ This is because, board members are liable to indemnify the loss, if they are liable, with all their assets (i.e. their personal liability is unlimited).

⁴⁷ PULAŞLI, *supra* note 13, at 1446.

⁴⁸ Branson, *supra* note 33, at 637.

3.2. Components of the Business Judgment Rule

In this chapter, we will parse and summarize essential components (elements) of the business judgment rule that are, by and large, accepted by the courts and scholars in the U.S. and by the scholars in Turkey respectively.

The Delaware courts in the U.S. have played an important role in formulation of the business judgment rule over the years.⁴⁹ Although, most of the decisions lack of clarity and consistency⁵⁰, Delaware court's statement of the rule in *Aronson v. Lewis*⁵¹ case is accepted as the best formulation of the rule⁵² and the one most quoted by the Delaware courts.⁵³ Accordingly, “[it] is a presumption⁵⁴ that in making a business decision the directors of a corporation acted on an *informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company*. Absent an abuse of discretion, that judgment will be respected by the courts.”⁵⁵ The Delaware Supreme Court opined that “[d]irectors’ decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose, or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available.”⁵⁶

As per Section 8.31 (*Standards of Liability for Directors*) of the Model Business Corporation Act⁵⁷ (Model Act), in principle, a board member will not be exposed to personal liability for loss of the company or its shareholders due to any decision to take or not to take action, or any failure to take any action. However, in case the party asserting liability of the board member in a proceeding establishes that business decision does not conform with the principle elements of the business judgment rule under

⁴⁹ Because much of the business judgment rule case law has been generated by the Delaware courts, and because the courts of other states often look to that case law. See Balotti & Hinsey IV, *supra* note 40, at 37.

⁵⁰ See Charles Hansen, *The Duty of Care, The Business Judgment Rule, and The American Law Institute Corporate Governance Project*, 48 BUS. LAW. 1355, 1360 (1993).

⁵¹ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

⁵² See Hansen, *supra* note 50, at 1360.

⁵³ *Branson*, *supra* note 33, at 632. See, e.g., *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

⁵⁴ See Bainbridge, *supra* note 3, at 83. For extended discussions regarding different approaches to the business judgment rule see also McMillan, *supra* note 22.

⁵⁵ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Therefore, the plaintiff should rebut at least one of the three presumptions, *i.e.*, the director is *not* acted on an informed basis, or in good faith, or in the honest belief that the action taken was in the best interests of the company.

⁵⁶ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

⁵⁷ AMERICAN BAR ASSOCIATION, MODEL BUSINESS CORPORATION ACT (2016 REVISION), (Online) <https://www.americanbar.org> (last visited Mar. 1, 2019). The Model Act is a model set of corporate law which was first promulgated in 1950 and since that time, it is reviewed and periodically revised by the Committee on Corporate Laws of the Section of Business Law of the American Bar Association. It is designated for use by both publicly held and non-public corporations of the U.S. For the business judgment rule's and the Model Act's history, see Balotti & Hinsey IV, *supra* note 40.

section 8.31(a)(2) of the Model Act, then such business decision will not be protected by the rule. These principle elements of the business judgment rule would be summarized as follows⁵⁸:

If the board member; (i) was not in good faith, or (ii) did not reasonably believe the decision to be in the best interests of the company, or (iii) was not informed to an extent he/she reasonably believed appropriate in the circumstances, or (iv) was not objective or independent, or (v) failed to devote attention to ongoing oversight of the business and affairs of the company, or to devote timely attention, by making (or causing to be made) appropriate inquiry, or (vi) received a financial benefit to which the board member was not entitled, or (vii) violated any other duties to deal fairly with the company and its shareholders that is actionable under applicable law, then such board member would be exposed to financial liability for the loss incurred by the company or its shareholders due to the misfeasance or nonfeasance of the duty of care. In that case, the board member may not be insulated from liability related to the business decision as one or several principle elements of the business judgment rule do(es) not exist on the matter at hand.

In Turkish doctrine, scholars accept certain principles as the components of the business judgment rule and generally allege that board members will be protected by the business judgment rule from the compensation of the damages arising from the business decision if the business decision subject to the court's examination bears such requirements. Then, the courts will reject liability case without analyzing the content of the decision as in that case it is accepted that board members use their discretion while making such decisions.

Pulaşlı⁵⁹ accepts the following five conditions as components of the business judgment rule: (i) there must be a business decision, (ii) board member must be independent, objective and free from conflict of interest, (iii) board member must be informed on the matter, (iv) board member must act in good faith, and (v) board member must act for the benefit of the company.

Akdağ Güney⁶⁰ considers that (i) the decision should not violate the mandatory provisions, (ii) the decision should be in accordance with the company's objectives and in the interests of the company, (iii) the decision must have been taken in a duly meeting, (iv) members must be independent and disinterested and (v) content of the decision should be defensible in order for a business decision not to be reviewed in terms of its correctness by the courts and the liability case will be rejected by the courts even if a loss is incurred due to such decision.

⁵⁸ As per the Official Comment of the Committee to Section 8.31 of the Model Act, “[t]he elements of the business judgment rule and the circumstances for its application continue to be developed and refined by the courts. Accordingly, it would not be desirable to freeze the concept in a statute.” Therefore, the business judgment rule was not codified as a whole under Section 8.31 of the Model Act. *See* AMERICAN BAR ASSOCIATION, *supra* note 57, at 189.

⁵⁹ PULAŞLI, *supra* note 13, at 1474.

⁶⁰ GÜNEY, *YÖNETİM KURULU*, *supra* note 6, at 190.

Altay⁶¹ opined that (i) existence of a conscious business decision, (ii) acting disinterested and independently, (iii) acting honestly, (iv) due care, and (v) no violation of a mandatory provision or of a norm with concrete content are the conditions of the business judgment rule defense.

As there is no consensus on such components of the rule among the scholars and as the business judgment rule is a concept derived from the common law, we will emphasize below on the generally accepted components mostly based on the understanding of the common law:

i. There Should be a Business Decision

In order for the board members to be protected by the rule, there should be a conscious business decision (to take or not to take action)⁶² which is taken in accordance with the procedural requirements. Indeed, all decisions of the board of directors are not business decisions. There are duties of the board members explicitly setting forth under the respective legislation or articles of association (e.g. duty of loyalty, notifying the court in case of any insolvency, etc.). In case of the breach of such duties, the protection of the business judgment rule would not take place as board members do not use the power of discretion while fulfilling such obligations.⁶³

Business decisions are the decisions that serve the realization of the company's management function or which affect the medium or long-term existence and development of the company or economic, financing and competitive position and income status of the company.⁶⁴ For example, proposal to the general assembly regarding increase or decrease of the share capital of the company, appointment of the managers, sale of the assets of the company, opening or closing of the branch offices would be deemed as business decisions of the board of directors. In such cases, board members reach a decision under uncertainty, the results of the decisions are unpredictable and dependent on the external factors such as market conditions, competitor companies' activities and customers⁶⁵ to some extent and they are highly complex by nature.

It is worth to mention that legal consequences (e.g. occurrence of damage) would arise only upon the implementation of the business decision. Business decision itself does not constitute damage *per se* and is not subject to the protection of the business judgment rule.

⁶¹ ALTAY, *supra* note 39, at 380-385.

⁶² *See, e.g.,* Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984). Delaware Supreme Court opined that “[h]owever, it should be noted that the business judgment rule operates only in the context of director action. Technically speaking, it has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act. But it also follows that under applicable principles; a conscious decision to refrain from acting may nonetheless be a valid exercise of business judgment and enjoy the protections of the rule.”

⁶³ PULAŞLI, *supra* note 13, at 1480.

⁶⁴ *Id.* at 1475.

⁶⁵ YAŞAR, *supra* note 11, at 177.

ii. Board Members Should Involve in Board Meetings Actively and the Decisions Should be Taken Duly and Carefully

Board members should be active and sensitive in the management of the company and while resolving the problems that the company faces.⁶⁶ Business judgment rule entails board members to discuss the issues that relates to the management of the company in a board meeting and resolve them as quick as possible. Board members should allocate adequate amount of time to the management of the company in order to mention about exercising due care. Besides, board members should follow the procedural rules before and during the decision-making procedure. For example, if the chairman or vice-chairman of the board of directors does not invite one of the board members to a board meeting, this would constitute a breach of the duty of care by the chairman or vice-chairman of the board of directors. Also, meeting and decision quorums should be regarded while making a decision in order to mention of a duly taken decision.

Participation to all board meetings is a right for the board members as well as a duty arising from the law under Turkish law. Business judgment rule is not applicable for the board member who does not participate in a board meeting without a justifiable excuse.⁶⁷ However, physical participation to the board meetings is not enough to benefit from the protection of the business judgment rule. Board members should involve in the discussions, ask questions, demand additional information, if the need be⁶⁸, from other board members, managers, committees, employees and express their opinions in favor or against the decisions accordingly.

Lack of knowledge, insufficiency, lack of time cannot exempt board members from their duties imposed by the law and the articles of association and cannot save the board members from the personal liability.⁶⁹

⁶⁶ PULAŞLI, *supra* note 13, at 1476.

⁶⁷ *Id.*

⁶⁸ Right to obtain information and review of the board members during the board meetings is regulated under Article 392 of the TCC as follows: “Each board member may request information, ask questions, conduct reviews on all matters and transactions of the company. The requests of a board member regarding any book, book record, contract, correspondence or document to be submitted to the board and review and discussion of such by the board of directors or board members or obtaining information from a manager or employee of the company may not be declined.

All members of the board of directors as well as persons charged with company management and committees shall be obliged to provide information at the meetings of the board of directors. No request of a director on such matters may be declined, nor questions be left unanswered.

Rights of the member of the board arising from this article may not be restricted nor rescinded. The articles of association and the board of directors may expand the member’s right to obtain information and review.”

⁶⁹ GÜNEY, YÖNETİM KURULU, *supra* note 6, at 197.

iii. Board Members Should be Disinterested and Independent

Impartiality and independence mean that board members only take the benefit of the company while taking and implementing the business decision.⁷⁰ Business decisions should be discussed and resolved only by the disinterested and independent board members (without attendance of the interested or dependent member(s)). If the interests of the company and the interests of the persons whom board members represent on the board of directors conflict on any item in the agenda of the board of directors, the representative board member should not attend the resolution procedure and discussions regarding such item by notifying the excuse of conflict of interest.⁷¹ This way, this board member would not affect the formation of the decision.

The same is applicable when there is a conflict of interest between the company on the one hand and dominant company, board member or any person charged with the management of the company or their relatives on the other hand. In any case, such decisions should be taken in line with the arm's length principle and in the best interest of the company.⁷² Board of directors should obtain a report from an independent expert regarding the subject matter if the need be.

This component of the rule has been taken into account while regulating Articles 393 (*Prohibition of Participation in the Negotiations*), 394 (*Financial Rights of the Board Members*), 395 (*Prohibition of Entering into Transaction with the Company and of Borrowing Money from the Company*) and 396 (*Prohibition of Competition*) of the TCC. Board members cannot benefit from the protection of the business judgment rule if board members do not put the benefits of the company before all other benefits.⁷³

iv. Adequate Research Should be Made before the Decision is Made (Informed Judgment)

Board of directors should obtain sufficient information from consultants, committees and experts, if the need be, in order to gain sufficient familiarity with the background facts and circumstances before making a business decision. Board member's lack of or insufficient knowledge in a matter does not relieve himself of liability.⁷⁴ Well then, the question is that how much information is "sufficient information".⁷⁵

⁷⁰ ALTAY, *supra* note 39, at 381. This element of the business judgment rule is also regulated under Article 369 of the TCC as the duty of loyalty: "[t]he board of directors and other third parties charged with management shall be under obligation to perform their duties with due care of a manager and *protect the interests of the company in compliance with rules of honesty*."

⁷¹ Pulaşlı, *Özen Yükümlülüğü*, *supra* note 1, at 62.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ GÜNEY, YÖNETİM KURULU, *supra* note 6, at 170. *See also* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

⁷⁵ Branson, *supra* note 33, at 640.

The Delaware Supreme Court in *Brehm v. Eisner*⁷⁶ case accepted an objective standard (due to the court's use of the words “*reasonably available*” and “*reasonable reach*”) ⁷⁷ that will be applicable for the determination of the sufficient information. The court states that “[t]he standard for judging the informational component of board of directors’ decision making does not mean that the board must be informed of *every* fact. The board is responsible for considering only *material* facts that are *reasonably available*, not those that are immaterial or out of the board’s reasonable reach.”⁷⁸

This requirement should be fulfilled before the board meetings and board members should discuss and exchange the information and their opinion on the issues in the agenda informedly. Board members should carefully review the expert reports and information provided by the experts before participating in the board meetings.⁷⁹ This is another condition for the board members to enjoy the protection of the business judgment rule.

Under Turkish law, Article 392 of the TCC provides detailed explanations on the rights of board members to obtain information during or outside the board meetings and sets out that these rights may not be restricted nor rescinded.

v. Board Members Should Act in Good Faith

Good faith is defined as the belief in the accuracy or the purpose of the work done, commitment to the person’s duty or obligation or emergence of the will by complying the current business conditions in a particular sector.⁸⁰ Board members should act in good faith (*bona fide*) while making business decisions. Board members should look out for the best interest of the company and should be honest while performing their duties. In fact, the Delaware Supreme Court admits that the requirement of good faith is fulfilled if the board members act in an honest manner and if their decisions are in line with the company’s best interests.

Good faith is a general legal principle set out under Article 2 of the Turkish Civil Law No. 4721 as “[e]veryone has to abide by the rules of honesty when exercising their rights and in fulfilling their obligations.” This component of the rule is also set out under Article 369 of the TCC. Accordingly, board members are obliged to protect the interests of the company in compliance with the rules of good faith.

4. Analysis of the Applicability of the Business Judgment Rule from and Protection Function of the Business Judgment Rule for the Board Members from the Turkish Law Perspective

⁷⁶ 746 A.2d 244, 259 (Del. 2000).

⁷⁷ Branson, *supra* note 33, at 640.

⁷⁸ *Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000). For detailed explanations on the sufficient information, see YAŞAR, *supra* note 11, at 177-181.

⁷⁹ *Id.* at 172-175.

⁸⁰ ALTAY, *supra* note 39, at 382.

As business judgment rule is entered into our law system with the preamble of the TCC and as since then there is a lack of court decision referring precisely to the rule⁸¹ or duty of care of board members in general, we are unable to review courts' view on the applicability of the business judgment rule. Therefore, in this chapter, applicability of the business judgment rule in Turkish law will be analyzed through doctrinal views and then our evaluation on the matter will be presented.

In general, Turkish scholars accept the applicability of the business judgment rule in Turkish law and consider the rule as providing objective criteria to determine fulfilment of the duty of care of board members.

Tekinalp⁸² states that the attitude (of the lawmaker) of not explicitly regulating the business judgment rule in the TCC but using a positive statement in the preamble is an expression of the desire of the lawmaker for the courts to apply the rule if the conditions are in place. He also argues that the reasons of the fact that the rule is not embodied under a provision of the TCC are that the rule is not yet defined in certain lines and such lines need to be determined especially by the Turkish Court of Cassation. Lastly, he considers Articles 369, 374 and 553/1 of the TCC as the positive legal grounds of the rule under Turkish law.

Akdağ Güney⁸³ opines that the business judgment rule is indirectly entered into Turkish law with the preamble of the TCC and that there is no obstacle in the application of the rule, which is accepted by the modern law system, in Turkish law. If board members comply with the criteria of the business judgment rule, they would be deemed as they showed the care of cautious manager and fulfilled the duty of care. Therefore, there will be no negligence or liability.

Kervankıran⁸⁴ is of the opinion that liability of the board members will be determined as per the business judgment rule principles in Turkish law due to the reference of the cautious board member under Article 369 of the TCC.

Altay⁸⁵ also accepts that the business judgment rule would be applicable in Turkish law due to the reference in the preamble of the TCC and examines the circumstances where the business judgment rule would be taken into account. Accordingly, he stresses that the rule will be of importance in case of violation of the duty of care where contradiction to the law is more uncertain. The board member would benefit from the principles of the business judgment rule while evidencing fulfilment of the duty of care and by doing so the burden of proof on the board member will be fulfilled.

⁸¹ For Court of Cassation' decisions referring to the fundamental ideas of the business judgment rule before introduction of the rule to the Turkish law system, see YAŞAR, *supra* note 11, at 260-267.

⁸² ÜNAL TEKİNALP, SERMAYE ORTAKLIKLARININ YENİ HUKUKU 385 (3rd ed. 2013).

⁸³ GÜNEY, *YÖNETİM KURULU*, *supra* note 6, at 189.

⁸⁴ Emrullah Kervankıran, *Alman Hukuku'nda Business Judgment Rule'nin Kodifikasyonu- Türk ve Amerikan Hukuku ile Karşılaştırmalı Bir Değerlendirme*, 1 Prof. Dr. Hüseyin Ülgen'e Armağan 249, 249-263 (2007).

⁸⁵ ALTAY, *supra* note 39, at 390.

Lastly, Göktürk⁸⁶ bethinks that it is possible and even necessary to benefit from the rule in civil liability cases against board members although there is no legal ground in *lex lata*.

Nevertheless, proving an approach on the applicability of the business judgment rule in Turkish law and accordingly on its protection function for the board members is not that simple, if not complicated, and should be taken into account from different perspectives.

4.1. From the Perspective of Applicable Law System

Civil Law system is accepted in Turkish law and therefore contrary to the Common Law system, courts should comply with the legislations enacted by the lawmaker instead of judge-made law. As the business judgment rule is not introduced to the Turkish law system with *lex lata* (with a positive norm of the law) but instead in the preamble of the TCC and as the components of the rule are not clearly specified in the preamble⁸⁷, there would be uncertainty for the judges in terms of application of the rule or its components and the courts would be reluctant for the implementation of the rule due to this uncertainty.

However, courts should apply the rule in terms of determination of fulfilment of the duty of care of the board members as an objective criterion. In other words, a function of the rule is to provide a care measure of the cautious manager. This understanding is also reflected to preamble of Article 369 of the TCC. “Cautious manager” constitutes an objective criterion in terms of civil liability of board members and business judgment rule is introduced to provide the components of this objective criterion.

In terms of absence of the components of the business judgment rule in *lex lata* and insufficient explanations in the preamble, the judges would develop and introduce them with the jurisprudence that is also a way of law making in Civil Law system in case of the absence of *lex lata*. Turkish courts would take into account of the generally accepted principle components of the business judgment rule as explained in Chapter 3 above while examining a business decision in terms of breach of duty of care.

In light of the above and bearing in mind of the affirmative wording and intention of the lawmaker in implementation of the rule in Turkey, we are of the opinion that, the business judgment rule is at least a legal theory, which is of binding legal force and recognized by the lawmaker, and would be applicable for board members in Turkey.

4.2. From the Perspective of Immunity Function

⁸⁶ Göktürk, *supra* note 4, at 238.

⁸⁷ Lawmaker states in the preamble of Article 369 of the TCC that general understanding of the business judgment rule is that if the researches are made in accordance with the situation, the information is taken from the related people and the decision is made on the board of directors; then the duty of care is fulfilled and the negligence cannot be mentioned even if the company incurred a loss. These components do not cover all (generally accepted) elements of the business judgment rule as explained in detail in Chapter 3 above.

One of the functions of the business judgment rule is to prevent the judges from examining business decision of the board of directors, which is brought to the fore due to the liability cases arising from the breach of the duty of care initiated against board member(s), in terms of appropriateness of the decision for the company.⁸⁸ Their role is limited to examine whether board members fulfilled the duty of care or not. In theory, board members will enjoy this function of the rule as board members are only obliged to be attentive (careful) while making a decision but not obliged to make accurate/appropriate decisions for the company due to the duty of care under Turkish law. This is also clearly explained in the preamble of Article 369 of the TCC.

A mere judgment error of the board members would not be deemed as a breach of the duty of care and no negligence or liability of board members would be mentioned as the business judgment rule does not focus on whether the decision is reasonable or not but rather focuses on the mechanisms and procedures that the board members use in arriving at the decision. This is also arising from the contractual relationship between the company and board members who are deemed as agencies and do not guarantee the results but act in due care under Turkish law. Having said that, if it is proved that there is a breach of duty of care, then the judges will analyze the accuracy of the business decision. This function will also make it easier for the board members to predict what to prove and to what extent in terms of duty of care during the civil liability cases.

In light of the above, we consider that business judgment rule provides an immunity for the business decisions of the board members taken by using the power of discretion and not in breach of the duty of care and will protect the power of discretion of board members during the civil liability lawsuits arising from the breach of the duty of care although the results of such decision causes loss for the company. It is surely beyond doubt that this function will be crystalized when the Court of Cassation in Turkey reaches a consensus on the understanding of business decision of board members and in general business judgment rule. Thereafter, we would mention about its real protection function for the board members in Turkey.

⁸⁸ It should be noted that Court of Cassation's approach to analyze business decisions in terms of their appropriateness before enactment of the TCC differs. *See, e.g.*, decision of 11th Civil Chamber of Court of Cassation, Decision No. 1982/3596 E., 1982/3884 K. dated Oct. 14, 1982. The Court of Cassation states that “[a]lso, it is for the *benefit of the plaintiff company* in terms of price that the agreements on the Phosphates of Syria contain delivery terms as within the borders of Turkey or at ports of Iskenderun unlike the previous ones which were “FOB”. In addition, as the Directorate of Elazığ Plant on May 10, 1977 and the Directorate of Samsun Plant on Jun. 13, 1977 notified that Phosphates of Syria has not caused any harm to the factory; it is necessary to acknowledge that *the decisions in question are appropriate.*” *See also* Assembly of Civil Chambers of Court of Cassation, Decision No. 2002/4-993 E., 2002/1052 K. dated Dec. 11, 2002. On the other hand, Assembly of Civil Chambers of Court of Cassation ruled on Jun. 2, 2010 that “[i]n the case of a business decision, an investigation cannot be carried out on whether the decision is useful or appropriate for the purpose. In short, business decisions cannot be subject to appropriateness analysis.” *See* Assembly of Civil Chambers of Court of Cassation, Decision No. 2010/9-272 E., 2010/276 K. dated Jun. 2, 2010.

4.3. From the Perspective of Preventive Function

Business judgment rule provides certain rules of conduct for the board members that should be taken into account in order to fulfil the duty of care (in other words, objective care measure). It is important to identify the principle components of the business judgment rule (objective criteria) that should be considered while making business decisions. Although those principles are not still fully clear under Turkish law due to inadequate explanations in the preamble on the principle components of the rule, board members would comply with the generally accepted components of business judgment rule as explained in Chapter 3 above. Board members would also consider corporate governance principles⁸⁹ applicable in Turkey *mutatis mutandis* while performing the board membership duty as referred in the preamble of Article 369 of the TCC.

The preventive function of the business judgment rule enables board members to foresee potential reasons that would cause civil liability of board members and crystallizes the limits of the power of discretion. Said that, we are of the opinion that, as the components of the rule is not clear yet and may be only clarified once the rule is started to be applied by the courts in Turkey, this function does not provide a real protection in practice for the board members in Turkey.

4.4. From the Perspective of Presumption Function

Finally, from the perspective of presumption function⁹⁰, unlike the Common Law system, the business judgment rule does not provide a presumption in favor of board members under Turkish law which is of utmost importance in order to mention of the rule to be a real protection for board members in Turkey. Indeed, business judgment rule is a nonliability presumption in favor of the board members in Common Law system and plaintiff should prove existence of the breach of the component(s) of the business judgment rule in order for the courts to analyze the content of the business decision.

Due to the fact that draft Article 369/3 of the TCC has been removed from the law when enacting the TCC, which was regulating the presumption function in line with the general understanding as “[i]t is a presumption that board members act carefully while performing their duties.”, board members will not benefit from this function of the business judgment rule and depending on the plaintiff⁹¹, they would be in

⁸⁹ Under Turkish law, corporate governance principles are regulated under the Communiqué on the Corporate Governance (II-17.1) dated Jan. 3, 2014 and the Capital Markets Board is entitled to publish and amend the corporate governance principles as per the TCC. These principles are only mandatory for certain listed companies. Nevertheless, there is no obstacle for non-public companies to consider the corporate governance principles *mutatis mutandis*. This intention of the lawmaker is also reflected in the preamble of Article 369 of the TCC.

⁹⁰ For detailed explanations and analysis for the applicability of the business judgment rule from the presumption perspective, see SEMİH SIRRI ÖZDEMİR, İŞ ADAMI KARARI İLKESİ (BUSINESS JUDGMENT RULE) VE TÜRK HUKUKUNDA UYGULANABİLİRLİĞİ 155-171 (2017).

⁹¹ Under Turkish law, burden of proof of negligence depends on the relationship between the parties. If plaintiff is the company or shareholder or creditor incurred indirect loss, then board member should prove not being negligent in occurrence of the loss incurred directly by the company or indirectly by shareholder or creditor due to the contractual relationship between the board member and company. If plaintiff is the shareholder or creditor and the

a position to prove that they are not negligent in the occurrence of loss (in other words, they fulfilled the duty of care) or the loss did not occur due to their negligence.

This change indeed reduced the protection function of the rule considerably. In order to enhance for the rule to become a real protection for the board members, the lawmaker should amend Article 369 of the TCC to restate the presumption clause of the draft Article 369/3 of the TCC stated above.

5. Concluding Remarks

The board of directors takes a great deal of risky business decisions by using power of discretion in matters related to the determination and implementation of company policies as well as in solving concrete problems.⁹² However, it is not possible to determine certain rules on how the discretionary power is to be used. Board of directors uses the power of discretion when it makes a choice among different alternatives which is in principle the most favorable one for the company. However, the decisions taken by the board of directors may have unfavorable consequences for the company although board members fulfill the duty of care. In terms of these decisions, it is highly important to ensure that these decisions are not audited by the courts whether there are appropriate for the company after the results have come out and the company has suffered losses in order to protect the area of the power of discretion of the board members.

The aim of the regulations on the civil liability of the board members under the TCC is to ensure board members to be attentive and careful while performing the duties in relation to the management of the company. However, in order for the board members to take conscious risky decisions, a balance must be maintained between the civil liability provisions and the authority granted. In order to ensure this balance between the authority and liability, the business judgment rule which is arising from the Common Law system (from the jurisprudence of the U.S.) and is used for the determination of fulfilment of the duty of care of board members has been adopted in our law system. Accordingly, the rule enables the courts in civil liability cases initiated against the board members due the breach of the duty of care to analyze the business decisions of the board of directors in terms of their compliance with the law by taking into account of the components of the rule but not their appropriateness.

We consider that board members should fulfil duty of care in order to enjoy the protection of the business judgment rule during the civil liability cases. If a business decision is taken in line with the elements of the business judgment rule, then the courts are not entitled to interfere with the content of the decision and examine the appropriateness of the decision for the company although the company, its

lawsuit is initiated due to the direct loss incurred by the shareholder or creditor, then the plaintiff should prove that board member is negligent in occurrence of the loss as per the tort provisions under Turkish law. See PULAŞLI, *supra* note 13, at 1535. *See also Id.* at 245-250. On the other hand, Çamoğlu considers that the burden of proof of negligence will be on the plaintiff in any case due to the general principle of the liability law. See POROY et al., ORTAKLIKLAR HUKUKU I 380 (13rd ed. 2014).

⁹² Göktürk, *supra* note 4, at 215.

shareholders or the creditors incur a loss due to such decision. This also arises from the agency contract between the company and board members where the agent does not guarantee to give the appropriate decisions for the principle but is obliged to give the best effort and fulfil its duties with due care. This evaluation should be made taking into account of the then conditions when the board of directors made such decision.

All in all, it must be noted that business judgment rule is a legal theory under Turkish law and would be applicable in civil liability cases arising from the breach of the duty of care although there are some deficiencies in the legal regulations⁹³. Nevertheless, due to the inexistence of any case law regarding implementation of the rule or duty of care in general taking into account of the new approach of the lawmaker to such duty, it we do not consider the business judgment rule to be a real protection for the board members who met the conditions of the application of the rule in civil liability cases before the Turkish courts.

Article contact: Gönenç Gürkaynak, Esq.

Email: gonenc.gurkaynak@elig.com

(First published by Mondaq on March 7, 2019)

⁹³ See Chapter 4 above for analysis on these deficiencies.

BIBLIOGRAPHY

Books

FİKRET EREN, BORÇLAR HUKUKU GENEL HÜKÜMLER (2012).

HASAN PULAŞLI, ŞİRKETLER HUKUKU ŞERHİ III (3rd ed. 2018).

İSTANBUL ÜNİVERSİTESİ HUKUK FAKÜLTESİ TİCARET HUKUKU ANABİLİM DALI, YARGITAY 11. HUKUK DAİRESİNİN TÜRK TİCARET KANUNUNA İLİŞKİN KARARLARI 2015-2016 (2018).

NECLA AKDAĞ GÜNEY, ANONİM ŞİRKET YÖNETİM KURULU ÜYELERİNİN HUKUKİ SORUMLULUĞU (2008).

NECLA AKDAĞ GÜNEY, ANONİM ŞİRKET YÖNETİM KURULU (2nd ed. 2016).

POROY et al., ORTAKLIKLAR HUKUKU I (13rd ed. 2014).

SEVGİ BOZKURT YAŞAR, ANONİM ŞİRKETLERDE İŞADAMI KARARI İLKESİNİN (BUSINESS JUDGMENT RULE) UYGULANMASI (2015).

SEMİH SIRRI ÖZDEMİR, İŞ ADAMI KARARI İLKESİ (BUSINESS JUDGMENT RULE) VE TÜRK HUKUKUNDA UYGULANABİLİRLİĞİ (2017).

SITKI ANLAM ALTAY, ANONİM ORTAKLIKTA YÖNETİM YETKİLERİNİN DEVRİNİN SORUMLULUĞA ETKİLERİ (2012).

ÜNAL TEKİNALP, SERMAYE ORTAKLIKLARININ YENİ HUKUKU (3rd ed. 2013).

Periodicals and Theses

Ahmet Battal, *Yeni Türk Ticaret Kanununda Anonim Şirket Yönetim Kurulu Üyelerinin Sorumluluk Rejimi*, 2 Akdeniz Üniversitesi Hukuk Fakültesi Dergisi 31 (2012).

Ali Bengi, *Anonim Şirket Yönetim Kurulu Üyelerinin İşlemlerinin Hukuka Uygunluk Denetiminde Yeni Bir Kriter: "Business Judgment Rule" (Yöneticinin Hukuka Uygunluk Kuralı)* (2009).

Charles Hansen, *The Duty of Care, The Business Judgment Rule, and The American Law Institute Corporate Governance Project*, 48 BUS. LAW. 1355 (1993).

Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982).

Douglas M. Branson, *The Rule That Isn't a Rule - The Business Judgment Rule*, 36 Val. U. L. Rev. 631 (2002).

Elizabeth Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, 30 Delaware Journal of Corporate Law 343 (2005).

Emrullah Kervankıran, *Alman Hukuku'nda Business Judgment Rule'nin Kodifikasyonu - Türk ve Amerikan Hukuku ile Karşılaştırmalı Bir Değerlendirme*, Prof. Dr. Hüseyin Ülgen'e Armağan 249 (2007).

Hasan Pulaşlı, *Türk Ticaret Kanunu Tasarısı'na Göre Anonim Şirket Yönetim Kurulu Üyelerinin Özen Yükümlülüğü ve Mütessesil Sorumluluğu*, 25 BATIDER 27 (2009).

İclal Çelik, *Anonim Şirketlerde Yönetim Kurulu Üyelerinin Ticari Takdir Yetkisi ve Bundan Doğan Sorumluluğu* (2012).

İsmail Kırca, *Anonim Şirket Yönetim Kurulu Kararlarında Takdir Yetkisi - Özen Borcu*, 3 BATIDER 85 (2004).

Kürşat Göktürk, *Amerikan, Alman, İsviçre ve Türk Hukukunda İşadamı Kararı İlkesi*, 2 İnönü Üniversitesi Hukuk Fakültesi Dergisi 207 (2011).

Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 Wm. & Mary Bus. L. Rev. 521 (2013).

Mert Can Albayrak, *The Business Judgment Rule and Directors' Duties related to the Rule: Analysis of the Cases of US, UK and Turkey* (2013).

R. Franklin Balotti & Joseph Hinsey IV, *Director Care, Conduct and Liability: The Model Business Corporation Act Solution*, 56 BUS. LAW. 35 (2000).

Sibel Hacımahmutoğlu, *The Business Judgment Rule: İşadamı Kararı mı Yoksa Ticari Muhakeme Kuralı mı?*, 30 BATIDER 99 (2014).

Sinan Yüksel, *Yönetim Kurulu Üyelerinin Hukuki Sorumluluğunun Şartları ve Yargının Bunlara Yaklaşımı*, İsviçre Borçlar Kanunu'nun İktibasının 80. Yılında İsviçre Borçlar Hukuku'nun Türk Ticaret Hukuku'na Etkileri 355 (2009).

Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

Cases

Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)

Bodell v. General Gas Electric Corporation, 140 A. 264, 267 (Del. 1927)

Brehm v. Eisner, 746 A.2d 244 (Del. 2000)

Dodge v. Ford Motor Co., 240 Mich. 459, 508 (Mich. 1919)

Nursing Home Bldg. Corp. v. DeHart, 13 Wn. App. 489, 498-99 (Wash. Ct. App. 1975)

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)

11th Civil Chamber of Court of Cassation, Decision No. 1982/3596 E., 1982/3884 K. dated 14.10.1982

Assembly of Civil Chambers of Court of Cassation, Decision No. 2002/4-993 E., 2002/1052 K. dated 11.12.2002

Assembly of Civil Chambers of Court of Cassation, Decision No. 2010/9-272 E., 2010/276 K. dated 02.06.2010

11th Civil Chamber of Court of Cassation, Decision No. 2015/559 E., 2015/8558 K. dated 16.06.2015

Statutes, Legislative and Administrative Materials

American Bar Association, the Model Business Corporation Act (2016 Revision) (2016).

Turkish Commercial Code No. 6102

Turkish Commercial Code No. 6762

Turkish Code of Obligation No. 6098

Turkish Civil Law No. 4721

Internet Sources

<https://www.americanbar.org>

<http://www.tdk.gov.tr>