

A FUNDAMENTAL CHANGE OF PERSPECTIVE IN THE LIABILITY OF THE BOARD OF MANAGERS IN THE NEW TURKISH CORPORATE LAW: TRANSFORMATION FROM PRUDENT MAN RULE TO BUSINESS JUDGMENT RULE*

ANONİM ORTAKLIKLARDA YÖNETİM KURULU ÜYELERİNİN BASİRETİLİ İŞ ADAMINDAN TEDBİRLİ YÖNETİCİYE (BUSINESS JUDGEMENT RULE) ŞEKLİNDE DEĞİŞİKLİK GÖSTEREN SORUMLULUĞU

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SUMMARY

As is known the new Turkish Commercial Code (TCC) brought up many innovations regarding the corporate law. The liability of the executive board members is based on a differentiated solidarity instead of absolute solidarity and the duty of care is based on business judgment rule instead of prudent man rule. Despite the fact that this new concept is not prescribed in the article 369/1 of the Turkish Commercial Code, we can see it in the rationale of the provision itself. In this study the prudent man and the business judgment rules are reviewed as well as the reasons behind this transformation.

Keywords: *Prudent man rule, business judgment rule, liability of the board of managers.*

ÖZET

Bilindiği gibi yeni Türk Ticaret Kanununda (TTK) şirketler hukuku ile ilgili birçok yenilik getirilmiştir. Yönetim kurulu üyelerinin sorumluluğu, mutlak teselsül yerine farklılaştırılmış teselsül esaslı üzerine inşa edilmiş ve özen yükümünde basiretli işadamı kuralı yerine işadamı kararı kuralı benimsenmiştir. Bu yeni kavram, TTK m.369/1’de açıkça düzenlenmemesine rağmen hükmün gerekçesinde bu kavrama yer verildiğini görmekteyiz. Bu çalışmada basiretli işadamı ve işadamı kararı kurallarının yanı sıra bu değişikliğin altında yatan sebepler incelenmiştir.

Anahtar Kelimeler: *Basiretli işadamı kuralı, işadamı kararı kuralı, yönetim kurulu üyelerinin sorumluluğu.*

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INTRODUCTION

As we all know the new Commercial Code adopted in 2011 and entered into force in 2012 introduced a number of new principles and rules. These new principles and rules have affected almost all parts of the Code but most significantly the Book on Company Law. The reason behind this fact is that the establishment of companies in Turkey is increasing steadily and there have been numerous changes in European Law, Swiss Code of Obligations and German Joint Stock and Limited Liability Company Acts, which have overall influenced the codification of the new TCC.

The new company law is based on four new pillars. These are namely, the corporate governance, transparency, independent audition and the separation of the personalities of partners from the company's legal personality.¹ These pillars have significant impacts on the legislation of the company law and especially on the obligations and liabilities of the board of managers.

The liability rules have been totally revised so as to judge a more reasonable and equitable degree of liability that the board members and other managers may face during the performance of their tasks. In this context, the rule of absolute solidarity is converted to differentiated solidarity to determine the degree of liability according to the intervention of each member in the decision making process. While the tort liability is sustained, the burden of proof belongs to the claimant not to the board members. Last but not the least the board of managers may delegate the management to third persons as managers. In that case the board members may be held liable as far as they are proved to have fault in the selection of the managers. From this perspective it may be inferred that the new rules are more equitable.

Similarly a new approach in the assessment of the diligence of the board members is adopted. Despite the fact that it is not prescribed in Company Law, the prudent man rule is replaced by the business judgment rule. In this study, I will try to focus on the business judgment rule in the evaluation of the liability of the board members. This study is divided into two parts. In the first part, the terminology and in the second part the reason why the law maker prefers the rule of business judgment is studied.

¹ Şehirli Çelik, Feyzan & Kırca, İsmail & Manavgat, Çağlar (2013), Anonim Ortaklıklar Hukuku, C. I, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, p. 69.

I. THE PRUDENT MAN AND THE BUSINESS JUDGMENT RULES

A. PRUDENT MAN RULE

In legal dictionary, **prudent man rule** is defined as “the requirement that a trustee, investment manager of pension funds, treasurer of a city or county, or any fiduciary (a trusted agent) must only invest funds entrusted to him/her as would a person of prudence, i.e. with discretion, care and intelligence”.² Some other definitions include skill as another feature to discretion, care and intelligence.³ On the other hand some authors define prudent man rule as a behaviorally-oriented standard.⁴ It favors safe investments instead of speculated ones.⁵

From a common law perspective prudent man rule goes back to 19th Century in the American Law System. It usually refers to the investment preferences and its consequences and is regarded as a constraint on the discretionary decision making of trustees and investment managers.⁶ In connection with this perspective, if the trustee or investment manager acts in an improper manner in that case the court shall have the power to control them with respect to whether their motive is proper even if it is not dishonest.⁷ In other words, no matter whether the motive is in good faith or not, the trustee still may face some sanctions.

The prudent man rule repealed in the USA after the adoption of Restatement (Third) of Trusts sections on prudent trust investment in 1992 and the 1994 Uniform Prudent Investor Act.⁸ It was replaced by the prudent investor rule. The major differences between the prudent man and prudent investor rules may be listed as,

a) In prudent man rule, the prudence of an investor is determined even with only one investment where in prudent investor rule, the prudence of an

² See <http://legal-dictionary.thefreedictionary.com/prudent+man+rule>, s.e.t. 14.07.2015.

³ Galer, Russell, “Prudent Person Rule Standard, For The Investment of Pension Fund Assets”, <http://www.oecd.org/finance/private-pensions/2763540.pdf>, p. 6, s.e.t. 14.07.2015.

⁴ Galer, p. 2.

⁵ Schanzenbach, Max M. & Sitkoff, Robert H. (Draft of September 17, 2007), “Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?”, 50 Journal of Law and Economics, http://www.law.harvard.edu/programs/olin_center/papers/pdf/Schanzenbach_Sitkoff_580.pdf, p.1, s.e.t. 17.10.2015.

⁶ Ravikofft, Ronald B. Curzant, Myron P. (May 1980), “Social Responsibility in Investment Policy and the Prudent Man Rule”, California Law Review, Volume 68, Issue 3, Article 3, p. 518 (p.518-546) .

⁷ Ravikofft & Curzant, p. 520.

⁸ Schanzenbach & Sitkoff, p. 8, 13.

investor is determined not only with an individual investment but all investment portfolios,

b) In prudent man rule diversification (reducing risk by investing in different assets) is not allowed where in prudent investor rule diversification is required, and there is no category or type of investment deemed as imprudent and

c) In prudent man rule the investors may not delegate their duty to third parties where in prudent investor rule; investment management may be delegated to third parties.⁹

As may be concluded prudent investor rule reflects a more contemporary and moderate attitude to trustees and fiduciaries than the prudent man rule.

In civil law, most countries still hold the prudent man rule, which, in practice lead the board members to be “risk averse” so as to intend to less risky investments.¹⁰ In Turkish law prudent man rule has a little bit different implications than the common law concept. According to the Turkish dictionary, the word “prudent” is defined as “the ability to see or to foresee the realities clearly, to envisage the consequences”.¹¹ The prudent man rule which is translated as “basiretli iş adamı” has taken place in Turkish Code of Obligations and Turkish Commercial Code in different provisions. In the Code of Obligations art.471 and art.506 require the agent’s or the contractor’s duty of care to be determined as an agent or a contractor acting prudently in the same position.

Similarly this rule is prescribed in three provisions of TCC. According to the art.18/2, the merchant is supposed to behave like a prudent man in all his commercial transactions. Here the term prudent imposes a heavy burden on a merchant, which requires him to be cautious, careful and intelligent as would a merchant be in the same position. In this context, a merchant should foresee the conclusions of his decisions and bear all the risks that may come out as a result of inexperience, lack of due care or discretion.¹² As a result of this requirement, a mer-

chant cannot make use of the advantages that are set forth for the ordinary people who may face certain risks in commercial transactions. The other two provisions entailing the prudent man rule are art.110/2 of the Code, which regulates the obligation of the agency to notify the merchant. According to this article, the agency should perform his business like a prudent man if he is not able to notify the merchant because of the emergency or if he is authorized to perform under the most appropriate conditions. And the third provision regulating the prudent man rule is related to the liquidation officers. According to art.286, liquidation officers are supposed to take the necessary measures for the protection of the assets of the company as a prudent man would do.

B. BUSINESS JUDGMENT RULE

Business judgment rule was born and has been developed in English and American case law¹³ and is defined as “a legal principle that makes officers, directors, managers, and other agents of a corporation immune from liability to the corporation for loss incurred in corporate transactions that are within their authority and power to make when sufficient evidence demonstrates that the transactions were made in **good faith**”.¹⁴ According to another definition, this rule requires the courts not to second guess the case against a corporate director if he made his decisions in good faith, with the care that a reasonably diligent man would use and he acted in the best interests of the corporate.¹⁵

In English law this rule is in connection with the duty of loyalty of the managers.¹⁶ In American Law this rule goes back to 19. century as communicated by Delaware court verdict stating that solely a wrong decision made by a manager should not lead to his liability.¹⁷ The court acknowledged the presumption that the managers make decisions with good faith and for the best interests of the compa-

9 https://en.wikipedia.org/wiki/Uniform_Prudent_Investor_Act, s.e.t. 17.10.2015.

10 Gerner-Beuerle, Carsten & Paech, Philipp & Schuster, Edmund Philipp (April 2011), “Study on Director’s Duties and Liabilities”, http://ec.europa.eu/internal_market/company/docs/board/2013-study-analysis_en.pdf, p. 74, s.e.t. 11.11.2015.

11 TDK Güncel Türkçe Sözlük, http://tdk.gov.tr/index.php?option=com_gs&arama=gts&guid=TDK.GT5.561e62a61b3250.89245233, s.e.t. 14.10.2015; Kirca&Şehirali Çelik&Manavgat, p. 658, fn. 717.

12 Arkan, Sabih (2012), Ticari İşletme Hukuku, 16. Baskı, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, p. 139.

13 Hacımahmutoğlu, Sibel (2014), “The Business Judgment Rule: İşadamı Kararı mı Yoksa Ticari Muhakeme Kuralı mı?”, BATİDER, Sayı: 4, Cilt: XXX, p. 99 (99-145).

14 See <http://legal-dictionary.thefreedictionary.com/Business+Judgment+Rule>, s.e.t. 21.07.2015.

15 See Business Judgment Rule, https://www.law.cornell.edu/wex/business_judgment_rule, s.e.t. 23.10.2015; Hacımahmutoğlu, p. 114.

16 Hacımahmutoğlu, p. 99.

17 Göktürk, Kürşat (2011) “Amerikan, Alman, İsviçre ve Türk Hukukunda İşadamı Kararı İlkesi”, İnönü Üniversitesi Hukuk Fakültesi Dergisi, Sayı: 2, Cilt: 2, p. 210 fn. 7 (p.207-247); Arsht, S. Samuel (1979, “The Business Judgment Rule Revisited”, Hofstra Law Review, Vol. 8: Iss. 1, Article 6, p. 93, <http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss1/6>, s.e.t. 22.10.2015.

ny.¹⁸ If the claimants assert the opposite in that case they need to put evidences in that direction.

Business judgment rule has also been adopted by the German Law¹⁹ as stated in art. 93/1 of German Joint Stock Company Act.^{20,21} Within this context, business judgment is made by the managers who are experts and elected as managers and it should be admitted that they may make mistakes because of the risks that commercial life possesses in its nature.²² Due to this fact they should not be held liable as long as they make their decisions in good faith and their best for the interests of the company. In other words, only the behaviors against the good faith should prevent the application of business judgment rule.²³ In connection with that if the managers are in fraud or have misused the discretion they have, they will not be able to make use of the business judgment rule.²⁴

From EU perspective it would be a true inference that European Commission has not brought up the liability of the board members in the legal instruments.²⁵ In EU Regulation number 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) article 51 leaves the liability issue to the domestic rules of each member state.²⁶ “Among the member states, as many as five jurisdictions adopted this rule while the majority does not still have an explicit formulation of this rule.”²⁷ These five jurisdictions are listed as Danish, German, Greek, Portuguese and Romanian jurisdictions.²⁸

According to the business judgment rule, when a legal proceeding is started against a board member the judge is not supposed to review the case in respect of the appropriateness control.²⁹ In other term the courses of actions of the board members should not be subject to judicial review just because a dis-

agreeing shareholder wanted it to be so.³⁰ Of course the judge shall review the decision but the criteria should not be the appropriateness of the decision to market rules or the timing of the decision. The criteria which the judge is to observe may be listed as following;³¹

- a) The compliance to the imperative provisions.
- b) The compliance to the goals and interests of the company.
- c) The properness of the decisions as to the formality.
- d) The independency and neutrality of the members favoring the decision.
- e) The defensibility of the content of the decisions.

It is acknowledged that where a manager makes a decision as he is entitled to do so under the conditions stated above he shall not be held liable even if the company faces a loss.³²

II. THE REPLACEMENT OF PRUDENT MAN RULE BY THE BUSINESS JUDGMENT RULE IN TURKISH LAW

A. REGULATION IN THE ARTICLE 369 OF THE TURKISH COMMERCIAL CODE

Business judgment rule is not formulized in Turkish positive law³³ however the wording of the art.369 implies this rule and the Rationale of this article stated that “cautious man” term is actually meant to be the rule of business judgment.³⁴

In art. 369/1 of the TCC which regulates “**the duty of care and loyalty**” it is stated that “**the board members and third parties who are involved with the management of the company are under the obligation of performing their duties with the due care of a cautious manager and safeguard the**

18 Hacımahmutoğlu, p. 99.

19 See Gerner-Beuerle & Paech& Schuster, p. 44.

20 The first sentence states that “in conducting business, the members of the management board shall employ the care of a diligent and cautious manager”.

21 *Tekinalp* argues that German Law has been under the influence of American Law in the recent years. See Tekinalp, Ünal (2013), *Sermaye Ortaklıklarının Yeni Hukuku*, İstanbul, Vedat Kitapçılık, p. 385.

22 Arshat, p. 99.

23 Göktürk, p. 220.

24 Göktürk, p. 221; Arshat, p.96.

25 Gerner-Beuerle & Paech& Schuster, p. vii.

26 See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R2157&from=EN> s.e.t. 14.11.2015.

27 Gerner-Beuerle & Paech& Schuster, p. xi.

28 Gerner-Beuerle & Paech& Schuster, p. 110, 111.

29 Güney, Necla Akdağ (2012), 6102 Sayılı Türk Ticaret Kanunu'na Göre Anonim Şirketlerde Yönetim Kurulu, İstanbul, Vedat Kitapçılık, p. 129; Pulaşlı, Hasan (2015), *Şirketler Hukuku Genel Esasları*, 3. Bası, Ankara, Adalet Yayınevi, p. 466.

30 Arshat, p. 95.

31 Güney, p.130; Pulaşlı, p. 466; Göktürk, p. 232, fn. 132.

32 Pulaşlı, p. 467.

33 Authors may refer to its translation in different ways such as “işadami muhakemesi kuralı”, “ticari yargı kuralı” “ticari muhakeme kuralı” and “işadami kararı”. However the phrase of “işadami kararı” is adopted in doctrine. See Göktürk p. 209; Hacımahmutoğlu, p. 99; Tekinalp, Ünal (2011), *Yeni Anonim ve Limited Ortaklıklar Hukuku ile Tek Kişi Ortaklığının Esasları*, 2. Bası, İstanbul, Vedat Kitapçılık, p. 278 (Tek Kişi).

34 Tekinalp (2011), p. 279.

interests of the company in good faith^{35,36} In the previous Code the board members were supposed to act prudently and carefully as referred to the partners of an ordinary partnership acting as managers.³⁷

In the initial draft, third paragraph of this provision stated that “the board members and the managers are presumed to act with the due care while performing their tasks”. But this paragraph was removed by the 22.Term Justice Sub Commission. We believe that if this paragraph had been sustained, it would have been a complementary part of the previous paragraph.³⁸

The new provision has brought up two innovations. The first one is that the board members and third persons in charge of management should perform their tasks with due care of a cautious manager (not a prudent businessman) and the second one is that they should observe the interests of the company.

The term “cautious manager” is not only used in art. 369/1 but also in art. 202/1/d, which regulates the liability of parent company controlling the group of companies (konzerns). Under this provision, if a parent company causes a loss to a subsidiary, this loss may not be claimed against the board of managers as far as they have acted in the interest of the company with the due care of a cautious manager.

Turkish dictionary defines the term “cautious” as “prepared in advance, taking the measures in advance.”³⁹ It may be argued that the term “cautious” is not as strong as the term “prudent” where it requires a person to foresee the consequences and to take all measures to prevent any risk. From this perspective “cautious” and “prudent” have different implications.

In the Rationale of the provision, the law-maker emphasizes the differences between the **prudent man** and the **business judgment** rules and explains why he has preferred business judgment rule instead of prudent man rule.⁴⁰

B. REGULATION IN THE ARTICLE 553/3 OF THE TURKISH COMMERCIAL CODE

In connection with the business judgment rule, the law maker has set forth another provision regulating the liability of the board members stating that “*no body may be held liable due to the violations of the law or the articles of association that are out of his control; nor the circumstance of not being liable may be declared null and void on the grounds of the duties of observation and due care*”.

This provision is a complementary one to the art. 369 because it actually marks up the limits of the due care and loyalty that needs to be displayed by the board members.⁴¹ As explained in the Rationale, this paragraph is aimed to avoid the liability of the board members which may be claimed simply due to an understanding of abstract duty in the absence of causality or fault. The law maker brings up an observance that in practice the board members are held liable for every individual breach of law or articles of association just because of an understanding of supervision which is beyond the limits of human tolerance. For that reason this paragraph is deemed to be in close connection with the business judgment rule.

C. THE REASONS OF TRANSFORMATION FROM PRUDENT MAN RULE TO BUSINESS JUDGMENT RULE

1. In General

In joint stock companies, the legal character of the relationship between the company and the board members is identified as an agency relationship⁴² not a contractor relationship. The main obligations of agent as specified in art.507 of the Turkish Code of Obligations are loyalty and due care. In connection

35 This art. of the TCC is translated from Swiss Code of Obligations Art. 717 which states that “*The members of the board of directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith.*”

36 Compare art. 93 of German Joint Stock Company Act (Aktiengesetz): “*Die Vorstandsmitglieder haben bei ihrer Geschäftsführung die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters anzuwenden:* The board members should have the diligence of a prudent and cautious manager in the management of the company.”

37 Former TCC art. 320 referred to the Art. 528/2 of the former TCO. In art. 528/2 it was stated that “*the partner in charge of the management in ordinary partnership would be liable as an agent would be liable.*”

38 For the same view see Tekinalp (2011), p. 279.

39 TDK Güncel Türkçe Sözlük, http://tdk.gov.tr/index.php?option=com_gts&arama=gts&guid=TDK.GTS.561e62a61b3250.89245233.s.e.t.14.11.2015

40 Pulaşlı, p. 465.

41 Çamoğlu, Ersin & Poroy, Reha & Tekinalp, Ünal (2014) Ortaklıklar Hukuku I, 13. Bası, İstanbul, Vedat Kitapçılık, p. 378.

42 Hacimahmutoğlu, p. 129.

with that the board members should act with due care and loyalty⁴³ while performing their tasks but the company may not expect them to achieve a concrete target.⁴⁴

Similar to the provision regulating the loyalty and care in the Code of Obligations, the obligations of due care and loyalty are specially regulated in art. 369 of the TCC under the title of “Due Care and Loyalty”. Within this context, the obligation of loyalty entails them to make decisions taking the interests of the company into consideration. They should hold the interests of the company above their own interests.⁴⁵

The content and nature of the obligation of due care is under dispute in Turkish doctrine. Some authors assert that the rule of good faith (*bona fides*) in the content of due care reflects the honesty rule stated in art.2 of the Turkish Civil Code which is based on objective good faith⁴⁶ while some other argue that it is based on art.3 of the Turkish Civil Code, which is based on subjective good faith.^{47,48} The main difference between them is the extent of good faith. In objective good faith, board members are expected to act with due care as should a manager under the same circumstances do⁴⁹ while in subjective good faith, the board members are expected to act with due care specifically expected from themselves, because of their personal skills.⁵⁰

If the latter is adopted as a rule it will be difficult to evaluate the degree of due care as the evaluation of personal skills would be quite difficult for the court. From this viewpoint we believe that the degree of due care should be determined according to art.2 of Turkish Civil Code, which is stated as objective good faith.

Let it be objective or subjective good faith, the managers, who are in charge of the management of the company as set forth in art. 374 of the TCC make

use of the discretion they are entitled to under the conditions full of many risks and they are not infallible people and there is always a potential risk of making mistakes.⁵¹ If they act with an over care and caution they may not be to perform their tasks at all. For that reason the board members should feel themselves comfortable enough to use the discretion and power to make sound decisions. Here the problem of determining the boundaries of this discretion comes out. We believe that the boundaries of discretion should be the intersect of the amount of care in the performance of the duties laid down in the provisions of TCC and in the articles of incorporation as well as the good faith and the degree of the loyalty which can be substantiated by the efforts that are in the interests of the company.

The law maker has emphasized a number of reasons underlying this change in the Rationale. We will try to list some of these reasons laid down in the Rationale as well as some other grounds specified by the authors.

2. The Strict Attitude of the Court of Cassation in the Assessment of Liability

The business judgment rule is not laid down in art. 369 of the TCC but is implied as stated in the Rationale of this provision.⁵²

The major aim of this change is expressed as refraining from using the prudent man rule as this rule has been interpreted too strictly and sometimes at extreme levels by the Court of Cassation (Appeal Court) and this attitude is regarded unjust in the assessment of the liabilities of the board members.^{53,54} From this viewpoint the business judgment rule which requires the board members to perform their

43 Hacimahmutoğlu, p. 129.

44 Göktürk, p. 208.

45 Hacimahmutoğlu, p. 130.

46 The term “*objective good faith*” was used by Doctrine in the sense of acting honestly during the employment of rights and performance of debts. See Oğuzman, Kemal & Barlas, Nami (2010), *Medeni Hukuk, Giriş, Kaynaklar, Temel Kavramlar*, 16. Bası, İstanbul, p. 221.

47 Good faith in Art. 3 of Turkish Civil Code is deemed as a presumption. See Helvacı, Serap & Erlüle, Fulya (2011), *Medeni Hukuk*, 2. Bası, İstanbul, p. 39; Hatemi, Hüseyin (2010) *Medeni Hukuk’a Giriş*, 4. Bası, İstanbul, p. 178.

48 Hacimahmutoğlu, p. 132.

49 Üçışık, Güzin & Çelik, Aydın (2013), *Anonim Ortaklıklar Hukuku*, I. Cilt, Ankara, Adalet Yayınevi, p. 490.

50 Hacimahmutoğlu, p. 132.

51 Arşit, p. 95, see p. 98 in order to review a Court decision, given 150 years ago, which very effectively stresses on the business judgment rule.

52 It may be argued that the reason behind the missing of the rule in the provision is that the boundaries of this rule are not clearly specified so far. See Tekinalp (2011), p. 279.

53 Some authors suggest that the same risk may be possible in the implementation of the business judgment rule. See Boztosun, Ayşe Odman (2013), *Hukuksal Açıdan Bağımsız Yönetim Kurulu Üyeliği*, Ankara, Seçkin Yayınları, p. 131 fn. 20.

54 Court of Cassation has many precedents based on the prudent man rule. In these precedents, it is emphasized that the managers should act as a prudent man so as not to cause the company to suffer damages. See, Yargıtay Hukuk Genel Kurulu, T: 11.12.2002, E: 2002/4-993, K: 2002/1052; Yargıtay Hukuk Genel Kurulu, T: 7.2.2007, E: 2007/19-63, K: 2007/52; Yargıtay 11. Hukuk Dairesi, T: 8.1.1975, E: 1974/3523, K:1975/31, Kazancı İçtihat Bankası, <http://www.kazanci.com/kho2/ibb/ara.htm>, s.e.t. 21.10.2015.

tasks with good faith relieves them from liability. On the other hand it is emphasized that business judgment rule is a requirement of corporate governance principle⁵⁵ and where an appropriate survey is done concerning the investment decisions, the board members may not be held liable just because of the losses of the company due to market changes.⁵⁶

Some authors have the concern that there is a risk of carrying the same attitude against the business judgment rule in the assessment of the liability of board members by the Court of Cassation.⁵⁷ This concern has a concrete ground. Because art. 18/2 of the TCC prescribes that a merchant should behave like a prudent man in all its activities relating to its business. On the other hand a company is deemed as a merchant and it has to behave like a prudent man. There seems to be a contradiction to expect from a company to behave like a prudent man while its managers are expected to manage it like a cautious manager not like a prudent man. For that reason the courts will review the case from both perspectives. As a matter of fact a very recent decision of 11th Chamber of Court of Cassation dated 22 December 2014 remarks a milestone in the change of perspective to the liability of the board members.⁵⁸ In this decision it is specially articulated that where the company faces a loss because of the selling out the shares by the board members to close up a due debt of the company, the board members may not be held liable (because this transaction is done in good faith and not intended to cause a loss).

3. The Insufficiency of the Subjective Care in the Determination of the Liability

The Rationale of the art.369 states that “the principle of subjective good faith is not sufficient in the determination of objectiveness; the due care required for the management of similar businesses should be observed.

In the Rationale, the criteria for the for the ob-

jectiveness of good faith are listed as efficiency, the capability to assess the relevant information, to acquire the required capacity and education in order to pursue the practice and developments as well as controlling thereof.

4. The Consideration of the Interests of the Company

Another innovation in due care and loyalty is the observation of the company interests with good faith. In the Rationale this rule is explained as “the board member should not hold his own interest, the interests of the main shareholder or shareholders’ or his relatives’ above the company’s interests”. In this context, the board members should take the necessary measures in case of the conflict of interests and compete for the interests of the company^{59,59} By this provision, in addition to the non-competition rule the board members are subject to abide by the prohibitions like insider trading and not making business with the company on his own.

5. The Clear and Distinctive Setting of Provisions Regarding the Duties and Obligations of the Board of Managers

In the new TCC the duties and obligations of the board of managers are set forth more distinctively and clearly⁶⁰ compared to the previous provisions. First of all, board members are supposed to carry out their duties listed in art. 375⁶¹ of the TCC in addition to those provided in other provisions and

55 Corporate governance principle is a principle employed basically in public companies. However the new TCC adopted this principle also for the private companies. According to this principle, equity, transparency, accountability and liability are the main pillars of company law. See Paşlı, Ali (2004), *Anonim Ortaklık Kurumsal Yönetimi*, İstanbul, Beta Yayınları, p. 25.

56 The Court should not be able to judge whether the board members have made a wrong decision as long as their decisions are in compliance with the imperative provisions of law, the articles of association, observing the interests of the company not their own. See Tekinalp (2011), p. 280.

57 See Boztosun, p.131 fn.20.

58 See Yargıtay 11. Hukuk Dairesi, T: 22.12.2014, E: 2014/12983, K: 2014/20169, Gürel, Murat & Tekin, Ufuk & Bektaş, İbrahim (2015), *Yargıtay Kararları*, BATİDER, Sayı: 1, Cilt: XXXI, p. 290.

59 As a matter of fact the Court of Cassation has some decisions on the implementation of prudent man rule for the board of managers with respect to their acts observing the interests of the company. See Yargıtay 11. Hukuk Dairesi, T: 17.12.1974, E: 1974/3677; K: 1974/3733. In this decision it is stated that “the criteria to determine the liability of the board of managers within the rule of prudent man is to what extent they observed the interests of the company”.

60 Tekinalp (2011), p. 115.

61 The unalienable duties of the board are stated as following in Art. 375 of the TCC:

- a) The top level management of the company and giving relevant instructions,
- b) Determination of the management organization of the company,
- c) Establishment of the necessary order for the accounting and financial control as required for the management,
- d) Appointment of the managers and the people with signature power,
- e) The top level supervision of the managers as to their accordance with the laws, articles of association, domestic instructions and written orders,
- f) Keeping the books of share registry, records executive board decision and the book of general board meeting and negotiations, drafting annual activity report and declaration of corporate governance and submission to general board, preparation and realization of the general board meetings,
- g) In case of indebtedness to report this case to court.

in the articles of incorporation. As a matter of fact, the duties laid down by law focus on domestic controlling mechanisms.⁶² These mechanisms are established both in order to facilitate the management of the company and to alleviate the duties of the executive board. In this context the rule of central planning and decentralized management has been applicable. According to the art. 367 of the TCC, the board may delegate its management duty to one of the members or to third people. And the board members shall be held liable because of damages of the third people in management except they have not displayed the reasonable care in the selection of these people as stated in art. 553/2.

The major obligations of the board are the due care and loyalty as specified by art. 369. The board members are subject to some other obligations provided in art. 393, 395 and 396. These obligations may be listed as

- a) Not to join the meetings facing conflict of interests (art.393)
- b) Not making business on his behalf and not to loan from the company (art.395)
- c) Non-Competition Rule.

As can be concluded there are a number of provisions regulating the duties and the obligations of the board members. In other terms since the duties and the obligations of the board members have been more distinctively and broadly prescribed by law, there should be some sort of balance between the burden of the board members and the extent of their liability. The modern approach of liability entails the criteria to be more objective, more equitable and be based on good faith. Otherwise the board members may not avoid from acting with an unnecessary hesitation and reluctance just because the possible consequences that may lead to their liability. For that reason they should not be held liable according to prudent man rule but according to business judgment rule which lays down more equitable criteria. As long as the court is convinced that the board members have done their best in good will and observed the interests of the company they should be relieved from liability. In other terms the judge should not search the appropriateness of the decision as long as it is believed to be in good faith.⁶³

III. CONCLUSION

Traditionally the Turkish courts and the Court of Cassation are inclined to hold the board of managers liable according to the rule of prudent man. As is reviewed prudent man rule imposes quite a strict liability, which prevents the board of managers and third people delegated as managers from employing their powers with no hesitation.

Despite the fact that it is not prescribed in company law provisions, the terminology used in art. 369 and 202 has shown that the business judgment rule prevails the prudent man rule. This rule does not relieve the board members from liability but brings out more equitable criteria and leads the successful managers to employ their powers without any hesitation or reluctance. On the contrary, they perform their tasks with a self confidence that they shall not be held liable as far as they act in good faith.

When the duties and the obligations of the board members are reviewed, it is seen that they have a number of duties particularly stated in article 375 of the TCC as well as in many separate provisions. On the one hand they need to perform their duties with a cautious care that a manager should reveal, on the other hand they should observe the interests of the company, and finally they should make their company get profit. When all these are considered, the courts are supposed to be judging more tolerantly while concluding on the liability of the board members. They should not review the case from an appropriateness perspective. As long as the decisions are not against the imperative rules of law, in compliance with the articles of association and made in good faith, the board members should not be held liable for the losses of the company.

In conclusion the attitude of the courts should not be expected to convert in a short term, but as the new verdicts favoring the rule of business judgment come out, this rule will be shaped more substantially. However it is believed that the business judgment rule needs to be stated clearly and distinctively in the relevant provisions so that the courts and Court of Cassation can discuss the boundaries of liability in accordance with the criteria of business judgment rule without any retrospective views. In addition to this, article 18/2 of the TCC, which requires the company to act like a prudent man needs to be revised if a harmony between the care of the managers and the company need to display in commercial transactions is expected to be realized.

62 Tekinalp (2011), p. 116.

63 Çamoğlu & Poroy&Tekinalp, p. 381.

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