Director's duty not to consciously determine the company to break the law – reality or controversy?

PhD student **Adina PONTA**[1]

Abstract

The paper at hand will analyze directors' duty not to make decisions which determine corporate violations of positive legal norms and it will provide an interpretation of corporate governance practices that underpin this duty in pre-existing institutions. In the first part, we will pursue the doctrinal attempts of integrating the duty of compliance within the contents of the duty of care or duty of loyalty. We will follow the evolution of this duty, from a simple effect of the ultra vires doctrine, to an obstacle of the contractual underlying of companies, to an element of the duty of loyalty. The paper will review effects that corporate legal violations have on agents' liability, such as tax law, competition law, labor law, human rights and environmental law breaches, and will illustrate other essential features of this duty, such as compliance with corporate governance codes, ethics and corporate social responsibility. Finally, we will demonstrate that regardless of the approach of good faith in corporate governance, as a distinct fiduciary duty or as element of the duty of loyalty, the duty of compliance is a prerequisite of good faith and can be accomplished simultaneously with the duty to maximize corporate profit and shareholders' wealth.

Keywords: *duty of compliance, duty of care, duty of loyalty, good faith, directors' liability, transnational justice*

JEL Classification: K22

1. Introduction

One of the fundamental premises of corporate governance is directors' duty to make decisions with the purpose of advancing corporate interests, while paying attention in the same time to the duty to maximize corporate profits and shareholders' wealth[2]. As such, Business Law developed mechanisms to verify corporate agents' conduct and achievement of the goals for which they have been appointed. In pursuit of their ambition to achieve high performance in fulfilling the mandate and gain additional bonuses, but also in fear of being replaced or sanctioned, members of the governing bodies often opt for quick and effective methods to reach these goals, neglecting the quality, morality, and sometimes even the legality of the chosen means.

The advocates of the theory by which a company is an entity build for the purpose of increasing shareholders' wealth, suggest that directors' purpose is to act exclusively in the interest of shareholders and not of other market players, which

---

[1] Adina Ponta - Faculty of Law, Babeș-Bolyai University, Cluj-Napoca, Romania, ponta.adina@gmail.com.

[2] Eisenberg, M.A.: *The duty of Good Faith in Corporate Law,* Delaware Journal for Corporate Law no. 31, 2006, p. 5.

justifies pursuing long-term profits without considering the consequences of their actions for external natural and legal persons[3]. Fiduciary duties are designed to regulate directors' conduct and their decisions in situations of conflict of interest, whereas currently, sufficient business law rules protect third party interests. However, we observe a small number of regulations that encourage agents to act with social responsibility.

An established principle as a prerequisite for complying with the (fiduciary duty of) good faith is that directors are under a duty not to knowingly cause a situation in which the corporation is in breach of the law, even if following a rational judgment, the foreseeable consequence of the violation is maximization of shareholders' dividends. The rationale for establishing this duty is that a corporation in which individuals comply with statutory schemes simply because they fear legal sanctions, cannot survive and in order to achieve the success of a corporation, most of its members need to internalize the moral obligation to respect the law. This moral duty includes the generally accepted standards of decency and honesty, and is not limited to the duty to comply with legal norms[4]. Thus, it is irrelevant whether the reasoning of the decision-maker was based on the fact that legal sanctions and damage to the company's reputation are disproportionate to the probability of being caught or whether the legal sanctions provided by law are lower than the estimated profit obtained as a result of the violation.

The social interest to forbid directors to consciously cause a corporation to break the law in search of profit growth, is becoming stronger. The present paper aims at analyzing the fundamentals and traits of this duty, which is first and foremost attached to corporate directors and officers, who guide the conduct and business agreements concluded by the company. In the first part, I will analyze the compatibility of the principle of lawful conduct with the principle of maximizing shareholders' wealth, namely the actual purpose for the founding and existence of a company.

Further, I will offer an interpretation of the corporate governance practices and rules which underpin this duty in various pre-existing institutions. A part of legal literature considers that a director who determines a company to break applicable law or discovers that the corporation doesn't comply with legal provisions and refrains from taking action to stop unlawful practices, violates the duty of loyalty[5]. Other authors believe that directors have the duty to adopt and enforce rules and procedures to ensure institutional compliance with regulations, therefore a director who deliberately causes a corporation to violate the law, breaches the duty of care.

We will demonstrate that no mechanism for limiting liability can function for acts or omissions committed without good faith, due to intentional improper conduct or intentional violation of the law. The homogenous Delaware case law

[3] Rosenberg, D: *Delaware's expanding duty of loyalty and illegal conduct: A step towards Corporate Social Responsibility,* Santa Clara Law Review vol. 52 no. 1, 2012, p. 82.
[4] See f.n. 1, Eisenberg, p. 32 and f.n. 2 Rosenberg, p. 101.
[5] Welch, E.P., Turezyn, A.J., Saunders, R.: *Folk on the Delaware General Corporation Law: Fundamentals,* Wolters Kluwer Chicago, 2011 edition, p. 116.

stipulates that directors' liability for violating the duty to comply with applicable law is subject to fulfilling an objective element, namely directors' knowledge of the facts that constitute a violation of the law and a subjective element, the intention and understanding of the effects of the violation[6]. Finally, we will evaluate the legislative approaches of EU Member States and corporate directors' liability for illicit acts and deeds perpetrated by the managed company.

2. The elements of good faith relevant for determining the duty of compliance

In 1993, the Delaware Supreme Court announced that fiduciary duties are not limited to the duty of care (diligence and prudence) and the duty of loyalty, but the *triad of fiduciary duties*[7] would also include good faith, a distinct and autonomous duty. Shortly after, Delaware Supreme Court[8] confirmed that good faith, as business law institution, is a condition for granting the protection of the Business judgement rule[9] and of other rules which limit directors' liability[10].

Beginning with year 2006, jurisprudence has gradually abandoned the self-standing nature of good faith and in its attempt to define its outlines, good faith has been incorporated as an element of the duty of loyalty[11], therefore mere good faith violations cannot substantiate anymore a derivative action against corporate directors. Contemporary doctrine is divided between the two approaches, but the principle of the two traditional fiduciary duties is embraced by Delaware Supreme Court[12] and by the majority doctrine. One of the arguments for the autonomy of good faith is its ability to explain the reasons why corporate directors adopt certain

---

6 *Frank vs. Arnelle*, Delaware Chancery Court 725 A.2d 444, 1999.

7 The triad of fiduciary duties was mentioned for the first time in *Cede & Co vs. Technicolor Inc*, 13, Delaware Supreme Court, 1987, A 2d 1182.

8 *Cinerama Inc. vs. Techicolor Inc*., 663, A.2d 1156, Delaware Supreme Court 1995, and *In Re Walt Disney Co. Derivative Litig*., 731 A.2d 341, Del. Ch. 1998, W*alt Disney Co. Derivative Litig*. (Disney IV), 907 A.2d 693, Del. Ch. 2005.

9 For a comparative approach of the Business judgement rule in the EU member states, see Catană, R. N, Ponta, A., *The Business Judgement Rule and its reception in European Countries*, The Macrotheme Review 4(7), Austin, Texas, 2015.

10 In order to avoid confusion and to emphasize the homogeneity of directors' duty of care and duty of loyalty, the term "director" used in this paper is meant to be extended to members of the board of joint stock companies which adopted the two-tier board system.

11 Common law doctrine and jurisprudence have partially renounced *the triad of fiduciary duties* and the current trend is to include good faith within the duty of loyalty. However, we share the view that good faith rationalizes and explains the variety of established specific duties that do not fall within the scope of the duty of care or duty of loyalty, such as the duty not to consciously determine the company to break the law. We consider that although good faith is undoubtedly a component of the duty of loyalty and of the duty of care, jurisprudence has shown that limiting it as a simple component would diminish its power as a tool for guiding fiduciary conduct.

12 Delaware courts are internationally recognized as the most prominent forum for corporate governance disputes. Their efficiency, predictable judgements, trust gained by the business market and continuous exposure to business law litigation is unique in the world. *Delaware Court of Chancery* is an equity court and a benchmark of professionalism, which determined considerable forum shopping.

decisions, such as the decision to comply with positive law, instead of opting for opportunistic corporate profits.

Prior to 1985, directors' liability for duty of care violations was very rarely triggered in practice, due to absence of concrete elements of conflicts of interest, which are actually inherent to the duty of loyalty. Subsequently, states began to allow charter clauses that limit or eliminate directors' liability for breach of due diligence and prudence, therefore the jurisprudential trend was to define conflicts of interest in order to preserve the essence of the duty of loyalty and to avoid similar mechanisms to safeguard directors' unfair conduct[13]. Through this evolution, good faith gained special importance in corporate governance, being conditioned by absence of bad faith conduct, by internal motivation to harm the company or to provoke the company to violate the law.

It is unquestioned that the actions of a legal person are determined by the intentions of those who are in charge with its management[14] and majority jurisprudence accepts that fulfillment of good faith elements depends on agents' intention to work for the benefit of the company[15]. Even bylaws and Codes of conduct[16] emphasize companies' duty to comply with applicable law when concluding business, and not the duty of its management bodies or representatives. This raises the question of the effects of directors' liability. In current jurisprudence, few *ultra vires* acts committed by directors are sanctioned with damages paid in favor of the company, the most common cases refer to directors who act beyond their powers in strategies of preventing abusive takeovers. In our view, effective directors' liability for these acts would be valuable for ensuring compliance with positive law and for implementing internal monitoring systems or, as is often the case in financial institutions around the world, for creation of *compliance departments*.

Hereafter, we will present doctrinal attempts to include the duty to obey the law into one of the traditional fiduciary duties, of which we consider that good faith would provide the most appropriate auspices. We will demonstrate that an expanded duty of compliance, called *duty of obedience* in common law, clarifies fiduciaries' role and ensures compliance with internal and external rules, being a standard of review both for shareholders and courts.

[13] Konstant, P.C: *Meaningful Good Faith: Managerial Motives and the Duty to Obey the Law,* New York Law School Law Review, vol. 55, 2010/2011, p. 425.

[14] One business law theory in common law literature is that directors are not corporate agents, but exclusively shareholders' agents, as they don't act for the company, but they determine the company's actions.

[15] *Sinclair Oil Corp. Vs. Levien,* 280 A.2d 717, Delaware Supreme Court, 1971.

[16] Section 2.01(b). See *American Law Institute – Principles of Corporate Governance - Analysis and Recommendations,* part VII, Remedies, Ch. 1, first edition in June 1985, quoted as "ALI Proposals". The ALI Principles are a benchmark for corporate governance in *common law* jurisdictions and even though they are not mandatory rules, they have a great influence in business law creation and application, in academia and research.

2.1 The essential nature of the duty to comply with positive law

Since the earliest doctrinal approaches to directors' duty to determine the company to comply with positive law, the cost-benefit analysis has been among the issues envisaged for determining directors' liability.

According to this theory, the "benefits" of complying with the law are measured by comparing possible gains obtained without breaking the law with the price paid for violation of the rules[17]. In contemporary corporate governance, actors still make calculations to compare profits and losses, since in most states, directors' liability caused to the company will be hold to the extent of the loss that outweighs profits, even if the protection of the Business judgement rule is not applicable.

Not every corporate deviation from fundamental rules will meet the conditions of directors' liability, such as not every negligent or unfair act leads to a sanction for the director. Corporate agents face business decisions every day, sometimes the cost-benefit calculations are decisive for the breach of statutory rules, if the foreseen benefits outweigh the probable legal sanctions. For example, a food delivery company will often choose to park in unauthorized places or refrain from paying parking fees for short delivery times, as it prefers to provide the service in a short time and bear the consequences of non-compliance with traffic rules[18].

Directors often justify law violations by their duty to promote corporate interests and maximization of shareholders' wealth. Thus, a few doctrinal opinions support the idea of insulating this duty from the traditional fiduciary duties and defining its autonomous status[19]. We choose not to embrace this opinion, as we consider that the duty not to determine the company to violate the law is one of the fundamental elements that rationalize the self-standing nature of good faith as independent fiduciary duty[20]. I have highlighted that the existence of this subsidiary duty of compliance, as an element of another key fiduciary duty, is imperative for corporate governance, because even if goodwill directors don't violate the law to maximize shareholders' wealth and corporate profits, more aggressive agents could take this initiative to achieve the company's objectives by illicit means[21].

We will show in the second part of the paper that the irony of the Business judgment rule, as a protective structure for agents who advance the corporations superior interests, sometimes protects them in situations where they reasonably choose to violate the law in order to maximize shareholders' profits to the detriment of other market players. The basis for these business decisions is determined by directors' commitment to shareholders' interests, which is the reason case law developed the notion of "legal fidelity" for situations when a director determines the

[17] Easterbrook, F.H., Fischel, D.R.: *Antitrust Suits by Targets of Tender Offers*, Michigan Law Review no. 80/1996, p. 1177.

[18] Palmiter, A.R.: *Duty of Obedience: The Forgotten Duty*, New York Law School Law Review, vol. 55, 2010/2011, p. 459.

[19] See Konstant, f.n. 13, p. 430 and Palmiter, f.n. 18, p. 458.

[20] For details, see f.n. 11.

[21] Clark, R.C.: *Corporate Law*, 1986, Ed. Little Brown, Delaware, p. 686.

company to violate positive law[22]. Contrary to the reasoning of some courts, we consider that loyalty towards positive law is not an element of directors' duty of loyalty, because the recipients of the two duties are different, fidelity to the law is owed to the community as a whole and to the state, while the duty of loyalty is exercised the relationship with the managed company and its shareholders.

Another reason for the unequivocal exposure of this duty lies in the application of criminal liability rules to legal entities, which, as we will expose in the last part of the paper, are fairly new in most continental law jurisdictions. The burden of proving directors' intent or knowledge about the law breech lies with the plaintiffs and is quite difficult. Criminal liability rules for legal entities should be tailored to the circumstances of the case, in order to achieve the purpose of criminal law, namely to avoid similar future behaviors, without adversely affecting newly affiliated shareholders or directors who were unaware of the illegal acts.

One reason for jurisprudential encompassing of good faith in the broader duty of loyalty[23] was determined by difficulties encountered in practice for proving good faith breaches. Good faith violations are very rarely determined by committing a single act, and usually require systemic and regular or continuous violations, such as violation of the duty to monitor the company and its current affairs. Directors' ambition for continuous profit growth leads to pressure on executives and employees, who opt for alternative ways to overcome competition. In our opinion, in order to outline the content of the duty of compliance, it is unimportant if this duty is subsumed under the duty of loyalty, the duty of care or good faith, the common denominator of each option is that a violation of a statutory rule cannot justify good-faith conduct[24], and no fiduciary has the right to opt for managing a company in a manner contrary to the law, even if he or she considers that illegal activity leads to corporate profits[25].

The practicality of this duty and its incorporation in one of the classical fiduciary duties seems obvious, but much of the doctrine criticizes the expansion of good faith in the sense of absorbing the duty to obey the law. The justification is that if a law breech represents an act without good faith, violation of positive legal rules would always mean a bad faith conduct and directors' liability cannot be limited or eliminated under any circumstances[26]. This would reduce the authority of the board of directors and managers would be particularly exposed to liability for any business decision, the number or derivative actions will grow considerably and courts will have the opportunity to evaluate the substance of business decisions. We do not endorse these views because stabilizing this duty in corporate governance would

[22] *Guttman vs. Huang,* 823 A.2d 492, Delaware Chancery Court, 2003.
[23] *Stone vs. Ritter,* 911 A.2d 362, Delaware Supreme Court, 2006.
[24] An idea confirmed by Delaware Supreme Court in W*alt Disney Co. Derivative Litig*. (Disney IV), 906 A.2d 27, 2006.
[25] Delaware Chancery Court in *Metro Communication Corp BVI vs. Advances Mobilecomm Technologies Inc.* 854 A.2d 131, 2004, *Desimone vs. Barrows,* 924 A.2d 934, 2007.
[26] Bainbridge, S.M., Lopez., S., Oklan, B.: *The Convergence of Good Faith and Oversight,* University of California Los Angeles Law Review no. 55, 2008, p. 591.

have positive effects on companies by empowering directors and creating a barrier to temptations of choosing illicit and immoral methods for rapid success.

Conceptualization of this duty among directors' fiduciary duties would not give courts the opportunity to scrutinize business decisions made in good faith and with diligence and prudence, as these decisions will be protected by the Business judgement rule, which limits judicial control to verification of technical elements of decision-making processes. Moreover, increase in legal action against directors who violate the law would create legal precedent and predictability for corporate managers, and stable case-law of this duty is completely lacking in most civil law jurisdictions.

3. The content and scope of the duty of compliance

We have shown that corporate acts in violation of statutory rules are incompatible with fundamental expectations of fiduciary behavior, even if, in their essence, these acts meet the conditions of the duty of care and don't represent unfair acts. We consider that the scope of this duty, sometimes expanded to the term *duty of obedience* in common law, encompasses both compliance with rules of positive law and bylaws, corporate governance codes and other rules of appropriate conduct of corporate directors.

As mentioned, *duty of obedience* was an independent duty before the formulation of the triad of fiduciary duties. Although it has lost independence, this duty has the same essence, namely it prohibits corporate directors to perpetrate *ultra vires* acts, i.e. acts that go beyond their authority and are beyond the scope of a company's business activity[27]. The evolution of corporate governance in common law and civil law systems pursued the development of the notion of "authority". In the beginning, jurisprudence evaluated exercise of powers under business law and corporate charters, and the *ultra vires* doctrine protected shareholders from directors' abuses, committed either by overcoming the powers conferred to them, by illegal acts or by determining the company to overcome its powers. This doctrine ensured compliance with applicable positive law and unlawful acts committed by the company were absorbed by the vast category of *ultra vires* acts, even those committed to advance the company's own interests[28].

A famous case for application of the *ultra vires* doctrine on violation of the law by a corporate manager is *Roth s. Robertson*[29]. The general manager of a fun park near the Niagara Falls has put the company in a position to offer money to people in the vicinity of the park who have threatened to notify the authorities, because the park was operated on Sunday, contrary to the legal rules for silent hours. It is undebated that the director made this decision with the goal of maximizing corporate profits, as most tourists visited the park on weekends. He reasonably

[27] *Gearhart Indus Inc vs. Smith International Inc.*, 741 F.2d. 707, Delaware 5th circuit, 1984.

[28] Greenfield, K.: *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality,* Virginia Law Review no. 87/2001, p. 1314.

[29] *Roth s. Robertson,* New York Supreme Court, 18.351, 1909.

believed that the predictable profits from opening the park on Sunday would outweigh the cost of a possible pecuniary sanction, by taking into account the chances of being caught and of effective enforcement of the sanction. The court rules that the director was liable for authorizing unlawful payments and ordered the return of the funds "wasted to the detriment of the shareholders" as illegal, immoral and *ultra vires*.

An effect of the *ultra vires* doctrine, the duty of compliance prevents companies from acting beyond their powers and hinders agents from committing acts in violation of applicable internal and external rules. This confirms the essence of this duty, namely directors' obligation not to allow corporate illicit behavior through deliberate conduct, even negligent, if this behavior deviates from corporate rules or rules from other fields of law[30].

In parallel with the development of corporate governance, doctrine and jurisprudence evolved from directors' liability for unauthorized acts, to their failure to comply with the duty to act responsibly, and the notion of "authority" was permutated to the term "duty". In the 1980s, the trend of equivalating modern companies to a "nexus of contracts" led to doctrinal approaches which denied existence of a duty not to violate positive law, given the superior goal of the corporation, to achieve maximum profit, and not the objective to follow predefined instructions[31].

The concepts of "efficient law violation" and "efficient compliance" undermine the value of statutory structures, treating legal rules as conduct pricing methods[32]. The decision to comply with the law and to determine the importance of a statutory rule based on the financial efforts required from a company in order to comply with the rule, leads to the erroneous idea that companies may "acquire" their right to violate the law through taking the risk of being sanctioned. The effect of interpreting lawful conduct as costs creates an optional approach to the law, differentiating between mandatory and facultative lawfulness. A philosophical approach reveals that compliance with the law does not imply a choice between price

[30] *Stone vs. Ritter,*see f.n. 23, the court ruled that directors violate good faith if they "knew or should have known that violations of law were occurring". The breach is determined by ignoring "obvious danger signs", which are an evident red flag indication of illegal conduct. In *Caremark Intl. Inc. Derivative Litigation,* 698 A.2d. 959, 971, Delaware Chancery Court 1996, the court ruled that "sustained and systematic failure" to insure reporting systems to identify illegal corporate conduct is a breach of the duty of care.

[31] See Easterbrook, Fischel f.n. 17, p. 1168 and Blair, M.M., Stout, L.A.: *Specific Investment: Explaining Anomalies in Corporate Law,* Journal for Corporate Law, University of Iowa, vol. 31/2006, p. 726. The doctrinal proposals advanced by Easterbrook and Fischel were received very critically in legal literature. Their view, that directors don't have a general duty to comply with the law, if the breach is profitable for the company, has been a shock for doctrine and business jurisprudence in the 1980s and criticism continued, see Williams, C.A.: *Corporate Compliance with the Law in the Era of Efficiency,* North Carolina Law Review vol. 76 no. 4, 1998, p. 1266, Greenfield, K.: *Corporate Ethics in a Devilish System,* Journal of Business & Technology Law, Univ. of Maryland, vol. 3, 2008, p. 427.

[32] See f.n. 31, Williams, p. 1267.

and sanction or the right to take the risk of being caught[33]. For these reasons, this theory was rejected in favor of a civic approach to legal duties and social responsibility.

Hereafter, case law created the "net loss rule", according to which directors are liable only if the damage caused to the company outweighed the profit obtained as a consequence of the breach of law, i.e. only serious law violations were sanctioned, breeches that caused significant prejudices [34].

With the development of fiduciary duties, the *ultra vires* doctrine has lost importance, and the duty that incorporates it, became obsolete in the absence of wide jurisprudence. It has disappeared in the way it was understood in the beginning, when the duty of compliance was also applied to the rules imposed by the parent company on a subsidiary (obedience). At present, this duty is unanimously recognized in doctrine, but its relationship to the traditional fiduciary duties is debated.

The *ultra vires* doctrine and the duty of compliance regained importance when corporate directors began to test the limits of their management power and in cases where there was a need to integrate internal systems to ensure compliance with internal and external rules[35].

With the decline of substantiating the duty to obey the law on the *ultra vires* doctrine, its doctrinal and jurisprudential recognition included the duty to follow internal corporate rules and corporate governance rules, recommendations of corporate governance codes and best practice codes. Thus, the term *compliance*, which is used in the original version in most jurisdictions, is the premise of the modern corporation.

Naturally, the net loss rule has been abandoned, as setting directors' liability dependent upon the social value protected by the violated rule is clearly incompatible with contemporary corporate governance, that promotes upright, loyal and fair behavior. This theory is also rejected by jurisprudence, even in situations where the violated rule refers to a contravention[36]. The effect of the contractual theory of company formation is opposed to the contemporary theory of approaching the company as a social entity. Therefore, conscious violation of the law cannot be justified in business law, nor by *ex ante* evaluation of the expected costs and benefits, nor *ex post* assessment of concrete results[37]. A company would lose credibility and

[33] See f.n. 31, Williams, p. 1270.

[34] Ryan, P.J: *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of The ALI Principles of Corporate Governance*, Washington Law Review no. 66, 1991, p. 495.

[35] See f.n. 18 Palmiter, p. 465. In accordance with art. 55 of the Romanian Corporations' Law 31/1990, legal acts concluded within the limits of the law and charter provisions by directors in the name and on behalf of the company engage the company in relations with third parties, even if these acts exceed the business activity (mentioned in the charter).

[36] The court concluded that speeding by employees of postal service providers does not justify increasing the profits of the company. In 1994, the United Parcel Service of America's board of directors allowed its drivers to collect 1.5 million USD parking fines only in New York City.

[37] See Palmiter, f.n. 18, p. 475.

legitimacy if its organizational culture allowed executives to violate positive law rules with the goal of increasing profits.

As we have shown, current legislations lack a clear formulation of directors' duty to comply with positive law, as well as unequivocal positioning of this duty in the corporate governance structure. Case law doesn't provide a clear-cut model of compliance with this duty either. At the beginning of the 20th century, courts considered that violation of positive law represented violation of the duty of compliance, a self-standing fiduciary duty expanded by common law jurisprudence to the *duty of obedience*[38]. Afterwards, courts included the duty to comply with the law within the duty of loyalty[39], mainly in cases where directors failed to follow bylaws or higher instructions. In these cases, compliance with this subsidiary duty depends on proving good faith, considered an element of loyalty. We do not endorse this approach, as compliance with instructions received from shareholders falls under the duty of loyalty, while the duty not to violate the law shall prevail over shareholders' instructions and be applicable even when shareholders influence directors to make decisions contrary to the law. Therefore, the duty of compliance is an intrinsic element of good faith, but not of the duty of loyalty, and situating the duty of compliance within the content of loyalty is not appropriate.

In other cases, courts have found that failure to fulfill this duty is a matter of directors' diligence and prudence by failing to establish and implement internal control systems to identify lack of compliance with health insurance rules[40]. In our view, by integrating this duty within the duty of care, the inherent value of the duty not to determine the company to break positive law would be lost. By including the duty of compliance within the elements of the duty of care, the assessment of the decision to implement an internal control system would also fall within the scope of the duty of care, and thus, like any other decision business, be subject to the protection of the Business judgement rule. In addition, decisions taken diligently and which are not in conflict of interest, but violate a positive law rule, would be subject to the cost-benefit analysis and protected by the Business judgement rule.

We therefore consider that subsuming this duty under good faith does not eliminate the good faith effects of traditional fiduciary duties, but on the contrary, the duty of compliance will be a condition of all of them as a component of good faith, which is absorbed by both the duty of loyalty and by the duty of care. The wording of this duty will have to differentiate between reasonable decision-making processes, whereby the company takes risks and accidentally and exceptionally violates some rules of conduct, such as illegal parking of a courier company's drivers from the assumed decisions to continue unlawful conduct and clear violation of mandatory rules. The reasoning in *Roth* was reiterated in *Hornstein vs. Paramount*

---

[38] *Roth s. Robertson,* f.n. 29, by approving the payment of money to illegally operate a fun park on holidays and *Miller vs. American Telephone & Telegraph Company (AT&T), Court of Appeals for the Third Circuit, 507 F.2d 759 (3d Cir. 1974).*

[39] *Ryan vs. Gifford,* 918 A.2d 341, Delaware Chancery Court 2007, the director didn't follow the instructions received from shareholders, who voted in favour of emission of stock options for executives.

[40] *McCall vs. Scott,* 239 F.3d 808, Delaware 6th Cir, 2001.

Pictures Inc.[41], where shareholders filed a derivative action against Paramount Pictures executives who paid 100,000 USD to union members who threatened to trigger a strike. The court ruled that the payment did not meet the legal conditions of bribe, therefore directors did not violate any applicable law. Although we do not want to suggest that the social value protected by the statutory rule should be a cause for limiting liability, we consider that the concretely violated law and the decision-making process that led to the unlawful conduct are matters that should be considered for establishing directors' liability.

We consider that the understanding of regulatory purposes in favor of interpreting the duty of compliance as a cost or risk calculation system, will contribute to a sustainable corporate governance, where the market presumes that companies comply with minimum standards of responsible conduct provided by positive law, even if breach of certain rules brings higher profits. By embodying civic responsibilities into corporate culture, corporate social responsibility will become an important asset of modern corporate governance. The pursuit of civic goals by a company sometimes conflicts with directors' duty to maximize shareholders' profits. However, in our view, corporate altruism can be expressed through a multitude of activities pursuing both goals in parallel and which should be supported by consensually approved strategic directions[42].

3.1 Violation of environmental laws

As we have illustrated, protecting third party interests is not a business law priority, but in its current evolution, corporate governance begins to encourage agents to act with social responsibility by undertaking initiatives that benefit individuals other than shareholders, such as employees, consumers, local communities, governments, the environment or technological development. A board of directors who chooses to disregard negative consequences of businesses on the environment, may indeed act in strict compliance with the fiduciary duties owed to shareholders because the latter will usually choose to only challenge business decisions that lack diligence and prudence, fairness or consciously and intentionally violate the law[43]. Business law does not provide for any obvious sanction for decisions that are profitable for shareholders, but disadvantageous to social interests, such as dumping waste in the cheapest possible way, polluting rivers and drinking water[44]. Even though this decision violates generally accepted ethical and moral standards by those who regard well-being of shareholders as an objective superior to other social values, it does not represent a violation of classical fiduciary duties if it doesn't meet the constitutive elements of an environmental law offense. Although the Business judgment rule offers directors a wide range of options to act, these

[41] *Hornstein vs. Paramount Pictures Inc* 37 New York Supreme Court, 1942.
[42] Engel, D.L.: *An Approach to Corporate Social Responsibility,* Stanford Law Review no. 32, 1979, p. 5.
[43] See Rosenberg, f.n 3, p. 1283.
[44] See Rosenberg, f.n 3, p. 1284.

decisions are limited to situations where agents advance the company's best interest and fit into a complex legal structure designed to increase shareholder profits in different ways. We consider that in the absence of clear and fair legal regulations, directors will always be able to rationally choose to violate the law in order to maximize profits based on their cost-benefit calculations[45].

The assessment of a breach of a legal rule with the purpose of maximizing the company's profits should also take into account the sanctions provided by the violated law, other than fiduciary duties. The effectiveness of these sanctions and the ability of the statutory rule to prevent deviant behavior, greatly influence directors' decisions to comply with the law. If the violated environmental law rule in the previous example is not applied for various reasons against a company that violates pollution rules, then directors will not bear any legal consequences and the law will not act as an incentive for proper conduct[46].

3.2 Human Rights violations

Doctrine has argued since the mid-twentieth century that companies, especially financial institutions, have a duty not to encourage or fund international human rights violations and highlighted the importance of identifying the proximity of corporate acts or deeds to sanctionable breeches[47]. Although states have assumed these obligations through public international law instruments, the burden of proving culpable actions committed by companies lies with the plaintiffs in national courts and business law sanctions towards directors responsible for the decisions that led to fundamental rights violations is very difficult. In the famous case *Ntsebeza et al. v. Citigroup, Inc*[48], victims of the South African apartheid regime filed lawsuits against various companies for their contribution between 1948 and 1994, by selling Daimler and General Motors vehicles, IBM computers, Shell fuel and approving loans from financial institutions as Union Bank of Switzerland (UBS), Credit Suisse and Citigroup, claiming moral damages. By using this equipment in the purposes known by the defendants, violations of public international law have been committed, such as forced labor, genocide, torture, extrajudicial killings and other war crimes. General Motors and others were able to enter into out-of-court transactions with the plaintiffs, and some of the petitions against the other companies were successful[49].

Currently, classic civil liability actions are often filed against multinational companies, for example Coca-Cola was sued for human rights violations in Colombia, including kidnappings and rape, Chevron-Texaco was accused of dumping toxic waste in Ecuador's tropical rainforests, and the Canadian fuel

[45] Beveridge, N.: *Does the Corporate Director have a duty always to obey the law?*, DePaul Law Review 45, Chicago, 1996, p. 730.
[46] See Eisenberg, f.n. 2, p. 33.
[47] Reichard E.T: *Catching the Money Train: Using the Alien Tort Claims Act to Hold Private Banks liable for Human Rights Abuses*, Case Western Reserve Journal of International Law, 2004, p. 263.
[48] *Lungisile Ntsebeza et al. v. Citigroup, Inc*., et al., Court Southern District of New York, 2004.
[49] https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2002cv04712/37462/92/, accessed on 27.10.2018.

producer Talisman of supporting the Sudanese army in the civil war[50]. We note that development of human rights goes beyond national boundaries of corporate liability and practice tends to privatize these human rights disputes, in which neither party is associated with any state power[51]. States remain responsible for protection and safeguarding human rights and thus for the obligation to implement private law rules that provide effective remedies for human rights violations caused by individuals or companies. This category includes considerations of labor law and the right to a healthy environment[52].

In the current transnational justice context, gaps of economic actors' liability for human rights violations in states with authoritarian regimes or armed conflicts are obvious[53]. Corporate complicity is divided into four categories[54]. The first category includes direct involvement of companies in committing violations through violent acts of their personnel inside the company's factories. The second category includes forced labor, the third financing or indirect participation in committing abuses with knowledge of intended results, and the latter case is illegal establishment of a subsidiary company and illegal conduct of business. Although criminal liability of persons who have allowed such violations is provided for by national criminal law, attribution of liability to individuals for corporate crimes is controversial[55]. In addition, although civil liability is regulated in most of the world's states, in practice, there is no effective mechanism to enforce responsible corporate actors' liability, as private law systems do not contain adequate mechanisms for addressing human rights.

An example of transparency is the multinational company Unilever, with Dutch and British roots, which in 2016 published a report on detailed implementation of the *UN Guiding Principles on Business and Human Rights*[56], after it was accused in 2014 that employees of its tea suppliers for production of Lipton Tea in Assam, India, lived and worked in inhumane conditions, in degraded and miserly homes, and most of them were malnourished. Unilever also declared a deal closed with former

---

[50] In the USA, the application of the ATCA (Alien Tort Claims Act) widens national court jurisdiction to any civil action filed by a foreigner for a prejudicial act committed in violation of a treaty in which the US is a party.

[51] Teitel, R.G.: *Globalizing Transitional Justice. Contemporary Essays*, Oxford University Press, New York, 2014, p. 170.

[52] In *Tătar c. România*, 67021/01/2009, the European Court of Human Rights condemned the Romanian State for lack of efficient regulations on the use of cyanide and other toxic substances by Transgold SA Baia Mare, demonstrated by the accident in 2000, when the cyanide-contaminated water was discharged from the reservoir, causing an ecological disaster along the Tisa River.

[53] Database *Corporate Accountability and Transitional Justice* is the result of a joint effort between practitioners and educational institutions, including University of Oxford, University of Minnesota and other institutions from Columbia and Argentina, to identify corporations' collaborations and complicity of corporations in human rights violation throughout the world.

[54] Payne, L.A., Pereira, G., Doz Costa, J., Bernal, L.: *Can a Treaty on Business and Human Rights help achieve Transitional Justice Goals?,* Homa Publica: International Journal on Human Rights and Business, vol. 1 no. 2, Ford Foundation Publications, 2017, p.8.

[55] *Idem,* Payne and others, f.n. 54, p. 14.

[56] Van Dam, C.: *Enhancing Human Rights Protection: A Company Lawyer's Business,* joint report by Amnesty International and Rotterdam School of Management, Erasmus University, 2016, p. 26.

employees, payment of *ex gratia* compensations and various forms of professional training. Unilever closed another thermometer factory in India in 2001, following mercury contamination of Lake Kodaikanal, when compensation for health and environment damages were settled in a transaction validated by British courts.

An example in which a company didn't take responsibility for violations and didn't attempt any reparation by offsetting damages, is the Spanish chain of Zara stores. In Zara's Brazilian factories 15 immigrants were found in 2011. They used to work 16 hours per day and had limited freedom of movement. Zara denied allegations of slavery, arguing that its Brazilian subsidiaries were required to monitor working conditions, with the parent company having no authority in the production chain[57].

4. The effects of breaching the duty to comply with positive law

Until now, directors' monetary liability for situations where they have allowed companies to violate internal rules and positive law has been an exception and only occurred in situations where they have conscientiously neglected their duties, including the duty to monitor illegalities committed by the company[58]. Although corporate law requires directors to act in good faith and employ diligence and prudence when making decisions, cases of proven guilt and monetary liability are very rare. Part of the doctrine assimilates the rights of nature persons with those of corporate agents, who should have the same freedom to analyze costs and benefits and make informed, sometimes even risky decisions[59].

As previously explained, directors' violation of positive law determines inapplicability of the protection afforded by the Business judgement rule. When directors refused to recover large sums for the company[60] owed for the use of telephone services by a political party, in violation of the funding laws for electoral campaigns, the court ruled that violation of the law on financing political parties represents a good faith breech, and as an effect, the Business judgement rule is inapplicable. The company, as private law subject, is liable in accordance with the applicable law for the acts committed by its representatives, and the sanctions applied to the legal entity may sometimes even have the effect of its disappearance from the market, by applying radiation or a high-level fine that hinders the financial recovery.

In principle, the agency theory bases directors' accountability to the company for violating the law on the prohibition to commit illegal acts. However, if the principal is aware of the breech or had reason to be, liability is subject to additional checks. If the principal advances money to an agent for making an unlawful payment, to commit an illegal act or ratifies unlawful conduct, the action for directors' liability will have a different outcome.

---

[57] *Idem,* Van Dam, f.n. 56, p. 36.
[58] See *Stone vs. Ritter,* f.n. 23.
[59] See Palmiter, f.n. 18, p. 476.
[60] See *Miller vs. AT&T,* f.n. 38.

Legal literature often mentions that "no company, no business is in perfect harmony with the law", what varies is just the gravity of the violation of the law[61]. We have illustrated that the classical application of the Business judgement rule cannot protect directors who deliberately violate positive law, but this outcome can be indirectly achieved by two other methods.

The first situation is quite common in practice because shareholders also apply the net loss rule in their own decision-making process and will hold directors liable if the violation of the law doesn't cause significant financial damage to the company[62]. The second situation became common following the development of internal corporate control mechanisms, as the decision to file an action for the accountability of a director is usually being voted by the board of directors, sometimes by setting up an internal investigation or discipline commission, mostly including non-executive members.

The importance of internal control mechanisms increased significantly, notably that of internal investigation commissions. In 1979, shareholders of a telephony service company filed a lawsuit against directors and auditors to recover the total of 11 million USD paid as a bribe to civil servants and foreign politicians for various favors, with the knowledge of directors[63]. The board of directors set up a committee of newly appointed, independent, non-executive directors who determined that the action was unjustified and following up of the case was not in the best interest of the company. Although the court of first instance considered that the decision of an internal commission could not have the effect of withdrawing an action for breach of public law rules, the court of appeal ruled that the decision made by the internal commission was protected by the Business judgement rule, therefore the derivative action for directors' liability may be withdrawn. In the current judicial context, we consider that courts would proceed in a different manner and replace the use of the Business judgment rule for the board's decision with judicial scrutiny, as the violation refers to a criminal law rule.

We have determined that directors' accountability to the company is not established automatically following the violation of the law, all the more so when the board of directors was aware of the breech. The common denominator of these cases is that the decision of an internal commission of inquiry cannot replace shareholders' will to hold directors liable for serious deeds, such as bribery. In situations where directors were unaware of, nor have reasonable grounds to believe, that their acts were contrary to positive law[64], they will not be liable. Especially in cases where professional advice was sought, which demonstrates compliance with

[61] See Palmiter, f.n. 17, p 475 and Beverige, f.n. 45, p. 732.

[62] See Beverige, f.n. 45, p. 733.

[63] *Auerbach vs. Bennett*, 393 N.E.2d, New York, 1979, a similar outcome in *Abrams vs. Allen,* 74 N.E.2d, 305, New York Court of Appeal, 1974.

[64] *Simon vs. Socony- Vacuum Oil Co., 38 NY, S2d., 270,* 1942, New York Supreme Court concluded that directors will not be liable if it isn't proven that they acted fraudulently, grossly negligent, corruptly or in bad faith.

the duty of care, directors will not be liable, if the counseling they obtained was reliable[65].

As I mentioned, statutory rules began to permit inclusion of charter clauses limiting or eliminating directors' liability for breaching the duty of care. These clauses are often formulated as exceptions to fiduciary conduct, but don't have the effect of full immunity[66]. These clauses cannot exclude liability for acts or omissions committed in bad faith, deliberate misconduct or conscious violation of the law[67], and sometimes limit liability to known or culpable breaches[68]. For determining violation of the duty of compliance, there is usually no distinction between violations of civil law or criminal law rules. Legal literature qualifies violations of the law as morally reprehensible acts according to generally valid standards[69], as breech of a civil law rule can also be committed in violation of good faith.

Moreover, in most countries, statutory rules and charter provisions prohibit companies in one way or another to grant directors indemnities for achieving business success in violation of the law, in particular by violating criminal law[70]. Although companies are tempted to reward directors for performance, this practice can sometimes encourage illicit or immoral conduct. For this reason, professional liability insurance will usually not cover damages caused by unlawful conduct, most insurances for professional liability don't cover prejudices caused by immoral conduct and expressly exclude coverage of fines, penalties or other amounts of money which cannot be legally insured.

As mentioned in the first part of the paper, in order to achieve corporate performance, most members of the company should internalize the moral duties to respect the law and generally accepted standards of ethics, decency and honesty. However, ethics is more than simply following the letter of law, and business law does not make it easier for directors who are willing to meet ethical standards in today's financial markets[71]. For example, if executive directors who seek to reward employees and consumers fairly and proportionately to their investment, they will be penalized by trading markets and shareholders. Executive directors who take these individuals' long-term interests into account, and who will prefer lower profits to costly sanctions, will be sanctioned for reduced performance[72]. Therefore,

[65] See Beverige, f.n. 45, p. 741.
[66] See Beverige, f.n. 45, p. 745.
[67] Delaware Code, section 102(b)7, New York Business Corporation Law section 402(b)(1).
[68] California Corporation Code, section 204(a)(10)9A)9i).
[69] See Beveridge, f.n. 45, p. 747 for an analysis of section 7.10(a)(1) of the Principles of Corporate Governance.
[70] In *Kaufman vs. CBS, Inc,* 514 S.2d 520, New York, 1987, the court rejected the request for a bonus, filed by a director who negotiated the transaction of a sexual harassment case, because the decision lacked good faith and the personal belief that the transaction was in the best interests of the company.
[71] The philosophical approach views the principle of limited liability, an essential principle of business law, as an obstacle for empowering directors, because it protects individuals from sanctions for their own fraudulent acts. See Greenfield, f.n. 28, p. 430.
[72] For details see Greenfield, f..n 28, p. 431.

doctrine considers that in today's corporate governance, absolute compliance with the law is more an aspiration than a reality[73].

4.1 The duty to obey positive law in the Member States of the European Union

In EU member states, there have been numerous legal violations committed by corporate directors and employees in the interest of legal persons, which led to European lawmakers' increased initiatives to regulate liability of legal entities and guilty representatives. In 2010, the European Commission launched a public debate on the need to tighten corporate directors' civil and criminal liability[74]. Currently, most member states opt for revoking directors who have been convicted of committing a crime, therefore assessment of violations of fiduciary duties becomes irrelevant in these cases[75].

EU member states jurisprudence is abundant in cases of directorial breaches of criminal law, generally regarding violations committed by directors through the company or in its shadow, but individual sanctions for determining a legal person to violate the law are almost non-existent, unless they involve a criminal act committed by a director as natural person. In the UK, courts sanction acts of bribery and influence peddling perpetrated by legal persons, but in most cases, they refer to violation of foreign jurisdiction legal norms. Thus, sanctioning of transnational companies often takes place in the US, as was the case with French bank BNP Paribas and German Commerzbank, which concluded deals with US prosecutors for violating sanctions against the states of Sudan, Cuba and Iran in 2002, by allowing transfers of funds belonging to sanctioned persons[76].

In recent years, most member states introduced regulations on criminal liability of legal persons, but lawmakers' tendency was to combine criminal liability of the legal person with criminal liability of the individual who caused the company to break criminal law[77]. An exception is Germany, which only holds directors' criminal liability, as the legal person is traditionally excluded from application of criminal law and only sanctioned administratively.

The concept of criminal liability of a legal person is new in most member states' legal culture, France being the first state to adopt the American model in 1994, followed by Belgium, Italy, Poland and Romania. After 2010, Luxembourg, Spain and Czech Republic followed suit. The basis of criminal liability of a legal entity in these states is represented by employees' acts or deeds, which may be attributed to

73 See Beveridge, f.n. 45, p. 777 and Williams, f.n. 31, p. 1270.
74 Green Paper on Corporate Governance for Financial Institutions, COM (2010) 285.
75 *Study on Directors' Duties and Liability, prepared for the European Commission*, by C. Gerner-Beuerle, Edmund Philipp Schuster (Department of Law, London School of Economics), London 2013, p. 237.
76 *A Guide to Corporate Governance Practices in the EU,* a report by International Finance Corporation, part of the World Bank Group and European Confederation of Directors Associations, 2016, p. 14.
77 *Corporate Liability in Europe,* Clifford Chance report, 2012, p. 2.

an entity[78] and which are committed with the purpose of fulfilling the company's business core activity, in the interest or for the benefit of the company. Some states condition liability for these acts upon perpetration by individuals with administrative responsibilities. A common feature of investigations is to verify the existence of an internal monitoring and control structure with a preventive function, and the wide presence of rules which oblige companies to implement adequate control systems underlines the importance attached to them by states and prosecutors. The most common sanction adopted by member States is criminal fine, the amount of which is rising in recent years. In France and Spain, the dissolution of the company is a frequently applied sanction, as is the prohibition to participate in public auctions.

4.2 Directors' duty of compliance in Romania

Romania introduced direct and personal criminal liability of a legal entity in 2006, a provision which was maintained in the 2009 Criminal Code, but the distinction of directors' liability from the simultaneous criminal liability of the legal person is not yet clear. The legal person is criminally liable for offenses committed in achievement of the core business activity (provided by the charter), in the interest or on behalf of the legal entity, which are alterative conditions. Criminal liability of the legal person does not exclude criminal liability of the natural person who contributed to the very same act[79]. By applying this rule, we consider that in Romanian law, liability of legal entities is almost impossible to apply without criminal liability of the natural person who determined the perpetration. Thus, the individual will only be criminally liable if the offense was committed with the degree of guilt provided by law[80] and the legal person will be liable if the act was committed in the name, for the benefit or for realization of the business activity of the company, with the required degree of guilt.

Agents' liability is expressly provided by law[81], licit or illicit acts committed by a body of a legal person are binding for the legal person itself, but only if these acts are related to the duties or functions entrusted to the agent[82]. Competition law offences for example, faithfully describe directors' duty not to determine the

[78] *Idem*, p.4.

[79] Art. 135 par. (3) Romanian Criminal Code.

[80] In case no. 5290/176/2016, definitive by Decision 886/2017 of the Court of Appeal Alba Iulia, a corporate director was sentenced to two years probation and payment of the amount of 85.000 Lei as moral damages, because he failed to take all appropriate measures to avoid a work accident where a young man died on a construction site.

[81] Art. 271-281 of Law no. 31/1990 mentions the individuals who can be liable under criminal law for the act committed by the legal entity, namely the founder, the director, the CEO, the member of the supervisory board or of the board of directors or the legal representative of the company and art. 281 mentions the applicability of criminal law rules.

[82] Art. 219 Civil Code. In accordance with art. 220 Civil Code, the legal action against directors, auditors, executive directors and other persons who acted as management representatives of the legal entity, for the damages caused to the legal entity by violating their duties will be filed in the name of the legal person by the competent management body, which will decide with the majority provided by law or in lack thereof, with the quorum provided by the charter.

company to violate positive law, otherwise, directors will be personally liable[83]. The guilt of legal entities is determined by reference to their bodies or their attitude, namely by decisions they make and by existing, tolerated or known practices[84]. We consider that establishing criteria for delimiting legal entities' guilt from liability of the members of its bodies would prove useful, but this evolution can only be determined by case-law. These criteria are all the more useful in the case of negligent acts, since negligence can only be determined in relation to the conduct of the members of governing bodies.

The regulation of legal persons' and directors' liability who caused the violation of law, is explicit in the current regulation, but lacks rich jurisprudence, therefore criminal investigations continue to focus on liability of the natural person who determined the violation of the law. In view of the tendency to combat economic and corruption offenses, we consider that efforts to sanction crimes committed by legal persons will increase. Most special laws provide for cumulation of sanctions applied to the legal entity and to the natural person who determined the offense, and directors' liability for damages caused to the company can be pursued in parallel. Regarding violation of rules other than criminal law, for their effective and efficient enforcement against legal persons, we believe that legal sanctions provided by special laws for natural persons should be adapted to legal entities. It is noted that judicial scrutiny of the violation of a law for the purpose to maximize corporate profits also takes into account the sanctions provided by law, but this practice ignores violations of public and private law rules outside the sphere of criminal law and the evolution of the fiduciary duty practice.

5. Conclusion

Corporate Governance principles recommend that business markets reflect the rules and recommendations for appropriate conduct, although it accepts the existence of deviations, referred to as "agency costs". The duty to obey the law is prevailing, but in absence of a clear legal formulation and its inclusion in the broader corporate governance structure, courts and legal literature have always contradicted themselves regarding the nature of this duty. Initially, courts considered that compliance with the law was a matter of diligence and prudence, then the fulfillment of this duty was subject to good faith, an element of the duty of loyalty. We consider that the duty of compliance is an intrinsic element of good faith, but we regard good faith as a self-standing fiduciary duty, as the existence of the duty to comply with positive law is precisely one of the reasons for which this duty falls within the scope of good faith, but not of the duty of loyalty. However, regardless of the label attached

[83] The right of recourse of a legal entity against the natural person accountable for committing the crime, employee or agent, will be filed based on civil liability rules for recuperating the financial damages caused by perpetrating the violation of the law.

[84] http://www.hotca.ro/index.php/blog-post/raspunderea-penala-a-persoanei-juridice-conditii-generale/, accessed on 27.10.2018.

to the duty of compliance, diligence and fidelity in complying with the law are intrinsic aspects of legal compliance.

The duty to obey the law, bylaws and extra-legal corporate rules is essential for the credibility and legitimacy of a company. This is substantiated in corporate governance institutions, even though it is not clearly incorporated in corporate governance structures, and is sometimes applied as *ultra vires* doctrine, as a legal duty to implement internal controls, or an exception to the application of the Business judgement rule.

We have shown that the limits and scope of good faith are still unstable, both in common law and in civil law systems. Although current jurisprudence does not regard good faith as an independent fiduciary duty and exclusive violation of good faith does not determine directors' liability, the importance of good faith elements remains strong, even if these are included in the terms of the duty of loyalty.

Corporate governance shall protect companies from powerful agents' opportunism by clarifying the interdiction to violate applicable positive law. Thus, if the breach of the law is considered to be an act of bad faith, directors' liability cannot be limited or eliminated by shareholders' decisions, charter provisions or jurisprudential rules, this duty being above the duties owed to the company or to shareholders. Good faith underpins the adaptation of the duty of care and duty of loyalty in different contexts and their ability to provide protection both inside and outside the company's limits[85].

We have shown that the principle of lawful conduct is perfectly compatible with the principle of maximizing corporate profits and shareholders' wealth, the latter being the very objective of the establishment and existence of a company. The principle of lawful conduct does not inhibit this goal, but only traces the channels for proper realization of its purposes. Applying the duty to obey the law and refusing to approve illegal practices is a step towards mitigating the prevalence of the standard of maximizing shareholders' wealth and a closer recognition of corporate social responsibility.

Bibliography

I. Books

1. Álvarez Rubio, J.J, Yiannibas, K.: *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union*, Routledge, London, 2017.
2. Clark, R.C.: *Corporate Law*, Ed. Little Brown, Delaware, 1986.
3. Teitel, R.G.: *Globalizing Transitional Justice. Contemporary Essays*, Oxford Univ. Press, 2014.
4. Welch, E.P., Turezyn, A.J., Saunders, R.: F*olk on the Delaware General Corporation Law: Fundamentals*, Wolters Kluwer Chicago, 2011.

[85] See Konstant, f.n. 13, p. 434.

II. Articles

1. Bainbridge, S.M., Lopez, S., Oklan, B.: *The Convergence of Good Faith and Oversight*, University of California Los Angeles Law Review no. 55, 2008.
2. Beveridge, N.P.: *Does the Corporate Director Have a Duty Always to Obey the Law?* DePaul Law Review no. 45, Chicago, 1996.
3. Blair, M.M., Stout, L.A.: *Specific Investment: Explaining Anomalies in Corporate Law*, Journal for Corporate Law, University of Iowa, vol. 31/2006.
4. Catană, R. N, Ponta, A., *The Business Judgement Rule and its reception in European Countries*, The Macrotheme Review 4(7), Austin, Texas, 2015.
5. Easterbrook, F., Fischel, D.: *Antitrust suits by targets of tender offers*, Michigan Law Review 80/1996.
6. Eisenberg, M. A.:*The duty of Good Faith in Corporate Law*, Delaware J. for Corporate Law 31/2006.
7. Engel, D.L.: *An Approach to Corporate Social Responsibility*, Stanford Law Review no. 32, 1979.
8. Greenfield, K.: *Corporate Ethics in a Devilish System*, Journal of Business and Technology Law, University of Maryland, vol. 3, 2008 and *Ultra Vires Lives! A Stakeholder Analysis of corporate Illegality*, Virginia Law Review no. 87/2001.
9. Konstant, P.C: *Meaningful Good Faith: Managerial Motives and the Duty to Obey the Law*, New York Law School Law Review, vol. 55, 2010/2011.
10. Palmiter, A.: *Duty of Obedience: The Forgotten Duty*, New York Law School Review, vol. 55/2010.
11. Payne, L.A., Pereira, G., Doz Costa, J., Bernal, L.: *Can a Treaty on Business and Human Rights help achieve Transitional Justice Goals?* Homa Publica: International Journal on Human Rights and Business, vol. 1 no. 2, Ford Foundation Publications, 2017.
12. Reichard E.T: *Catching the Money Train: Using the Alien Tort Claims Act to Hold Private Banks liable for Human Rights Abuses*, Case Western Reserve Journal of International Law, 2004.
13. Ryan, P.J: *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.0 of The ALI Principles of Corporate Governance*, Washington Law Review no. 66/1991.
14. Rosenberg, D: *Delaware's expanding duty of loyalty and illegal conduct: A step towards Corporate Social Responsibility*, Santa Clara Law Review vol. 52 no. 1, 2012.
15. Williams, C.A.: *Corporate Compliance with the Law in the Era of Efficiency*, North Carolina Law Review vol. 76 no. 4, 1998.

III. Reports

1. *Corporate Liability in Europe*, Clifford Chance, 2012.
2. Van Dam, C.: *Enhancing Human Rights Protection: A Company Lawyer's Business*, Amnesty International and Rotterdam School of Management, Erasmus University, 2016.
3. *Study on Directors' Duties and Liability, prepared for the European Commission*, by Gerner-Beuerle, C., Schuster, P., Department of Law, London School of Economics, London 2013.