

F P S

Legal advice. Made for you.

GGI SPECIAL INTEREST GROUP „CORPORATE GOVERNANCE + COMPLIANCE“

BUSINESS JUDGEMENT RULE OR DIRECTORS‘ AND OFFICERS‘ LIABILITY



Dr. Georg-Peter Kränzlin
Vienna, October 20th, 2017

The practice of legally safe decision making

OVERVIEW

- BJR principles
- Entrepreneurial decisions
- Adequate decision basis
- Acting in the interest of the company
- Decision making

BJR PRINCIPLES

The practice of legally safe decision making

The principles of risk-intelligent decision making are also well known to the legislator:

*“An entrepreneurial decision is often based on **instinct, experience, fantasy** and **intuition** for future developments and a sense for the markets and the reaction of the buyers and competitors. “
BegrRegE UMAG, BT-Drucks. 15/5092, P. 11*

The practice of legally safe decision making

Evolutionary history of the Business Judgment Rule (BJR):

Role models from the Anglo-American jurisdiction (Section 4.01(a) of the the American Law Institute's Principles of Corporate Governance):

"A director or an officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances ..."

The practice of legally safe decision making

ARAG/Garmenbeck decision (BGH, decision dated 4/21/1997, BGHZ 135, 244):

[A liability for damages]"can only be considered if the limits - in which

*an entrepreneurial acting oriented at a sense of responsibility, exclusively oriented at the company good, based on the determination of the basics for decisions must operate - are (a) **significantly exceeded**, (b) if the willingness to accept risks was **over-extended in an irresponsible manner** or (c) if the behavior of the management board must be viewed for other as contrary to duty."*

The practice of legally safe decision making

§ 93 para. 1 sentence 2 AktG in the version of the Act on Corporate Integrity and Modernization - UMAG (2005):

“A neglect of duty does not exist if the management board could assume for an entrepreneurial decision that the board was acting on the basis of adequate information for the good company.”

*“The basic idea ... is not limited to the liability element of an of § 93 AktG and not limited to the corporation but can also be without positive legal regulation **in all forms of entrepreneurial activities.** “*

The practice of legally safe decision making

The Business Judgment Rule is a guidance for the legally safe decision making:

*“The law does not want to take away the **courage for entrepreneurial risk** but does also not want to encourage and **carelessness** on the expense of the capital providers and the employees.”*

BegrRegE UMAG, BT-Drucks. 15/5092, P. 12

The objective of an entrepreneurial decision is not to avoid liability but to generate legally safe entrepreneurial success. The avoidance of liability is only the consequence, not the purpose of a “good” entrepreneurial decision.

ENTREPRENEURIAL DECISIONS

The practice of legally safe decision making

- **Conscious** entrepreneurial decision
- with a **scope of discretion**
- Based on their **relationship to the future**, entrepreneurial decision are are characterized by forecasts and subjective judgments
- No safe harbor exists for legally bound decisions based on the directive in directive in laws, the charter and/or by-laws; however, the non-adherence adherence to legal requirements can in individual cases be without legal without legal consequences based on a mistake of law

The practice of legally safe decision making

Examples for entrepreneurial decisions:

- Strategic entrepreneurial decisions, e.g. M&A transactions/public acquisition/going public/going private
- Financing decisions, e.g. acceptance of external capital, utilization of approved capital
- Settlement of lawsuits
- Investment decisions, e.g. construction of steel plants in the USA and Brazil
- (new) Development of products and markets
- Divestment decisions/divestiture of business areas

ADEQUATE INFORMATION BASIS

The practice of legally safe decision making

The prerequisites of the decision making must be assessed from the standpoint of the affected body (“*may assume*”), however, which will be given a certain externalization and objectification (“*reasonably*”):

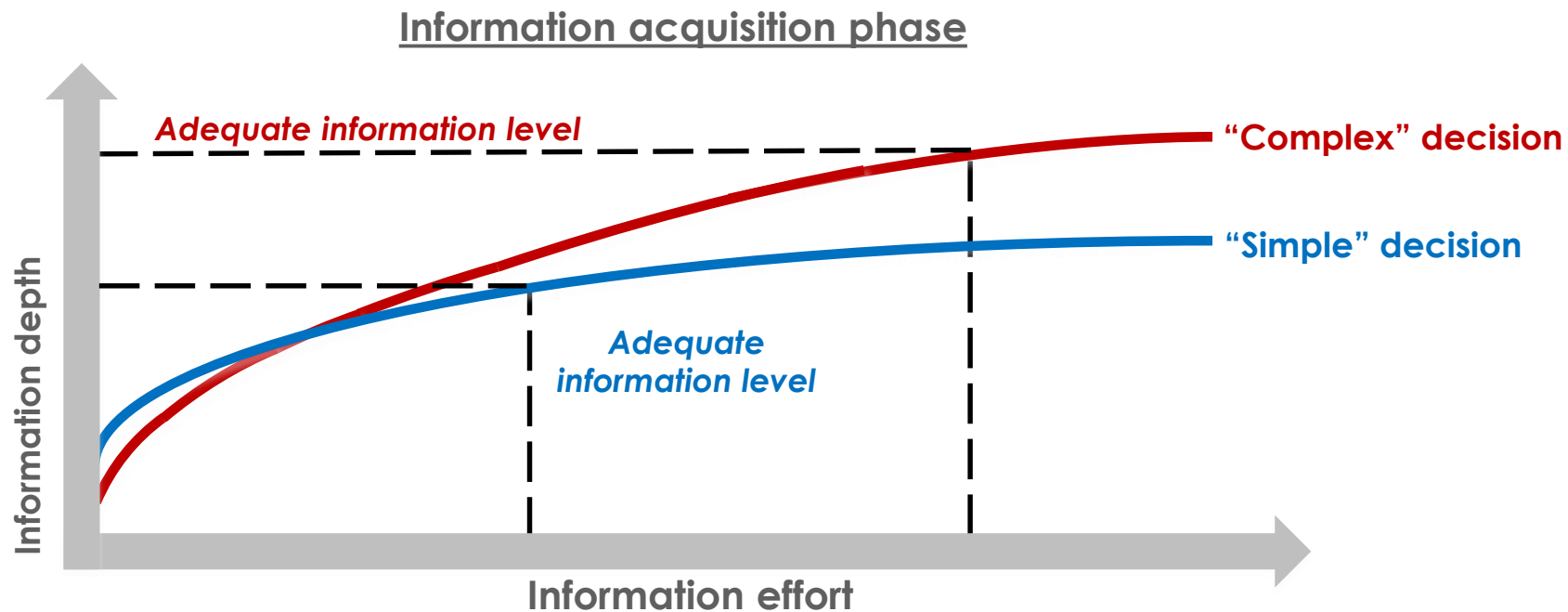
- Information does **not have to be all-encompassing**: adequate efforts relative to the specific decision situation and the information sources available
- **Leadtime, weight/type** of the decision must be weighted, **availability**
- Information acquisition should be in accordance with focal points on business-management (risk assessment, investment volume, financing, etc.)

on this basis

Diligent determination of the decision principles and information acquisition

The practice of legally safe decision making

Decision time and adequate information level (**MODEL**):



The practice of legally safe decision making

Potential information carriers:

- Board member of the respective area responsibility with adequate expert knowledge shall take the lead in the decision making process
- All board members
- Additional information carriers that can/must be involved:
 - Supervisory board
 - (Experts) advisory board
 - Functional department of the corporation
 - External experts and consultants
 - (Major shareholder/main shareholder)

The practice of legally safe decision making

Involvement of external information carriers:

“It is not the objective of the law that only a formal safeguarding takes place through routine obtaining of expertises, consultant votes or external market analyses.

*The question whether and with what scope external must be obtained, must be decided in accordance with business-management requirements as well as the own possibilities of the corporation **and not in accordance with formal safeguard strategies.**”*

BegrRegE UMAG, BT-Drucks. 15/5092, P. 12

The practice of legally safe decision making

Guidelines in German case law for adequate information:

- “The functional representative of a corporation, who itself does not the required expert knowledge, can only be in accordance with requirements for an assessment of the legal situation and the to laws and case laws for which it is responsible, if the advised - by **providing a comprehensive description of the corporation and disclosing the required documents** - by an **professional who is expertly qualified** for the question to be clarified if the representative subjects the provided legal advice to a **plausibility check**” (BGH decision 09/20/2011 - **ISION**)
- “The excessive complexity and non-transparency of the segment caused almost the impossibility for the management make decisions based on an adequate information basis.” (OLG Düsseldorf, decision 09/12/2009 - **IKB**) – “hard cases make law?”

ACTING IN THE INTEREST OF THE COMPANY

The practice of legally safe decision making

*“An **acting in the interest of the company** does exist if it contributes to the **long term profit improvement and competitiveness of the company and its products or services**. also includes the **interest of subsidiaries and the overall group of companies**.”*

*This does not address the ex post interest of the company, because for the cases of interest here it turned out later that the activity failed and damaged the corporation. It must therefore address a company interest that was targeted by the business manager **ex ante in good faith**.”*

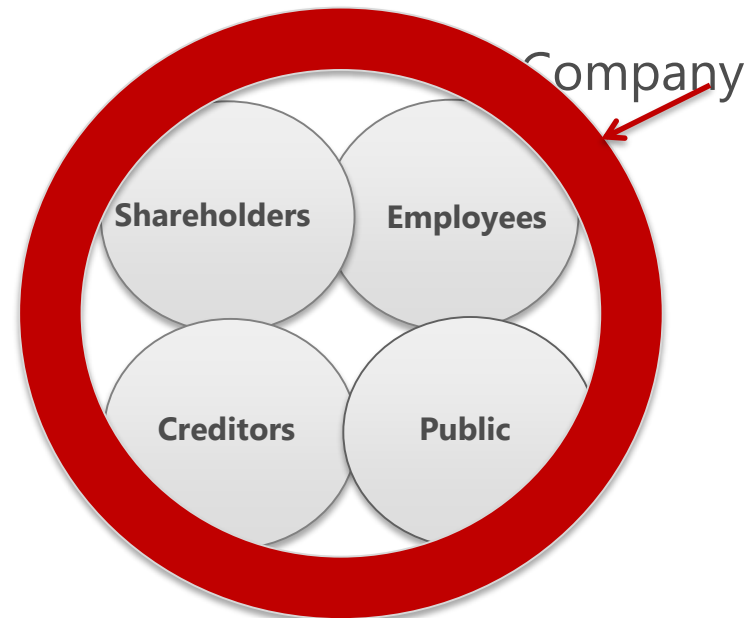
BegrRegE UMAG, BT-Drucks. 15/5092, P. 11

The practice of legally safe decision making

An entrepreneurial decision is the informed selection of action options, that options, that are in the best interest of the company after responsible risk assessment including a forecast.

Interest plural target conception

The body has a certain scope for judgment evaluation (“can assume reasonably”)



The practice of legally safe decision making

This also means:

- Free of external influences
 - Impartiality
 - Independence
- Free of conflicts of interest
 - Uninhibitedness/open-mindedness
 - Acting without direct self-interest

The practice of legally safe decision making

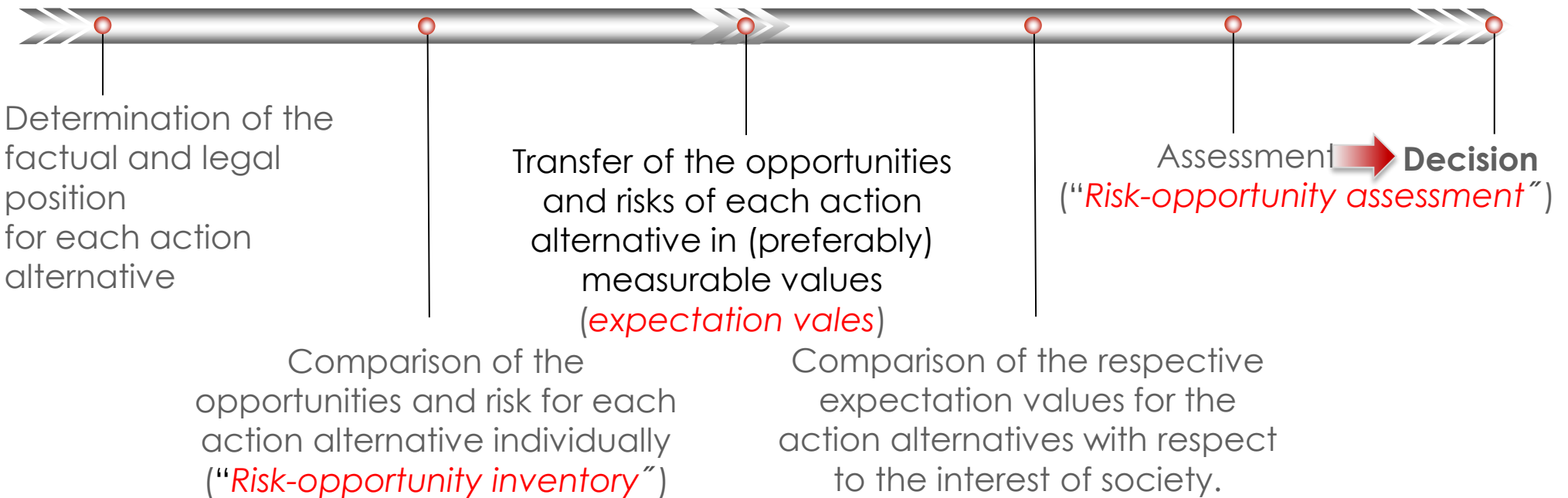
Guidelines of the case law for the good of the company:

- *“When exactly the risks connected to an action are “**outsized**” or **unjustifiable** and therefore not longer in the interest of society, more detailed delimitation and assessment for the individual case.” (Stuttgart, decision 02/29/2012)*
- *“The tasks of the defendants as bank executive board members look for and utilize income opportunities for the bank The risk of the investment type CDO was realized through the loss that occurred, however, not a special risk for the specifically selected. Not even the plaintiff claims that the decision for the purchase of CDOs was generally indefensible and does not need to be based on the former state of knowledge” (LG DUS, decision **APO**)*

DECISION MAKING

The practice of legally safe decision making

Process:



The practice of legally safe decision making

In the interest of later traceability of the individual assessments, decision preparation and decision making must be carefully and comprehensively documented through a.o.:

- Submissions/presentations
- Meeting minutes and decisions of the bodies involved
- Communication to the market and regulatory agencies

The practice of legally safe decision making

Quintessence:

- **Understanding:** Courage to scrutinize and lateral thinking, creativity
- **Listening and observing:** a.o. internal and external experts, resolve contradictions
- Make yourself **inwardly independent:** “**risk-opportunity inventory**” with open results
- **Identifying**, that many correct or good decisions possibly exist
- **Exclude rashness and carelessness** (risk intelligence works)
- **Courage to decline outsized risks** (“sunk costs” for information acquisition) !
- **Second (Independent Expert) Opinion ?**
- **Documenting:** The legal safety is only an approximated value, the **traceability** makes the decision defensible!

F P S

Legal advice. Made for you.

Thank you for your attention

Dr. Georg-Peter Kränzlin
Attorney

Königsallee 60 C (KÖ-Höfe) • D - 40212 Düsseldorf
T +49 211 302015-60 • M +49 171 3570254 • F +49 211 302015-90
kraenzlin@fps-law.de • www.fps-law.de

BERLIN

Kurfürstendamm 220
10719 Berlin
T +49 30 88 59 27-0
F +49 30 88 59 27-100
berlin@fps-law.de

DUSSELDORF

Königsallee 60 C (KÖ-Höfe)
40212 Dusseldorf
T +49 211 30 20 15-0
F +49 211 30 20 15-90
duesseldorf@fps-law.de

FRANKFURT AM MAIN

Eschersheimer Landstr. 25–27
60322 Frankfurt am Main
T +49 69 95 957-0
F +49 69 95 957-455
frankfurt@fps-law.de

HAMBURG

Große Theaterstraße 31
20354 Hamburg
T +49 40 37 89 01-0
F +49 40 36 62 98
hamburg@fps-law.de