

On the Responsibilities and Risks of the Activities of Senior Officials of Economic Companies

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The responsibility of the senior officials of business companies is multifaceted. They are liable to the company on the basis of breach of contract, while to third parties, mainly creditors, on the basis of non-contractual damages. Today, business risk is extremely high for senior executives. It is very difficult to calculate unexpected risks because you have to prepare for invisible damages. During managerial decision-making, exemption must be provided for unforeseen and unexpected circumstances, even with the help of liability insurance.

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“A careful person only undertakes what
he is good at and what he knows...”
(Ignác Frank)

Introduction

Risk-taking has become the biggest challenge in the management of business companies in our world. Risk-taking is unavoidable in managerial decision-making. The managers of the companies must also be prepared for the fact that legal responsibility can often be established for failure to make a risky decision¹.

The executive activity of managers requires that the aspects of efficiency and economy are applied at the same time. In the case of business companies, the main attraction of business management is efficiency, ensuring the greatest possible profit. In the world of companies, the owner's expectation from

¹ Kölner Kommentar zum AktG (1970) 93.§. 12. 36 Punkte, a Fischer/Lutter, GmbH Kommentar, 11. Auflage (1985) 43.§. 2.,4.Punkte. and D. Vidal. Droit des sociétés, 3. Edition, L.G.D.J. Paris, 2001, 204-205.

the management is based on the “even more... principle”, if the management is unable to provide this, then the need for transformation and change is immediately raised. Every manager must consider this risk. A certain degree of protection today is provided by the outstanding remunerations, which represent an existential net regarding the uncertain future².

Business management requires a permanent managerial activity. In view of the increased risks, senior officials are expected to continuously perform operational management duties. Representing the company in the property market and ensuring the continuity of the business-like economic activity also clearly fit into the scope of executive duties.

The following can be highlighted from the list of main business management and authority responsibilities of senior officials: legal representation of the company, ensuring legal operation, in accordance with the law or fulfillment of reporting and data provision obligations prescribed in other laws, ensuring the operation of the organization and the regularity of certain procedures within the company, preventing the adoption of illegal corporate resolutions, implementing legal resolutions, inspection obligations, the company or regarding the fulfillment and implementation of the obligations imposed on some of its bodies, cooperation with other bodies of the company, or with its senior officials, ensuring the economic activity of the company - competitiveness, liquidity, enforcement of claims, ensuring the exercise of the rights of the company's members (including members in the minority) and the protection of creditors' interests

In view of their obligations to the company, the executive officers' liability for damages is typically one-way, i.e. the liability based on the breach of contract towards the company. Damage to third parties entering into a legal relationship with the company (typically creditors), whether based on a breach of contract or out of contract, is considered the illegal conduct of the company and not the conduct of the executive officer. The liability shield of the company, based on its independent legal entity, protects the senior official by removing his harmful behaviour from the behaviour of the legal entity and imputing it to the latter.

The so-called based on the doctrine of strict separation of corporate liability - which is otherwise a risk-mitigating factor - the “crossing” of liability over the corporate legal entity wall can only be justified in exceptional cases. The direct suing of a senior official can only be justified in the event of liability for damages when the behaviour of the person who caused the damage cannot be attributed to the company because it is not causally related to the

² Ulrich Hübner, *Managerhaftung* C.H.Beck'sche Verlagsbuchhandlung München 1992. p. 27-34.

authority attached to his status. Such a case is typically the commission of a crime, a fraudulent, bad-faith procedure that caused the damage³.

In order to support all these mentioned theses, we will further outline the legal situation of liability, which also shows the risks of the activities of senior officials.

On the risks arising from the peculiarities of the legal relationship between the executive and the company

To the rights and obligations of the senior official in this capacity, the rules of the Civil Code regarding assignments (corporate legal relationship) or, if he is employed by the company, the governing rules of Mt.

The risk dimensions of this duality are often spectacular, because the labor law rules and the rules governing civil law commission contracts do not result in the same liability situation, which in itself can be a risk-increasing circumstance. Such a difference is apparently caused by the fact that the labor law compensation liability is maximized for wages

The senior official performs his duties independently. In this capacity, it is only subject to the laws, the partnership agreement, and the decisions of the company's supreme body, and the sole proprietorship. and sole proprietorship with the exception of - it cannot be rejected by the members (shareholders) of the business association (principle of self-responsibility). The supreme body of the company can only remove the executive officers' or the executive board's powers in the company's management in the case and scope, if this law or the company contract allows this. (prohibition of removal of powers) These rules undoubtedly increase the executive the risks of their decisions⁴.

It is also an undoubted fact that the duration of the managerial relationship also carries a kind of risk. If the articles of association do not provide otherwise, senior officials must be elected for a fixed term, but not more than five years, or appointed in the articles of association. If the members (shareholders) do not stipulate the duration of the executive officer's appointment in the company contract, the executive officer shall be considered elected for a five-year term, unless the business association was established for a shorter

3 Schneider, Uwe H. Haftungs-minderung für Vorstandsmitglieder und Geschäftsführer bei fehlerhafter Unternehmensleitung? Festschrift Für Wilfried Werner, Berlin 1984 p. 795. old., Hübner, Managerhaftung i.m. p. 2., M.Coizan-A Viandier-F.Deboissy: Droit des sociétés, 16. Edition, Litec, Paris 2003. p. 149. D. Vidal. Droit des sociétés, 3e Edition, L.G.D.J. Paris, 2001, p. 205.

4 Robert R. Drury, The Liability of Directors for Corporate Acts in England Law p. 110-111.

period of time. The appointment of a senior official is established by acceptance by the person concerned and not at the time of appointment.

Executive officers can be re-elected and recalled by the company's highest body at any time without any obligation to provide reasons. Within fifteen days from the acceptance of the new executive assignment, the senior official must inform the companies in which he is already a senior official or member of the supervisory board in writing. The senior officials - with the exception of the first mandate created when the company contract is concluded - are elected by the company's highest body (this does not include the case when a decision-making supervisory board is elected).

On the liability of the senior executive for damages caused to the company

If the senior official causes damage to the company in the course of his business management activities, he is liable to the company according to the rules of liability for damage caused by breach of contract. This breach of contract is realized if you violate your obligations either stipulated in the contract or according to the law⁵.

The application of this contractual liability can be traced back to the contractual legal relationship, which is either an employment law relationship or a civil law assignment-type legal relationship⁶. By accepting their status, the senior officials of business companies undertake to act with the care normally expected in the given situation in the interest of the company.⁷ The fulfillment of this duty of care determines whether there will be a way to establish liability⁸. If the behaviour does not meet the requirements of the expected care, it is considered a breach of contract. The level of care expected of senior officials is

5 PJD2021.26

6 Mónika Csöndes, A Ptk. vagy az Mt. alapján kell megítélni a vezető tisztségviselő kártérítési felelősségét, ha a tisztségét munkaviszonyban látja el? Magyar Jog, 5/2017. p. 280

7 Special considerations may apply if, due to the nature of the business, the manager must also take into account the interests of a wider group of persons, such as the family, in addition to his or her basic duties. See in this context for example: Arató, Balázs: A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspektusai; in: Glossa Iuridica 7:1-2.; pp. 141-177; 2020, see also: Arató, Balázs: The Legal Institutions of Asset Preservation and Asset Transfer in Hungary; in: Karoli Mundus 1:1; pp. 229-240.; 2021., or ARATÓ, Balázs: A családi vállalkozások jellegmegóvásának eszközei (Instruments to preserve the character of family businesses), in: Gazdaság és Jog 3-4.; 2023.; Orac; p. 31-38., and ARATÓ, Balázs: Családi vállalkozások nemzetközi kitekintésben: Jogalkotási irányok, jó gyakorlatok; in: GLOSSA IURIDICA 7: 3-4; pp. 263-285., 23 p. (2020).

8 Ádám Fuglinszky: Kártérítési jog Budapest 2015. p. 136.

high for several reasons. The performance of such a task requires appropriate competence, subordinating one's own interests to the interests of the legal entity. The measure of increased management care is objectified, which means that it is a risk-laden measure in many respects. The care expected in the management of the company's affairs must always be judged in connection with a specific obligation. If you perform the required diligence during your business management activities, we cannot speak of a breach of contract. The senior official violates his contract if he does not show the increased care expected of persons holding such a position. The lack of business results does not in itself constitute a breach of contract if the senior official acted with the increased care normally and expected of him during the performance of his duties⁹.

The liability legal situation of a senior official changes if he intentionally causes damage to a third party. The effective Civil Code according to: "If a senior official of a legal entity (business company) intentionally causes damage to a third party in connection with this legal relationship, he and the legal entity are jointly and severally liable to the injured party". It is necessary to emphasize that the joint and several liability applies only if the intentionally caused damage occurred in connection with the legal relationship.

This consequence of executive joint and several liability is useful for prevention purposes, but the legal personality (organizational legal entity) cannot provide the management with a lighter liability situation due to the main rule of joint and several liability in the case of fraudulent and illegal procedures unrelated to their legal relationship. Serious abuses cannot be covered even partially by the cloak of legal personality. The responsibility of an official who deliberately causes damage outside of his authority, abuses the company's legal personality, acts illegally and fraudulently is an independent *sui generis* responsibility that crosses the wall of a legal personality, resulting in full standing¹⁰.

Exemption from liability for damages caused by breach of contract must be based on the date of the breach of contract in terms of the foreseeability criterion, because at the time of the establishment of the contractual relationship, the possible breach of contract related to business management cannot yet be calculated in advance. to fulfill etc. are connected.

The date of creation of the management relationship can therefore be used as a basis for damages caused during the performance of the executive's usual duties. These tasks and the risks associated with their performance can be assessed when assuming the leadership position, and they can be foreseen - considering their nature.

9 Kemenes István: A vezető tisztségviselő kártérítési felelőssége, Magyar Jog 1/2017.

10 Tibor Nochta, Társasági jog. Dialóg Campus Kiadó Budapest-Pécs 2011. p. 246.

However, in the case of extraordinary obligations, unusual tasks, damages caused during the fulfillment of specific obligations arising in the course of business activity, the time of undertaking the given task must be taken into account from the point of view of predictability, since the risks associated with them can only be calculated then¹¹.

The injured party bears the burden of proof regarding the extent to which the breaching party foresaw or should have foreseen the damaging consequences of the breach of contract. Since the damage to be compensated (and its extent) is one of the basic prerequisites for the liability of the breaching party, the burden of proving it is on the contracting party who suffered the damage. The realization of the purpose of the foreseeability clause also requires this solution. In order for the subsequent party in breach of contract to be able to make a well-founded and conscious decision on risk-taking when concluding the contract (a senior official taking on an extraordinary task), among other things, his contractual partner (the later injured party) must put him in an appropriate factual situation. He must provide adequate information to ensure that he is able to make a decision on taking the risk, the price of taking the risk, or on the protection of the risk with insurance, based on the most accurate knowledge of the risk of expected damages¹².

The senior official's liability for damages caused to third parties

If the senior official of the legal entity causes damage to a third party in connection with this legal relationship, the legal entity is liable to the injured party (principle of attribution). The theoretical explanation for this can be found in the fact that management officials are the factors that bring the legal entity to life and keep it alive, and their activities are considered the activities of the legal entity to the outside world. This legal fact applies to official damages that are related to the executive relationship¹³.

Therefore, the senior official can only be held responsible if the conduct of the tortfeasor cannot, due to its nature, be classified as damage caused by a legal entity, or if the damage was caused intentionally while acting in his managerial capacity. Civil Code on the responsibility of senior officials. 3:24 am. The phrase "acting within the scope of this authority" in paragraph (2) of Sec. 6:540.

11 Ádám Fuglinszky, Az előreláthatósági klauzula alkalmazhatóságának újabb dilemmái. *Gazdaság és Jog* 2019.XXVII.6-8pp. p.1-7.

12 Máté Mohai: Felelősség és helytállási kötelezettség a társaságok jogában. Pécs, Magyarország: Menedzser Praxis Kiadó 2019. p. 196.

13 Le Cannu: *Droit des sociétés*, 2. Edition, Montchrestien, Paris, 2003. p. 283.

(1)-(2) of §, the provision regarding the legal relationship of employee and member. The legislator therefore chose the solution of regulating liability for damages caused by a senior official acting in his capacity in the same way as the provisions on liability for damage caused by employees and members.

If the damage is the result of a breach of contract in the contractual relationship between the legal entity and the 3rd party, then the breaching party is the legal entity itself and not the executive officer. The legal entity (organizational legal entity) cannot provide the senior official with a “liability” situation in the event of fraudulent and illegal procedures that are outside of his legal relationship. Serious abuses cannot be covered even partially by the cloak of legal personality. The responsibility of an official who causes damage while acting outside of his authority, abuses legal personality, acts illegally and fraudulently is an independent *sui generis* branch of responsibility that crosses the wall of legal personality. In the Book on Legal Entities, there are also special rules for additional liability arising from business-like business activities for senior officials of business companies. We consider that the special liability provisions governing the senior officers of business companies can serve as a good example when explaining the legal position.

The senior official manages the company's affairs independently based on the priority of the company's interests. In this capacity, it is subject to the laws, the company contract and the decisions of the company's supreme body. Due to the principle of self-responsibility, a member of the company cannot dismiss the executive officer, and his authority cannot be revoked by the supreme body. As can be deduced from the different ownership situation, in a sole proprietorship, the sole member can give instructions to the management, which the senior official must carry out.

It follows from the special power-sharing structure of companies, which also affects management responsibility, that the so-called exemption institution, which undoubtedly has a risk-mitigating effect. The Civil Code also accordingly provides that if, at the request of the executive officer, the company's supreme body grants a dispensation establishing the adequacy of the business management activities carried out in the previous business year at the same time as the report is accepted, the company may file a claim for damages against the executive officer based on a breach of management obligations, if the facts or data on which the exemption was granted were untrue or incomplete.

If the senior official's legal relationship is terminated between two consecutive meetings dealing with the report, the senior official may request that the supreme body decide on the release of the exemption at its next meeting.

In addition to the responsibility of senior officials towards the company - on the basis of which, in principle, a claim for damages can be asserted by the

company at any time during the company's operation within the limitation period - the members can only bring a claim for compensation against the former senior officials of the company that has already ceased to exist without a legal successor. Based on this rule of the code, after the termination of the business company without a legal successor, the claim for compensation against the company's senior officials can be asserted - within the one-year limitation period from the company's deletion from the register - by those who were members at the time of the deletion. The member may claim compensation in proportion to his/her share of the assets distributed upon dissolution of the company. This provision partially takes into account the criterion of separation of responsibilities, which is so important in corporate law, as well as the exclusion of possible acquisition of damages, as well as the enforcement of parallel claims for damages¹⁴.

If the business company is dissolved without a legal successor, in addition to the members, the creditors may also file a claim for compensation against the senior officials according to the following rules: Creditors may assert a claim for compensation to the extent of their unsatisfied claim against the senior officials of the company in accordance with the rules of liability for damages caused outside of the contract, if the senior official did not take creditor interests into account after the situation threatened the company's insolvency.¹⁵ However, this provision cannot be applied in case of termination by liquidation.

On the issue of responsibility breakthrough and responsibility transfer in the area of risks

Due to the unlawful harmful behaviour of members, senior officials, and trustees, private liability can have branches that cross the wall of legal personality. On the basis of this general theoretical responsibility thesis, the doctrine of breach of responsibility, and the doctrine of "piercing the corpo-

14 Tibor Nochta: A polgári jogi felelősség változásairól a társasági jogban. *Gazdaság és Jog* 27, 7-8pp. 12-18. p. 2019

15 See for example: Arató, Balázs: A gazdasági társaság tagjainak és szerveinek felelőssége tőke- és hitelezővédelmi szempontból; *MAGYAR JOG* 70: 6 pp. 371-383., 13 p. (2023), see also: Arató, Balázs: A vezető tisztségviselő magánvagyonai felelőssége; in: Arató, Balázs (szerk.) *Jogalkotási tükrök 2010-2018*, Budapest, Magyarország: Patrocinium Kiadó (2018) 358 p. pp. 191-224., 34 p., or Arató, Balázs: Haftung des Geschäftsführers mit seinem Privatvermögen während des Liquidationsverfahrens: Derzeitige Regelung und Rechtsprechung in Ungarn; in: Winner, Martin; Cierpial-Magnor, Romana (szerk.) *Sanierung, Reorganisation, Insolvenz: Internationale Beiträge zu aktuellen Fragen*. Wien, Ausztria: Nomos (2018) 267 p. pp. 9-38., 30 p.

rate veil” of the legal person as a model can be applied to legal persons in general¹⁶.

The solutions of each legal system have in common that the limited liability of the members (founders) and the directed liability of the senior officials towards the legal entity can only exist as long as the legal entity is not used to deceive or harm creditors, commit crimes or carry out procedures that harm the public interest.

Legislation (and also legal practice) - mainly for the protection of creditors and the public interest - go beyond the limit of the separation of liability principle in the case of certain behaviours. This is especially visible in corporate law, where the cases of transfer of limited member liability (Haftungsdurchgriff) and piercing the corporate veil created by the legal personality of the company are shaped by both legislation and judicial practice.

The legal entity may not provide members (founders) and officials with liability protection without exception, either by legal or contractual limitation of liability. Fraudulent and illegal procedures and abuses cannot be covered by the guise of legal personality. Abuse of the personality of the legal person and the limited liability, as illegal behaviour, is a very visible cross-cutting branch of responsibility on the wall of the legal entity¹⁷.

The prevailing theoretical and jurisprudential position in Hungary is that transfer of responsibility is an independent form of *sui generis* delictual liability. The reason for this is that the Civil Code and other laws regulate the cases of transfer of responsibility item by item, which can only be broadened by a statutory provision. The cases of transfer of responsibility are based on responsibility, sanctioning, and can be based on the member's illegal and reprehensible behaviour (abuse of limited member responsibility). The reason for the transfer of responsibility is that the member's illegal and reprehensible behaviour prevented the legal entity from paying its debt to the creditor.

The member's liability is only for those damages that are causally related to his blameworthy conduct, and not for all damages that the legal entity has not satisfied as a claim against him. The creditor's claim is an independent claim for compensation, in which the member can no longer dispute the basic claim, which, however, must be a claim that has not yet been barred in the liquidation procedure.

The basis for withdrawing the member's limited liability protection is the abuse of a right, which resulted in “undercapitalization” of the legal entity. The conversion of liability into unlimited liability appears as a sanction for

16 Marta Brehoszki, PhD *Értekezés Kézirat* Budapest 2007. p. 11.

17 Tibor Nocht: *A magánjogi felelősség útjai a társasági jogban*. Dialóg Campus Kiadó Budapest-Pécs 2005. p. 94-95.

illegality manifested in the abuse of rights. As a result of the member's illegal behaviour, the creditors can be harmed the most. In such a case, the court may determine that the members must meet the debts of the terminated legal entity with their private assets or possibly the companies they founded to meet the demands of the creditors.

It is a well-known jurisprudential position based on which a member (shareholder) of a business company can assert a claim against a third party in a contractual or non-contractual legal relationship directly due to the occurrence of a disadvantage affecting his own private property or personality, if the legal conditions for non-contractual liability for damages are met. This jurisprudential understanding is actually based on the fact that the order of *alterum non laedere* behind the prohibition of non-contractual damages can be extended to the contracting parties. In other words, it is a matter of broadening the contractual duty of care and protection (*culpa in contrahendo*, *Vertrag mit Schutzwirkung für Dritte*) in order to establish liability for non-contractual damages. A contract must also serve to protect third parties. Thus, in the event of a breach of a contractual obligation, in addition to the contractual partners, third parties may also be harmed. They are because the breaching party did not fulfill his general duty of care and protection towards them.

A condition for delictual liability to arise is that the tortfeasor (breacher of contract) foresees the consequences of his u resulting in damage to the company's member (shareholder). If the valuelessness of the member's (shareholder's) company share, business share, and shares were demonstrably foreseeable, the drastic decrease in their market value, then the possibility of delictual liability of the breaching contract cannot be ruled out.

Unlawful unilateral termination of a contractual relationship may have the following consequences for a shareholder's financial situation and the market value of his shares:

The mobilization rights attached to the share ownership belonging to the shareholder's private property become limited or cease. A share is a security embodying shareholder rights with a freely transferable nominal value, the market value of which is determined by market supply and demand. It's always worth what you pay for it in the end. If it loses its market value, the owner of the share will not even receive the amount corresponding to its nominal value. The trading value of the share at a given time therefore actually represents an abstracted market value separate from the nominal value.

The legal basis of the injured shareholder's claim for damages is therefore the unlawful behaviour by which the market value of the shares was reduced, and is based on the cause-and-effect relationship on the basis of which the tortfeasor had to reckon with the consequences of pecuniary and non-pecuniary damage.

Based on the published decisions dictating legal practice directions, the abuse of the legal personality of the company and the limited liability of members was the first legal consequence of liability in our law.

The liability shield created by the legal entity is, as a general rule, impenetrable to the members (founders) of the non-economic company with membership, even in the case of non-profit organizations (associations), because the legal entity is obliged to cover its obligations with its own assets; the members and the founder of the legal entity are not responsible for the debts of the legal entity. If the member or founder of the mentioned non-profit organization-legal entity abused their limited liability, and because of this unsatisfied creditor claims remained at the termination of the legal entity without a legal successor, the member or the founder is obliged to pay for these debts without limit.

Non-profit legal entities and business associations have the same responsibility for their intentional harmful behaviour as a senior official in their field of business.