FOCUS

CORPORATE GOVERNANCE FROM A COMPARATIVE PERSPECTIVE

DOES THE BUSINESS JUDGMENT RULE HELP PROMOTE CORPORATE SOCIAL RESPONSIBILITY?

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The business judgment rule (BJR) is a U.S. corporate law concept that has gained international recognition. It has been moulded, particularly in the definition of the Delaware courts, to protect the managerial business discretion, in other words to protect directors’ decisions from judicial review. Corporate social responsibility (CSR) questions the relationship between corporation with a business purpose and society. More and more attention is drawn to the various impacts of corporate decisions on society, asking for the necessity for directors to take these impacts into consideration when making business decisions. At the centre of CSR and the BJR are the fiduciary duties of the directors — the duty of diligence and the duty of care — and the question as to if the directors have breached their duties and if they have fulfilled them in a CSR compatible manner. This paper discusses how the BJR helps promoting CSR by discussing the advantages and disadvantages (real or apparent) of the BJR with respect to CSR.

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INTRODUCTION

The business judgment rule (BJR) is a U.S. corporate law concept that has extended to corporate law in many countries around the world. The BJR ensues from the fiduciary duty of care of the directors in the countries, which distinguish between the fiduciary duty of care and the fiduciary duty of loyalty or from the unique two-fold directors’ fiduciary duty toward the corporation in countries, such as European countries that do not make this distinction. The BJR is thus a pure question of corporate governance since it advocates for the directors against the share/stockholders in the debate pertaining to who is better equipped to make managerial decisions in the best interests of the corporation.

On the other hand, growing attention is drawn to corporate social responsibility (CSR) at a national and an international level. The question at stake is that of the relationship between private corporations, in particular those with a business purpose, and society. Elhauge defined CSR as “sacrificing profits in the public interest.” CSR has an impact on the comprehension of the directors’ fiduciary duty (duties) towards the corporation by integrating the stakeholders in the conception of a corporation, or at least in the perimeter of individuals whose interests shall be taken into consideration by the directors in addition to shareholders’ interests. The question is, as Kerr points out, whether “the corporate decisions that look beyond the shareholder profit maximization” are promoted or at least permitted by the law of corporate governance. The purpose of this article is to clarify in particular whether and to what extent the BJR fosters CSR and allows the sacrifice of profits for the purpose of social interest.

1. BJR’S DEFINITIONS AND RATIONALES

The BJR has made its first appearance in New York case law in 1944 before Delaware courts formally adopted it in 1960. There are, however, two formulations of the BJR in the U.S.: the American Law Institute’s (ALI) formulation and the Delaware case law definition.

According to ALI’s formulation of the BJR, a director must make decisions exempt from self-interest, on an informed basis, and there must be a rationale for any such

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1 The term of corporate responsibility (CR) is currently preferred by corporations.
5 The ALI’s formulation is a prudential regulation, which may or not be adopted by a federal legislature or by a court.
decisions. The burden of proof is on the directors.

The courts of Delaware (State in which most of the U.S. corporations are incorporated) defines the BJR as “a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” In accordance with the Grobow vs Perot test, directors shall (a) act (the BJR is inapplicable in case of an omission), (b) on an informed basis, (c) in good faith, (d) in the best interests of the corporation and (e) without involving self-interest. The idea of serving the best interests of the corporation implies that the directors have not acted without a rational business purpose. The decision must not be a waste of corporate assets. The “waste standard” is set at the point where the decision lacks any business purpose. In other words, the belief of the directors that their decision is in the best interests of the corporation must be “rational in the sense that it is supported by an arguable chain of reasoning and is not a belief that no reasonable person in their position would hold.” It does not matter if the decision does not serve the interests of the corporation: An alleged business purpose at the time of the decision making is sufficient.

The Delaware case law BJR is complemented by a reversal of the burden of proof: “Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.” The Delaware case law BJR thus provides for a rebuttal presumption that shields directors from personal liability. Under the Delaware case law BJR, the courts in essence do not second-guess managerial business discretion about which decision was in the best interests of the corporation, unless some “procedural” conditions are not met.

There are various rationales for the BJR. The grounds most often invoked are the

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6 Aroson vs Lewis, 473 A.2d 805, 812 (Del. 1984); Kaplan vs Centex Corp., 284 A.2d 119, 124 (Del. 1971); Robinson vs Pittsburgh Oil Refinery Corp., 126 A. 46 (Del. 1924).
9 Id. at 22.
10 B. Horrigan, Directors’ Duties and Liabilities — Where Are We Now and Where Are We Going in the UK, Broader Commonwealth, and Internationally?, 3 International Journal of Business and Social Science, 39 (2012).
11 Aroson vs Lewis, 473 A.2d 805, 812 (Del. 1984); Puma vs Marriott, 283 A.2d 693, 695 (Del. 1971).
12 On the question of the application of the BJR to managers that are not also directors of the company, please refer to L. A. Hamermesh & A. G. Sparks, Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson, 60 The Business Lawyer, 865 (2005); See Dahlberg, fn. 8; C. A. L. Giraldo, Factors governing the Application of the Business Judgment Rule: An Empirical Study of the US, UK, Australia and the EU, Bogota (Colombia), at 121–125 (2006).
following:

1. It encourages the board of directors to take business risks;
2. It prevents courts from reviewing business decisions (since courts are an inadequate forum for such a purpose);
3. It offers a remedy for the lack of an objective standard of review of the business decisions;
4. It respects the shareholders’ will whereby the directors and not the courts are to make business decisions;
5. It overcomes the practical difficulties for the judges to reconstruct the factual environment at the moment of the business decision making;
6. It encourages qualified business professionals to become directors.13

Each constitutive element of the BJR, in particular of the Delaware case law BJR, reflects some or all of the rationales of the BJR. The BJR prevents a shift in the business decisions making from the directors to the courts by setting restrictive conditions under which a court may review the merits of a business decision. In principle, the judges limit their review to the procedural conditions (i.e. the Grobow vs Perot test). This is in substance the echo to rationales 2 and 5 here above.

Said restriction to the review of the merits by a judge promotes the idea that the board of directors, and not the courts, are in charge of the management of the company and have the necessary freedom of decision to take business risks that may lead to favourable or unfavourable outcomes for the company. This is in accordance with the above listed rationales 1 and 4. The purpose of the BJR is that the latitude of decision of the directors may not be replaced by judge’s one. The BJR thus proposes an objective standard of review, limiting the courts’ review to the strict necessity, while leaving the management of the company to the board of directors. The requirement of an alleged business purpose, instead of an effective business purpose, for the fulfilment of the condition that the board of directors shall believe that its decision serves the corporation’s interests, confers to the board of directors a latitude of decision.

This recognition of the directors’ power (instead of the judges’ power) on the running of the company is also helpful for the recruitment of new directors (rationale 6): Their liability will not be judged by a court, but by the other directors or the shareholders, provided that the cohesion of the board is not disrupted by issues related to bad faith or self-interest of some/all of its directors. As Giraldo explains, “[t]he efficiency and synergy of boards highly depends on idiosyncratic relationships and ways of working that members develop producing sure equilibrium [and t]he essential task of the BJR is to reduce external interference in board’s activity and protect the corporate structure and

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13 See Dahlberg, id; Giraldo, id.
unity of the board of directors, limiting it to the cases where the synergy and confidence among the members have already been broken, such as in fraud and self interested transactions, when members usually act alone betraying the other members."14

The reversal of the burden of proof strengthens the directors’ freedom and ability to make business decisions in an independent manner.

II. BJR AT AN INTERNATIONAL LEVEL

The Delaware case law BJR has gained popularity around the world both in common law countries and in civil law countries. Other common law countries have taken inspiration from this U.S. judicial doctrine. The UK, without implementing a legal concept called BJR, has recognized the elements of the U.S. BJR.15 An English court can thus exclude (fully or partially) a director’s liability if the latter acted honestly and reasonably and ought to be excused in all fairness in light of all the circumstances.16 English courts in such cases refrain from reviewing managerial decisions. However, there must be a plausible rationale whereby the relevant action serves the shareholders’ interests.17 The protection of directors is thus lower in the UK than in the U.S. Likewise, under Canadian corporate law, the directors are required to act in the best interest of the corporation but cannot ignore the shareholders’ interests. Australia’s formulation of the BJR has gone beyond the American model by incorporating it into the statutory law.18 But in the Australian version, the burden of proof lies with the directors and the BJR is more a defence instrument.

Civil law countries generally have not implemented the BJR. However, some exceptions can be mentioned such as the Czech Republic law. The BJR has been included in the Czech Corporation Act in force since January 1, 2014.19 At the moment, the principle of non-implementation remains the rule in the other European countries because it is either not necessary considering their corporate law or cultural traditions, or difficult to implement in view of the existing extensive case law on directors’ duties.20 The question had been raised at the European Parliament level whether a modified BJR should be adopted. The proposal was rejected mostly because of the difficulties in implementing in civil law countries a rule constructed under common law and the risks for the BJR to be too favourable for management since directors do not have the same clear duty to

14 See Giraldo, id. at 125.
15 Id. at 147.
16 See Horrigan, fn. 10 at 25.
17 See Giraldo, fn. 12 at 147.
18 Id.
maximize shareholders’ profits as seems to exist in the U.S., at least in the State of Delaware.\textsuperscript{21}

In the EU, there is no uniform abstention doctrine (\textit{i.e.} the doctrine whereby the courts abstain from reviewing the managerial decisions). Some member States such as Germany, France, Spain and the Netherlands, given their understanding of the duty of care, the level of litigation and their national peculiarities, have not implemented the BJR as a standard of judicial review.\textsuperscript{22} French and German case law allow and even encourage directors to make decisions by taking into account the interests of all stakeholders. They also do not formulate an obligation to maximize shareholders’ profits.\textsuperscript{23}

The same is true in Switzerland and in Japan. In Japan, where corporations have a strong CSR tradition, the BJR is not at the moment comprised in the law but merely helps to interpret the directors’ fiduciary duties.\textsuperscript{24} Swiss courts have recognized the BJR as a principle of Swiss law but not as a rule applicable as such and are very cautious when assessing \textit{ex post} if a managerial decision has been taken in full respect of the fiduciary duties.\textsuperscript{25}

In China, there is no mention of the BJR in corporate law.\textsuperscript{26} The courts fully review the managerial decisions and may impose their own business decisions.\textsuperscript{27} Therefore, some scholars are calling for an implementation of the BJR to reduce the power of review of the judges on the management of a corporation and to protect the idea of corporate self-governance.\textsuperscript{28} Some judges, including judges of the Supreme People’s Court (SPC), published articles to encourage Chinese courts to enact a judicial interpretation of Chinese law that incorporate the BJR.\textsuperscript{29} In practice, as WANG says “[d]espite influential SPC judges’ enthusiastic embracing of the BJR, neither judicial interpretations nor typical cases related to the BJR have emerged in China [and it] is still an open question, from a doctrinal perspective how Chinese courts will consider the constituent elements of the BJR in judicial practice.”\textsuperscript{30}

The BJR has thus gained a truly international dimension as to the concept of CSR and its connections with the BJR reach beyond national borders. Many countries, among

\begin{itemize}
  \item \textsuperscript{21} See Giraldo, id. at 144.
  \item \textsuperscript{22} Id. at 145.
  \item \textsuperscript{23} See Reinhardt, Stavins & Vietor, fn. 20.
  \item \textsuperscript{25} See Swiss Supreme Court decision 4A.74/2012 dated Jun. 18, 2012.
  \item \textsuperscript{26} WANG Jiangyu, \textit{Company Law in China: Regulation of Business Organizations in a Socialist Market Economy}, Edward Elgar Publishing Limited (Cheltenham), at 213 (2014).
  \item \textsuperscript{27} See WENG, fn. 7 at 147.
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} See WANG, fn. 26 at 214–215.
  \item \textsuperscript{30} Id. at 215–216.
\end{itemize}
which China and Switzerland, are still debating as to if and how they should incorporate the BJR in their respective corporate law or judicial interpretations.

III. ADVANTAGES OF THE BJR WITH RESPECT TO CSR

A. The Directors’ Major Independence

The BJR grants the directors increased discretion and independence. This is one of the rationales of the BJR, which is further strengthened with the reversal of the burden of proof contained in the Delaware case law BJR. The plaintiff has to prove the existence of fraud, self-dealing, waste or of an invalid business purpose or of gross negligence in information gathering in order to reverse the existing presumption in favour of the validity of any managerial decision. This grants directors a much greater degree of freedom and protection.

As a direct consequence, this freedom and independence of directors favours CSR since it allows them to pursue social objectives. The directors are able “to temper business decision making with their perceptions of social values.” Their decision to sacrifice corporate profits for the social interest is protected from judicial review, as long as the directors can plausibly claim that their decision and action are in the long-term interests of the corporation. We argue in particular that the fact that the “waste standard” is set particularly high under the BJR supports CSR. Indeed, it is only if the decision lacks any rational business purpose that the action is considered as a waste of corporate assets. This advantage is particularly evident in the Delaware case law BJR, since it entails a reversal of the burden of proof. Because under the Delaware case law BJR the burden of proof lies with the petitioner and not with the defendant, the fulfilment of directors’ fiduciary duties and in particular their fiduciary duty of care is rendered difficult to challenge.

In practice, donations to local communities and colleges and the supposed protection of the neighbourhood have been protected by the BJR. These case law precedents,

31 Conditions are different if the corporation is subject to a takeover, see Revlon vs MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986).
33 See Reinhardt, Stavins & Vietor, id.
35 See Munch fn. 32 at 179.
which will be further developed, prove that the independence granted to the directors by the BJR favours CSR.

B. The Supposed Business Purpose

Although researchers have demonstrated that there is no systematic connection between CSR activities and financial performance, even if such a connection exists, the BJR protects directors who make corporate social decisions insofar as these decisions have a supposed business purpose.\(^{37}\) The BJR has permitted corporations to improve such areas as employees’ comfort or to maintain the quality of life of neighbours, through charitable donations, community programs or specific decisions, by claiming the existence of a potential ultimate profit for the corporation.\(^{38}\)

As discussed, a business decision is protected from judicial review by the BJR if, among other conditions, the directors are convinced, when making the decision, that the latter will serve the interests of the corporation. This means that the decision must be rational. In other words, the decision shall be based on a supposed business purpose. This criterion of an existence of a supposed business purpose, instead of an effective business purpose, confirms the freedom given by the BJR to the directors and clarifies that “the locus of authority” for the running of the company is the board of directors and not the court, which is the main rationale of the BJR.\(^{39}\)

With the added flexibility of a supposed business purpose, instead of an effective business purpose, directors have the power to decide that the interests of the employees, of the community or of other stakeholders take precedence over those of the shareholders.\(^{40}\) The BJR, through this criterion, allows for social impact considerations, meaning that the “shareholder value [can be] viewed through the lens of financial as well as social wealth.”\(^{41}\) The reversal of the burden of proof contained in the Delaware case law BJR further strengthens this possibility opened to directors. Thus, the BJR helps promoting CSR work in corporations.


\(^{38}\) See Munch, fn. 32 at 178.


\(^{41}\) See Kerr, fn. 4 at 669.
Evidence thereof can be found in U.S. case law. In *Kelly vs Bell*, the court approved the board’s decision to make donations to the local county government since the development of the county’s community and industry was in the interest of the corporation and thus based on a supposed business purpose.42 Similarly, in *Armstrong Cork Co. vs H. A. Meldrum Co.* and in *A. P. Smith Mfg. Co. vs Barlow*, courts upheld contributions from the corporation to local colleges since the corporation had a self-interest in the improvement of future employees’ qualifications.43 Courts have respected the great latitude of directors in pursuing social ends even where there was “the most tenuous of supposed business purposes.” *Shlenksy vs Wrigley* is an example of the rule that directors may take into consideration, through the BJR, the interests of stakeholders without the fear of being sued for not having focused on maximizing shareholders’ profit.44 Indeed, in *Shlenksy vs Wrigley*, Philip K. Wrigley, majority shareholder and dominant member of the board, decided not to schedule night games because for him baseball was a daytime sport. The minority shareholders sued Philip K. Wrigley for liability, claiming that his decision went against the corporation’s interests. The court dismissed the shareholders’ claim under the Delaware case law BJR and speculated that Wrigley’s decision was based on a reasonable business purpose, i.e. the idea that the deterioration of the neighbourhood’s quality of life could decrease the value of the baseball field property, which was a real estate asset of the corporation. These case law precedents show that the BJR, in particular the Delaware case law BJR, gives to the board the possibility to consider and even serve the interests of the community, employees, the neighbours or other stakeholders.

These case law precedents also evidence that the courts have a deep understanding of the criterion of the supposed business purpose. Under the BJR, courts refrain from reviewing the true intent of the directors when making managerial decisions and whether they actually pursued profitability or not.45 The business purpose of managerial decision does not need to be exempt from criticism, but there should be at least a potential business purpose, even a tenuous one, at the time the decision was taken. Besides, courts tend to find some business purpose even when it is dubious that there was one, as was the case in *Shlenksy vs Wrigley*.46 Since it is not difficult to claim the existence of a connection (even conceptual) between short-term profit sacrifice and long-term profit generation for the corporation, the BJR gives enough latitude to the directors to sacrifice profits in the social interest.47

42 See *Kelly vs Bell*, fn. 36.
44 See *Shlenksy vs Wrigley*, fn. 36.
45 See Elhauge, fn. 2 at 770.
46 See *Shlenksy vs Wrigley*, fn.36.
47 See Elhauge, fn. 2 at 771.
C. The Service of the “Interests of the Corporation”

The BJR refers to the interests of the corporation and not exclusively to the interests of the stock/shareholders. Based on recent developments, a corporation may no longer be viewed as a gathering of shareholders. The concept of shareholder supremacy and the agency theory as explanation of the purpose of the board is outdated.\textsuperscript{48} Despite the fact that, under the traditional view, corporations have a fiduciary duty to maximize profits for shareholders, this view is not sufficiently supported by legal basis.\textsuperscript{49}

Current developments concerning the meaning and purpose of a corporation tend to promote a collective approach. A corporation is more and more seen as a community of various stakeholders (e.g. employees, creditors, suppliers, local communities, NGO and shareholders included).\textsuperscript{50} This differentiation between the shareholders’ interests and the corporation’s interest fits into the CSR debate. The notion of “interests of the corporation” is no longer interpreted as being the equivalent of the shareholders’ interests but also includes the other stakeholders’ interests.

The BJR thus serves CSR by referring to the corporation’s interests instead of the shareholders’ interest and this allows boards of directors to consider and serve the interests of all stakeholders of the corporation, in addition or even to the exclusion of the interests of the shareholders.

D. The Ex-Ante Benefits

Some scholars also argue that the BJR may also have \textit{ex ante} advantages for CSR.\textsuperscript{51} The existence of the directors’ discretion to sacrifice profits creates an expectation that directors will be responsive to social and moral sanctions. The belief in such prospective managerial behaviour encourages others to invest in the corporation or to treat it favourably even before the decision to sacrifice profits in the public interests is made.\textsuperscript{52} The BJR favours CSR by creating an opening for the development of “a very general sort of social understanding that actors are likely to comply with social and moral norms, which leads to a social reciprocity that is profit-maximizing for each actor.”\textsuperscript{53} For ELHAUGE,\textsuperscript{54} \textit{ex-ante} profit maximization was implicitly recognized in \textit{Dodge vs Ford}.

\textsuperscript{49} See Reinhardt & Stavins, fn. 40 at 361.
\textsuperscript{51} See Blair & Stout, fn. 48 at 275, 285; See Elhauge, fn. 2 at 780.
\textsuperscript{52} Id.
\textsuperscript{53} See Elhauge, fn. 2 at 781
\textsuperscript{54} Id.
He claims that “the city’s decision to award [the] profitable piping right to the corporation might never have been made without the prospect that corporate managers would have the discretion to comply with social or moral norms of gratitude (here, by engaging in future profit sacrifices to reward the city for that favourable treatment when the city needed it), so that sustaining the discretion to give away water was ex ante profit maximizing even though it diminished the stream of ex post profits that followed the water giveaway.”

It is true that such an argument in favour of the theory that the BJR fosters CSR is difficult to prove because the increase of profits for a corporation is easier to evidence than a non-diminution of them.

IV. REAL OR APPARENT DISADVANTAGES OF THE BJR WITH RESPECT TO CSR

A. The Risk of Excessive Managerial Generosity and Bad Decisions

Some scholars present the argument that the BJR, in particular the Delaware case law BJR, may either lead to excessive managerial generosity or to bad decisions since the BJR sets only procedural conditions and prevents courts from reviewing the merits of the managerial decisions. The BJR is deemed as creating a “safe harbour” for the directors. It is true that the discretion given by the BJR to directors may not be without negative consequences and disadvantages for CSR, some of which are real and others only apparent.

In the first place, the BJR protects directors from the accusation of there being a potential conflict of interest by not recognizing non-financial advantages as a source of conflicts. The BJR also prevents the courts from reviewing the rationality of a

56 See Elhauge, fn. 2 at 781–82.
59 See Reinhardt & Stavins, fn. 40 at 167.
managerial decision if the procedural preconditions of the BJR are fulfilled. This led to the 1989 court decision, in which directors of Occidental Petroleum had been protected from liability by the BJR with regard to the decision to spend almost half of the company’s annual net profit on an art museum named after its CEO.60 A decision is thus protected by the BJR unless bad faith appears to be the sole reason for its taking, rendering it irrational.61 In addition, “bad faith will be found if a fiduciary intentionally fails to act in the face of a known duty to act demonstrating a conscious disregard for his duties.”62 A managerial decision, which serves neither the interests of the corporation nor those of the shareholders, does not promote CSR. If the BJR may not per se correct such deviations from the expected behaviour, the market, the shareholders’ replacement power (shareholders who may decide not to re-elect the directors or even to remove them), the managerial profit-sharing or stock options or the threat of takeover may well offer such remedy. Thus, the BJR does not grant as such a true carte blanche to the directors of a corporation for taking bad managerial decisions even with an alleged business purpose, given the fact that limits are ultimately set to the exercise of the directors’ discretion and latitude by the market and replacement power of the shareholders. In addition, the BJR does not in theory apply to irrational decisions, in other words to decisions which no reasonable business person would support.63 In such cases, a supposed business purpose is indeed lacking.

The BJR might be an appropriate instrument, but its interpretation by the judges might be the reason why some questionable decisions are protected by the BJR. Indeed, U.S. case law supports the conclusion that courts tend to interpret the BJR more for the protection of the directors than for the protection of the corporation’s interests.64 As a result, some scholars propose to prevent the protection of irrational decisions by the BJR either by developing a duty of good faith or the notion of reasonableness, or by setting higher requirements (than for a reasonable person) for the directors taking managerial decisions.65

B. The Lack of Duty to Take into Account the Stakeholders’ Interests

Another frequent argument against the view that the BJR helps promoting CSR is that the BJR permits but does not require directors to take into account stakeholders’ interests. Again, we share the opinion that this position is not supported by the BJR but mostly by

60 See Donohue, fn. 34 at 86.
61 See Reinhardt & Stavins, fn. 32 at 167.
63 See Munch, fn. 32 at 179.
64 See Dahlberg, fn. 8 at 42.
65 C. R. Taylor, The Inadequacy of Fiduciary Duty Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done about It, 84 Oregon Law Review, 1025 (2006); in the same way, D. Rosenberg, Galactic Stupidity and the Business Judgment Rule, The Journal of Corporation Law, 301 (2007) which proposes that in some circumstances a judge should ask himself what a reasonable and not only a rational director would have done to prevent that the duty of good faith dissolves completely into the duty of loyalty; Dahlberg, fn. 8 at 43.
the interpretation by the courts. According to the BJR, a managerial decision shall be made on an informed basis. Accordingly, directors have an obligation to obtain and consider all reasonable information available, susceptible of having an effect on their decision. Since stakeholders may hold such information, a “stakeholders assessment” should be required from directors under the BJR. Directors may thus find alternatives to the decision previously held and become more receptive to stakeholders’ interests. Consequently, “stakeholder assessments would result in decisions more attuned to corporate social responsibility and the best interests of the entire corporate enterprise.”

C. The Necessity of a Prospective Profitability

It is also not correct to say that the BJR allows the sacrifice of profits for social interest (and so allows CSR) only insofar as there is a plausible connection with prospective profitability for the shareholders. Following this point of view, social entrepreneurship may only be promoted to the extent that it presents a way to meet new market opportunities. Pure sacrifice of corporate profits without any potential return on investment would thus not be allowed under the BJR. We share, however, the opinion that the BJR protects board decisions even in “those rare situations where a decision is motivated solely to benefit non-shareholder constituencies and no argument can be made that shareholder profits will eventually and however indirectly accrue.” Indeed, except in occasional Delaware precedents, e.g. Revlon, Inc. vs MacAndrews & Forbes Holdings Inc., according to which “a board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders,” the interests of the corporation are not defined under the BJR as the ultimate maximization of shareholders’ wealth. A distinction shall be made between the notion of profitability and the duty of maximizing shareholders’ profit. The BJR does not include a duty for the board to maximize the shareholders’ wealth. It only comprises a duty of the board to be led by the subjective conviction that the decision serves the interests of the corporation, and the criterion for the evaluation of such belief is the existence or absence of a supposed business purpose.

However, if it is incorrect to state that the BJR prevents boards from making decisions

67 Id. at 469.
68 Id. at 474.
69 See Elhauge, fn. 2 at 797–798; L. E. Mitchell & T. A. Gabaldon, If I only Had a Heart: Or, How We Can Identify a Corporate Morality, 76 Tulane Law Review, 1665–1666 (2002); Sneirson, fn. 66 at 276.
70 See Sneirson, fn. 66 at 477
71 Id. at 461; similarly See Elhauge, fn. 2 at 842.
that could not ultimately maximize shareholders’ profits, it is correct to say that the BJR does not promote the sacrifice of corporate profits without any potential return on investment for the corporation.

As Elhauge advocates that “the real constraint imposed by the test requiring a rational relationship to profitability was not that it imposed a duty to profit-maximize, but that it set a limit on the degree of profit-sacrificing,” the BJR does not prevent any kind of profit sacrifice for social interest, but indirectly sets a limit to it. Consequently, the BJR, even if it permits any kind of CSR activities, it does not promote all of them. Directors may not decide to give away an important part of the corporation’s assets for CSR purposes without any claimable profitability for the shareholders in the long run — or at least they may not do so on a recurrent basis and be protected by the BJR. Indeed, “the more management gives away, the less plausible any long-term profitability claim may be.” The risk that the BJR may lead to excessive managerial generosity in the long run does not exist.

On the contrary, the true and complete sacrifice of profits in the social interest without any potential economic advantages for the corporation is not promoted and protected by the BJR that sets a limit to the degree of profit-sacrificing allowed. Based on the research up to this day, no court has been able to identify a possible interest for a corporation without defining it in terms of monetary profits either by way of a direct or indirect increase of the share value or by way of a direct or indirect non-diminution of the share value (which is harder to prove). In other words, the BJR does not allow directors “enough [flexibility] to cover the kind of prominent, recurring public service actions that are core to the mission of social enterprises.” The BJR does not protect the board of directors that would decide to pursue unprofitable public interest objectives. The BJR does not allow the constant pursuit of non-financial ends; therefore, if this is the definition to be given to social entrepreneurs, it does not promote such an attitude among the boards of directors of corporations with a business purpose. Other avenues, such as a different corporate structure, will have to be adopted by social entrepreneurs.

CONCLUSION

Depending on the definition given to CSR, the BJR may or may not favour and promote CSR. If CSR is defined as the duty of a corporation to consider and sometimes serve the interests of stakeholders, the BJR clearly promotes it. If CSR is defined as sacrificing corporate profit for social interest, then the BJR allows CSR and promotes it

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74 See Elhauge, fn. 2 at 842.
75 Id.
76 See Munch, fn. 32 at 179.
77 Id. at 180.
only to the extent that such sacrifice is profitable in the long run for the corporation.

Unprofitable corporate profit sacrifice is tolerated by the BJR, although not promoted by it, because the BJR sets a limit to the degree of such sacrifice. In particular, the Delaware case law BJR helps promoting CSR more than the ALI’s formulation of the BJR since the reversal of the burden of proof contained in the former increases the latitude and freedom afforded to directors to pursue social ends.

All in all, the BJR helps promoting CSR activities even if not all CSR activities. The BJR allows and fosters the board of directors to consider and even give preference to the employees’ interests, the interests of the community or the interests of other stakeholders over the shareholders’ interests. The BJR does not entail a duty to maximize shareholders’ profits and pertains rather to the interests of the corporation. The BJR allows the directors to follow the recent developments in the comprehension of the notion of a corporation and of corporate governance, which are compliant with CSR. The directors are not seen anymore as agents of the shareholders but as independent decision-makers who manage corporations viewed as a community of stakeholders.

If it is true that the BJR may lead to negative decisions that disadvantage CSR since the BJR prevents courts from judging the merits of managerial decisions, the advantages of the BJR for CSR overcome such disadvantages. This paper addresses four advantages of the BJR with respect to CSR, two apparent but not real disadvantages and one limited disadvantage. Indeed, the risk that the BJR leads to excessive managerial generosity or to bad decisions is limited: A better interpretation of the duty to believe that the business decision serves the interest of the corporation as well as a better analysis of whether the business decision is really based on a supposed business purpose would reduce the cases where an irrational decision is protected by the BJR. Besides, even though the BJR does not clearly specify that the directors must take into account the stakeholders’ interest, such a duty to make an assessment of the stakeholders’ interests derives from the duty to make a business decision on an informed basis, rendering the alleged disadvantage only apparent. Finally, this paper demonstrates that the BJR permits the sacrifice of corporate profits for the social interests without any potential profitability for the stakeholders, even though it does not promote it, so that the argument of some scholars that the BJR allows CSR only insofar as there is a plausible link with prospective profitability for the shareholders is unfounded.

In consideration of the advantages of the BJR for CSR as opposed to the apparent disadvantages, it appears that the key constitutive elements of the BJR for CSR may be summarized and listed as the following: the duty to believe that a decision is made in the interests of the corporation and the related criterion of a supposed business purpose, the reference to the interests of the corporation (instead of the interests of the shareholders), the duty to act on an informed basis and the reversal of the burden of proof.

In our view, the BJR shall be seen as a tool of corporate governance. It may, however,
not be a sufficient tool to promote CSR since the correction made by the market forces and by the community as well as the shareholders’ power of replacing directors may in some cases also be useful to hinder a director’s abusive decision-making when going against CSR.

The BJR is thus neither an exhaustive means to promote CSR nor a sufficient one. It is at least a useful tool in helping to promote CSR, depending on the situation at hand. The constitutive elements of the BJR discussed above are key factors in the promotion of CSR. The way to incorporate them in national corporate laws, through the implementation of the U.S. model BJR or through a development of the duty of care and loyalty, is only one of the means to improve corporate governance. Other corporate governance aspects, such as the composition of the board, the method of remuneration of the directors, the vote of the pension funds, the conception of the duty of loyalty and the disclosure duties, may also impact heavily on the pursuit by corporations of CSR activities.