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# Entrepreneurial Decisions

Avoiding liability risks (Section 93 AktG, Business Judgement Rule).

By Werner Gleißner

**RMA** When preparing the most important decisions that board members and managing directors make, so-called "entrepreneurial decisions," minimum legal requirements should also be observed. These are primarily derived from the so-called **Business Judgement Rule (BJR)** and fortunately largely coincide with requirements that also make sense from a business perspective. However, these requirements are often not yet fulfilled in business practice, which can result in personal liability risks for board members and managing directors.

The BJR regulates derelictions of duty by board members and managing directors of limited liability companies that are liable to damages (cf. Section 93 of the German Stock Corporation Act, AktG) (based on Gleißner, 2019d). A dereliction of duty is not given, if a board member or managing director acts on the basis of adequate information and in the



best interests of the company when making an "entrepreneurial decision". For the BJR to apply, an entrepreneurial decision must involve a choice between alternative courses of action and the decision must have certain characteristics. The decision-making process must also be based on suitable business methods of decision theory.

It is the central intention of the legislator to clarify with the BJR that no managing director or board of directors is liable for bad luck. Entrepreneurship and entrepreneurial decisions are inevitably associated with opportunities and dangers (risks). With every entrepreneurial decision, e.g., a major investment, acquisition or new product development, the company takes risks. Risks that, for example, a managing director

takes with their decision can, of course, occur at some point and trigger severe negative deviations from the plan, a profit warning, losses, or in the worst case even insolvency. Whether a risk materializes is a matter of chance, a question of good luck or bad luck. It is nonsensical to condemn a decision-maker if they were simply unlucky (i.e., a known risk occurred to a foreseeable extent). This is exactly how the BJR should be understood as well: No decision maker is liable for the bad luck that a risk they have taken materializes.

Instead of liability for the result of a decision, due care stands for the preparation and presentation of decisions. What information is "adequate" has been specified in case law, in particular with references to business methods for preparing decisions under risk. This means that a board of directors or managing director cannot determine at will what they consider to be "adequate" (and otherwise the law would be ineffective too).



Requirements for the preparation of "entrepreneurial decisions," and the content of decision documents, are thus clear (see the summary in RMA, 2019). But these requirements are often not yet met, which can result in breaches of due care and personal liability risks. This is especially the case in the interim because the relevant requirements for risk management in Germany have been clearly expressed since the end of 2018 by the new auditing standard of the German Institute of Internal Auditors (DIIR RS No. 2).

## Implications for Corporate Management and Decision Preparation

In principle, the legislator requires that "entrepreneurial decisions" are to be made on the basis of "adequate information" and should, of course, serve the best interests of the company (see Graumann, 2014). The burden of proof for this lies with the management board or managing director (Section 93 (2) AktG). A management board cannot discharge itself from its due care requirements (and liability risks) even if it obtains the approval of the supervisory board. Even if the supervisory board has approved a corporate decision, the responsibility for proper preparation and adequate decision papers remains with the management board or managing director.

In the case of a decision under uncertainty, it is the risk information in particular that must be given special attention in the preparation of the decision and must be made available to the management board or managing director so that they have "adequate information". The consequence is a closer linking of controlling and risk management for decision preparation ("decision-oriented risk management"), cf. Vanini, 2017 and 2018 as well as Gleißner/Kalwait, 2017. The decisive factor is the consideration of risks at the time when they can be influenced the most: namely in the decision-making situation.

The following content requirements are specifically relevant for decisions about

- Changes in corporate strategy
- Annual planning (annual budget)
- Acquisitions and major investments
- Change in insurance coverage or significant risk management measures (such as hedging of foreign exchange risks)

- Financing decisions (especially with credit agreements/covenants)
- Major projects (with customers or in research and development).

The requirements from the BJR are usually of no major significance for a sole shareholder (owner-manager), as long as the company does not get into an insolvency situation. In such a situation, however, the creditors would possibly have access to the private assets if it can be proven that the insolvency was caused by an inadequately prepared entrepreneurial decision, e.g., a major investment. From an economic point of view a better basis and preparation of entrepreneurial decisions is, of course, generally advisable. The topic is particularly relevant for managing directors who are not themselves shareholders, or managing directors who are at least not the sole shareholder. In principle, any shareholder who later suffers losses, e.g., because of a decision in favor of a major project or an investment, can have the underlying decision papers reviewed. They could accuse the managing director of a dereliction of duty to exercise due care if the requirements outlined above were not demonstrably met. For the reasons explained above, a constellation is particularly problematic, in which risks have subsequently arisen which were not mentioned in the decision papers and were therefore not acknowledged. Particularly in the case of disputes among (family) shareholders, this can quickly lead to very critical developments for managing directors.

## Contents of decision preparation and decision papers

Based on case law, Graumann (cf. Graumann, 2014 and Graumann et al., 2009) calls for the following questions in particular to be answered when preparing such decisions:

- What are the objectives of the decision?
- What possible actions can be taken?
- How do the possible actions affect the objectives?
- How are the predicted effects to be evaluated in terms of benefit and risk?

Decision documents should contain the information explained below in particular (adapted from Gleißner, 2019d). First, it should be briefly explained **what the decision paper actually deals with** and what exactly is to be decided. Above all, it should be stated which objectives are to be achieved

by the decision. Reference should also be made to the company's top target figure and the assessment standard used to evaluate various existing options for action when preparing the decision. Specifically, a risk-adjusted and model-based enterprise value is useful as a metric for the risk-return profile of the courses of action. (For methods of balancing return and risk and thus a "risk-adjusted valuation," specifically strategy valuation, see Gleißner, 2013 and 2019d.) Likewise to be specified are existing constraints that limit the number of courses of action and make it possible to also reduce the number of courses of action that will later be considered in more detail, in advance. Constraints can arise via the resources available in the company (e.g., management capacities) or security objectives formulated by the company management (e.g., in the form of minimum rating requirements).

Every decision paper contains a **description of the initial situation** (actual state). A description of the initial situation often precedes an explanation of the possible actions. Furthermore, the options for possible actions that are considered, which have been assessed and in view of which a decision is planned by management or the board of directors, must be named in the decision document. To describe the possible actions, an initial (qualitative) assessment should be made, which can be done by specifying advantages and disadvantages. Decisions refer to the future and thus forecasts for the (uncertain) future developments are required. In addition to forecasts for the status quo



### Summary

*The most important decisions made by board members and managing directors, the so-called "entrepreneurial decisions," are subject to minimum legal requirements. These result from the so-called Business Judgement Rule and largely coincide with requirements that also make sense from a business perspective. They are therefore also relevant for controlling. However, they are often not fulfilled in corporate practice, which can result in personal liability risks for the managing directors.*



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(one does nothing different than before), **forecasts for all options that are being considered** are required to show what effects are expected here, in particular for cash flows, profits, earnings, and the target specified above as well as the constraints. An explanation should be provided as to how these projections were made. In addition, the key assumptions on which the forecasts are based should be stated. Most assumptions are uncertain because deviations are possible, i.e., there are opportunities and dangers (risks). When the future cannot be predicted with certainty, entrepreneurial decisions are always associated with risks because (1) the development of the environment and (2) the effects of the measure itself are uncertain. Consequently, an essential task of decision preparation is a structured identification, quantification, and aggregation of the risks associated with the respective courses of action. Above all, the uncertain planning assumptions must be recorded as risks (e.g., by specifying the minimum value, most probable value, and maximum value of the corresponding possible characteristics or by specifying alternative conceivable future scenarios). Planning and forecasting in conjunction with the risks results in realistic bandwidths of future development.

For the actual assessment, **risk and return must be weighed against each other** (taking into account the rather qualitative advantages and disadvantages of the course of action specified above, which should be considered in the quantification). At this point, it is recommended to use so-called risk-oriented assessment procedures that map the risk-return profile of the course of action to the measure of success (simulation-based assessment; see Gleißner, 2019b and Gleißner, Risikoadäquate Bewertung bei unternehmerischen Entscheidungen in this book). An overall assessment rounds off the decision paper. An explicit recommendation for a specific course of action is not required.

## Problem areas and implementation in practice

Various problems and sources of error are known from corporate practice, which can easily lead to a violation of the BJR requirements.

1. Boards of directors or managing directors make "entrepreneurial decisions" without decision papers or without demonstrably having "adequate information" (e.g., there is no analysis of the risks associated with the decision).
2. It remains unclear which decisions were made by a board member or managing director in their role as a corporate body (and thus as a "Section 93 AktG decision") or in another capacity, e.g., as head of treasury (with lower requirements for decision preparation).
3. The risks associated with a corporate decision are revealed (and presented in risk reporting) as part of the risk management process after the decision has been made, without the corresponding risks being shown in the decision paper.

4. It remains unclear to what extent the decision for corporate planning (annual budget) has approved all measures and projects contained therein (or whether there are reservations that require new "entrepreneurial decisions", e.g., regarding individual projects).
5. Decision documents are obviously not neutral (as required) but are primarily requests from interested parties (such as the project manager) to the executive board.
6. Essential parts of the "adequate information" required by law are missing (e.g., transparent presentation of the assumptions used for forecasts, identification of possible courses of action, or comprehensible consideration of risks in the decision-making process).
7. The "informational depth" is too low and thus not "adequate", i.e., the scope of the analyses preparing the decision (especially of the risk analysis) - time and money invested - is not in any meaningful proportion to the investment volume and risk of the decision (and there are often no guidelines for assessing "adequateness").

## Implications for risk management

Empirical studies show that risk management in particular is not yet geared to the preparation of entrepreneurial decisions, which must all be understood as management decisions involving risk (see Vanini/Leschenko, 2017 and Köhlbrandt et al., 2020). This results in deficiencies in the decision papers, especially in the risk analysis for preparing decisions. Traditionally, the core task of risk management is to create transparency about individual risks and the aggregated overall scope of risk to identify potential insolvency risks jeopardizing the company's existence at an early stage so that countermeasures can be initiated in time (explained below with reference to Gleißner, 2019d; see also Gleißner, 2019a).

The requirement for risk aggregation is the central requirement for a risk management system (RMS) that serves to prevent crises and safeguard the company's existence. The "developments that could jeopardize the company's existence" usually result from combination effects of individual risks, which are analyzed via risk aggregation. Since risks cannot be added, a Monte Carlo simulation is needed for the aggregation, see Gleißner, 2017a.

Developments threatening the company's continued existence today are primarily caused by (impending) illiquidity, which means that the sole consideration of the possibility of over-indebtedness (and balance sheet losses), as was still common years ago, is insufficient. Impending illiquidity arises in possible future scenarios that show a violation of minimum rating requirements or where covenants are breached, resulting in the termination of a loan. The early detection of possible crises and insolvencies thus implies the aggregation of risks in relation to corporate planning, evaluating the impact on rating and covenants (and not only through over-indebtedness).

Today, risk management is seen as part of the "second line of defense" (cf. Bantleon, et al., 2017) and a component of integrated risk-oriented management - and no longer as a quasi-autonomous management system. Connections to all other management systems that deal with risk, such as controlling, treasury, and quality management are important (cf. Gleißner, 2020). COSO Enterprise Risk Management (2017), ISO 9001 (2015) and ISO 31000 (2018) emphasize the importance of risk and the intention of creating integrated management systems. This intention is echoed by the idea of Enterprise Risk Management, GRC, and Risk Governance (see Stein/Wiedemann, 2016). However, many GRC approaches - Governance, Risk & Compliance - still lack the decision orientation and the link with controlling and value-based management. Instead, one often sees a focus on compliance, i.e., a focus on adherence to laws and internal regulations as well as risk avoidance. A central challenge of an integrated and decision-oriented risk management is linking to controlling and corporate planning. This is necessary to obtain planned values that are "unbiased" and to be able to consistently weigh up risk and return when making decisions.

In addition to early crisis detection, risk analysis should now also serve to prepare for decision-making. This requires, in particular, powerful procedures for risk analysis, simulation-based risk aggregation, and risk-based evaluation of possible actions (e.g., for strategy development, cf. Schwenker/Dauner-Lieb, 2017, and for strategy evaluation). As a result, "decision-oriented risk management", as specifically outlined by DIIR RS No. 2, is recommended to meet the requirements of the BJR for the preparation of entrepreneurial decisions (cf. Gleißner/Kimpel, 2019).

## Implications for Controlling

In the case of corporate groups and larger medium-sized companies, it is obvious that controlling and risk management support the preparation of entrepreneurial decisions. Controlling in particular is already often seen as the body whose primary task is preparing entrepreneurial decisions ("business rationality assurance"). Since information on the risks associated with a decision is one of the key elements of the decision paper, a risk analysis is necessary in preparation for the

decision, and this requires the involvement of risk management, if such a department has been established in the company.

The expected success of a company largely depends on the quality of the decisions made by the executive board or management. To prepare upcoming management decisions, controlling should select an adequate methodology, procure the information required for this application and thus submit a transparent and well-founded decision proposal. Minimum requirements for this are set out in the explained Section 93 of the AktG, where adequate information is required as a basis for decision-making.

The most important driver for the implementation of BJR requirements in many companies may be controlling rather than risk management, cf. Wolfrum, 2018. This is because controlling is already the central instance for preparing entrepreneurial decisions for the board and management in many companies. And when preparing entrepreneurial decisions, the opportunities and dangers (risks) associated with them must be taken into account. A starting point for risk-adequate decision preparation is therefore first to systematically record the business decisions and then to work out which methods are to be used to prepare them adequately - and specifically how opportunities and dangers (risks) are to be taken into account in the decision preparation. This automatically leads to the need to provide methods for the identification, quantification, and aggregation of risks in controlling. Whether the corresponding capabilities are built up in controlling, or controlling works together with risk management for this, is of secondary importance.

Unfortunately, however, many empirical studies prove that the necessary cooperation between risk management and controlling - or simply the use of risk management methods in controlling - is still underdeveloped (see e.g., Angermüller/Gleißner, 2011 and Vanini, 2017 and 2018 as well as Vanini/Leschenko, 2017). Controlling is thus unable to adequately fulfill its most important task. Preparing decisions without considering risks is simply nonsensical. Even the legal minimum requirements of the BJR outlined here (Section 93 AktG) are not fulfilled. Of course, since the future cannot be predicted with certainty, it is precisely the infor-

mation on risks that forms the core of the "adequate information" required by law.

The task of controlling to contribute to the preparation of entrepreneurial decisions cannot be solved without explicitly considering opportunities and dangers and assessing their implications. Deterministic (single value) planning, sham accuracy and the illusion of control regularly noted by psychologists do not help. Decision-oriented controlling must have and apply appropriate methods, that

- systematically identify and help quantify opportunities and dangers (risks),
- aggregate quantified individual risks to the overall risk level; and
- can assess the implications of planning and the risks that can trigger deviations from the plan for (a) owners (performance measure) and (b) creditors (rating).

It can be seen that this requires the tools of risk management in controlling. The aim is to systematically capture uncertain planning assumptions and exogenous risks (e.g., due to the uncertain effects of technological trends or changes in competitive forces). These must be described by suitable probability distributions (in the simplest case by specifying the minimum value, most probable value, and maximum value of a planning item). And since risks cannot be added up, a Monte Carlo simulation is required for risk aggregation, i.e., it is necessary to determine a large representative number of future scenarios to calculate the range of future developments of cash flows and earnings. Instead of single-value planning, from which no one knows how far one can deviate, bandwidth planning is used. The risk content is expressed by a risk measure (such as standard deviations of earnings or the value-at-risk), which in turn enables simple "calculating with risks". In this way, expected risks and returns can be weighed against each other when preparing decisions. This is done using the methods of risk-adjusted valuation (e.g., by deriving cost-of-capital rates in investment appraisal from aggregated return risks; see Gleißner, 2017a and 2019b). To meet the requirements of the Control and Transparency Act (Section 93 AktG), we also investigate whether combination effects of risks could result in developments that could jeopardize the company's continued existence (e.g., if the minimum rating requirements or covenants are violated).

## Organizational implementation of the BJR requirements

For companies of all sizes, from smaller medium-sized enterprises to corporate groups, it is advisable to fundamentally think through and regulate how "entrepreneurial decisions" are to be prepared systematically and soundly in the future. The following questions should be considered, discussed, and finally documented:

- What specifically is meant by an "entrepreneurial decision" in the company and what types of such decisions typically occur (e.g., regarding investments, large research projects, financing, etc.).
- What should the paper for an entrepreneurial decision look like in principle, and what information is generally included (see above) - and what specific information requirements arise for special types of decisions (e.g., customer orders or investments)?
- Which departments of the company are to be involved in the preparation of entrepreneurial decisions in which way and how is the overall process of decision preparation – up to the preparation of the decision paper – to be organized?

Particularly in the case of small and medium-sized companies, there is usually no separate unit for controlling, and certainly not for risk management, although the establishment of risk management in some form is also mandatory for such companies. The preparation of entrepreneurial decisions and the creation of decision papers is thus the task of the commercial manager or a managing director directly. This is not a fundamental problem at first. The legislator speaks of "adequate information" and thus makes it clear that the informational foundation naturally depends on the size, importance, and risk of the pending decisions. If, for example, an investment or project involves comparatively low capital expenditure and risks, a more concise documentation of the decision paper is justified as well.

In addition, it should be noted that, particularly in the case of small and medium-sized companies, a managing director performs a variety of tasks for different posts at the same time, not all of which are the consequence of his or her position as an organ of the company – as managing director. So,

whether a written decision document is even necessary depends on whether the pending decision is actually an "entrepreneurial decision", i.e., of fundamental importance for the company. Other decisions can, but do not have to be prepared and documented to such an extent. However, it makes sense to clearly define what indeed must be considered an "entrepreneurial decision" in view of the size of the company. The number of actual "entrepreneurial decisions" is manageable for most companies.

To ensure adequate preparation of entrepreneurial decisions from an organizational point of view, **3 steps are therefore necessary:**

### 1. Recording of all "entrepreneurial decisions"

The aim of this step is to identify all the key entrepreneurial decision-making situations in corporate management and the system used to prepare decisions. This includes, above all, a clear definition of what is and is not considered to be an entrepreneurial decision. Furthermore, initial potential for improvement can be identified in a cursory manner in (1) the content of the decision papers and (2) the procedure and methodology for drafting them.

### 2. Establish requirements for a decision paper and for "adequate information" (Section 93 AktG)

Here, the necessary content of and further requirements for decision papers are designed in order to be able to substantiate "adequate information". In most cases, a general "template" for a decision paper is created first. On this basis, text templates can be derived, e.g., for special types of decisions, such as investment decisions.

### 3. Design of the management system for the creation of decision papers

In this step, the management system for preparing and reviewing the decision paper is designed and thus anchored in existing management processes (such as controlling and risk management). So, necessary specifications are discussed, which units/departments are to be involved in the preparation of the decision, at which times and with which resources. In this process it must be decided which unit in the company will take the lead on the system. This may, for example, be the management assistant or controlling or risk management. Particularly for

the risk management system, the need to adapt existing processes, the risk manual, etc. is discussed to meet the requirements of a "decision-oriented risk management system" (in accordance with DIIR RS No. 2). In addition, the necessary resource requirements for the policy for legally compliant decision preparation are also discussed. Most notably, it is examined what additional resources (and qualifications) might need to be built up.

The essential regulations can be summarized in a compact "handbook". It is also useful to prepare "standard forms" for certain types of decisions, as the amount of work required to prepare a decision can then be significantly reduced and the decision-maker, managing director or board member, saves working time: they always receive similarly structured decision templates.

It is advisable to consider possible problem areas at this stage already and to think through basic strategies for action. How, for example, is it to be achieved that the submitted application is transformed into a neutral decision document? Under what conditions are simplifications acceptable? When is explicit quality assurance of a decision paper necessary?

## Conclusion and Implications

The quality of an entrepreneurial decision depends on the quality of the information underlying it. To avoid derelictions of duty to exercise due care, it is required by law to base the preparation of "entrepreneurial decisions" on adequate information, notably including statements about the opportunities and dangers (risks) associated with the decision. Accordingly, it is necessary to set up a "decision-oriented risk management" that helps to prepare decisions by means of risk analyses. To improve management systems efficiently and unbureaucratically with regard to the ability of boards of directors and managing directors to prepare decisions – while also making risk management decision-oriented – the following starting points are helpful:

- An already existing risk management system should be audited with regard to the requirements from the BJR as well, for which the audit criteria according to the new German risk management standard DIIR Audit Standard No. 2 can be helpful.



- Companies should clearly define which "entrepreneurial decisions" are made in the board of directors and management to ensure, at least for these cases, an appropriate basis for decision-making (with adequate information).
- It should be clearly regulated which information must generally (and verifiably) be included in the decision papers for entrepreneurial decisions, with particular attention being paid to the central importance of information on the opportunities and dangers (risks) associated with the decision.
- The internal processes should be aligned in such a way that adequate decision papers are created as efficiently as possible, which requires a "decision-oriented focus" of risk management.

It is important to emphasize once again that the mere occurrence of a risk that has led to negative deviations from the plan cannot be construed as a dereliction of duty to exercise due care in a decision. Other risks that are inevitably associated with entrepreneurial decisions can also materialize. An indication of a dereliction of duty to exercise due care as a result of an inadequate decision-making paper (specifically inadequate decision-preparing risk analyses) is given, if

- a risk not mentioned in the decision paper leads to negative deviations from planning and losses (because of a lack of systematic risk identification) and/or
- negative deviations from planning have occurred due to risks to such a high extent that it cannot be explained by the required quantitative risk analysis (i.e., the extent of the losses is greater than the extent of the risk). For risk quantification and risk aggregation, as well as methods for testing the adequacy of risk analyses, see Gleißner, 2017a; 2019b and 2019c.

Checking this is the function of a plan deviation analysis: no plan deviation without underlying risk.

As a result, one fact becomes clear from the BJR: entrepreneurial decisions are associated with risk. No managing director or executive board is liable for the misfortune that the risks associated with their decisions – e.g., regarding investments or new product developments – may also be realized one day (and may result in losses). However, derelictions of duty to exercise due care do occur when "entrepreneurial decisions" are not

based on adequate information, more specifically when the decision papers do not make it clear which opportunities and risks are associated with the decision. This also has implications for controlling. In most cases, controlling is the unit responsible for preparing entrepreneurial decisions and thus for preparing decision papers containing the "adequate information" required for such management decisions under uncertainty. Since this primarily includes information on the risks associated with the decision, it is necessary for controlling to either include risk analyses from risk management or to use its own risk analyses to show how the company's risk level would change as a result of a decision.

In conclusion, it should be noted that especially the "entrepreneurial decisions" of particular importance for the success of the company should be adequately prepared by managing directors and board members and the results of the decision preparation should be documented in decision papers. The legal requirements of the Business Judgement Rule (Section 93 of the German Stock Corporation Act, AktG) are to be interpreted as minimum requirements for the preparation of decisions and are therefore of particular importance for controlling. ■

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