

Criminal breach of trust in credit institutions

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1. Introduction

The recent financial and sovereign debt crises triggered global public debate on the lending and investment practices of financial institutions, as well as their corporate governance structures. Many called for a reinforcement of the legal (civil and criminal) accountability of directors and senior managers of financial institutions¹, while others highlighted the dangers of over-deterrence for innovation and economic growth. In Greece, the so-called “red loans” are still a hotly debated and largely unresolved matter. In that context, bank directors and officers are often being blamed for irresponsible, even predatory mortgage

¹ *See.g.* the 2010 European Commission Green Paper on Corporate governance in financial institutions and remuneration policies, http://ec.europa.eu/internal_market/company/docs/modern/com2010_284_en.pdf.

See also the 2013 amendment of article 54 of the German law for Financial Institutions (Kreditwesengesetz - KWG§ 54), discussed by Alexandra Mikroulea, *He Diatakseis Tou Neou Rithmistikou Plasiou Gia Tin Etairiki Diakivernisi Ton Pistorikon Idrimaton (N. 4261/2014, CRD IV)*, [The Provisions Of The New Regulatory Framework For Corporate Governance Of Credit Institutions (law 4261/2014, CRD IV)], CHRIMATOPISTOTIKO DIKAIIO, 1 (2014) (Greece).

and consumer lending, as well as for extending sub-collateralized credit to entities with questionable solvency, esp. media enterprises and political parties. This has recently led to litigation, with charges being brought against senior bank managers, pursuant to article 390 of the Greek Penal Code (GPC).

Distinguishing between reasonable and excessive financial risks is admittedly a very difficult task. Banking is not exempt from the observation that “most poor business decisions could be avoided (and many good ones made even better) with the benefit of hindsight”². Part of the debate is whether the law (as opposed to shareholders, markets or other mechanisms) has a role in determining “how much risk is too much risk” and if so, how exactly the law should intervene (e.g. through government regulation of risk-taking, mandatory disclosure rules and/or judicial review)³. A further question is which should be the role, if any, of criminal law in the context of financial risk-taking; and whether the initiative for criminal prosecution should come from traditional law enforcement agencies (acting *ex officio*) or following a complaint lodged by the victim or its stakeholders (private prosecution).

It is our contention that the role of criminal law should be limited to extreme cases of implausible business decisions, taken in clear violation of due process. The dangers of hindsight bias, inherent in *ex post* judicial review, and the underlying policy interests make it paramount that said review is subject to clear limits, already identifiable at the time that business judgment is exercised. Otherwise, the benefits of holding particular individuals accountable for their shortcomings, as well as the related deterrence effect, will be negligible, as compared to

² Joel B. Harris & Charles T. Caliendo, *Who Says the Business Judgment Rule Does Not Apply To Directors of New York Banks?*, 118 *Banking L.J.* 503 (2001), with detailed references to NY cases and legislation regarding the standard of liability for banking directors.

³ Wulf A. Kaal & Richard W. Painter, *Initial Reflections on an Evolving Standard: Constraints on Risk Taking by Directors and Officers in Germany and the United States*, 40 *Seton Hall L. Rev.* 1441 (2010).

the costs to the efficient operation of the banking system and the national economy as a whole.

2. The dangers of hindsight bias

The adverse impact of the so-called hindsight bias on judicial review has been identified and discussed exhaustively in the US and Europe, particularly in the context of the so-called “*Business Judgment Rule*”. Adjudicating in the light of *ex post* knowledge may very well lead a judge to the conclusion that fraud or other misconduct had occurred, even where it had not. The potential effects of hindsight on judgment have accurately been summarized as follows⁴:

“Hindsight blurs the distinction between fraud and mistake. People consistently overstate what could have been predicted after events have unfolded- a phenomenon psychologists call the hindsight bias. People believe they could have predicted events better than was actually the case and believe that others should have been able to predict them. Consequently, they blame others for failing to have foreseen events that reasonable people in foresight could not have foreseen. [...] hindsight can mistakenly lead people to conclude that a bad outcome was not only predictable, but was actually predicted by managers.”

Further to the above, psychological research shows that mere awareness of the hindsight bias is not enough to reduce its distorting influence on judgment⁵. Therefore, awareness of the danger is not a remedy in itself.

It has been suggested that, in order to address the hindsight bias problem, one must reconstruct the situation as people saw it beforehand, i.e. focus on the circumstances that gave rise to the outcome and

⁴ Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 Nw. U.L. Rev. 774 (2003-2004).

⁵ *Id.* at 780, 791.

not to the outcome itself⁶. One should therefore examine only contemporaneous information specific to the bank and consider the predictive ability of the managers, i.e. their ability to make accurate forecasts. Intervening events not specific to the bank should be ignored. That said, at the time that a prediction or forecast is made, a number of indicators will be available, supporting or refuting the reasonableness of that forecast. Once the prediction fails, the evidence refuting it will seem much more significant. This indicates that the review of contemporaneous information does not protect against the hindsight bias⁷; knowledge of the outcome may “contaminate” the retroactive evaluation of the information available at the time of the action or omission and make the obscure seem obvious.

It is clear that there is no easy solution to the hindsight bias problem. Being aware of it will not necessarily lead to judicial self-restraint. This is exactly why any *ex post* judicial review must focus not on the substance of the business decision, but on the legitimacy and soundness of the decision-making process. This should particularly be the case regarding financial institutions (even more so than in regular corporations), with view to the competing interests at stake, to which we now turn.

3. Relevant interests at stake

Arguably, banks serve a “quasi-public” function, by holding the public’s funds for safekeeping, and as a result the standard for the duty of due care in the context of banking may be higher than in ordinary corporations⁸. It is further argued that a personal immunity of directors and officers from liability (i.e. the lack of potential adverse consequences at an individual level) will encourage unsound and high-risk

⁶ *Id.* at 786 .

⁷ *Id.* at 816.

⁸ See Cory A. McKenna, *FDIC v. RIPPY: Due Care and the Business Judgment Rule in the Forth Circuit and the Potential Implications for the Banking Industry*, 20 N.C. Banking Inst. 201 (2016).

practices⁹, or even opportunistic behavior, at the expense of the entire corporation.¹⁰ Under that approach, there is a need to promote accountability¹¹, which is defined as “the need to deter and remedy misconduct by the firm’s decision makers and agents.”¹² In that direction, the 2013 Fourth Capital Requirements Directive (CRD IV) has considerably increased the risk for bank directors of paying damages or facing administrative sanctions, in case of violation of their administrative duties¹³.

On the other hand, everyone acknowledges that risk-taking is an inherent aspect of any lending activity; the expectation and the importance of risk for the vitality and competitive position of banking institutions cannot be overlooked. If directors and officers are fearful of incurring personal liability (civil or criminal), they will likely avoid potentially beneficial risks, which they would otherwise take. This is also particularly the case when they enjoy little or none of the benefits earned by the corporation on risky projects¹⁴. Risk-averse directors

⁹ E.g. highly speculative investments of the bank’s money, without sufficient information on the financial products’ structure and value.

¹⁰ See McKenna, *supra* note 8, at 215-6.

¹¹ For the cultural aspect of the debate, esp. the different approaches to risk, as well as the contention that societies that emphasize personal responsibility are likelier to view corporate officers and directors as being an appropriate focus of regulation and to hold them legally liable for their mistakes see Kaal & Painter, *supra* note 3, at 1451-2.

¹² Stephen Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 Vand. L. Rev.116 (2004).

¹³ Up to € 5.000.000 or double the loss incurred as a consequence of the violation, CRD IV, art. 67 (2)(f)-(g).

¹⁴ Gerhard Wagner, *Officers’ and Directors’ Liability Under German Law- A Potemkin Village*, 16 Theoretical Inq. L.94 (2015), points out that managers don’t internalize the full gains accrued from their diligent decisions and should therefore not internalize all the negative consequences of their negligent ones. He further observes (p. 95) that “Managers who face such asymmetric payoffs will adapt their behavior accordingly. They will be careful to avoid decisions that may lead to losses, particularly losses large enough to threaten their personal wealth because they exceed the ceiling of the D&O insurance cover. At the other end of the spectrum, they will

and officers can therefore act as a barrier to capital for those relying on banks to secure credit, e.g. in order to start or expand a business. This tendency towards over-precaution, even inertia will lead to reduced revenue for the bank, will have an adverse impact on its market share and, more importantly, will stifle growth in the economy as a whole¹⁵.

Another, less obvious negative implication of too much *ex post* scrutiny is herd behavior: it is easier to justify a choice that follows in the rest of the industry's footsteps, instead of trying something new and innovative. But, as eloquently put, "Ironically, few disagree with the proposition that bank managements' herd behavior was one of the catalysts of the financial crisis."¹⁶ Risk of liability also creates a perverse incentive to stick to a previously chosen course of action, instead of changing strategies to rectify past errors. Indeed, a prompt reaction to previous mistakes will likely expose, sooner rather than later, the shortcomings of a previous decision and intensify the risk of being held liable. One can always hope that staying put and waiting for a favorable change in circumstances may remove that risk altogether¹⁷.

An additional consideration, which is particularly salient in large entities with bureaucratic and hierarchical structures, is the extent to which one is entitled to rely on information and advice provided by subordinates or advisors. Directors, officers and ordinary employees enjoy different levels of involvement in particular projects and different levels of accessibility to corporate information. There must be certainty as whether an officer of the bank may rely in good faith on the bank's records (information, opinions, reports, statements [including financial statements and other financial data] prepared or presented by other officers or employees of the corporation, legal counsel or public

not care much about foregone opportunities to earn high profits, as these profits would accrue to the company and not to them personally."

¹⁵ McKenna, *supra* note 8, at 210.

¹⁶ Luca Enriques & Dirk Zetsche, *Quack Corporate Governance, Round III? Bank Board Regulation Under the New European Capital Requirement Directive*, 16 *Theoretical Inq. L.* 229 (2015).

¹⁷*Id.* at 229.

accountants etc). Having to micro-manage and double-check everything in the context of overseeing and monitoring subordinates will not only be counterproductive, but effectively paralyzing for the activities of the institution¹⁸.

Finally, the risk of having directors and officers vindicating their business judgments at court will also discourage highly qualified individuals from seeking positions of responsibility in the banking industry¹⁹. Alternatively, tight liability standards will lead to demands for increased insurance²⁰, indemnification rights and compensation of residual risk²¹. These costs will be passed on to the consumer, with no obvious counter-benefit.

On the balance, there is a clearly identifiable value in directors' and officers' authority and discretion, which would be lost if their decisions were routinely subject to judicial scrutiny. Meanwhile, as correctly pointed out, accountability mechanisms may amount to a shift of authority to judges, since "the power to hold to account is ultimately the power to decide."²²

All these considerations further highlight the necessity of setting such limits to the judicial review of the substantive merits of a business judgment, that strike the appropriate balance between accountability and decision-making authority²³. For that purpose, it is useful to review the provisions of article 390 GPC on Criminal Breach of Trust, as

¹⁸ See concerns expressed by Mikroulea, *supra* note 1, regarding the provisions of article 91(8) of Directive CRD IV and article 83(8) of law 4261/2014 and the need to exclude negligent behavior from their all-too-vague scope.

¹⁹ See McKenna, *supra* note 8, at 209-10.

²⁰ The fact that most of the risk associated with directors' personal liability is shifted to insurance companies, with the costs being incurred by the corporation, instead of the parties threatened with liability, and the related moral hazard problem, are discussed by Wagner, *supra* note 14, at 80, 89.

²¹ See Enriques & Zetsche, *supra* note 16, at 228.

²² See Bainbridge, *supra* note 12, at 103, 108, with further references to KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 78 (1974).

²³ For an analysis of the tension between authority and accountability see Bainbridge, *supra* note 12, at 84 *et. seq.*

applied by case law particularly in the case of banks, as well as evaluate the significance of the business judgment rule in that context.

4. Criminal Breach of Trust pursuant to article 390 GPC, as applied by case law

4.1. The provisions of article 390 GPC

Pursuant to Article 390 of the Greek Penal Code, “He who knowingly causes harm to property belonging to another, the custody or management of which has been entrusted to him by law or by virtue of a transaction (in whole or in part or for a single action), is subject to a penalty of incarceration for a minimum of three (3) months. If the property damage exceeds the amount of thirty thousand (30.000) Euros, the perpetrator is subject to a penalty of imprisonment of up to ten (10) years”.

4.2. Salient elements of the *Actus Reus*

4.2.1. Custodian or manager of property belonging to another

Criminal breach of trust is a *delictum proprium*, i.e. only the custodian or manager of property belonging to another can be the subject of the criminal behavior. According to related case law²⁴ and academic

²⁴ See e.g. Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 754/1982, LG' POINIKΑ CHRONIKΑ [P.CH.], 164 (1983) (Greece), which dealt with the case of a bank employee, who held on to 66 bank checks (which had been issued by a client of the bank and delivered to him) for a number of months, thereby failing to cash them out promptly, to the financial detriment of the bank. The Supreme Court annulled the appellate judgment as legally unfounded, because it failed to specify whether the accused (a simple bank employee subject to the orders of the director of the branch) had been vested with the power to cash out the checks delivered to him, i.e. whether he had been contractually entrusted with the custody or management of the property of the bank. See also Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 1617/2010 and 532/2011, <http://lawdb.intrasoftnet.com> (NO-

literature²⁵, the custodian or manager must have the power to act discretionally and at will, *i.e.* exercise judgment and enjoy a degree of independence while taking and enforcing decisions concerning the property belonging to another. Simple employees, who don't take initiative, but only execute orders or instructions of their supervisors with regard to the management of the property, cannot be held liable for criminal breach of trust.

Determining who is a custodian or manager of the property is more difficult in the context of large legal entities with a bureaucratic structure and several corporate organs, which act collectively²⁶. Those at the top of the corporate hierarchy and in managerial positions (e.g. board of directors, CEOs, heads of financial departments) will likely qualify as custodians or managers of the property of the entity²⁷, while those at the bottom, who only deal with menial tasks, will not. For those holding intermediate positions, it will be established on a case-by-case basis, with a focus on whether the accused exercised discretion and judgment, while performing her duties²⁸. Thus, members of the Senior

MOS).

²⁵ See ILIAS ANAGNOSTOPOULOS, ZITIMATA APISTIAS - ARTHRA 390 & 256 PK [ISSUES OF CRIMINAL BREACH OF TRUST- ARTICLES 390 & 256 PC], 8-11 (Law & Economy, P.N. Sakkoulas SA eds., 2d ed.)(2002).

²⁶ *Id.* at 14.

²⁷ See, however, Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 1586/1994 (in Council), <http://lawdb.intrasoftnet.com> (NOMOS), MD' POINIKIA CHRONIKA [P.CH.], 1381 (1994), which pointed out that the position of Chairman or member of the board of directors doesn't, in itself, come with a power to represent the company and manage its affairs; however, the articles of incorporation or a resolution of the BoD may vest a director or officer with such representative powers. As accurately observed, the BoD is a manager when it acts collectively and commits the company toward third parties as its organ of representation (art. 18(1), 22 of law 2190/1920), see CHRISTOS MYLONOPOULOS, POINIKO DIKAIODEIDIKO MEROS, TA EGLIMATA KATA TIS IDIOKTISIAS KAI TIS PERIOUSIAS (ARTHRA 372 – 406 PK) [PENAL LAW-SPECIFIC PART: THE CRIMES AGAINST OWNERSHIP AND PROPERTY (ART. 372-406 PC)], 627 (Law & Economy, P.N. Sakkoulas SA eds., 2d ed.) (2006).

²⁸ ANAGNOSTOPOULOS, *supra* note 25, at 14.

Credit Board of a banking institution, who approved a working capital line of credit, as well as the issuance of two letters of credit in favor of a corporate borrower, have been deemed as managers of the property belonging to the bank²⁹.

4.2.2. The transactional and external nature of the harmful act or omission

According to well-established case law³⁰, the harmful act or omission of the custodian or manager must be **external**, i.e. have an impact on the property relations of the property owner towards third parties; in principle, purely internal actions or omissions (be they material or legal acts) do not suffice³¹ (although some times the lines are blurred). Also, said harmful behavior must be **of a transactional nature**, namely fall within the scope of the legally vested representative power of the custodian or manager, who creates legally binding obligations for the property owner. Material acts or omissions (such as the destruction of property, the unauthorized use of company resources, the inadequate

²⁹ See Efeteio Athinon (Efet.Ath.) (Athens court of appeals) 623/1993, ANAGNOSTOPOULOS, *supra* note 25, at 15, 28.

³⁰ See e.g. Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 78/1922, LD' Themis, 243 (1923-4) (Greece), which held that internal abuses of power, such as the misappropriation of funds or negotiable instruments of the bank by a bank officer, do not satisfy the *actus reus* of the crime of breach of trust, because they do not constitute an abuse of the representative power of the custodian, by means of an external transactional action. See also Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 973/2010 (in Council), Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 532/2011, <http://lawdb.intrasoftnet.com> (NOMOS).

³¹ In that sense, it is correctly pointed out that when a bank officer or members of a collective supervisory organ of the bank approve a transaction (e.g. a loan agreement, a letter of credit), without being involved in the execution of the contract with the client, they shouldn't be indicted as principals, but as procurers, because their actions are not external. The subordinate officers directly involved in the transaction may be indicted as accomplices, see ANAGNOSTOPOULOS, *supra* note 25, at 28-9, 83-86.

supervision of subordinates, when unconnected with a specific legal transaction³²) will fall outside the scope of art. 390 PC³³. In other words, criminal breach of trust requires an abuse of the representative and managerial powers of the perpetrator, in the context of managerial actions or omissions towards third parties; the offensive behavior must fall within the objective scope of said representative powers³⁴, while violating the terms of the internal relationship, which connects the perpetrator with the afflicted party³⁵.

4.2.3. The violation of the rules of diligent management (due care)

Under the now prevalent view in case law and academic literature, an implied element of the *actus reus* of the crime is that the custodian or manager has violated the rules of diligent management (due care)³⁶.

³² For examples see generally MYLONOPOULOS, *supra* note 27, at 633-4.

³³ ANAGNOSTOPOULOS, *supra* note 25, at 28, see also Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 970/2006, 54 NOMIKON VEMA [N.V.], No. 2, 1348 (2006) (Greece).

³⁴ Violations of the duty of loyalty which are devoid of an external and representative nature fall outside the objective scope of article 390 PC, see I. Manoledakis, *Gia Ta Antikeimenika Oria Tou Eglimatos Tis Apistias [About The Objective Limits Of The Crime Of Breach Of Trust]*, LD' POINIKI CHRONIKA [P.CH.] 553-4 (1984).

³⁵ See Efeteio Thessalonikis (Efet.Thess.) (Thessaloniki court of appeals) 481/2004, <http://lawdb.intrasoftnet.com> (NOMOS).

³⁶ See Nikolaos Androulakis, *He Apistia- Agrafon Ousiodes Systatikon Tou Eglimatos Tis Apistias (arthr. 390 P.K.) [Criminal Breach Of Trust- An Unwritten Substantial Element Of The Crime (Art. 390 PC)]*, KE' POINIKI CHRONIKA [P.CH.], 161 *et seq.* (1975). Under an alternative approach, the focus should be on the abuse of the representative power of the perpetrator, *i.e.* the overstepping of the limits set out by the internal relationship between manager and property owner. These limits are co-determined by the rules of diligent management, which therefore do not constitute a separate, unwritten element of the *actus reus*, see Antonios Vomvas, *He Paravasi Ton Kanonon Epimelous Diacheirisis Stin Antikimeniki Ypostasi Tou Eglimatos Tis Apistias- Arthro 390 P.K. [The Violation Of The Rules Of Diligent Management In The Actus Reus Of The Crime Of Criminal Breach Of Trust- Art. 390 PC]*, 13 POINIKI DIKAIOSINI [POIN. DIK.], 1044 (2010).

These rules are determined by law, the contract between the owner of the property and the custodian or manager, the articles of association, bylaws and internal regulations of corporations, the nature and the goals of the management and the good practices prevalent in the related industry or transactional field³⁷. It has been held that there is no abuse and therefore no crime, when the accused hasn't violated the rules of diligent management, because her actions were allowed pursuant to the contract vesting the managerial powers, the requisite procedures were abided by, all negotiation options were exhausted and no better alternatives were available at the time³⁸. It is further contended that there is no violation of the rules of diligent management, if the course of action taken was one of many equally acceptable options and there is dissent among experts as to the optimal choice³⁹, namely when the violation is not obvious⁴⁰. In the face of uncertainty as to potential outcomes of available options, the optimal decision-making process includes an estimate of the expected value of each alternative⁴¹.

³⁷ *See.g.* Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 967/2009, <http://lawdb.intrasoftnet.com> (NOMOS). *See also* Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 930/2007, <http://lawdb.intrasoftnet.com> (NOMOS), which dealt with a case of accused officers of a bank's regional branch, who issued a letter of credit in favor of a non credit-worthy company, without taking the required security, as determined by the bank's central supervisory board, which was competent to authorize such transactions. The officers had also ignored clear guidelines issued by the bank's central offices, as well as best practices common in the banking industry and adopted by the aggrieved bank.

³⁸ *See* Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 973/2010 (in Council), <http://lawdb.intrasoftnet.com> (NOMOS), regarding an investment decision for the liquidation of mutual funds.

³⁹ Konstantina Papathanasiou, *Arthro 390 - Apistia*, in II POINIKOS KODIKAS-ERMENEIA KAT' ARTHRO [PENAL CODE- INTERPRETATION BY ARTICLE], 2081-2 (Aristotelis Charalambakis ed., 2011).

⁴⁰ Evangelos Nisireos, *Epicheirimatikos Kindinos kai to eglima tis apistias* [Business Risk And The Crime Of Criminal Breach Of Trust], 39 NOMIKON VEMA [N.V.], 1073 (1991).

⁴¹ Christos Mylonopoulos, *He Symvoli Tis Theorias Ton Apofaseon Ston Ypologismo Tis Perioussiakis Vlavis Tis Apistias* [The Contribution Of Decision Theory In The Calcula-

Particularly in the case of credit institutions, it is argued⁴² that custodians and managers (i.e. directors, officers and employees vested with representative power) are subject to heightened standards of compliance, which stem from the articles of association, the internal regulations, administrative guidelines and other legally binding documents. Under the same approach, large bureaucratic institutions with a more rigid structure, such as banks, are not managed “freely”, as is the case in normal corporations, but are instead subject to “institutional management”; a particular set of rules and guidelines designate the decision-making process for major managerial decisions, including the extension of credit, the monitoring and restructuring of outstanding loans⁴³, as well as the investment of funds on financial products and their resale to third parties⁴⁴. Serious shortcomings in loan documentation and monitoring, as well as the use of stale or forged financial information, in clear violation of the bank’s internal regulation, will act as red flags for a potential criminal breach of trust⁴⁵.

tion Of Property Damage In Criminal Breaches Of Trust], MD’ POINIKΑ CHRONIKΑ [P.CH.], 705 *et seq.* (1994).

⁴² ANAGNOSTOPOULOS, *supra* note 25, at 49.

⁴³ *Id.* at 48-52.

⁴⁴ See *e.g.* Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 1568/2005 (in Council), <http://lawdb.intrasoftnet.com> (NOMOS), which dealt with a case of purchase and resale of bonds to clients at prices highly skewed in favor of the clients and occasionally below cost, to the financial detriment of the bank, without proper documentation, in clear violation of the rules of diligent management and contrary to well-established banking practices.

⁴⁵ See *e.g.* Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 1488/2006, <http://lawdb.intrasoftnet.com> (NOMOS), which dealt with bank employees who extended credit to a number of insolvent individuals and companies, operating even outside the region covered by their branch, against collateral (particularly securities) which was forged or stolen. See also Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 1511/2006 <http://lawdb.intrasoftnet.com> (NOMOS), regarding an omission of solvency checks required by the bank’s internal regulations and credit policies; Efeteio Thessalonikis (Efet. Thess.) (Thessaloniki court of appeals) (in Council) 481/2004, <http://lawdb.intrasoftnet.com> (NOMOS), which dealt with the siphoning of funds to an insolvent company, via fictional loan agreements ex-

However, it has been contended that there shouldn't be a "one-size-fit-all" approach: credit institutions with different business models are subject to different standards. Thus, a credit institution focusing on industrial development may extend credit to a company under terms, which would have been evaluated as unacceptably risky for a regular commercial bank⁴⁶. Otherwise, flexibility and innovation in the banking sector will likely be stifled, at the expense of the real economy.

4.2.4. Harm to property belonging to another

Further to the above elements of the *actus reus*, it must be established that an actual, quantified harm (economic loss) was causally inflicted to property belonging to another⁴⁷. Lack of the requisite certainty as to the harm inflicted will lead to an exoneration of the accused (*in dubio pro reo*)⁴⁸. To determine such harm, one must compare the valuation of the property, which would have existed, had the perpetrator managed it diligently and with due care, and the valuation of the property, *as is* pursuant to the examined questionable acts or omis-

cuted under the names of uninvolved third parties, as well as other procedural shortcuts (deviations from established credit procedures, lack of collateral, no solvency checks, lack of required documentation, extension of credit beyond the authorized limits); Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 466/2004 <http://lawdb.intrasoftnet.com> (NOMOS), regarding extension of credit beyond the authorized limits and without the appropriate collateral.

⁴⁶ See Androulakis, *supra* note 36, at 169; MICHAEL MARGARITIS & ADA MARGARITI, POINIKOS KODIKAS- ERMENEIA- EFARMOGI [PENAL CODE-INTERPRETATION-APPLICATION] 1335 (3d ed. 2014). See also Vomvas, *supra* note 36, at 1045, according to whom in Germany there is a different regime for savings banks (Sparkassen) and for mortgage banks (Hypothekenbanken).

⁴⁷ See e.g. Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 460/1990, M' POINIKA CHRONIKA [P.CH.], 1135 (1990); Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 1318/1991 (in Council), M' POINIKA CHRONIKA [P.CH.], 238 (1992); Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 367/2003, <http://lawdb.intrasoftnet.com> (NOMOS).

⁴⁸ ANAGNOSTOPOULOS, *supra* note 25, at 61.

sions⁴⁹. To deal with this hypothetical question, one must look at available alternatives to the course of action actually taken⁵⁰, and evaluate their probability, in a quantifiable manner.

Said legal requirement of a quantified harm raises the further question, whether the calculation of the harm should be focused on isolated transactions (which are being scrutinized in the context of a criminal prosecution) or on the overall management tactics of the accused. It may be that a risky, niche strategy adopted by the accused created multiple benefits for the managed property, *i.e.* had a positive overall effect, while only a few projects turned sour. If the spotlight is turned only on the failures, while disregarding the successes, managers and officers will have another perverse incentive to avoid innovation and risk altogether, in order to reduce their own risks of criminal liability. This is particularly salient with regard to the extension of credit, as it is statistically certain that some loans will never be repaid, for reasons not necessarily predictable at the time that the contract is executed.

De lege lata and with regard to common banking transactions, it must be noted that a criminal breach of trust (or an attempt thereof) may exist even at the stage when credit is extended or a letter of credit issued, if the debtor does not meet the solvency requirements indicated by the bank's internal regulation or by the practices prevalent in the banking industry⁵¹. A mere concrete endangerment of pecuniary interests (e.g. in the case of granting bad loans or making highly speculative investments in financial products) is therefore deemed equivalent to a

⁴⁹ *Id.* at 61-2.

⁵⁰ See *e.g.* the case of a loan restructuring with a 40% debt write-off, agreed upon between the National Bank of Greece and the company Halyps SA. The public prosecutor filed the criminal complaint lodged against the members of the bank's BoD as clearly factually unfounded, taking into account the dire financial circumstances of the debtor and the lack of more favorable alternatives for the bank (order No. C-90-1503/13.7.1990, as reported by ANAGNOSTOPOULOS, *supra* note 25, at 50).

⁵¹ ANAGNOSTOPOULOS, *supra* note 25, at 65.

real economic loss⁵². As correctly pointed out⁵³, such financial loss is also reflected on the balance sheet, considering that an allowance for depreciation (downgrading) on the assets side is legally required. For that reason, from a legal and factual perspective, the difference between the face amount of a bad loan and the depreciated amount on the assets side of the balance sheet is a real loss.

4.3. *Mens rea* (required intent as mental legal element)

Pursuant to article 390 GPC, the perpetrator must “*knowingly*” inflict harm on property belonging to another. The perpetrator must therefore know a) that she is the custodian or manager of property belonging to another and b) that her action or omission is harmful to that property; she must also intend to cause this harm⁵⁴ (in the sense that she either acted with the specific intention of inflicting the harm⁵⁵, or she predicted this harm as a necessary consequence of her actions or omissions and accepted its occurrence)⁵⁶. This excludes *dolus eventualis* (which was deemed sufficient before the amendment of article 390 of the Greek Penal Code, pursuant to art. 36(2) of law 2172/1993)⁵⁷. The

⁵² See e.g. Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 204/2010, <http://lawdb.intrasoftnet.com> (NOMOS); ANAGNOSTOPOULOS, *supra* note 25, at 68; MYLONOPOULOS, *supra* note 27, at 643. This is also the prevailing view in German jurisdiction and academic literature, see Volker Krey, *Financial Crisis and German Criminal Law: Managers’ Responsibility for Highly-Speculative Trading in Obscure Asset-Backed Securities Based on American Sub prime Mortgages*, 11 German L.J. 326 (2010).

⁵³ Krey, *supra* note 52, at 326-7.

⁵⁴ See e.g. Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 532/2011, <http://lawdb.intrasoftnet.com> (NOMOS).

⁵⁵ See MYLONOPOULOS, *supra* note 27, at 646.

⁵⁶ See e.g. Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 930/2007, Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 1617/2010, <http://lawdb.intrasoftnet.com> (NOMOS).

⁵⁷ See e.g. Areios Pagos [A.P.] [Supreme Criminal Court of Greece] 967/2009, <http://lawdb.intrasoftnet.com> (NOMOS); MYLONOPOULOS, *supra* note 27, at 646.

knowledge is evaluated *ex ante*, based on the facts available to the perpetrator at the time of the criminal act or omission⁵⁸.

5. The significance of the business judgment rule in the context of article 390 GPC

5.1. The Business Judgment Rule in general corporate law

The so-called “Business Judgment Rule” (BJR)⁵⁹ was formally introduced to Greek corporate law pursuant to law 3604/2007, but its criteria had previously been applied by case law⁶⁰. Pursuant to article 22(a)(2) of law 2190/1920, the members of the BoD of a *Société Anonyme* bear no personal liability towards the company regarding actions or omissions which are based on a legitimate resolution of the general assembly or pertain to a reasonable business decision which was taken in good faith, on an informed basis and exclusively in the interests of the company⁶¹. If these conditions are met, a court may not review the substance and the impact of the business decision to the company, even if

In Germany, the so-called *dolus eventualis* (which exists when the perpetrator seriously takes into account that her act *could* fulfill the legal elements of the offense and accepts this possibility) is sufficient, *see* Krey, *supra* note 52, at 327.

⁵⁸ Papathanasiou *supra* note 39, at 2085.

⁵⁹ The German version of the Business Judgment Rule is discussed by Wagner, *supra* note 14, at 69.

⁶⁰ Michael-Theodoros Marinos, *Zitimata Efarmogis Tou Kanona Tis Epicheirimatis Kriseos (Business Judgment Rule) Sto Etairiko Kai To Ptoxeutiko Dikaio* [Issues Of Application Of The Business Judgment Rule In Corporate And Insolvency Law], 15 DIKAIΟ EPICHEIRISEON KAI ETAIRION [D.E.E.], No. 6, 657 (2009). *See also* George Sotiropoulos, *He Euthini Ton Melon Tou Dioikitikou Symvoulion Gia Epicheirimatikes Epiloges- He Isxis Tou “Business Judgment Rule” Stin Ellada* [The Liability Of The Members Of The Bod For Business Choices- The Applicability Of The Business Judgment Rule In Greece], 9 DIKAIΟ EPICHEIRISEON KAI ETAIRION [D.E.E.], No.7, 785 (2003).

⁶¹ For the “safe harbor” of the Business Judgment Rule to apply, the members of the BoD must be disinterested with regard to the transaction. If there is a conflict of interest the rule doesn’t apply, *see* Marinos, *supra* note 60, at 654.

it subsequently proves to be poor or destructive for the company⁶².

The BJR precludes the *ex ante* judicial second-guessing of decisions taken by the directors of the company through informed and rational decision-making processes⁶³. It preserves the discretion of the directors and allows them to take calculated business risks, without the fear of *ex post* legal liability. If the requirements of the business judgment rule are not met, the member of the BoD can still be exempted from liability, if she proves that she met the diligence standards of a prudent businessperson. Although technically the rule only applies to the directors of Sociétés Anonymes, the standard of liability set by the rule should arguably also apply to other officers of the company who hold positions of responsibility and exercise discretion⁶⁴, as well as extend to other corporate types⁶⁵.

5.2. Why the BJR also applies to financial institutions

The application of the business judgment rule in financial institutions is contested.⁶⁶ Some claim that the rule only applies in the case of “free management”, namely in ordinary commercial companies. This contention is partly based on the quasi-public function of credit institutions and partly on the complex regulatory framework applicable to their activities.

⁶² *Id.* at 654.

⁶³ See Sotiropoulos, *supra* note 60, at 775-6; Theodoros Katsas, *Epixeirimatikos Kindinos Kai Euthini Tou Dioikitikou Symvouliou Anonimis Etairias [Business risk and liability of the BoD of a SA]*, 12 DIKAIΟ EPICHEIRISEON KAI ETAIRION [D.E.E.], No. 8-9, 891-2 (2006).

⁶⁴ The disparity in the treatment of directors and officers as to the exculpatory effect of the BJR is explored by McKenna, *supra* note 8, at 211-215.

⁶⁵ As to its application to other corporate types see Marinos, *supra* note 60, at 657.

⁶⁶ The opposing views are summarized in Mikroulea, *supra* note 1. See also ALEXANDRA MIKROULEA, ORIA DRASIS KAI EUTHINI TON ETAIRIKON DIOIKITON [LIMITS OF ACTION AND LIABILITY OF CORPORATE DIRECTORS], 292 (Nomiki Vivliothiki eds., 2013).

It is true that banking is a heavily regulated commercial activity and it has become more so, post-crisis. The discretionary powers of directors and officers are not only subject to the limitations set by the institution's articles of incorporation, bylaws and internal regulations. There is a vast regulatory framework set by EU and national legislation, as well as technical standards and opinions on good practices issued by the European Banking Authority (EBA) and the Bank of Greece. Only indicatively do we refer to Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms, law 4261/2014 incorporating Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (CRD IV), the 2013 Opinion of the EBA on Good Practices for Responsible Mortgage Lending, the 2014 EBA Final Draft Implementing Technical Standards on Supervisory reporting on forbearance and non performing exposures, Decision 42/30.5.2014 of the Executive Committee of the Bank of Greece on the framework of Supervisory reporting on forbearance and non performing exposures, the 2015 EBA Guidelines on creditworthiness assessment, the 2015 EBA Guidelines on arrears and foreclosure and the 2016 Code of Deontology pursuant to law 4224/2013 (issued by the Credit and Insurance Committee of the Bank of Greece and published on Issue 2376/2.8.2016 of the National Gazette).

However, it would be a mistake to assume that said regulatory framework is meant to exclude discretion and informed business judgment, with a view to eliminating risk-taking in financial institutions. This would be unrealistic and counterproductive, unnatural even. On the contrary, the point is to encourage the channeling of savings into productive investments in the real economy, while ensuring the mitigation of credit risk, esp. via diversification and appropriate monitoring of large exposures⁶⁷. Emphasis is placed on the creation of sound corporate governance and internal control structures⁶⁸, the de-

⁶⁷ See Preamble of Regulation (EU) 575/2013, par. 32, 44, 51, 55.

⁶⁸ A discussion of the role of chief risk officers, risk committees and the aspect

velopment and validation of credit risk management and measurement systems⁶⁹ and the use of a reliable system of collection, verification, evaluation, updating and monitoring of financial information, when credit is first extended or at the refinancing/ restructuring stage⁷⁰. Business judgment is still inescapable (even with the assistance of decision trees)⁷¹: this becomes evident by the wide range of available⁷² (short and long-term) options at the restructuring stage of distressed loans. It would make no sense to provide for restructuring solutions such as the operational restructuring of debtor companies or debt / equity swap agreements (whereby the credit institution considers a change of management of the debtor company or becomes a shareholder of the latter), without embracing the exercise of considerable business judgment and the assumption of additional risk for the credit institution. Discretion may be more limited in financial institutions, but it is still there and its importance cannot be overlooked.

In other words, across industries or business fields, any judicial review should focus on the decision-making process (whether informed and rational decision-making processes have been employed to take a decision), not on the result. Wherever discretion is exercised and judgment calls made, the business judgment rule should apply as a limit to *ex post* review. Therefore, also in the case of credit institutions, disinterested directors and officers should be exempt from personal liability for the poor or even catastrophic results of actions taken on an informed basis, in good faith and in the honest belief that they were acting in the best interests of the company.

of executive pay practices can be found in Mikroulea, *supra* note 1.

⁶⁹ Preamble of Regulation (EU) 575/2013, par. 42.

⁷⁰ See *e.g.* part III (ib) of decision 42/30.5.2014 of the Executive Committee of the Bank of Greece, as well as the 2016 Code of Deontology recently issued by the Credit and Insurance Committee of the Bank of Greece.

⁷¹ Part IV (c) of decision 42/30.5.2014 of the Executive Committee of the Bank of Greece.

⁷² Pursuant to decision 42/30.5.2014 of the Executive Committee of the Bank of Greece and the 2016 Code of Deontology.

5.3. The criminal law perspective

From the point of view of criminal law, any *ex post* judicial scrutiny of business decisions should be subject to even stricter standards than civil liability (also considering the heightened intent requirements).

One must remember that criminal law is an *ultimum remedium*, i.e. is not designed to cover all aspects of human behavior, but only actions or omissions which are highly antisocial and cannot be prevented by other means (e.g. civil claims or administrative sanctions). The principle of subsidiarity of criminal law therefore indicates that not all violations of private law duties are (or should be) criminally sanctioned⁷³. Indeed, a violation of private (civil and commercial) law duties of care is a necessary, but not adequate element of criminal liability⁷⁴.

Besides, an additional cause of concern is the broad and vague definition of the criminal offence, which comes in the form of a general clause. This may lead to cases where the requirements for compliance with the law are not clear *ex ante*, but only *ex post*, and therefore a margin of appreciation is called for to lessen the heavy burden imposed on managers⁷⁵.

That said, the business judgment rule should come into play in criminal proceedings, to help determine whether the accused abused her representative powers, in the context of a specific transaction. The scope of the business judgment rule is of course much wider than article 390 GPC, as it provides a “safe haven” also regarding actions or omissions which clearly fall out outside the scope of article 390 GPC (e.g. purely internal -legal and material- actions or omissions). *Ratione personae*, it is narrower, as article 22(a)(2) of law 2190/1920 technically applies only to directors of SAs (although, as previously discussed, the criteria developed in its context are valuable to determine the standard

⁷³ Vomvas, *supra* note 36, at 1046-7.

⁷⁴ *Id.* at 1046-7. See also Papathanasiou, *supra* note 39, at 2082, who contends that the business judgment rule may be “helpful” in identifying whether the rules of diligent management were violated, for the purposes of art. 390 PC.

⁷⁵ See Wagner, *supra* note 14, at 76.

of liability for all officers or employees exercising discretion, irrespective of corporate type). In any case, to the extent that no civil or commercial law obligation is breached (either because the BJR applies as a safe harbor, or because the accused met the diligence standards of a prudent businessperson), criminal liability is excluded and the accused exonerated⁷⁶.

6. Who should initiate criminal prosecution for criminal breach of trust?

A final question to be explored is whether the initiative for criminal prosecution should be vested on traditional law enforcement agencies, acting *ex officio*, or whether arguments can be found in favor of private prosecution (*i.e.* whether a prior criminal complaint by the victim should be a prerequisite).

Presently, prosecution is brought *ex officio*. This is somewhat counter-intuitive, given that the victim is -in theory- in a better position to evaluate to which extent the relationship of trust has been violated, as well as whether actual harm has been caused to its assets.

Particularly in the case of banking institutions, the public interest aspect (soundness of particular financial institutions, as well as of the banking system as a whole) cannot be overlooked. This concern can, however, be addressed adequately via the harsh administrative sanctions already in place, against banks and D&O not acting in accordance with the dense regulatory framework established by EU and national law. Moreover, one cannot ignore the agency problems prevalent in large corporations with widely dispersed share ownership. To rely entirely on the management of the bank or the general assembly for the initiation of criminal proceedings against directors or officers will likely lead to weak enforcement and under-deterrence.

But does this inescapably point to a public *ex officio* prosecution as the optimal solution? Not necessarily. As previously discussed, an ex-

⁷⁶ Nisireos, *supra* note 40, at 1070, MIKROULEA, *supra* note 66, at 292.

ceedingly harsh liability regime, coupled with an aggressive enforcement policy applied by members of the judiciary who lack business insights, will lead to over-deterrence. The harm caused to the national economy by excessive risk aversion caused by judicial activism will be multifold. In order to strike the appropriate balance, the law could provide for private prosecution, formed as a minority right (e.g. require a complaint lodged by shareholders representing at least 1% of the nominal capital; this would also allow the State to initiate proceedings, as a shareholder). Alternatively, the power to bring criminal proceedings in cases of criminal breach of trust in financial institutions could be vested on a specialized fraud unit in the Public Prosecutor's office, subject to a complaint lodged by the Capital Market Commission.

7. Conclusion

When banks fail, emotions run high and public pressure to assign blame is accentuated. However, hindsight bias is lurking in the background, and may lead to unfair prosecutions. Convictions may appease the public outrage, in the short run, but the long-term repercussions for the smooth operation of the financial system and the economy as a whole cannot be ignored. The business judgment rule, which also applies to financial institutions, may serve to mitigate such risks, particularly in the context of criminal law.

