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Fiduciary Principles in European Civil Law Systems

Law Working Paper N° 392/2018
March 2018

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For helpful comments, we thank David Johnston, Paul Miller, James Penner, Teddy Rave, Alexandra Santangelo-Reif, Johanna Schwartz Miralles, and participants of the Fiduciary Law conference at Harvard (November 2017).

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Abstract

This chapter surveys fiduciary principles in Western European civil law jurisdictions. Focusing on France and Germany, we suggest that functional equivalents to fiduciary duties have developed on the Continent, although they do not always carry exactly the same connotations as their common law counterparts. We suggest that the common law developed fiduciary duties as a distinct category largely for two reasons. First, the common law distinguished between law and equity, with fiduciary law developing within equity. By contrast, contracts law required consideration, which meant that fiduciary principles for gratuitous actions necessarily arose outside of contract law. Civil law generally did not develop this particular categorization. For example, the paradigmatic fiduciary relationship, the mandate (agency), is by default a gratuitous contract. Consequently, the lines between fiduciary and contract law remained blurred. Second, common law bargaining for contracts emphasizes part autonomy more strongly, while the civil law of contracts incorporated a stronger duty of good faith, thus making it more hospitable to an implied and inchoate loyalty obligation. The duty of loyalty in civil law jurisdictions is not categorically different from such duties, but exists on a continuum with them. Consequently, civil law duties of loyalty in those relationships that would be considered fiduciary under the common law can be seen as an extension of weaker loyalty obligations elsewhere. We survey the civil law of agency, equivalents of trust, as well as corporate and financial law. Germany and countries influenced by German law began to identify duties of loyalty in corporate and trust relationships in the middle of the 20th Century and identified them as a larger civil law principle permeating different areas of law. France and related jurisdictions have been more reluctant to adopt such duties, and have been more likely to rely on specific statutory prohibitions to reach similar results.

Keywords: fiduciary duties, related-party transactions, corporations, duty of loyalty, French private law, German private law, Liechtenstein trust, Treuhand, agency, mandate, equity, legal families

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1. Introduction

At first sight, fiduciary principles are one of the distinctive traits of the common law, as compared to civil law traditions: looking for fiduciary law in European civil law jurisdictions would seem to be an artificial and doomed enterprise.[1] Fiduciary principles have manifested themselves in England, Australia, Canada and the US, where they are primarily concerned with "care" and "loyalty",[2] in its fiduciary sense that requires self-denial. However, as has been stressed, "there is more fiduciary law in civilian jurisdictions than most English or American lawyers would think."[3] While there are no fiduciary law scholars, relationships in which a person has discretionary

[1] Pierre Legrand, La comparaison des droits expliquée à mes étudiants, in Comparer les droits, résolument 209-244, 220-224 (Pierre Legrand ed., 2009).

[2] Matthew Conaglen, Fiduciary principles in contemporary common law systems [forthcoming in this volume].

[3] Michele Graziadei, Virtue and Utility. Fiduciary Law in Civil Law and Common Law Jurisdictions, in Philosophical Foundations of Fiduciary Law 287-301, 287 (Andrew S Gold & Paul B Miller eds., 2015). See also Stefan Grundmann, The Evolution of Trust and *Treuhand* in the 20th Century, in Itinera Fiduciae. Trust and Treuhand in Historical Perspective (Richard Helmholz & Reinhard Zimmermann eds. 1998), at 469, 469 ("Common Law authors often

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power – to refer to a well-known formal property of fiduciary relationships –[4] are frequent in civil law jurisdictions, as well. One can think of financial advisors or directors. Such relationships feature structural properties, including inequality, vulnerability, trust, and confidence[5] and impose particular duties on the power holder. The requirement that financial advisors warn their retail clients about risks relating to certain decisions is an illustration.

Indeed, fiduciary relationships and fiduciary duties have invigorated the law of civil law jurisdictions for a long time. But they have often not been named and have remained inchoate and implicit. Perhaps as a result, it is often difficult to translate the term "fiduciary duties" into languages other than English. In US usage, fiduciary duties comprise the duties of loyalty and of care (depending on the context, a duty of good faith and fair dealing and a duty of obedience may also apply). By contrast, in German law, there is a duty of care (*Sorgfaltspflicht*) and a duty of loyalty (*Treupflicht*) that approximately correspond to their English-language equivalents, but there is no broader term that encompasses both. The situation is similar in France, where agents owe a duty of care (*devoir de diligence*) largely corresponding to its English-language equivalent, and which is sometimes referred to in a more explicit manner as a duty of "care and advice" (*devoir de diligence et conseil*). A duty of loyalty is also recognized, and often expressed as a duty of "loyalty and fidelity" (*devoir de loyauté et de fidélité).*[6] But again, no single term exists to

complain that lawyers on the Continent are reluctant to make the effort to understand the trust concept. The same authors write about specific statutory forms of the trust's equivalent in the Germanic law family, the *Treuhand*, without quoting a single primary source: they treat the *Testamentsvollstrecker*, the testamentary executor who holds the powers of trustee, without reference to the German, Austrian, Swiss or Japanese Supreme Court or relevant doctrine in these countries").

[4] Paul Miller, The Fiduciary Relationship, in Philosophical Foundations of Fiduciary Law 63, 69 (Andrew Gold & Paul Miller eds., 2014) ("A fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)").

[5] Ibidem, 73.

[6] See infra note 104.

encompass both of these duties, and these distinct terms do not necessarily apply to all actors who bear fiduciary-like duties in the French system, such as agents, medical care-givers and directors. The reason why in both Germany and France, no term was crafted in order to embrace both duties may be that fiduciary status is not understood as a separate category fundamentally different from contract.[7]

As we will discuss below, some aspects of civil law fiduciary duties are codified, while others have been developed by judges in case law. But in both cases, civilian fiduciary duties remain quite different from their common law relatives. When they are codified, fiduciary duties often lack the colorful expressions that make them stand apart in common law jurisdictions: they tend to blend into other types of mandatory provisions. The French phrase "regulated transactions" (*conventions réglementées*), for instance, does not carry the same expressive weight as its English equivalent, "self-dealing transactions".

In addition, fiduciary duties have largely remained fragmented, since civil and commercial laws are separate in most jurisdictions in continental Europe. In some jurisdictions like France, specialized courts deal with commercial disputes. This separation among courts has hindered the constitution of a body of "fiduciary law" that would span civil and commercial transactions.[8] Another reason why fiduciary principles have not lent themselves to the emergence of a unified field is that the sources of the duties are rooted in different parts of the law; historically, the civil

[7] Another problem in German is that "Treupflicht" can easily be confused with the contract law concept of "Treu und Glauben" (§ 242 BGB), i.e. the equivalent of "good faith and fair dealing." Marcus Lutter, Theorie der Mitgliedschaft, 180 Archiv für die civilistische Praxis 84, 103 (1980). While German limits itself to a single term (*Treue*), English expresses slightly distinct concepts with three different words (good faith, fiduciary, loyalty).

[8] Graziadei, supra note 3, at 294.

law has not always recognized fiduciary relationships as general principles permeating many areas of law.

Meanwhile, certain claims that are part of fiduciary law in common law jurisdictions can be grounded in the general law of obligations in continental jurisdictions. There is therefore limited need or appetite for fiduciary law conceived as separate from contractual obligations. This is all the more true since in European legal systems, the general law of obligations typically contains broad notions such as "fair dealing" and "good faith" that can be called upon to deal with conflict of interest cases.[9]

Moreover, in common law countries, fiduciary duties may have developed as a separate category because equity was considered separate from law.[10] Fiduciary duties are a creature of equity, which is one of the distinctive features of the common law.[11] Historically, courts of equity supplemented the common law: for example, equity courts developed orders requiring performance from an individual who had breached or threatened to breach contractual obligations (specific performance) and orders requiring a party to do or abstain from doing a particular act (injunction). But even after equity and common law merged, the substantive rules of common law and equity remained distinct. In common law jurisdictions, old "equitable" remedies continued to develop in the courts alongside common law remedies. The traditional division between courts of

[9] Id.

[10] Until their fusion pursuant to the Judicature Acts 1873 and 1875, the two old jurisdictions of common law and equity were administered by separate courts. See e.g. Sealy, supra note 11, at 70 ("So long as the relief meted out by the Lord Chancellor followed broad principles and involved a degree of discretion, a simple legal vocabulary relying on general words such as "trust" and "confidence" was adequate"), and 72-73 (noting that in a fiduciary relationship, every remedy can be sought); John H. Langbein, The Contractarian Nature of the Law of Trusts, 105 Yale L.J. 625, 635-36 (1996) (explaining that the procedural powers of the Chancery Court were necessary to grant specific performance to the trust).

[11] See L.S. Sealy, Fiduciary Relationships, 1962 Cambridge L.J. 69, 72 (defining fiduciary relationships as "all trust-like relations including the trust itself").

law and equity, which is unique to the common law, likely facilitated the rise of fiduciary principles as a separate field within equity, and to some extent separate from contract. Civil law countries never had this division, which provides a technical explanation why the functional equivalents to fiduciary duties were more naturally absorbed into other doctrinal edifices.

The complexity of this background justifies the present effort to clarify the role of fiduciary principles in continental civil law jurisdictions. In the following, we first discuss the contours of traditional relationships of loyalty, such as agency relationships, in European civil law systems (Section 2). We then turn to specific types of legal relationships that raise similar problems: trusts and their close equivalents (Sections 3) as well as corporate and financial relationships (Section 4). Section 5 summarizes and concludes.

2. Contours of relationships of loyalty under civil law

2.1. Implied inchoate loyalty obligations in contract law

Legal relationships, even if they are not qualified as fiduciary, often to some degree entail duties that could require a party to consider the interests of a counterparty. These loyalty obligations vary in intensity and do not necessarily amount to the exacting standard of fiduciary loyalty that comes into play when one person's interest conflicts with another's and requires that other's interest prevail. The duty of loyalty can be understood as a particularly strong obligation between parties to a legal relationship that exists in inchoate and implied form elsewhere in the law.[12]

[12] See Alfred Hueck, Der Treuegedanke im modernen Privatrecht 9-19 (Verlag der bayerischen Akademie der Wissenschaften 1947) (suggesting a "hierarchy" of loyalty duties, beginning with the general prohibition to inflict harm on another person *contra bonos mores*, continuing to the requirement of acting in good faith, and culminating in actual duties of loyalty).

In common law jurisdictions, contracts are typically recognized as self-interested by their very essence. In contrast, the civilian law of contract requires parties to take into account the interest of the other contracting parties, at the stages of negotiation, formation and enforcement. This is true despite the divergent nature of parties' interests in a contractual relationship[13]. For instance, pursuant to this loyalty requirement, negotiations may not be abruptly interrupted,[14] and parties have to cooperate as necessary to allow each other to carry out their contractual duties.[15] German law famously establishes a good faith and fair dealing requirement at the beginning of its law of obligations.[16] In this respect, the contrast between the common law and the civil law traditions seems to hold. The major overhaul of the French Civil Code that took place in 2016[17]

[13] In most instances, contracting parties will have divergent interests. Associations are an obvious exception and gave rise to a separate body of law. Within contract law, cooperative contracts might also be an exception, when for example two businesses arrange to share a transportation means in order to send goods from and to the same place.

[14] See in French law Cass. com. 2 July 2002, RTD Civ. 2003, 76 noted by Jacques Mestre and Bertrand Fages. Under German law, the beginning of negotiations creates an obligatory pre-contractual relationship between the parties that entails to a certain extent to have regard to the interests of the other party. Violations of these obligations can result in liability because of *culpa in contrahendo*, a doctrine first developed by Rudolf von Jhering in 1861 that subsequently spread throughout the civil law world. See Rudolf von Jhering, Culpa in Contrahendo, oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen, 4 Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts, 1 (1861). In the US, see, e.g., Friedrich Kessler & Edith Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401 (1964). For a comparison, see also E. Allen Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations, 87 Colum. L. Rev. 217, 239-243 (1987) (surveying German, French and US developments and suggesting that American courts have been more reluctant to accept a general duty of fair dealing). The 2002 reform of the law of obligations explicitly established the existence of a pre-contractual relationship in § 311(2) BGB.

[15] See in French Law Cass com 24 Nov 1998, Bull. Civ. IV n°277. In Germany, the good faith requirement implies e.g., that a debtor must not perform at a time or location that would be particularly inconvenient for the creditor (e.g. at night or during a holiday). See, e.g. Claudia Schubert, § 242 BGB ¶ 181, in 2 Münchener Kommentar zum BGB (Wolfgang Krüger, 7th ed. 2016).

[16] § 242 BGB provides that the debtor must perform in good faith considering common usage ("Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.")

[17] Reforms were effected by special executive enactment ('ordonnance') authorised by parliamentary legislation (art 8 of Loi n° 2015-177 of 16 February 2015 for the modernisation and simplification of law and procedures relating to justice and interior affairs) rather than by parliamentary legislation directly: Ordonnance n° 2016-131 of 10 February 2016 reforming the law of contract, the general regime and proof of obligations, Journal Officiel de la République française n° 0035 of 11 February 2016 (the 'Ordonnance'). The Ordonnance was translated by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker: available at http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf (last visited 11 October 2017) and as appendix of J. Cartwright and S. Whittaker (eds), The Code Napoleon Rewritten (Oxford: Hart, 2017) 409.

illustrates the current and tenacious nature of the divergence. In the extensively restructured and modernized version of codified contract law, the prominence given to good faith – and to the loyalty element of this principle – is hardly debatable. In fact, the duty of good faith is now elevated to a matter of public policy, which means that parties are not allowed to contract out of it. The loyalty obligations deriving from the good faith principle are, however, quite light, not rising, for example, to the level of a duty to account found in fiduciary law.

To illustrate how, in civil law jurisdictions, some loyalty is always expected from parties, it is worth drawing attention to contracts in which one party enjoys a unilateral power over the other party. A unilateral right of termination or a unilateral right to change the price are examples. Limitations placed on the use of such unilateral contractual rights provide an example of a heightened expectation of loyalty among contracting parties. The other-regarding requirement of good faith and loyalty takes indeed a stronger form in the context of a rapport granting unilateral power to one of the parties, requiring the kind of self-restraint that is characteristic of fiduciary obligations, though its origin is purely contractual. For example, the fact that , on their face, the conditions are met for a party to trigger a unilateral termination is not enough: the termination is only rightful if the power to terminate was granted by the other party with the expectation that it could operate in such circumstances.[18]

Given this variation in the nature of contract law, fiduciary relationships do not enjoy the same exceptional status they have in the common law system. There, status, contract, and fiduciary

[18] Cass. civ. 1, Jan. 31, 1995, Bull. Civ. I, n° 57, noted by D. Mazeaud, *Recueil Dalloz* 1995, 230, D. Mazeaud, C. Jamin *Recueil Dalloz* 1995, 389 and J. Mestre, *Revue Trimestrielle de droit civil*, 1995, 623 (the court dismiss the claim for delay penalty of a bank that had abstained for six years from enforcing a termination clause against a borrower and triggered it after the capital was fully repaid).

relationships are traditionally understood as distinct modes of interaction.[19] This distinction, however, is not pure and has led to a debate among legal theorists how to understand the relationship between the doctrinal phenomena. Common law contracts require consideration, which means that they cannot be uncompensated. Moreover, contract is characterized by self-interested bargaining and a largely unfettered ability of the parties to give the relationship whatever shape they agree, whereas fiduciary law almost necessarily exhibits a set of mandatory minimum rules.[20] To develop legal relationships that often seemed to arise because of status, were frequently gratuitous, and in almost all cases were characterized by mandatory rules, common law jurisdictions needed to resort to the parallel system of equity, where fiduciary law could develop.

With the recognition that fiduciary relationships did not exactly always adhere to this traditional model, common law theorists attempted to reconcile contract and fiduciary law. The result of this struggle was a contractarian approach to fiduciary duties,[21] which characterized them

[19] Tamar Frankel, Fiduciary Law, 71 Cal. L. Rev. 795 (1983). See also Lionel Smith, Contract, Consent and Fiduciary Relationship, in Contracts, Status and Fiduciary Law 117-138, 118 (Paul Miller & Andrew Gold eds., OUP 2016).

There is a sophisticated ongoing doctrinal debate about the relationship between contract, status and fiduciary duties. While fiduciary status cannot be described as merely "deriving" from status, "where a duty arises because of a manifest, or objective, undertaking the status or office held by a person is an important circumstance in determining the scope of the duties which the officeholder may reasonably be held to have undertaken", James Edelman, The Role of Status in the Law of Obligations. Common Callings, Implied Terms, and Lessons for Fiduciary Duties, in Philosophical Foundations of Fiduciary Law 21-38, 21 (Andrew S. Gold & Paul B. Miller eds., 2015). This author supports the idea that a demonstration that an objective manifestation of an undertaking is a condition in equity for a fiduciary obligation to arise, see James Edelman, When do Fiduciary Duties Arise? 126 L.Q. Rev. 302 (2010) and for a refutation of that condition, see Lionel Smith, Contract, Consent, and Fiduciary Relationships, in Paul Miller and Andrew Gold (ed), Contract, Status, and Fiduciary Law (OUP 2016) 117-138, at 131-133 and Matthew Harding, Fiduciary Undertakings in Paul Miller and Andrew Gold (ed), Contract, Status, and Fiduciary Law (OUP 2016) 71-89.

Some authors also suggest conceptualizing fiduciary relationships beyond the status / contract divide and along the lines of four rather than two ideal types: innate statutes, offices, contract types (a repertoire of alternative frameworks for voluntary arrangements), and open-ended contracts, see Hanoch Dagan and Elizabeth Scott, Reinterpreting the Status-Contract Divide. The Case of Fiduciaries, in Paul Miller and Andrew Gold (ed), Contract, Status, and Fiduciary Law (OUP 2016) 51-70.

[20] See Paul Miller, The Idea of Status in Fiduciary Law in Paul Miller and Andrew Gold (ed), Contract, Status, and Fiduciary Law (OUP 2016) 25-50, at 35-36.

[21] Frank H. Easterbrook & Daniel R. Fischel, Contract and Fiduciary Duty, 36 J. L. & Econ. 425 (1993).

as a backup to contractual duties, whose function was to fill gaps in long-term relationships featuring information asymmetries and high transaction costs. Theorists have not wholly abandoned status to explain the law, as some relationships "are considered in law to be presumptively fiduciary as a matter of status, given the incidents of the relationship or the role occupied by the fiduciary".[22] Guardians, trustees and directors are examples where status-based fiduciary duties exist.

By contrast, the absence of a sharp distinction between law and equity made it easier for civilians to integrate fiduciary duties into a system of voluntary undertakings. As we have seen, even contractual relationships entail implied inchoate duties of loyalty. Moreover, in civil law systems, contracts can be gratuitous and do not require reconsideration. This is the case, for example, with the civil law mandate. In this kind of system, it is entirely possible, and indeed more obvious, to regulate fiduciary-type relationships within the framework of contracts and thus unnecessary to carve out a special category governed by wholly independent principles.[23]

2.2. The civil law mandate and its relationship to more specific fiduciary relationships

Actual duties of loyalty that go beyond good faith and could be compared to fiduciary duties are present in certain legal instruments of civil law, especially where there is a special relationship of confidence or social dependence, such as between employer and employee, in a trust, or within a family.[24] These duties are not necessarily considered categorically different from

[22] Paul Miller & Andrew Gold, Introduction, in Contract, Status, and Fiduciary Law 1, 2 (Paul Miller and Andrew Gold (eds), OUP 2016).

[23] E.g. Grundmann, supra note 3, at 482 ("The first [step] was taken in the [1920s and 30s] when it became established that fiduciary duties were completely distinct from *other* contractual duties" [emphasis added by authors]).

[24] Schubert, supra note 15, ¶ 240-242

the contractual obligations described so far; rather, they exist on a continuum. A possible distinction should, however, be noted: whereas in most contracts, loyalty obligations are merely accessory to the main duty to perform, in cases analogous to fiduciary relationships, the duty of loyalty is the main contractual duty.[25] For example, German scholarship appears to be divided on the precise nature of these duties. According to one view, the duty of loyalty under corporate law should be understood as rooted in the "good faith" provision of the law of obligations,[26] and thus essentially constitutes a more demanding version of it. The reason for the heightened obligation is directors' and other shareholders' ability to affect the interests of others,[27] as well as the correlation between legal power and responsibility as a guiding principle.[28] Other scholars argue that the duty of loyalty is categorically different from good faith because the former is one of the essential obligations in relationships where it applies, whereas the latter is merely a generally applicable incidental duty.[29]

Among this category of contracts including demanding other-regarding duties that can be compared to fiduciary duties are mandates. Analogous to the agency relationship in common law, "mandates" are modern descendants of Roman law, which are typically enshrined in civil codes and can be considered the general legal relationship whereby one party acts on behalf of another,

[25] Schubert, id., ¶ 177-179 (describing the duty of loyalty under corporate law, employment law, family law and public law as a mere special case of the duty of good faith ["Treu und Glauben"], but with greater intensity and the primary duty under the respective relationship).

[26] § 242 BGB.

[27] E.g. Joachim Hennrichs, Treupflichten im Aktienrecht, 195 Archiv für die civilistische Praxis 221, 228-234 (1995).

[28] Hennrichs, id., at 235-237.

[29] Lutter, supra note 7, at 103, 122; Grundmann, supra note 3, at 483 n.64.

and incurs fiduciary obligations. In French law, for example, agency is recognized as a specific contract in the Civil Code (*contrat de mandat*). [30]

Typically, the rules of the applicable civil code governing mandates constitute the general framework for more specific types of relationships in which one acts on behalf of the other. Basic civil law principles pertaining to a fundamental instrument such as the mandate can be important tools in interpreting the law in other areas. Courts or scholars looking for a solution in the more specific area, such as company or trust law, might turn their attention toward general agency principles to clarify ambiguities or to fill gaps in the specific area, or by looking for analogies in other, related areas of law (e.g. one might look toward corporate law to resolve doubts in trust law). General principles, however, do not come into existence in a vacuum; often they are derived by synthesizing rules pertaining to more specific areas. An example would be the development of the duty of loyalty in Germany, which originated in corporate law and spread to other fields from there.[31] The interpretation of law thus proceeds in a hermeneutic process that includes both inductive and deductive reasoning.

Mandates were gratuitous contracts under Roman law: the service is rendered without remuneration being paid, a feature that shows the fiduciary nature of agency relationships in Roman law and in civil law jurisdictions that descend from it. This is true, even if mandates are now recognized as market transactions in most civilian jurisdictions. The Italian code includes a presumption that the mandate is compensated. [32] And while the French and German codes affirm

[30] French Code Civil Art. 1994-2010.

[31] Infra notes 95-97 and accompanying text.

[32] Italian Civil Code Art. 1709.

by default the gratuitous nature of mandates, [33] provisions related to the remuneration of the agent are valid and sometimes explicitly established as a separate type of contract. [34] One may remember that there is no clear-cut distinction between contract and fiduciary relationships – in the common law, a contract is always compensated (consideration), which may be one reason why agency relationships developed as a separate doctrinal category outside of contract.

The French Commercial Code provides some additional rules relating to agency relationships in the commercial context (*contrat de commission*) in articles L. 132-1 and following of the commercial code. Other branches of French law have also been modeled on agency law, such as the rules applicable to corporate officers that represent the company (*mandataires sociaux*). They have, however, largely developed in parallel to agency law but independently from it. For instance, the corporate officer's duty of loyalty was articulated as a principle to be applied by the commercial judge, rather than in reference to the nature of agency relationships.

Under German law, even if the mandate (*Auftrag*) is gratuitous, the general law of obligations applies, which potentially exposes the agent to liability in cases of defective performance.[35] Unlike in other gratuitous contracts (such as a gift or uncompensated loan), mere negligence of the agent suffices for liability, and an objective standard applies.[36] The agent is required to disgorge all benefits he received from the mandate to the principal.[37] One distinctive feature of the German BGB is that it distinguishes clearly between the interior relationship

[33] French Code Civil Art. 1986; BGB § 662.

[34] For example, German law explicitly provides for the *Geschäftsbesorgungsvertrag* in § 675 BGB, which is a compensated contract for services or labor to which most provisions on the mandate apply.

[35] E.g. Frank Schäfer, § 662 ¶ 62-66, in 5/2 Münchener Kommentar zum BGB (Martin Henssler ed., 7th ed. 2017).

[36] Schäfer, id., ¶ 68.

[37] § 667 BGB.

(*Innenverhältnis* between principal and agent) and exterior relationship (*Außenverhältnis* between principal and third party). Unlike Roman law, US law, or older civil codes such as the Austrian ABGB of 1811,[38] which establish a unitary relationship between the principal and the agent that can create binding effects vis-à-vis third parties, German law considers the interior relationship and exterior relationship to be formally separate legal acts that are separate under the abstraction principle (*Abstraktionsprinzip*).[39] Each of them can exist without the other. The exterior relationship governs the powers of the agent, i.e. to what extent he can create binding obligations vis-à-vis third parties, or dispose of the principal's assets.[40] The interior relationship can essentially be any contract between the principal and the agent that instructs, obliges or commits the agent to act on behalf of the principal.[41] The "interior" relationship may be governed by a mandate[42] or a legally equivalent, but compensated contract of services.[43]. In both cases, the agent is understood to be subject to a duty of loyalty, given that an agent is required to personally take care of the interests of the principal.[44]

[38] §§ 1002-1034 ABGB. Even if the ABGB does not explain the distinction between third-party relationship and internal relationship, today Austrian civil law textbooks, legal doctrine, and case law essentially understand the agency relationship as two different relationships as under German law. For example, a recent textbook describes this part of the ABGB as badly drafted because it mixes up the *Vollmacht* (relationship with third parties) and the *Auftrag* (mandate), given that authority to represent a principal does not necessarily have to be grounded in a mandate. Stefan Perner, Martin Spitzer & Georg Kodek, Bürgerliches Recht 257 (2nd ed. 2008).

[39] E.g. Claudia Schubert, in 1 Münchener Kommentar zum BGB, § 164 ¶ 206 (Franz Jürgen Säcker, 7th ed. 2015).

[40] §§ 164-181 BGB.

[41] To put it differently, the exterior relationship determines what an agent can do, while the interior relationship says what the agent may do.

[42] §§ 662-674 BGB.

[43] This "*Geschäftsbesorgungsvertrag*" is defined in § 675 BGB. In this case, the relationship between principal and agent is governed by a contract of services or contract of employment, but supplemented with the same law that otherwise governs the *Auftrag*.

[44] See, e.g. Hans Hermann Seiler, in 4 Münchener Kommentar zum BGB, § 662 ¶ 36-37 (Martin Hennsler, 6th ed. 2012). For the third party, the question would not be whether actual, apparent or inherent authority was established, but only whether the exterior relationship has been established (except in the case of a pure *Innenvollmacht*). There are only a few cases where the "dual structure" changes the outcome, but it is analytically clearer. This is especially true in the law of business associations, where internal decision-making structures between e.g. several board members

3. In pursuit of trust: *Treuhand* and *fiducie*

One of the paradigmatic fiduciary relationships is the common law "trust", which is rooted in a particular expression of the principle of equity that did not traditionally exist in civil law jurisdictions. Most civil law countries do not have a common law trust. This can be explained by history and (in some jurisdictions at least) by the deliberate effort during the French Revolution and the turn of the 18th Century to cut off of wealth transmission from the culture.[45] However, most civil law jurisdictions also provide special legislation for particular functions, such as investment funds, which are essentially a special type of legal entity, or for the administration of estates. Civil law countries differ in how far they have gone in adopting the trust or developing similar models. Approaches range from the adoption of the common law trust or the development of a close functional equivalent, to belated attempts to craft more distant, "trust-like" devices in order to prevent business from fleeing away.

are distinct from their power to represent the business entity vis-à-vis third parties. Powers toward third parties can usually not be limited, even if they are outside the object of the company (no "ultra vires" rule). This prohibition has been enshrined in EU Law: originally, these rules were found in the 1968 First Company Law Directive 68/51/EEC. The directive was subsequently recast as Directive 2009/101/EC and recently included in the "Codification" Directive 2017/1132 of 14 June 2017, 2017 O.J. (L 160) 46, art. 8-9.

[45] Hansmann and Mattei claim that the French revolution is to blame for an ideology pervasive in the civil law tradition that supposedly does not allow divided ownership. Henry Hansmann & Ugo Mattei, The Function of Trust Law: A Comparative Legal and Economic Analysis, 73 NYU L. Rev. 434, 442 (2003). This is a problematic generalization given that the French Revolution did not directly affect all of civil law Europe to the same extent. For example, the Austrian Civil Code of 1811 (ABGB) originally included provisions governing the various feudal relationships, such as *Erbpacht* (heritable tenancy), *Erbzinsvertrag* (heritable lease) and *Bodenzins* (soil lease). The provisions governing these relationships (§§ 1122-1150 ABGB) became obsolete with the abolition of feudalism in 1848, but remained on the books until 2006.

3.1. Legislative adoption of the common law trust

A few jurisdictions have explicitly adopted the common law trust, such as the Czech Republic, whose 2014 law was inspired by the law of Quebec.[46] The earliest adopter, however, was the Principality of Liechtenstein (a hub for property and financial management), which in 1926 explicitly introduced trust principles modelled on the common law.[47] Closely related to Austrian and Swiss law, Liechtenstein law does not have a concept of equity in the common law sense, but reaches the same result by defining as a trustee an individual or legal entity "to whom chattel or real property has been dedicated with the obligation to manage said property as trust assets in his own name, but as a separate legal entity to the benefit of one or multiple third parties."[48] In other words, in the absence of a principle of equity, Liechtenstein law uses the law of obligation to bind the trustee to the intentions of the settlor. Another difference is that a prospective trustee cannot unilaterally declare a trust without the beneficiary's consent.[49] The trustee's fiduciary position is primarily governed by the deed setting up the trust;[50] he cannot be made subject to continuous instructions from the settlor.[51] The trustee must faithfully follow the trust deed and manage the trust with the care of a conscientious businessperson;[52] he must not take actions that would inhibit the fulfillment of the trust's purpose.[53] The trustee is liable to the settlor

[46] Lucie Joskova, Position of a Trustee: The Capacity to Be a Trustee and a Trustee's Duty of Care, 24 Eur. Rev. Priv. L. 1075, 105 (2016).

[47] Art. 897-932 Personen- und Gesellschaftsrecht of January 20, 1926 (version of January 2018), [hereinafter PGR].

[48] Art. 897 PGR (own translation).

[49] See, e.g. Rainer Kulms, Trusts as a Vehicle for Investment, 24 Eur. Rev. Priv. L. 1091, 1111 (2016).

[50] Art. 910, 922(1) PGR.

[51] Art. 918 PGR. If the document establishing the relationship provides for binding instructions, the relationship is qualified as a regular mandate or employment relationship.

[52] Art. 922(1) PGR.

[53] Art. 922(2) PGR.

and beneficiaries for damages in cases of breach of trust under general principles of tort law.[54] Trustees must not obtain any benefits from the trust (besides compensation and reimbursement of expenses).[55] Unless otherwise provided in the trust deed, the trustee must not enter into transactions with the trust on his own account or on the account of close relatives and friends, except in cases of transactions within the usual course of business; transactions in contravention of these rules are voidable and expose the trustee to liability.[56] In that respect, the duty of loyalty appears to be less strict than in common law countries, which would not normally permit such transactions, nor, in many cases, a waiver in the document establishing the trust.

3.2. Partial functional equivalents rooted in Roman law tradition

Other legal systems have developed other instruments (*fiducia*, *Treuhand*) that in some cases come close in function to the common law trust, and provide for rich fiduciary relationships. In Germany and legal systems influenced by Germany, the "fiduciary trust" (*fiduziarische Treuhand*, *Vollrechtstreuhand* or just *Treuhand[-verhältnis]*) has existed since the late 19th Century. It has a smaller area of application than the trust, since civil codes typically establish specific institutions – endowed with duties of care and loyalty – that occupy part of its function, such as execution of a will, the *Nacherbschaft* (a life estate with the remainder going to a different heir), or charitable foundations. Where none of these specific institutions applies, the *Treuhand* remains as a versatile instrument for the administration of assets by one person for the benefit of another. In all of these cases, similar fiduciary duties apply.[57] The *Treuhand* was originally devised

[54] Art. 924(1) PGR.

[55] Art. 925(1) PGR.

[56] Art. 925(2), (3) PGR.

[57] Grundmann, supra note 3, at 489-490.

by scholars, specifically the pandectist scholar Ferdinand Regelsberger, who took inspiration from Roman law sources to develop the possibility of legal transactions where one person receives a certain legal power from another in the expectation of using it only for a particular purpose.[58] Subsequently, the idea was used in practice and recognized by jurisprudence.[59] In the case of a *Treuhand*, the transferor transfers assets to a transferee, the *Treuhänder* or trustee. The trustee thus acquires full ownership of the assets in the view of the outside world, but on the inside, she is bound by her contract – typically a mandate – with the transferor.[60] In light of the trustee's full and unencumbered ownership of the assets, a third party could e.g. acquire rights from the trustee.[61] Should the trustee violate the interior relationship, she would be liable to the transferor for breach of contract, and the transferor might also be able to specifically enforce this contract against a faithless trustee.[62]

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[58] Helmut Coing, Die Treuhandtheorie als Beispiel der geschichtlichen Dogmatik des 19. Jahrhunderts, 37 Rabels Zeitschrift für ausländisches und internationales Privatrecht 202, 205-206 (1973); Sibylle Hofer, Treuhandtheorien in der deutschen Rechtswissenschaft des 19. Jahrhunderts, in Itinera Fiduciae, supra note 3, at 389, 391-394. The original source is Ferdinand Regelsberger, Zwei Beiträge zur Lehre von der Zession, 63 Archiv für die civilistische Praxis 157-207 (1880).

[59] Alexandra Braun & William Swadling, Management: Trust, Treuhand, and Fiducie, in Cases, Materials and Text on National, Supranational and International Property Law 553, 562 (Sjef van Errp & Bram Akkermans eds. 2012).

[60] Braun & Swadling, supra note 59, at 563. The *Treuhand* thus serves as an illustration of the distinction between the "outer" and the "inner" side of a fiduciary relationship discussed above in section 2.2. See Grundmann, supra note 3, at 470 ("Traditionally, and in Germany up to this day, the third party relationship or the property aspects of trust and Treuhand have been considered the crucial one").

[61] Grundmann, supra note 3, at 477 (because restrictions in the powers of conveyance do not have an effect vis-à-vis third parties, "trust and *Treuhand* converge at least partially in result").

[62] Braun & Swadling, supra note 59, at 583. This was, in fact, the issue in one of the first cases of the Supreme Imperial Court adopting Regelsberger's theory and explicitly citing his scholarship. See Coing, supra note 58, at 206 (citing RG 2.6.1890, RGZ 26, 180). In the original theory, *Treuhand* may be used to the benefit of the trustee to create a security interest (*Sicherungsübereignung*). During the late 19th Century, German legal scholarship was divided into a "Romanistic" and a "Germanistic" camp. While Regelsberger's theory is rooted in Roman law, Alfred Schultze developed a similar doctrine based on medieval Germanic (specifically Lombard) law. In this model, restrictions are imposed on the trustee not by obligation, but by encumbrances rooted in property law, e.g. triggered by a condition subsequent (Coing, id., at 206-207; Hofer, supra note 58, at 406-408 (discussing how Schultze's theory applied in particular to testamentary executors). Consequently, a violation of the terms of the conveyance renders it void, which creates uncertainty for third parties and underpins the need for a *numerus clausus* in property rights. For this reason, Regelsberger's "Romanistic" theory was more practically useful and prevailed in most contexts. Grundmann, supra

One aspect that brings the *Treuhand* close to the common law trust is its treatment in insolvency, which developed in the German courts in the early 20th Century. The property held in *Treuhand* is not understood as having legal personality, but as being a separate pool of assets held by the trustee. In the trustee's bankruptcy, the transferor or a third-party beneficiary can request that the assets be set aside from the bankruptcy estate; personal creditors of the trustee cannot seize the trust assets if they are properly set aside.[63] Conversely, in case of insolvency of the transferor, normally[64] the assets revert to the transferor's insolvency estate.[65] While the assets are understood to be the property of the trustee, personal creditors cannot enforce claims against the trust property.[66] The German *Treuhand* thus combines asset partitioning with administration by a trustee governed by the equivalent of fiduciary duties. Instead of using principles of equity, German law combines property law and the law of obligation to reach similar results.[67] Austrian law, where scholars and courts have adopted the German doctrine with little basis in the civil code,

note 3, at 472; Stefan Grundmann, Trust and Treuhand at the End of the 20th Century: Key Problems and Shift of Interests, 47 Am. J. Comp. L. 401, 404-405 (1999).

[63] Grundmann, *id.*, at 407; Braun & Swadling, supra note 59, at 596-597. Curiously, the doctrinal reason for considering the *Treuhand* assets as belonging to the transferor are not entirely clear. One possibility is customary law. In the context of Austrian law, see Johannes Wühl, Der Trust im österreichischen internationalen Privatrecht, Zeitschrift für Rechtsvergleichung 20, 23 n. 49 (2013) (noting that the customary law interpretation comes close to the common law notion of "equity"). For the codified Liechtenstein Trust, see Art. 914 PGR.

[64] This assumes that the *Treuhand* was set up to benefit the transferor. If it was set up to benefit the trustee, e.g. to create a security interest, the trustee can foreclose on the assets.

[65] Braun & Swadling, supra note 59, at 605.

[66] But also Hansmann & Mattei, supra note 45, at 456 n.67. Hansmann and Mattei consider the "Germanistic fiduciary transaction" that provides this result an exception to the general civil law pattern. These authors suggest that its advantages are limited by the trustee not having the full right to dispose of the trust property. This is not entirely accurate with respect to jurisdictions such as Germany and Austria, where the *Treuhänder* does have the power to dispose of the assets in the exterior relationship – i.e. with respect to third parties – but is limited only in the interior relationship, i.e. he might be subject to contractual limitations enforceable by the transferor. In other words, a bona fide third party can rely on the trustee's entitlement to the assets. See Grundmann, supra note 63, at 409.

[67] A difference would seem to be that in a common law trust, the settlor could enforce his equitable ownership against a third party, whereas in Germany, a third party would likely acquire ownership from a faithless trustee unless they conspired in the transaction. Braun & Swadling, supra note 59, at 583-584. See also Ugo Mattei, Comparative Law and Economics 158 (1997) (suggesting the trustee's capacity to transfer away trust assets as the reason why "Italy and other civil law countries" did not adopt Regelsberger's "Romanistic" trust theory).

largely follows German law in these respects. Ultimately, the effects vis-à-vis third parties are quite similar to the Liechtenstein trust, where the statute seems to explicitly rest on a contractual obligation of the trustee.[68] However, the property effects of the German-style *Treuhand* end when the trustee has disposed of assets to third parties; in this case, the principal cannot normally "trace" the assets, even if the trustee violated his duties to the principal.[69]

It is difficult to identify a uniform set of duties in German *Treuhand* relationships, given that it can serve so many different purposes. The duty of loyalty will usually require the trustee to subordinate his own interests to those of the principal. For example, in the case of a trust relationship serving the interests of the principal (*uneigennützige Treuhand*), the trustee will usually be subject to a duty not to compete with the principal.[70] The trustee's duty of loyalty may be attenuated if the trust relationship is intended to serve the interests of the trustee (*eigennützige Treuhand*), whose purpose it usually is to use the trust assets as collateral (*Sicherungsübereignung*). Ultimately, the extent of the duty is one of interpretation of the contract establishing the trust relationship. This is another illustration of the importance of contract in the development of fiduciary duties in civil law jurisdictions.

3.3. Contractual instruments loosely modeled on trust

By contrast, a number of countries have not adopted their own trust analogues, or have done so only very reluctantly. Most prominently, in France, a form of trust, *fiducie*, was introduced

[68] Liechtenstein trust law also provides that a trust beneficiary can reclaim trust assets from a third party who acquired trust assets from a faithless trustee if the third party knew that the trustee lacked the power to convey the property. Art. 912(3) PGR. This result seems to correspond to the German *Treuhand* and not the common law trust.

[69] Jörg Nerlich & Volker Römermann, Insolvenzordnung, § 47 ¶ 37 (C.H. Beck, loose-leaf, 33rd supplementary shipment, 2017).

[70] Schubert, supra note 15, ¶ 200.

only in 2007.[71] Until then, France did not have a general device allowing persons to transfer rights to another to be managed for the benefit of a beneficiary or a purpose. The *fideicommis* was a fiduciary device known under the Ancien Régime, but it had been abolished at the time of the 1789 Revolution. It was not included in the Code civil enacted in 1804. Business and financial life prompted the development of transactions that had a fiduciary nature, though they were not designed as such (*fiducies innommées*), including fiduciary assignments of receivables,[72] asset securitization through funds (*fonds communs de créance*), and loans of securities (*portage d'action*). Beginning in the late 1980s, attempts were made to formally integrate into the Code a general system of rules on fiduciary relationships.[73] This was prompted by the need to increase French law's attractiveness for foreign investors and to provide an equivalent to the common law trust. In addition, the ratification of the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition required a domestic "trust-like" device to prevent business from fleeing from France.[74] Twenty-one new articles were integrated in the Code civil under the heading "De la fiducie",[75] with further changes introduced in 2008 and 2009.[76]

[71] François Barrière, The Security fiducie in French Law, in The Worlds of the Trust 101-140 (Lionel Smith ed. 2013); François Barrière, The French Fiducie or the Chaotic Awakening of a Sleeping Beauty, in Re-imagining the trust: Trusts in Civil Law 222-257 (Lionel Smith ed. 2012).

[72] Cession Dailly, art. L. 313-23 and following of the Code monétaire et financier.

[73] For the successive phases, see Braun & Swadling, supra note 59, at 571.

[74] France has not yet ratified the Hague Convention.

[75] Lo n° 2007-211 of 19 February 2007. For a detailed presentation, see Paul Matthews, The French Fiducie: And Now for Something Completely Different, 21 Trust L. Int'l 17, 22 (2007). Reception was lukewarm at best: Christian Larroumet, "La loi du 19 février 2007 sur la fiducie. Propos critiques" (2007) Recueil Dalloz 20, 1350; Pierre Crocq, "Lacunes et limites au regard du droit des sûretés", ibidem, 1354.

[76] Loi n° 2008-776 of 4 August 2008, art. 18; Ordonnance n° 2008-1345 of 18 December 2008; Ordonnance n° 2009-112 of 30 January 2009; Loi n°2009-526 of 12 May 2009. See Martin Gdanski and Tara Pichardo-Angadi, Recent Changes to French Law Affecting Fiducie and Rights of Secured Creditors, J. Int'l Banking L. & Reg. 262 (2009).

Under these newly-adopted rules, the *fiducie* arises from a contract and involves a transfer of assets from the settlor (*constituant*) to the trustee (*fiduciaire*). The rights transferred to the trustee do not become part of the trustee's personal assets (*patrimoine*). Like the English trustee or the German *Treuhänder*, the *fiduciaire* is bound by a duty to keep the assets received separate from his personal patrimony.

Because the legislation remains quite recent and only few cases have been decided, the status of the trustee and nature of the relationship between the trustee and the settlor have not yet been fully clarified. Trustees do not fit an existing legal classification in French law: characterized as temporary owner on behalf of another, they are not recognized as agent or administrator.[77] In practice, as in Luxembourg,[78] *fiduciaire* in France have to be professionals or institutions subject to state control. This includes corporate bodies in the banking, insurance or finance sectors listed in the Monetary and Financial Code, as well as, since 2008, lawyers.[79] In other words, in these jurisdictions, only individuals subject to a strict professional duty of loyalty quite similar to a fiduciary duty can serve as trustees. To some extent, the enforcement of professional duties by competent bodies such as the bar association will likely serve as a substitute for liability under private law.

French law recognizes management trusts (*fiducie-gestion*) as well as security trusts (*fiducie-sûreté*), and trustees may fulfil various roles: they may administer assets to advance a purpose that the settlor determined (assets are to be remitted to the beneficiaries upon fulfillment

[77] Blandine Mallet-Bricout, The Trustee: mainspring, or only a cog, in the French fiducie? in The Worlds of the Trust 141-166, 142 (Lionel Smith ed. 2013).

[78] See André Prüm & Claude Witz, La nouvelle fiducie luxembourgeoise, in Trust et fiducie. La Convention de La Haye et la nouvelle législation luxembourgeoise 65 (2005).

[79] Code civil Art. 2015 (2).

of the terms of the trust); they may also manage assets that provide a security for the benefit of a third-party creditor. The two functions can also be combined. All in all, however, the role of the trustee in France remains quite passive.

Consequently, the trustee's fiduciary obligations are not as comprehensive as the ones that bind common law trustees.[80] First, the duties of the trustee towards the settlor and the beneficiary are only sketched in a single article of the Code civil, which states that the trustee is personally liable for any wrong he commits whilst carrying out his functions[81] but fails to elaborate on the nature of the liability. The general approach is that liability can be civil or criminal (on basis of breach of confidence, for example). Civil liability may only be contractual or tortious, the two sole categories available in the absence of equity, but the legislative provisions do not clarify the nature of the liability.[82] It is expected that if the victim is the settlor or any party to the contract, the claim will be a breach of contract.[83] If the victim is a third party, rules on liability for tort apply.[84] Once the beneficiary has accepted the trust, he becomes a party to the contract and can sue for breach of contract; otherwise, it is expected (and this remains to be confirmed in case law) that he will have to sue in tort.[85] Second, liability of the trustee is not as strict as in English law, but depends on the nature of the wrongdoing. Consequently, a French trustee is liable only for intentional or negligent breach of duty,[86] while common law trustees have to disgorge profits, regardless of fault. All in

[80] Graziadei, supra note 3, at 294.

[81] Code civil Art. 2026.

[82] Id.

[83] This is in accordance with Code civil Art. 1217 et seq.

[84] Code civil Art. 1240; former French Code civil Art. 1382.

[85] Stressing the questions that remain to be seen, Mallet-Bricout, supra note 77.

[86] Code civil Art. 2026.

all, the *fiducie* does not create fiduciary relationships: it molds itself into classical contractual relationships and their contractual implied inchoate loyalty requirements.

4. Commercial relationships

In commercial relationships, both corporate and financial ones, a broader conception of fiduciary relationships has been emerging in civilian jurisdictions. Under the pressure of harmonization of business law at the EU level, relationships involving the administration of legal persons or the property of others are progressively being grouped under a common umbrella.

4.1. Corporate law

The globalization of firms and the development and opening of capital markets and the financial sector have fostered the evolution of company and financial laws within EU Member States and their harmonization at the EU level. A distinguishing feature of these developments, which have often grown out of various corporate scandals, has been the increasing weight granted to the prevention and management of conflicts of interest.

Traditionally, EU company law harmonization has avoided regulating directors' duties.[87] The proposed Fifth Company Law Directive, which was initially intended to harmonize national corporate law by establishing a two-tier board structure and setting rules to govern the relationship between boards and shareholders, would at least have created a supervisory board approval requirement for certain conflicted transactions, where the conflicted fiduciary would have been

[87] This is one of the reasons critics have brought for EU company law's practical irrelevance. Luca Enriques, EC Company Law Directives and Regulations: How Trivial are They?, 27 U. Pa. J. Int'l Econ. L. 1, 11 (2006).

excluded from deliberations.[88] However, it was never passed, and the European Company Statute, which created an EU law company form, was only enacted in 2001 as a watered-down compromise that left all of the details about board structure and directors' duties to the Member States.[89] Only the 2017 amendments to the Shareholder Rights Directive introduced, for the first time, EU-wide rules on related-party transactions.[90] While these amendments elicited considerable controversy and resistance,[91] they are in line with a trend toward better regulating self-dealing transactions. For example, France has long had rules to this effect.[92] In Italy, the securities regulator (CONSOB) introduced in 2010 procedural safeguards for approval.[93] However, the EU has avoided a supranationalization of fiduciary duties as such, and national laws typically leave the development of a general duty of loyalty to the courts.

[88] Commission of the European Communities, Proposal for a Fifth Directive to coordinate the safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, as regards the structure of sociétés anonymes and the powers and obligations of their organs, COM (72) 887 final, (Oct. 1972), art. 10.

[89] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), 2001 O.J. L 294/1, art. 9c.

[90] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, 2017 O.J. (L 132) 1.

[91] E.g. Tobias H. Tröger, Corporate Groups: A German European's Perspective, in German and Nordic Perspectives on Company and Capital Markets Law 157-199 (Holger Fleischer, Jesper Lau Hansen & Wolf-Georg Ringe eds. 2015); Luca Enriques, Related Party Transactions: Policy Options and Real-World Challenges (with a Critique of the European Commission Proposal), 16 Eur. Bus. Org. L. Rev. 1, 25-31 (2015).

[92] C. Com. Art. L 225-38 and L 225-40. See e.g. Luca Enriques, The Law on Company Directors' Self-Dealing: A Comparative Analysis, 2 Int'l & Comp. Corp. L.J. 297, 319-320 (2000).

[93] Regulations Containing Provisions Relating to Transactions with Related Parties, COBSOB Resolution No. 17221 of 12 March 2010, available at http://www.consob.it/mainen/documenti/english/laws/reg17221e.htm. For a comparative overview, see also Pierre-Henri Conac, Luca Enriques & Martin Gelter, Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy, 4 Eur. Comp. & Fin. L. Rev. 491, 498-499 (2007).

Despite this, fiduciary duties for corporate officers and directors are today recognized in most jurisdictions, although the terminology used to refer to these duties is sometimes confusing.[94]

For example, the German corporate law doctrine has long recognized the existence of a duty of loyalty of partners in a partnership or corporate directors, even if there are no specific rules establishing one.[95] In fact, starting in the 1930s and continuing until after World War II, scholars developed the duty of loyalty in German law while writing about partnership and corporate law, seeking to determine what duties individuals bound together in a business association have to each other.[96] Starting from there, it was extended to other relationships such as the closest analogue to the trust, the *Treuhand*.[97] Contemporary sources, including a 2005 decision by the Federal Supreme Court, explicitly describe the corporate duty of loyalty as a specific example of a general principle of civil law that applies to individuals managing another person's property.[98]

France is to some extent an exception. French corporate law has long had mechanisms other than fiduciary duties for dealing with conflicts of interest, including approval requirements for related-party transactions and criminal penalties for misuse of corporate assets.[99] As a matter of a

[94] E.g. Enriques, *supra* note 92, at 302-303 ("all of the legal systems considered here impose a general duty of loyalty (*bonne foi*, *lealtà*, *Treuepflicht*) upon directors").

[95] Infra section 3.

[96] Lutter, supra note 7, at 102-105; Grundmann, supra note 3, at 482-485; Holger Fleischer, Mitgliedschaftliche Treuepflichten: Bestandsaufnahme und Zukunftsperspektiven, 2017 Der Gesellschafter 362, 363 (all describing the development of the idea of the duty of loyalty in the writings of scholars such as Alfred Hueck and Wolfgang Zöllner). For partnership law, see in particular Alfred Hueck, Der Treuegedanke im Recht der offenen Handelsgesellschaft, in Festschrift für Rudolf Hübner 72-91 (1935).

[97] Grundmann, supra note 3, at 484-485. See infra section 3.

[98] E.g. BGH 21.12.2005, 3 StR 470/04, NJW 2005, 522, 523 ("Mannesmann"). Abbreviated translations are provided in Franklin Gevurtz, Global Issues in Corporate Law 97-104 (2006), and also Andreas Cahn & David C. Donald, Comparative Company Law 435-441 (2010).

[99] On the crime of *abus de biens sociaux*, see, e.g. Nicole Stolowy, Company-Related Offenses in French legislation, 2007 J. Bus. L. 1, 3-7; Conac et al., supra note 93, at 518-519.

functional comparison, one could argue that other doctrines perform similar functions as the duty of loyalty in French corporate law. In particular, the crime of *abus de biens sociaux* has made it illegal for a director to use the company's assets for personal reasons in bad faith.[100] Relatedly, the doctrine of *abus de majorité* has restricted majority shareholders' voting decisions. However, a fiduciary duty was recognized in France after the *Vilgrain* case in 1996 in the context of an officer's personal fiduciary obligation to a shareholder following a promise.[101] Though a fiduciary duty towards the company was also recognized,[102] this duty was first narrowly understood as a basis for ruling against directors for hiding specific information from individual shareholders who were in the process of selling their shares, and who were therefore deprived of an opportunity to achieve a better sale. While the duty has not been codified, it is recognized by courts as a "principle" and may therefore be directly used as the primary basis for decisions.[103] Since 2011, the duty of loyalty, sometimes expressed as a "duty of loyalty and fidelity" has been used as a ground to prohibit more generally opportunistic behavior on behalf of directors or officers.[104] This development shows an intensification in business ethics and the recognition of a fiduciary duty

[100] C. Com. art. L. 241-3, L. 242-6.

[101] Cass. Com. 27 February 1996 (JCP E 1996, II, 838, n. D. Schmidt and N. Dion).

[102] Cass. Com. 24 February 1998 (Bull. Joly 1998, p. 913, n. B. Petit).

[103] Jean-Louis Bergel, Methodologie juridique (PUF 2001) 209, 381.

[104] Cass. Com. Nov. 15. 2011, n° 10-15.049, F-P+B, Sté DL finances c/ A (JCP E, 2011, p.16, note Alain Couret et Bruno Dondero; D. 2012, p.134, note Thierry Favario; Bull. Joly 2012 §116, note Henri Le Nabasque, Dr. des Sociétés 2012, n°2, p.21, note Myriam Roussille; Contrats, Conc., Consom. 2012, n°2, p. 39, note obs. Marie Malaurie ; Gaz. Pal. 2012, n° 41, p. 19, note. Bernard Saintourens). See also Genevieve Helleringer, Le dirigeant à l'épreuve des opportunités d'affaires, Recueil Dalloz 1560 (2012).

that has been, until recently, relatively absent in French business and legal culture,[105] and that remains still limited in scope.[106]

In Germany, by contrast, the duty of loyalty (*Treupflicht*) is commonly recognized even without an explicit statutory basis. The *Aktiengesetz* (stock corporation act) states that directors have to employ the care of a diligent and conscientious manager,[107] without expressly mentioning loyalty. However, it is commonly accepted that directors are subject to a duty of loyalty that "bars them from (consciously) pursuing objectives in conflict with the corporate benefit."[108] This duty is often seen as a specific instance of the general good faith requirement of the law of obligations (although scholars differ on this).[109] Under this duty, a director must prioritize the welfare of the corporation over his own interests and may not, for example, be "involved in a deal through which he grants preferential treatment to relatives or to other corporations in which he personally holds shares."[110] Specific statutory provisions, such as the duty of confidentiality and the prohibition against competing with the corporation,[111] are understood to be examples of this broader, uncodified duty of loyalty.[112] Interestingly, the Federal Supreme Court has described the corporate

[105] The contract law of mandate requires from the agent a duty of loyalty. See Philippe Malaurie, Laurent Aynes & Pierre-Yves Gautier, Les contrats spéciaux ¶ 567 (5th ed. 2011).

[106] Typically, French law does not impose a duty of loyalty on shareholders, see Cass. com., 10 Septembr 2013, n° 12-23888, M. X and Sté EGT c/ Sté LBDI noted by Marie Caffin-Moi, *L'essentiel droit des contrats*, 6 November 2013, 7.

[107] § 93(1) AktG.

[108] Hans Christoph Grigoleit, Directors' Liability and Enforcement Mechanisms from the German Perspective, in German and Asian Perspectives on Company Law 105, 109 (Holger Fleischer, Hideki Kanda, Kon Sik Kim & Peter Mülbert eds. 2016).

[109] E.g. Hennrichs, supra note 28, at 228-234.

[110] Grigoleit, supra note 108, at 109.

[111] §§ 88, 93(1) AktG

[112] Gerald Spindler, in 2 Münchener Kommentar zum Aktiengesetz, § 93 ¶ 108 (4th ed., Wulf Goette & Mathias Habersack eds. 2014). See also Cahn & Donald, supra note 98, at 339 ("The general standard of the duty of loyalty is,

duty of loyalty as an example of a duty that applies to any "manager of another person's property"[113], adding that "the general principle of civil law, according to which someone managing another person's property, must exclusively and without limit act in the interest of the owner … applies also in corporate law."[114] It is also sometimes considered a backstop for the statutory requirement to treat shareholders equally,[115] even if the uncodified duty of loyalty itself in fact has had far greater practical significance.[116] In light of this, it is clear that German jurisprudence and doctrine consider the director's duty of loyalty to be a general corporate law principle rather than merely a narrow, contextualized, statute-specific duty.

In recent decades, German courts have extended the duty of loyalty from directors to shareholders, and do not hesitate to explain it not only as benefiting the corporation, but also the other shareholders. In a 1988 decision, the Federal Supreme Court decided that a majority shareholder has a duty of loyalty toward the minority.[117] In a subsequent 1995 case, the court explained that a minority shareholder that had *de facto* veto power over a transaction essential to the corporation's survival because of a supermajority requirement was also subject to an *ad hoc* duty of loyalty.[118] As Holger Fleischer points out, this to some extent resembles US law, but contrasts with UK, French, and Swiss law, where courts have not extended fiduciary duties to

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however, not expressly provided for in the statute, but has been extrapolated by German courts and legal scholars from the nature of the position that directors hold and the tasks they are required to perform").

[113] E.g. BGH 21.12.2005, 3 StR 470/04, NJW 2005, 522, 523.

[114] BGH 21.12.2005, 3 StR 470/04, NJW 2005, 522, 524.

[115] § 53a AktG. See Uwe Hüffer & Jens Koch, Aktiengesetz § 53a ¶ 13 (12th ed. 2016).

[116] Hüffer & Koch, id., § 53a ¶ 2.

[117] BGH 1.2.1988, II ZR 75/87 ("Linotype"). A translation is available in Cahn & Donald, supra note 98, at 583-585.

[118] BGH 20.3.1995, II ZR 205/94 ("Girmes"). For a translation, see Cahn & Donald, id., at 594-598. On the development, see also Fleischer, supra note 96, at 363-364.

shareholders.[119] Scholars sometimes explain this development as an extrapolation of principles from the law of partnerships, which in modified forms even applies in the public limited company, in spite of the far more limited personal connections among its shareholders.[120] Even if shareholders can in principle vote their shares in their personal interest, the countervailing interests of the company and other shareholders may set limits to pure selfishness.[121] In business associations in general, German scholars often distinguish between the use of rights intended to serve common purposes (e.g. management rights), and those intended to serve individual purposes (e.g. information rights). Restrictions imposed by the duty of loyalty are stronger in the prior category.[122]

Arguably, in corporations, the conception of the duty of loyalty appears to be broader than in the US. First, besides "negative" prohibitions against self-dealing or taking of corporate opportunities, the duty of loyalty may also require a board member or manager to "positively" engage in certain actions. For example, one leading commentary mentions that a director may be required to work extra hours or to interrupt a vacation under special circumstances.[123] Second, unlike in the US, where the duty of loyalty essentially applies to a specific set of circumstances triggering entire fairness review (such as interested transactions), the German doctrine is understood as entailing a balancing of conflicting interests, at least when shareholders are exercising individual rights. To take a relatively recent appellate case as an example, the court

[119] Holger Fleischer, A Guide to German Corporate Law for International Lawyers, in German and Asian Perspectives on Company Law 19, 39 (Holger Fleischer, Hideki Kanda, Kon Sik Kim & Peter Mülbert eds. 2016).

[120] Hüffer & Koch, supra note 115, § 53a ¶14.

[121] Günter H. Roth & Peter Kindler, The Spirit of Corporate Law 138 (2013).

[122] E.g. Torsten Schöne, § 705 ¶ 103-104, in Beck'scher Online-Kommentar BGB (Heinz Georg Bamberger, Herbert Roth, Wolfgang Hau & Roman Poseck eds., 44th ed. 2017), see also Grundmann, supra note 3, at 485.

[123] Spindler, supra note 112, § 93 ¶ 109.

found that putting profits into corporate reserves instead of distributing them could be a violation of the majority shareholder's duty of loyalty. The court weighed the interest of the corporation in retaining profits against the minority shareholders' interest in receiving profits and invalidated the decision to create a balance sheet reserve.[124] (In doing so, the court did not specifically make reference to the corporation being closely-held, which, for some US courts, justifies a similar rule[125]). At the very least, "starving" the minority shareholders is considered impermissible under the duty of loyalty.[126] However, if we follow the view of those scholars who argue that the duty of loyalty is just a heightened expression of the general duty of good faith stemming from the law of obligations, then another explanation might be that this is the reason why it is not limited to directors or majority shareholders, but encompasses everyone involved in the common corporate venture, including minority shareholders.[127]

Even if fiduciary duties are not necessarily rooted in status, at least in corporate law Continental European countries are less likely to accept an opt-out than does US law. Provisions allowing for the limitation of liability for violations of the duty of care found in Delaware's General Corporation Law § 102(b)(7), or the elimination of fiduciary duties under the Delaware Limited Liability Company Act § 18-1101(e), which in fact diverge from the traditional fiduciary model of common law jurisdictions, appear to have no parallel. For example, in German law, ex ante liability waivers are void because directors' duties of loyalty and care are derived from their

[124] OLG Nürnberg, 9.7.2008, 12 U 690/07.

[125] Donahue v. Rodd Electrotype, 328 N.E.2d 505 (Mass. 1975); Smith v. Atlantic Properties, 422 N.E. 2d 798, (Mass. 1981).

[126] Roth & Kindler, supra note 121, at 139. One may speculate that the reason for this difference can be traced to the German *Treupflicht*'s historical origins in the law of business associations, as opposed to the common law duty of loyalty's origins in agency and trust law, see Grundmann, supra note 3, at 484-485 (discussing differences in fiduciary duties depending on whether the beneficiary is one person or multiple individuals).

[127] Hennrichs, supra note 28, at 237.

position as members of a corporate "organ."[128] At the same time, however, there is a debate about the enforcement of fiduciary duties. At least in the context of directors' duties, they are arguably under-enforced because for structural and institutional reasons, it is difficult for shareholders to bring a derivative lawsuit.[129] Following self-dealing transactions, for example, lawsuits are typically brought only after a change in ownership of the corporation or[?] in bankruptcy. It has been argued that the doctrine of concealed contributions of capital, which is typically enforced by the bankruptcy trustee, thus often takes the function of the duty of loyalty in policing self-dealing.[130]

4.2. Financial law

In the EU, the Markets in Financial Instruments Directive ('MiFID II') adopted in 2014[131] and currently still in the process of being transposed in some jurisdictions, governs the relationship between financial advisers and their clients. When providing investment services to professional and retail clients, firms must act honestly, fairly, and professionally in accordance with the best interest of their clients.[132] The rule is quite vague[133] and the EU Commission described MiFID as entailing "reinforced fiduciary duties".[134] It is explicitly designed to ensure that the advice is suitable for the client, not tainted by conflicts of interest, that clients' orders are handled fairly and

[128] Spindler, supra note 112, § 93 ¶ 27; see also Grigoleit, supra note 108, at 114.

[129] See Martin Gelter, Why do Shareholder Derivative Suits remain rare in Continental Europe?, 37 Brooklyn J. Int'l L. 844-892 (2012); Maria Isabel Sáez & Damaso Riaño, Corporate Governance and the Shareholders' Meeting: Voting and Litigation, 14 Eur. Bus. Org. L. Rev. 343, 363-375 (2013).

[130] Conac et al., supra note 93, at 502-503.

[131] MiFID II and Regulation (EU) N°600/2014 [2014] OJ L173/84 ('MiFIR') recasting Directive 2004/39/EC [2004] OJ L145/1 (MiFID).

[132] MiFID II, art. 24(1).

[133] Niamh Moloney, EU Securities and Financial Markets Regulation 215-24 (3rd ed. 2014).

[134] EU Commission, Green Paper on Retail Financial Services in the Single Market, COM (2007) 226 final, Brussels 30 April 2007, 12.

executed in the client's best interest, etc. Member States have to comply with these provisions. They may also supplement them with additional legislative requirements. An example of such "gold-plating" is the ban of the taking of commissions by persons offering independent financial advice introduced in the Netherlands from 2013.

5. Conclusion

The law-equity distinction in the common law tradition led to the establishment of fiduciary law as a separate field. Fiduciary relationships are governed by equity, which is based on "conscience" and loyalty.[135] While there is no unified body of fiduciary law as such in civil law systems, obligations bearing the marks of their fiduciary nature can be found in various domains. Fiduciary duties form a patchy mosaic in Europe, rather than an easily readable fresco. The growing literature commenting on the relevant articles of codes or legislation and founding cases participate in the progressive uncovering of fiduciary relationships as a broader concept in European jurisdictions. This development is particularly obvious in business relationships for two main reasons. First, the pressure to harmonize company and financial services law throughout EU triggered a confrontation between the English legal tradition and continental European ones. Second, a wave of corporate and financial scandals raised awareness about conflicts of interests and shed light on the regulatory strength of legal frameworks based on fiduciary duties.

An important difference between civil law and common law jurisdictions remains: the language used here and there to describe fiduciary obligations starkly differs. Common law's

[135] As a consequence, equity prevents people from taking advantage of a technicality in bad faith. By contrast, the common law approach was originally primarily concerned with forms. Snell's Equity by John McGhee (general editor), Matthew Conaglen, Timothy Dutton, David Fox, Timothy Harry, Edwin Johnson, Thomas Leech, Adam Smith (contributors), Thomson Sweet Maxwell (33rd ed. 2015) 1-07 to 1-09.

vocabulary reflects a psychological and anthropological view of man and includes precatory language that is meant to inspire higher standards of morality in behavior; civilian codes traditionally do not use a discursive or value-charged vocabulary.[136] They do not effectively convey to citizens the sense that legal boundaries are required because "man [is] a moral subject responding to conscience, whose volition is not perfectly free, and whose conduct is driven as much by desire and emotion, as by reason."[137]

[136] Graziadei, supra note 3, at 298. But see Fleischer, supra note 96, at 366 (noting that the moral underpinnings of the duty of loyalty, which can even be traced to the Roman *societas,* were overemphasized by National Socialism, which led to a more cautious understanding after World War II).

[137] Id.

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