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Conflict of Interest, Secrecy and Insider Information of Directors - A Comparative Analysis

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Klaus J. Hopt
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Abstract

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Klaus J. Hopt
Max Planck Institute for Comparative and International Private Law
Mittelweg 187
D-20148 Hamburg
phone: +49 40 41 90 02 05 , fax: +49 40 41 90 03 02
e-mail: hopt@mpipriv.de

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A Comparative Analysis

Klaus J. Hopt, Max Planck Institute for Comparative and International Private Law, Hamburg[#]

Abstract

The duty of loyalty is highly developed in Anglo-American countries, while in continental European countries it has only received more hesitant attention. Yet more recently there are tendencies to more convergence. They stem from company law scholarship, but also from more institutionally driven developments such as the independent director movement, the corporate governance codes, to a certain degree also the harmonization efforts of the European Commission and the general influence of US American law on European company law and practices. This article concentrates on conflict of interest, secrecy and insider information of corporate directors in a functional and comparative way. The main concepts are loans and credit to directors, self-dealing, competition with the company, corporate opportunities, wrongful profiting from position and remuneration. Prevention techniques, remedies and enforcement are also in the focus. The main jurisdictions dealt with are the European Union, Austria, France, Germany, Switzerland and the UK, but references to other countries are made where appropriate.

Key words

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I. Duty of loyalty in a comparative corporate law setting: path dependency and convergence

1. Path dependency

a) In comparative company law[1] the duties of the directors of the board are traditionally separated into two groups: *duty of care* and *duty of loyalty*. This corresponds to the common law roots of these duties. The duty of loyalty has its origin in fiduciary principles that were developed by the courts in equity, while the duty of care has its grounds in the law of negligence.[2] The duty of care is fairly well developed in most countries, though often only in

legal doctrine because of the reluctance of the courts to interfere with business decisions, a reluctance which is reflected in the business judgment rule. Yet as regards the duty of loyalty, there is a striking difference. In the USA, the UK and former Commonwealth countries, this duty is highly developed; in continental Europe, for example Germany, France, Italy, Austria and Switzerland, and in Japan too attention only turned to this concept at a later date, and more hesitantly.[3] In the USA, the American Law Institute's Principles of Corporate Governance devote one whole part to the duty of fair dealing and one chapter to the directors and senior executives,[4] while in Austria a leading commentary devotes just a few lines to this duty.[5] The question arises why this obvious path dependency has developed.

b) There are a number of reasons or at least hypotheses for this difference. The main one is the *trust analogy*. The strictness of the duty of loyalty of directors in common law results from the equation of the duties of company directors with the duties of trustees by the courts of equity in the early 19th century. These courts treated directors of unincorporated companies as holding property for the shareholders as trustees, and then also applied this principle to the directors of incorporated companies, even though the latter are agents of the company and only 'constructive trustees'. In case of breach of their fiduciary duties, they were required to restore the value of the property of the company that they had misappropriated.[6] In civil law countries that do not have the tradition of the trust, the duties of directors were developed separately under company law, sometimes with recourse to general civil law agency principles, which were much less strict than the English trust. Also under German law, for example, the basic agency contract is a not-for-profit relationship, which was not suited to commercial relationships, and of which there were only rare cases. The case law that developed for service contracts was more frequent, but too heterogeneous and not geared toward fiduciary principles.

Other circumstances may have contributed to this path dependency. Traditionally, in the USA and the UK the duty of the directors is owed to the shareholders. This is a clear-cut relationship. The principals are the shareholders and the directors owe their duties only to them.[7] While this is still true today in Switzerland,[8] in many other continental European countries the duties of the directors are owed to the enterprise[9] or even directly to the different stakeholders or constituencies, such as employees, customers and the general public. The prime example is Germany, another one is Japan, though more recently even the United Kingdom has adopted a broader view under the enlightened shareholder value (ESV)

approach.[10] In such loose relationships, concrete duties and even trust concepts are more difficult to conceive because the beneficiary is opaque.

Further path dependent developments have added to the difference. The *two-tier board system*[11] has developed in continental European countries such as Germany, Austria and a number of other countries. In this system, the board is split into a managing board and a supervisory board. The managing directors are elected and dismissed by the supervisory board, not by the shareholders, and they are not responsible to the shareholders, but only to the company. The supervisory board is more remote from the daily operations of the business and as a general rule only operates on a part-time basis. This reduces, though does not completely exclude, personal conflicts of interest, as they are typical for a trustee. As a matter of consequence, the prohibition of competition does not extend to supervisory board members. On the other hand institutional conflicts arise because the supervisory board members who are only part-time usually sit in the board of more than one company as we shall see infra.

Group law may also play a role.[12] In countries without a formalized group law, conflicts of interest in groups are usually governed by duties of the controlling shareholder, who often sits as a director or even chairs the board. In contrast, where there is a special group law such as in Germany, the conflicts of interest between the parent company and the subsidiary are governed by specific rights and duties of the member companies of the group. Personal duties of the directors of the parent company and the subsidiaries also exist, but are less relevant than duties between the members companies of the group, not least because of the parent company's deeper pockets of the company, though the directors may be sued together with the company.. In practice, the same person frequently sits in the board of the parent company and the board of a subsidiary. Under such circumstances, the law makes it clear that in the function as director of the subsidiary, the director must first promote the interests of this company and not of the parent, though *de facto* compliance with this may often be difficult.

2. Convergence

Having set out these path dependent differences as regards the duty of loyalty, one should not overlook the fact that there are recent indications of convergence. Several factors play a role in this.

a) The first factor is *comparative law scholarship*. Comparative company law research has a long historical tradition in the context of the preparation of major company law reforms,[13] occasionally also merely driven by academic research interest. Walter Hallstein, the President of the European Commission, who, while he was still assistant at the Kaiser Wilhelm Institute in Berlin (the predecessor of the current Max Planck Institute for Comparative and International Private Law in Hamburg) wrote a comparative law opinion on American and English company law in the 1930s.[14] Other examples include Ernst-Joachim Mestmäcker, who in 1958 addressed conflicts of interest in American law and drew conclusions for German law.[15] A comprehensive study on European Insider Law was published in the 1970s and a comparative study on regulating directors' conflicts of interest was carried out at the European University Institute in Florence in the 1980s.[16] Other academic contributions came from the economic principle agency theory,[17] and in particular its interest in the board, and comparative board and board law studies. Yet, interestingly, though much of this was geared towards Europe, and the late André Tunc had held conflicts of interest and the duty of loyalty of directors to be excellent candidates for harmonization, there was no fully fledged European harmonization of core company law, including directors' duties. It is only in recent times that there are renewed signs of interest in company law harmonization from the European Commission[18] and the studies it has commissioned: the Reflection Group report[19] and the forthcoming LSE Study.[20]

b) Other more institutionally driven developments have led in the same convergence direction. This is especially true for the *independent director movement*.[21] This movement started in the United Kingdom,[22] where the concept of the independent non-executive director (NED) was created, and was taken up by the European Commission in its Recommendation of 15 February 2005.[23] Even though this was only a recommendation and compromises had been made, for example, as regards labor directors under German quasi-parity co-determination,[24] its success was limited. Traditional company lawyers resisted the idea, both in France[25] and in Germany.[26] But overall there was recognition that the concept was useful and some even called it 'une pièce maîtresse du gouvernement d'entreprise'[27] (the cornerstone of corporate government).

Yet when the concept of independent director was incorporated into the *corporate governance codes,* there was considerable convergence in the European Union,[28] despite the fact that this

caused considerable difficulties for countries with a concentrated shareholder structure such as Germany as regards independence from a controlling shareholder, and this issue caused some resistance.[29]

More generally, *US American law and legal practices* have been an important influence on European law and there has been a broad influx of these ideas into European law for some time.[30] This has widened the trend towards transatlantic convergence.

II. Independence, conflict of interest and duty of loyalty: concepts and case law

1. The different concepts of independence, conflict of interest and duty of loyalty

Conflict of interest of directors, independence and duty of loyalty are often mixed up in the general discussion and it is true that the lines between these three concepts are not entirely clear. Without purporting to remedy this by entering into a broad doctrinal discussion, these concepts will be used in this article in the following way:

Independence is understood as an objective status of a director, not as a subjective state of mind, as important as such a mental disposition may actually be. It would be difficult, if not impossible, to determine such a state of mind and accordingly this would be hardly practical as a legal criterion. Furthermore independence is supposed to create expectations and confidence. Therefore certain relationships that may threaten independence and are listed in the Annex of the European Commission's Recommendation 'should be based on due consideration.'[31]

Conflict of interest is also understood in an objective sense, but arising from a concrete conflict situation. In a broader sense, conflicts of interest exist everywhere, but as such are hardly a concept to be accorded legal consequences. An example for these difficulties are the conflicts of interest of banks, which cannot be dealt with in the abstract, but must be faced concretely by looking at the risks involved and the transactions to be dealt with by the regulators.[32] In this sense, a principle that is broad, but clear cut, and can therefore be addressed is the principle of the priority of the company interest over the private interest of the director.[33] A clear case of such a conflict was the *Schaffgotsch* case, in which a banker

who was also board member of another bank tried to convince the latter bank to give a credit to his own financially-stressed bank.[34]

It is much more difficult to state such principles if there are conflicting interests of third parties. In such circumstances, a balance must be drawn which is fact-based and requires judgment. Such third-party conflicts are frequent in countries with a two-tier system, since as mentioned before the supervisory board directors are usually only part-time and sit in a number of other supervisory boards.[35] The number of board seats a director may hold at any one time is limited today by law or codes, but in former times it was not unknown for directors to hold up to 30 supervisory board memberships´ concurrently. The prime example is the famous German banker Hermann Josef Abs. Yet such conflicts arise even in one-tier systems, for example if the board owes duties not only to the shareholders, but also to other constituencies, in particular labor. Yet these constituency conflicts will usually just lead to a broader discretion of the board, where the self-interest of staying in office or maintaining good relations may *de facto* prevail. More difficult is the *Bsirske* case, where a trade-union boss who was the Vice Chairman of the co-determined board of Lufthansa Corporation organized a strike in December 2002 that caused millions of Euro damages to Lufthansa; he did not step down from his board seat.[36] As a consequence, the annual general meeting of Lufthansa singled him out among the board members, and refused to discharge him from liability, a step that is highly unusual in Germany.

The concept of the *duty of loyalty* is used as a standard of behavior which the director is require to obey to under company law and which, if violated, leads to sanctions and other remedies. It is true that the duty of loyalty is not a rule in the technical sense, but a standard[37] and has even been described as an 'umbrella phrase'[38] to control related-party conflicts. As such, it needs to be substantiated in the light of the necessary protection of the company and its shareholders. But it is important to see that at the same time the duty of loyalty is also aimed at the protection of competition and the market.[39]

2. Duty of loyalty: examples and case law

The duty of loyalty has been substantiated by courts and academic research ever since it was developed by the English common law courts in the early 19th century and many doctrinal examples and, to a lesser extent, case law can be found in most jurisdictions with a developed,

not necessarily codified, company law. It is not the intention of this article to give a full comparative law survey of this. A whole book would probably not even suffice to give a full picture. Instead a concise comparative overview of the most important categories and case groups of the duty of loyalty of directors shall be given.[40]

Before doing this a remark on future research seems appropriate: Consideration should be given to the idea that conflicts of interest are not restricted to company directors, but common to all service professions such as bankers, attorneys, auditors and many others. If one realizes this, a number of common problems and solutions can be identified and fruitfully be transferred to other case categories.[41]

a) *Fraud:* The directors are held to the standard of general loyal behavior. As a minimum, they may not commit penal or fraudulent acts such as stealing company property.[42] This prohibition includes granting and receiving bribes and kick-backs, unfortunately a widespread practice in international commerce, but with dire consequences if discovered, as in the case of Siemens Corporation and others. Directors are also not expected to degrade their company.[43]

b) *Loans and credit to directors:* In many countries there are special legal provisions on loans and credit to directors,[44] for example in Germany, France and the UK. In other countries, this has traditionally been developed by case law. Some countries single out similarly dangerous contracts like guarantees. The solution sought is usually prohibition, with the possibility of prior or sometimes also later consent. The consent needed is sometimes required from the supervisory board or the board as a whole, sometimes from the shareholders.

c) *Self-dealing:* In many countries self-dealing[45] is covered by specific provisions, sometimes by case law. In the UK, for example, section 190 of the Companies Act 2006 requires shareholder approval for substantial property transactions between the company and the director. The reason for this is the following: '(I)f directors enter into a substantial commercial transaction with one of their number, there is a danger that their judgment may be distorted by conflicts of interest and loyalties, even in cases of no actual dishonesty...'[46] Sometimes there are special requirements for related party transactions.[47] In France, if the transaction is not prohibited, the rules on the *conventions contrôlées* apply.[48] In Switzerland, there is no explicit provision in the Companies Act, but since 2005 there is a requirement as regards a special form for self-dealing: the contract needs to be made in writing.[49] As a

general principle, it can be formulated that the solution is twofold: a procedural one, namely self-dealing needs to be checked by another organ of the company, and in substance the transactions are usually not forbidden, but must be made at arm's length. The entering into or amendment of the employment contract between the company and the director, in particular as far as remuneration is concerned, is a special case that will be addressed below.

Self-dealing is not restricted to directors, but is also a frequent phenomenon in the relationship between the company and its controlling shareholder.[50] In many countries there is no clear distinction and the rules differ greatly, but in countries with a special group law there are special rules that are aimed at the risks and the protection needed. The latter approach is preferred, since the frequency of self-dealing, its risks and the adequate means of legal reaction differ considerably for both types of self-dealing. It is safe to say that regulation of the second type, i.e. the group law approach, is more complicated than regulation of the first type, but we shall return to the remedies below.

d) *Competition with the company:* In a number of countries there are special rules forbidding or restricting competition of the director with their company. Sometimes these rules are explicit legal provisions in the company codes, so prominently in Germany, sometimes they arise from case law or from codes.[51] The rules differ considerably as far as strictness is concerned. In some countries, such competition is forbidden subject to permission. In other countries, it is relevant whether the harm to the company is outweighed by the benefit to the company. Still other countries distinguish between management board and supervisory board members, the latter in general just being part-time and therefore being dependent on other activities. In some countries, there seems to be no specific rule, either because the duty is self-evident as in the United Kingdom or, on the contrary, there is no duty at all, as it seems to be the case of France.[52] If competition is not allowed, the actual delineation of the duty to abstain may be very difficult to identify in practice because the relevant market has to be defined. The problem is well known in antitrust law. Clear contractual rules are recommended.[53]

e) *Corporate opportunities:* The corporate opportunity doctrine[54] has its origin in the Anglo-American world. It is rooted in the trust analogy for directors as fiduciaries of the company. Directors may not use for themselves business opportunities that arise for their company. This doctrine overlaps with the no-competition rule just mentioned, but it is not identical. Acts of

competition do not necessarily involve opportunities for the company, since they go far beyond mere transactions.

A problem arises if the company is unwilling or unable to take up the business opportunity, either financially or in terms of experience. For reasons of efficiency of the rule according to case law, this is not an excuse *per se*, unless there is permission for the director to seize the opportunity. Yet here the rationale of the rule comes into the play: If it is a conflict of interest rule, then in such a situation the rule should not apply, but if it is a no-profit rule, then the director must abstain or disgorge the profit made to the company.[55] The English courts are stricter in this respect than other jurisdictions, including Commonwealth country jurisdictions. But it is difficult to see why, once the opportunity has been disclosed to the company and the company has made clear that it is unwilling or even unable to take it up, the opportunity should be left to competitors.[56]

In practice, it may become difficult to see whether in a particular case an opportunity is one for the corporation or not. The line of business test has been developed for this delineation. Even if the director become aware of an opportunity within this line on a social occasion, he still has to grasp it for the company. If the business opportunity is not yet in the actual sphere of activities of the company, this is not an excuse, but the company may also be interested to get into this line of business. Here the case law has developed the expectancy or interest doctrine. Still more borderline is the situation in which the new business does not fall at all into the statutory business reach of the company. Yet, in an English case trustees were held liable because they could have made an application to the court to extend the scope of the trust.[57]

The potentially most difficult question arises if the director who is an expert in the field has received a personal offer from a third party to found a new company with the third party to exploiting a new business idea in the field after the director has left their job. The Court of Appeal in Stuttgart has decided that the director cannot be blocked by the corporate opportunity doctrine from starting up his own business or company, provided there is no post-contractual prohibition of competition clause in his contract. The German Federal Court of Justice (*Bundesgerichtshof*) squashed this decision,[58] not appreciating the negative overall consequences: Directors who have expertise, but not enough capital of their own, are

prevented from opening their own business which is negative for themselves and the market as a whole.

f) *Wrongful profiting from position:* Beyond the case situations mentioned previously, affirming or denying the existence of a duty of loyalty becomes blurred. A more rigid view originating in the USA holds that directors are not allowed to use their position for their self-interest, i.e. that in principle there is a prohibition against 'wrongful profiting from position'.[59] Of course, this is a general statement that would need to be substantiated. While it is obvious that directors may not use company money for their own benefit, the situation is less clear if the directors use their position to get financial or even non-financial benefits from third parties. American cases have gone a long way in respect of the latter circumstance and have held the use of corporate funds to perpetuate personal status and control as being illegal. But if there are no financial benefits, the proposed distinction between a contest over policy and a purely personal contest may not work safely.[60] Section 4.3.2 of the German Corporate Governance Code says: 'Members of the Management Board and employees may not, in connection with their work, demand nor accept from third parties payments or other advantages for themselves or for any other person nor grant third parties unlawful advantages.' The duty not to accept benefits from third parties is also acknowledged in other countries, such as the United Kingdom.[61] Other situations concern political donations and expenditure for which, under English law, the directors need the general permission of the shareholders, but this had the unwelcome consequence that such donations have become more rare.[62] In other countries, directors have a certain leeway, provided they respect the relevant political party financing regulations and they do not use company money for furthering their private political preferences.

g) *Remuneration:* Today one of the big issues regarding boards is 'pay without performance'. The conflict between the company and indirectly its shareholders on the one side and the director on the other is obvious. Yet this is not the typical conflict of self-dealing but, at least in principle, it is the usual, self-evident conflict between two contracting parties. Therefore the director is allowed to look out for his own interest and to bargain price and contract conditions that correspond to his market value.[63] But in view of the remuneration excesses that rightly raised the concern of the general public and legislators, special rules have been introduced either by law or by codes in order to fight these excesses. This is the case in many countries.[64] In Germany, the supervisory board has a special legal duty to keep the

remuneration of the management board directors in line with their performance.[65] Difficult borderline cases arise for premiums allotted to directors of target companies, as shown by the unfortunate (and wrongly decided) *Mannesmann* case in Germany.[66]. The shareholders have a role to play as regards their input on pay, which following the British principle under the Listing Rules[67] has been introduced in other countries like Germany, though up to now this input on pay resolution is only consultative. Yet reform proposals are pending in the UK and in Switzerland to give the general meeting a decisive role in this process, and in Germany and other countries the trade unions require legislators to set upper limits to directors' remuneration in a certain relationship to workers' pay. Much of this is sheer populism; Switzerland is intending to hold its so-called *Abzocker* (rip off) referendum in 2012 or 2013.[68]

h) *Ongoing duty of loyalty:* The post-contractual duty of loyalty is also a problem.[69] While according to some statements the duty of loyalty continues even if the director has stepped down, it is more correct to say that there is no such general rule, but certain situations may arise where there is a post-contractual duty of loyalty, in particular as far as company secrets and other information gained is concerned. But as a matter of principle, the former director is free to follow his own interest in the market. There is also no duty of non-competition after the exit from office but under exceptional circumstances and then only for a very short time, maybe half a year. Of course, such a post-contractual competition must not be prepared while the director is still in office and uses the means and opportunities of the company and his position therein.

3. Special conflict of interest situations: takeovers, MBO and groups of companies

a) *Takeovers:* This is not the right forum to investigate all the more special and sector-specific conflict of interest situations that may arise, but three of them might be mentioned briefly. Probably the most important one arises in takeover bid situations and relates to the duties of the target company board members.[70] The two prime examples on how the law can deal with these conflicts and duties are the UK and the USA. In the UK, the passivity rule or no frustration rule has been in place for a long time, while in the USA the board of the target company is free to say no to the offer. Coupled with a staggered board, this is a far-reaching defensive mechanism that, despite criticisms, is still in force in the USA today. The Takeover Directive of the European Union of 2004 (as well as many continental European jurisdictions) has followed the British rule, but has given in to the pressures from lobbies and Member

States to allow the Member States to opt out of this and related rules of the Directive. Since this is a highly politicized issue, when revising the Takeover Directive in 2012/13 the European Commission is not expected to take up this matter.

The evaluation of the two contradictory rules and policies is not easy; as a general rule the directors of the target company board who lose their job in a successful hostile takeover have a serious conflict between their own interest and the interest of the shareholders. It is true that the directors are in a position to force up the takeover bid price and that they have a fiduciary duty to act in the interest of the shareholders, but this duty is hard to follow and even harder to enforce. What is true is that this rule has a dampening effect on takeovers, but this has not prevented the UK takeover market from flourishing and is a price to be paid for solving this conflict in the interest of the shareholders. The complicated legal and economic arguments as regards the no frustration rule have been analyzed more fully in a recent book.[71]

b) *Management buy-outs:* An even more striking case of conflicts of interest is management buy-outs.[72] The conflict which has been described for hostile takeovers is even more evident if some or all directors of the target company are not only deciding on whether to accept or refuse an offer of a bidder, but if they are themselves the bidders. It is obvious that the shareholders need protection in such a case, not by a flat prohibition of the transaction that would not be in their interest, but by full disclosure and also by participation of independent directors, auditors or other gatekeepers. The duty to disclose implies two difficult questions. Firstly, there is an insider law problem because the director is not supposed to disclose inside information to privileged persons. If this problem is solved, there is the second question of what constitutes full disclosure. It cannot mean that the director who offers a management buy-out must disclose his own ideas on how to run the company more profitably and what is the value of the company under this perspective, unless this prospect is already part of the corporate business and opportunities. In this regard, there is a link with the corporate opportunity doctrine analyzed above. Yet in the logic of the above-mentioned decision of the German *Bundesgerichtshof*[73] this information would also have to be disclosed to the shareholders, with the consequence that management buy-outs would be severely restricted and may be made completely impossible. This again underlies the criticism of that decision.

c) *Groups of companies:* The special conflict of interest problems that arise in groups of companies between the parent and its directors on the one side and the subsidiary and its

directors on the other side have already been mentioned. They arise particularly if a director sits on both boards, as it happens frequently because the parent rightly wants to effectuate its control over the subsidiary.[74]

III. Secrecy and insider information

1. Secrecy

The obligation of board members to keep company secrets confidential is common to company laws everywhere,[75] otherwise the company could not do business. In many jurisdictions, there is a special legal rule on keeping company secrets confidential. If there is no such rule, then the duty of secrecy follows from the duty of loyalty,[76] not of the duty of care. This is not merely an academic controversy, but also has practical consequences since the duty of care is circumscribed by the business judgment rule, while the duty of loyalty is more extensive. The American Law Institute's Principles of Corporate Governance are in line with this concept, since they combine in one single rule the 'use by a director or senior executive of corporate property, material non-public information, or corporate position'.[77]

a) The secrecy obligation not only covers company secrets in the strict sense but extends far beyond and includes any confidential information the director may get from the company and about the company. The information does not need to be categorized by the company as secret. It is not even necessary for the company to have a special interest in keeping the information secret, but the lack of such an interest may be a justification for disclosing it under certain circumstances. Information on the company the director receives from outside is also protected. It is not necessary that the director should receive this information in his capacity as director.[78] If he receives information on takeover plans of a prospective bidder on a social occasion, this falls under company secrecy. In a group of companies, the company secrets may even include information on a subsidiary despite it being a separate company. The secret only stops being secret if the information is publicly available. Information is not yet publicly available if it is mentioned in the shareholders' general meeting or in local newspapers. In the famous German *Kirch/Deutsche Bank* case,[79] the chairman of the bank Breuer had said in an interview with the American press that 'According to all what one can read and hear on this, the financial sector is not ready any longer to extend further credit or even own capital on the same basis as up to now.' While this case was decided on the banking

secrecy, it is relevant also for company secrecy insofar as the remark of the directors confirms a certain action or omission of the company.

b) The actual reach and boundaries of the duty of secrecy may be difficult to determine in practice if there are no clauses either in the company by-laws or in the directors' contracts.[80] The duty of secrecy is not absolute, but has limits:[81] For example by law under disclosure rules; in the interest of the company in a case when the permission to an interested buyer or bidder to do the due diligence is given;[82] possibly between members of a group of companies; and last but not least in the interest of the director himself, who must be able to defend against defamation and other accusations. Particular difficulties as to secrecy and disclosure arise in the context of takeovers.[83] Unfortunately, board secrecy is often not observed as a matter of practice and secret information on planned lay-offs, possible mergers and other projects often leaks out. This is particularly true in two-tier boards with representatives of different constituencies (as in Germany), but also in one-tier boards, as it was the case for example in Switzerland in the Swissair crisis.[84]

2. Insider information

a) The duty of secrecy has become of prime importance with the development of the insider regulation that started in the 1930s in the USA and since then has become a general feature of capital markets laws all over the word. In the European Union, there is the Market Abuse Directive[85] that is currently under revision and has been the subject of a number of decisions of the European Court of Justice, such as the *Spector* case and the recent *Daimler* case as well as the latest *Geltl* Case with their far-reaching consequences for stretched decision-making processes.[86] Yet this article deals with company law problems and does not address the field of capital markets law. Particular problems for dealing with insider information arise in the context of takeovers.[87]

b) Insider information has also been a problem for company law and remains so, despite its extensive regulation in capital markets law. The reason is that capital market regulation, at least in Europe, is geared mainly at exchange-listed companies. Quite apart from capital markets insider law, there is the duty of directors under company law not to engage in insider transactions and not to unlawfully disclose insider information to third parties.[88] This duty is often overlooked, but it is important because it extends to all companies, not just listed ones.

It does not necessarily have the same content and reach as for the latter, since the investor and market protection rationale of capital markets insider law is not the same as the loyalty rationale. In particular, possible consent, sanctions and recoveries under the company law duty are different and are usually less demanding. Furthermore the duty can also be violated in contexts not involving transactions in securities. Some jurisdictions, in particular the USA,[89] treat the use of non-public corporate information as a use of corporate property.

IV. Prevention, remedies and enforcement

1. Procedural prevention techniques

The duty of loyalty is often discussed exclusively in the context of a substantive company law duty of the directors, but it is important to see that much of the problem concerns prevention, remedies and enforcement. In particular, procedural prevention techniques[90] merit some observations.

a) *Disclosure:* The main technique in the context of the duty of loyalty and its offspring duties is disclosure.[91] Conflicts of interest have to be disclosed before taking up a directorship and afterwards, if they arise, corporate opportunities have to be notified to the other board members, and full disclosure of the relevant facts has to be made when permission is sought to make a transaction that might be a violation of the duty of loyalty without the necessary prior approval. In order to check whether the disclosure obligation has been fulfilled, but also in the interest of the directors for defense and evidentiary purposes, it is not only advisable to document that disclosure has been made and what information has been disclosed, but there may be an actual legal duty of documentation,[92] the violation of which may result in a harmful presumption.

b) *Consent:* It makes a big difference to whom the disclosure must be made or who is competent to give the permission. The relevant rules differ widely among the jurisdictions, and radical changes of attitude can also be found within the same jurisdiction. The oldest rule is outright prohibition of conflicting transactions by the director. Yet very soon it was realized that this is not necessarily beneficial to the shareholders, since the transaction of the company with the director may make good sense, for example, if there is an opportunity for the

company to buy well-located premises from the director or if there is an attractive management buy-out offer or in situations of financial difficulties of the company.

Therefore most jurisdictions introduced a mere consent requirement, be it the consent solely of the chairman of the board or, further, of all other members of the board,[93] or in two-tier board countries the consent of the supervisory board. The stricter requirement of the consent of the shareholders[94] is burdensome and not adequate if quick decisions have to be made, for example if the corporate opportunity exists only for a very short time. On the other hand mere board authorization may not provide sufficient protection because there may be a controlling shareholder or there may be a danger of mutual backscratching. Therefore under more recent rules the consent must be given by independent directors[95] and sometimes also on the basis of a special report of the auditor[96] or a fairness opinion from a bank or an independent expert. In particularly relevant cases, the consent of the shareholders may still be necessary, for example under British law for substantial property transactions.[97]

Salaries are a special case.[98] Until now, decisions on salaries have only been possible with a consultative resolution of the shareholders, but as mentioned previously, the development goes into the direction of a fully fledged decision not about individual remuneration, but about the general remuneration policy, including upper ceilings of remuneration.

c) *Organizational duties:* The best way to prevent conflicts of interest is, of course, avoidance of such conflicts. This cannot just be done on an individual basis by not becoming a director on the boards of competing companies (that may in any case be forbidden) or of companies with partly overlapping sectors of business. In practice, it is more important to organize such prevention by adequate organization of the company, such as by implementing Chinese walls,[99] by installing consent requirements, by involving independent directors, auditors or experts or more generally by a compliance organization. Duties of organization are well established in capital markets and banking law. Similar though less far-reaching legal duties must be observed also in company law.[100]

d) *Techniques against circumvention:* Despite the disclosure rules, the handling of circumventions of the requirements of the duty of loyalty remains difficult in practice. The jurisdictions use various techniques in this respect. One technique is to extend the reach of the prohibition, for example by including spouses in loan prohibitions, family members in insider

prohibitions, associates in conflicts of interest or connected persons and associate bodies corporate.[101] Another technique is to regulate the burden of proof,[102] for example by adopting a *prima facie* proof (which is not a full reversal of the burden of proof), or by imposing the full burden of proof on the directors, or even by working with presumptions that may be refuted or may be irrefutable.

2. Substantive remedies[103]

A panoply of remedies and sanctions are available. Their use in the various jurisdictions varies considerably.

a) *Nullity, prohibition against voting:* If a director makes a transaction in violation of his duty of loyalty, and if he has not obtained the necessary consent, the transaction will usually be void, sometimes with the possibility of securing consent *ex post*.[104] If the director has a conflict of interest and a decision of the board has to be made in which the conflict of interest is relevant, the director may certainly be required to abstain from voting. A stricter rule is that he may not even take part in the deliberation, because he could influence his co-directors in favor of his interests or the interest of the third party.

b) *Liability for damages and disgorgement of profit:*[105] The usual sanction for a violation of such a duty is liability for damages. This is the usual sanction for a breach of the duty of care, but it is available also in case of a breach of duty of loyalty. Yet there may be problems with evidencing the exact damage or proving the causation link. In such cases, disgorgement of profit provides better protection for the company. In most jurisdictions this sanction is generally available for breaches of the duty of loyalty, for example if the director has violated his duty of non-competition or has appropriated a corporate opportunity. In such a case, the company may choose either to ask for damages or to enter itself into the transaction as a party instead of the director.

c) *Stepping down or dismissal:* If the conflict of interest is grave and not temporary but more permanent, the best solution is for the director to step down. He may even have a legal duty to do so and if he does not, he may be dismissed either by the supervisory board or by the shareholders. This is a clear-cut solution that should be used more frequently.

d) *Disqualification:* If the director violates his duty of loyalty gravely and/or permanently, he may no longer be a fit and proper person to be a director. This is the case as regards special crimes under criminal law, but also in certain cases under company law. The sanction of disqualification[106] is used in particular in the banking and financial markets sector, where the supervisory authority has the power to expose the relevant violation and the discretion to take action with a disqualification order.

3. Enforcement[107]

a) *Private enforcement:* Initial enforcement of the duty of loyalty lies with the company itself. If a director or the whole board are poised to act despite a conflict of interest or are about to break their duty of loyalty, the board or the co-director(s) are obliged to oppose such action or, if possible, to prevent it taking place. Mere passivity of action is insufficient.[108] The co-director is well advised to ensure that his opposition is documented in the minutes of the board meeting. In more grave cases, the co-director must even go further and inform the chairman of the board or the entire board, or in extreme cases even the shareholders' general meeting, and the auditor. Like for the auditors, there may be a legal duty for the directors to 'speak up'. In the banking and capital market sector there may even be a duty to inform the supervisory authority. If the violation continues and no one takes action, the co-director may not only be well advised, but even legally required, to step down.[109]

If legal claims are made against a director who has breached his duty of loyalty, the question arises as to who has standing to file an action before the court — only the company or also a minority of shareholders or even an individual shareholder alone. The jurisdictions differ considerably on this issue. The traditional view is that individual shareholders have no standing. The shareholders collectively may pass a corresponding resolution, though with a number of obstacles as in the UK,[110] and even a mere group of shareholders may have the right to sue on behalf of the company. In Germany, a minority that holds ten per cent of the share capital or shares with the nominal value of €1 million can ask the court to mandate a special minority representative to sue the director.[111] But in practice this and additional requirements present a barrier that is too high. As a consequence, only a few such actions are brought and reform proposals including the standing of a single shareholder are under discussion. This is the law in France under the action *ut singuli*,[112] but even there this action is

seldom brought because of the cost risk for the claimant and because any damages awarded, are paid directly to the company.

b) *Public enforcement:* If the thresholds for private enforcement are too high, the shareholders may seek to convince public authorities to step in. In the Netherlands, for example, the shareholders tend to use the indirect route of enquiry proceedings by the Enterprise Court.[113]

In the banking and financial markets sector, the supervisory authority has the task of disqualifying directors who are not fit and proper. The relevant cases usually reveal lack of experience or qualification, but violations of the duty of loyalty may be sufficient to disqualify a director.

More important is criminal law and criminal sanctions. If the violation of the duty of loyalty amounts to a criminal or statutory offence, the consent of shareholders is of no help. The use of criminal sanctions in the context of company law differs in the various jurisdictions. In France, this kind of public enforcement is traditionally rather strong and frequent. A criminal offence is the *abus des biens sociaux*,[114] and this may be the case if the director has appropriated means of the company for himself or for his personal interest.[115] In other countries, criminal enforcement has traditionally been rare apart from obvious theft and similar offences. But more recently, in particular in the aftermath of the financial crisis, the criminal courts have become much more involved.[116] While in Germany and some other countries there is a dangerous tendency of the criminal courts to apply criminal law concepts indiscriminately to directors instead of using the long-standing and balanced criteria of civil and company law,[117] courts in Switzerland seem to be more careful.[118]

V. Theses and conclusion[119]

1. The duty of loyalty is highly developed in Anglo-American countries, while in continental European countries it has only received more hesitant attention. This is a clear case of path dependency. There are a number of reasons or hypotheses for this difference. The main one is the trust analogy in English and American law. Other circumstances may have contributed, for example the difference between the shareholder-oriented or stakeholder-oriented approach of company law, the one-tier or two-tier board system and possibly the development of group law.

2. Yet more recently it has been possible to observe tendencies to more convergence. They stem from company law scholarship, but also from more institutionally driven developments such as the independent director movement, the corporate governance codes, to a certain degree also the harmonization efforts of the European Commission and the general influence of US American law on European company law and practices.

3. There are different concepts of independence, conflict of interest and duty of loyalty. Independence is an objective status of the director. Conflicts of interest here is also understood in an objective sense, but arising from a concrete conflict situation between the interest of the director and the interest of the company or of third parties. The duty of loyalty is a legally expected standard of behavior of the director.

4. The duty of loyalty is an 'umbrella phrase'. It needs to be concretized by the courts and academic research. The major subcategories are: (a) fraud, (b) loans and credit to directors, (c) self-dealing, (d) competition with the company, (e) corporate opportunities, (f) wrongful profiting from position and (g) remuneration. There is also the question of (h) the ongoing duty of loyalty of the director after having left the board. A host of legal problems exist for each of these groups and the jurisdictions show often great differences between them.

5. More special and sector-specific conflict of interest situations are takeovers, management buy outs (MBOs) and groups of companies. All of them are highly relevant in practice and as a consequence are particularly controversial.

6. The obligation of board members to protect company secrets is common to all company laws. If not laid down in a special provision, the duty of secrecy follows from the duty of loyalty, not from the duty of care; this is not just a theoretical question, but has practical consequences. The actual reach and limits of the duty of secrecy may be difficult to determine since there is a tension with the duties of disclosure. As a matter of practice, secret information on planned lay-offs, possible mergers and other projects often leaks out.

7. Insider dealing is not only the target of capital markets law, such as the European Market Abuse Directive that is under revision, but also of general company law. This is important for non-listed companies and results in differences as to possible consent, sanctions and

recoveries. Furthermore, the company law duty can also be violated in contexts that do not involve transactions in securities.

8. Prevention of, remedies for and enforcement of the duty of loyalty are as important as the duty as such. Procedural prevention techniques merit attention in particular, especially disclosure, consent and organizational duties. Important techniques against circumvention are the extension of the duty to connected persons and associate bodies corporate. Another important technique is to regulate the burden of proof, which can be done in quite different ways.

9. Among the substantive remedies are for example (a) nullity and prohibition against voting, (b) liability for damages and disgorgement of profit, (c) stepping down or dismissal and (d) disqualification.

10. Enforcement is traditionally up to the company itself, its organs and the shareholders collectively. Jurisdictions differ considerably as to the standing of groups and of minority rights to launch a claim, and in particular as to the standing of individual shareholders. Public enforcement is carried out by the supervisory authorities in the banking and financial market sector. As regards enforcement by the criminal law, there are considerable, path dependent public policies.

[#] Lecture given at the 7th Symposium of the European Company and Financial Law Review held at Luxembourg on 28 September 2012. The comparison deals mainly with the UK, Germany, France, Switzerland and Austria, but some references are also made to US, Dutch and Japanese law.

[1] Cf. K. J. Hopt, 'Comparative Company Law', in: M. Reimann, R. Zimmermann, eds., *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2006, pp. 1161-1191.

[2] P. L. Davies and Sarah Worthington in Gower and Davies*: Principles of Modern Company Law*, 8th ed., London, Thomson, Sweet & Maxwell, 2012, para 16-24. The Companies Act 2006 lists seven duties: one of these is the duty of care, three others are duties related to conflicts of interest (self-dealing, personal exploitation of the property, information or opportunities of the company and receiving benefits from a third party for acting as director in a specific way), *idem* at paras 16-18. On the history of Anglo-American case law and legislation in the field cf. J. H. Farrar, S. Watson, 'Self-Dealing, Fair Dealing and Related Party Transactions – History, Policy and Reform', *Journal of Corporate Law Studies* 11

(2011) 495. The landmark case cited is *Aberdeen Rail. Co. v. Blaikie Brothers* (1854) 1 Macq. 461, (1843-60) *All E.R. Rep.* 249.

[3] K. J. Hopt, 'Comparative Corporate Governance: The State of the Art and International Regulation', 59 *American Journal of Comparative Law* (2011) 1 at p. 38 et seq. with further references; *idem*, 'Die Haftung von Vorstand und Aufsichtsrat', in: *Festschrift für E.-J. Mestmäcker*, Baden-Baden, Nomos, 1996, p. 909 at 921 et seq. For Japan H. Kanda, C. J. Milhaupt, 'Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law', 51 *American Journal of Comparative Law* (2003) 887. Cf. also for Y. Borrius, 'Directors' Liability: The Netherlands', *European Company Law* 8 (2011) 246.

[4] American Law Institute, *Principles of Corporate Governance, Analysis and Recommendations*, St. Paul, Minn., American Law Institute Publishers, 1994, vol. 1, §§ 502-5.09, among them transactions with the corporation; compensation; use of corporate property, material non-public corporate information or corporate position; corporate opportunity and competition with the corporation.

[5] C. Nowotny in P. Doralt, C. Nowotny and S. Kalss, eds., *Kommentar zum Aktiengesetz*, 2nd edn., Vienna, Linde, 2012, § 84 comment 9, citing mostly German sources.

[6] *Gower and Davies* (fn 2), 8th ed. 2008, para 16-17.

[7] Hopt (fn. 3), 59 *A. J. C. L.* (2011) 1 at 29 et seq. comparing the shareholder-oriented and the stakeholder-oriented approaches.

[8] P. Böckli, *Schweizer Aktienrecht*, 4th edn., Zurich, Schulthess, 2009, § 13 comments 598 et seq.

[9] R. Kraakman, J. Armour, P. Davies, L. Enriques, H. Hansmann, G. Hertig, K. Hopt, H. Kanda and E. Rock, *The Anatomy of Corporate Law* 2nd edn., Oxford, Oxford University Press, 2009 at p.103 et seq. (cited: *Anatomy*)

[10] Section 172 of the Companies Act 2006; Gower and Davies (fn 2), paras 16-64 et seq. 16-166, 16-220.

[11] Hopt (fn 3), 59 *A. J. C. L.* (2011) 1 at 20 et seq.; P. Davies, K. Hopt, R. Nowak and G. van Solinge, 'Boards in Law and Practice: A Cross-Country Analysis in Europe', in: P. Davies, K. Hopt, R. Nowak and G. van Solinge (Forum Europaeum Corporate Boards), eds., *Corporate Boards in European Law: A Comparative Analysis,* Oxford University Press (forthcoming; cited: FECB, page numbers refer to the manuscript).

[12] K. J. Hopt in K. J. Hopt and H. Wiedemann, *Aktiengesetz, Großkommentar,* 4th edn., Berlin, de Gruyter, 1992 et seq., § 93 comments 152 et seq.

[13] Hopt (fn 1), at 1167 et seq..

[14] W. Hallstein, *Die Aktienrechte der Gegenwart: Gesetze und Entwürfe in rechtsvergleichender Darstellung*, Berlin, Franz Vahlen, 1931.

[15] E.-J. Mestmäcker, *Verwaltung, Konzerngewalt und Rechte der Aktionäre*, Karlsruhe, C.F. Müller, 1958, p. 152 et seq., 209 et seq.

[16] E.g. K. J. Hopt and M. Will, *Europäisches Insiderrecht*, Stuttgart, Enke, 1973; K. J. Hopt, 'Self-Dealing and Use of Corporate Opportunity and Information: Regulating Directors' Conflict of Interest', in: K. J. Hopt and G. Teubner, eds., *Corporate Governance and Directors' Liabilities*, Berlin, New York, de Gruyter, 1985, p. 285-326.

[17] Cf. H. Fleischer, 'Zur organschaftlichen Treuepflicht der Geschäftsleiter im Aktien- und GmbH-Recht', *Wertpapier-Mitteilungen* (WM) 2003, 1045 at 1048.

[18] European Commission, *Consultation on the future of European Company Law, and Conference on 'European Company Law: the way forward',* Brussels on 16-17 May 2011; see also response of the European Company Law Experts (ECLE), May 2012, available at < www.ecle.eu >.

[19] *Report of the Reflection Group On the Future of EU Company Law*, Brussels, 5 April 2011, in particular 3.1.6 Corporate governance, Position of Management and Independent Directors, ch. 4 on groups of companies.
[20] C. Gerner-Beuerle and E. Schuster, London School of Economics, *Comparative Study on Directors' Liability for the European Commission,* due in December 2012. See also C. Rose, 'Director's liability and investor protection: a law and finance perspective', *European Journal of Law & Economics* 31 (2011) 287.
[21] Hopt (fn 3), 59 *A. J. C. L.* (2011) 1 at 29 et seq , 23 et seq., 35 et seq.; M. Roth, 'Unabhängige Aufsichtsratsmitglieder', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht ZHR* 175 (2011) 605 at 628 et seq.; *Anatomy* (fn 9), p. 94 et seq. on the trusteeship strategy; OECD, *Related Party Transactions and Minority Shareholder Rights*, Paris 2012, at p. 22 et seq.
[22] Cf. Gower and Davies (fn 2), paras 14-69 et s., 14-75 et s.; see also the concise version of Davies, *Introduction to Company Law*, 2nd edn., Oxford, Oxford University Press, 2010, p. 198 et seq.
[23] European Commission, Recommendation of 15.2.2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, OJEU L 52/51, section II no. 4 and annex II.
[24] The compromise covers the fact that both employees of the company and trade unions entering into collective agreements with the company are not independent, see Roth (fn 21) at 638 et seq.; FECB (note 11), p. 20 et seq.
[25] P. Le Cannu and B. Dondero, *Droit des sociétés*, 3rd edn., Paris, Montchrestien, 2009, no 629: '*devenus à la mode'*, no 681: '*La notion suscite de vraies réticences chez les juristes français...*'.
[26] As to this controversy, see K. J. Hopt, 'Der Deutsche Corporate Governance Kodex: Grundlagen und Praxisfragen', in: *Festschrift für M. Hoffmann-Becking,* Munich, Beck, B III 3 a (in print for 2013).
[27] M. Cozian, A. Viandier and F. Deboissy, *Droit des sociétés*, 23rd edn., Paris, Litec, 2010, no 527.
[28] See more generally M. Martynova and L. Renneboog, 'Evidence on the international evolution and convergence of corporate governance regulations', *Journal of Corporate Finance* 17 (2011) 1531, a (better) European counterpiece to the La Porta (LLSV) studies.
[29] Cf. the various versions of the German Corporate Governance Code and the dispute on them, Hopt (fn 26).
[30] K. J. Hopt, 'Company Law Modernization: Transatlantic Perspectives' in: *Rivista delle società* 51 (2006) 906; German version: ‚Aktienrecht unter amerikanischem Einfluss', in: *Festschrift für Claus-Wilhelm Canaris*, Munich, Beck, 2007, vol. II, p. 105; J. von Hein, *Die Rezeption US-amerikanischen Gesellschaftsrechts in Deutschland*, Tübingen, Mohr Siebeck, 2008; for Switzerland see Böckli (fn 8), § 13 comments 665 et seq.; as to the U.S.duty of loyalty being transplanted into Japanese corporate law see Kanda, Milhaupt (fn. 3).
[31] Recommendation (fn 22) Annex II no. 1. Cf. also the British distinction between independent NEDs and disinterested directors in Davies, 'Introduction' (fn 21) at p. 203 et seq.
[32] Cf. K. J. Hopt, *Anlegerschutz im Recht der Banken*, Munich, Beck, 1975, § 7 on universal banks.
[33] For the UK, see section 175 of the Companies Act 2006, and Gower and Davies (fn 2), para 16-143; for exceptions, see *idem*, paras 16-201 et s.; for Switzerland see Böckli (fn 8), § 13 comments 633 et seq.; for France, see Cozian et al. (fn 27), no. 332. For a comprehensive

treatment, see the Professor thesis on conflict of interests by C. Kumpan, *Interessenkonflikte im Deutschen Privatrecht,* Hamburg 2013 (in print).
[34] German Bundesgerichtshof, decision of 21 December 1979 (Schaffgotsch case), *Neue Juristische Wochenschrift NJW* 1980, 1629 with comment P. Ulmer, 'Aufsichtsratsmandat und Interessenkollision', *Neue Juristische Wochenschrift NJW* 1980, 1603.
[35] K. J. Hopt, 'The German Two-Tier Board: Experience, Theories, Reform', in: K. J. Hopt, H. Kanda, M. J. Roe, E. Wymeersch and S. Prigge, eds., *Comparative Corporate Governance – The State of the Art and Emerging Research*, Oxford, Oxford University Press, 1998, p. 227.
[36] K. J. Hopt, 'Trusteeship and Conflicts of Interest in Corporate, Banking, and Agency Law: Toward Common Legal Principles for Intermediaries in the Modern Service-Oriented Society', in: G. Ferrarini, K. J. Hopt, J. Winter and E. Wymeersch, eds., *Reforming Company and Takeover Law in Europe*, Oxford, Oxford University Press, 2004, p. 51 at p. 52 et seq., 74 et seq.; German version in *Zeitschrift für Unternehmens- und Gesellschaftsrecht ZGR* 2004, 1 at 4, 35 et seq.
[37] Anatomy (fn 9), p. 99.
[38] Anatomy (fn 9), p. 173.
[39] R. Clark, *Company Law*, Aspen Law & Business 1986, sec. 4.2.1, p. 151.
[40] As to the following, see further references in the following commentaries and treatises: for the UK Gower and Davies (fn 2), ch. 16 on Directors' Duties, in particular paras 16-93 et s., 16-96 to 16-113, 16-143 to 16-177; for the USA American Law Institute (fn 4); for Germany K. J. Hopt (fn 12), § 93 comments 144-186; for France Cozian et al. (fn 27), nos 612, 613 et seq.; for Switzerland Böckli (fn 8), § 13 comments 596-678; for Austria briefly Doralt et al. (fn 5); for the Netherlands Y. Borrius, 'Directors' Liability: The Netherlands', *European Company Law* 8 (2011) 246; for Japan Kanda, Milhaupt (fn 3). See also the comparative law articles by K. J. Hopt (fn 3) and the Forum Europaeum Corporate Boards (fn 11).
[41] Hopt (fn 36).
[42] See infra, section IV 4 b.
[43] K. J. Hopt (fn 12), § 93 comment 157.
[44] For Germany § 89 of the Stock Corporation Act (AktG); for the UK Gower and Davies (fn 2), paras 16-132 et seq., and Davies (fn 22), p. 172; for France Cozian et al. (fn 27), nos 599 et seq. and Le Cannu and Dondero (fn 25) nos 758 et seq.: *conventions interdites*.
[45] For the UK Gower and Davies (fn 2), paras 16-41, 16-96 et seq., and Davies (fn 22), p. 161 et seq., 169 et seq.; for Germany Hopt, 'Self-dealing …' (fn 16), p. 287 et seq.; *idem* (fn 12), § 93 comments 159 et seq., and Fleischer (fn 17), *WM* 2003, 1045 at 1051 et seq.; cf. also the comparative law study of FECB (fn 11), p. 40 et seq. From an economic point of view Ming zhi Liu/M. Magnan, 'Self-dealing Regulations, Ownership Wedge, and Corporate Valuation: International Evidence', *Corporate Governance: An International Review* 2011, 19 (2) 99.
[46] Gower and Davies (fn 2), para 16-123 citing an earlier version of s. 190.
[47] American Law Institute (fn 4), § 5.02, § 5.07; Gower and Davies (fn 2), para 16-131 and Davies (fn 22), p. 172 et seq.: Listing rules; OECD 2012 (fn 21) at 20 et seq.
[48] Cozian et al. (fn 27), nos 603 et seq.; Le Cannu and Dondero (fn 25), nos 746 et seq.
[49] Böckli (fn 8), § 13 comments 600 et seq.
[50] P.-H. Conac, L. Enriques and M. Gelter, 'Constraining Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy', *European Company and Financial Law Review ECFR* 2007, 490 with many further references; FECB (fn 11), p. 40 et seq.
[51] Section 88 of the German Stock Corporation Act (AktG); American Law Institute (fn 4), § 5.06; for the UK Gower and Davies (fn 2), para 16-165 et seq., Davies (fn 22), p. 185 et seq.; for Switzerland Böckli (fn 8), § 13 comments 611 et seq.

[52] Le Cannu and Dondero (fn 25), no. 713: '*sauf circonstances particulières, on ne peut pas dire que repose sur les administrateurs une obligation de non-concurrence'*.
[53] For Switzerland Böckli (fn 8), § 13 comment 613.
[54] American Law Institute (fn 4), § 5.05; Gower and Davies (fn 2), paras 16-145 et seq. and Davies (fn 22), p. 173 et seq.; Hopt, 'Self-dealing …' (fn 16), p. 295 et seq.; idem (fn 12), § 93 comments 166 et seq.; Fleischer (fn 17), *WM* 2003, 1045 at 1054 et seq.; FECB (fn 11), p. 41 et seq.
[55] Gower and Davies (fn 2), para 16-164; Davies (fn 22), p. 177 et seq.
[56] But this is the position taken by *Regal (Hastings) Ltd. v Gulliver* (1942) 1 *All E.R.* 378.
[57] *Phipps v Boardman* (1967) 2 AC 46, House of Lords.
[58] German Bundesgerichtshof, decision of 23 September 1985, *Wertpapier-Mitteilungen* (WM) 1985, 1443, contra Hopt (fn 12), § 93 comment 169, but it should be disclosed that at that time Hopt was one of the judges who rendered the decision of the court of appeals of Stuttgart. Cf. also Davies (fn 22), p. 181 and 185 et seq. and for a similar Japanese case Kanda, Milhaupt (fn. 3) at 895 et seq., but there the violation consisted in the poaching key employees.
[59] *Anatomy* (fn 9), p. 173, American Law Institute (fn 4), § 5.04; Hopt (fn 12), § 93 comments 176 et seq.
[60] Cf. *Rosenfeld v Fairchild Engine and Airplane Corp.,* 309 N.Y. 168, 128 N.E. 2d 291 (1955); sceptical observation by Hopt, 'Self-dealing …' (fn 16), p. 314 et seq.
[61] Gower and Davies (fn 2), para 16-174 et s.; Davies (fn 22), p. 182.
[62] Gower and Davies (fn 2), para 16-142.
[63] Hopt (fn 12), § 93 comment 160; American Law Institute (fn 4), § 5.03; Gower and Davies (fn 2), paras 14-33 et seq.
[64] G. Ferrarini et al., 'Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe', 10 *Journal of Corporate Law Studies* 73 (2010). For France, see Le Cannu and Dondero (fn 25), p. 475 et seq., 554.
[65] Section 87 of the German Company Act, but there are many doctrinal and practical difficulties with this and a controversial reform discussion is taking place.
[66] C. J. Milhaupt and K. Pistor, *Law and Capitalism*, Chicago et al., University of Chicago Press, 2008, p. 69 et seq.
[67] Gower and Davies (fn 2), para 14-39 et seq.
[68] P. Forstmoser, ''Say-on-Pay': Die Volksinitiative 'gegen die Abzockerei' und der Gegenvorschlag des Parlaments', *Schweizerische Juristen-Zeitung* 108 (2012) Nr. 14, p. 337.
[69] Hopt (fn 12), § 93 comment 183; Switzerland Böckli (fn 8), § 13 comments 669 et seq.
[70] P. Davies and K. J. Hopt, 'Control Transactions', in: *Anatomy* (fn 9), p. 224 at 233 et seq. with further references; FECB (fn 11), p. 44 et seq.
[71] K. J. Hopt, 'Europäisches Übernahmerecht', in: K. J. Hopt, C. H. Seibt and R. Veil, *Europäisches Übernahmerecht*, Tübingen, Mohr Siebeck (in print for 2013).
[72] A. Vicari, 'Conflicts of Interest of Target Company's Directors and Shareholders in Leveraged Buy-Outs', *European Company and Financial Law Review ECFR* 2007, 346; W. F. Ebke, 'The Regulation of Management Buyouts in American Law: A European Perspective', in K. Hopt and E. Wymeersch, eds., *European Takeovers, Law and Practice*, London, Butterworths, 1992, p. 295; H. Fleischer, 'Informationspflichten der Geschäftsleiter beim Management Buyout im Schnittfeld von Vertrags-, Gesellschafts- und Kapitalmarktrecht', *Die Aktiengesellschaft* 2000, 309.
[73] Bundesgerichtshof (fn 58).
[74] Hopt (fn 12), § 93 comments 152, 153; for Switzerland Böckli (fn 8), § 13 comments 618 et seq., 623 et seq., Cozian et al. (fn 27), p. 347.

[75] For Germany Hopt (fn 12), § 93 comments 187 et seq.; for France with many open questions Le Cannu and Dondero (fn 25), no. 714: *obligation de discrétion*; for Switzerland Böckli (fn 8), § 13 comments 670 et seq.; for Austria Nowotny (fn 5), § 84 comments 12 et seq.
[76] For Switzerland Böckli (fn 8), § 13 comment 671; for Germany Hopt (fn 12), § 93 comment 187.
[77] American Law Institute (fn 4), § 5.04.
[78] Hopt (fn 12), § 93 comment 198; Nowotny (fn 5), § 84 comment 18.
[79] Bundesgerichtshof, Decision of 24 January 2006, *Official Collection of Decisions in Civil Law Matters, BGHZ* 166, 84; see on this decision with further references K.J. Hopt in: Baumbach and Hopt, *Handelsgesetzbuch*, 35th edn., Munich 2012, (7) Bankgeschäfte, comments A/9 et seq.
[80] Hopt (fn 12), § 93 comments 199 et seq.; cf. the questions raised by Le Cannu and Dondero (fn 75).
[81] Hopt (fn 12), § 93 comments 206 et seq.
[82] For Germany Hopt (fn 12), § 93 comment 213; for Austria Nowotny (fn 5).
[83] K. J. Hopt, 'Takeovers, Secrecy, and Conflicts of Interest: Problems for Boards and Banks', in J. Payne, *Takeovers in English and German Law*, Oxford, Hart, 2002, p. 33 at 38 et seq.; OECD, *Conflicts of Interest and the Market for Corporate Control, A Review of Selected Issues and Measures*, Paris, 16-17 April 2008.
[84] Böckli (fn 8), § 13 comments 673 et seq. Cf. also P. Forstmoser/M. Küchler, ''Vertreter' im Verwaltungsrat und ihr Recht auf Weitergabe von Information', in: R. Sethe et al., *Kommunikation, Festschrift für Rolf H. Weber,* Bern, Stämpfli, 2011, p. 35.
[85] With comprehensive references K. J. Hopt, 'Insider- und Ad-hoc-Publizitätsprobleme', in H. Schimansky, H.-J. Bunte and H.-J. Lwowski, eds., *Bankrechts-Handbuch*, 4th edn., Munich, Beck, 2011, vol. II § 107, p. 1120-1168.
[86] As to the insider problems in stretched decision-making processes, see idem (fn 85), § 107 comments 37 et seq., 90 et seq.; M. Nelemans/M. Schouten, Takeover Bids and Insider Trading, August 2012, available at < http://ssrn.com/abstract=2147360 >; L. Klöhn, 'Das deutsche und europäische Insiderrecht nach dem Geltl-Urteil des EuGH', *ZIP* 2012, 1885.
[87] See supra fn 83.
[88] American Law Institute (fn 4), § 5.04 comment d(2) with illustrations 13-19; Hopt, 'Self-dealing …' (fn 16), p. 315 et seq.; idem (fn 12), § 93 comments 173 et seq.; for France Le Cannu and Dondero (fn 25), no. 713; for Switzerland Böckli (fn 8), § 13 comments 616 et seq.
[89] American Law Institute (fn 4), § 5.04, see supra III 1 before (a).
[90] FECB (fn 11), p. 38 et seq. ; see also S. Djankov, R. La Porta, F. Lopez-de-Silanes, A. Shleifer, 'The law and economics of self-dealing', *Journal of Financial Economics* 88 (2008) 430, an empirical study where it is argued (for listed companies) that disclosure combined with consent by disinterested shareholders is the best solution.
[91] Gower and Davies (fn 2), paras 16-102 et seq.; Hopt, 'Trusteeship …' (fn 41), p. 67 et seq.; Hopt (fn 12), § 93 comments 185 et seq.
[92] Hopt, 'Trusteeship …' (fn 41), p. 71.
[93] Cf. for example for the UK A. Keay, 'The Authorising of Directors' Conflicts of Interest: Getting a Balance?', *Journal of Corporate Law Studies* 12 (2012) 129 with a critical survey of alternative solutions; for France Le Cannu and Dondero (fn 25), no 755.
[94] See the long comparative list on shareholder approval requirements for related party transactions (excluding salaries) in: OECD 2012 (fn 21), p. 30 et seq. at p. 35 et seq.
[95] Gower and Davies (fn 2), para 16-120 at p. 642 and more generally paras 16-123 et seq., 16-187 et seq.

[96] For France special report of the commissaire de compte, Le Cannu and Dondero (fn 25), no. 756, and on the role of the commissaire de compte, idem, nos. 506 et seq.
[97] Gower and Davies (fn 2), paras 16-123 et seq.; Davies (fn 22), p. 165, 167 et seq., 169 et seq., 186 et seq.
[98] For the UK Davies (fn 22), p. 208 et seq.; cf. also *Anatomy* (fn 9), p. 78, 166 et seq.; see also supra II 2 g on remuneration.
[99] Hopt in Payne (fn 83), p. 56 et seq.; C. Kumpan and P. Leyens, 'Conflicts of Interest of Financial Intermediaries', *European Company and Financial Law Review ECFR* 2008, 72 at 85 et seq.
[100] Hopt, 'Trusteeship …' (fn 41), p. 80 et seq.
[101] Idem, p. 66.
[102] *Anatomy* (fn 9), p. 173.
[103] For the UK Gower and Davies (fn 2), paras 16-178 et seq.; for Germany Hopt, 'Trusteeship …' (fn 41), p. 71 et seq.; idem, 'Prävention und Repression von Interessenkonflikten im Aktien-, Bank- und Berufsrecht', in: *Festschrift Peter Doralt*, Vienna, Manz, 2004, p. 213; for Switzerland Böckli (fn 8), § 13 comments 649 et seq. Cf. for financial intermediaries Kumpan and Leyens (fn 99), *ECFR* 2008, 72 at 86 et seq.
[104] Le Cannu and Dondero (fn 25), no. 756: *nullité* with the possibility of confirmation by the shareholders' general meeting on the basis of a special report of the auditors.
[105] Gower and Davies (fn 2), para 16-184; Davies (fn 22), p. 166 et seq., 181 et seq.
[106] Gower and Davies (fn 2), paras 10-1, 10-9; Davies (fn 22), p. 90 et seq.
[107] *Anatomy* (fn 9), p. 46 et seq., 178 et seq.; E. Ferran, 'Enforcement of Insider Dealing Laws', in: J. Armour and J. Payne, eds., *Rationality in Company Law: Essays in Honour of DD Prentice*, Oxford, Hart Publishing, 2009, p. 57. More generally L. Klöhn, 'Private versus Public Enforcement of Laws – a Law & Economics Perspective', in: R. Schulze, ed., *Compensation of Private Losses,* Munich, Sellier european law publishers, 2011, p. 179.
[108] For Switzerland Böckli (fn 8), § 13 comment 675a.
[109] Idem, comments 438 et seq.
[110] For the UK Gower and Davies (fn 2), paras 17-3 et seq.; Davies (fn 22), p. 189 et seq.
[111] Section 147 of the German Company Act.
[112] Le Cannu and Dondero (fn 25), no. 480.
[113] Borrius (fn. 40) at 248, 249.
[114] Cozian et al. (fn 27), nos 622 et seq.
[115] Cozian et al. (fn 27), no 633.
[116] For Germany, see on the crime of company law fraud C. H. Seibt, 'Aktienrechtsuntreue', *Die Aktiengesellschaft* 2010, 301.
[117] The *Mannesmann* case is an example (fn 66).
[118] For Switzerland Böckli (fn 8), § 13 comment 676.
[119] These theses and conclusion have been presented to the participants of the ECFR conference 2012 in Luxemburg and have not been amended.

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