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Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law

Law Working Paper N° 378/2017
November 2017

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Abstract

The paper surveys the corporate opportunities doctrine in four jurisdictions: the US, the UK, Germany, and France. Our analysis enables us to trace the development of the doctrine, exposing the way in which certain models of dealing with a particular issue have arisen, and how these models have then spread. Fiduciary duties are often today held out as typical instruments of shareholder protection in the US and the UK, both of which are often held out as model jurisdictions in corporate governance internationally. However, fiduciary duties in these two jurisdictions often operate in strikingly different ways. While the US relies on an open-ended standard, the UK corporate opportunities doctrine effectively constitutes a rule.
We explore the transplantation of the corporate opportunities doctrine, largely based on the US model, to France and Germany. In Germany, the law historically prohibited officers of the corporation from engaging in competing business activities; the statutory prohibition applied to some but not all corporate opportunities, and also left open some space for the corporate opportunity doctrine to move into. The German version of the doctrine developed gradually over the past fifty years and owes its adoption to a number of academics who studied US law and reinterpreted a number of cases – where it was clear that an officer had violated his duties to the corporation – in light of the newly discovered doctrine. By contrast, it was not until late 2011 that French courts recognized for the first time that a director may not appropriate a corporate opportunity. Until then, self-dealing issues were dealt with under a statutory provision enacted in 1867 merely requiring corporate approval for conflicted transactions, not including corporate opportunities. As the core thesis of the paper, we show that there is a considerable degree of convergence relating to the corporate opportunities doctrine, which has radiated primarily from US law to the two civil law jurisdictions. Overall, we can thus identify an "export" of the US model, possibly signaling some convergence in corporate law. The paper compares the treatment of corporate opportunities problem in all four jurisdictions, explores why the US example may have been more attractive as a transplant than the UK model, and discusses possible implications for transplant theory and the debate about convergence in corporate governance.

Keywords: Delaware, Guth v. Loft, Broz v. Cellular, Conflict Avoidance, Convergence, Bhullar v. Bhullar, Foss v. Harbottle, Fairness Test, Geschäftschancenlehre, Fiduciary Duties, Directors, Controlling Shareholders, Legal Transplants

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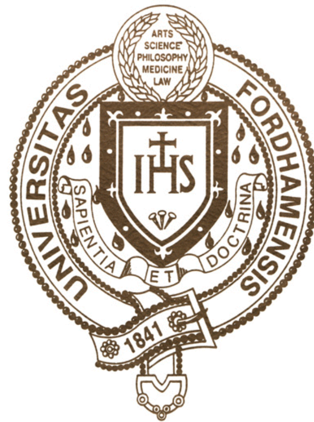

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Opportunity Makes a Thief[†]

Corporate Opportunities as Legal Transplant and Convergence in Corporate Law

MARTIN GELTER[*] & GENEVIÈVE HELLERINGER[**]

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[†] Francis Bacon, *Letter to the Earl of Essex,* 1598.

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1. Introduction

Consider a director of a building company, who hears at a private party about a development site that will soon be available for sale. It is an opportunity that the building company might have exploited. Instead, the director purchases the site through a new company, completely owned by himself, and builds his house for on it. Has he wrongfully taken an opportunity that belonged to the company for his private benefit? Can a self-interested director lawfully exclude the company from a transaction it could have exploited? Rules and practices regarding the handling of directors' personal interest in certain business opportunities encompass an economic as well as a moral dimension. Considering the differences in business ethics and corporate culture, it is no surprise that there is a large disparity in these rules and practices in common law jurisdictions versus civil law jurisdiction. But convergence may be at play. The conflict between the directors' private interests and their obligations towards their companies shapes directors' duties to perform certain actions while refraining from others. The shape and practice of such duties, appear increasingly similar across jurisdiction.

The resulting balance may still differ from one jurisdiction to another, depending on the weight accorded to the duty of loyalty of directors. One of the most prevalent distinctions exist

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when comparing the differences in common law and civil law tradition. In common law legal cultures, the duty of loyalty has a long tradition. It is rooted in the conception of the business corporation. Corporations, as legal institutions, have developed in a series of innovations as a result of partnership and trust law.[1] In these areas, fiduciary duties are key elements. As a corollary, the director has been primarily seen as a trustee or fiduciary that must display absolute integrity when dealing with the property of the beneficiaries.[2] In contrast, in many civil law jurisdictions, the director's fiduciary position has not received similar emphasis. Typically, banning a director from deriving a profit as a result from his position on the board, whether the benefit came from self-dealing or self-exploitation of a corporate opportunity, is not as salient as in common law jurisdictions. Civil law jurisdictions have nevertheless regulated self-dealing for a long time and have started moving towards regulating self-dealing and protecting corporate opportunities more seriously.

There are various strategies for handling 'corporate opportunities'. A corporate opportunity includes any options to make investments or otherwise use information or property, with a profit a fiduciary receives, whether or not in his capacity as fiduciary, that could benefit the company.. There is more than one model to look to for inspiration. Scholars have increasingly discussed both the US and the UK model in recent years.[3] The two approaches are strikingly different despite both countries' common law heritage. The US and the UK models have different starting points. While the UK model focuses on avoiding conflicts of interest, the US approach starts with identifying the correct owner of the opportunity.

The development of the doctrinal as well as judicial conversation on business opportunity displays an interesting geography and chronology. There is more than one definition of what qualifies as a corporate opportunity in the US alone. [4] In the UK, since the *Aberdeen* case[5] a large number of cases have shaped the no-conflict and no-profit principles. The gap between the approach implied by these principles and the corporate opportunities doctrine is documented and the attraction of the latter approach discussed.[6] Although one might think that such considerations would be a basic necessity in the legal dialog, it is interesting to note that it was not until late 2011

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[1] See RONALD RALPH FORMOY, THE HISTORICAL FOUNDATION OF MODERN COMPANY LAW (1923); BISHOP CARLETON HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, 1800-1867 (1936).

[2] See Bray v Ford, [1896] A.C. 44, 51 (H.L.).

[3] *See, e.g.* Marco Claudio Corradi, *Corporate Opportunities Doctrines Tested in the Light of the Theory of the Firm – a European (and US) Comparative Perspective,* 2016 EUR. BUS. L. REV. 755; Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers,* 117 COLUM. L. REV. 1075 (2017); Stephen M. Bainbridge, *Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as a Case Study,* UCLA LAW & ECONOMICS RESEARCH PAPER NO. 17-01, at https://ssrn.com/abstract=2894577; David Kershaw, *Opportunities and Connected Assets,* forthcoming in THE FOUNDATIONS OF ANGLO-AMERICAN FIDUCIARY LAW (forthcoming 2018).

[4] For the canonical treatment, see Victor Brudney & Robert Charles Clark, *A New Look at Corporate Opportunities*, 94 HARV. L. REV. 997, 1006-1022 (1981) (discussing various tests employed by the courts to define what constitutes corporate opportunities).

[5] Aberdeen Rly v Blaikie Bros, [1854] 1 Macq 461 (H.L.).

[6] *See e.g.,* David Kershaw, *Lost in Translation: Corporate Opportunities in Comparative Perspective*, 25 OX. J. LEG. STUD. 603, 607-608 (2005); Irit Samet, *Guarding the Fiduciary's Conscience – A Justification of a Stringent Profit-stripping Rule,* 28 OX. J. LEG. STUD. 763-781 (2008).

that French courts recognized for the first time that a director may not appropriate a corporate opportunity.[7]

A demand for a change in the law often occurs when existing mechanisms fail to provide effective governance or respond to changes in the economic or political sphere.[8] There is currently an identifiable demand for the regulation of conflict of interests and for more ethical business practices, particularly in countries like France, where trust in institutions has been shattered.[9] At the same time, in recent years, there has been a development of the corporate opportunities doctrine. For this reason, a comparative perspective on this topic is timely.[10] Furthermore, there is no jurisdiction in which the corporate opportunity regulation has reached an acceptable equilibrium. Its nature and function (deterrence, prevention or primary attribution rule) are still being discussed across jurisdictions.[11] The core thesis of this paper shows that there is a considerable degree of convergence in the corporate opportunity doctrine, which has radiated from US law to Germany and France that did not originally develop them. The UK – as a jurisdiction of origin itself – has largely retained its own, separate tradition. However, the convergence may remain incomplete: similar rules may have different consequences.

The paper surveys the corporate opportunities doctrine in four jurisdictions: US, UK, Germany, and France. Our analysis enables us to trace the development of the doctrine, exposing the way in which certain models of dealing with a particular issue have arisen, and how these models have then spread. This allows us to contribute to the debate on global convergence in corporate governance. We can distinguish two "ancestral" models, namely the UK and US ones, which are both rooted in the common law model of fiduciary duties of corporate directors. Regarding the regulation of corporate opportunities, the UK model developed from the mid-19th century a strict conception based on the figure of the fiduciary and characterized by the no-conflict/no-profit rules. The rules were codified in 2006 and a procedure of *ex ante* authorization by the board of directors was for the first time introduced at that time. In the end, however, the traditional conception remains entrenched. Such stable and strict expectations of directors distinguish the UK from the doctrine in the US.

The US corporate opportunity doctrine has developed through case law. After a period of expansion over the course of the 20th century, the doctrine has culminated in a broad conception of fairness, as shown by the most recent important case.[12] This has in practice led to attempts to opt out of the corporate opportunities doctrine, either *ex post* – by submitting the question to the

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[7] *See* Genevieve Helleringer, *Le dirigeant à l'épreuve des opportunité d'affaires*, 24 RECUEIL DALLOZ 2 (2012). Corporate opportunities issues could in theory be framed under certain circumstances as unfair competition cases: this was however seldom the case and there were hardly any legal consequence for managers.

[8] Such demand also increases with the development of transactions for which non-legal mechanisms of governance were once adequate.

[9] See for instance, the letter written by the CEOs of the main accounting firms in France and published in the French newspaper Le Monde. *Ce que l'économie demande aujourd'hui à la profession réglementée du chiffre,* LE MONDE, March 21, 2016; *L'évolution de la comptabilité des entreprises à l'aune de celle des Etats,* LE MONDE, Oct . 9, 201 (stressing the higher standard of accountability now in place).

[10] *See already* Kershaw, *supra* note 6.

[11] *See recently* Lionel Smith, *Deterrence, prophylaxis and punishment in fiduciary obligations*, 7 J. EQUITY 1 (2013).

[12] Broz v. Cellular Information Systems, 673 A.2d 148 (Del. 1996).

board – or *ex ante* – by attempting to eliminate corporate opportunities in the corporate charter, or by specifying what opportunities belong to the corporation. Since corporate opportunities are of particular relevance in closely held firms, this can be seen as a part of the larger trend to contractualize fiduciary duty, which is particularly evident in limited liability companies. We hypothesize that fiduciary duties may have reached a stage of retrenchment in their life cycle. Given that open-ended standards seem to have an inherent tendency to expand, eventually a backlash may develop.

For the comparative analysis, however, we make the observation that the US corporate opportunity doctrine has been the inspiration for the gradual adoption of the doctrine in Germany and France. In Germany, in particular, the law historically prohibited officers of the corporation from engaging in competing business activities. The statutory prohibition applied to some but not all corporate opportunities and also left open some space for the corporate opportunities doctrine to move into. It owes its adoption to a number of academics who studied the US corporate opportunities doctrine and re-interpreted a number of cases involving officers who violated their duties to their corporations. Through the confluence of judicial and academic developments, the US model of the corporate opportunities doctrine thus became entrenched in German law.

French law, which has until very recently hesitated to say that directors owe a duty of loyalty, has moved in a similar direction. Though the exploitation of corporate opportunities is still hardly regulated in France, and cases only deal with *gérants* (managers) of small, privately held limited companies, the rules that are emerging encompass the idea of preventing competition to the company's activities. The reference to the company's line of business signals an affinity with the US approach and a divide with the UK conception.

Overall, we can thus identify an export of the US model, possibly signaling some convergence in corporate law. The convergence debate in corporate governance revolves around the question to what extent corporate law and corporate governance practices have become more similar over the years, with a trend toward a shareholder-oriented model. Our paper enables us to tackle a number of questions. First, how can convergence take place on the micro-level of specific legal doctrines? Second, why are systems converging to a particular model (here apparently the US one)? And third, is convergence complete or incomplete? In a well-known paper, Gilson distinguished between *formal* and *functional* convergence.[13] Our analysis suggests a complex picture. We can see relatively complete formal convergence in Germany toward the US model, but only a limited level of it in France, where the doctrine has largely been absorbed *sub rosa*.

This article proceeds as follows. Section 2 sets up the question we are trying to answer in this paper: Are jurisdictions converging to a single model of the corporate opportunity doctrine? To that end, we look at the meaning of convergence, the process, and both of its formal and functional content. We therefore have to explore the economic role of the corporate opportunities doctrine within the framework of agreements underlying a specific corporation, as well as the larger environment in which corporations operate. We also have to deal with the question of legal transplants: When a rule or legal principle is transplanted from one system to the other, how will the host system react? Section 3 begins the comparative investigation by looking at the two "origin" countries that developed the corporate opportunity doctrine by themselves, namely the

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[13] Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function,* 49 AM. J. COMP. L. 329 (2001).

UK and the US. As we show, the doctrine in those two jurisdictions shares some common features, but ultimately they rest on very different principles. Section 4 provides two case studies in legal transplantation: While the corporate opportunities doctrine is of common law origin, both Germany and France have adopted it in recent years. As we show, both countries have adopted a model that resembles the US model more closely than the UK model. Section 5 attempts to explain the success of the US model compared to the UK model by framing the debate within the context of convergence in corporate governance. Section 6 discusses implication for legal theory, specifically the convergence debate in corporate governance and the transplant debate in comparative law. Section 7 summarizes and concludes.

2. Legal transplants as a vehicle for convergence in corporate governance

The concept of business opportunities and the necessity to subject them to some kind of judicial scrutiny are of more recent vintage in Germany and in France than in the UK and in the US, where the doctrines' outlines started to take shape in the late 19th century. This raises several question: 1) why in both common law and civil law jurisdictions, corporate law doctrines often come to resemble each other over time, and 2) how deep this resemblance actually is.[14] Additionally, this development triggers the question of whether the law protecting corporate opportunities is converging. In this part, we survey the phenomenon of convergence in corporate governance and situate the doctrinal concept of corporate opportunities as a legal transplant within this debate. Subsection A discusses convergence in corporate governance generally and distinguishes between formal and functional convergence. Subsection B argues that the corporate opportunity doctrine constitutes a legal transplant as understood by the comparative law literature. To better understand the role such a legal transplant can take up in the host jurisdiction, subsection C investigates the economic functions of corporate opportunities, particularly from the standpoint of incomplete contacts theory.

A. Convergence in corporate governance – phenomenon or phantom?

The convergence debate in corporate governance typically attempts to describe a development that reached its highest point during the (late) 1990s and early 2000s. In short, in the view of convergence theory a corporate governance model focused on the interest of shareholders, in particular outside investors, radiated from the US and the UK and began to influence both the corporate governance practices and the corporate laws of countries where previously other interests dominated. In the 1990s and early 2000s, the rise of the "corporate governance movement" around Europe resulted in the enactment of corporate governance codes based on the British "comply or explain" model.[15] Corporate law reforms of this period, such as the German

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[14] As stressed by David Nelken, *Towards a Sociology of Legal Adaptation*, *in* ADAPTING LEGAL CULTURES 7, 22 (David Nelken & Johannes Feest eds., 2001) ("We still know little about the relation between the circulation of goods and money and the circulation of law").

[15] Ruth V. Aguilera & Alvaro Cuervo-Cazurra, *Codes of Good Governance,* 17 CORP. GOV. 376, 377-379 (2009) (describing the spread of codes from their English origins). The ECGI provides a list at http://www.ecgi.org/codes/all_codes.php. Since a 2006 amendment, art. 46a of the Fourth EC Company Law Directive (the "Accounting Directive") requires that publicly traded firms must disclose whether the company applies a corporate governance code, and explain if it does not apply some of its provisions. The significance of these codes in Continental Europe is questionable, given that there is little, if any empirical evidence showing positive effects. For alternative interpretations *see* Steen Thomsen, *The Hidden Meaning of Codes: Corporate Governance and*

Control and Transparency Act of 1998,[16] the French "Nouvelles régulations économiques" of 2001[17], and the Italian reforms of 2004, were ostensibly intended to appeal to the interests of shareholders.[18] Both the EU's "High Level Report of Company Law Experts" of 2002[19] and the 2007 Shareholder Rights Directive followed a shareholder agenda.[20]

Henry Hansmann and Reinier Kraakman, whose provocative 2001 article constitutes the most known academic contribution to the convergence debate, identify not only the forces of logic and the example of the successful model of the Anglo-Saxon countries[21] (the appeal of which has to some extent faded since the financial crisis), but they also argue that larger macroeconomic trends, such as greater openness toward competition and the wider diffusion of equity ownership play a role in this purported trend.[22] Related changes, such as those in the structure of retirement systems, may also have played a role.[23] Additionally, the international expansion of institutional investors clearly contributed to this trend, e.g. CalPERS, which began to promote a set of "Global

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Investor Rent Seeking, 7 EUR. BUS. ORG. L. REV. 845 (2006) (interpreting codes a rent-seeking mechanism for institutional investors); Lutz-Christian Wolff, *Law as Marketing Gimmick – The Case of the German Corporate Governance Code,* 3 WASH. U. GLOBAL STUD. L. REV. 115, 132-133 (2004) (plausibly describing the German code as a marketing instrument aimed at foreign investors); Alessandro Zattoni & Francesca Cuomo, *Why Adopt Codes of Good Governance? A Comparison of Institutional and Efficiency Perspectives,* 16 CORP. GOV. 1, 13 (2008) (suggesting that the content and adoption process of codes supports a "legitimation theory" for the adoption of codes in civil law countries); MATHIAS M. SIEMS, CONVERGENCE IN SHAREHOLDER LAW 56-59 (2008).

[16] Gesetz zur Kontrolle und Transparenz im Unternehmensbereich [KonTraG, Law on Control and Transparency in Business], March 3, 1998, BGBl. I at 786. *See e.g.* Mariana Pargendler, *State Ownership and Corporate Governance,* 80 FORDHAM L. REV. 2917, 2952 (2012) (discussing the role of the KonTraG and privatization for the development of shareholder value thinking in Germany); PIERRE-YVES GOMEZ & HARRY KORINE, ENTREPRENEURS AND DEMOCRACY 192 (2008); However, the ostensible motivation of this comprehensive legal reform were actually a number of corporate failures in the late 1990s. For an overview of the act, *see* Ulrich Seibert, *Control and Transparency in Business (KonTraG): Corporate Governance Reform in Germany,* 1999 EUR. BUS. L. REV. 70, 70 (describing the collapse of Metallgesellschaft as a main trigger for the debate).

[17] Ben Clift, *French Corporate Governance in the New Global Economy: Mechanisms of Change and Hybridisation within Models of Capitalism,* 55 POL. STUD. 546, 553-557 (2007).

[18] *See also* Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe,* 21 J. ECON. PERSP. 117, 127-137 (2007) (surveying Continental European reforms).

[19] *Report of the High Level Group of Company Law Experts on a Modern Framework for Company Law in Europe*, Brussels, November 4, 2002.

[20] Directive 2007/36/EC, 2007 O.J. (L184) 17 (implementing e.g. a record date system and facilitating voting for international investors).

[21] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law,* 89 GEO. L. J. 439, 449-450 (2001).

[22] Hansmann & Kraakman, *id.,* at 450-453.

[23] *See* PETER ALEXIS GOUREVITCH & JAMES J. SHINN, POLITICAL POWER AND CORPORATE CONTROL 220–21 (2005) (suggesting a shift in the political preferences of workers toward minority shareholder protection); Martin Gelter, *The Pension System and the Rise of Shareholder Primacy,* 43 SETON HALL L. REV. 909, 967-968 (2013); *see also* ALAN DIGNAM & MICHAEL GALANIS, THE GLOBALIZATION OF CORPORATE GOVERNANCE 66–70 (2009) (discussing retirement savings of workers as reason for the political importance of shareholders); Gerald F. Davis, *The Twilight of the Berle and Means Corporation*, 34 SEATTLE U. L. REV. 1121, 1129 (2011).

Corporate Governance Principles" in the 1990s.[24] In their view, the end of history in corporate law and governance had come to an end, with the shareholder-oriented achieving dominance.[25]

Other authors contributing to the early convergence literature contested strong convergence claims and emphasized institutional hurdles impeding changes. For example, Curtis Milhaupt argued that as long as inefficient institutions remain, there could not be an optimal convergence in corporate governance.[26] In the same vein, Lucian Bebchuk and Mark Roe stressed that path dependence is bound to prevail over the pressure of global competition for convergence. As a consequence, diversity will dominate in the short and medium term.[27] More precisely, Roe argued that corporate governance institutions are largely idiosyncratic in each country since they are formed by historical and political factors that differ from one country to another. This sets boundaries to possible developments of corporate governance towards the most efficient solutions. Choices made by firms and states carry a stronger influence:[28] Even in the face of market pressures to adjust to a more economically efficient corporate governance system, a pre-selected path resulting from historical and political origins may prevent corporate governance from adjusting to contemporaneous challenges. In practical terms, past institutional changes have created interest groups of stakeholders who enjoy an advantage under the system as it has developed.[29] This situation creates high adaptation costs that are likely to impede reforms that do not advance the interests of these groups and perpetuate existing power structures and institutional choices. Moreover, some systems may not be well-positioned to follow a particular development that is difficult to integrate into the existing doctrinal framework. Our case in point, corporate opportunities, is a quite typical example that relates to the question of conflicts of interest, an issue that not all legal cultures have been equally sensitive. Traditionally, there has been little concern in French corporate law debates about conflict of interests issues within firms, besides the question of insider trading and minority shareholders oppression. Directors' liabilities are traditionally subsumed into the board's. The duties individually imposed upon directors have only been discovered in recent cases.[30] As a result, French corporate law is not well-prepared to address the corporate opportunity problem.

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[24] Thomas J. André, *Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideology to Germany,* 73 TUL. L. REV. 69, 76-83 (1998) (describing CalPERS' portfolio and its code of principles).

[25] The authors also recognize that differences may persist among countries but they do not explain how the persistence of such differences does not weaken their general claim.

[26] Curtis J. Milhaupt, *Property Rights in Firms*, 84 VAND. L. REV. 1145, 1189-1190 (1998).

[27] Lucian Arye Bebchuck & Mark J. Roe, *A Theory of Path Dependence in Corporate Governance and Ownership*, 52 STAN. L. REV. 127-169 (1999)

[28] Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 646-652 (1996); MARK J. ROE, STRONG MANAGERS - WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 47, 245-280 (1994); Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 580-584 (2000); MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 151-152 (2003).

[29] Typically, a group of stakeholder may enjoy private rents or have made firm-specific investments that would be devalued if there were radical institutional changes. See Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV.833, 912 (2003).

[30] *See* Court of cassation, commercial chamber March 30, 2010, *Crédit Martiniquais* case 08-17.841, n°405 F P-P+B+R+I REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 377, note B Dondero and P Le Cannu, JURISCLASSEUR ENTREPRISE 2010.II.1416 A Couret.

Another major irritant in the original convergence literature is the monolithic view of superior Anglo-Saxon governance that is sometimes assumed, which tends to overemphasize the similarities between the US and the UK, and also between jurisdictions in Continental Europe, while overlooking the differences. In several areas, the US and the UK stand at different polar ends of the regulatory spectrum, e.g. in terms of the shareholder-manager balance of powers and in the board's duties when facing a hostile takeover.[31] In the area of corporate opportunities the difference is more subtle, but still significant. As we will discuss below, France and Germany adopted the corporate opportunities doctrine mainly from the US, although with considerable differences.

"Just because corporate law converges in form does not mean it also converges in function.", and vice versa. The distinction between 'convergence of form' and 'convergence of substance' (or 'of function') was first introduced by Gilson.[32] Convergence is only *functional* (but not *formal*) when governance institutions are flexible enough to embrace changed circumstances while keeping their formal characteristics. For example, this would be the case if a jurisdiction does not adopt rules that explicitly address corporate opportunities, but relies on its own mechanisms (e.g. a formal prohibition for directors to compete with the firm) to tackle what is locally a new issue. New circumstances may sometimes lead to a change in the structure of the governance institutions. Such institutional alterations signal *formal* convergence.[33] This would be the case, for example, if a jurisdiction abandoned its previous doctrinal approach to the corporate opportunities problem and adopts the line of reasoning and vocabulary established under US law.[34] Finally, it is possible for convergence to be merely *formal,* but *not functional.* This can happen when a jurisdiction adopts a statute from abroad, but enforces it adequately idiosyncratically e.g., uses it to tackle different factual situations than the jurisdiction of origin. On its face, corporate law might then seem to have converged, even if effectively it has not.

B. Convergence through legal transplants

Although the convergence literature does not often intersect with the concept of legal transplants in the comparative law literature, legal transplants can be vehicles of convergence in corporate governance: the adoption of a corporate opportunity concept across very different jurisdictions can lead to convergence of rules.

As we will see in sections 3 and 4 when discussing the four jurisdictions discussed, there are discussions of UK and US law in the doctrinal literature in France and Germany, and the vocabulary used by courts in these jurisdictions mirrors the Anglo-American terminology. An importation appears to have occurred, accounting for France and Germany following, in their limited adoption of the corporate opportunity law, a pattern set abroad. The adoption takes the

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[31] *E.g.* Christopher M. Bruner, *Power and Purpose in the "Anglo-American" Corporation,* 50 VA. J. INT'L L. 380, 603-611 (2010).

[32] Gilson, *supra* note 13, at 329-357.

[33] If the political context does not allow for legislative action, modifications may be embedded in contract and provide for contractual convergence.

[34] The formal legal order of many countries was borrowed, voluntarily or not, from a small group of origin countries, including France, Germany, the US and the UK. See Daniel Berkowitz, Katharina Pistor & Jean-François Richard, *Economic development, legality, and the transplant effect*, 47 EUR. ECON. REV. 165, 171, 176-179 (2003) (showing a table summarizing transplants' origins in terms of legal family on pp. 176-179).

form of a "transplant", [35] which can be defined as "the moving of a rule or a system of law from one country to another, or from one person to another".[36] This dynamic differs from both the automatic global convergence of socio-economic structures advocated by Hansmann and Kraakman[37] and the institutional dynamic identified by Milhaupt and others.

In order to understand the implications of the legal transplant hypothesis, a brief account of the scholarly debate on this topic is necessary. This account will illustrate the case for the possibility of a transplant and explain how the transplant took place and what its potential effects are. As explained later, a crucial factor of legal transplants is their ability to adjust to the local legal culture of their host jurisdiction.

The transplant of a legal solution gives the importing jurisdiction a model. It therefore enables it to quickly deal with the concerned issue as compared with the time that the exporting jurisdiction required to refine a balanced solution. While the existence of transplants is a historical fact,[38] conditions of their reception and their actual practical impact have been controversial.[39] According to Alan Watson's account,[40] jurisdictions often borrow from elsewhere laws that, even if they were strongly rooted in the local history,[41] are able to operate in very different places. As the laws integrate into a specific 'legal culture',[42] transplants will necessarily be affected by the

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[35] The medical metaphor is has been used since the 1970s. Sometimes attributed to Watson, who theorized the notion (see below), its use is anterior, see John W. Cairns, *Development of Comparative Law in Great Britain*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 131, 146, 150, 170-171 (Mathias Reimann, & Reinhard Zimmermann eds., 2006) More importantly, the term appears in various papers at the about the same time and in different places (e.g. in France, as from 1972 Rivero discusses how the utility of such metaphor drawn from advanced surgery, in Jean Rivero, *Les phénomènes d'imitation des modèles étrangers en droit administratif*, 2 PAGES DE DOCTRINE 459, 459 (1980).

[36] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974) 21.

[37] *See above* Hansmann & Kraakman, *supra* note 21, at 449-450.

[38] E.g., for an account of legal transplants in German company law, *see* Holger Fleischer, *Legal Transplants im deutschen Aktienrecht Aufsatz,* NZG 2004, 1129. For a French perspective across various legal areas, see *L'américanisation du droit,* Arch. Phil. Droit 45 (2001) 7-267. *See also* Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties,* ECFR 2005, 378.

[39] Savigny strongly advocated that the law of any country grows up naturally by customary usage and without legislation. FRIEDRICH KARL VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814). This view slowed down the adoption of a civil Code in Germany that turned out to heavily draw on Roman law.

[40] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974) 21; ALAN WATSON, SOURCES OF LAW, LEGAL CHANGE AND AMBIGUITY (1984); *see also* Alan Watson, *Comparative Law and Legal Change*. 37 CAMBRIDGE L.J. 313, 313-314 (1978); Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1125 (1983). For a literature review, see John Cairns, *Watson, Walton, And The History Of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 637, 672 (2013). For an account of history and current debate, see Cairns, *id.,* at 639.

[41] The main examples Watson uses for his demonstration are taken from the reception of Roman law in Western Europe. Roman rules were included in Germanic legal compilations, and these compilations themselves tended to be adopted and adapted cross-nationally for centuries throughout Western Europe. According to the Watsonian approach, "the interconnection between law and society is not so close as to preclude borrowing from alien systems. Reception is both possible and explicable so long as one recognizes that the most important group for reception of legal rules is the legal elite", in Michael H. Hoeflich, *Law, Society and Reception: The Vision of Alan Watson*, 85 MICH. L. REV. 1083, 1088-89 (1987). For a (sympathetic) account of Watson's theory, see also Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MODERN L. REV. 11, 14-15 (1998).

[42] "Legal culture" is understood here as law as culture, *see* LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 15, 193-194 (1975); Volkamar Gessner, Armin Hoeland and Csaba Varga, *European Legal Cultures* (1996) 3-5, Martin Hesselink, *The New European Culture – Ten Years On,* in Geneviève Helleringer, Kai Purhagen (eds), TOWARDS A

way the law is applied, obeyed and practiced in the receiving jurisdiction. However, transplants will also affect the legal culture they integrate.[43] We can expect a significant impact on legal reasoning, particularly when the transplant bridges different legal traditions, such as the common law and the civil law. A transplant shaped in a concrete and practical tradition, possibly receptive to economic analysis of law, will potentially introduce to its host jurisdiction a new type of reasoning, in contract to its traditionally abstract and category-based analyses.[44] To capture the evolutionary dynamic triggered by this phenomenon, scholars have coined competing sets of vocabulary, in particular "legal irritants"[45] as well as "legal formants",[46] which capture the social, economic, political and doctrinal dimensions put into motion by transplants.[47]

The radical critique of transplants[48] is not corroborated by empirical observation: [49] the borrowing after the collapse of the Berlin wall of legal codes from Western powers in Eastern Europe illustrates the reality of at least one example of transplant.[50] The critique effectively touches more upon the effect of transplant and their effectiveness rather than their existence.

Over the last forty years, this short account of the academic debate on legal transplants clarifies an important idea for our own enquiry. A legal transplant cannot be expected to engineer a solution fully compatible with the host jurisdiction. It should be expected to take on a life of its own in its new host, in the form of a legal irritant interacting with the local legal culture. Hence, the fact that French or German solutions do not exactly follow an identified model does not meant that they cannot result from an importation. On the contrary, adaptation is provides evidence for successful importation, as the debate on transplant strategy shows.

EUROPEAN LEGAL CULTURE (2014), 17-24. It must be noted that Watson also draws on ideas of culture, but understood as the culture of the lawyers, whereas our conception is broader and corresponds to the usual understanding of the expression.

[43] Mathias Reimann, *Droit positif et culture juridique. L'américanisation du droit européen par réception*, ARCHIVES DE PHILOSOPHIE DU DROIT 45, 61 (2001) 63-64.

[44] Reimann, *id.*, at 70.

[45] Teubner, *supra* note 41, at 12.

[46] Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law,* 39 AM. J. COMP. L. 1 (1991).

[47] Otto Kahn-Freund, *On Uses and Misuses of Comparative Law,* 37 MOD. L. REV. 1, 8 (1974).

[48] Legrand draws on epistemological premises and anthropological theory to argue that law simply cannot be separated from its context as it only exists as interpreted and applied within an interpretative community. Law only has a meaning in context; change the context and the law changes. Pierre Legrand, *The Impossibility of Legal Transplants,* 4 MAASTRICHT J. EUR. & COMP..L. 111 (1997); *see also* Pierre Legrand, *What "Legal Transplants"?, in* ADAPTING LEGAL CULTURES 55 (David Nelken & Johannes Feest eds., 2001).

[49] See Teubner, *supra* note 41, at 15.

[50] *See, e.g.,* Steven J. Heim, *Predicting Legal Transplants: The Case of Servitudes in the Russian Federation,* 6 TRANSNAT'L L. & CONTEMP. PROBS. 187, 203 (1996) (explaining why post-collapse of the Russian Federation is an appropriate time to study legal transplants). The intense debate about the harmonization or unification of European Private Law also steered the legal transplant conversation. EU Parliament, Resolution on Action to Bring into Line the Private Law of the Member States, 1989 O.J. (C 158) 400; EU Parliament, Resolution on the Harmonisation of Certain Sectors of Private Law of the Member States, 1994 O.J. (C 205) 518; *see also* Guido Alpa, *European Community Resolutions and the Codification of "Private Law,"* 8 EUR. REV. PRIV. L. 321, 323 (2000).

C. The corporate opportunities doctrine as a legal transplant

1) The law of corporate opportunities, its function, and its interaction with national production structures

Corporate law is typically analyzed within the framework of agency theory and incomplete contracts,[51] which seek to explain structures of finance and production from an economic standpoint, both of which are affected by the protection of corporate opportunities. It therefore carries a different importance in jurisdictions that have different financial and production structures to start with. A strong protection of corporate opportunities may be advantageous in some contexts, but counterproductive in others.

Agency costs are the economic translation of the presence of conflict of interests.[52] Fiduciary duties are protections granted to the shareholders in compensation for the deficit of explicit promises in the corporate contract.[53] Within the agency theory framework, shareholders invest in a corporation for the purpose of achieving a certain goal, typically understood as maximization of long-term profitability. Directors and officers of the corporation, however, will rationally pursue their own goals and engage in opportunistic behavior, specifically by activities that draw resources from the corporation, for which they often have the opportunity because of information asymmetries. To keep down the cost of capital, rational shareholders will monitor them, while directors and officers may sometimes be in the position to signal their good intention to those who are – in economic terms – considered their principals.[54]

In this framework, the duty of loyalty (the duty to prioritize the principal's interests over the agent's own) is a mechanism that either 1) incentivizes fiduciaries to reveal information *ex ante*, for example by creating incentives to inform shareholders about potentially opportunistic transactions,[55] or 2) deters fiduciaries' opportunistic behavior by imposing penalties in the form of damages and/or the disgorgement of profits made ex post. However, in the context of corporate opportunities, the question is more subtle: The duty of loyalty always protects the corporation (and its shareholders) relative to a certain baseline. In the case of self-dealing transactions, this is a relatively straightforward assumption that directors and officers will not siphon any corporate resources out of the corporation through transactions they enter with the company. For the corporate opportunities doctrine, the baseline is that directors and officers will not, to the detriment of the company, appropriate any profitable business opportunities to themselves.[56] However, the

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[51] For a review of incomplete contracts theory in corporate law, *see, e.g.* Luigi Zingales, *Towards a Political Theory of the Firm,* 31 J. ECON. PERSP. 113, 118-119 (2017).

[52] FRANK H. EASTERBROOK & DANIEL R. FISHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 103 (1991).

[53] "If contracts can be written in enough detail, there is no need for 'fiduciary' duties as well" EASTERBROOK & FISHEL, *id.,* at 90.

[54] *See, generally,* John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies,* in THE ANATOMY OF CORPORATE LAW 28, 28 (Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe & Edward Rock, 3rd ed. 2017).

[55] One example would be the consequences of approval of transactions either by fully informed disinterested directors or by a fully informed majority of the disinterested minority shareholders, in which case courts will apply a standard more favorable to the fiduciaries if the transactions is challenged in court.

[56] *E.g.* Luca Enriques, Gerard Hertig, Hideki Kanda & Mariana Pargendler, *Related-Party Transactions,* in ANATOMY, *supra* note 54, at 145, 145.

difficulty here is to determine *ex ante* on which opportunities the corporation effectively has a right of first refusal, meaning that directors or officers may only take the opportunity if the corporation forebears this right.

Following the Coase Theorem[57], one could imagine the parties *ex ante* bargaining for the optimal allocation of corporate opportunities between the corporation and its managers.[58] The parties could thus delineate – either in its articles at the time of the formation of the corporation or during negotiations when a manager is hired – which types of opportunities managers, directors or controlling shareholders can take. In the absence of transaction cost, it should therefore not matter whether or not the law protects corporate opportunities. In practice, we often do not always observe such bargaining, and courts might even make it impossible by considering its own assignment of corporate opportunities among the parties mandatory law. Under these circumstances, it is plausible for scholars to argue that the courts should aim at protecting the legitimate expectations of shareholders as to which opportunities will either be used by the corporation itself or released only after an *ex post* negotiation resulting in the payment of a price to the corporation.[59] Thus, courts have to first determine what these expectations are, which may not be obvious in the business opportunity context.[60]

Absent an explicit contractual stipulation[61], a court facing the question of delineating whether an opportunity should be reserved to the corporation, might ask what the parties would have agreed on if they had thought about a specific business opportunity ex ante and had completed their contractual relationship accordingly. Thus, one could see the corporate opportunity doctrine as a default assignment of property rights.[62] If the corporation, its shareholders (and other constituencies potentially benefiting from it) and its directors and officers were able to foresee all possible future states of the world, they would contractually agree to assign each opportunity to the highest value user in each possible state of the world (which could be either the firm or someone else). Such a scheme would maximize the total payoff from exploiting the opportunity.[63] This is a case of incomplete contracting, since it is not possible for the parties to foresee and prepare for all possible future scenarios. Moreover, even ex ante, one party is likely to have superior information, thus resulting in opportunism in the negotiation and the preclusion of a mutually beneficial

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[57] According to the Coase Theorem, regardless of the original entitlement parties will reach the efficient result in negotiations provided there are no transaction costs (which is of course a very restrictive assumption). *See generally* R.H. Coase, *The Problem of Social Cost,* 3 J. L. & ECON. 1 (1960) (original article developing the economic theory); David de Meza, *Coase Theorem,* in 1 PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 270 (1998); Francesco Parisi, *Coase theorem and transaction cost economics in the law,* in THE ELGAR COMPANION TO LAW AND ECONOMICS 7, 10-28 (Jürgen G. Backhaus ed. 1999) (both explaining the significance of the theorem).

[58] Corradi, *supra* note 3, at 768-769.

[59] *See* Brudney & Clark, *supra* note 4, at 1010-1012 (discussing rational expectations of shareholders as a test for corporate opportunities in close corporation).

[60] *But see* our discussion below of incentives for business innovation, which might inform criteria applied by the court. *Infra* section 5.A.

[61] See below on DGCL 122(17) section 3.A.2)

[62] Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine,* 108 YALE L. J. 277, 280 (1998).

[63] Talley, *id,,* at 322-325.

complete contingent contract.[64] Much of the literature seems to consider it the paramount goal for the highest value user (or the lowest cost user) to exploit the opportunity. Brudney and Clark, for example, recommend a "higher value" defense even for the controlling shareholder of a publicly held corporation,[65] where they normally would consider a strong protection of dispersed outside investors to be determinative.[66]

The corporate opportunities doctrine thus fulfills an important function in assigning potential business opportunities either within the corporation or to the free-wheeling "morals of the marketplace," where they are up for grabs.[67] Since there is no natural default assignment an opportunity's ownership, this task may be difficult. In fact, the delineation developed by the courts may shape the expectations of the party. There are competing ways to analyze the issue: it might be conceptualized in terms of ownership or in terms of loyalty and status of the director. As we shall see, US and UK corporate opportunity laws sharply diverge on this. The former follows an ownership approach while the latter largely follows a status approach. Both approaches formally rely on fiduciary duties, a tool that is flexible enough to adjust to the different lines of reasoning.[68]

Corporate opportunities are often protected with gain-based sanctions, effectively assigning them as a property right to the corporation.[69] A fiduciary will thus be forced to reveal information he possesses about a business opportunity in order to negotiate an opt-out.[70] If he is indeed the higher value user that wants to take the opportunity himself, he may face opportunistic bargaining on behalf of the corporation, which could eviscerate the gain and even make it sometimes even unfeasible for the opportunity to be exploited at all in a high-transaction cost environment.[71] On the one hand, weak protection of corporate opportunities, or "elasticity" in their legal protection,[72] may foster innovation by permitting fiduciaries to take innovations with them and employ them for their highest value use.[73] Thus, a widely-cast net in the definition of opportunities and strong property rights protection may at times reduce innovation and prevent

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[64] Talley, *id,,* at 327.

[65] Brudney & Clark, *supra* note 4, at 1055-1060 (discussing the assignment of corporate opportunities between parent and subsidiary firm).

[66] Brudney & Clark, *id.,* at 1001-1006 (suggesting that a categorical prohibition should generally apply in publicly traded firms).

[67] Unless those potentially "grabbing" the opportunity are subject to further limitations, e.g. a contractual or legal duty not to compete, as are e.g. members of the executive board in German stock corporations.

[68] "Socially optimal fiduciary rules approximate the bargain that investors and managers would have reached if they could have bargained (and enforced their agreement) at no cost." Frank H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 92 (1991).

[69] On property rules as opposed to liability rules *see, generally* Guido Calabresi & A. Douglas Malamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1989 (1972). On the application of the Calabresi-Melamed framework to corporate opportunities *see* Michael J. Whincop, *Painting the Corporate Cathedral: The Protection of Entitlements in Corporate Law*, 19 OX. J. LEG. STUD. 20, 35 (1999).

[70] On penalty default rules, *see generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87 (1989).

[71] On high and low transaction cost environments *see* Kershaw, *supra* note 6, at 617-8

[72] *Compare* in the financial context an account of 'law's elasticity', i.e., "the probability that ex ante legal commitments will be relaxed or suspended in the future", Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315, 320 (2013).

[73] *See* Corradi, *supra* note 3, at 776-778 (discussing innovation as "information-specific investment").

desirable market entry ex post when an opportunity arises. Ex ante, it may also deter fiduciaries from seeking out new business opportunities, thus reducing the vitality of the economy overall.[74]

2) The reception of the law of corporate opportunities as a legal transplant

How well a legal transplant is received may be measured by the degree of enforcement of the imported rules. This criterion rests on the generally accepted view that enforcement and effective legal institutions are important for economic development, whereas weak legal institutions are an impediment to future growth and development.[75] What improves enforcement, the content of the transplant or the context of transplantation, is debatable, however. Scholars have granted considerable weight to the content of the transplant, i.e. to the substantive law of the exporting jurisdiction. "Countries of origin" or "origins" have famously been advocated for as key predictors of the quality of a transplant.[76] The policy implication is that at the time of transplant, choosing the best possible rule will enhance economic development. Though differences among legal families of origins (Common Law, French, German and Scandinavian families) are widely accepted, it remains disputed whether the Common Law, and US law in particular, carries a premium.[77] In a less controversial manner, for the purpose of our study, the implication of this line of research is that the choice for the transplant between the US and the UK models of corporate governance law bears consequences.

Other researchers have established that the context, i.e., how the legal order is transplanted, is more important than the choice of the law of a particular legal family.[78] For the transplanted law to be effective, it must be meaningful in its context of application. Otherwise, citizens have no incentive to use it and will demand effective legal institutions to enforce it. In the longer term, the transplanted law must also be amenable to evolutions and improvements, which may require the host jurisdiction to embrace the more concrete and contextualized reasoning an Anglo-American transplant displays as compared to the civil law traditions. In other words, the existing legal infrastructure must complement the transplant in order to absorb it in the legal system.[79]

The importance granted to the local context in this line of research draws attention to the risk of "transplant shocks". They relate to the possibility that a legal rule that works well in one

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[74] For the comparable case of non-compete clauses, see Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants not to Compete*, 74 NYU L. REV. 575-629 (1999).

[75] Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian privatization and corporate governance: what went wrong?* 52 STAN. L. REV. 1731, at 1752-1757 (2000); Simon Johnson, Daniel Kaufmann & Andrei Shleifer, *The unofficial economy in transition*. 2 BROOKINGS PAPS. ON ECON. ACT. 159, 161 (1997).

[76] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, & Robert W. Vishny, *Legal determinants of external finance*, 52 J. FIN. 1131 (1997); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, & Robert W. Vishny, *Law and Finance*, 106 . J. POL. ECON. 1113 (1998).

[77] *Compare* Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing,* 88 J. FIN. ECON. 430, 462 (2008) (finding that common law countries have more robust anti-self-dealing laws than French legal origin countries in particular), *with* Mark J. Roe, *Legal Origins, Politics, and Modern Stock Markets,* 120 HARV. L. REV. 462, 495-502 (2006) (suggesting that the less deep stock markets in Continental Europe are better explained by economic collapse in the first half of the 20th Century).

[78] Berkowitz et al., *supra* note 34, at 174-181.

[79] Hideki Kanda & Curtis Milhaupt, *Re-examining legal transplants: The Director's Fiduciary Duty in Japanese Corporate Law,* 51 AM. J. COMP. L. 887, 891 (2003) (discussing "micro-fit").

jurisdiction will not have the same effect or even be rejected in another jurisdiction where the historical, political, or cultural background is different.[80] As to corporate opportunities, there is some empirical evidence that psychology of the actors might be a key component of the efficacy of the rule. Stout has suggested that, among the elements of local context for transplant shocks, one is "local inclination toward other-regarding behavior."[81] Stout focuses on the rules of fiduciary duty. She demonstrates that in practice, these rules are open-ended standards that are only imperfectly and incompletely enforced by legal sanctions.[82] US corporate insiders nevertheless exhibit a relatively high degree of compliance with fiduciary duty rules.[83] According to Stout,

> "we do not yet fully understand the sources of such differences, some of the more obvious possibilities include nature (genetics), nurture (learning), and present social context (culture, i.e., of the needs, expectations, identities, and likely behavior of those around us). Which source is most significant matters, because depending of the source and determinants of altruism, the task of successfully exporting U.S. corporate law may range from merely difficult, to impossible."

By itself, the adoption of formal rules of law that resemble U.S. corporate law may not produce results similar to those observed in U.S. corporations. In order to make sense of transplants, it will be useful to assess the local context from a socio-economic perspective.

Gilson has suggested that corporate governance systems sometimes converge in function, when they do not converge in form. If a particular solution is not available in the legal system, or a particular encumbrance resulting from the local system is present, legal actors might find another workaround to reach the same functional outcome.[84] The transplant effect – resulting from different economic structures or otherwise – may then result in the opposite situation: While a legal system has maybe superficially absorbed the corporate opportunities doctrine, legal actors might apply it in a mitigated way because its effects would be too disruptive. Consequently, we would see convergence in form, but not in function.

3. Two original styles of corporate opportunities regulation: The UK and US models

Having explored both the process and content determinants of the convergence observed in the Western world in the protection of corporate opportunities, we now move on to the country-level analysis of its development, and its transplantation across jurisdictions. The corporate

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[80] Berkowitz et al., *supra* note 34, at 167; Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2095 (2001); *see also* Kanda & Milhaupt, *id.*, at 891 (discussing a transplanted rule's "macro-fit", meaning how well it fits into the political economy of the host country).

[81] Lynn Stout, *On The Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can A Transplant Take?* UCLA School of Law Working Paper No 02-11, 3, at http://ssrn.com/abstract=313679.

[82] *Id.,*, at 3.

[83] *See* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, at 1928-1929 (1996) (pointing out that US corporate managers are usually convinced that they work for the shareholders).

[84] Gilson, *supra* note 13, at 337-340.

opportunity doctrine is said to originate from the common law.[85] However, as this section will show, in many areas of corporate law, there is no single common law model. The US and the UK employ two different legal strategies, which we survey in subsections A and B respectively. The US doctrine, after a century of development in case law, could be described as the "ownership approach." In the US, the main question courts ask is whether an opportunity "belongs" to the corporation because it is one that shareholders would typically expect the corporation to pursue. By contrast, the UK strategy is called "status approach." It is rooted in the conflict-of-interest paradigm, which has a long tradition in UK company law and is based on the underlying principle that fiduciaries should not be allowed to put themselves in positions of conflict. This model, even if policy-makers and courts intermittently called it into question in recent decades, was largely affirmed in the 2006 Companies Act.[86]

A. The US corporate opportunities doctrine: delineating the "ownership approach"

The US approach, which developed through case law over the decades, has not been codified except in the American Law Institute's non-binding Principles of Corporate Governance.[87] While the doctrine has antecedents in the 19th century,[88] the doctrine adopted its familiar contours and solidified in the first half of the 20th century. Over much of its development, it was concerned with the question what types of opportunities can be considered as "belonging" to the corporation, thus excluding directors from taking them in a personal capacity. Nevertheless, this delineation of ownership of opportunities eventually culminated in a broad conception of fairness, as shown by the most recent case considered to be important.[89] This has in practice led to attempts to opt out of the corporate opportunity doctrine, either *ex post* – by submitting the question to the board – or *ex ante* – by attempting to eliminate corporate opportunities in the corporate charter, or by specifying what opportunities belong to the corporation.

1) The development and contours of the corporate opportunities doctrine

In the United States, case law spelled out the outlines of the corporate opportunities doctrine over the decades. The most famous duty of loyalty case, *Meinhard v. Salmon*, dealing with a joint venture, sweepingly established that a party to a joint venture must share an opportunity with their joint adventurer. However, the case did not establish particularly clear

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[85] For example, the recent European Model Companies Act refers to UK and US law, but leaves the definition of corporate opportunities up to the national courts. *See* EUROPEAN MODEL COMPANIES ACT (2017) § 9.06.

[86] That is while the company is solvent, see COMPANIES ACT 2006 (UK), Ch. 2: ss. 170-181

[87] ALI PRINCIPLES OF CORPORATE GOVERNANCE (1994) §§ 5.05, 5.12. As a matter of actual state corporate law, fiduciary duties are assumed to pre-exist in common law, which leaves their development to the courts. Some acts provide that managers or members may not take opportunities of the business entity. *E.g.* REV. UNIFORM LIMITED LIABILITY COMPANY ACT § 409(b)(1)(C), (g)(1) (providing that members in a member managed LLC and managers in a manager-managed LLC must account to the company and hold as a trustee for it any property, profit or benefit derived from the appropriation of a LLC opportunity). However, even in those cases, business opportunities are usually not legislatively defined.

[88] *See* Kershaw, *supra* note 6, at 43-47.

[89] Broz v. Cellular Information Systems, 673 A.2d 148 (Del. 1996).

criteria of what opportunities are captured by this obligation.[90] Similarly, in the well-known 1934 corporate opportunities case of *Irving Trust*, the Federal Court of Appeals for the Second Circuit defended a principle "that fiduciaries should not be permitted to assume a position in which their individual interests might be in conflict with those of the corporation" and, in doing so, found that the corporation's inability to pursue an opportunity does not provide a defense for the director taking it.[91]

However, today, analysts generally understand the corporate opportunities doctrine to be permissive. The focus is on the threshold question: Which opportunities "belong" to the corporation?[92] Textbooks generally cite three tests: 1) the interest or expectancy test, 2) the line-of-business test, and 3) the fairness test.[93] These tests often operate in conjunction with each other. In applying these tests, the courts' focus have shifted away from more formalistic and narrow definitions depending on clear pre-existing entitlements toward more flexible ones, thus expanding the application of the doctrine.

The oldest and most narrow "interest or expectancy test" asks whether a corporation already has established a tentative claim to the opportunity. Historical examples include opportunities to purchase assets in which the corporation already had partial ownership or a lease, as well as the opportunity to acquire an asset that were critical to the use of assets the corporation already owned.[94]

The most famous corporate opportunity case from Delaware, *Guth v. Loft*[95] of 1939 is often cited for establishing the "line-of-business test", which asks whether an opportunity relates "to the business the corporation engages in."[96] In *Guth,* the defendant was the director and controlling shareholder of a chain of candy stores who was approached by the controlling shareholder of the bankrupt Pepsi Cola Corporation and offered the majority of shares in a new corporation to continue Pepsi's business and purchase its recipe. The Supreme Court of Delaware found that "Loft had no interest or expectancy in the Pepsi-Cola opportunity,[97] but it was (maybe somewhat

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[90] Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). According to the court, the new lease fell into Meinhard's reasonable expectations because it was "an extension and enlargement of the subject-matter of the old one". *Meinhard*, *id.,* at 548. However, it is not entire clear why this should be the case, given that the new project was considerable more extensive than the original one, which had been entered into for a limited time.

[91] Irving Trust Co. v. Deutsch, 73 F.2d 121, 124 (2d. Cir.1934).

[92] *E.g.* Kershaw, *supra* note 6, at 608 (comparing US to UK law); *In re* Digex, 789 A.2d 1176, 1188 (Del. Ch. 2000) (analyzing to whom an opportunity "belongs").

[93] *E.g.* ROBERT CHARLES CLARK, CORPORATE LAW 225-229 (1986).

[94] *See* Lagarde v. Anniston Lime & Stone Co., 126 Ala. 496 (1900) (a corporation holding 1/3 of a stone quarry has an expectancy in purchasing the other shares); Pike's Peak Co. v. Pfunter, 123 N.W. 19 (Mich. 1909) (a corporation having leased property has an expectancy to purchase it when it is available); Nebraska Power Co. v. Koenig, 139 N.W. 839 (Neb. 1913) (a corporation has an expectancy to purchase rights to divert a river upstream from its power plants).

[95] Guth v. Loft, 5 A.2d 503 (Del. 1939).

[96] *E.g.* CLARK, *supra* note 93, at 227; b*ut see* FRANKLIN A. GEVURTZ, CORPORATION LAW 384-5 (2nd ed. 2010) (questioning the accuracy of the predominant characterization of the case).

[97] *Guth*, 5 A.2d. at 514.

questionably) within its line of business, given its “reasonable needs and aspirations for expansion.”[98]

A general reading of the case leads to the conclusion that the case focused on more than just the perceived line of business, even if it was clearly a major factor. The court also looked at whether the opportunity came to the fiduciary in his official or individual capacity, and whether the corporation was financially capable of taking it.[99] The court addressed by the fact that the person who had approached the director had probably expected the firm – and not the director – to take the opportunity. Furthermore, Guth controlled the corporation, and thus compromised the other directors’ abilities to independently assess the situation. Here, an argument can be made that the case could be an example of a broader “fairness test”,[100] in which the line of business is just one major factor alongside the origin of the information and its relationship to the corporate functions of the executive.

We can see a progression in the case law that revolves – with respect to all of these tests – around the question of reasonable expectations.[101] Ultimately, the issue is what opportunities a (minority) shareholder can reasonably expect the corporation to take. The doctrine starts out with a narrow test based on an existing interest or right in the earliest cases, but then swiftly expands to a broader test in *Guth.* While the Delaware court employed a relatively expansive and malleable definition of what constitutes a corporate opportunity, and while it continued to use language indicating an “uncompromising rigidity” of the duty, at the same time it created a “way out” for directors that at least would give them an argument that some opportunities are not inherently tied to the corporation.

The emphasis on shareholders’ expectations can also be seen in the ALI Principles of Corporate Governance, which illustrates two possibilities to consider an opportunity “corporate.” First, there is the case when either a director or executive became aware in connection with the performance of his functions and expected to be offered to the corporation, or he became aware of it through use of corporate information and should reasonably have believed it to be of interest to the corporation. Second, an opportunity is “corporate” when the senior executive knew that it would be closely related to a business of the corporation.[102] Even if these tests rest depend in part on the reasonable belief or knowledge of the executive, the decisive question is always whether a shareholder would have expected the corporation to take such an opportunity.

The most frequently discussed recent case is *Broz* of 1996,[103] which largely follows *Guth* in its delineation of what qualifies as a corporate opportunity. Summarizing the test developed by the Delaware courts in *Guth* and its progeny, the *Broz* court finds that a director is not allowed to take an opportunity if

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[98] *Guth*, *id.*

[99] *Guth*, *id.* at 511.

[100] GEVURTZ, *supra* note 96, at 385.

[101] *See* Brudney & Clark, *supra* note 4, at 1010.

[102] ALI PRINCIPLES OF CORPORATE GOVERNANCE (1994) § 5.05(b).

[103] *Broz*, 673 A.2d at 148.

"(1) the corporation is financially able to exploit the opportunity;

(2) the opportunity is within the corporation's line of business;

(3) the corporation has an interest or expectancy in the opportunity; and

(4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimitable to his duties to the corporation."[104]

Along with other recent case law, , it rests with in a "fairness" paradigm that combines the factors of both traditional tests.[105] The court summarized the development of the fairness test by emphasizing "[n]o one factor is dispositive and all factors must be taken into account insofar as they are applicable. Cases involving a claim of usurpation of a corporate opportunity range over a multitude of factual settings. Hard and fast rules are not easily crafted to deal with such an array of complex situations."[106] Here, the determination of what qualifies as a corporate opportunity doctrine is treated as an open-ended standard,[107] in other words a legal duty to which texture is given only in an ex post assessment by the courts.

Broz, as a widely-discussed case re-enunciating the corporate opportunities doctrine, is also emblematic for its erosion in practice. Within the confines of the traditional doctrine, parties have attempted to delineate the scope within which directors can take corporate opportunities with the assent of the board, thus further hollowing out the doctrine. *Broz* illustrates practical problems resulting from the corporate opportunity doctrine. The defendant was the 100% owner of a corporation in the cell phone business (RFBC), and served on the board of CIS, a competitor. After learning of the opportunity to purchase a cell phone license, he took it for RFBC and not CIS. PriCellular, which subsequently acquired troubled CIS, sued him and argued that he should have prioritized the interests of CIS and PriCellular as its acquiring shareholder. Even if Broz ultimately won under the "fairness test", the case illustrates how difficult it can be to avoid being subject to dual loyalties. CIS' financial inability to take the opportunity played an important role in the outcome, but in case where there are interlocking directorships in a particular industry, and when ownership of firms is to some extent fluid, the corporate opportunities doctrine can often create difficulty. The conflict of interest would have even been more difficult to resolve if Broz had not been the sole owner of another firm, but merely RFBC's director and CEO, and thus exposed to second set of fiduciary duties within RFBC.

Not only did the Delaware Supreme Court reverse the Court of Chancery on its finding that Broz had been required to present the opportunity to the CIS board (even though he had learned it in his case in his role at RFBC), given that CIS did not have the capacity to take the opportunity. The court further stated that submission to the board creates an *ex ante* safe harbor for a fiduciary that would otherwise be potentially faced with an uncertain *ex post* determination by a court as to

[104] *Broz*, *id.,* at 155.

[105] *E.g.* Talley, *supra* note 62, at 293 (noting that a small number of jurisdiction have adopted the fairness test in the past 25 years).

[106] *Broz*, 673 A.2d at 155.

[107] *E.g.* Jens C. Dammann, *Indeterminacy in Corporate Law: A Theoretical and Comparative Analysis,* 48 STAN. J. INT'L L. 54, 83 (2013).

whether the requirements of the corporate opportunity doctrine are met.[108] As the court explained, "presentation avoids the possibility that an error in the fiduciary's assessment of the situation will create future liability for breach of fiduciary duty."[109] While superficially reaffirming the corporate opportunities doctrine as applied in Delaware, Broz thus points toward a larger problem in this context – and in fiduciary law in general – namely the difficulty for decision-makers in business life to plan around it.

2) Corporate opportunities and the rise of waivers

The difficulties created by the corporate opportunity doctrine were evident in *Siegman v. TriStar*[110] of 1989, where the Delaware Court of Chancery dealt with, among other things, the validity of an amendment to TriStar's certificate, which attempted to eliminate liability of its directors for breaches of fiduciary duty under specified circumstances that could be construed as corporate opportunities. While the actual issue underlying the case was a combination of TriStar's and Coca-Cola's entertainment division and the ensuing restructuring of corporate holdings, a number of its directors were representatives of major shareholders such as Coca-Cola and HBO, who had occasional relating and competing interests with TriStar. In an amendment to the certificate, the parties essentially attempted to define those circumstances to *not* fall within the business interests of TriStar, thus creating a carve-out from the corporate opportunities doctrine. Vice Chancellor Jacobs, however, expressed concern that a Coca-Cola nominee director on the TriStar board could direct an opportunity to Coca-Cola. Since DGCL § 102(b)(7) only permits the elimination of liability in cases of breaches of the duty of care, the Vice Chancellor refused to grant the motion to dismiss.[111]

The dot.com era of the late 1990s led to an increasing number of firms with overlapping ownership structures, which led to a push for a legislative overhaul of *Siegman* in Delaware.[112] This eventually resulted in the enactment of a statute in 2000. The law now permits corporations to "[r]enounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders" (DGCL § 122(17)). The objective of the reform was to permit "the corporation to determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity of the corporation rather than to address such opportunities as they arise."[113]

[108] *Broz*, 673 A.2d at 157.

[109] *Broz*, *id.*

[110] Siegman v. Tri-Star Pictures, 1989 WL 48746, *reprinted in* 15 DEL. J. CORP. L. 218 (1990).

[111] *Siegman*, 15 DEL. J. CORP. L. 235-236 (1990).

[112] Rauterberg & Talley, *supra* note 3, at 1093.

[113] 2000 DEL. LAWS Ch. 343 (S.B. 363), section 3; *see also* Lawrence E. Hamermesh, *The Policy Foundations of Delaware Corporate Law,* 106 COLUM. L. REV. 1749, 1780-81(2006) (noting that *Siegman* was the cause for the enactment of the statute).

Other states have followed the Delaware model in recent years and permitted corporate opportunity waivers.[114]

While DGCL § 122(17) does not permit the flat-out elimination of the corporate opportunity doctrine, the provision is part of a larger pattern that can be traced back to the introduction of § 102(b)(7) and continued with the trend toward the elimination of fiduciary duties in LLCs and other "unincorporated" business organizations in the 2000s.[115] In corporations, it is now possible to narrow down and specify which opportunities are protected, while in LLCs, it has become possible to eliminate the corporate opportunities doctrine entirely, alongside the remainder of the duty of loyalty. Critics have denounced the watering down of fiduciary duty in the past thirty years[116] and the contractual view of fiduciary duty as rhetorical ploy.[117] Anecdotal evidence and the presence of significant amounts of case law on LLCs suggest that transactional lawyers often attempt to eliminate fiduciary duties in closely-held firms.[118] Specifically, the corporate opportunity doctrine especially creates problems when an individual serves on the board of multiple corporations in the same or related industries, as seen in the *Broz* case. Investors increasingly attempt to put "constituency directors" on boards to represent their interests. This is particularly evident in the venture capital industry.[119] Courts typically find that such special interest directors have the same fiduciary duties as all other corporations.[120] With corporate opportunities conflicting between different firms, a venture capitalist firm might find itself in a difficult position as it tries to protect its investment in different firms.[121] The problem may even

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[114] Rauterberg & Talley, *supra* note 3, at 1101-1104.

[115] Under Delaware law, in interpreting LLC and LP law, "maximum effect" will be given "to the principle of freedom of contract and to the enforceability of limited liability company agreements. 6 DEL. C. § 18-1101(b) (regarding LLCs); 6 DEL. C. § 17-1101(c) (regarding LPs). A 2004 amendment, explicitly stated that "[t]o the extent … a member or manager or other person has [fiduciary duties], [these] may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing." 6 DEL. C. § 18-1101(c); for the amending legislation *see* 2004 DELAWARE LAWS CH. 275 (H.B. 411); Larry A. DiMatteo, *Policing Limited Liability Companies Under Contract Law,* 46 AM. BUS. L.J. 279, 279 (2009); *see also* Brent J. Horton, *Modifying Fiduciary Duties in Delaware: Observing Ten Years of Decisional Law,* 40 DEL. J. CORP. L. 921 (2016) (analyzing the effects of the 2004 amendment on the case law). On the debate whether fiduciary duties apply by default under Delaware LLC law, *see* Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies,* 46 AM. BUS. L.J. 221, 222-223 (2009); LARRY E. RIBSTEIN, THE RISE OF THE UNCORPORATION 176 (2010); Auriga Capital Corp. v. Gatz Properties, 40 A.3d 839, 849-856 (Del. Ch. 2012) (Strine, V.C. suggesting that fiduciary duties exist by default); Gatz Properties LLC v. Auriga Capital Corp., 59 A.3d 1206, 1218-1220 (Del. 2012) (Steele, C.J. criticizing the Court of Chancery for even raising the issue); 6 DEL. C. § 18-1104, as amended by 2013 DELAWARE LAWS CH. 74 (H.B. 126) (resolving the debate by legislating that "the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern").

[116] Joshua Getzler, *Understanding the Operation of Consent,* in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 39, 46 (Andrew Gold & Paul Miller eds. 2014)..

[117] Tamar Frankel, *Watering Down Fiduciary Duties,* in PHILOSOPHICAL FOUNDATIONS, *id.*, at 242, 244-49.

[118] *E.g.* Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1617-18 (2004) (noting that practitioners attempt to limit their client's exposure to liability through contractual arrangements).

[119] *E.g.* Martin Gelter & Geneviève Helleringer, *Lift not the Painted Veil! To Whom are Directors' Duties Really Owed?* 2015 U. ILL. L. REV. 1069, 1072.

[120] *In re* Trados Shareholder Litigation, Inc., No. Civ. A. 1512-CC, 2009 WL 2225958 (Del. Ch. July 24, 2009).

[121] Terence Woolf, *The Venture Capitalist's Corporate Opportunity Problem,* 2001 COLUM. BUS. L. REV. 473, 489-496.

lead to a situation where a director or venture capitalist *inevitably* become responsible for one of two firms, namely the one that does not end up taking to the opportunity. Recent empirical evidence suggests that corporate opportunity waivers have in fact become common, presumably for good business reasons.[122] In the end, US corporate law doctrine has proven itself sufficiently flexible to address this concern.

3) The pushback against fiduciary duty and the lifecycle of corporate law

In light of these developments, we can interpret the development of the corporate opportunities doctrine as part of a larger trend. In corporations, it is now possible to narrow down and specify which opportunities are protected, while in LLCs it has become possible to eliminate them entirely alongside the remainder of the duty of loyalty.

The question of whether fiduciary duties should be mandatory has been the subject to an extensive debate during the past three decades: On one side of the debate, contractarians argue that fiduciary duties are intended to fill gaps with hypothetical terms that parties would have agreed to had they considered the issue and negotiated. Hence, if parties have actually negotiated terms, it is counterproductive for the courts to impose additional costs by overriding the parties with mandatory fiduciary principles.[123] By contrast, the traditional common law view considers fiduciary duty to be rooted in status and not in contract. Fiduciary duties thus arise through the fulfillment of objective criteria and not consent.[124] Traditionalists tend to be concerned that opting out of fiduciary duties will open up corporations and LLCs to opportunism by the individuals in control.[125]

Larry Ribstein, a leading contractarian scholar, aptly argued that fiduciary duties should only apply in situations akin to managers in a publicly traded corporation, with a strong separation between powerful managers and powerless shareholders.[126] It should remain possible, however, for the parties to negotiate other protections, as the ex post judicial strategy of fiduciary duty may not always be the most cost-effective, at least compared to the hypothetical bargain of the parties.[127] Critics have decried the economics-inspired watering down of fiduciary duty in the past thirty years[128] and criticized the contractual view of fiduciary duty as rhetorical ploy.[129] At a minimum, anecdotal evidence and the presence of significant amounts of case law on LLCs

[122] Rauterberg & Talley, *supra* note 3, at 1123-1128.

[123] *E.g.* Larry E. Ribstein, *Fiduciary Duty in Unincorporated Firms,* 54 WASH. & LEE L. REV. 537, 544-45 (1997).

[124] *E.g.* James Edelman, *Common Callings, Implied Terms, and Lessons for Fiduciary Duties,* in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 21, 23-27 (Andrew Gold & Paul Miller eds. 2014)..

[125] *E.g.* Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1611-12 (2004) (summarizing problems of opportunism).

[126] Larry E. Ribstein, *Are Partners Fiduciaries?,* 2005 U. ILL. L. REV. 209.

[127] Ribstein, *id.,* at 223.

[128] Joshua Getzler, *Understanding the Operation of Consent,* in PHILOSOPHICAL FOUNDATIONS, *supra* note 124, at 39, 46.

[129] Tamar Frankel, *Watering Down Fiduciary Duties,* in PHILOSOPHICAL FOUNDATIONS, *supra* note 124, at 242, 244-49.

suggest that transactional lawyers often attempt to eliminate fiduciary duties in closely-held firms.[130]

In the end, the corporate opportunities doctrine may have reached a stage in development where its costs often exceed its benefits, thus creating incentives for parties to opt out. This may be the reason why courts and legislatures have shifted toward a strict enforcement over time and broadened the possibilities to escape its grasp, both ex ante and ex post. As we will see next, US law is distinct from the other jurisdictions in this respect.

B. The UK's conflict avoidance doctrine: an ambiguous "status approach"

In the UK, corporate opportunity law has been ambiguous since its inception. A large number of cases have shaped twin applicable principles - the no-conflict and the no-profit principles – without clarifying their respective domains.[131] The 2006 codification foregrounded the no-conflict rationale but has not clarified the boundaries of the prohibited conflicts. The level of contractual flexibility to restrict fiduciary duties in corporate opportunities law remains quite limited.[132]

1) The development and contours of the conflict avoidance approach

As we have seen, US corporate law has developed a pragmatic definition of corporate opportunities, with a focus on the impact of the corporation. This development has trended toward greater permissiveness. In contrast, UK law is based on a codified conflict, where the basis for liability resulted from a period of tension between two competing grounds in equity, the "no profit" and the "no conflict" rule.

a) Tension between the "no-profit" and "no-conflict" rules

Since the 19th century, UK directors have been likened to agents or trustees of the company. Therefore, directors have been subject to fiduciary duties and equitable principles that more generally shape the corporate opportunities problem for agents and trustees who are entrusted with the affairs and assets of others (be they trustees, executors, agents, or directors). These principles are stated in cases going back to *Keech v Sandford* in 1726[133] and *Bray v Ford* in 1896.[134] Persons in a fiduciary position are neither allowed to make a profit nor put themselves in a position where their interests and their duties conflict.[135]

First, directors are first required to avoid putting themselves in a position where their personal interest, or a duty they owed to a third party, would conflict with their duty to promote

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[130] *E.g.* Miller, *supra* note 125, at 1617-18 (noting that practitioners attempt to limit their client's exposure to liability through contractual arrangements).

[131] *See e.g.,* Kershaw, *supra* note 6, at 607-8; Samet, *supra* note 6, at 763-781.

[132] *See* Christopher M. Bruner, *Opting Out of Fiduciary Duties and Liabilities in U.S. and U.K. Business Entities*, forthcoming in RESEARCH HANDBOOK ON FIDUCIARY LAW [13] (Andrew Gold & D. Gordon Smith eds. 2018).

[133] Keech v. Sandford, (1726) 25 Eng. Rep. 223 (C.A.).

[134] Bray v. Ford, [1896] A.C. 44 (H.L.).

[135] *See* Gareth Jones, *Unjust enrichment and the fiduciary's duty of loyalty*, 84 L.Q. Rev. 472, 472-4 (1968).

the success of the company. This no-conflict principle was powerfully set forth in *Aberdeen Ry. v. Blaikie Bros*, a case decided in 1854.[136] Lord Cranworth enounced that: "no one, having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or even can have, a personal interest conflicting, or which possibly may conflict, with the interests to whom he is bound to protect." Courts have initially based on the solutions of directors' liability in business opportunities on this rule.[137] *Cook v. Deeks*[138] is an early illustration of this approach. Lord Buckmaster stated that "men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favor business which should properly belong to the company they represent." In other words, an opportunity must be reserved to the company if exploiting it would create a conflict between the director's interest to benefit from a profitable opportunity and the duty of good faith or fidelity (also known as the "duty to promote the success of the company").

Later, in Regal (Hastings) Ltd v Gulliver,[139] the "no profit" rule governed the liability of directors. Here, a director must not make a profit out of property acquired by reason of their relationship to the company of which they are fiduciaries. In the case, directors had planned to add to their existing movie-theater business by leasing two other cinemas through a subsidiary. They assessed that the company could not afford to capitalize the subsidiary as requested by the lessor and decided to enter the capital of the subsidiary and increase it themselves. When the directors sold the shares of the parent and the subsidiary to a third party as a single business, they made a profit as shareholders of the subsidiary. The company shareholders sued the directors for a breach of duty and succeeded – although the actual victims were the outside shareholders of the company with no standing. The court found the defendant liable based on the principle of equity that "those, who by use of a fiduciary position make a profit, [are] liable to account for that profit".

The no-conflict rule and the no-profit rule are historically two principles that are universal to the fiduciary doctrine of loyalty.[140] They have provided for twin lines of authority delineating corporate opportunities law. Strictly speaking, the conditions under which each rule is violated are specific. Violation of the "no profit" rule only requires that the director uses his fiduciary position to exploit the opportunity; violation of "no conflict" rule occurs when the director's personal

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[136] 1 Eng. Rep. (Macq) 461 (H.L. 1854).

[137] Solutions for self-dealing problems were also historically based on this rule. See PAUL DAVIES & SARAH WORTHINGTON, GOWER & DAVIES' PRINCIPLES OF MODERN COMPANY LAW ¶¶ 16-53, 54 (10th ed. 2016).

[138] [1916] 1 A C 554 (PC). In this case, three out of the four equal shareholders, who were also directors, diverted an opportunity to a new company in which only these three shareholders / directors were involved. The three of them agreed thereafter to pass a resolution at a shareholders meeting of the four-person company in order to confirm that the latter company had no interest in the opportunity.

[139] [1967] 2 AC 134, 159 (H.L.) (Porter, L.J.).

[140] ANDREW STAFFORD QC & STUART RITCHIE QC, FIDUCIARY DUTIES: DIRECTORS AND EMPLOYEES 32 (2nd ed, 2015). Both rules have characterized the duty of loyalty, see for instance Lord Herschell's statement in *Bray v. Ford, supra* note 134: "It is an inflexible rule of the court of equity that a person in a fiduciary position, such as the plaintiff's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

exploitation of the profitable opportunity is incompatible with his duty to loyally promote the success of the company. However, boundaries between the two rules have become blurred as shown in the discussion of both in the Lord Hodson's judgment and Lord Upjohn's dissenting opinion in the[141] House of Lords case, *Boardman v Phipps*.[142] In some cases, the courts found liability on the basis of elements borrowed from both theories when neither would have been an independently sufficient ground for liability. For instance, courts have sometimes imposed liability on directors who come across an opportunity outside the scope of their employment and did not leverage corporate resources for the opportunity (condition for the no-profit rule to apply not met). In a well-known cases, the Court of Appeals held defendants liable even after the company's board had previously decided (though informally) not to acquire further opportunities of this type (which arguably eliminate the presence of a conflict of interests).[143]

There is, in any case, considerable overlap between the two lines of authorities. Note that 'no profit' cases would usually receive the same solution in a 'no conflict' approach. This is not surprising since at a higher level of abstraction the goal of the no profit rule is arguably a safeguard against the risk that the perspective of a personal profit will make the director less caring about the promotion of the company's success when assessing whether to take the opportunity. Therefore, the reason for not allowing a director to profit from exploiting a corporate opportunity is avoiding a conflict rather than a superficial objection to directors making profits in connection with their office.[144] It has even been argued that the profit principle is a merely a specific application of the conflict principle,[145] though there is no doctrinal consensus on this point.[146] In any event, the no-conflict approach has been the most common basis of the solution in more recent common law corporate opportunity cases such as *Bhullar v Bhullar*,[147] *O'Donnell v Shanahan*.[148]

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[141] *See* Michale Bryan, Annotations, *in* LANDMARK CASES IN EQUITY 581-610 (Charles Mitchell & Paul Mitchell eds. 2012).

[142] *Bordman v. Phipps, sub nom Phipps v. Bordman* [1967] 2 A.C. 46.

[143] Bhullar v. Bhullar, [2003] 2 Brit. Comp. L. Cases 241 (C.A.). See DAVIES & WORTHINGTON, *supra* note 137, ¶¶ 16-95.

[144] DAVIES & WORTHINGTON, *id.*, ¶¶ 16-87, 88. A scenario in which the no profit rule would apply and the no conflict would not operate is when a director receives an opportunity while discharging its functions but there is no possible conflict because the opportunity presents no possible interest of the company

[145] Lord Upjohn famously made this point in Bordman v. Phipps, *supra* note 142, at 123.

[146] Matthew Conaglen, Fiduciary Loyalty (2010) 114-120. The author remarks on the basis of his extensive review of the authorities by recognizing "how difficult it is to determine whether cases were decided on the basis of contravention of the conflict principle or of a separate profit principle" (at 116). He then concludes in a quasi-Pascalian manner that the profit principle merits to be treated separately as "if the profit principle is a wholly contained subset of the conflict principle, one loses nothing except time by considering it separately; whereas, if it is not, one runs the risk of reaching faulty conclusions if one ignores it and considers only the more clearly established conflict principle."

[147] Bhullar v. Bhullar, [2003] 2 Brit. Comp. L. Cases 241 (C.A.).

[148] *In re* Allied Business and Financial Consultants Ltd, sub nom O'Donnell v. Shanahan and another, [2009] 2 Brit. Comp. Law Cases 666 (C.A.).

b) Prominence of no-conflict rule in the 2006 codification

The Companies Act 2006 codified the directors' duties and gave prominence to the "no-conflict" approach.[149] First, Section 175 is titled 'Duty to avoid conflicts of interest'. Second its content puts the no-conflict rationale in the foreground:

"Section 175

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(…)

(4) This duty is not infringed— (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest"

Provisions formally stress the no-conflict requirement. Even the final bracket in s. 175(2) could be read as a clarification to remove any incentives for directors no to do everything they can for their companies, rather than a reference to the no-profit rule. The legislation reads therefore as an invitation to clarify and unify the doctrinal basis on which decisions on corporate opportunities are rendered. It is however too early to tell whether courts will accept this invitation as they construct the statute.

In order to fully appreciate the content of the legislative reform, it is worth noting that in its final report leading to the 2006 Companies Act, the Company Law Review Steering Group[150] indicated a preference for an approach focused on the 'ownership' of opportunities, which is confusingly often referred to as a "corporate opportunities" doctrine and is inspired by US law. It suggested that the new codified rule should enable courts to first focus on the issue of whether the considered opportunity belongs to the company. The government's White Paper on Modernizing Company Law[151], published in 2002, has adopted the same approach. These suggestions were however not integrated in the final version of the statute, even if the ownership issue amounts Section 175's hidden Achilles heel.

c) Construction of the no conflict statutory requirement

The 2006 codification does not eliminate all ambiguities since the terms of the forbidden conflicts does not appear fully spelt out. The personal interest unquestionably consists in the benefit expected from the private exploitation of a profitable opportunity. The duty owed to the company is not expressed, but it is breached when directors divert some form of property from the

[149] Section 175 of the UK 2006 Companies Act provides that "A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company" (s 175(1)) and that "this applies in particular to the exploitation of any property, information or opportunity" (s 175(2)). Section 175 provides a rule that is general for all conflicts of interest but transactions and arrangements with the company (s 175 (3)), which are dealt with by other statutory provisions.

[150] THE COMPANY LAW REVIEW STEERING GROUP, FINAL REPORT, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY (2001).

[151] HOUSE OF COMMONS TRADE AND INDUSTRY COMMITTEE, THE WHITE PAPER ON MODERNISING COMPANY LAW, SIXTH REPORT OF SESSION 2002-03 (2003).

company. Directors have therefore a duty to protect, including against their own personal interest, the assets that belong to the company or should be offered to the company first. What turns an opportunity into such assets? What are the contours of opportunities ownership? The statute does not provide criteria. Guidance must therefore be found in the (pre-existing) case law. Decisions refer to many different 'connecting factors' including that the opportunity is part of the company's present or potential business activities, that the director came across the opportunity in the course of discharging the duties of the office, that corporate resources were used to develop the opportunity, that the director had been employed to obtain opportunities of that sort for the company.[152] On the basis of the framing of the issue and of the variety of connecting factors referred to, there is a resemblance between UK and US cases.

The substantive solutions do differ. English law tends to more strictly protect the interests of the company and therefore of its outside investors while US law tends to favor directors,[153] and to assess whether the nature of the interesting business opportunity is such that, in fairness, its private exploitation would even require an authorization.[154]

UK courts will often define the company's interest broadly, using an *in abstracto* approach rather than considering the limits to the company's ability to act. As *O'Donnel* stressed,[155] directors are fiduciaries, and are very different from partners: "trustees' and directors' fiduciary duties were not so similarly circumscribed by the terms of a contract". The extent of partners' fiduciary duties is determined by the nature of the partnership business and is limited by the partnership agreement.[156] By contrast, the nature of directors' fiduciary duties is unlimited. It is analogous to a general trusteeship. Even in circumstances in which it is unlikely that the company will want or be able to pursue an opportunity, the opportunity is there for the company to consider – and potentially reject. The fact that an opportunity is unable to benefit the company, for practical or legal reasons, is not a defense to a breach of fiduciary duty.[157] While this is the purpose of the no-conflict rule within the company's scope of business broadly interpreted, outside that context, this solution might raise the fiduciary rule "from pragmatic prophylaxis to something far more draconian."[158] In essence, the no-conflict rule aims at ensuring loyalty exists in the corporate endeavor. Arguably, such goals implicitly require courts to consider the scope of the endeavor. The more abstract approach observed in *Bhullar* or *O'Donnell* artificially inflates the realm of corporate endeavor and prevents the tangibility a possible conflict to be assessed. This uninhibited approach raises risks for directors, forced to present very entrepreneurial prospects to the board to approve. This also increases the chances of pure windfall gains for the company and the shareholders.

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[152] DAVIES & WORTHINGTON, *supra* note 137, ¶¶ 16-89 to 92.

[153] Kershaw, *supra* note 6, at 622-4. Stressing the more flexible and undetermined nature of the American model, see also David Kershaw, *Does It Matter How the Law Thinks about Corporate Opportunities?*, 25 LEG. STUD. 533, 541 (2005).

[154] *See above* section 3.A.1).

[155] *Allied Business*, [2009] 2 Brit. Comp. Law Cases at 824.

[156] *See* Aas v. Benham, [1891] 2 Ch. 244 (C.A.).

[157] Boardman v. Phipps, [1967] 2 A.C. 46 (H.L. 1966).

[158] DAVIES & WORTHINGTON, *supra* note 137, ¶ 16-98.

The fact that there is little defense for the interested director[159] is a point of distinction with the way case law has evolved in the United States: while in the earliest cases the US doctrine relied upon a narrow test based on existing interests or right, it has since expanded to a broader test based on "rational expectations" in *Guth,*[160] and to an even broader assessment based on "fairness" with *Broz*[161] that leaves a large discretion to ex post assessment by the courts.

The UK approach reveals a policy decision: the outcome of various debates and attempts to balance efficient transactions and conflicts of interest theories,[162] is a preference for erring on the side of safeguarding the directors' duty of loyalty[163] rather than giving directors the benefit of the doubt and permitting them to engage in entrepreneurial activities,[164] as in the US. Though s.175(4) (a) invites a denial of breach if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest," recent authorities such as *Sharma v Sharma*,[165] and *Pennyfeathers Ltd v Pennyfeathers Property Co Ltd*[166] appear to be in line with common law authorities on the issue of the scope of the directors' duty. If this solution is confirmed in future cases the 2006 Companies Act will not have altered the logic of the law on this matter.[167] Courts will remain in a position to develop the principles of fiduciary duty as they generally apply and to favor the integrity of the director's duty of loyalty over the promotion of a more entrepreneurial culture.[168]

Courts recognize that the existence and scope of a duty, and therefore whether exploitation of a particular opportunity or the withholding of information in relation to which the director owes a duty of confidence to a third party, depends on the specific circumstances. [169] Typically, having

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[159] Knowing that in any case acting in good faith i.e. having honestly formed the view that the company's interest would not he harmed, is not a valid defense either. See DAVIES & WORTHINGTON, *supra* note 137, ¶ 16-88.

[160] *Guth*, 5 A.2d at 503.

[161] *Broz*, 673 A.2d at 148.

[162] John Hynes Farrar & Susan Watson, *Self-Dealing, Fair Dealing and Related Party Transactions – History, Policy and Reform*, 11 J. CORP. L. STUD. 495 (2011).

[163] Kershaw, *supra* note 6, at 603.

[164] John Lowry & Ron Edmunds, *The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies,* 61 MOD. L. REV. 515, 521 (1998).

[165] Sharma v Sharma [2013] EWCA Civ 1287.

[166] Pennyfeathers Ltd v Pennyfeathers Property Co Ltd [2013] EWHC 3530 (Ch).

[167] *Contra* Simon Witney, *Corporate Opportunity Law and the Non-Executive Director*, 16 J. CORP. L. STUD. 145, 153 (2016). For recent contributions on the academic debate regarding the scope of directors' duty as to corporate opportunities, see David Gibbs, *The Absolute Limit of Directors' Fiduciary Liability for Conflicts of Interest: The Director's Perspective,* 36 COMP. LAW. 231 (2015); Sarah Worthington, *Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae*, 72 CAMBRIDGE L.J. 720 (2013); Shue Sing Churk, *Just Abolish the No-Profit Rule*, 7 INT'L COMP. & COMM. L. REV. 244 (2015).

[168] *Regal (Hastings) Ltd.*, [1967] 2 AC at 159 (Porter, L.J.) ("directors, no doubt, are not trustees, but they occupy a fiduciary position towards the company whose board they form").

[169] Courts do recognize that the existence and scope of a duty, and therefore whether exploitation of a particular opportunity or the withholding of information in relation to which the director owes a duty of confidence to a third party, depends on the specific circumstances. *See* Witney, *supra* note 167, at 184 ("in most cases, the court is likely to find that there is no duty to avoid conflicts of interest (or indeed any other duty – including, importantly, the duty to promote the success of the company) while a director is very clearly acting in that other (fully disclosed and accepted) capacity. Just as it is clear that there is no duty upon a director to vote any shares that she holds in the company in accordance with her fiduciary duties as a director, because she is acting qua

multiple capacities creates potential conflicts for directors: section 175 of the 2006 Companies Act requires that the additional capacities be disclosed and authorized.[170] Such authorizations can be regarded as part of the factual matrix that permits a delineation of the scope of the fiduciary duty owed to the company.[171] This means that as a practical matter, venture-capitalists and non-executive directors are generally more well-advised to fully disclose outside commitments and seek informed consent during their directorship.

2) Restrictions on fiduciary duties

The difference between the two jurisdictions is even more pronounced in regards to potential restrictions on the requirements of fiduciary duties, either via statutory provisions or liability waiver.

a) ***Statutory provisions***

The Companies Act 1929 prohibited provisions in the articles of association exempting directors from liability for breach of duty (the equivalent of §122(17) of the DGCL).

It is to be noted that before 1929, there was no impetus to insert protective provisions in the articles regarding corporate opportunities (in contrast to provisions regarding self-dealing). The first line of cases establishing directors' liability for corporate opportunities usurpation did not appear to have inspired provisions enabling board approval or taking certain categories of corporate opportunities out of the fiduciary regime altogether.

b) Ex post or ex ante authorizations

The basic equitable rule has never been a strict prohibition. A breach of fiduciary duty can be approved ex post or ex ante by the beneficiary of the duty, e.g., the company. Such approval blocks challenges as to conflicted transactions and relieves the director of any liability. On this basis, shareholders have collectively been able to authorize the conflicted appropriation since the mid-nineteenth century: there was no question that shareholders were the company.[172] There was also little chance that directors might then have been regarded as being the company: the division of powers between the shareholders and the directors was only recognized in the early twentieth century.[173]

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shareholder, so a director who has an acknowledged separate capacity outside the company is likely to have no duty to the company, or very limited duties, when acting in that capacity. No exemption has been given by the company from the duty; it is simply that the law will not impose a duty in those circumstances").

[170] Typically, it is possible for articles of incorporation to acknowledge that directors, and non-executive directors in particular, have other directorships: articles sometimes permit these other roles, in other cases, a directors' approval is required for the potential conflict that may follow For an empirical assessment of the content of articles in relationship with corporate opportunities, see Witney, *id.*, at 169.

[171] Witney, *id.*, at 169.

[172] Pursuant to the Company Clauses Consolidation Act 1845, section 90, shareholders could by ordinary resolution instruct the directors how they should exercise their management power.

[173] Such division can be altered by the shareholders via an amendment to the articles, but such amendment requires a supermajority vote.

In practice, obtaining general meeting sanction of the conflicted transaction creates an inconvenience, especially in larger companies, both in ex ante and ex post situations. But in the UK, boards did not enjoy this power until the 2006 codification. Boards were not able to decide *not* to pursue a particular opportunity, enabling a director to pursue it himself because it was no longer a corporate one. The Company Law Review successfully recommended that disinterested members of the board should be permitted to approve the taking of a corporate opportunity by a director, while no other amendment of the fiduciary rules should be permitted. At present, pursuant to the 2006 Companies Act, "[a]ny provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void".[174] But pursuant to Section 175(4)-(6) of the 2006 Companies Act, the board can authorize the taking of corporate opportunities, but the director in question and any other director having an interest in the opportunity are excluded from voting.[175]

How board authorizations can relax directors' duty in practice requires a cautious assessment. First, the board approval rule is only a default rule. Board authorization is available in private companies, unless the articles exclude it, and in public companies only if the articles authorize it. However, anecdotal evidence tends to suggest that in practice, public companies often insert board approval provisions into their articles and investors do not oppose such provisions.[176] Second, any authorization that is designed to deprive the company of a valuable business opportunity or that is not specific enough (a defect that may affect any ex ante authorization) is likely to be invalid.[177] It must however be noted that the board is not required to obtain any input from a third party before taking its decision. Also, a shareholder would in principle not be able to challenge an approved corporate taking on the grounds the transaction is unfair to the company. This illustrates, in contrast to US law, the weight English law grants to procedural over substantive protections. All in all, board approvals are likely to be effective. From an economic standpoint, they do facilitate bargaining over the allocation of the opportunity to the person who, between the company and the director, is best able to exploit it.

4. Germany and France as recipients of the corporate opportunities doctrine as a legal transplant

As we have seen, UK and US courts presently employ a similar analytical approach and prohibit directors from usurping opportunities that are deemed to be "corporate" on the basis of a multi-factor balancing test. US and UK Courts however differ as to their general orientations, which can be crudely portrayed as pro-management in the US and pro-external investors in the

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[174] COMPANIES ACT 2006, c. 46, § 232(1).

[175] COMPANIES ACT 2006, c. 46, § 180 (4). The general duties of directors, which include the duty to avoid conflicts, have only effect "subject to any rule of law enabling the company to give authority, specifically or generally, for anything to be done (or omitted) by the directors, or any of them, that would otherwise be a breach of duty."

[176] Paul Davies, *Related Party Transactions: UK Model*, in THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS (Luca Enriques and Tobias Troeger eds. forthcoming 2018).

[177] DAVIES & WORTHINGTON, *supra* note 137, ¶¶ 16-68.

UK. US law follows a more flexible ownership-centric vision that empowers directors to a greater extent, whereas the UK approach prioritizes a more rigid loyalty requirement that comes with the fiduciary status. The broad definition of corporate opportunities in English law is likely to subject to the rules almost all situations in which outside shareholders have an interest. Also in cases of non-authorized exploitation of an opportunity, there is little defense in England for the interested director, even if, in practical terms, no harm is caused to the company.[178] Having identified these two different styles within common law doctrine, we shall also note that current English law of corporate opportunities has uneasily emerged through convoluted cases developments and with some over-statements as to the prohibitions imposed on directors.[179] The 2006 legislative intervention clarified the rules that govern corporate opportunities. Importantly, it also granted board the right to approve takings, which enables a more efficient allocation of the opportunity between the board and the director.

We now turn to the civil law world, in which France and Germany take particularly prominent places due to the historical prestige and influence of their legal systems. As we will see, the US style of corporate opportunity doctrine has been largely adopted in the case law in both countries. In section A, we look at Germany, where the adoption of the doctrine can be traced back several decades, and where the debate proceeds entirely along US lines. Doctrinal convergence toward the US model in the courts was initially only functional and likely inadvertent. The influence of legal scholars, a characteristic feature of German legal culture, subsequently led to formal convergence as well, turning corporate opportunities into a widely recognized doctrinal feature of directors' duty of loyalty. In section B, we look at France, which followed suit only during the past few years. The duty of loyalty as such is still a very new development in France, and doctrinal convergence with respect to the corporate opportunity problem has so far remained on the functional level, without receiving formal recognition in the case law by scholars nor legislation.

A. German *Geschäftschancenlehre*: Common-law-style reasoning in a civil law country?

1) Historical origins in practice and scholarship

Germany began to develop the corporate opportunity doctrine in the 1960s and 1970s. At the source, we see two streams of development, namely one in the rather intuitive reasoning by the Federal Supreme Court, and one in the academic analysis of comparative law scholars who looked at the US. By the late 1980s, we can identify a confluence of these two streams into a single, widely recognized, but less often used doctrine.

As a matter of legislation, German law has for a long time blankly prohibited members of the management board of a stock corporation from operating a commercial business, from engaging in business transactions in the line of business of the corporation, and from being a member of the supervisory board, manager, or personally liable partner in another firm. These activities may compete with the corporation and would have to be explicitly permitted by the

[178] Samet, *supra* note 6, at 765.

[179] Davies, *supra* note 176.

supervisory board.[180] Separately from this statutory prohibition, German law has long recognized that directors and managers were subject to an uncodified duty of loyalty. Managers of private limited companies, to which the statute does not applied, are nevertheless assumed to be subject to an analogous prohibition because of their general duty of loyalty.[181] It is not entirely clear whether the prohibition to compete is a specific application of the corporate opportunities doctrine, whether corporate opportunities are a specific application of the prohibition not to compete, or whether they are separate but overlapping prohibitions.[182]

The earliest case often cited for the corporate opportunity doctrine dates back to 1967.[183] The plaintiff was a manager of a brewery (in the form of a GmbH, i.e. Private Limited Company), which was expanding into a small town and looking for real estate to purchase. In the course of the company's dealings with the town's mayor, the manager bought a number of lots for himself and re-sold them to a development company at a profit. When shareholders subsequently dismissed him from his position, he sued, arguing that there had not been sufficient cause to terminate his employment agreement. The court found that there was sufficient cause, as the manager had violated his duty of loyalty by obtaining a personal advantage as a result of his dealings for the firm, while keeping these activities secret from his co-manager and the supervisory board. As the court stated, the corporation can expect that its officers act only for the benefit of the business and not for their personal gain.[184] The court did not consider it relevant that the mayor had thrust the business opportunities upon the manager, and that the company had not been harmed. The result did not rest on a specific statute, and the court had not yet developed the term "corporate opportunity" or related language at that time; the manager's obligation was seen as a specific manifestation of a general duty of loyalty. The court, however, interpreted the situation as similar to a prior case where a manager had been bribed to enter into a contract on behalf of the company.[185]

In a 1977 case, two manager-members of a GmbH (who jointly held the majority) set up another entity to purchase some real estate that the company needed. The company thus had to rent the land. Citing the previously discussed case for the statement that managers must prioritize the corporation's interest over their own, the court found that the two members would only have been permitted to buy the land if it was clear that the company did not need it, or the members had collectively decided to forego the opportunity.[186] As in the previous case, the court did not apply an explicit statute.[187] It suggested the managers had abused their voting rights (in approving a

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[180] § 88 AKTG.

[181] *See, e.g.,* Klaus-Dieter Stephan & Johannes Tieves, in MÜNCHENER KOMMENTAR ZUM GMBHG, § 35, ¶ 86 (Holger Fleischer & Wulf Goette eds. 2012).

[182] Gerald Spindler in 2 MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, § 88 ¶ 61 (Wulf Goette & Mathias Habersack eds., 4th ed. 2014); CHRISTOPH KUMPAN, DER INTERESSENKONFLIKT IM DEUTSCHEN PRIVATRECHT 485-486 (2014).

[183] BGH 8.5.1967, AG 1967, 327.

[184] BGH, *id.,* ¶ 10.

[185] BGH, *id.,* ¶ 10; *see* Wolfram Timm, *Wettbewerbsverbot und „Geschäftschancen"-Lehre im Recht der GmbH,* 1981 GMBHR 177, 179 (using the term "Schmiergeld" – bribery – to characterize the fact pattern).

[186] BGH 10.2.1977, GmbHR 1977, 129, ¶ 13.

[187] It also did not refer to § 47 GmbHG, bars shareholders from voting when subject to certain conflicts of interest.

"discharge" resolution concerning themselves), and remanded the case to the lower court for further fact-finding.[188]

In a decision of 1981[189], one of the members of a GmbH – who controlled the firm together with family members – was going to purchase a controlling stake in a competing firm. The articles explicitly prohibited him from doing so but permitted that members could vote to waive the prohibition. Again, the court declined to apply a statutory voting prohibition, which allowed his family members to vote for the waiver. However, the court found that, in general, a vote could be considered abusive in specific cases if the corporation itself would have been interested in making the purchase.[190] The court did not explicitly talk about corporate opportunities, and, in contrast to the other two cases, did not even speak of the duty of loyalty. Instead, it deployed language of the (more specific) law of corporate groups.

At about the same time as the courts were starting to deal with corporate opportunities in substance, scholars began to pay attention to the US concept of corporate opportunities as a formal doctrine.[191] Authors began to develop a doctrinal framework for the duty of loyalty in the German context, pointing out that US courts would have applied the corporate opportunities doctrine to the 1968 case.[192] A number of articles in the early 1980s summarized the German case law, issued by a supreme court that very likely had had no reason to take any interest in US doctrine, and drew a roadmap for the application of the US doctrine in Germany.[193] Corporate opportunities thus became an established *topos* in German law in the 1980s, and subsequent cases clearly refer to the doctrine. For example, in a 1985 case on a manager who registered a patent for himself shortly after leaving a corporation, the court cites some of the prior case law discussed above but now uses the term *Geschäftschance,* which is the German equivalent of business opportunity.[194] Similarly, a 1989 case applied the doctrine to the limited partner whom the general partner had asked to negotiate a deal on behalf of the limited partnership.[195]

As a new standard component of the duty of loyalty in Germany, corporate opportunities found its way into the German Code of Corporate Governance[196] as well as textbooks and treatises.

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[188] BGH 10.2.1977, GmbHR 1977, 129, ¶ 21.

[189] BGH 16.2.1981, BGHZ 80, 69.

[190] For a summary, *see* Timm, *supra* note 185, at 180.

[191] ERNST-JOACHIM MESTMECKER, VERWALTUNG, KONZERNGEWALT UND RECHTE DER AKTIONÄRE 166-179 (1958); ULRICH IMMENGA, DIE PERSONALISTISCHE KAPITALGESELLSCHAFT 156-159 (1970); *see also* Friedrich Kübler, *Erwerbschancen und Organpflichten,* in FESTSCHRIFT FÜR WINFRIED WERNER 437, 438 (1984); Holger Fleischer, *Legal Transplants in European Company Law – The Case of Fiduciary Duties*, 2 EUR. COMPANY & FIN. L. REV. 379, 390 (2005) (both noting the importance of these authors for the development of the doctrine in Germany).

[192] IMMENGA, *id.,* at 267.

[193] Timm, *supra* note 185; Kübler, *supra* note 191, at 439-440, 445-447.

[194] BGH 23.9.1985, NJW 1986, 585. A decision regarding a partnership that came down the same day uses similar terminology. BGH 23.9.1985, NJW 1986, 584.

[195] BGH 8.5.1989, NJW 1989, 2687.

[196] GERMAN CORPORATE GOVERNANCE CODE § 4.3.1; *see also* GERMAN CORPORATE GOVERNANCE CODE § 5.5.1 (regarding supervisory board members). For the application of the doctrine to the supervisory board as a matter of law *e.g.* GÜNTER H. ROTH

Writing in 2003, Holger Fleischer was able to summarize the doctrine as a prohibition, "which anciently found its way into German corporate law through comparative preparatory work and today belongs to the core of the duties of conduct for corporate organs."[197] When another case reached the Federal Supreme Court in 2012 (specifically in the context of a partnership governed by the Civil Code),[198] the court found it self-evident that the prohibition against the appropriation of business opportunities derived from the managing partner's duty of loyalty and did not require an explicit prohibition in the partnership agreement.[199]

2) The scope of corporate opportunities and the limited effect of the doctrine

As we can see, German law has at least formally absorbed the US doctrine as a legal transplant, even if the absorption process was gradual. To some extent, an American observer might even be tempted to say that the courts have adopted it by employing common law methods. As we have seen, the courts have repeatedly refused to extend the scope of application of bright-line rules – specifically the prohibition against directors competing with the company.[200] Instead, it superimposed the corporate opportunity doctrine as a standard requiring judicial assessment.[201]

However, the German courts have apparently not fully adopted the range of defenses and opt-outs available in the US. For example, it is not clear if shareholders can abrogate the doctrine in the corporate charter.[202] In particular, liability waivers do not appear to be an issue at all. As to defenses available to directors, the sparse case law suggests a more rigid approach than in the US. In a 1985 case, the Federal Supreme Court rejected the defense of the corporation's inability to take the opportunity, and even suggested that a fiduciary might be required to raise outside capital to enable the firm to take it.[203] The court also rejected the defense that a director had learned of the opportunity in a private capacity, suggesting that the duties of care and loyalty are indivisible.[204] A plausible policy explanation is that a director could easily fabricate such an assertion.[205]

& HOLGER ALTMEPPEN, GMBH-GESETZ § 52, ¶ 32 (7th ed. 2012); Mathias Habersack in 2 MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ, *supra* note 182, § 116 ¶ 47.

[197] Holger Fleischer, *Gelöste und ungelöste Probleme der gesellschaftsrechtlichen Geschäftschancenlehre,* 2003 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 985, 985.

[198] BGH 4.12.2012, DStR 2013, 600. It is not completely clear whether the doctrine would apply to non-business partnerships. Between 1989 and 2012, there were only appellate court cases on the issue: OLG Frankfurt, 13.5.1997, GmbHR 1998, 376; OLG Celle, 26.9.2001, NZG 2002, 469; KG 11.5.2001, NZG 2001, 129; OLG München 10.6.2010, BeckRS 2010, 14180.

[199] BGH 4.12.2012, ¶ 20-21.

[200] *Supra* notes 180-182 and accompanying text.

[201] *Supra* notes 183-199 and accompanying text.

[202] For the discussion, *see* KUMPAN, *supra* note 182, at 505-506.

[203] BGH 23.9.1985, II ZR 257/84, NJW 1986, 584,

[204] BGH 23.9.1985, II ZR 246/85, NJW 1986, 585,

[205] Holger Fleischer, *Gegenwartsfragen der Geschäftschancenlehre im englischen und deutschen Gesellschaftsrecht,* in INFORMATIK – WIRTSCHAFT – RECHT. REGULIERUNG IN DER WISSENSGESELLSCHAFT. FESTSCHRIFT FÜR WOLFGANG KILIAN ZUM 65. GEBURTSTAG 645, 656 (Jürgen Taeger & Andreas Wiebe eds. 2005).

3) The bottom line: Formal and functional convergence in the case law catalyzed by legal scholarship

Overall, the German case study reveals a few factors that are somewhat typical of German corporate law: (1) A penchant for judicial lawmaking in the form of standards (as opposed to rules); (2) considerable influence of scholarship; (3) openness toward foreign influence, particularly from the US, at an early stage when US corporate law did not yet have the prestige it enjoys today. As to the argument that German law is somewhat stricter than US law in permitting fewer defenses,[206] we may attribute it to a generally less deferential attitude toward directors, which may be, as Kershaw suggests for the parallel case of the UK, due to an absence of regulatory competition in corporate law.[207] Moreover, in line with our own explanation for the difference between the US and the UK,[208] it seems possible that German law also has remained slightly stricter as enforcement has remained weaker given that there are fewer judicial opportunities to further refine the doctrine and mitigate its effects.

Finally, it is possible that the effects of strong enforcement would be felt more strongly in Germany given the differences in corporate ownership structures. Interestingly, all of the reported German cases appear to involve individuals with management capacity. In each, there was a strong case against the fiduciary. It is less clear how the courts would assess a situation comparable to *Broz,* where a fiduciary faced a dual loyalty due to his involvement in two firms. In fact, given the relatively more concentrated ownership structure and more intertwined corporate groups, conflicts of interest of the *Broz* type should emerge quite frequently, even in larger firms. In fact, under the German law of corporate groups, public companies (stock corporations) integrated into a de facto group may be largely exempt from the corporate opportunities doctrine.[209]

In the end, we can say that Germany presents a case of both formal and functional convergence, although with a twist to the patterns previously identified in the literature. German courts and scholars adopted the corporate opportunity doctrine as a legal transplant from the United States and integrated it into German corporate law. However, as we have seen, German case law initially developed to address issues that may have posed a corporate opportunities problem without labelling the doctrine as such. We could characterize this as functional, but not formal convergence. In the literature, Coffee, for example, argued that functional convergence in

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[206] This is suggested by the German report contained in CARSTEN GERNER-BEUERLE, PHILIPP PAECH & EDMUND SCHUSTER, STUDY ON DIRECTORS‘ DUTY AND LIABILITY PREPARED FOR THE EU COMMISSION DG MARKT 324 (2013).

[207] Kershaw, *supra* note 6, at 610-615.

[208] Martin Gelter & Geneviève Helleringer, *Corporate Opportunities in the US and in the UK: How Differences in Enforcement Explain Differences in Substantive Fiduciary Duties*, forthcoming in RESEARCH HANDBOOK ON FIDUCIARY LAW (Andrew Gold & Gordon Smith eds).

[209] Under the law of corporate groups applicable to stock corporations, a de facto controlling (corporate) shareholder may inflict disadvantages on a controlled stock corporation integrated into the group provided that the disadvantage is compensated within the current fiscal year. Both the definition of a "disadvantage" and the question how the corporation is compensated (i.e. through new business opportunities within the group) leave a lot of space to interpretation. Litigation by minority shareholders under corporate group law is rare, probably even non-existent in general. Maybe this explains why the case law remains limited to private limited liability companies and limited partnerships.

corporate governance does not always necessitate formal convergence.[210] Both Gilson and Coffee have suggested that functional convergence usually precedes formal convergence.[211] These authors typically look at large, internationally operating corporations that need to compete for capital and suggest merely functional convergence as way of circumventing inefficient corporate governance arrangements.[212] Our study of the corporate opportunities doctrine shows that similar forces may also often be at play on a micro-level of specific doctrines affecting mainly small and medium-sized enterprises.

With functional convergence tentatively in place, formal convergence followed also for corporate opportunities in Germany. From the perspective of comparative law theory, it is most remarkable feature that the method of transplantation was ultimately a reinterpretation of existing case law by legal scholars who were aware of American corporate law doctrines and recommended them for German domestic needs. An important caveat is that we do not observe convergence by legislation, which a casual observer might maybe expect in a civil law jurisdiction (and for which there are examples in German corporate law[213]). Comparativists generally ascribe a greater significance to legal scholarship in the German legal tradition than in others.[214] It is thus not surprising that scholarship also provides a pathway for legal transplants, which do not require a foothold in legislation. For a complex body of case law such as the US corporate opportunity doctrine, legislation might not be the appropriate vehicle for an "export." Given the role of legal scholarship in Germany, adoption through scholarship is likely more appropriate.

B. France: Recent adoption of the corporate opportunity doctrine by a latecomer

1) From unfair competition to duty of loyalty and corporate opportunities

Our analysis of French law is inherently limited by having to rely on a limited number of cases, all of them recent. However, this immature jurisdiction is moving towards recognizing a duty of loyalty that the directors owe to the company and—beyond the corporate personality—to the shareholders. The reference to the directors' "duty of loyalty" as the cornerstone of the courts' reasoning signals a possible convergence of form inspired by the UK's duty of loyalty. The duty of loyalty of the directors towards the shareholders was first introduced in the *Vilgrain* case in 1996.[215] So far the duty had, however, been narrowly understood as a basis for ruling against

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[210] John C. Coffee, Jr., The *Future as History: The Prospects of Global Convergence in Corporate Governance and Its Implications*, 93 NW U. L. REV. 641, 650 (1999).

[211] Gilson, *supra* note 13, at 336; Coffee, *id.,* at 679-680.

[212] *See* DIGNAM & GALANIS, *supra* note 23, at 176 (discussing how firms whose securities are listed on a foreign market need to adopt foreign corporate governance standards).

[213] A prominent example is the business judgment rule, which, in modified form, was initially espoused by the Federal Supreme Court in the ARAG/Garmenbeck case in 1997. BGH April 21, 1997, II ZR 175/95, BGHZ 135, 244. Subsequently, the German version of the business judgment rule was codified in § 93 AKTG in 2005. *See, e.g.* Gudula Deipenbrock, *The "Business Judgment Rule" and the Problem of Hindsight Bias – Observations from a German Perspective,* 2016 EUR. BUS. L. REV. 197, 203-204.

[214] *See generally* Stefan Vogenauer, *An Empire of Light? II: Learning and Lawmaking in Germany Today,* 26 OX. J. LEG. STUD. 627 (2006).

[215] Cass. com. 27 Feb 1996, n° 94-11.241, Bull. civ. IV, n° 65, Recueil Dalloz 1996, p. 518, obs. Philippe Malaurie, ibidem p. 342, obs. Jean-Claude Hallouin, ibid. p. 591, note Jacques. Ghestin, Revue Trimestrielle de Droit civil 1997, p. 114, obs. Jacques Mestre,

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. Yet in cases in which managers appropriate themselves an opportunity that should arguably have been reserved to the company, the reasoning is very much fact-based, which, as we need to stress, is a relatively uncommon approach in French law. Even the French Court of Cassation, the Supreme Court in civil and commercial matters[216] which only judges legal principles, relies heavily on the factual assessment of lower courts to reach conclusions in corporate opportunity cases, particularly weighing the impact of directors' behaviors on the corporation. Such an approach is characteristic for the application of an implicit fairness standard. It matches what we have identified as the US approach in this matter. Statements by scholars, who refer to US law more than to the tradition of their English neighbors, provide further evidence for the role of US law at a substantive level. The preeminence of the less stringent US approach is not surprising, since the progress of corporate opportunity law shows an intensification in business ethics and the recognition of a fiduciary duty that has been relatively absent in the French business and legal culture until recently.[217] This expansion understandably builds upon notions well known in general private law (such as property law) and immediately raises the question of to whom a specific corporate opportunity belongs.

Neither the Civil Code relating to companies nor the Commercial Code expresses any general duty of loyalty on behalf of directors or any officer appointed to represent the company's interest. No formal corporate opportunities doctrine or any general fiduciary law has been developed in French case law. For a long time, only the rules of competition law set limits to the freedom of managers to engage in private activities for a profit. Alongside their activities as agents, managers enjoyed the possibility of developing business as principals, as long as they did not divulge corporate secrets, recruit the companies' employees to act for another business, or commit other acts of unfair competition. Only since the end of the 1990s, managers' private businesses has been subjected to stricter scrutiny, inaugurating a new period of development that is still not concluded. While competition law rules provided the conceptual framework for the first decade, recent cases from the 2010s refer to the new, transplanted principle of loyalty.

The first interesting case was *Kopcio*,[218] where employees resigned *en masse* and were hired soon after by another corporation, which was founded by the general manager of the initial company, Mr. Kopcio. The Supreme Court stressed that as a manager, he owed a "duty of loyalty" towards the initial company. Though the court's reasoning also referred to unfair competition with

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Revue Trimestrielle de droit commercial 1999, p. 273, obs. Hervé Le Nabasque, Bulletin Joly Société 1996, p. 485, note Alain Couret.

[216] Whereas the Court of cassation is the Supreme Court in civil, commercial and criminal matters, the Conseil d'Etat is the highest jurisdiction in administrative and public law and the Conseil Constitutionnel is the highest court in constitutional matters.

[217] The contract law of mandate requires from the agent a duty of loyalty, *see* PHILIPPE MALAURIE, LAURENT AYNÈS & PIERE-YVES GAUTIER, LES CONTRATS SPÉCIAUX, n°567 (5th ed, 2011).

[218] Cass. com., 24 févr. 1998, 96-12638, *Société Pic/Kopcio*: JCP 1998, IV, n°1864; Bull. civ. 1998, IV, n°86; D. 1999, 100, note Yves. Picod; RTD com. 1998, 612, obs. Claude Champaud et Didier Danet; REV. SOCIÉTÉS 1998, 546, note Marie-Laure Coquelet; BULL. JOLY 1998, 813, note Bruno Petit

the company, a majority of commentators[219] identified—as confirmed by later cases[220]—the duty of loyalty as the true basis for the decision. For a manager, personally engaging in an activity that competes with the activity of the company he manages is per se contrary to the duty of loyalty, and therefore improper.[221] There is no need to demonstrate *unfairly* competitive behavior, but merely competitive behavior.

With the *Société DL Finance v. Alibiac* case in 2011,[222] the paradigm shifted towards a broader recognition of the consequences of the duty of loyalty in French corporate law. In that case, shareholders of the corporation sued the executive manager for entering into negotiations for potential building work in his role as a manager of his own company rather than on behalf of their corporation, after the first stage of building work had been performed for the same client by their corporation. The shareholders filed a claim on the basis of breach of loyalty and unfair competition. The Supreme Court stated that the manager had a duty of loyalty and fidelity towards the corporation that made it unlawful for him to negotiate as manager of another company. This decision was the first attempt to directly tackle the question whether a manager can decide to take advantage of a business opportunity personally that he heard about while in office.

The question was further considered in the *Besins* case, where an executive manager appropriated a real opportunity that the shareholders (including the executive manager) had considered as a development opportunity for the corporation they set up to manage a medical clinic. Shortly before selling his shares, Mr. Besins, a member of the managing committee, bought the building in which the medical clinic was set up. This happened at a time when Mr. Besins knew that the other shareholders wanted to purchase the building and had given a mandate to a professional to negotiate the sale in their name. The French Supreme Court held that Mr. Besins' behavior was culpable and disloyal towards the shareholders. The Court ruled on the basis of sections of the Commercial Code relating to directors' liability. But its reasoning referenced the

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[219] Some authors interpreted the decision as a mere reaffirmation of the solution then in force: on the various interpretations, see Karine Grevain-Lemercier, LE DEVOIR DE LOYAUTÉ EN DROIT DES SOCIÉTÉS, preface Hervé Le Nabasque (2013)..

[220] Cass. com., 6 juin 2001, 98-16.390, *SA Graphibus / SARL Taugeron*: CONTRATS, CONC. CONSOM. 2001, 158, note M. Malaurie-Vignal: "In so deciding, after finding that Mr. Taugeron, manager of Taugeron, had breached his duty of loyalty to Graphibus by creating a competing company and that Mr. Taugeron had caused prejudice to Graphibus by attracting towards Taugeron various customers of Graphibus, which showed that Taugeron had acquired a clientele wrongly diverted by its manager, the court of appeal did not draw the legal consequences of its own findings"

See also Cass. com., 12 févr. 2002, Darres c/ Société Locam: DR. SOCIÉTÉS 2002, comm. 146, note Thierry Bonneau; Bull. civ. 2002, IV, 32 ; JCP E 2002, 581, 3, obs. Alain Viandier and Jean-Jacques Caussain; BULL. JOLY 2002,617 note Bernard Saintourens; REV. SOCIÉTÉS 2002, 702, note Laurent Godon; D. 2003, somm. 1032, obs. Yves Picod; DR. ET PATRIMOINE mai 2002, 94, note Didier Poracchia) Fails to fulfill its duty of loyalty and fidelity to the company it heads "the resigning manager who starts a competing company during the notice period imposed by a clause in the articles of association and whose competing company starts to operate before the expiry of that period".

[221] Jean-Jacques Caussain, *A propos du devoir de loyauté des dirigeants de société*, in MÉLANGES MERCADAL, Francis Lefebvre publishing, 307 (2002)

[222] Cass. Com., Nov. 15. 2011, n° 10-15.049, F-P+B, *Sté DL finances c/ A*, JCP éd. E, 2011, 16, note Alain Couret and Bruno Dondero; D2012, 134, note Thierry Favario ; BULL. JOLY 2012 §116, note Henri Le Nabasque, DROIT DES SOCIÉTÉS 2012, n°2, p. 21, note Myriam Roussille; CONTRATS CONCURRENCE CONSOMMATION 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 opportunité d'affaires*, D 2012, 1560.

judge-enunciated principle that directors have a “duty of loyalty” towards the shareholders and the corporation.

Cases continue to clarify the content of the duty of loyalty, not via careful interpretation of a written codified rule, but by the concretization of a standard. Consequently, there is room for divergent opinions regarding the content of the duty of loyalty. While there is agreement on the existence of a stringent information requirement towards the shareholders, some authors limit the duty of loyalty towards the company to a non-compete obligation only triggered under certain factual circumstances. On the other hand, others recognize that a more extensive principle bans any behavior that may adversely affect the company.[223] In any case, French law appears to be in the process of expanding the duty of loyalty. With the *Besins* and the *DL Finance* decisions, the duty of loyalty included a broader meaning for the first time: it encompasses a duty of loyalty towards the company. The language used by the Supreme Court in these cases is interestingly both emphatic and uncertain. The Court refers in the 2011 *DL Finance* decision to “a duty of loyalty and fidelity”,[224] without the courts ever explaining the meaning of either term. Moreover, only one consequence is drawn from the breach of both obligations, as if they formed a pair. Authors have usually concluded that the “duty of fidelity” has no independent meaning: it is mentioned to reinforce the solemnity of the relationship between the manager and the company.[225] French legal vocabulary does not include “fiduciary duties”: based on a common root, the notion of fidelity may be understood as conveying the same idea.

The solutions expressed in the *Kopcio, DL Finance*, and *Besins* cases give some indication of the direction of the law’s development, and enable one to affirm with confidence that French law is expanding the duty of loyalty of directors and is on the verge of embracing the concept of corporate opportunities. However, the limited number of decided cases leaves certain important issues open. In particular, it is unclear which opportunities are deemed to be “corporate” opportunities and as such privileged. There are two criteria found in US and UK law: first, the content of the opportunity and how closely it relates to the corporation’s activity; secondly, how the opportunity arose. *DL Finance* does refer to “negotiating a contract in the same domain of activity,”[226] but no guidance is offered to interpret this criterion, which might include the existence of direct competition. Regarding the origin of the opportunity, *Besins* mentions that the opportunity came to the manager’s knowledge while in office but within a cluster of other factual observations, without drawing specific conclusion about this specific basis. Other aspects of French corporate law give some guidance, though it is incomplete. Opportunities that are identified by a director while he is in office are likely to be identified as belonging to the corporation.[227] A similar analysis is at play

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[223] See Revue Trimestrielle de droit commercial 2013, p. 90, obs. B Dondero and P Le Cannu.

[224] Such a doublet was already used in an earlier decision (Cass. com., 12 Feb. 2002, *Darrès c/ Société Locam*,supra note 223).

[225] (*see* L Godon, L’obligation de non-concurrence de l’associé et du dirigeant de société, Rev. Sociétés, 2012, p. 202)

[226] Cass. Com., Nov. 15. 2011, n° 10-15.049, F-P+B, *Sté DL finances c/ A*, JCP éd. E, 2011, 16, note Alain Couret and Bruno Dondero.

[227] Cass. crim., 12 janv 2005, n° 04-8399: “Commits an offense of abuse of company’s assets a non-salaried manager who deposits in his own name a Soleau envelope concerning an invention which was the result of the design and work carried out within the company.'

in the field of intellectual property: inventions made by employees are attributable to the employer on the basis of circumstances and means used.

2) Functional, but not formal convergence

Until quite recently, conflicts of interest were not a topic of concern in French business practice and were not subjected to any specific legal treatment besides self-dealing.[228] Even the rules relating to related-party transactions were not openly described as a response to potential harm created by conflicts of interest. Such transactions have to follow an authorization procedure that combines approval of the board (if there is one) and of the shareholders. But this procedure only applies to agreements that the interested party declares as being unusual or not concluded at arms' length.[229] There are no provisions dealing with tunneling more generally,[230] but for rules enunciating that managers shall be liable if they commit a wrongdoing that causes harm to the company, and for criminal sanctions for abuse of corporate assets or votes. Liability and criminal sanctions are in practice rarely triggered (unless the company has become insolvent), despite the possibility for investors to act *ut singuli* in the name of the harmed company.[231]

A tendency to moralize business practices has emerged during the last two decades to meet the conditions required by modern and more globalized capitalism. Considerations about the management of conflicts of interests have represented an aspect of this development,[232] with clear attention being paid to corporate governance practices in other countries,[233] particularly the US and the UK.[234] The influence of the Anglo-American corporate opportunities law can therefore be traced back to this momentum.

The French case study reveals elements that are emblematic of French corporate law: (1) formal expression of general principles after they are uncovered by judicial lawmaking; (2) pressure toward the moralization of business behavior; (3) recognition of foreign influence

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[228] Bruno Dondero, *Le traitement juridique des conflits d'intérêts : entre droit commun et dispositifs spéciaux*, DALLOZ 2012, p. 1686.

[229] For a critique of the efficacy of the procedure, *see* Genevieve Helleringer, *Related Party Transaction. The French Model*, in THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS (Luca Enriques & Tobias Troeger eds., Cambridge University Press, forthcoming 2018).

[230] There is no procedure authorizing the private taking of corporate opportunities as in codified English company law.

[231] The fact that class action procedures and contingent fee agreements for lawyers are not available might explain for the limited number of actions.

[232] The 1995 Vienot report marked the realization that foreign professional investors set pressure for reform in the way French capitalism, and corporate governance in particular, operated. *See* André Tunc, *Le rapport Viénot sur le conseil d'administration des sociétés cotées*, 1996, vol 48, n°3, 647-655. Though the subject matter of the report was limited to the board of public companies, the message it contained touched more broadly on French capitalism.

[233] The report 1995 Viénot was the product of a working group set up by the two main employers' organizations, AFEP and CNPF (which became MEDEF in October1998) and chaired by Marc Viénot, then director and executive director of Société Générale Bank.

[234] The US Principles of Corporate Governance, the UK Cadbury report as well as the Greenbury report were used as references. See André Tunc, prec. 654-655. The Viénot report included recommendations for a directors' behavior guidebook (*charte de l'administrateur*). It included a paragraph on conflicts of interest, requiring the director to disclose them to the board and to abstain from voting on matters relating to them. Such a guidebook was later drafted and adopted by the MEDEF and AFEP, including the provision on conflict of interest (paragraph 17) that also recommended that directors should abstain to enter any conflict of interest.

confined through a so-called "French conception" of the underlying transplant. The limited case law leaves many questions unanswered as to what French law is in relation to corporate opportunities. What is certain is that such a doctrine is presently in the making. In accordance with classical French legal reasoning, the judge-made development rests on a rule coined as the "director's duty of loyalty." The notion of "loyalty" was forcibly introduced into company law (and into various other branches)[235] less than two decades ago in connection with directors' and managers' duty toward shareholders.[236] It has been the Trojan horse paving the way towards the possible recognition of fiduciary duties. Such duties could grant the basis for the manager's liability –and disgorgement obligation – in case of tunneling.

Though the vocabulary "duty of loyalty" is similar to UK law, suggesting formal convergence, the case study showed that, in practice, judges tend to take into account the ex post situations when assessing the potential liability of the director and, in particular, to take into account whether the company suffered harm, which is a condition of the manager's liability under the general provision. This approach relies heavily on judicial assessment after the fact. It can be compared to the US approach and its standard-based regulatory strategy. From this perspective, the convergence is essentially functional. Unlike German law, French law is not formally converging toward the US model, since the courts have not yet adopted the concept of corporate opportunities, but French law functionally applies the duty of loyalty to equivalent situations.

5. Searching for an explanation for convergence

As we have seen, the US and the UK have developed two different models for corporate opportunities in light of their very different corporate legal environments. Albeit in a limited manner, France and Germany have both adopted corporate opportunities law. While we cannot generalize from these two jurisdictions to Continental Europe or the Civil Law world generally, it is remarkable that both jurisdictions largely follow a pattern set by the US. This leaves three questions to be answered. First, since this is likely an example of convergence in corporate governance, what forces have pushed these systems towards it? Typically, legal transplants require both a good "micro-fit" in the legal infrastructure and a good "macro-fit" in the political economy to take root.[237] What (if any) changes in these areas precipitated the adoption of the concept of corporate opportunities? Second, why do we seem to see a trend toward the US model and not the UK model, which seems to be more influential in other areas?

In the following sections, we first explore potential economic consequences of corporate opportunities law. We first discuss whether the doctrine even provides a good fit to the French and German corporate governance models (section A). We then suggest that changes in the past decades have improved that fit (section B). Finally, we examine why the American model was still

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[235] E.g., in procedural law, judges are now allowed to ignore certain written rules pursuant to the loyalty principle, see N. Fricero, *La loyauté dans le procès civil*, Gaz. Pal. 2012, n°145, p. 27; in the performance of contract, loyalty is required, including on behalf of non-professional sellers, Cass. Civ. 3, March 16, 2011, n° 10-10.503, *Mahoudeau c/ Galloux*.

[236] Vocabulary has remained uncertain: 'duties' and 'obligations' of loyalty may be used in case decisions and doctrinal works.

[237] Kanda & Milhaupt, *supra* note 81, at 891.

adopted based on the development of the French and German corporate governance environments (section C).

From a chronological perspective, it does not appear that the adoption was necessarily part of the "neoclassical" wave of corporate law in the 1990s and 2000s. For Germany, at least, it appears that we can rule out this hypothesis. The original cases have their roots in the 1960s and 1970s, and even when they were "retconned" by scholars into the shape of the corporate opportunities doctrine,[238] convergence in corporate governance was nowhere near . It could potentially relate to a longstanding interest in comparative law, specifically US corporate law, which has a long tradition in Germany.[239] However, we can probably say that the doctrine was reaffirmed and strengthened in the more recent period of convergence, for example, in the German Corporate Governance Code.[240] The purpose of this type of soft law was largely to appeal to Anglo-Saxon institutional investors[241] because these investors have served as a catalyst for transplanting a common law legal concept into civil law jurisdictions.

In contrast, the local incarnation of the doctrine in France is more recent and is in the process of being established against considerable dissatisfaction toward the current standard of business ethics and pressure from Anglo-Saxon institutional investors.[242] Here, a direct influence of the US model seems more plausible, in a context in which directors are more concerned that their behavior might be challenged and their liability triggered.[243] MEDEF and AFEP drafted and adopted a corporate ethics guidebook in 2008. This soft law instrument that is still current includes a provision recommending that directors abstain from entering any conflict of interest (paragraph 17). Obviously, these instruments were inspired by the ALI's Principles of Corporate Governance[244] as well as the UK Cadbury and Greenbury reports.[245]

A. Integration of the corporate opportunities doctrine in the German or French corporate governance environment

As we previously discussed,[246] the corporate opportunity doctrine interacts with how production is organized in an economic system. Therefore, it may provide a better fit in some systems of economic organization than in others, which could have an impact on its transplantation. Legal systems where the doctrine creates considerable resistance would likely not

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[238] *Supra* notes 183-199 and accompanying text.

[239] *E.g.* JOHANNES C.D. ZAHN, WIRTSCHAFTSFÜHRERTUM UND VERTRAGSETHIK IM NEUEN AKTIENRECHT (1934) (providing an early comparison between German and US corporate law, specifically the powers of directors and shareholders).

[240] Section 4.A.1).

[241] Wolff, *supra* note 17, at 132-133.

[242] US portfolio holdings of foreign securities account for around 12% of market capitalization in France, *see* Markus Roth, *Labor and Corporate Governance in Times of Pension Capitalism,* 18 FORDHAM J. CORP. & FIN. L. 751, 778 (2013).

[243] *See* Véronique Magnier, *Réception du droit américain dans l'organisation interne des sociétés commerciales* in L'américanisation du droit, *supra* note 40, at 213, 219-21. See also *Crédit Martiniquais, supra* note 32

[244] On the ALI Principles, *see supra* note 102 and accompanying text.

[245] *See* Véronique Magnier, *Les conflits d'intérêts dans les Principes de corporate governance*, in LES CONFLITS D'INTÉRÊTS DANS LE MONDE DES AFFAIRES, UN JANUS À COMBATTRE? 139-154 (Véronique Magnier ed. 2006).

[246] *Supra* section 2.C.1).

be particularly receptive to the corporate opportunities doctrine. In other words, the doctrine would lack the necessary macro-fit for a successful legal transplant because an adverse political economy would trigger considerable resistance. On the one hand, this might result in outright political resistance. On the other hand, courts often try to find pragmatic solutions that are not completely at odds with business practice. The intuition of individuals acting within a legal system adopting a doctrine from abroad – who are socialized in a particular mode of economic organization and culture, of which the legal system is a part – might induce them to work with a doctrine differently than their counterparts in the legal system of origin. In such a case, the reason would be that the imposition of the unmodified doctrine would be seen as too burdensome for an important constituency in the economic and legal system, namely business interests. Hence, the doctrine is applied differently than in the system of origin, thus resulting in a typical transplant effect.

Intuitively, one might think that the corporate opportunities doctrine should be straightforward and uncontroversial. Investors should be more likely to invest ex ante if they are protected from fiduciary opportunism ex post. Protection of property rights in corporate opportunities thus contributes to a stronger base of external financial investment.[247] This seems particularly important in firms or industries where a high level of specific investment in information by the firm is necessary to develop business opportunities, and strong enforcement may be necessary to preserve incentives to invest.[248] Investors would likely want to be protected from a fiduciary departing the firm with innovation worth 10 years of corporate expenditures. However, we can observe different levels of enforcement of fiduciary duties generally between jurisdictions, and we observe corporate opportunity waivers. Thus, the corporate opportunities doctrine must logically present a trade-off, most likely because it prohibits certain transactions and inhibits certain business structures.

Economically speaking, the corporate opportunity doctrine protects business innovation. The firm may have researched possible business expansion and spent time and money doing so. This may be interpreted as "specific investment in intellectual skills that has been carried out by managers as a team." [249] Concurrently, some business innovation will also be carried out by team members outside the team at their own time and expense. Ideally, the doctrine should delineate these two cases. Of course, courts are not always able to differentiate. UK courts tend to define the company's interest very broadly and also tend to strictly protect the outside investors to the detriment of the directors. Even under the flexible US "fairness" standard, courts might sometimes be over-expansive, thus discouraging individual investment in business innovation.[250] The tradeoff inherent in the doctrine lies in the discouragement of financial investment in cases of a low level of enforcement, and in a discouragement of individual investment on business innovation in cases of a high level of enforcement.

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[247] *Supra* section 2.C.1).

[248] *See* Corradi, *supra* note 3, at 776.

[249] Corradi, *id.*, at 777.

[250] A parallel example might be the likely effect of covenants prohibiting workers to compete, which arguably have been a competitive disadvantage for Route 128 (Massachusetts) relative to Silicon Valley (California) because they made it hard for employees to transfer acquired knowledge to new ventures. See Ronald J. Gilson, *The Legal Infrastructure Of High Technology Industrial Districts: Silicon Valley, Route 128, And Covenants Not To Compete*, 74 NYU L. REV. 575 (1999).

To apply this analysis to the convergence debate, we need to take different financial systems, as they are often described in the comparative corporate governance literature, and analyze what impact a strictly enforced corporate opportunity doctrine would have in these systems. In particular, the socio-economic "varieties of capitalism" theory suggests that different countries have developed different packages of socioeconomic and political institutions that have helped the respective jurisdiction to be competitive by virtue of providing different sets of institutional complementarities. While so-called market-based or liberal capitalist systems (which include the US and the UK) rely mainly on individual market transactions to coordinate economic activity, coordinated capitalist systems (which include France and Germany) operate more strongly through coordination between aggregated interest groups such as unions and employer associations relying on collective bargaining.[251] Specific human capital investment creating a stronger long-term relationship between firms and employees is thought to be more important in the latter group, whereas the former system is characterized by a mobile labor force.[252]

A related, but not entirely identical literature distinguishes between "outside" or "arm's length" financial systems and "inside" or "control-oriented" financial systems. Outsider systems serve firms' financial needs by providing deep stock and bond markets, whereas insider systems are characterized by bank finance and other large shareholders.[253] It is obvious to see a connection to the longstanding debate about ownership structures, which tends to find that publicly traded firms in the US, and to a lesser extent in the UK, have more dispersed share ownership than their Continental European counterparts.[254]

If we accept the veracity of these distinctions, we can see that the tradeoff inherent in the corporate opportunities doctrine will likely play out differently in distinct financial systems. In a dispersed ownership system relying largely on external, arm's length finance, such as that of the US, a strong enforcement of the corporate opportunity doctrine will benefit outside finance by dispersed shareholders. On the margin, dispersed shareholders will be more likely to invest in the firm because their expectations in the use of business opportunities are relatively unlikely to be disappointed. The cost of the corporate opportunity doctrine is relatively small, given that their target would primarily be managers in control of the firm. In firms with dispersed ownership, controlling shareholders are unlikely to be significantly affected by the doctrine through their interaction with the firm given that they are rarely involved with business decisions and not necessarily represented in the board of directors. As non-controlling shareholders, they would not be subject to a fiduciary duty.

By contrast, in relational finance systems with significant shareholders and corporate group structures, such as Germany and France, a corporate opportunities doctrine might produce lower

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[251] On the distinction between "liberal" and "coordinated" market economies in the varieties of capitalism literature, *see* Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism,* in VARIETIES OF CAPITALISM 1, 8-9 (Peter A. Hall & David Soskice eds. 2001); RICHARD W. CARNEY, CONTESTED CAPITALISM 3 (2010).

[252] E.g. Margariata Estevez-Abe, Torben Iversen & David Soskice, *Social Protection and the Formation of Skills: A Reinterpretation of the Welfare State*, in VARIETIES OF CAPITALISM, *id.*, at 145, 146-147, 154

[253] *See generally* Erik Berglöf, *A Note on the Typology of Financial Systems,* in COMPARATIVE CORPORATE GOVERNANCE 151 (Klaus J. Hopt & Eddy Wymeersch eds. 1997); DIGNAM & GALANIS, *supra* note 23, at 64.

[254] E.g. Marco Becht & Alisa Roëll, *Blockholdings in Europe: An International Comparison*, 43 EUR. ECON. REV. 1049 (1999); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471-517 (1999).

benefits and the higher costs. Outside investment is less important, which means that defeating expectations of outside shareholders is a smaller problem for firms seeking a continued ability to attract investment in the stock market. Large shareholders, so long as they are not controlling shareholders, will less frequently need judicial enforcement, given that they will monitor directors through their delegates on the board. Large shareholders may themselves engage in business innovation. As significant investors or with interlocking board members, they will more likely be inhibited in business activities by the doctrine should it end up being enforced. A strict judicially enforced corporate opportunity doctrine thus may be counterproductive since it would inhibit the creation of corporate groups. The reason is that parent corporations may themselves be considered fiduciaries, which is why they would be subject to the corporate opportunities doctrine and therefore potentially inhibited in their own business innovation.

For the sake of analytical clarity, we have kept our analysis purely static and treated ownership structures and financial systems as exogenous to the corporate opportunities doctrine. This may not entirely be true – on the margin, the presence of a corporate opportunity doctrine may, together with other factors and enforcement of fiduciary duties in general, push firms more closely toward an outside finance system. However, causation could also be reversed – a particular ownership structure and financial system may have an impact on the legal doctrine, as it shapes the political economy of corporate law, and thus adjusts the "macro-fit" of a doctrine considered a legal transplant. Therefore, it is probably difficult to speak of the corporate opportunity doctrine being a cause for financial structures; rather, we should consider it as a component of the law that complements a particular set of economic institutions. In addition, a particular set of legal doctrines may have an impact on what industries and production structures will thrive in a jurisdiction. For example, while countries following such a model (traditionally European civil law jurisdictions) are often quite successful at capital-intensive incremental product innovation, they typically do not excel at small-scale startups (e.g. the IT industry).[255] The impact of the corporate opportunities doctrine may influence the viability of these industries in different degrees. We could hypothesize that in an industry where large scale capital investment is important, a corporate opportunity doctrine that inhibits groups with large scale shareholders might have higher costs than benefits.

B. Enhanced Economic Attractiveness behind a Strong Protection of Corporate Opportunities

We can hypothesize that there are economic reasons why a corporate opportunities doctrine and the enforcement of the duty of loyalty more generally have become more attractive in Germany and France. While generally share ownership structures in Continental Europe can still be characterized as concentrated, there has been movement toward a more dispersed ownership structure. As an important case in point, the fact that German banks have famously divested some of their stakes in the late 1990s and early 2000s has often been referenced.[256] In countries with

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[255] *E.g.* Hall & Soskice, *supra* note 247*,* at 36-44.

[256] One reason was apparently the elimination of a capital gains tax for sales of shares between corporations, which made it easier for financial institutions to reduce their stakes in industrial companies. *See* Brian R. Cheffins, *The Metamorphosis of "Germany Inc.": The Case of Executive Pay,* 49 AM. J. COMP. L. 497, 503 (2001); Dariusz Wójcik, *Change in the German model of corporate governance: evidence from blockholdings 1997-2001,* 35 ENV'T & PLAN. 1431, 1435 (2003); DIGNAM & GALANIS, *supra* note 23, at 291; JOHN W. CIOFFI, PUBLIC LAW AND PRIVATE POWER 159-162 (2010); Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG,* 63 AM. J. COMP. L. 493, 518-519 (2015)..

significant state ownership in large firms, there was a trend toward privatization during the same period. Concurrently, institutional investors from overseas, such as mutual funds and pension funds, have increased their stock ownership in Continental Europe. It has been estimated that "US portfolio holdings of foreign securities account for 13% of market capitalization of the German stock market," while they account for 12% in France.[257] Outside investors are thus becoming an important constituency. One could argue that some Continental European corporate governance systems are shifting from relational finance toward outside finance. The shift is certainly not been complete, but it does imply an increase in the relative importance of outside investors. In comparison, the significance of dealing with the corporations "main bank" may have declined, as did the significance of group structures for which a strongly enforced corporate opportunity doctrine constitutes a hindrance.

At the same time, this model helps us understand why corporate opportunity waivers have become common in the US in recent years.[258] While the "re-concentration of share ownership" in US firms that commentators have observed[259] should not significantly impact corporate opportunities, the venture capital industry frequently employs corporate opportunity waivers.[260] Venture capital firms often that invests in several business, and often take a controlling stake that exposes them to the duty of loyalty. Consequently, they are more likely to run afoul of the corporate opportuntites doctrine, which may turn out to be a hindrance to business innovation in this context..

While this may help explain why the political economy of Continental European corporate law became more receptive to corporate opportunities, it does not explain why the US approach has become more influential than the UK approach in France and Germany. Moreover, the German courts have not adopted some elements in the US approach that might have been a good fit to the German corporate governance system, such as approval by the board or the defense of incapacity.

C. Why has the US model been predominantly transplanted in Germany and France?

In both Germany and France, the corporate opportunities doctrine has developed under the umbrella of a "duty of loyalty" while largely following an ownership approach. In Germany, tests that closely match the US corporate opportunity doctrine have been adopted.[261] In France, the vocabulary of the duty of loyalty merely introduces analyses centered on the reasonable expectations of the corporation and how directors shall not divert from the corporation opportunities that should benefit such corporation.[262] In France and even more so in Germany, court reasoning based on the duty of loyalty, in the context of corporate opportunities, entails a

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[257] Markus Roth, *Labor and Corporate Governance in Times of Pension Capitalism,* 18 FORDHAM J. CORP. & FIN. L. 751, 778 (2013).

[258] *Supra* section 3.A.2).

[259] Ronald .J. Gilson and Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights,* 113 COL. L. REV. 863, 886-888 (2013).

[260] *Supra* section 3.A.2).

[261] See above section 4.A.

[262] See above section 4.B.

cautious balancing of interests, weighing the interests of the corporation against the legitimate interests of the directors. While there is no obvious premium to US-origin transplant in terms of cultural fit,[263] other factors can be suggested to explain the hierarchy that benefit US-origin transplants over global competitors such as Britain.

First, in the previous subsections we have speculated that in a relational finance system, the benefits of the corporate opportunities doctrine are met by greater social cost. Even if the two Continental European jurisdictions have absorbed elements of an outside finance system, the cost of the stricter UK approach toward corporate opportunities would have been greater than that of the US model during the transitional period.

Second, the judicial nature of the transplant represents the primary reason that seems to account for the predominance of the US approach over the UK approach in that corporate opportunity law has been transplanted from the Anglo-American tradition to France and Germany. Judges have been the main actors in the adoption and development of corporate opportunities law in these two countries. In the absence of legislative text, they have not engaged in creative interpretation of a written source but have rather developed, on the basis of a general principle, the duty of loyalty and judgments aiming at a fair and balanced solution taking into account the interests of the corporation and of the directors. In these jurisdictions, corporate opportunity law is shaped, case after case. This organic development leaves judges flexibility to design and clarify the applicable tests.[264] Such an approach is based on the use of standards, as in the US model: they give discretion for adjudicators to determine ex-post whether violations have occurred, and to mold corporate decision.[265]

That it has been predominant is not surprising as adopting rules is not a very common strategy for regulating complex, intra-corporate relations. Such matters can hardly be regulated with a mere matrix of prohibitions and exemptions. In addition, Continental judges are not in a particularly good position to design such matrix. Comparatively, UK judges are in a better position to create the law and could rely on the extremely well-developed body of fiduciary law.

A third reason that may account for the prevalence of the US approach is the specific economic and political power of the US and the signaling strategy that it invites. US economic power and US economic and corporate law are bedfellows. Their ambassadors include institutional investors, lawyers, business executives, and multinational enterprises that are financed and advised by American investment banks. Economic and political power influence legal transfers.[266] Borrowing from US corporate law can be expected to show institutional investors that the host jurisdictions comply with the US domestic legal standards.[267] Though the corporate opportunities doctrine transplant has been tolerated but not actively initiated by a legislature,[268] the economic importance of signaling a sound local investors protection has penetrated into various levels of

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[263] See above section 5.B.

[264] As has already been the case in Germany, see above section 4.A.

[265] See Armour et al, *supra* note 54, at 40.

[266] Otto Kahn-Freund, *On Uses and Misuses of Comparative Law,* 37 MOD. L. REV. 1, 8 (1974).

[267] *See* Daniel Berkowitz, Katharina Pistor, Jean-François Richard, *The Transplant Effect,* 51 AM. J. COMP. L. (2003) 163, 164

[268] On this distinction and the importance of passively tolerated transplants in corporate law, *see* Fleischer, *supra* note 197, at 388.

actors, so as to become the spirit of the age. Such *Zeitgeist* inspires academics who introduce new foreign ideas into the debate, lawyers who write briefs and judges who, even in civil jurisdictions, are instrumental in updating the law in practice.

A fourth reason that must be stressed is that, compared to English law, US corporate law enjoys a higher power of attraction among the legal actors who are instrumental in the actual corporate law transplant process. Explanations for this power include the exemplary reputation of leading US law schools among law firms and the reputation for innovation in legal thinking fostered by a strong competition for talented students.[269] There is a reasonable case for an academic ground supporting the success of American legal transplant. Interdisciplinary scholarship in areas such as corporate law & economics and law & finance largely remains the hallmark of US legal thinking. The legitimacy of US law –and therefore transplants originating from the US – rests also in the expert interdisciplinary scholarship that accompanies legal solutions. The corporate opportunities doctrine has not been analyzed anywhere in as much detail as it has been in US academic literature. As a corollary, import of US law can also come through the import of economic or financial expertise, or the sociology and anthropology of corporations.[270] Additionally, the influence played by top European students who go to Columbia, Berkeley or Harvard for a LL.M. and then return to their home country and develop a successful career at the bar, on the bench or as academic, should not be undermined.[271] These former students act as agents between the continents: "the role of students returning to their home countries after studying abroad has been of central importance ever since the invention of universities."[272] The role of Middle Ages scholar educated in Bologna or the Sorbonne who contributed to the circulation of Roman law in Germany is further proof of this importance.[273]

6. Implications for the convergence and transplant debates

In this section, we discuss larger implications of our investigation for corporate governance in comparative law debates. In part, these points overlap, but they are relevant for different audiences. While convergence is primarily of interest to corporate law scholars, the debate about legal transplants is mainly a concern for comparativists. First, we suggest that convergence in corporate governance may sometimes be brought about by changes in legal doctrine – a mechanism that has so far received little attention in the literature (section A). Second, we suggest that scholars of comparative law need to broaden their perspective in their understanding of legal transplants and recognize that general concepts are easily transplantable because they are adaptable (section B).

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[269] Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars,* in ADAPTING LEGAL CULTURES 241, 250-51 (David Nelken & Johannes Fees eds. 2001).

[270] Dezalay & Garth, *id.*, at 251.

[271] However, it appears that common law countries are overrepresented in top US LL.M. programs. *See* Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law,* 2009 BYU L. Rev. 1813, 1849-51 (2009).

[272] David Nelken, *Towards a Sociology of Legal Adaptation,* in ADAPTING LEGAL CULTURES 7, 24 (David Nelken & Johannes Fees eds. 2001).

[273] Fleischer, *supra* note 197, at 391.

A. Convergence of legal doctrines

Convergence in corporate governance is usually identified on the level of corporate governance practices or on the level of legislation, with the examples given in the literature typically falling into these two categories. For example, Hansmann and Kraakman look at convergence of corporate governance practices on the one hand,[274] and legal convergence on the other.[275] The literature typically focuses on examples that require some of form of legislative action, (including disclosure requirements, board structure, shareholder litigation or the spread of the UK model of takeover law),[276] or corporate governance codes and reports.[277] Other authors have emphasized mechanisms requiring conscious firm choice, in particular to avoid inefficient laws.[278] Mathias Siems, in his comprehensive study of convergence in corporate law relating to the position of shareholders, emphasizes the primacy of statutory law over case law for convergence, noting that "[i]n an area like company law, structural problems cannot be tackled, nor legal certainty adequately ensured, through case law alone." He also points out that statutes can be transplanted more easily.[279]

Our case study highlights an alternative pathway toward convergence, namely legal doctrine embedded in the case law. The possibility of legal doctrines as a vehicle for convergence has been considered in the literature, but it has rarely been studied on the micro-level.[280] Our analysis leads us to several observations for the convergence debate. First, the target jurisdictions we studied, France and Germany, are usually considered quintessential civil law jurisdictions. An observer from the common law world might be impressed by the stereotype about case law not being significant in civil law jurisdictions due to the absence of a formal rule of *stare decisis*. The example of corporate opportunities clearly illustrates that case law can be a component of convergence if courts absorb foreign doctrinal models and incorporate it into their own reasoning.

Second, our study sheds light on formal and functional convergence and the relationship between the two. Both France and Germany provide examples of doctrinal convergence on the level of legal doctrine. However, the pathway in each case is very different. In Germany, we see gradually developing doctrinal functional convergence that precipitated formal convergence on the level of doctrine. In France, we can see only subtle functional convergence so far, although formal convergence may actually follow. The catalyst for formal convergence in Germany was

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[274] Hansmann & Kraakman, *supra* note 21, at 454-455; *see also* Eddy Wymeersch, *Convergence or Divergence in Corporate Governance Patterns in Western Europe? in* CORPORATE GOVERNANCE REGIMES 230, 240-241 (2003) (discussing ownership structure); Steen Thomsen, *The Convergence of Corporate Governance Systems to European and Anglo-American Standards,* 4 EUR. BUS. ORG. L. REV. 31, 38-40, 41-44 (2003) (discussing convergence with respect to independent directors and corporate ownership structures).

[275] Hansmann & Kraakman, *id.,* at 455-458.

[276] Hansmann & Kraakman, *id.,* at 455-458; Wymeersch, *supra* note 274, at 237-238.

[277] *E.g.* Wymeersch, *id.,* at 236-237; SIEMS, *supra* note 15, at 56-59.

[278] Gilson, *supra* note 13, at 346-356 (discussing convergence through contract and hybrid convergence through regulatory competition).

[279] SIEMS, *supra* note 15, at 244-245.

[280] *But see* David Cabrelli & Mathias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based Quantitative Analysis,* 63 AM. J. COMP. L. 109, 138 (2015) (including case law as a source of law in their quantitative comparative study).

legal scholarship. For whether doctrinal convergence will remain purely functional or also take a formal shape will depend on how legal reasoning generally takes place in a particular jurisdiction. For the German case in point, there were two prerequisites, namely (1) the strong influence of legal scholarship on legal doctrine in German, and (2) the receptivity of German scholars to comparison. In France, where scholarship tends to exercise less overt influence on the courts, we may not expect to see formal convergence.

Third, we can observe a continued divergence between US and UK corporate opportunities law, in spite of the shared adherence to the common law tradition. At least in the UK, policymakers and scholars are generally receptive to considering US influence, and in practice, the UK came close to adopting the US model when the Companies Act of 2006 was being prepared. However, it was ultimately rejected, in large parts because a domestic doctrinal framework was already in place. The example shows that doctrinal path dependence may inhibit convergence in legal doctrine.

B. The nature and mechanism of transplants

Our analysis of corporate opportunities also allows us to draw some more general lessons for the theory of legal transplants. First, we have shown that even today, legal transplants do not necessarily have to be of a legislative nature, but can rather be general concepts (e.g., fiduciary duties), legal doctrines (e.g., corporate opportunity doctrine), and even their subparts (e.g., "tests" for corporate opportunities used in the US). Transplantation through case law may at first glance appear to be limited, especially since legislatures tend to have more extensive law-making powers than courts. However, case law transplants are often determinative of changes in legal reasoning, which are gradually absorbed by the judges and other actors within the legal system. They may therefore precipitate larger cultural changes that ultimately result in a fundamental transformation of the legal system, which eventually might chip away the familiar "transplant effect." Scholars should therefore reconsider the traditional pessimistic view that "the Anglo-American concept of fiduciary duty may not be easily transplantable (…) to civil law systems."[281] On the contrary, the flexible nature of general principles such as fiduciary duties increase their chances to be incrementally adopted and to successfully adapt into the host jurisdiction.[282]

Second, transplants can be merely formal or substantial, but their effect is always the result of an interaction with the local legal culture. A transplant may be applied fully or only partially. More precisely, the way the transplant occurs, the canals through which imports are made, matter and impact how the transplant operates. In our example, we have observed two different transplant routes; one is more theoretical and relies primarily on the dialog of scholars (German model). In this case, the medium for the transplant was scholarship, and the precise impact is determined by whether scholars are receptive to foreign influence or not. As we have seen, the receptivity of German scholars has led to an overt parallelism to US doctrinal structures. The other mode of transplantation is more practical and relies primarily on the dialog of judges, as seen in the French model. Institutionalized exchanges such as those of supreme courts judges have facilitated the

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[281] Katharina Pistor & Chenggang Xu, *Fiduciary Duties in (Transitional) Civil Law Jurisdictions – Lessons from the Incompleteness of Law Theory,* in GLOBAL MARKETS, DOMESTIC INSTITUTIONS: CORPORATE LAW AND GOVERNANCE IN A NEW ERA OF CROSS BORDER DEALS 77, 99 (Curtis Milhaupt ed. 2003).

[282] Fleischer, *supra* note 197, at 393.

process. A dialog between scholars and judges also exists but it is more domestic. If judges are constrained in their ability to adopt foreign doctrinal structures overtly, they may limit themselves to a functional adoption of a foreign doctrine. If judges adopt a doctrine because of a deeply felt need to transition to a particular model, the adoption may be more profound and functional, even if the existence of a legal transplant is less visible on the surface.

7. Conclusion

How to handle corporate opportunities and in particular the interest of a director in such opportunity has been a difficult question in the UK and the US for a long time. Though it is a relatively new question in Germany and France, it has been similarly identified as a difficult one. Our study has shown a considerable degree of convergence: the corporate opportunities doctrine has radiated from US law to these two countries. It is an illustration of the Americanization of the law that scholars have has frequently emphasized.[283] The UK, which has the oldest tradition on this issue, has largely retained its own. While we cannot generalize to other Continental European civil law jurisdictions, the no-conflict approach has not been received in the two jurisdiction we have investigated as a structuring principle. The economic macro-fit of the corporate opportunity doctrine may have improved in recent decades in light of changes in these corporate governance systems. Hence, they became more receptive to the doctrine, specifically its US version, which apparently provided a better fit than the UK equivalent. However, the two jurisdictions differ in significant ways from each other, as each of them has absorbed the doctrine in its own fashion. On this matter, the dividing line is still between the two common law and the two civil law countries. This finding underlines the complexity of the legal geography. Legal traditions are not blocks that oppose each other but streams able to merge, influence one other and potentially differentiate along the various dimensions of a given issue.

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[283] *L'américanisation du droit,* Arch. Phil. Droit 45 (2001); JENS DROLSHAMMER, A TIMELY TURN TO THE LAWYER? GLOBALISIERUNG UND DIE ANGLO-AMERIKANISIERUNG VON RECHT UND RECHTSBERUFEN – ESSAYS 77-96 (2009).

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