

Conflict of Interest, Secrecy and Insider Information of Directors

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Theses

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

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

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

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

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

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

7. Insider dealing is not only the target of capital markets law, such as the European Market Abuse Directive that is under revision, but also of general company law. This is important for non-listed companies and results in differences as to possible consent, sanctions and recoveries. Furthermore, the company law duty can also be violated in contexts that do not involve transactions in securities.

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

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

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