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WHAT IS A DUTY OF LOYALTY FOR DIRECTORS OR SHAREHOLDERS AND DOES IT EXIST UNDER BELGIAN LAW?

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Abstract

This is my contribution to the liber memorialis of Didier Willermain, one of Belgium's foremost corporate law attorneys and part-time academic, who died prematurely in 2021. In the text, I argue that it only makes sense to talk about a duty of loyalty for directors if one means a UK-style no-profit rule and that Belgian courts pay lip service to such a duty of loyalty for directors, but do not actually apply it and have indeed sometimes explicitly refused to apply it. I also argue that talk by German and Delaware courts about a duty of loyalty for shareholders verges on the misleading and, more importantly, that such a duty for (controlling) shareholders is not part of Belgian law and could not lawfully be construed by Belgian courts.

The author welcomes your comments at hans.dewulf@ugent.be

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WHAT IS A DUTY OF LOYALTY FOR DIRECTORS OR SHAREHOLDERS AND DOES IT EXIST UNDER BELGIAN LAW?

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J'ai appris à connaître Didier Willermain lors des réunions de la section droit des sociétés du comité de rédaction de la RDC-TBH. Il était non seulement un excellent juriste, mais aussi quelqu'un avec une personnalité chaleureuse, toujours calme et affable. Un juriste d'une qualité exceptionnelle, mais néanmoins modeste à tout moment. Sur le plan académique, je retiens surtout qu'il était pionnier de la recherche novatrice sur les devoirs des administrateurs et notamment sur la possibilité d'introduire une doctrine de « corporate opportunities » en droit belge. Ses contributions à ce sujet continueront à être consultées pendant de nombreuses années tant par les praticiens du droit que dans le monde académique. Des lors, il me semblait approprié de consacrer ma contribution à la question s'il existe ou non un devoir de loyauté (« duty of loyalty ») dans le chef des administrateurs de société en droit belge. Et qu'en est-il de l'affirmation tant à la mode que les actionnaires de contrôle sont également liés par un tel devoir de loyauté ?

1. What is a duty of loyalty?

In a standard textbook about UK or Delaware corporate law, one will find a section about directors' fiduciary duties including the statement that there are essentially two such fiduciary duties, namely the duty of care and the duty of loyalty, even though various other duties may be recognized and indeed the 2006 UK Companies Act recognizes 7 directors' general duties[1] and in Delaware, too, here is some talk about a duty of good faith.[2] Continental European corporate law scholars, when they write in English about their own legal systems, have adopted the habit of talking about fiduciary duties -even though at least in French-inspired legal systems, this concept is lacking from the rest of civil law- and distinguishing between care and loyalty.[3]

[1] Sections 170 through 177 2006 Companies Act. Only three of those are about loyalty in the sense of subordination of interests and can therefore properly be called fiduciary.

[2] See e.g. for Britain P. DAVIES and S. WORTHINGTON, *Gower's Principles of modern company law*, 10th edition, 2016, ch. 16, p. 461 ff. For the US, see e.g. the old but in this respect still representative enough AMERICAN LAW INSTITUTE *Principles of Corporate Governance. Analysis and Recommendations,* St. Paul, Minnesota, 1994, 137.

[3] See e.g. the European Model Company Act (EMCA), first edition, 2017, available at https://ssrn.com/abstract=2929348 , Chapter 9 "directors" duties", sections 9.03 and 9.04 on respectively the duty of care and the duty of loyalty.

However, as some of the more thoughtful Anglo-American commentators have pointed out, it is doubtful whether it is useful to talk about the duty of care as a fiduciary duty.[4] Of course, it is beyond doubt that directors owe their company[5] due care, but this is not a duty typical of fiduciaries, but merely one of the duties imposed on fiduciaries as on many others. Building contractors and many others who are not fiduciaries at all also owe duties of care, and in tort law there has been talk for decades about a general duty of care.

The duty of loyalty properly understood is, by contrast, specific to fiduciaries, and is generally regarded as "the core fiduciary principle"[6]. What does it mean when we say that a director owes loyalty to a company? Essentially, it means the fiduciary needs to completely subordinate its own interest to those of its principal, the company and is subject to a no profit rule. Sometimes there is, somewhat misleadingly, talk about a "no conflict rule". The no conflict rule does not mean fiduciaries should avoid getting into a situation of conflict of interests, where their duty to exclusively serve the interests of the principal potentially clashes with their own interests. Such situations are bound to arise for any fiduciary who, like company directors, performs his tasks on a continuous basis and does not limit himself to a one -off transaction. The fiduciary can't help it. But it does mean the fiduciary should not derive any personal benefit from such situations, and in most cases where a conflict arises, should abstain from acting, and often should inform the principal about the existence of the conflict of interest. The two major prongs of the duty of loyalty are, as often expressed in English law: the no profit rule[7] and the dual loyalty rule (sometimes this second rule is also called, confusingly, the no conflict rule).[8] The no profit rule means that the fiduciary is entitled to the remuneration that was agreed by the principal, but that apart from this remuneration, the fiduciary should not derive any (material, monetary) benefit from his position as a fiduciary. In the UK at least, this rule is interpreted very strictly. The dual loyalty rule is known in Belgium and the Netherlands as the rule on serving two masters.[9] There is a conflict of duties when the fiduciary serves the interests of two (or more) principals whose interests clash. Both in Belgium and the US and UK, this rule is construed in such a way that it is applied far less strictly than the no profit rule. In fact, it is misleading to talk about a dual loyalty "rule" –

[4] J.C. SHEPHERD *The Law of Fiduciaries*, Toronto, Carswell, 1981, 48.

[5] In this text I use, as is standard in continental European legal usage, the word 'company' as a general expression, encompassing both partnerships - companies with unlimited shareholder liability and which in Belgium are regarded as *intuitu personae* contracts – and corporations- in the sense of companies whose shareholders enjoy limited liability, and which since the 2019 (Belgian) Code on Companies and Associations (BCCA) are (in Belgium) no longer treated as contracts (let alone *intuitu personae* contracts).

[6] See e.g. J. WEINRIB, "The fiduciary obligation", *University of Toronto law Journal*, 1975, vol. 25, 1; Shepherd, supra footnote 3

[7] For the UK, a clear expression is found in Bray v Ford (1896) A.C. 44 at 51-52 HL: "It is an inflexible rule of a court of equity that a person in a fiduciary position 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."

[8] See, again, P. DAVIES and S. WORTHINGTON, *Gower's Principles of modern company law*, 10th edition, 2016s. 16-52, p. 514-515.

[9] "Dienen van twee heren". See about this H. DE WULF,*Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap*, Antwerp, Intersentia, 2002, 581 and 659- 704.

"standard" would perhaps be more apposite- since it is often unclear how the fiduciary should act when he is subject to competing duties. Typical of the approach to conflicting duties was the UK Law Commission's 1995 report on "Fiduciary duties and regulatory rules"[10] where it was stressed that in many service industries, it would be unrealistic to expect the strict application of a no conflict rule to dual loyalty situations; this would have been incompatible with "industry structure". After the 2007-2008 financial crisis, deference to "industry structure" became less pronounced, especially in the damned financial industry, but still, in many jurisdictions a more lenient -one could also say: nuanced- approach to dual loyalty situations prevails as compared to the stricter approach to self-dealing. For Belgian company directors, it is well known that the statutory rules on personal conflicts of interests[11] do not cover "merely functional[12] conflicts of interests", e.g. when one company sells a branch of its activities to another company, and these companies have some directors in common. Provided these directors are not at the same time (substantial) shareholders in at least one of the companies involved, and their remuneration is not influenced by the result of the transaction (e.g. they don't have share options the value of which could be influenced by the outcome of the transaction), the boards involved will not have to apply the art. 7:96 § 1 conflicts of interests procedure.

The lack of rules on "serving two masters" should be contrasted with the so-called generally applicable principle of law (*principe général du droit*), recognized by the Belgian court of cassation[13], concerning "contracting with oneself" or, as Dutch and Belgian scholars call this with a German word: "Selbsteintritt". For instance, if a shareholder of a company asks its managing director to help him find a buyer for his shares, the director may not buy the shares himself without disclosing his own interest to the shareholder and getting that shareholder's fully informed consent. In a French case, a director had asked family members to set up a company that made a bid for the shareholder's shares, and the director recommended that bid to the selling shareholder, without mentioning that his own daughters controlled the bidding company and even though the director had received competing bids, through investment banks, from external bidders. The director was of course condemned for violating his duty of loyalty.[14] Under Belgian law, such cases would be dealt with under the heading of

[10] Law Commission report no 236, London, HMSO, 1995, 125 p.

[11] Such rules are only applicable to the *SA, SRL* and *SC,* that is the public, private and cooperative companies, but not to partnerships (*société simple, société en nom collectif, société en commandite*). See arts. 5:76, 6:64and 7:96 BCCA. (The BCCA also contains conflicts of interests rules for public companies with a dual board (art. 7:102) or single director (art.7: 122), as well as for associations (art. 9:8) and foundations (art. 11: 8)).

[12] i.e. merely qualitative, originating merely from two different roles, functions, positions one holds.

[13] Cass. 7 December 1978, *Pas.* 1979, I, 408.

[14] Cass. fr. 27 February 1996, *JCP* 1996, II, 22663, ann. J. GHESTIN This case gave rise to the first judgement by the French *cour de cassation* that clearly and explicitly recognized the existence of a general duty of loyalty *(devoir de loyauté*) for company directors. On the early development of the "devoir de loyauté" under French law, see e.g. B. DAILLE-DUCLOS, "Le devoir de loyauté du dirigeant", *JCP E* 1998, 1486; H. LE NABASQUE, "Le développement du devoir de loyauté en droit des sociétés" *RTDComm* 1999, 273; H. DE WULF, *Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap*, Antwerp, Intersentia, 2002, 448-456.

"Selbtseintritt". The court of cassation has deduced a general principle of law banning people from "contracting with themselves", which in reality means acting on both sides of a transaction if on one side one has a duty to serve the interests of another party[15]. Thus, a notary charged with the public auction of a person's estate may not bid for those assets himself (neither in person nor through a proxy or through close family members). The difference between the rules on "Selbsteintritt" and serving two masters was well illustrated in the 1990s in a case about the public take-over bid launched by Suez[16] for the shares of its Belgian subsidiary Tractebel. Suez did of course own a substantial number of shares in Tractebel prior to the bid, but now wanted to acquire all remaining shares, in order to delist Tractebel and acquire full control. Both companies shared several directors, including the chairperson of their boards. Minority shareholders of Tractebel had therefore argued that those directors on the board of Tractebel that were also board members in Suez were conflicted and should have abstained from taking part in drafting the mandatory advice a target board has to give to its shareholders about the merits of the bid. But since the directors' remuneration was not influenced by the transaction, this was a situation of "serving two masters" or, as Belgian lawyers usually put it, a "merely functional conflict of interests", not caught by the statutory rules on directors' conflict of interests. Since the directors were clearly not in their personal capacity parties to the bid, the Brussels court of appeal, confirmed by the court of cassation, ruled that Belgian law contained no conflicts of interest rules that would apply to the facts of the case[17]. In reaction to this, the 2007 Takeover Bid Act introduced statutory rules on such situations, essentially saying that the target (subsidiary) board may not limit itself to issuing the standard opinion addressed to shareholders on the merits of the bid, but that in addition a committee of independent directors must appoint one or more independent experts to issue a fairness opinion on the valuation of the target's shares. [18]

The duty of loyalty does not merely include the legal duty to subordinate one's own interests to those of the principal, but is also expressed through an attendant disgorgement rule[19]: anything acquired by the fiduciary in the course of performing its tasks, should be handed

[15] Cass. 7 December 1978, *Pas.* 1979, I, 408. The court ruled that there existed a general principle of law of which art. 1596 Civil Code (concerning sales) was a mere illustration.
[16] The predecessor of the French company now called Engie.
[17] Brussels, 19 January 2001, *TBH* 2001, *108*, TRV 2001 ann. C. Croes. The commercial court of first instance had incorrectly judged otherwise, see president commercial court Brussels 26 October 1999, *Bank. Fin.* 1999, 478, with my critical note H. DE WULF, "Bestuurders tussen hamer en aambeeld bij een groepsintern overnamebod," *Bank-en financiewezen- Revue de la banque* 1999, pp. 468–477.

[18] See arts. 21-23 of the Royal Decree of April 27 2007 on public take-over bids.
[19] About disgorgement as applied to directors' breaches of duty under UK law, see P. DAVIES and S. WORTHINGTON, *Gower's Principles of modern company law*, 10th edition, 2016, 16-114, p. 566-567. The authors point out (on p. 563, section 16-112) that another remedy, "restoration" of property, is applied when a director disposes of the property of a company in unauthorized ways, and that in such cases, directors, though generally they are not trustees of the company (who would hold the property of the company in trust), are nevertheless held to be constructive trustees of the company, for example in JJ Harrison (Properties) Ltd v Harrison (2002) 1 *BCLC* 162 CA (they refer for "an early recognition of the principle" to Re Forest of Dean Coal co (1878) 10 Ch. D. 450.).

over to the principal (unless it is remuneration agreed by the principal). The doctrine of tracing[20], as developed in trust law, recognizes that the principal has to a certain extent "real" (*in rem*, proprietary) rights on the assets that were taken from him by the fiduciary and that this right is to a certain extent enforceable against third-party acquirers. The fiduciary who violates his duty of loyalty will not be allowed to limit himself to paying damages: he will have to transfer the assets or benefits that he diverted and took for himself, even if the value of those assets exceeds the damage suffered by the principal. This is because the principal has a subjective right to the diverted assets, and it's not merely a case of interests that have been damaged. In other words, as Marc Kruithof has explained in his brilliant Ph.D. thesis[21], these are cases that Calabresi and Melamed would call violation of a property right, not merely of a liability rule[22].

2. *Is there a duty of loyalty for company directors under Belgian law?*

The brief answer to the question in the title of this subsection is that the court of cassation seems to have recognized a duty of loyalty for directors[23], but that this has a different meaning than the duty of loyalty as understood in UK or American law. In my 2001 Ph.D. thesis I argued that Belgian courts could construe an Anglo-American style duty of loyalty, minus the disgorgement remedy, based on the good faith principle enshrined in article 1134, para 3 Civil Code[24].For some people, such as company directors, good faith implies that in the performance of the tasks they contractually agreed to perform, they must completely subordinate their own interests to those of their principal. In other words, they must live according to the no profit rule long recognized in UK fiduciary law. This clearly goes beyond the good faith duty that is part of all contractual relationships, which usually however does not at all prevent the contracting party from pursuing its own interest at the expense of its counterparty. My Ghent

[20] For Belgian lawyers who want an introduction to the English concept of tracing, I recommend to begin with C. AE UNIKEN VENEMA, *Van Common law en Civil law*, Zwolle, Tjeenk Willink, 1971, 91 ff. For a discussion of the tracing remedy as applied to corporate directors' breaches of duty, P.L. DAVIES and S. WORTHINGTON, *Gower's Principles of modern company law*, 10th edition, 2016, 564 refer to *Relfo Ltd (In Liquidation) v Varsani* (2014) EWCA civ 360 CA; (2015) 1 *BCLC* 14.

[21] M. KRUITHOF, *Belangenconflicten in financiële instellingen -Deel I*, unpublished Ph.D. thesis, Ghent University, 2009 (available in Flemish university libraries), see p. 237-238 for his explanation about the connection between Calabresian property rights and subjective rights, topic which he also dealt with in a published article on disgorgement, M. KRUITHOF, "De vordering tot voordeeloverdracht", *TPR* 2011,(13) 39-41 .

[22] G. CALABRESI and A.D. MELAMED, "Property rules, liability rules, and inalienability: one view of the cathedral"; *Harvard Law Review* 1972, vol. 85, 1089-1128.

[23] Cass. 25 June 2020, AR C.18.0144.N *NJW* 2021, 211, ann. S. DE GEYTER, *TBH* 2020, 943 (summary), *TBBR* 2021, 79, ann. M. Servais.

[24] H. DE WULF, *Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap*, Antwerp, Intersentia, 2002, 363-364 and 405 ff.

colleague Marc Kruithof later showed that in cases where a duty of loyalty applies, even a disgorgement remedy ("*voordeelsafdracht*" in Dutch) could be construed under Belgian law[25].

However, as I will explain, Belgian courts may pay lip service to a duty of loyalty for directors[26], but such a duty is in reality not a part of Belgian positive law, of law as it stands, precisely for lack of court cases. This is illustrated by a recent decision of the Antwerp court of appeal that refused to recognize the existence of a corporate opportunity doctrine under Belgian law.[27] If a duty of loyalty for directors were taken seriously, courts would first of all use it to plug the gap left by statutory rules on conflicts of interest, which don't apply to partnerships[28], only to corporations. This hasn't happened, even though courts have had the opportunity for well over a century.

To correctly understand my assertion that an Anglo-American style duty of loyalty is not part of Belgian law, I need to indulge in a very brief digression to make clear what I mean by "Belgian law as it is" or "positive Belgian law". Without completely adopting his views, I have a lot of sympathy for the "American realist" view of which O.W. Holmes was the founder.[29]Essentially, what constitutes positive law is an empirical matter. To find it, one should look at statute[30] and court decisions, but look beyond the language of statute and the rhetoric of judgements, to determine what the law does in actual practice. When there is a discrepancy between the language of statute and how it is applied to actual conflicts, or between what judges say they do and what they actually do, then the latter wins. Common

[25] M. KRUITHOF, "De vordering tot voordeeloverdracht", *TPR* 2011, 13-74.See below for a further discussion of this issue. So I had been wrong in rejecting the possibility of disgorgement in my own Ph.D. thesis. But, as I will point out again in this text, Belgian courts do not apply the disgorgement remedy in cases of directors' conflicts of interest, so Kruithof's theory remains just that: a theory waiting to be transformed into law by our courts.

[26] For an overview of what scholarship deems to be the implications of a director's duty of loyalty under Belgian law, see D. WILLERMAIN, "Les devoirs des dirigeants sociaux, spécialement des administrateurs de sociétés anonymes" in X. Dieux, D. Willermain (eds.) *Droit des sociétés*, Brussels, Bruylant, 2012,(49), esp. 71-86; H. DE WULF, *Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap*, Antwerp, Intersentia, 2002, 363 ff. ; B. TILLEMAN and K. DEWAELE, *Bestuur van* vennootschappen, Brugge, die Keure, 2022, 314-379; S. DE DIER and A. VAN BEVER, "Zo zijn we niet getrouwd. Over de loyaliteitsplicht van werknemer en bestuurder", *Jura falconis* 2008-2009, 321-391; S. DE GEYTER and H. DE WULF, "Rechten en plichten van de bestuurders: een overzicht van de algemene juridische beginselen," in *Vademecum van de bestuurder*, Mechelen, Kluwer, 2007, pp. 123–152.

[27] Antwerp 24 March 2022, *TRV-RPS* 2022, 609, ann. K. Dewaele.

[28] Companies with unlimited shareholder liability, in Belgium the *société simple*, *société en nom collectif* and *société en commandite*.

[29] See O.W.HOLMES, "The Path of the Law", *Harvard Law Review* 1897, vol. 10, 457-478.

[30] One gets the impression that some "hardcore" realists only attach importance to what *courts* do, but suffice it here to say that that is a mistake (the argument that if a statutory rule is not applied by courts to actual conflicts, it is not really "living law" seems to me to be deeply flawed, but I can't develop this here).

opinion expressed in scholarship is often a very poor, in fact downright misleading indicator of what the law is. In addition, it certainly does not constitute law when all Belgian authors who have written about the matter agree that, say, the rules on financial assistance should not be applied in situation X, but there is no judgment confirming this and it does not flow undisputably from the literal text of statute. Likewise, if all authors agree that it can be deduced from art. 1134 s 3 Civil Code[31] that company directors are subject to rules on corporate opportunities, but no Belgian court has ever asserted as much, that corporate opportunity doctrine is not part of Belgian law. It could become part of Belgian law once judges use their interpretive powers to construe it and apply it if one assumes that Belgian judges can indeed do this, but as long as that does not happen, it is not part of the law.

a. The duty of loyalty in Belgian court cases

Belgian courts seem to have recognized the existence of a duty of loyalty of directors, since there are several decisions by courts of appeal in which the court rules that directors are subject to a "*devoir de loyauté*".[32] Most of these cases deal with directors who developed economic activities that seemed to compete with those of the company where they were director, or with directors violating their duty to keep non-public company information confidential, a duty nowhere to be found in statute but "generally accepted" (by lawyers, not by directors). I have not found any cases where disgorgement remedies were applied, but injunctions in the form of cease -and desist orders are issued, which amounts to the enforcement of the duty not to compete for the future. In literature, the duty of loyalty is usually also invoked as the legal basis for the undisputed duty of confidentiality of directors, that is their duty to keep knowledge about the inner workings of the company secret, even when the information does not qualify as a business secret, and to keep information about board deliberations confidential as well, even towards shareholders[33]. It also entails a duty not to use non-public information

[31] The rule that contracts give rise to contractual duties that were not explicitly formulated in the contract, but flow from a good faith interpretation of the contract.

[32] For instance, Ghent 13 October 2014, *DAOR* 2015, 94 (ban on competition by director to the company; in this case the director was also a controlling shareholder, who had sold "his" company); Antwerp, 9 November 2017, *TRV-RPS* 2018, 418, ann. N. Hallemeesch, *JDSC* 2019, ann. M. Coipel (ban on competition by director and therefore ban on becoming a director of a competing company; this ruling was quashed by the June 25 2020 decision by the court of cassation (which is taken by many to be the recognition by our highest court of a duty of loyalty for directors) because it had ruled that the non-competition duty could endure after the resignation of the director); Liège, 18 November 2020, *JDSA* 2021, 447, *JLMB* 2021, 350 (duty of loyalty implies directors have to give priority to the company's interest and are bound by a duty of confidentiality; the case was one between two shareholders, where one tried to exclude the other from the company). See also the first instance decisions Commercial court Liège 17 November 2015, *DAOR* 2016, nr. 119, 43 (competition by director with company) and president commercial court Liège, 5 August 2019, *JLMB* 2019, 1462, *JDSC* 2020 (summary), 167, case note M. Caluwaerts (duty of confidentiality and ban on using company information for private purposes).

[33] P. VAN OMMESLAGHE "L'acquisition du controle d'une société anonyme et l'information de l'acquéreur" in *Mélanges R.O. Dalcq: responsabilités et assurances*, Brussel, Bruylant, 1994, 591 rightly pleaded for some realism about the question whether directors can communicate with controlling shareholders about board deliberations, and I followed in his footsteps in H. DE WULF,*Taak en*

about the company for one's own benefit, even outside the rules about insider dealing concerning listed companies[34].

It seems to be generally accepted that the Belgian court of cassation has recognized the existence of a duty of loyalty for directors in its June 25 2020 ruling.[35] This case was about a decision of the Antwerp court of appeal[36], which had explicitly stated that directors of companies are subject to a duty of loyalty as a result of article 1134 para 3 Civil Code, the principle that all contractual obligations have to be construed and performed in good faith[37]. The court of appeal confirmed the opinion expressed in most legal doctrine that, while there are no statutory rules in Belgium that impose a non-compete obligation on every company director, such a general duty to refrain from developing competing activities can indeed be deduced from the good faith rule and is the expression of a duty of loyalty. In this particular case, the court of appeal, after having acknowledged that this duty is of a contractual nature and does not extend beyond the duration of the contract between director and company, added that there may be cases where the good faith non-compete duty endures after the director has ceased his functions as a director at the company[38]. The appeals court argued, on the facts of the case, that such an "afterglow" effect of the non-compete duty was warranted in this particular case, because the company was a *de facto* closed company, of an *intuitu personae* nature, and the director in question had been chiefly responsible for client recruitment and retention. The Court of cassation quashed the appeals decision on this latter point -the existence of a post-contractual duty for former directors not to compete as part of a duty of loyalty deduced from the obligation to perform the director's mandate in good faith. In coming to its conclusion, the court of cassation cites the reasoning of the court of appeal, including the parts on the duty of loyalty, but nowhere does the court of cassation positively express the idea that directors are subject to a duty of loyalty and that this can be seen as an emanation of the good faith principle from art. 1134 para 3 CC. The renowned/notorious finer points of "cassation technique" here again, as in many judgments, allow the court of cassation

loyauteitsplicht van het bestuur in de naamloze vennootschap, Antwerp, Intersentia, 2002, 351. If Didier Willermain was to be believed, our more lenient attitude had become received opinion, see D. WILLERMAIN, "Les devoirs des dirigeants sociaux, spécialement des administrateurs de sociétés anonymes" in X. Dieux, D. Willermain (eds.) *Droit des sociétés*, Brussels, Bruylant, 2012,(49), 81.

[34] See D. WILLERMAIN, "Les devoirs des dirigeants sociaux, spécialement des administrateurs de sociétés anonymes" in X. Dieux, D. Willermain (eds.) *Droit des sociétés*, Brussels, Bruylant, 2012,(49), 75.

[35] Cass. 25 June 2020, AR C.18.0144.N *NJW* 2021, 211, ann. S. De Geyter, *TBH* 2020, 943 (summary), *TBBR* 2021, 79, ann. M. Servais.

[36] Antwerp, 9 November 2017, *TRV-RPS* 2018, 418, ann. N. Hallemeesch, *JDSC* 2019, ann. M. Coipel.

[37] The court of appeal of Liège, 18 November 2020, *JDSA* 2021, 447, *JLMB* 2021, 350 confirmed the existence of a duty of loyalty for directors and to underpin its opinion extensively cited Didier Willermain's contribution "les devoirs des dirigeants sociaux, spécialement des administrateurs de sociétés anonymes" in X. Dieux and D. Willermain (eds.) *Droit des sociétés* Brussel, Bruylant, 2021, 74 ff.. This means at least 3 of the 5 courts of appeal have recognized the existence of such a duty: Antwerp, Liège and Ghent (see footnote 32). I'm not aware of judgments from Brussels or Mons.

[38] The court of appeal of Ghent had earlier issued a similar ruling (the Antwerp decision in part uses very similar wording to the Ghent decision) in which it had also ruled that exceptionally, the non-compete obligation may apply after the director's contract has been terminated: Ghent 13 October 2014, *DAOR* 2015, 94.

to issue a ruling the ambit of which is unclear. I think it would be wrong to argue that, if cassation had wanted to quash the decision of the appeals court because the appeals court had wrongfully accepted the existence of a duty of loyalty, it would have taken the opportunity to do so; the court of cassation systematically tries to find, and to limit itself, when deciding to quash a decision of a fact-finding court, the narrowest ground possible to quash the lower court's decision, thereby often creating maximum confusion, a grave dereliction of duty for a court that was established to help clarify what the law is. Nevertheless I agree with most commentators that we should be allowed to deduce from the ruling that Cassation agrees with the existence of a duty of loyalty for directors (but that such a duty does not imply a post-contractual non-compete duty, but only a duty limited to the duration of the contract). If the court of cassation did not want the legal community to reach this conclusion, it should have said so explicitly, and since it hasn't done so, it has only itself to blame if it's being misunderstood.

Even if one agrees that court cases have confirmed the existence of a duty of loyalty and that the court of cassation has also done so, one must admit that, when reading those cases, they agree with Didier Willermain and myself[39] that the basis of such a duty is the "good faith" article from the Code civil, but they don't add that in case of a director, this principle of good faith entails a total subjugation of the director's interest to that of the company or a no -profit rule. The cases constitute a "regular" application of the good faith principle, simply deducing the existence of an unwritten rule from the principle that contracts should be executed in good faith and that this can lead to creating obligations that are not explicitly formulated neither in statute nor in the relevant contract. Long before Didier and I began to argue that the duty of loyalty is based on a particular application of good faith, courts had already deduced a non-compete obligation from art. 1134 para 3 civil Code without recourse to the concept of duty of loyalty[40]. And indeed one may wonder whether the non-competition duty really is an application of the duty of loyalty. For that one would need to show an application of the idea of subordination of personal interests to those of the company. Arguably, this element is present when a director personally competes with the company where he is a director, that is, by personally engaging in competing activities. That is outlawed. However, the attitude of courts is far less certain concerning directors who simply become directors at a competing firm that neither they nor close family members set up. Belgian court cases provide very little guidance on whether this is allowed. In legal doctrine it is usually assumed that this should be regarded as unlawful competition as well. But I would now argue[41] that such cases are in fact examples, as a rule, of serving two masters, akin to "merely functional" conflicts of interest, for which there are no clear-cut rules: one should look at all the facts of the case and

[39] See *supra*, footnote 26.

[40] See the old case law discussed in, for instance, V. THIELMAN, " Juridische problematiek van de concurrentie gepleegd door ex-werknemers, zelfstandige medewerkers, werkende vennoten", *DAOR* 1990, nr. 17 p. 55.

[41] In fact, Didier and I already defended a nuanced approach in past writings, see his "Les devoirs des dirigeants sociaux, spécialement des administrateurs de sociétés anonymes" in X. Dieux and D. Willermain (eds.) *Droit des sociétés* Brussel, Bruylant, 2021, p. 85 and my *Taak en louyauteitsplicht*, p. 694.

based on that judge whether the director was acting in good faith, in the sense of art. 1134 para 3 Civil code (objective, not subjective good faith) when he accepted to become a director at a competing firm without prior informed consent of the firm where he already was a director.

The lack of a corporate opportunity doctrine under Belgian law is another illustration of the fact it is doubtful whether we really have a duty of loyalty for directors. Here, Didier was a pioneer. Together with myself, he was the first to introduce UK and US ideas about corporate opportunities in Belgium[42]. By now, France, Germany and the Netherlands can all be said to have recognized some form of corporate opportunity doctrine.[43] Not so Belgian courts. Didier Willermain and I have argued that Belgian courts could build a corporate opportunity doctrine on art. 1134, para 3 Civil Code and could more or less copy American ideas, such as the line of business tests, to determine whether an investment opportunity can be considered to be a corporate opportunity. If an investment opportunity is not part of the current or prospective activities of a company, usually the company will not have an interest in the opportunity, and hence the director would be allowed to take it, since there would not be a conflict between his personal interest and his duty to serve the interests of the company.

In a recent ruling, the Antwerp court of appeal[44] judged that the corporate opportunity doctrine does not form part of Belgian law[45]. The facts of the case were quite complicated, but essentially some directors of a company that managed public parking garages were sued by the company because they had bought individual parking spaces in those garages in order to rent them out to people looking for a parking space. A major component of plaintiff's claim

[42] See H. DE WULF,*Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap*, Antwerp, Intersentia, 2002, chapter 6, p.705-842; D. WILLERMAIN, " Les corporate opportunities notamment au sein des groupes de sociétés", *TBH* 2005, 453-479. Like in those two Belgian contributions, a comparative perspective can be found in e.g. D. KERSHAW, "Lost in translation: corporate opportunities in comparative perspective", *Oxford Journal of Legal Studies*, 2005, 603-627 and M. GELTER and G. HELLERINGER, "Opportunity makes a thief: corporate opportunities as legal transplant and convergence in corporate law", *Berkeley Bus.L.J.* 2018, 92-146.

[43] For France, see e.g. recently (the first case decided by the cour de cassation dates to 1998) Cass. fr 21 September 2022, nr. 20-20959 and B. DONDERO, "Loyauté des dirigeants: retour sur les opportunités d'affaires", *Bulletin Joly Sociétés,* December 2022, Lextenso nr. BJS201m5; G. HELLERINGER, "Le dirigeant à l'épreuve des opportunités d'affaires", *D.* 2012, 1560. For the Netherlands, the classic contributions in scholarship are those by Verdam, e.g. in addition to his 1995 Ph.D ("Corporate opportunities", Schoordijk Institituut), A.F. VERDAM, "Corporate opportunities. The appropriation by company officers of business opportunities belonging to the company", *NILR* 1998, 233 and see among the court cases e.g. Ondernemingskamer Gerechtshof Amsterdam, 31 August 2008, *JOR* 2001, 208. For Germany, the "breakthrough" piece of scholarship was probably the Phd. thesis of J. WEISSER, *Corporate opportunities. Zum Schutz der Geschaftschancen des Unternehmens im deutschen und im US-amerikanischem Recht,* Köln, Heymanns, 1991, 293 p. although F. Kübler had published earlier important articles on the topic and Mestmäcker even briefly discussed the American doctrine in his 1958 *Habilitation*; for a more or less recent application by the *Bundesgerichtshof* see BGH 4 December 2012, *NZG* 2013, 216.

[44] Antwerp 24 March 2022, *TRV-RPS* 2022, 609, ann. K. Dewaele.

[45] Full disclosure: at the request of the law firm representing some of the directors who were sued in this case, I submitted an expert report to the courts in this case in which I also argued that the corporate opportunity doctrine is not part of Belgian positive law.

was the allegation that the opportunity to buy those parking spots was a corporate opportunity. The company at which the defendant directors served had, apparently, never before bought parking lots, since it limited itself to managing them. The court of appeal ruled (among other things) that Belgian law does not contain a corporate opportunity doctrine and that the directors could not therefore in any case be held liable on that basis, neither on the basis of a duty of loyalty or the duty to perform contracts in good faith. The court added, however, that the directors could potentially be held liable for a violation of their duty of care, if plaintiffs showed that the directors, in buying the parking spaces, had manifestly acted contrary to how a reasonable and diligent director would have acted in similar circumstances, in other words, if they had acted negligently. I believe [46] this shows there *is* room for the development of a corporate opportunity doctrine under Belgian law, but that it should not be seen as an illustration of a duty of loyalty in the narrow sense of a duty to at all times subordinate one's own interest to those of the company. If other courts follow the lead of the Antwerp court of appeal, they will look at each case through the lens of negligence. Prior to this Antwerp judgement, the only two Belgian corporate opportunity decisions (which did not use the word) that were published were both set in a group context, and dealt with the issue of whether a *shareholder*, the parent company, was entitled to "take" the opportunity[47]. In both cases the court ruled that Belgian law did not contain explicit rules on the matter and that, as long as the shareholder did not abuse its power as a parent company, it should be left to group policy to determine which investment opportunities are awarded to which company within the group[48]. In fact, this amounts to an application of the Rozenblum doctrine[49] to the allocation of corporate opportunities within groups.

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[46] Like K. Dewaele in his annotation of the judgement in *TRV-RPS*, see footnote 34.

[47] President commercial court Brussels 27 April 1978, *TBH* 1978, 345. In this "Xerox" or "Barro-Flambo" case, a US parent company "diverted" to itself a lucrative government contract that management of the subsidiary had won after lengthy negotiations. Minority shareholders of the subsidiary sued, but the judge essentially ruled that allocation of contracts between group companies was left to the discretion of group policy, unless where the "taking" would have led to the bankruptcy of the subsidiary. The second case is Antwerp, 22 May 2003, *TRV* 2005, 489, ann. H. De Wulf. In this Antwerp case, a parent decided that a merger with a company outside the group would be brought about through one of its subsidiaries and not through another subsidiary, even though the line of business of the latter was quite similar to the business of the outside company that was absorbed through the merger, with a valuation that was very favorable to the acquirer (the subsidiary). Minority shareholders in the "neglected" subsidiary sued unsuccessfully, the court again ruled that such policy choices were at the free discretion of controlling shareholders.

[48] See my approving comments on the Antwerp judgment mentioned inthe previous footnote in H. DE WULF, "De spanning tussen de vrijheid om een groepsbeleid omtrent corporate opportunities te ontwikkelen en de legitieme verwachtingen van minderheidsaandeelhouders," *TRV* 2005, pp. 491–501.

[49] Referring to the doctrine used to evaluate intragroup-transactions, as inspired by the French court decision on "abus de biens sociaux" in "Rozenblum", Cass. (crim.) fr., 4 February 1985, *D.* 1985, 478 ann. Ohl, *JCP* 1986, II, 14613 ann. Jeandidier, *Rev. soc.* 1985, 648 ann. Bouloc. This doctrine was also adopted by Belgian courts, see e.g. Brussel 15 September 1992 ("Wiskeman"), *TRV* 1994, 275, ann. A. François, *JT* 1993, 312 and Brussels 10 September 2004, *BFR* 2006, 25 ("Lendit"), ann. K. Macours. See

The corporate opportunity doctrine illustrates that directors may also be confronted with conflicts of interest outside the context of any board deliberation or any decision they take on behalf of the company. The Belgian statutory rules on conflicts of interests of directors do not apply to such "private" situations. Hence the question whether those statutory rules can be complemented by a judge-made duty of loyalty that would apply to such private situations.

b. Filling statutory gaps with a judge-made duty of loyalty, including a disgorgement remedy ?

In Belgium, to this day, it has never been accepted that the statutory rules on directors' conflicts of interest could be supplemented by judge-made rules based on a duty of loyalty. Between 1995 and 2019, the statutory rules allowed conflicted directors in non-listed companies to take part in decision-making at board level. People would have rejected any judgement that would have imposed an abstention rule, because this would have been manifestly contrary to legislative intent. For the same reason, it would not be accepted if someone (other than parliament) tried to subject dual loyalty situations ("merely functional" or "merely qualitative" conflicts of interest of company directors) to conflicts of interest rules, since they are clearly not covered by the statutory rules in e.g. art. 7:95 BCCA, which only cover conflicts where the director has a personal pecuniary interest in the decision or transaction.

However, our court of cassation has recognized a general principle of law outlawing agents to "contract with themselves", the doctrine of *Selbsteintritt* discussed above which prevents an agent from lawfully turning around and directly or indirectly closing the deal that the principal was pursuing with himself, unless the agent acts with the fully informed consent of the principal. While there is some debate in literature whether directors should, in their relationship with a company, be treated as agents or as contractors[50], nobody could or should dispute that directors can and should be treated as agents when it comes to determining the rules on accountability towards the company to which they are subject. This means that in situations not covered by statutory rules that impose different rules, they are subject to the Selbsteintritt-doctrine as developed by our court of cassation. In my opinion, this means that courts could apply this doctrine to directors in partnerships, where there are no statutory rules on conflicts of interest. It would be wrong to deduce from the fact that statutory rules on conflicts of interest of directors only apply to corporations, not to partnerships, that the Belgian legislator took the decision, implicitly expressed in statute, that directors of partnerships

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also E. WYMEERSCH " Het recht van de vennootschapsgroepen" in *Rechtspersonenrecht*, W. Van Eeckhoutte ed., PUC Willy delva 1998-99, Gent, Mys&Breesch, 1999, 404.

[50] A false dichotomy in my view. For a summary of the discussion, see B. TILLEMAN and K. DEWAELE, *Bestuur van vennootschappen*, Brugge, die Keure, 2022, p. 6.

should not be covered by conflicts of interest rules. There is not a shred of evidence to support such a claim. Hence, I would argue, where a director of a partnership engages in self-dealing, in the sense that he acts, directly or indirectly, as the counterparty of the partnership he serves, he needs to inform the company and must abstain from contracting, unless the partnership gives its fully informed consent to him acting as counterparty. I think one can debate whether in such a situation this consent should be given by the partners or by any other unconflicted directors the partnership may have. In partnerships, the directors will usually also be partners, and often there will be complete identity between the two groups, but where this is not so, I think it would be better if a meeting of partners (excluding the conflicted director) decided on whether to consent to the deal[51]To the best of my knowledge, Belgian courts have never applied these rules to partnership directors, so that, according to my own criteria, these rules are not part of Belgian positive law yet, especially since I think partnership directors very rarely behave in accordance with these principles: the general opinion among partnership directors and their legal advisors no doubt is: "there are no rules on conflicts of interests in partnerships, unless we introduced them ourselves in our articles of association". But courts could make the rules part of Belgian law by imposing them in judgements.

In the same vein, courts could introduce a disgorgement remedy, but have not yet done so. Marc Kruithof has convincingly argued that in cases of (civil) fraud, Belgian law already contains a disgorgement remedy[52]. He seems to argue that every situation of conflict of interests should be treated as a case of fraud, in the sense of conscious and intentional disregard for a subjective right of the principal[53]. More generally, disgorgement ("voordeelsafdracht") is, in his (convincing) view, a possible remedy in every situation where a person is protected by what Calabresi and Melamed called property rules which, Kruithof again convincingly argues, are simply what we continental Europeans call subjective rights (as opposed to mere interests, merely protected by a liability rule, entitling the victim to damages instead of disgorgement). For agents, it is clear they are subject to article 1993 Civil Code which states that an agent is bound to transfer to the principal anything he receives as part of his activities as an agent, even when the principal did not otherwise have a claim to whatever was received. Since, as we mentioned, art. 1993 Civil Code no doubt also applies to the directors of companies, whether they are partnerships or corporations, this could be construed as the basis of a disgorgement remedy -albeit without the "tracing" rights that are typical of disgorgement remedies under English law[54]. But to the best of my knowledge, Belgian courts never apply the disgorgement remedy to company directors (except in cases where the director committed a criminal offense and the rules on "bijzondere

[51] But I'm open to arguments by specialist in partnership law in favour of the power of unconflicted directors to give consent.

[52] M. KRUITHOF, "De vordering tot voordeeloverdracht", *TPR* 2011, 13-74, see esp. his conclusion on p. 61, nr. 44.

[53] M. KRUITHOF, *Belangenconflicten in financiële instellingen -Deel I*, unpublished Ph.D. thesis, Ghent University, 2009 (available in Flemish university libraries), at 244, 249 and esp. p. 266 nr. 257 ev.

[54] See H. DE WULF,*Taak en loyauteitsplicht van het bestuur in de naamloze vennootschap*, Antwerp, Intersentia, 2002,444 and my elusive quest to find a *proprietary* basis in Belgian law for remedies for directors' breach of loyalty duties on p. 822-838 of that book.

verbeurdverklaring"/"special forfeiture" from the Criminal Code can be applied). I suspect this is because the statutory rules on directors' conflicts of interest contain "only" two remedies: the possibility, primarily for the company or individual shareholders, to demand that the transaction be declared null and void, and the possibility for both the company and other victims to claim damages. These statutory provisions have probably, in the minds of judges and practicing lawyers, obscured the possibility of claiming disgorgement -although I have to add that, admittedly, the avoidance remedy is, of course, a functional equivalent of disgorgement, in that it ideally restores the situation as it would have been without the breach of duty. Here, I would be more reluctant to state that disgorgement in cases of conflicts of interest is not part of Belgian law as it stands, because of the clear text of article 1993 Civil code, which *is* applied by courts to other agents than company directors, and even to directors outside situations of conflicts of interest.

3. *A duty of loyalty for shareholders towards the company or towards each other?*

It has become almost fashionable (for academics) to state that shareholders have a duty of loyalty towards each other, or towards the company, or at least the controlling shareholder owes a duty of loyalty to minority shareholders[55]. I believe such statements result from a confusion between a duty of loyalty -which does not exist (in Belgium) for any type of shareholder- and the undisputable fact that shareholders can abuse their voting rights and that this can lead to the avoidance of resolutions of the general meeting based on art. 2:42 ff. BCCA. *In this sense* (and in that sense only: abuse can lead to nullity) should shareholders respect the company's interest. But they hardly have a duty not to pursue profits "at the expense" of the company, or "the shareholders taken as a group". Under Belgian law, a duty of loyalty for shareholders does not exist, judges could not lawfully construct it if they wished to, and recognizing such a duty would be both undesirable and useless. Even in the US and Germany, where such duties are recognized, one can doubt the usefulness of the court-developed doctrines concerning such a *Treuepflicht*, and in any case the doctrines do *not* mean that shareholders are asked to subordinate their interests to those of other shareholders in the way a director is subject to the no profit rule. We want to have a closer look at German and Delaware law, because references to it are sometimes used as a rhetorical trick by Belgian proponents of a duty of loyalty for controlling shareholders in public corporations.

a. *The duty of loyalty of shareholders in Germany: 'Linotype' and 'Girmes'*

[55] A recent, thorough and well-argued (but nevertheless unconvincing) treatment of the question -arguing that a duty of loyalty for controlling shareholders is already part of Belgian law- is N. HALLEMEESCH, "Loyaliteitsplicht van meerderheidsaandeelhouders. Aard en misbruik van stemrecht herbekeken", *TPR* 2018, 323-391.

It's worthwhile to have a closer look at the landmark decisions "Linotype"[56] and "Girmes"[57] of the German *Bundesgerichtshof* (BGH) that established the existence in public corporations (i.e. of the *Aktiengesellschaft* type) of a duty of loyalty of shareholders towards each other, in order to find out what the specific meaning, ambit and foundation of these duties is.

In Germany, it had for a very long time been recognized that in *partnerships* and in *private* corporations (the *GmbH*), partners/shareholders have a duty of loyalty (*Treuepflicht*) towards each other.[58] The reasons why in a private corporation shareholders can have a duty of loyalty towards each other are twofold, according to the BGH: first, the internal organization and which activities it engages in, are in a private corporation largely determined by the shareholders, just like in partnerships (whereas public corporations are, in Germany[59] and in the eyes of the BGH, much more of a "prepackaged" institution the governance of which is far less influenced by the choices of majority shareholders). Second, in private corporations majority shareholders can have direct influence on the directors and cause these to take actions to the detriment of minority shareholders, among other reasons because in German private companies, the general meeting of shareholders has the statutory right to give binding instructions to directors.

In its 1988 Linotype decision, the BGH for the first time recognized that in a *public* corporation too, a controlling shareholder can have a duty of loyalty towards a minority shareholder. The case was about the voluntary dissolution of a public company followed by the acquisition of most of its assets by its majority shareholder, a private company, that continued its business, using those assets. Private company A had wanted to acquire all assets of public company T, in order to integrate T's production facilities into that of its own factories. At the time of the judgement, German law required unanimous consent of all target company shareholders for a legal (statutory) merger in which T would be absorbed by A. A tried to obtain such unanimous consent, but failed. It did however succeed in acquiring 96% of the shares in T, more than enough to dissolve T -for that an 80% majority at general meeting was required. The dissolution was decided and after that, A acquired all assets of T and integrated them into its own activities. A minority shareholder of T who had voted against the dissolution, sued to block the dissolution and the case ended up with the BGH. The BGH pointed out that it had long been accepted that partners in a partnership and shareholders in private companies have a duty of loyalty towards each other. It had also previously ruled that shareholders in both private and public corporations have a duty of loyalty towards the company[60]. But until its 1988 Linotype decision, the BGH had denied a duty of loyalty of shareholders towards each other in public corporations. In "Linotype" the court said that had been a mistake: the legal

[56] BGH 1 February 1988, *BGHZ* 103, 184 (195), *NJW* 1988, 1579 (1582).
[57] *BGHZ* 129, 136, *NJW* 1995, 1739.
[58] For the GmbH, see *BGHZ* 65, 15, 18/19.
[59] Where most statutory rules on the AG (public corporation) are mandatory.
[60] See *BGHZ* 14, 25/38.

form of company should not play a role in determining whether a duty of loyalty exists, only its internal structure.

But the reasoning bringing the court to that conclusion is remarkable and shows that the BGH, had it been Belgian, would have used the concept of abuse of law or at least abuse of majority power (*abus de majorité*) to justify its conclusion, and that the BGH did not introduce a no profit rule or a duty of the majority shareholder to subordinate its interests to those of the minority shareholders.

The court first rejected the minority shareholders' argument that by choosing the route of a dissolution to acquire the assets of the target company, the majority shareholder had unlawfully evaded the statutory protection offered to minority shareholders in mergers. The court opined that the minority protection in mergers is intended to protect shareholders who remain shareholders in a continuing business entity that is subject to new rules (eg when a private companies is merged into a public company, with fewer rules on minority protection). It is not intended to also apply when a businesses' existence is ended as a result of a dissolution of a company. Minority shareholders could certainly not stop the dissolution, the court ruled, but could only sue for damages if they could show that, for instance, the majority shareholder was pursuing "unjustified (private) benefits" ("Ungerechtfertigte Vorteile"). Secondly, the BGH ruled that, while decisions of general meetings of public corporations could indeed be invalidated[61] on the basis of a "judicial review of their contents/merits" ("sachliche Inhaltskontrolle"), including on the basis of *Rechtsmissbrauch*, i.e. abuse of right, this was not possible for the decision to dissolve the company and end its activities: for that discretionary decision the procedure and majorities required by statute were sufficient and could not be supplemented with an *ex post* check by the court on, for instance, the purpose pursued with the dissolution. Such a "material content control", the BGH (convincingly) claimed, would amount to binding (the majority of) shareholders to their investment in a way not contemplated by the legislator. In specific cases, it could be that, based on the specific facts of the case, the dissolution constituted *Rechtsmissbrauch*, but contrary to what leading German corporate law professors had argued, the court rejected the opinion that dissolution was only justified if it was intended to liberate the invested capital and make it available for other uses by the shareholders. If dissolution was used with a view to excluding minority shareholders from the busines, that would not in itself constitute an unlawful evasion of the rules on shareholder exclusion nor in itself be a form of abuse of law. If the minority shareholder had, as a result of the dissolution, an equal[62] chance with the majority shareholder of acquiring the business or certain of its assets, the minority shareholder was not in a similar situation as in an exclusion.

[61] Declared null and void.
[62] One assumes the BGH here meant "proportionate", namely to the number of shares held by each shareholder.

Nevertheless the BGH ruled that in the specific case brought before it, the decision of the general meeting could indeed be annulled by the fact-finding court, because it had been established that prior to the general meeting decision on dissolution, the majority shareholder had been in contact with the board of the target and had struck deals about the acquisition of certain assets with that board. In doing so, the majority shareholder had sought to acquire "specific advantages" ("Sondervorteile", private benefits) to the detriment of minority shareholders. As a result, the latter had not been in a position to acquire the business or parts of it and to continue its exploitation, alone or together with other investors. This influence that the majority shareholder had exerted over the board would have constituted a breach of its duty of loyalty, even if its talks with the board had not resulted in binding agreements concerning certain assets. Such a duty of loyalty should be assumed, the court explained, in public companies as well, if the majority shareholder, just as is typically the case in partnerships and private companies, had been in a position to influence the board so as to acquire benefits for itself to the detriment of minority shareholders. For the existence of a duty of loyalty, it's not the legal form of the company, but its inner *de facto* governance structure ("innere Struktur") that is decisive.

It is clear that the *Treuepflicht* of controlling shareholders recognized by the BGH in this case, is premised on the shareholder potentially influencing the board (it had never been disputed that the board had a *Treuepflicht* towards the company). It is also clearly fact-specific. It clearly does not amount, as would a duty of loyalty in the true sense, to a general duty of the controlling shareholder to subordinate its interests to those of the company or the other shareholders, nor to a duty for the controlling shareholder to abstain from voting or install other process measures to protect the decision from undue influence. The *Linotype* case revolved really - in spite of the rejection by the BGH of the application of *Rechtsmissbrauch* which in this context it seems to understand as what we in Belgium would call *détournement de pouvoir*[63]- around the abuse of the possibility to dissolve the company in such a way as to divert benefits to oneself as a majority shareholder while denying minority shareholders to benefit in the same way from this dissolution (it seems clear to me that the idea of equal treatment of shareholders is an important subtext in the decision). It is unclear what the added benefit of invoking the existence of a duty of loyalty in this case was. Clearly, some unwritten doctrine needed to be invoked since it could not be argued that the majority shareholder had violated any statutory or contractual rules. Even if the German court clearly was of the opinion that the doctrine of *Rechtsmissbrauch*, abuse of right/power, could not be applied in this context, I would argue that the analysis of the BGH would or should in Belgium have been formulated in terms of "abus de droit" or its application to decisions of the general meeting, "abus de majorité". One of the reasons why I point this out is that I want to stress two things: a. As already mentioned, the *Treuepflicht* of controlling shareholders under German law does not entail a duty of subordination of one's own interests to those of the company, let alone a

[63] Using a power for another purpose than that for which it has been granted by the legislator, in other words disregarding the proper function of a power.

no profit rule such as is applicable to directors b. Belgian authors in favor of the introduction of a duty of loyalty for (controlling) shareholders in Belgium, would not be justified in invoking the fact that other countries such as Germany have recognized such a duty: what in Germany is called a duty of loyalty, the standard translation of *Treuepflicht*, has the same content as our rule against "abus de majorité /minorité", although the *Treuepflicht* as such (looked at in isolation, leaving aside the possibility for minority shareholders to also in some cases invoke *Rechtsmissbrauch*) may in fact be *more limited* than the Belgian abuse doctrine, as in "Linotype" it clearly seemed premised on a showing that a controlling shareholder had influenced board decisions. In that respect, the German *Treuepflicht* is reminiscent of the Delaware idea that only "controllers" have a duty of loyalty and whether a shareholder acted as a controller is fact-specific, not just based on holding a majority of the shares.

The similarity of the German *Treuepflicht* to the Belgian *abus de majorité/minorité* doctrine is even more striking and in fact undisputable in the 1995 "Girmes" case, in which the BGH ruled that minority shareholders too, can be subject to a Treuepflicht towards other shareholders. The BGH ruled that this duty of loyalty meant that a minority shareholder had to exercise his membership rights, especially his co-decision and control rights, with due consideration for the company-related interest of other shareholders.[64]In the specific case submitted to the court, the Treuepflicht meant that a minority shareholder could not use his voting rights to block, on selfish grounds[65], a useful/sensible ("sinnvolle") restructuring pursued by the majority of the shareholders, even though this restructuring entailed a capital decrease that would imply a dilution of the shareholding of the minority shareholder. The case was brought before the courts after a coalition of minority shareholders had successfully blocked the approval, at the general meeting, of the restructuring proposed by the board and supported by the majority shareholder. Plaintiffs sued the minority shareholders, arguing that their successful opposition to the recapitalization had caused the insolvency of the company. In its judgment, the BGH added (in obiter dicta) that the *Treuepflicht* could also be invoked against minority shareholders in other cases where they were in a position to disturb corporate decision-making, such as by abusing their right to issue statements during the general meeting[66], which the BGH, using an English word, called "filibustering". In any case, the facts of the Girmes case are the same as those that in Belgium are used by every corporate law professor to illustrate to first year students the meaning of our concept of "abus de minorité", a form of abuse of right, that is, "abus de droit". Again my point is that this German duty of loyalty does not imply a no profit rule or a subordination of the minority's interest to those of other shareholders; in Belgian legal parlance it's simply an application of the duty to behave in good faith ("bonne foi") and not to abuse one's voting power.

[64] "Sie verpflichtet ihn, seine Mitgliedsrechte, insbesondere seine Mitverwaltungs-und Kontrollrechte, unter angemessener Berücksichtigung der gesellschaftsbezogenen Interessen der anderen aktionäre auszuüben".
[65] "aus eigennützigen Gründen".
[66] "Rederecht".

b. The duty of loyalty of controlling shareholders in Delaware

In the US, it has long been recognized in Delaware law that controlling shareholders are subject to a duty of loyalty[67]. The assumptions behind the doctrine as developed by the Delaware courts can be summarized as follow- this is a citation from a useful summary by the law firm Fried Frank in a 2018 newsletter:[68]

"*When a* controller *is self-interested in a transaction – that is, the transaction is between the company and the controller or is between the company and a third party but the controller has an interest in it that differs from that of the other stockholders – the board's independent judgment as to whether the transaction is in the best interests of the company and the other stockholders is viewed as inherently affected (and potentially undermined) due to the ability of a controller to remove the directors and elect new ones. When a* minority stockholder *with significant influence is self-interested in a proposed transaction, the issue is whether the stockholder, notwithstanding its non-majority equity stake, is a controller with respect to the transaction – that is (…) whether it is reasonably conceivable that the stockholder had and exercised a degree of influence over the board that compromised the board's independence when it considered the transaction*."

In other words, both majority and minority shareholders can under certain circumstances be regarded as "controllers", and this- the capacity to control- determines whether the duty of loyalty will apply. "Controlling shareholder" is in this context thus not used within the meaning the expression has in Belgium and Europe in accordance with the EU accounting directives[69]. Nevertheless, a shareholder owning stock entitling it to more than 50% of the vote, will normally be regarded as a controller, absent specific facts that prevent that majority shareholder from exercising actual control over the board or the relevant decision. Minority shareholders are normally not regarded as controllers, but there may be specific circumstances where a minority shareholder does exert control over the board, also because no special process was put in place to insulate the board from the minority shareholder's "outsize influence". Thus, it was held that in certain transactions, Elon Musk, holding at the time 22% of Tesla, and Larry Ellison, holding 28 % of a company, were controllers[70], whereas in the *Rouse* case[71], a 33% shareholder was not treated as a controller, a decision which was clearly influenced by the fact that a special committee of independent directors had dealt with the

[67] Leading early cases seems to be *Sinclair Oil v. Levien* 280 A.2d 717 (Del. 1971) and *Ivanhoe Partners v. Newmont Mining Corp.* 535 A.2d 1334, 1344 (Del. 1987).
[68] G. WEINSTEIN, R.C. SCHWENKEL, S.J. STEINMAN, "Controlling shareholder transactions", April 26 2018, available at https://corpgov.law.harvard.edu/2018/04/26/controlling-shareholder-transactions/.
[69] As implemented in Belgium in e.g. the control definition of art. 1:14 BCCA.

[70] *In re Tesla Motors, Inc. Stockholder Litig.*, Consolidated C.A. No. 12711-VCS (Del. Ch. Mar. 28, 2018) and *In re Oracle Corp. Derivative Litig.* - No. 2017-0337-SG, 2018 Del. Ch. LEXIS 92 (Ch. Mar.19, 2018).

[71] *In re Rouse Properties, Inc. fiduciary litigation,* (Del. Ch. Mar. 9, 2018).

transaction and the 33% shareholder had recused himself from board deliberations on the transaction. However, in *Oracle* the major shareholder had taken similar measures (as opposed to Elon Musk in the Tesla case) and the court had still ruled that because of his influence on the board through other channels[72], Larry Ellison still had to be treated as a controller.

If a controller engages in a transaction with a corporation in which he is conflicted, meaning his interests do not run parallel to those of other shareholders, the standard of review for the transaction is entire fairness, which means a fair price and a fair process, including the negotiation of the transaction by independent directors. Directors therefore do not enjoy the protection of the business judgement rule. However, if such a conflicted controller transaction was approved by *either* a committee of independent directors *or* a majority of the non-controlling shareholders, the burden of proof concerning fairness shifts from the controller to the plaintiff (instead of the controller having to prove the entire fairness of the contested transaction, the plaintiff now has to prove it was not entirely fair). Following the *MFW*[73] decision of the Delaware supreme Court, if a "controlled merger" is from the outset subject to approval by *both* well-functioning committee of independent directors *and* the majority of disinterested shareholders, then the entire fairness standard does not apply, and the transaction is protected by the business judgement rule.

Importantly, a conflicted shareholder is allowed to pursue its own interest as a shareholder (not as a director if he is simultaneously a director). A clear illustration of this is that if a controlling shareholder proposes a transaction between the company and himself, in which he is clearly conflicted, and the board comes up with an alternative transaction that creates superior value for stockholders, the controlling shareholder may refuse to cooperate to bring this transaction about. He may refuse to offer his shares in the alternative transaction, may vote against it, may actively try to defeat it. What he may not do is use his influence over the board to try and move the directors not to suggest to the stockholders this alternative transaction, and directors should be aware that if there is no approval of the transaction by the unaffiliated shareholders, the transaction will be subject to entire fairness (price and process) review. But the controlling shareholder who has not tried to influence the board not to even consider the alternative transaction has not violated a fiduciary duty and it seems directors who know that the conflicted shareholder has the power, as a shareholder, to block alternative transactions, do not violate their own fiduciary duties if they do not pursue the alternative transaction, since that seems a dead end from the start[74].

[72] Including his overbearing personality, the fact that his co-CEO was very deferential to him, and the fact that board members had under the influence of Ellison been awarded lucrative 500.000 dollars a year compensation, and managers huge compensation of 40 million a year.
[73] *Kahn v. M&F Worldwide Corp.* 88 A.3d 635 (Del. 2014).

[74] My whole paragraph is based on G. WEINSTEIN, R.C. SCHWENKEL, S.J. STEINMAN, "Controlling shareholder transactions", April 26 2018, available at https://corpgov.law.harvard.edu/2018/04/26/controlling-shareholder-transactions/.

This all illustrates at least two things. First, even though in the US there is talk about a fiduciary duty of loyalty of controlling shareholders in change of control transactions, this duty is quite different from the duty of the same name imposed on directors, and does certainly not mean the conflicted shareholder is subject to a no profit rule. If he can live with entire fairness review, he may even vote on the transaction, provided a committee of independent directors has approved it, so that the burden of proving the transaction is not entirely fair will shift to the plaintiff. Second, essentially all the case law revolves around the question what process *the board* should put a contemplated transaction through in order to fulfill its own fiduciary duties and protect the transaction from entire fairness review. True, the controlling shareholder is also subject to a fiduciary duty, but this is essentially limited to a ban for him to use his influence over the board to pursue benefits for himself to the detriment of other shareholders or the company. At the general meeting, he may use his powers as a shareholder as he wants, except that he may not vote on the transaction *if he wants to avoid entire fairness review*. Belgian readers will note that in Belgium, companies/controlling shareholders have no possibility to avoid entire fairness review, albeit that the burden of proof will always be on the plaintiff pursuing avoidance or damages, and the transaction can only be declared null and void if abuse of voting power was shown, or "detournement de pouvoir" which is probably a higher bar to clear for plaintiffs than proving a transaction was not entirely fair concerning process and price.

c. *It would be incoherent to build a duty of loyalty for controlling shareholders under Belgian law*

In Belgium there is some scholarship that argues that controlling shareholders are subject to a duty of loyalty[75], and somewhat more authors argue that the power of shareholders to vote is a power they can only use to further the interests of the company[76] -these authors, if asked to take a stance, would conceivably also argue that there is duty of loyalty for shareholders. But like I mentioned before, even universal agreement among scholars -which in this case is certainly lacking[77]- does not create law. In Belgium there are neither court cases nor legislation

[75] N. HALLEMEESCH, "Loyaliteitsplicht van meerderheidsaandeelhouders. Aard en misbruik van stemrecht herbekeken", *TPR* 2018, 323.

[76] Only a few of those: J. VAN RYN, *Principes de droit commercial*, I, Brussels, Bruylant, 1954, 444-45; H. LAGA, "Het gelijkheidsbeginsel in het vennootschaps-en efectenrecht, *RW* 1992, 1177, nr. 44; PH. ERNST, *Belangenconflicten in naamloze vennootschappen,* Antwerpen, Intersentia, 1997, 602; X. DIEUX "Nouvelles observations sur l'abus de majorité ou de minorité dans les personnes morales fonctionnant selon le principe majoritaire", *TBBR* 1998, 19, nr. 10; O. CAPRASSE and R. AYDOGDU *Les conflits entre actionnaires. Prevention et résolution,* Brussels, Larcier, 2010, 202-209.

[77] Many authors defend the view that voting powers are discretionary powers, and no doubt a majority of academics in Belgium argues it's a "mixed power" (see the many references in footnote 54 of HALLEMEESCH (fn. 73) but this latter opinion is, to put it bluntly, useless, since it does not provide any criteria that can be applied in the real world to determine whether a shareholder exercised its voting power in an acceptable manner. What all these approaches seem to have in common is an exclusive focus on the way a (controlling) shareholder votes, neglecting the fact that shareholders can exert

that recognize a duty of loyalty of shareholders. On the contrary, the Belgian companies Act (BCCA) contains several provisions from which it can be deduced that policymakers at least in the recent past were hostile to the idea of a general duty of loyalty for (controlling) shareholders. To be sure, there are some limited rules on conflicts of interest of shareholders. The best known example is the rule that if new shares are issued without preemption rights and the issue is at least partially reserved for a major shareholder, namely one that holds more than 10% of the shares or votes in a corporation, then that major shareholder is not allowed to vote at the general meeting on the question whether preemption rights should indeed be disapplied in favour of that major shareholder[78]. But the official Explanatory Memorandum to the BCCA explicitly mentions, as a result of the fear of the drafting committee (of which I was a member) that otherwise this provision would be invoked by those arguing in favor of a duty of loyalty, that the rule should not be regarded as an application of a wider notion of duty of loyalty[79]. When Belgium introduced statutory rules in 1995 for decisions of the board of listed companies in relation with their major shareholder[80] or, from 2001, with an associated ("verbonden") company, in order to protect minority shareholders through the involvement of a committee of independent directors, decisions that the board took in connection with subsidiaries of the parent company were explicitly excluded from the scope of the law. That approach was maintained when the rules were later amended, the last times in 2019 (introduction of the BCCA) and 2020 (implementation of SRDII). The main idea behind this exception was that in those cases, the listed company board would be exercising the power the parent had, as a shareholder, over the subsidiary, and that the parent should be allowed to exercise that power in a more or less unfettered way. It was not felt that the minority shareholders of the subsidiaries needed any special statutory protection through the procedure of what is today art. 7:97 BCCA (whereas the minority shareholders of the listed company-parent did not need protection precisely because it was unlikely that the parent board, when deciding about a subsidiary that the parent by definition controlled, would be under pressure to harm the interest of the minority shareholders of that parent company[81]). When Belgium had to implement the rules from SRDII[82] on related party transactions (RPTs), Belgian policymakers very consciously[83] used the option offered by SRDII[84] not to apply those rules to decisions of the general meeting of shareholders.

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influence over the board through other channels, a fact fully acknowledged in Delaware case law in these matters.

[78] Arts. 7:193 § 1 al. 4 and 5:131 § 1 al 4 BCCA.

[79] See Memorie van toelichting, *Parl. St.* Kamer nr. 54-3119/001, 261.

[80] Then in art. 60bis of the then Companies Act, later art. 524 Companies Code, now, with a changed content, art. 7:97 BCCA.

[81] Unless where the parent of the parent has a potentially controlling (25%) interest in the subsidiary, which explains the well-known "25% exception" to the exception for subsidiaries in art. 7:97 BCCA.

[82] 2nd Shareholder Rights Directive, officially Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, *OJ L 132, 20.5.2017, p. 1–25.*

[83] See the explanation in *Parl. St*, Kamer, extraordinary session 2019, nr. 55-0553/001, p. 20-21, at (ii).

[84] In art. 9*quater* para. 6 b of SRDII.

More generally, it is well-known and uncontested, in Belgium, that rules for directors on conflicts of interest do not apply when such a director is at the same time a shareholder and is conflicted at the general meeting. The classic example is that directors may vote for their own discharge (which in Belgium implies that the company waives its right to sue the director for breach of duty) at the general meeting. Hallemeesch[85] is correct in arguing that one should not draw too many *a contrario* conclusions from legislative history – in the 1930s, the famous corporate law specialist who was also a member of parliament, Wauwermans, tried to introduce an amendment to the Belgian companies act stating that directors who were also shareholders could not vote at the general meeting on their own discharge. The bill was rejected for abstruse reasons. It is indeed unconvincing to deduce from this history that it would go against legislative intent for courts to introduce such a rule.

But the point is that a duty of loyalty as suggested by Hallemeesch is not a duty of loyalty at all, but simply a scholarly term for the undisputed rule that shareholders may not abuse their voting power. That rule is not a no profit rule, and the banality that shareholders may not intentionally violate the interest of the company does not provide anybody (courts, legal advisors of controlling shareholders or directors) with a standard of review that can be operationalized, i.e. made useful to judge specific real world cases.

It's the majority at the general meeting that, through its decisions, will determine what is in the best interest of the company. True, those decisions can be reviewed by courts, but it bears repeating that they cannot be declared null and void because of incompatibility with the company's interest: the judge that wants to invalidate them must find an abuse[86] of voting power (art. 2:42 BCCA), he cannot directly test the content of the decision against his (the judge's) conception of the company's interest. "Abus de majorité" or "abus de minorité" do not imply a subordination of the shareholder's interest to anyone else's, and whatever the criteria for establishing an "abus" are, they are clearly far more stringent than a direct test against "the interest of the company" would imply.

Even if courts would want to construct a duty of loyalty of controlling shareholders, against the pretty clear policy choices expressed in the BCCA, on what basis would they do so? I do not think such a basis could be found. Contrary to what is the case for directors, it is unclear that the requirements of good faith (art. 1134 para 3 Civil Code) imply a no profit rule or a subordination of interest. What would be the source of a duty of a shareholder to *serve* the interests of the company? Certainly shareholders are not each other's agents, they do not have

[85] N. HALLEMEESCH, "Loyaliteitsplicht van meerderheidsaandeelhouders. Aard en misbruik van stemrecht herbekeken", *TPR* 2018, p. 338, his footnote 59.

[86] That abuse of law/power must be established, is rightly stressed by J.M. NELISSEN GRADE, "De la validité et de l'exécution de la convention de vote dans les sociétés commerciales", *RCJB* 1991, 245, nr. 53 and S. COOLS, *De bevoegdheidsverdeling tussen algemene vergadering en raad van bestuur*, Roeslaere, Roularta, 2015, 158, among others.

power over the exercise of each other's subjective rights, and it would of course be diametrically opposed to the core of corporate law to assume that shareholders are subject to a no-profit rule. Conflicts of interest rules only arise when there is a potential conflict between interest and duty, but assuming that there is a duty is a *petitio principi*. (In addition, precisely because shareholders have no contract with the company, technically art. 1134 does not apply in any case). The fact that controlling shareholders exert power over other shareholders, cannot be the basis of a fiduciary duty -just as such power is not accepted as a sufficient basis for the recognition of a duty of loyalty in the UK or US. A case can be made to look at the issue differently in cases where the specific facts of the case show that controlling shareholders have used their influence over the *board* to induce the *board* to suggest to the general meeting transactions in which the shareholder *who acts as a director* has a personal interest that may conflict with the interest of other shareholders. This is essentially the Delaware approach, and is also the policy idea behind art. 7:97 BCCA (which only applies to board decisions). But, again, while I think an innovative court doctrine to that effect, the application of which would always require a very close look at the facts, could be worth considering, Belgian courts until now have not begun to build such an approach, which would run counter to the very deliberate refusal of parliament to impose conflicts rules at the general meeting. So I rest my case: a duty of loyalty for shareholders in corporations is not part of Belgian law today.

We want to conclude this section with a more general remark. For many years, Xavier Dieux has convincingly been stressing that there are no or hardly any "general principles" applicable to all company types and all their shareholders; being a shareholder in a partnership is something different, also legally, from being a shareholder in a public, let alone in a listed corporation. Dieux' pleas influenced the drafters of the 2019 BCCA, which no longer contains a section ("Book") with rules common to all companies, as opposed to the BCA (the predecessor of the BCCA). It's now high time that Belgian lawyers – academics, judges and attorneys- recognize that the legal position of 'shareholders' (partners) in partnerships is fundamentally different from that of shareholders in corporations, certainly in public corporations. The bonds between shareholders in the latter are not *intuitu personae* (some cases like joint ventures that take the form of a corporation excepted) and in partnerships good faith therefore can lead to more demanding requirements of the shareholders towards each other. Now there's a topic that's underdeveloped in Belgian law and legal scholarship.

Conclusion

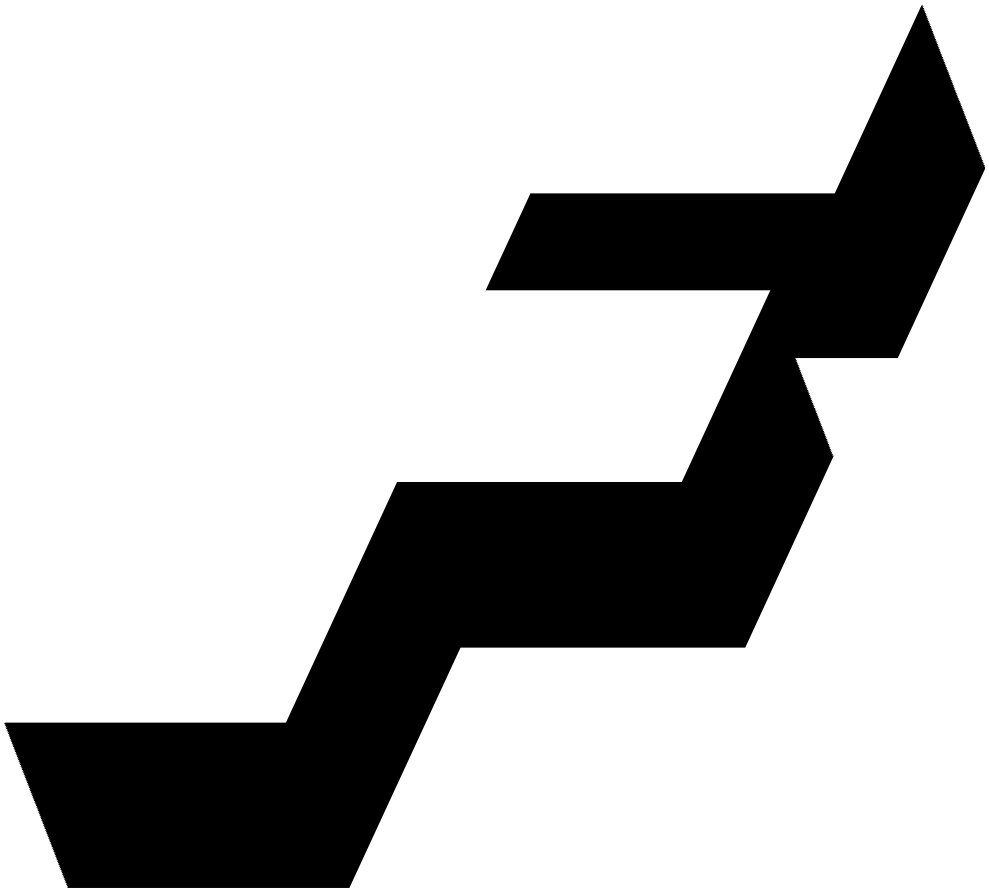
The first point this contribution wanted to make is that it only makes sense to use the expression "duty of loyalty" for situations where the legal system imposes the duty on a fiduciary to completely subordinate his personal interests to those of a principal (the company, in the case of directors), and in fact to live by a no profit-rule, accompanied by a disgorgement remedy. In my 2001 Ph.D thesis I tried to show that Belgian courts could, if they wanted to,

develop such a duty of loyalty, based on art. 1134 para 3 civil Code (good faith as applied to certain service contracts) and Marc Kruithof in his 2009 Ph.D. showed that, contrary to received opinion, judges can even recognize a disgorgement remedy (and indeed this is already applied in certain contexts outside the enforcement of directors' duties). Since then, some courts have paid lip service to the existence of a duty of loyalty for directors, but in fact mainly in cases (about competition, and the duty of directors to treat corporate information confidentially) where calling on the concept was unnecessary -in fact, potentially confusing- and without turning it into a UK style no profit rule. I'm convinced the existence of statutory rules on directors' conflicts of interest, the scope of which is limited, has played an inhibitory role vis-à-vis the courts. Didier Willermain and myself developed the foundations for a Belgian, judge-made corporate opportunity doctrine, but Belgian courts have refused to develop such a doctrine. It is therefore not part of Belgian law as it stands, in an "American realist" conception of what the law is. If Belgian courts want to invoke the duty of loyalty in a matter where it would be useful to invoke it, they could use it to develop self-dealing rules for directors -and even potentially for partners- of partnerships, for which the Belgian companies act contains no statutory rules on conflicts of interest. The fact that they have not done so is probably again due to a in this case misguided deference to parliament (legislative inaction with regard to partnerships is not the consequence of a conscious policy by lawmakers to give free rein to freedom of contract). The general conviction among practitioners seems to be that, therefore, "there are no rules on conflicts of interest in partnerships".

For shareholders, some authors argue that they are already subject to a duty of loyalty, but such a duty is nowhere to be found in statute or court cases and courts would not only exceed their powers if they introduced one, such a duty would in addition be incoherent without prior fundamental changes, by parliament, to how shareholders are treated in our legal system. Also, the proponents of a duty of loyalty for shareholders do not seem to be aware of the implications of what they're saying. When they argue that shareholders already are subject to a duty of loyalty, what they seem to mean is that they should exercise their powers as shareholders in good faith, and without the intention to inflict harm upon the company or other shareholders. But that has been uncontroversial for at least 70 years and should not misleadingly be called a duty of loyalty, since it is not comparable to the no profit rule that directors are subject to. Moreover, such statements do not lead to a standard of review that could usefully be applied by courts (or shareholders who want legal advice on whether their planned behaviour would be compatible with a duty of loyalty thus construed). Neither is it very convincing to point to countries like Germany or the US/Delaware, whose courts seem to have recognized a duty of loyalty for (controlling) shareholders. I hope to have shown that for all the talk about *Treuepflichten* in Germany, the leading cases *Linotype* and *Girmes* were, again, not really about anything like a duty of loyalty. The situation may be different in Delaware, which has a true duty of loyalty for controlling shareholders, but even there, the scope of that duty is rather limited. I think a

convincing case can be made, in Belgium, for more specific statutory rules on conflicts of interest for shareholders, especially when those shareholders are at the same time director, or have *de facto* directorial powers. Belgium also could have made the rules on related party transactions from SRDII applicable to general meetings- but very consciously decided not to do so. But introducing a general duty of loyalty for shareholders would be incoherent and undesirable. Let's start by taking the existing rules for conflicts of interest of directors seriously -something many top corporate law advisors do not seem to do: they seem to concentrate on minimizing the impact of those rules for their clients, by defending minimalist interpretations of the statutory rules, and were recently aided and abetted in this by a ruling from our Court of cassation[87] that, based on a very unconvincing reasoning, made it more difficult for companies to demand the avoidance of board decisions that were taken without respecting the statutory rules on conflicts of interest.

[87] Cass. 9 December 2021 C.19.0644.N. The decision is as yet unpublished, but will be published with critical comments from myself in *TBH-RDC* 2023 issue 1.



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