Related party transactions and corporate groups : when Eastern Europe meets the West

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2. CONFLICTS OF INTEREST IN CORPORATE GOVERNANCE AND THEIR TYPES

2.1. CORPORATE GOVERNANCE AND OTHER AREAS WHERE INTERESTS CONFLICT

2.1.1. Introduction to conflicts of interest in law

Interests can collide in various different spheres and areas. Since the times of Roman law, private interests, initially associated with individuals, have been opposed to public interests relating to the state. These interests then came to be used to differentiate between relationships arising in private law and in public law, with the two areas complementing each other and together constituting a single united legal system.[186]

Dividing interests into private and public, despite being based on simple and understandable criteria, is not enough for regulating relationships in the modern world. Defining only two types of interests is an oversimplification of the complex relationships arising in today's society with its numerous actors, each with their own interests that need to be considered. The variety of legal actors is demonstrated by the respective legislative provisions, as evidenced by Article 2 of the CCU,[187] which provides that civil relationships can be formed by natural persons, legal entities, the state, municipalities, the Autonomous Republic of Crimea and other entities governed by public law. These public-law entities are indicated exclusively for the formal purposes of legal regulation. However, taking a legal entity as a separate participant in a legal relationship, an analysis of that relationship will establish the entity's private interest as an arena for interplay between the interests of different social groups, in the terminology of Adolf Berle and Edwin Dodd,[188] or social functions, according to Gunther Teubner.[189]

Reconciliation of the various parties' interests consequently poses a question for law, and company law in particular. The fact that parties in relationships pursue different goals does not in itself give rise to conflicting interests. In a transaction where a player gambles in a casino, the player's interests are in opposition to the casino's interests, for example, yet this does not constitute a conflict of interest. In order for a particular situation to involve a conflict of interest, one party must have an interest that is contrary to the interest of another party on whose behalf the first party is acting and the promotion of which *by definition* inevitably has a negative effect on the latter interest. In corporate governance, this is most common where a director attempts to derive benefits from the company in response to demands that do not coincide with the company's interests, to satisfy either the director's own interests or the interests of a third party (vertical agency conflict),[190] or where a majority shareholder acts to the detriment of minority shareholders (horizontal agency conflict).

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[186] Дождев Д, *Римское частное право* (Нерсесянц В ed, Third edn, М.: Норма 2008), 11.
[187] CCU, Article 2.
[188] Berle AA, 'Corporate Powers as Powers in Trust' (1931) 44 Harvard Law Review 1049; Berle Jr AA, 'For Whom Corporate Managers Are Trustees: A Note' (1931) 45 Harvard Law Review 1365.
[189] Teubner G, 'Corporate Fiduciary Duties and Their Beneficiaries' in Hopt K and Teubner G (eds), *Corporate Governance and Directors Liabilities* (Berlin, de Gruyter 1985), 151.
[190] Hopt KJ, 'Trusteeship and Conflicts of Interest in Corporate, Banking, and Agency Law: Toward Common Legal Principles for Intermediaries in the Modern Service-Oriented Society' in Ferrarini G and others (eds), *Reforming Company and Takeover Law in Europe*, vol 4 (2004), 52.

Regulation has emerged for conflicts of interest where this is necessary to properly balance interests in relationships between parties, specifically in the functioning of investment firms and financial service providers. These are areas where the client's awareness of a conflict of interest will potentially influence his or her decision of whether or not to enter into a business relationship. The 'Kick-Back I' decision of the German Federal Supreme Court is a textbook example: the bank failed to disclose to a client that it had an agreement with the client's portfolio manager, under which the bank was obliged to pay 33 per cent of any transaction fees and custodian fees from the transaction value. The bank was found to be in breach of an organizational duty to make its employees aware of the disclosure obligations.[191] This was not in accordance with Germany's national legislation, which had been designed with a view to implementing the relevant EU directive.[192]

One of the major differences between conflicts of interest in financial services and in corporate governance lies in the respective lists of parties whose interests need to be taken into account. In financial services, the principal categories of persons that could potentially be involved in conflicting transactions include managers, employees and tied agents, any person directly or indirectly linked to them by control, and their clients.[193] In corporate governance, clients are not, initially, among the groups whose interests need to be considered. This does not mean, however, that for publicly held investment banks the issues of corporate governance are left unresolved. On the contrary: regulation becomes more complicated, extending to at least two layers of conflicts of interests. On the first level (corporate governance), the issues of ownership and control come first, while on the second level (financial services), the client-manager relationship is crucial. This distinction has no bearing on companies that are not in a position to render financial services, and their executives are not burdened by an additional set of fiduciary obligations to their public-investment bank clients.[194]

Although it may seem that conflicts of interests are less complex in corporate governance than in financial services, even for corporate governance it is not always clear whether a conflict of interest exists. In situations where a director steals the company's secrets, appropriates business opportunities or receives excessive remuneration, or where a majority shareholder engages in tunnelling, it is simple to establish an outright conflict. However, besides these outright conflicts, situations exist where preferences diverge; for example, a director can adopt one of various different attitudes towards risk, namely risk acceptance, risk aversion or risk neutrality. This depends largely on the director's personality. The fact that the director can react differently to emerging risks makes it more difficult to identify a conflict of interest. Similarly, different actors will have different preferences depending on the allocation of the up-side and down-side in their relationships (equity versus debt claimants) or the diversifiability of their investments (well-diversified portfolio versus non-diversifiable human capital).

2.1.2. Ownership and control as origins of conflicts of interest in corporate law

[191] Helm R and others, *Practitioner's Guide to Conflicts of Interest in the Financial Services Industry* (Sweet & Maxwell 2012), 279.
[192] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L 145/1, 30.4.2004.
[193] Ibid, Article 18.
[194] Stark A, 'The Furore over Banker Compensation' in Peters A and Handschin L (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge University Press 2012), 285.

Any close examination of the issues of ownership and control supposedly separated[195] and discussed by scholars in law and economics[196] must make reference to the classic study presented by Berle and Means.[197] Ownership is explained as being apportioned to those individuals who have major interests and, before the law, those who hold legal title. Control, in turn, is in the hands of those who hold the major elements of power over an enterprise.[198] In companies, legal title is held primarily by the shareholders, while management exercises authority in the company and accordingly possesses a certain amount of power. Where management is motivated solely by a desire for personal monetary gain, its interests oppose the interests of shareholders, who would rather increase the company's wealth. This then means that the interests of ownership and control are also opposed.[199]

The arguments for the separation of ownership and control as presented by Berle and Means in their celebrated book made perfect sense for the US economy at that particular stage of its development, where dispersed ownership was marked as a distinctive feature.[200] In later academic research, however, their theory was questioned, with some critics wondering whether it could be applied equally to countries where the picture of ownership was different.[201] It was even queried whether small shareholders were sufficiently numerous in the US for it to be seen as a jurisdiction with dispersed ownership.[202] Although the US is still regarded as a jurisdiction where large shareholders are relatively uncommon, the presence of family firms and wealthy investors should not be dismissed entirely.[203] In the network of shareholders, institutional investors play a special part, with shareholders pooling large sums of money to invest in companies.[204] The dramatic rise of institutional investors is a characteristic shared by all industrial economies.[205] In the US, the growth of institutional ownership has accelerated rapidly since 1980: '*institutional assets grew eightfold*' during the period 1990-1998.[206] The reason for the predominance of institutional investors and minority shareholders in the US might lie in the protection that their rights enjoy. The same cannot always be said for many countries with concentrated corporate ownership.[207] At the same time, it would be wrong to extend the argument of weak investor protection to developed European countries, where regulation of the financial markets has proved successful,[208] yet where controlling shareholders are prevalent. According to Becht and Böhmer's 2001 study, voting powers in German companies are highly concentrated, with over half of all listed companies being controlled by a majority block and only 17.4 per cent of companies not having a blockholder that has a minority veto right (25 per cent).[209] It would defy credibility to extrapolate these data to other European countries by concluding that all European companies are

[195] Berle A and Means G, 120.
[196] See, e.g., Bratton WW and Wachter ML, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and The Modern Corporation' (2008) 34 Journal of Corporation Law 99, 118-122; Marks SG, 'The Separation of Ownership and Control' [1999] Encyclopedia of Law and Economics 692; Fama EF, 'Agency Problems and the Theory of the Firm' (1980) 88 The Journal of Political Economy 288, 288.
[197] Becht M and Mayer C, 'Introduction' in Barca F and Becht M (eds), *The Control of Corporate Europe* (Oxford University Press 2001), 1.
[198] Berle A and Means G, 120.
[199] Berle A and Means G, 123.
[200] Belcredi M and Ferrarini G, 'Corporate Boards, Incentive Pay and Shareholder Activism in Europe: Main Issues and Policy' in Belcredi M and Ferrarini G (eds), *Boards and Shareholders in European Listed Companies: Facts, Context and Post-Crisis Reforms* (Cambridge University Press 2013), 21.
[201] La Porta R, Lopez-de-Silanes F and Shleifer A; La Porta R and others, 'Investor Protection and Corporate Governance' (2000) 58 Journal of Financial Economics 3.
[202] La Porta R, Lopez-de-Silanes F and Shleifer A, 472.
[203] Shleifer A and Vishny RW, 'A Survey of Corporate Governance' (1997) 52 The Journal of Finance 737, 754.
[204] Nix P and Chen J, *The Role of Institutional Investors in Corporate Governance: an Empirical Study* (Springer 2013), 44.
[205] Ibid, 4.
[206] Davis EP and Steil B, *Institutional Investors* (MIT Press 2001), 131.
[207] La Porta R and others, 14.
[208] Ibid, 23.
[209] Becht M and Böhmer E, 'Ownership and Voting Power in Germany', 142.

increasingly concentrated. As such, data reported in the Netherlands for the same year witnessed the average stake of the largest blockholder in companies listed at the Amsterdam Stock Exchange as being 27 per cent.[210]

The established facts of concentration of capital in one party are not necessarily negative, especially taking into account the efficiency of family-owned firms and their ability to react to downturns more easily.[211] Nevertheless, they may be evidence of an absence of strong investor protection.

Despite these differences between legal systems and economies regarding the dispersion or concentration of ownership in companies, and, consequently, the issue of whether or not ownership and control are separated (at least to some degree), every company's functioning is influenced to a vast extent by both shareholders and management. Their importance to the company is beyond any doubt; however, their actions might have different effects, moving the company either towards prosperity, or towards bankruptcy.

2.2. CONFLICTS OF INTEREST AND FIDUCIARY DUTIES

2.2.1. The interconnection between interests, rights and duties

The concept of interest in and of itself is a necessary element in the theory of conflicts of interest. The interests of both managers and shareholders as summarized above are only one aspect of the overall picture of the corporate relationships involving these actors. The issue with the concept of interest and, consequently, with conflicts of interest is that they cannot always be measured by the law and, moreover, do not necessarily need to have any legal meaning. The fact that a person is overwhelmingly interested in personal gain for legal purposes does not matter as long as that person's actual actions are for the company's benefit. It is not the role of the law to force individuals to think in a particular manner. It would be of more significance to understand whether their acts conform to their obligations and the legal rules governing them. The interest would surely be at the root of any behaviour, an inner engine for further actions, an aspiration that is not embodied in a particular subjective right.[212] However, for the emergence of a conflict of interest in legal terms it is not enough to have a manager who wholeheartedly acts for the company's benefit while simultaneously thinking of stealing a car from that same company. From a

[210] De Jong A and others, 'Ownership and Control in the Netherlands', 205.
[211] Belcredi M and Ferrarini G, 23.
[212] In Ukrainian law the definition of a legitimate interest was given by the Constitutional Court of Ukraine (*Decision of 1 December 2004 No. 18-pn/2004 (case about legitimate interest)* Case No 1-10/2004, Ofitsiynyi visnyk Ukrayiny of 31 December 2004, No 50, page 67, st 3288 (Constitutional Court of Ukraine)) where it was defined as an aspiration to use a tangible or intangible asset as permission legitimated by objective law and not clearly defined in a subjective right, which is an independent object for judicial protection for the purpose of satisfying individual and collective demands that are not incompatible with the Constitution of Ukraine, Ukrainian legislation, public interest, fairness, reasonableness, good faith and other general rules. The Court was also asked to explain whether a breach of a shareholder's right could constitute a ground for protection of a legitimate interest of a company in which that shareholder owns shares. The Court replied that the company's interest cannot be equated to the sum of all the shareholders' interests, and that a sole shareholder may seek judicial protection only in matters concerning his or her own rights or legitimate interests. Today the Court's reply could be regarded as outdated, due to the fact that in 2015 the possibility of derivative suits was introduced in Ukrainian law (Law of Ukraine 'On Amending Certain Legislative Acts on the Protection of Investors' [Закон України 'Про внесення змін до деяких законодавчих актів щодо захисту прав інвесторів']). At the same time, it is important to remember that the shareholder's interest may be contrary to that of the company. Following the KSH (Article 212(2)), the company's management may refuse to share information with certain shareholders if that information could be used against the company's interest.

psychological point of view, it can be argued that a conflict of interest exists, given that those two interests visibly conflict with each other. The latter ambivalent approach seems superfluous in jurisprudence, for at least two reasons. Firstly, by acknowledging the legal effect of an internal conflict of interest it ignores the interests of the company's other stakeholders,[213] and secondly, for a person to be considered for legal purposes to be acting with a *legally relevant* conflict of interest, it requires more, namely a real violation of his or her duty of loyalty.[214]

The notions of duties and rights have more to do with actual actions than with a person's thoughts. That is why this section analyses the concept of conflict of interest primarily in connection with rights and duties of persons who are in a position to have conflicting interest.

2.2.2. Overview of managerial fiduciary duties

While conflicts of interest can occur for both managers and shareholders, managers firstly represent the company's interests in its dealings with others. Moreover, management is authorized to act on the company's behalf without power of attorney, but on the basis of charter documents and relevant legislative provisions.[215] This is rarely the case with shareholders: although they discuss matters that are important for the company when voting at general meetings, these actions are not representative. Rather, they are individual acts that in aggregate reflect the will of the company as a separate entity in legal relationships. Even the appointment of a shareholder as an executive officer in a company does not transform share ownership into representation: it merely means that one person simultaneously is part of two different relationships in two different capacities.

In addition to the capability to act on the company's behalf, management bears another distinctive characteristic that is not shared by all corporate constituencies, namely the fiduciary duty. The existence of a fiduciary duty reflects the existence of a fiduciary relationship.[216] Fiduciary relationships have received more attention from scholars and in case law in common law jurisdictions, where several attempts have been made to define or explain the meaning of a fiduciary relationship.[217] Fiduciary relationships as defined in those works are not restricted to fiduciary duties only. Although fiduciary duties are vital for understanding fiduciary relationships, they are not rights in and of themselves. Rather, they complement the expansive discretionary powers of the company's management by counterbalancing them and establishing limitations on

[213] Ungerer F, *Prozedurale Regulierung und Transparenz von Related Party Transactions in börsennotierten Aktiengesellschaften: eine vergleichende Untersuchung des deutschen und europäischen Aktien-und Kapitalmarktrechts unter besonderer Berücksichtigung von Art. 9c der novellierten Aktionärsrechterichtlinie* (Duncker & Humblot 2019), 43.

[214] Even the breach of a duty of loyalty does not always give rise to liability. For instance, in the Netherlands the duty not to compete with the company is covered by both general provisions of corporate law (Articles 2:8, 2:9 of the BW) and articles on tort law, meaning that a breach of the non-competition duty does not automatically lead to liability (Gerner-Beuerle C, Paech P and Schuster EP, *Study on Directors' Duties and Liability* (European Commission DG Markt, 2013), 155).

[215] German Stock Corporation Act (Aktiengesellschaft Gesetz), (BGBl. I p. 1089) FNA 4121-1, Art. 78; Civil Code of the Netherlands (Burgerlijk Wetboek) as in effect on 1 October 2008, most recently amended by the Act of [1 September 2008], Staatsblad 2008 [100], Article 2:130; Code of Commercial Companies of Poland (Kodeks Spolek Handlowych), 15 September 2000 (Dziennik Ustaw nr 94 z 8 listopada 2000 pozycje 1037), Article 201; LLC Law of Ukraine, Article 39; JSC Law of Ukraine, Article 60.

[216] Peters A, 'Conflict of Interest as a Cross-Cutting Problem of Governance' in Peters A and Handschin L (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge University Press 2012), 13, 15.

[217] Hollander C and Salzedo S, *Conflicts of Interest* (Fifth edition edn, Thomson Reuters 2016), 13-22; McCormack G, 'Fiduciary Obligations in a Changing Commercial Climate' in Rider B and Andenas M (eds), *Developments in European Company Law*, vol 1/1996 (Kluwer Law International 1997), 33-47; Akinbami F, 'The Fiduciary Duties of Institutional Investors' in Tomasic R (ed), *Routledge Handbook of Corporate Law* (Taylor & Francis 2017), 99-100.

overly risky behaviour.[218] It is important for an obliged person to possess a certain discretion or power that affects the other party's interests.[219] In fiduciary relationships, these powers are based primarily on trust and confidence.[220] Without those basics, one party in a relationship would not give the other sufficient autonomy. While the degree of autonomy certainly varies in different countries, it must exist to at least some extent. In the Netherlands, the autonomous nature of management boards was established by the Dutch Supreme Court in the Forum Bank case in 1955.[221] In Germany, for public companies the Federal Supreme Court stated that '*directors possess a wide margin of appreciation for their activities, because any business activity is inconceivable without such discretion*'.[222] In Poland, the autonomy of the members of a management board in managing their company's affairs also derives from company law,[223] and the broad powers of the management board have been further confirmed by Polish case law. The judgment of the Supreme Court of the Republic of Poland of 15 April 2010 states, '*Article 368 § 1 (of the KSH) provides for the general and unrestricted competence of the joint company's board to manage the affairs of the company and represent it*'.[224]

One of the main ideas with fiduciary relationships is that they are based on trust, as the Latin origin of the word already indicates. The core obligation of the fiduciary is to act in the best interests of the beneficiary.[225] In the case of a company and its shareholders, their interests primarily involve growing their wealth, which is linked directly to the company's wealth. If inefficient corporate governance causes the company to lose money, this does not necessarily give rise to liability for breach of fiduciary obligations. In order to hold a person liable for breach of a fiduciary obligation, the judicial authorities, or another authority responsible for law enforcement, must assess whether and to what extent the fiduciary has abused his or her rights and acted in a manner incompatible with the beneficiary's interests, while paying less attention to the outcome of their behaviour.[226]

The ambiguity that lies at the heart of every fiduciary relationship and makes the beneficiary vulnerable is that the fiduciary is not given specific instructions for how to act. This therefore creates the problem of how the fiduciary can be sufficiently incentivized or constrained without specifying what exact actions he or she should take.[227] At the same time, insisting on more detailed rules for fiduciaries would also have drawbacks: the more specific the director's obligations are made, the greater the possibility is that some element will be overlooked. Practice always brings new circumstances to light that could not be predicted even by the most ingenious mind.[228] By comparison: as the incomplete contracts theory shows that all contracts are inevitably incomplete and do not observe all the variables,[229] so also would it be problematic to stipulate in

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[218] Velasco J, 'Fiduciary Duties and Fiduciary Outs' (2013) 21 George Mason Law Review 157, 168.
[219] McCormack G, 33-47.
[220] Hollander C and Salzedo S, 14.
[221] De Savornin Lohman HA, *Duties and Liability of Directors and Shareholders under Netherlands Law: Piercing the Corporate Veil* (Kluwer Law International 1996), 9.
[222] Bröhmer J, 'Germany' in Omar PJ (ed), *Directors' Duties and Liabilities* (Ashgate/Dartmouth 2000), 55.
[223] Zak T, 'Poland' in Loos A (ed), *Directors 'Liability: A Worldwide Review* (International Bar Association, Netherlands 2006), 350.
[224] Judgment of the Supreme Court of the Republic of Poland II CSK 526/09, as quoted by Mitręga E, *Contemporary Enforceable Directors' Duties in Switzerland and in Poland-the Path of (GRC) Corporate Governance, Compliance and Risk Management from Soft Law to Hard Law?* (Schulthess 2016), 49.
[225] Velasco J, 163.
[226] Easterbrook FH and Fischel DR, 'Contract and Fiduciary Duty' (1993) 36 The Journal of Law & Economics 425, 426.
[227] Cooter R and Freedman BJ, 'Fiduciary Relationship: Its Economic Character and Legal Consequences, The' (1991) 66 New York University Law Review 1045, 1047.
[228] Nolan RC, 'The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report' in Armour J and McCahery JA (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Bloomsbury Publishing 2006), 374.
[229] Scott RE and Triantis GG, 'Incomplete Contracts and the Theory of Contract Design' (2005) 56 Case Western Reserve Law Review 187, 190.

law or in contract all the variables of fiduciary misconduct. In addition, the possible types of fiduciary misconduct are as numerous and unforeseeable as their counterparts, i.e. successful business decisions that lead to beneficial outcomes. Therefore, it is equally important to preserve fiduciaries' freedom and to understand how to regulate these relationships properly, taking into account that they sometimes enter the extra-legal realm of ethical rules[230] and bearing in mind all the difficulties surrounding their enforcement.[231]

Opinions vary on how to group fiduciary duties. According to Bernard Black, two main duties out of four can be distinguished: a duty of care and a duty of loyalty, and additionally a duty of disclosure and a duty of 'special care', which comes into play in connection with takeovers.[232] Joseph McCahery and Erik Vermeulen separate fiduciary duties into four groups: (a) a duty of care and loyalty; (b) a duty to disclose information; (c) a duty to abstain from self-dealing transactions, personal use of partnership assets, usurpation of partnership opportunities and competition with the partnership; and (d) a duty of good faith and fair dealing.[233] Julian Velasco however lists at least five duties, with a duty of loyalty and a duty of care forming the fiduciary 'pillars', followed by a duty of good faith, a duty of objectivity and a duty of rationality.[234] Maarten Muller equates the duty of good faith with the duty of loyalty.[235] Without evaluating the suggested groupings in detail, an endeavour that goes beyond the scope of this thesis, it is important to stress the interrelation between different fiduciary duties: they are all gathered under the umbrella of fiduciary relationships based on trust and confidence, where loyalty is a central part of the fiduciary's obligations.[236]

Besides recognizing the overarching nature of fiduciary duties, this research also works from the premise that the duty of care and the duty of loyalty are fundamentally different. The duty of care pertains to the standard of a diligent manager and finds its reflection in the business judgment rule, giving sufficient discretion to the company's management to act as their economic views dictate based on the available information.[237] Managers are expected to possess sufficient knowledge about the company to act in a manner that is advantageous to the company. Yet the presence of the duty of care does not necessarily mean that the business judgment rule applies. Of the jurisdictions in focus for this research, only in Germany is the business judgment rule explicitly codified;[238] in the Netherlands and Poland it is not.[239] However, the fact that the latter two jurisdictions do not have a codified business judgment rule does not mean that regulation of the duty of care is strict in all respects. For instance, in Dutch companies the directors' duty of care stems from the broad scope of Article 2:9 of the BW, which obliges directors to be responsible for the proper performance of their duties and affords a wide margin of judicial discretion in assessing that responsibility.[240] In addition, in Germany the existence of a codified business judgment rule is counterbalanced by the fact that the burden of proof is borne by the directors.[241]

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[230] O'Connor MA, 'How Should We Talk about Fiduciary Duty-Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance' (1992) 61 The George Washington Law Review 954, 983.
[231] Nolan RC, 377.
[232] Black BS, 'The Core Fiduciary Duties of Outside Directors' [2001] Asia Business Law Review 3, 2.
[233] McCahery J and Vermeulen EM, 'Conflict Resolution and the Role of Courts: Empirical Study' in Neville M and Sørensen KE (eds), *Company Law and SMEs* (Thomson Reuters 2010), 228.
[234] Velasko J, 165.
[235] Muller MH (ed), *Corporate Law in the Netherlands* (third edn, Wolters Kluwer Law & Business 2013), 139.
[236] Hollander C and Salzedo S, 14.
[237] Hopt KJ, 'Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis' [2013] European Company and Financial Law Review 167, 168.
[238] Gerner-Beuerle C, Paech P and Schuster EP, 110.
[239] Ibid, 112.
[240] Ibid, 78, 110.
[241] AktG, Art. 93(2).

In Poland, unlike in Germany but similarly to the Netherlands, the business judgment rule is not established in statute.[242] As a result, managers in Polish companies are required to act with due care,[243] yet unlike in German public companies[244] they are not regarded as being in a 'safe harbour' of decision-making. Nevertheless, this does not diminish the fact that managers enjoy discretion when exercising their powers.[245] However, in order for a director to be held liable under Polish law, breach of the duty of care must be accompanied by a breach of a specific statutory or contractual obligation.[246]

Unlike the duty of care, the purpose of the duty of loyalty is to prevent conflicts of interest.[247] A director acting in breach of the duty of care is not necessarily in breach of the duty of loyalty, given that inefficient business decisions by directors are not always made on purpose. Such decisions may stem from poor qualification or simply planning mistakes on the directors' part. In addition, the duty of care does not affect management's duty to preserve confidentiality of information. That duty, where it is not defined in company law, is generally viewed as a part of the duty of loyalty.[248] Even if the obligation of confidentiality is enshrined in statute close to provisions on the duty of care, as in Germany,[249] doctrine nonetheless tends to include this duty in the scope of the broad notion of the duty of loyalty.[250]

What the duty of care and the duty of loyalty have in common is their 'standard' nature. Both duties are evaluated ex post by an independent authority.[251] Interestingly, the link between the duty of care and the duty of loyalty can be observed in the phrasing of the business judgment rule for public companies in German statute and its enforcement in practice. One of the necessary preconditions for a director of a German company to enjoy the business judgment rule is the absence of any conflict of interest:[252] a director in breach of the duty of loyalty cannot benefit from the business judgment rule.

2.2.3. Managerial duty of loyalty

Among the duties described above, the duty of loyalty occupies a special place, sometimes controversially referred to as the only actual fiduciary duty.[253] This duty is most notable for this element of this research for the fact that it concerns situations involving a conflict of interest.[254] The idea on which this duty is based is easy to perceive: it merely requires the trustee to act loyally,

[242] Oplustil K and Radwan A, 'Company Law in Poland: Between Autonomous Development and Legal Transplants' in Jessel-Holst C, Kulms R and Trunk A (eds), *Private Law in Eastern Europe* (2010) https://ssrn.com/abstract=3079494, accessed on 28 December 2018, 483.
[243] KSH, Articles 293(2), 483(2).
[244] AktG, Articles 93(1).
[245] Radwan A and Regucki T, 'The Possibilities For and Barriers to Sustainable Companies in Polish Company Law' International and Comparative Corporate Law Journal, Forthcoming; University of Oslo Faculty of Law Research Paper No 2012-32 Available at: http://ssrncom/abstract=2159217 <https://ssrn.com/abstract=2159217>, accessed on 6 December 2018, 20.
[246] Ibid, 28.
[247] Hopt KJ, 'Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis', 168, 175.
[248] Ibid, 183.
[249] AktG, Article 93(1), sentence 3, Article 116.
[250] Gerner-Beuerle C, Paech P and Schuster EP, A331.
[251] Goshen Z, 'The Efficiency of Controlling Corporate Self-dealing: Theory Meets Reality' (2003) 91 California Law Review 393, 403.
[252] Gerner-Beuerle C, Paech P and Schuster EP, 115; AktG, Article 93(1), sentence 2.
[253] Bruner CM, 'Is the Corporate Director's Duty of Care a Fiduciary Duty - Does It Matter' (2013) 48 Wake Forest Law Review 1027; Miller PB, 'Justifying Fiduciary Duties' (2013) 58 McGill Law Journal/Revue de droit de McGill 969.
[254] Pistor K and Xu C, 'Fiduciary Duty in Transitional Civil Law Jurisdictions' in Milhaupt CJ (ed), *Global Markets, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals* (Columbia University Press 2012), 77.

i.e. not to place his or her own interests or the interests of third parties above the interest of the principal in relationships involving the latter. A straightforward example is a commercial transaction between a director and a company managed by that director. For this kind of transaction, the duty of loyalty is fulfilled by acting on the arm's-length conditions, meaning that the director, acting for the company, would agree on the same terms for this transaction with third parties as with himself. This is a standard requirement, which is sometimes supplemented by disclosure, approval and other obligations for the director. However, that is more an issue of strategy as determined by national company law, which is discussed in detail in the chapters that follow.

It is beyond doubt that managers are substantially regarded as agents in corporate relationships.[255] The problem lies in the fact that it is not always clear who the principal is. The easiest and the most tenable solution would be to consider the company as the principal (beneficiary).[256] As a result, the agent would be required to act in its best interests, similarly to the German concept of 'the best interests of the enterprise' (*Unternehmensinteresse*).[257] While this solution could prove effective if introduced into legislation, due to its apparent simplicity,[258] for practical reasons it needs further clarification.[259] Firstly, companies are not black boxes, as classical economic theory teaches. They are the products of the reconciled interests of different corporate constituencies. Secondly, the issue of multiple loyalties rears its head if a single person performs managerial duties for various different companies, and as such has various different principals.[260] Thirdly, other internal and external stakeholders, besides shareholders, whose interests need to be considered, including employees, suppliers, customers, banks, the government, and various 'pressure groups'.[261] By considering the interests of external stakeholders, including the environment and social concerns, management internalizes those interests and shifts the issue to the theory of corporate social responsibility.[262]

It can be difficult to understand which theory is more favoured in Europe: shareholder or stakeholder. On the one hand, European institutions and government representatives have frequently been enthusiastic to take steps towards developing corporate social responsibility.[263] The dominance of stakeholder theory has been established in both Germany and the Netherlands.[264] In Germany, since 2001, pension funds have been required to report on how they integrate social and environmental factors into their investment decisions.[265] In the Netherlands, companies are encouraged to submit financial reports that also contain social and environmental

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255 Brudney V, 'Contract and Fiduciary Duty in Corporate Law' (1997) 38 Boston College Law Review 595, 611.
256 Andersen PK, 'Directors' Duties - and the European Model Company Act' in Neville M and Sørensen KE (eds), *Company Law and SMEs* (Thomson Reuters 2010), 78.
257 Saenger I, 'Conflicts of Interest of Supervisory Board Members in a German Stock Corporation and the Demand for Their Independence: An Investigation in the Context of the Current Corporate Governance Discussion' (2005) 1 Corporate Governance Law Review 147, 154.
258 In some cases it has already been put into law, e.g. in Articles 2:129 (5), 2:239(5) of the BW and Article 92 of the CCU.
259 The concept of a company's interests is certainly not devoid of practical content, as shown by the application of the 'ultra vires' doctrine in the Netherlands, namely the courts will apply remedies for any conduct that is incompatible with the company's object if that conduct is not in the company's interests (see Muller MH (ed), 44).
260 Hopt KJ, 'Trusteeship and Conflicts of Interest in Corporate, Banking, and Agency Law: Toward Common Legal Principles for Intermediaries in the Modern Service-Oriented Society', 61.
261 Du Plessis JJ and others, *Principles of Contemporary Corporate Governance* (Cambridge University Press 2014), 32.
262 Sjåfjell B and Anker-Sørensen L, 'Directors' Duties and Corporate Social Responsibility (CSR)' in Birkmose HS, Neville M and Sørensen KE (eds), *Boards of Directors in European Companies: Reshaping and Harmonising Their Organisation and Duties* (Wolters Kluwer Law & Business 2013), 156.
263 Lux J, Skadegard Thorsen S and Meisling A, 'The European Initiatives' in Mullerat R (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International 2005), 279.
264 Gerner-Beuerle C, Paech P and Schuster EP, 68, 71.
265 Ibid, 294-295.

information.[266] While the Polish KSH does not expressly favour any theory,[267] incidental court decisions and internal corporate documents (Polish Petroleum and Gas Mining) exist that consider the interests of various stakeholders.[268] As Anna Peters argues, a growing trend can be discerned in corporate governance and other fields of knowledge towards an expansion of fiduciary obligations to extend to a broad circle of principals.[269] For instance, in the ASMI case, the Enterprise Court in the Netherlands ruled in favour of activist shareholders, who claimed that the company's governance structure was outdated and defensive, in that directors were appointed based on the exclusive decision of the supervisory board, which could be overturned only by more than two thirds of the shareholder vote. The Enterprise Court, in inquiry proceedings, ordered an investigation into the policies and affairs of ASMI. The Enterprise Court's decision was annulled by the Dutch Supreme Court, which emphasized the board's role to serve 'the interests of the company and of the enterprise it ran', and that this involved the interests of all stakeholders, including the shareholders.[270] However, this does not imply that the board is obligated to seek the prior approval of the general meeting for strategic decisions that belong to the board's competence. The Dutch Supreme Court's judgment indicates an apparent adherence to the stakeholder theory. In the more recent case of PPG/Akzo Nobel, it was the Enterprise Court of Amsterdam that favoured the stakeholder theory. The Court did not agree with the minority shareholders, who wanted PPG to take over the (shares in) AkzoNobel, and the Court did not award their request for measures against the Chairman of the company's supervisory board, who resisted against the takeover. In its reasoning the Court referred, amongst other considerations, to the interests of the company and all its stakeholders.[271]

The Anglo-American approach, conversely, has traditionally been one of 'shareholderism'.[272] This means that a company's shareholders are principals for its management, and so management is entrusted with the goal of maximizing share value. This theory is not commonly ascribed to the jurisdictions of Continental Europe. However, some flashes of this theory appear in European corporate law and governance in its current state. As Guido Ferrarini acknowledges, the concept suddenly emerged in Germany, traditionally referred to as a 'stakeholder' society, where the idea has now become fashionable and to a certain extent integrated into the corporate culture. To illustrate this, the author notes that listed companies have established investor relations departments and that the services of US investment banks are overwhelmingly used.[273] Yet these facts should not be interpreted as a complete shift from a stakeholder to a

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[266] Goldsmith J, 'Lawyers' Responsibility for Advising on Corporate Social Responsibility' in Mullerat R (ed), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International 2005), 422.

[267] Some sources argue that, of the various stakeholder groups, shareholders have the greatest influence on companies' interests in Poland (Gerner-Beuerle C, Paech P and Schuster EP, 72).

[268] Radwan A and Regucki T, 'The Possibilities For and Barriers to Sustainable Companies in Polish Company Law', 18-19.

[269] Peters A, 16.

[270] *ASMI, Decision of 9 July 2010* NJ 2010/544 (Supreme Court of the Netherlands).

[271] *PPG/Akzo Nobel, Decision of 29 May 2017* JIN 2017/116 (Enterprise Court of Amsterdam). See R.A. Wolf, Overnameperikelen: Elliot International L.P. c.s., AkzoNobel en PPG Industries. Een analyse, TvOB 2017-5, 164.

[272] The origins of shareholder theory are found in the very first part of Adolf Berle's classic article that starts with the words, '*It is the thesis of this essay that all powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders…*' (Berle AA, 'Corporate Powers as Powers in Trust', 1049). Even though Berle subsequently developed his approach in a direction where the company's interests further national social welfare policy (Bratton WW and Wachter ML, 118), refuting his purely shareholder stance, some scholars nonetheless regard his approach as being confined to the shareholder primacy model. Edwin Dodd, who criticized Berle for his words, preferring to consider the enterprise as '*an economic institution which has a social service as well as profit-making function*' (Dodd EM, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harvard Law Review 1145, 1148), is today exaggeratedly regarded as a supporter of a corporate social responsibility approach as a variation on stakeholder theory.

[273] Ferrarini G, 'Shareholder Value and the Modernization of European Corporate Law' in Hopt KJ and Wymeersch E (eds), *Capital Markets and Company Law* (Oxford University Press 2003), 229-230.

shareholder theory. The issue should not be characterized purely in terms of black or white. This is also true for common law jurisdictions, regarded as jurisdictions where the shareholder theory prevails, as illustrated by the UK calling for a broader consideration of societal concerns.[274] As Beate Sjafjell states, '*company law across jurisdictions allows boards to implement legal externalities beyond compliance, at least as far as the business case argument allows*'.[275] In many countries around the world, therefore, economic players now tend to pay more attention to environmental and societal issues and regard them as part of socially and economically responsible behaviour.

What the stakeholder theory implies for conflicts of interest in corporate governance is a blurring of the line between due and undue interests pursued by managers.[276] An 'undue' interest can also be described as a secondary interest, i.e. not an interest that the agent is obliged to pursue, but for example the agent's own interest, based on personal or financial relationships.[277] These are the 'grey zones of reality'[278] for conflict rules, with an ambiguity that is impossible to eliminate entirely for separating legitimate interests from illegitimate ones.

Apart from purely stakeholder and shareholder approaches, a 'third way' has been proposed for dealing with the beneficiary issue, which has been termed 'Long Governance'.[279] What does this view add to the previously expressed thoughts on shareholder or stakeholder primacy, and to whom exactly do the directors owe their duties? Long Governance essentially suggests that companies have several classes of shareholders. The interests of those who pursue long-terms goals should be prioritized over those of the short-term, '*deal driven merger arbitrageurs*', in the terminology of takeover law.[280] In spite of the fact that this approach seemingly favours shareholders as a class, it essentially creates a solid base for protecting various different company constituencies whose interests can be aligned by their motivation of sustainably developing the company. The reasoning behind this theory makes particular sense in the situation where a publicly held company, with a dispersed ownership of shareholders that have diverging interests, faces a takeover. It is very doubtful in that scenario that all shareholders will be facing in the same direction.[281] In fact, this theory is directed more at the company as basically the principal beneficiary for its managers, and so it provides for a more realistic implementation than the idealistic stakeholder theory or the value-driven shareholder theory. The suggested approach is similar to the enlightened shareholder value approach,[282] and could correlate with the idea of the Constitutional Court of Ukraine that a company's interests are no more than the sum of the interests of all its shareholders.[283]

The idea of Long Governance has found its implementation in the recently revised Dutch CGC, most recently amended on 8 December 2016. The main goal was broadly to revise the Code to reflect the long-term value creation approach, as opposed to the short-term goals more

[274] Villiers C, 'Mapping Paper: Sustainable Companies UK Report' University of Oslo Faculty of Law Research Paper No 2013-16 (June 17, 2013). Available at SSRN: https://ssrncom/abstract=2280350, accessed on 7 December 2018.
[275] Sjåfjell B, 'Achieving Corporate Sustainability: What Is the Role of the Shareholder?' in Birkmose HS (ed), *Shareholders' Duties* (Wolters Kluwer 2017), 383.
[276] Peters A, 19.
[277] Ibid, 20.
[278] Friedberg E, 'Conflict of Interest from the Perspective of the Sociology of Organised Action' in Peters A and Handschin L (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge University Press 2012), 50.
[279] Masouros PE, *Corporate Law and Economic Stagnation: How Shareholder Value and Short-Termism Contribute to the Decline of the Western Economies* (Eleven International Publishing 2013), 271.
[280] Ibid, 278.
[281] Ibid, 279.
[282] Ho VH, 'Enlightened Shareholder Value: Corporate Governance beyond the Shareholder-Stakeholder Divide' (2010) 36 Journal of Corporation Law 59.
[283] *Decision of 1 December 2004 No. 18-pn/2004 (case about legitimate interest)* Case No 1-10/2004, Ofitsiynyi visnyk Ukrayiny of 31 December 2004, No 50, page 67, st 3288 (Constitutional Court of Ukraine).

commonly associated with detrimental events in corporate governance, including accounting fraud, corruption and cartel activity.[284] It further evidences that the long-term value creation approach and the stakeholder theory are not contradictory, but mutually complementary. This approach was further confirmed in the recent decision of the Enterprise Court of Amsterdam, in the dispute between Akzo Nobel and its shareholder PPG,[285] where the court ruled in favour of the company rather than its shareholder. In its decision, the court made explicit reference to the CGC and showed its preference for the stakeholder model by requiring that the interests of all stakeholders, including shareholders, must be taken into account. This is also in line with earlier case law in the Netherlands.[286]

2.2.4. The duty of loyalty for shareholders

Shareholders can act solely in that capacity by voting at general meetings and by exercising other rights of shareholders. In closed companies it is moreover not uncommon for a shareholder to be appointed as a director. This then means that the shareholder owes the company a director's duty of loyalty. However, it remains controversial whether a shareholder who is not a director also has a fiduciary duty to the company. The issue causes less dispute for partnerships, where fiduciary duties most often arise, as opposed to companies. The nature of partnerships presupposes that the partners, unlike shareholders in a company, work closely together and can be held liable for their acts towards the partnership. This creates a duty of loyalty.[287] For companies, conversely, this is not a usual scenario, especially publicly held companies, where shareholders are often no more than passive investors unwilling to participate in corporate affairs or influence the decision-making. Those types of shareholders usually prefer to exercise cash-flow rights either by claiming dividends or by re-selling shares to capitalize on significant differences between the purchase price and the selling price. These shareholders contrast with shareholders with the capability to exercise control over the company and, consequently, to decide its destiny along with the destiny of shares belonging to the minority shareholders. Burdening controlling shareholders with a duty of loyalty would then play a role in protection against opportunistic behaviour from both managers and shareholders with large blocks of shares.

Opponents of the idea to increase the scope of shareholders' duties by adding the duty of loyalty admit that this approach could be counterproductive, given that shareholders should concentrate on monitoring, rather than productivity.[288] This reasoning proceeds with the argument that companies consisting of several shareholders use other devices to prevent opportunistic behaviour, namely renegotiation and reputational incentives. In general, as already noted above, the duty of loyalty is more common in partnerships, where partners do not remain hidden behind the corporate veil like shareholders in companies do. It could also be argued that for other business forms, including publicly held companies, it is less appropriate to have the same level of fiduciarity in relationships between shareholders.

Legislation in the EU is silent on this issue: no explicit rule exists that imposes a duty of loyalty towards the company on its shareholders. This area has not been harmonized, and the Court of Justice of the EU has not expressed any opinion on the matter. Governing this issue falls within the ambit of national company laws of the EU Member States. An example is Germany, where the duty of loyalty of shareholders has been recognized in case law for an extensive list of corporate

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[284] *Dutch Corporate Governance Code Has Been Updated* (Monitoring Commissie Corporate Governance Code 8 December 2016).
[285] *PPG/Akzo Nobel, Decision of 29 May 2017* JIN 2017/116 (Enterprise Court of Amsterdam).
[286] *ABN Amro, Decision of 13 July 2007* R07/102HR (OK 137) (Supreme Court of the Netherlands).
[287] Sørensen KE, 'Duty of Loyalty of Shareholders - a Possible Remedy for Conflicts in SMEs?' in Neville M and Sørensen KE (eds), *Company Law and SMEs* (Thomson Reuters 2010), 129.
[288] McCahery J and Vermeulen EM, 'Conflict Resolution and the Role of Courts: Empirical Study', 230.

forms, including private companies (GmbH) and public companies (AG).[289] The extent to which shareholders owe that duty and to which they could then be held liable depends on the structure of the company and the level of participation.[290] Historically, shareholders in Germany gradually became burdened with a duty of loyalty. It started with shareholders in closed companies (ITT decision, 1975), through shareholders in public companies (Linotype decision, 1988), reaching the introduction of a duty of loyalty for minority shareholders possessing the capability to exercise veto rights and block decisions at a general meeting (Girmes decision, 1995).[291]

In the Netherlands, shareholders do not have a duty of loyalty as it exists in Germany. Rather, the status of shareholders is characterized by a degree of autonomy. No direct provision is made in statute for the concept of shareholder autonomy: it comes from case law, the Dutch CGC and legal doctrine.[292] It means that shareholders are expected to pursue their own best interest on the basis of their shareholdings. This freedom is not without limitation, however. The ramifications of shareholder conduct are set out in Article 2:8 of the BW, which describes the standards of reasonableness and fairness.[293] Those standards are not an exclusive feature of the law on legal persons: the principles of fairness and reasonableness have been employed in various spheres, including contract law and property law,[294] and in general are attributed to Dutch legal thinking.[295] Besides the standards of reasonableness and fairness in relationships between shareholders and their company, Bastiaan Kemp outlines one additional standard: abuse of power.[296] He argues that reasonableness and fairness are positive in nature, and oblige shareholders to ‘act’ in a particular way, whereas abuse of power has a negative content and forces them to ‘not act’. At the same time, provisions on abuse of power are similarly contained in Article 2:8, specifically in subsection 2, and where it is linked to the principles of reasonableness and fairness as outlined in the BW. The effect of Article 2:8(2) is far-reaching, as these standards can be applied by rendering law, common practice, articles of association, internal regulations, or resolutions inapplicable if they are incompatible with the principles of fairness and reasonableness. Decisions of corporate bodies that are unacceptable according to standards of reasonableness and fairness are voidable under Article 2:15 of the BW.[297]

The standards of the reasonableness and fairness are by themselves vague and require further explanation. As Bastiaan Kemp clarifies, three possible scenarios exist where shareholder conduct runs contrary to the standards of reasonableness and fairness: ‘*(a) where the conduct is intolerably disproportionate to the interest of a third party relative to the shareholder’s interest, (b) where a power is exercised by the shareholder for no other purpose than to harm the interest of another stakeholder, and (c) where a shareholder exercises power for any purpose other than the purpose for which it was granted*’.[298] For the first of these criteria for measuring conduct, various circumstances may be relevant, depending on the specific case,[299] including the position of the person concerned, the sector where the activities take place, the nature of the interests

[289] Sørensen KE, ‘Duty of Loyalty of Shareholders - a Possible Remedy for Conflicts in SMEs?’, 130.
[290] Beinert D, Burmeister F and Tries H-J, *Mergers and Acquisitions in Germany* (Verlag C.H. Beck München 2009), 21.
[291] Pistor K and Xu C, 95-96.
[292] Kemp B, ‘Aandeelhoudersverantwoordelijkheid: de Positieve Rol van de Aandeelhouder en Aandeelhoudersvergadering = Shareholder Responsibility: the Position and Role of the Shareholder and the Shareholders Meeting’ (Dphil thesis, Wolters Kluwer 2015), 430.
[293] BW, Article 2:8.
[294] Ibid, Articles 3:12, 6:2.
[295] Cartwright J, ‘Redelijkheid en billijkheid: a view from English law’ (2016) 30 BW-krant Jaarboek 39, 39.
[296] Kemp B, 432.
[297] Schutte T, ‘Good Governance: Reasonableness and Fairness of Directors and Supervisors’ Newsletter, as of 27 August 2015, available at: https://wwwrussellnl/Uploaded_files/Zelf/Publicaties/good-governance-reasonableness-and-fairness-of-directors-and-supervisors6588a8pdf, accessed on 30 August 2017.
[298] Kemp B, 432.
[299] Ibid, 433.

involved, the previous behaviour shown by the shareholder and the severity of the disadvantage.[300] These circumstances can be helpful in balancing the interests of shareholders and their company, not to mention the interests of other stakeholders. So, although the company is not strictly speaking a beneficiary for shareholders, they are not permitted to disregard its interest by acting contrary to the standards of reasonableness and fairness.

In Ukrainian company law, the duty of loyalty of shareholders does not take the same form as in Germany, for instance. Ukrainian company law does not use standards to impose a duty of loyalty: rather, it uses rules to address types of conflicted transactions. The JSC Law of Ukraine includes rules for shareholders' conflicts of interest, namely a procedure for approval of transactions between the company and any shareholder owning 25 per cent or more of the shares or an affiliated person (for a detailed analysis of affiliated persons, see Chapter 3).[301] This covers only one part of the 'conflict of interest' concept, leaving all other types of conflict unaddressed: a prohibition on competing with the company and business opportunities (see section 2.3). Additionally, procedural safeguards established by the mentioned provisions of the Law do not cover transactions where the shareholder has an interest, but to which a company where more than 25 per cent of share capital belongs to that shareholder is not a party – for example, transactions between a shareholder's subsidiary and a company's competitor. In that situation, the transaction could run contrary to the company's interests. According to the context of the Law, only the company is regarded as a beneficiary here, and the interests of other stakeholders are respected as long as they align with the interest of the company in this regard. However, it is not the court's role to assess whether the company's interests have been violated on the basis of the JSC Law of Ukraine.

A similar regulation is contained in the LLC Law of Ukraine, with one significant difference: the approval requirements apply if all the company's shareholders have agreed to include them in the articles of association.[302] Interestingly, the 'conflict of interest' concept as defined in this Law is not in any way related to shareholder duties: only company officers can be affected by the 'conflict of interest' rules.[303] In other words, conflict of interest is interpreted in a narrow sense in this Law, limiting shareholder duties to optional norms about approval of transactions with interest where the shareholder holds at least 20 per cent of the share capital or an affiliated person is the counterparty.

Therefore, even if its introduction in Ukrainian law is deemed useful, the duty of loyalty of shareholders is limited in its scope by the tenets of procedural requirements established for approval of transactions with interest in Ukrainian public and private companies where the company is regarded as a beneficiary.[304]

2.3. REGULATORY RESPONSES TO CONFLICTS OF INTEREST

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[300] Schutte T.
[301] JSC Law of Ukraine, Article 71.
[302] LLC Law of Ukraine, Article 45(3).
[303] Ibid, Article 42(3).
[304] When the Draft LLC Law of Ukraine was submitted to Ukraine's Parliament in May 2016, it included special provisions introducing procedural safeguards for dealing with RPTs, similar to those set forth in the JSC Law of Ukraine. At a later stage, however, those provisions were substituted by a modest set of rules for conflicts of interests (Draft Law of Ukraine 'On Limited and Additional Liability Companies' [Проект Закону України 'Про товариства з обмеженою та додатковою відповідальністю']).

2.3.1. Conflicts of interest and EU law

To identify and describe what types of conflicts of interest exist, it is necessary first to address the relevant provisions of hard and soft law directed at preventing these conflicts from occurring and, where they cannot be prevented, from causing negative consequences.

At the EU level, several instruments can be identified that deal with conflicts of interest. The first are the results of the successful harmonization, imposing a variety of obligations on Member States. One example is the Takeover Directive.[305] While this Directive does not in fact use the words ‘conflict of interest’, conflicts sometimes nevertheless arise as management of an issuer might possess information about the price of shares or other important details that could be used for his own benefit, rather than the company’s. One of the explicit concerns that the Directive addresses is the possibility of bid frustration by the offeree’s board.[306] The latter may obviously be influenced by the decisions of new shareholders who would gain control over the company as a result of a successful bid. Among other rules, the Directive requires that all decisions by the offeree company’s board directed at bid frustration, except to seek alternative bids, should be approved by the offeree’s general meeting of shareholders.[307] At the same time, while preventing the offeree’s board from taking steps to block the bid, the Directive also obliges the board to prepare and make public a document about its opinion of the bid and the reasons on which that opinion is based, which must then be delivered to the employees’ representatives.[308] Therefore, while bid frustration might run contrary to the interest of shareholders and the company, the board’s document with its opinion of the bid by itself does not constitute frustration, and although it may contain negative, conflict-related and even unreliable information about the offeror, it is nonetheless better than nothing. If considered critically and with due understanding of the various interests involved, this document can give food for thought about whose interests the board is protecting. Still, it could also exert a negative influence on stakeholders, and overreliance on it is not recommended.

In order to improve corporate governance, which had been heavily shaken by a series of widely publicized corporate scandals,[309] the EU has also stepped in with several recommendations containing provisions aimed at dealing with conflicts of interest of directors. First, according to Commission Recommendation 2004/913/EC,[310] the remuneration policy must be disclosed through a special statement. This statement may be a part of either a remuneration report or the company’s annual report, which must then be published on the company’s website.[311] Remuneration schemes may easily conceal conflicts of interest due to the possibility of excessive salaries of directors. For this reason, the Recommendation establishes mechanisms for a shareholder vote on the remuneration of individual directors[312] and share-based remuneration.[313] This means that, even if the director’s remuneration is higher than average, it must first have been approved by the shareholders.

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305 Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L 142/12, 30.4.2004.

306 Ibid, recital 16.

307 Ibid, Article 9(2).

308 Ibid, Article 9(5).

309 For example, see: Cuomo F, Mallin C and Zattoni A, ‘Corporate Governance Codes: A Review and Research Agenda’ (2016) 24 Corporate Governance - an International Review 222, 228; Haisler P, ‘Codes of Conduct as a Means of Regulation - With Point of Departure in Corporate Governance Debate’ in Neville M and Sørensen KE (eds), *The Regulation of Companies* (Forlaget Thompson 2003), 146.

310 Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies [2004] OJ L 385/55, 29.12.2004.

311 Ibid, section II, 3.1.

312 Ibid, section III, 5.

313 Ibid, section IV, 6.

Another Commission Recommendation, 2005/162/EC,[314] is not aimed at dealing primarily with remuneration issues, but in general seeks to improve corporate governance in listed companies having either supervisory directors (always present in two-tier jurisdictions such as Germany) or non-executive directors if no supervisory board is formed. The emphasis in this Recommendation is more on the proper composition of the board, the organization of board committees and the profile and appointment of directors, including requirements for independent directors. Independent directors are required to be free from any potential conflicts of interest, as they are regarded as independent only if they do not have any business, family or other relationships with the company, its controlling shareholder or either's management.[315] The Recommendation advises companies to have independent directors in those areas where the probability of conflicts of interest is especially high, namely on remuneration, nomination and audit committees.[316]

In 2009, these two Commission Recommendations were supplemented by the new provisions to increase the focus on conflicts of interest stemming from remuneration schemes.[317] The Commission went on to suggest that directors of companies that use share-based remuneration schemes should retain their shares at the end of their mandate[318] and that the shares should not vest rights for at least three years thereafter.[319] These measures are intended to ensure that directors exercise their powers in their company's interests.

2.3.2. Conflicts of interest and CGCs

Where the EU's harmonized measures meet national corporate laws, a special place is occupied by CGCs and their provisions dealing specifically with directors' conflicts of interest. Since the enactment of Directive 2006/46/EC[320] and following the provisions of the Accounting Directive, which replaced the Fourth and Seventh Council Directives,[321] EU Member States have been expected to adopt CGCs. According to the phrasing of the rule in the currently enforceable Accounting Directive, the management report of any legal entity whose securities have been admitted to trade on a regulated market of one of the Member States must include a corporate governance statement, with mandatory reference to a specific CGC. If the entity does not apply the CGC in its entirety, it must explain where it deviates from the CGC and why.[322] This provision is commonly referred to as the 'comply-or-explain' principle. This principle originated in the UK

[314] Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board [2005] OJ L 52/51, 25.2.2005.
[315] Ibid, Section III, 13.1.
[316] Ibid, Section II, 5.
[317] Commission Recommendation of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies [2009] OJ L 120/28, 15.5.2009.
[318] Ibid, recital 8.
[319] Ibid, Section II, 4.1.
[320] Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings [2006] OJ L 224, 16.8.2006, 1–7.
[321] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings [2013] OJ L 182, 29.6.2013, Article 20.
[322] Ibid, Article 20(1)(b).

Cadbury Report 1992 and has since then spread to a number of judicial corporate arrangements across Europe.[323]

The Directives mentioned above have not made CGCs into binding legal acts, limiting the imperative nature of the codes by the comply-or-explain principle. It is for the individual Member States to decide what would be the best-case scenario for regulating corporate relationships, bearing in mind the comply-or-explain principle. Regulation has therefore taken various different paths and has become country-specific, stirring up a debate on how best to qualify the nature of CGCs. Among the works that place specific emphasis on the issue of codes is the book by Annika Galle, who identifies five possible judicial corporate governance arrangements for CGCs: (a) pure self-regulation; (b) regulation supported by non-statutory norms; (c) facilitation by statutory rules; (d) regulation of self-regulation (meta-regulation); (e) pure regulation.[324] The scale presented here shows how rules in CGCs can be combined with legislative provisions. The possibilities range from independent codes that are fully separated from legislation, to a regulatory approach where the provisions of CGCs are also stipulated in legislation (the Sarbanes-Oxley Act, for example).[325] Having examined various jurisdictions, Galle claims that the Netherlands uses arrangement (c): the comply-or-explain principle is embedded in legislation. The situation in Germany is closer to arrangement (d), meanwhile.[326] In the first case, the legal basis for compliance with the Dutch CGC is enshrined in the BW, where a special government regulation is set forth to govern matters regarding compliance with the code.[327] In Germany, the AktG explicitly requires compliance with the German CGC, having effect for both the past and the future.[328]

The current version of the Dutch CGC, which came into force on 1 January 2017, devotes one chapter to preventing conflicts of interest arising in management and/or supervisory board situations (principle 2.7). The previous version of the Code contained two separate sections on conflicts of interests, for management and for the supervisory board.[329] Among other differences, the new version vests more power in the supervisory board and increases the focus on the majority of shareholders as being subject to conflicts of interest. The types of conflicts in the new CGC are basically the same as in the previous version: (a) competing with the company; (b) demanding or receiving substantial gifts from the company; (c) taking unjustified advantage of third parties at the company's expense; (d) taking advantage of business opportunities falling to the company.[330] All these conflicts are unacceptable. In addition, the CGC contains a number of clauses establishing rules for RPTs: it defines the obligations of related parties (members of the management or supervisory boards) to disclose conflicts of interest,[331] the requirements for the terms of RPTs and their approval.[332] A further section of the CGC is devoted to a specific category of RPTs: loans, guarantees and similar arrangement that place the company in a vulnerable position.[333]

An examination of the current version of the German CGC, which was most recently updated on 7 February 2017[334] quickly reveals that, similar to the previous version of the Dutch

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[323] Galle JGCM, *Consensus on the Comply or Explain Principle within the EU Corporate Governance Framework: Legal and Empirical Research* (Kluwer 2012), 90.
[324] Ibid, 88.
[325] Ibid, 89.
[326] Ibid, 92.
[327] BW, Article 2:391(5).
[328] AktG, Article 161(1).
[329] Dutch Corporate Governance Code, as revised on 8 December 2016; the first edition of the Dutch Corporate Governance Code was drafted by the Tabaksblat Committee in 2003 and later revised in December 2008.
[330] Dutch CGC, section 2.7.1 Preventing conflicts of interest.
[331] Ibid, section 2.7.3 Reporting.
[332] Ibid, sections 2.7.4 Accountability regarding transactions: management board and supervisory board members, 2.7.5 Accountability regarding transactions: major shareholders.
[333] Ibid, section 2.7.6 Personal loans.
[334] German Corporate Governance Code (Deutscher Corporate Governance Kodex), as amended on 7 February 2017; the Code was initially adopted in February 2002, but has since undergone revisions almost annually.

CGC, it separates conflicts of interest into conflicts of management and of the supervisory board, although in essence these conflicts have much in common. According to the German CGC, both managers and supervisors are prohibited from pursuing their personal interests in their positions and from exploiting any business opportunities that fall to the company.[335] Interestingly, only managers are subject to restrictions on competing with the company, demanding or receiving unlawful advantages from third parties in connection with their work and granting unlawful advantages to third parties; members of the supervisory board are not covered by this rule.[336] Transactions between managers, their related parties and the company must conform to standards customary in the sector. If sufficiently important, these transactions, together with managers' sideline activities and supervisors' service agreements or work contracts with the company, require approval from the supervisory board.[337] The new 2019 version of the German CGC, which has not yet become effective, devotes a separate section to conflicts of interest of members of both the management board and the supervisory board.[338] The new CGC preserves the prohibition on exploiting business opportunities, the non-compete clause for managers and the recommendation to make sideline activities subject to the supervisory board's approval.[339] On the issue of RPTs, the new CGC merely refers to the applicable legal regulations, rather than giving specific rules.[340] The 2019 German CGC will become effective at the same time as the act implementing SRD II, though no concrete date has been determined as yet.

While the CGCs in Germany and the Netherlands exist as separate instruments that are not necessarily attached to a particular institution or authority, besides the monitoring commissions that revise the codes, in Poland[341] similar rules are the province of the Warsaw Stock Exchange, where the recent recast of the WSE Best Practice has been in effect since 1 January 2016.[342] Chapter V of the WSE Best Practice deals with conflicts of interest, naming only one type of conflict: benefits received by management or the supervisory board that could jeopardize their impartiality or objectivity in making decisions or reflect unfavourably on the assessment of the independence of their opinions or judgments.[343] The prohibitions described above, restricting competition with the company and the use of business opportunities, are not included, although arguably the broad interpretation of the concept of a conflict of interest could be said to implicitly refer to these types of conflicts as well. Other types of conflicts must be specified in the company's articles of association.[344] What the WSE Best Practice provides in return for a modest list of conflict types are various additional ex ante and ex post safeguards against conflicting behaviour. In particular, it contains the approval requirement for transactions between the company and its shareholders or related parties, with an assessment of equal treatment of shareholders and the interest of the company,[345] the duty of managers and supervisors to refrain from voting on resolutions that give rise to conflicts of interest[346] and the right of managers and supervisors to

[335] Ibid, sections 4.3.1, 5.5.1.
[336] Ibid, sections 4.3.1, 4.3.2.
[337] Ibid, sections 4.3.3, 4.3.4, 5.5.4.
[338] German Corporate Governance Code (Deutscher Corporate Governance Kodex) 2019, section E.
[339] Ibid, section E, Principle 19, recommendation E.3.
[340] Ibid, section A, Principle 6.
[341] Poland had a draft Gdansk CGC, prepared by the Gdansk Institute for Market Economic in June 2002. However, it has not received any further impetus for state-wide use (Dzierzanowski M and Tamowicz P, *The Corporate Governance Code for Polish Listed Companies (The Gdańsk Code)* (The Polish Corporate Governance Forum and The Gdansk Institute for Market Economics, 15 June 2002)).
[342] Best Practice of GPW Listed Companies 2016, as approved by the Exchange Supervisory Board on 13 October 2015.
[343] Ibid, section V.Z.3.
[344] Ibid, section V.Z.6.
[345] Ibid, sections V.Z.1, V.Z.5.
[346] Ibid, section V.Z.2.

request that minutes of the management board or supervisory board show their position on the existence of a conflict.[347]

Although the title of the WSE Best Practice does not include the word 'code', nothing precludes this document from being treated as a CGC: both the authors of the WSE Best Practice and academic scholars interpret it as the basis for the comply-or-explain principle in light of relevant EU law.[348]

2.3.3. Conflicts of interest in the Principles of Corporate Governance in Ukraine

In contrast to the European countries discussed above, Ukraine does not possess a supranational legal basis at the EU level for introducing a CGC. The Accounting Directive is not included in an annex to the EU-Ukraine Association Agreement, as it did not exist when the Agreement was being drafted. Its predecessor, the Fourth Council Directive,[349] was stipulated in the EU-Ukraine Association Agreement without the future changes introduced by Directive 2006/46/EC. Therefore, formally Ukraine has no international obligation to adopt a CGC, despite some debate on this issue. Critics who found it unnecessary to adopt a national CGC referred to the Principles of Corporate Governance adopted by the decision of the NSSMC. Those Principles are similar in content and scope (listed public companies) to the CGCs of the EU's Member States. At the same time, they essentially constitute an administrative act that is advisory in nature.[350]

Although the Principles of Corporate Governance originate from the administrative act, their usage is more limited than that of CGCs in the EU. The Principles were not adopted to implement the various EU Directives, but rather to follow paragraph 29 of Article 7 of the Law of Ukraine 'On State Regulation of Securities Market in Ukraine', which outlines the competence of the NSSMC.[351] That Law does not contain a comply-or-explain' rule, and the Principles add further ambiguity by referring to this rule as an alternative to voluntary application of the Principles.[352]

In addition to the ambiguous wording of the Principles, a statutory comply-or-explain rule has recently been envisaged.[353] Issuers of securities, meaning public companies, are now obliged to prepare their annual reports in compliance either with their own CGC or with the CGC of a

347 Ibid, section V.Z.4.

348 Ibid, Introduction; Mucha A, 'Dobre Praktyki Spółek Notowanych na GPW 2016 – kontynuacja czy rewolucja? (Best Practice for Warsaw Stock Exchange Listed Companies 2016–Continuation or Revolution?)' Allerhand Working Papers, March 3, 2016. Available at SSRN: https://paperssrncom/sol3/paperscfm?abstract_id=2741585, accessed on 6 December 2018, 5.

349 Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54 (3)(g) of the Treaty on the annual accounts of certain types of companies [1978] OJ EC L 222/11, 14.8.78.

350 Principles of Corporate Governance, approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955], available at: http://www.nssmc.gov.ua/law/18922, accessed on 28 December 2018.

351 Law of Ukraine 'On State Regulation of Securities Market in Ukraine' [Закон України 'Про державне регулювання ринку цінних паперів в Україні'] of 30 October 1996, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 1996, No. 51, St. 292.

352 Principles of Corporate Governance, approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955], section I.6.

353 Law of Ukraine 'On Amending Certain Legislative Acts on the Simplification of Business and Attraction of Investments by the Issuers of Securities' [Закон України 'Про внесення змін до деяких законодавчих актів України щодо спрощення ведення бізнесу та залучення інвестицій емітентами цінних паперів'], Chapter 1, paragraph 15, subparagraph 15.

stock exchange or another code the company has voluntarily agreed to apply.[354] In other words, the comply-or-explain rule, having been in force in the EU for some time, has only recently entered the legislative realm in Ukraine. The absence of a culture of applying this principle, coupled with the vague provisions of the Principles in practice, have made public companies reluctant to comply.

Turning to the issue of enforcement of CGCs, sufficient evidence can be found that courts in Germany and the Netherlands have applied their countries' CGCs as sources of law.[355] Conflicts of interest, as described in the codes, have also come into judicial focus in the respective jurisdictions, namely in the German case of *Kirsch versus Deutsche Bank*, where the failure by the board of a bank to deal with its chairman's false statement was established.[356] In the Dutch *Begemann* case, the Enterprise Court of Amsterdam also highlighted the need to apply the code's provisions on conflicted directors and the company's duty to publish a corporate governance statement in its annual report.[357] Another famous decision besides *Begemann* was in the *ABN AMRO* case, where the Dutch Supreme Court referred to the provisions of the Dutch CGC (the Tabaksblat Code) and applied them as giving substance to the principles of reasonableness and fairness enshrined in Article 2:8 of the BW.[358] With that decision, the Dutch Supreme Court overturned the decision of the Enterprise Court of Amsterdam, which had earlier ruled in favour of the plaintiff VEB, one of the ABN AMRO shareholders. The plaintiff had claimed that the transaction formed by ABN AMRO to sell shares in ABN AMRO North America should have been subjected, among other requirements, to prior approval by the shareholders of ABN AMRO Holding, following Article 2:8 in conjunction with Article 2:107a(1) of the BW.[359] Legal literature further argued that by ruling in this manner the Enterprise Court of Amsterdam had abandoned the stakeholder theory commonly used in the Netherlands, preferring instead to focus on the interests of shareholders.[360] Despite also basing its reasoning on Article 2:8 of the BW, by referring to the standards of reasonableness and fairness, the Supreme Court interpreted those standards differently, namely through the provisions of the CGC. One of the main arguments used by the Supreme Court was that the obligation of prior consultation of the general meeting of shareholders would have resulted in unacceptable legal uncertainty.[361] Still, CGCs cannot be equated with provisions of hard law: as Eddy Wymeersch suggests, they have not been applied as legally binding instruments.[362]

Courts in Ukraine have also made reference to the Principles of Corporate Governance in their decisions.

In case No. 20-11/421-7/514, resolved by the Supreme Economic Court of Ukraine, the claimant sought to void the director's relinquishment of the company's property for the benefit of third parties, arguing that the relinquishment had been made without the supervisory board's approval and was not on market terms. The court rejected the claim by querying the claimant's standing, since at the time Ukrainian laws did not recognize shareholders submitting claims to

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[354] Law of Ukraine 'On Securities and Stock Market' [Закон України 'Про цінні папери та фондовий ринок'] of 23 February 2006, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 2006, No. 31, St. 268, Art. 40(3).

[355] Wymeersch E, 'European Corporate Governance Codes and Their Effectiveness' in Belcredi M and Ferrarini G (eds), *Boards and Shareholders in European Listed Companies: Facts, Context and Post-Crisis Reforms* (Cambridge University Press 2013), 85-89, 98-101.

[356] Kirsch v. Deutsche Bank, BGH, 16 February 2009, II ZR 185/07, as quoted by Wymeersch E, 'European Corporate Governance Codes and Their Effectiveness', 88.

[357] *Begemann, Decision of 28 December 2006* JOR 2007/68 (Enterprise Court of Amsterdam).

[358] Oostwouder W, 'Can You Trust the Dutch (Company Law System)?' (2007) 4 European Company Law 211, 212.

[359] De Groot C, Van Nood A and Lambert F, 'The ABN AMRO Ruling: Some Commentaries' (2007) 4 European Company Law 168, 171.

[360] Ibid, 172.

[361] *ABN Amro, Decision of 13 July 2007* R07/102HR (OK 137) (Supreme Court of the Netherlands)..

[362] Wymeersch E, 'European Corporate Governance Codes and Their Effectiveness', 101.

protect their company’s rights and legitimate interests (derivative action).[363] One of the sources on which the Court drew was the Principles of Corporate Governance, as in effect on the date of the judgment (2003 version), using those Principles as a secondary source, in addition to the CCU and the Land Code of Ukraine.

As an additional note on that judgment, the Economic Procedural Code of Ukraine now allows shareholders owning 10 per cent or more of the shares to claim damages on behalf of the company.[364] This change was added in April 2015 and became effective on 1 May 2016.[365] At the same time, it does not grant shareholders the power to use legal recourse on behalf of the company other than to seek compensation for loss or damage caused by company officers.

It was a logical decision for the court to apply soft law after hard law. Moreover, in the judgment discussed here, the provisions from the Principles of Corporate Governance did not bring anything new to the rules contained in the relevant legislative acts. Without reference to the Principles, the outcome of the case would have been the same.

Even where the Principles are treated as a source of law, their effect is limited in scope, as they are generally used as an additional source to add detail and authority to statutory law, not as a source on which a lawyer can build a case. Arguably, they could be applied on their own if the court regards them as principles of law: the CCU does in fact allow applying principles of law by analogy of law if statutory provisions cannot be applied.[366] The principles specified in the CCU include the principles of fairness, good faith and reasonableness,[367] as well as a more general principle of the rule of law as declared in the Constitution of Ukraine.[368] The sphere of conflicts of interest is not excluded from the possible scope of these principles. Until recently, courts in Ukraine were reluctant to apply the principles of law. The decision by the Supreme Economic Court of Ukraine of 10 January 2012 in a case No. 5021/1197/2011[369] is an example of a judgment where the court invalidated a transaction as being contrary to the principles of law. In this case, the transaction contract provided for fixed monthly payments for services in the amount of UAH 30,000, without stipulating any specific obligations of the other contracting party. The court annulled this contract on the basis of Articles 3, 203(1) and 509(3) of the CCU, and acknowledged that it was incompatible with the principles of fairness, good faith and reasonableness. The new Supreme Court, which came into office on 15 December 2017,[370] has applied the principles of law to corporate disputes on several occasions. According to the recent digest of court practice, in corporate disputes the Supreme Court has referred to the general principle of the rule of law, and to the principles of legal certainty and fairness as the former’s constituent elements.[371]

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[363] *LLC ‘Svarog Asset Management’ vs. OJSC ‘Sebastopol Sea Plant’, Judgment of 2 July 2008* Case No 20-11/421-7/514 (Supreme Economic Court of Ukraine).

[364] Economic Procedural Code of Ukraine [Господарський процесуальний кодекс України] of 6 November 1991, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 1992, No. 6, St. 56, Arts. 12(1)(4-1), 4-8, 28

[365] Law of Ukraine ‘On Amending Certain Legislative Acts on the Protection of Investors’ [Закон України ‘Про внесення змін до деяких законодавчих актів щодо захисту прав інвесторів’].

[366] CCU, Article 8(2).

[367] Ibid, Article 3.

[368] Constitution of Ukraine [Конституція України] of 28 June 1996, published in Vidomosti Verkhovnoyi Rady Ukrayiny, 1996, No. 30, St. 141, Article 8.

[369] *LLC ‘Sarex’ vs. Open JSC ‘Sumske ATP-15928’, Resolution as of 10 January 2012* Case No 5021/1197/2011 (Supreme Economic Court of Ukraine).

[370] ‘The New Supreme Court Started Functioning in Ukraine [В Україні почав роботу новий Верховний Суд]’ (2017) <https://ua.korrespondent.net/ukraine/3918262-v-ukraini-pochav-robotu-novyi-verkhovnyi-sud>, accessed on 29 September 2019.

[371] *Digest of Court Practice of the Supreme Court in Cases Arising of Corporate Relations (2018 - 15 July 2019) [Дайждест судової практики Верховного Суду у справах, що виникають із корпоративних відносин (2018 рік - 15 липня 2019 року)]* (website of the Supreme Court. Available at: https://supremecourtgovua/userfiles/media/Dajest_korporat_vidnosunu_1pdf?fbclid=IwAR0IBFqlG-nLKuBLtZ1is7p7h44lGyAyRoSamP3PC7X1ndYStc-c8SNFlnI, 2019), pp. 136, 167.

In the cases described here, courts in Ukraine took the shortcut of applying the principles of law, usually observed within the concept of analogy of law.[372] In contrast, the concept of analogy of statute is the application of provisions of a statute regulating similar relationships, where civil relations are not governed by the Code, other civil legislation or the actual contract.[373] In corporate law, analogy of statute has been used, for instance, to apply the provisions on LLCs to private enterprises.[374] However, the Principles of Corporate Governance are by nature not an act of civil legislation and cannot be applied by analogy of statute. This therefore lessens the likelihood of independent application to corporate relationships.

Unlike the Dutch, German and Polish CGCs, the Ukrainian Principles of Corporate Governance lack a firm basis such as EU law, which consequently affects their practical significance. This is confirmed by the lack of court decisions that make reference to the 2014 Principles.

Accordingly, acknowledging the problems with the practical effect of the Principles of Corporate Governance, it is necessary to consider their substance and how it relates to conflicts of interest.

The 2014 version of the Principles that is currently in place in fact offers a comprehensive set of rules regarding conflicts of interest. The function of controlling the prevention, revelation and resolution of conflicts of interest is vested with the company's supervisory board,[375] which is advised to establish separate committees from among its members to prevent conflicts of interest: an audit committee, a nomination committee, a remuneration committee and a committee on information policy.[376] Interestingly, these requirements go further than required under the JSC Law of Ukraine[377] and Commission Recommendation 2005/162/EC,[378] which make no mention of committees on information policy, while the Recommendation allows committee functions to be grouped as the supervisory board sees fit[379] – for instance, merging the nomination and remuneration committees. At the same time, it is important not to overstate how comprehensive the rules contained in the Principles are: in some respects they are vague and declarative. This is illustrated by the concept of an independent supervisory board member that the Principles offer,[380] which is considerably less detailed than the notion of an independent director, as found in the JSC Law of Ukraine[381] and Commission Recommendation 2004/913/EC.[382]

Conflicts of interest are also specifically discussed in section II, paragraph 3.3 of the Principles, which describes the duties of company officers to act in good faith and in the company's

372 CCU, Article 8(2).
373 Ibid, Article 8(1).
374 *Osoba 6 vs. Private Enterprise 'Illichivska perlyna', Judgment of 11 April 2016* Case No 916/2855/15 (Supreme Economic Court of Ukraine).
375 Principles of Corporate Governance, approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955], section II.3.1.3(*г*).
376 Ibid, section II.3.1.13.
377 JSC Law of Ukraine, Article 56(1).
378 Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board [2005] OJ L 52/51, 25.2.2005, section II, 5.
379 Ibid, section II, 6.1.
380 Principles of Corporate Governance, approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955], section II, 3.1.12.
381 JSC Law of Ukraine, Article 2(1)(10-1).
382 Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies [2004] OJ L 385/55, 29.12.2004, Annex II.

best interests,[383] to notify any conflicts of interest in connection with any company decision or transaction,[384] not to use business opportunities that fall to the company[385] and not to compete with the company.[386] The Principles also set out specific requirements for loans to company officers: these need to be recorded in the company's internal documents, approved by the supervisory board and disclosed to the shareholders.[387] Here the Dutch CGC goes a step further, by introducing additional restrictions on personal loans, namely that they need to be made in the normal course of the company's business, on the same terms that apply to the greater workforce and without the possibility of remission, so that even if approval is obtained from the supervisory board, it must be in the company's best interests.[388] In addition, unlike the WSE Best Practice and the Principles of Corporate Governance, the Dutch CGC covers a wider range of corporate relationships by also considering conflicts of interests involving shareholders with 10 per cent or more of the share capital: as it would be nonsensical to deny that shareholders that hold a large portion of the share capital can significantly influence the company's functioning, these elements appear to be a logical addition to the Dutch CGC.

2.3.4. RPTs and conflicts of interest

If a director is said to act in conflict with the company's interests, it means that an internal contradiction exists between the interests of the director and the interests of the company (beneficiary) on whose behalf he or she is acting. This contradiction is inherent in RPTs. At the same time, the chief executive officer of a company who enters into a transaction with a relative on behalf of the company is not necessarily acting in a manner that is harmful. A related party will not necessarily behave more detrimentally to the company than a third party. Professional literature views transactions with independent third parties as being at arm's length, and generally contrast them with RPTs.[389] Some sources, however, find that RPTs can be at arm's length, provided that additional procedural safeguards are used, such as India's system of prior audit committee approval.[390] Still, even if that potential approach is accepted, transactions are at arm's length from a procedural viewpoint, rather than by substance. The question is more one of parties acting independently, rather than of the fair outcome of a particular transaction. Transactions at arm's length cannot be guaranteed to arrive at a fair result. While this is also true of RPTs, the parties to RPTs are not independent actors as they would be in arm's length transactions. Only if the RPT yields advantages to the related party does the risk inherent in conflicted transactions materialize, and is the related party acting in his or her own interest, rather than the company's. This means that, even though RPTs are included among the possible types of conflicts of interest by some

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[383] Principles of Corporate Governance, approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955], section II, 3.3.1.
[384] Ibid, section II, 3.3.2.
[385] Ibid, section II, 3.3.3.
[386] Ibid, section II, 3.3.4.
[387] Ibid, section II, 3.3.5.
[388] Dutch CGC, section 2.7.6.
[389] Cheung YL and others, 'Tunneling and Propping Up: An Analysis of Related Party Transactions by Chinese Listed Companies' (2009) 17 Pacific-Basin Finance Journal 372, 386; Gordon EA and Henry E, 'Related Party Transactions and Earnings Management'. Available at SSRN: https://ssrncom/abstract=612234 or http://dxdoiorg/102139/ssrn612234 , accessed on 27 November 2018, 9.
[390] Mahtani U, 'An Analysis of Related-Party Transactions in India' WORKING PAPER SERIES WP NO: 2017/01/FN (GOA INSTITUTE OF MANAGEMENT, PORIEM, SATTARI, GOA 403505), available at: https://wwwgimacin/newpdfs/Related-party-transactions-Group-and-Non-Group-Company-Perspective-Jan2017pdf <http://www.iimb.ernet.in/sites/default/files/WP%20No.%20402_0.pdf>, accessed on 6 December 2018, 2.

sources,[391] strictly speaking they are not. A conflict of interest in an RPT can be defined as an incompatibility between the interests of the related party and the interests of the company. It is then more correct to say that these 'transactions imply conflicts of interest,'[392] as related parties can be granted additional advantages by the company. These transactions are exposed to a higher level of risk, since human nature means a very high probability of related parties exploiting their position by extracting benefits from the company, and consequently giving rise to conflicts of interest.

Nevertheless, RPTs do not always lead the company to a dead end, and their use is not necessarily as deliberately harmful as anticipated. A clear example of an economy where RPTs are part of the ordinary course of business is described in an article by Luca Enriques.[393] As that author argues, in countries similar to the imaginary business-unfriendly state Tunnelland, RPTs may become a reasonable response to badly designed and poorly functioning institutions.[394] Companies in countries like Tunnelland would be forced to use RPTs to prevent their assets from flowing into the hands of corrupt officials or raiders. While this example is of course not a valid argument for continuing to use RPTs rather than changing the rules of the game for all players, even in an economy that differs from the non-existing state of Tunnelland, RPTs are not necessarily harmful to companies, especially in family-owned firms. RPTs can also have a value-creating effect for listed companies. For example, if a dominant shareholder in a company invests in a research and development project, he or she usually knows the project's chances for success better than any third party.[395] The profound understanding of the specific business and production processes make him or her a perfect investor in this case. This is where RPTs can have a value-creating effect for numerous companies: banning them outright would rule out too many efficient transactions.[396] That is why, while in general the sense remains that behaviour that conceals conflicts of interest should be prohibited entirely, for example competing with the company, RPTs amount simply to risky behaviour that demands a more delicate approach through use of appropriate strategies, as amply demonstrated in the 'Anatomy of Corporate Law'.[397] Like an all-out ban, a non-intervention approach is not a solution, as it would generate free-rider issues and inefficient decisions by investors.[398] The need for intermediate solutions for RPTs, rather than radical moves, matches the OECD recommendations specifically dealing with RPTs, but not with conflicts of interest in general.[399]

That having been said in regard to RPTs, and following the analysis of the CGCs described above, the types of conflicts that can be discerned are as follows: (a) use of the company's business opportunities, and competition with the company (this category includes transactions entering the sphere of the company's finances, but not transactions between the company and its related parties[400]); (b) use of any advantages of the company, and the grant of advantages to third parties (also within RPTs).

[391] Gerner-Beuerle C and Schuster EP, 'Mapping Directors' Duties: Strategies and Trends in the EU' in Birkmose HS, Neville M and Sørensen KE (eds), *Boards of Directors in European Companies : Reshaping and Harmonising Their Organisation and Duties* (Wolters Kluwer Law & Business 2013), 23.
[392] Dotevall R, 'Is a Common Structure of Company Directors' Duties Evolving in EU?' (2016) 27 European Business Law Review 285, 6.
[393] Enriques L, 'Related Party Transactions: Policy Options and Real-world Challenges (with a Critique of the European Commission Proposal)', 4.
[394] Ibid, 5.
[395] Ibid, 7.
[396] Goshen Z, 'The Efficiency of Controlling Corporate Self-dealing: Theory Meets Reality', 401.
[397] Kraakman R and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2nd edn, Oxford University Press 2009), 155-178.
[398] Goshen Z, 'The Efficiency of Controlling Corporate Self-dealing: Theory Meets Reality', 404-407.
[399] OECD, *Related Party Transactions and Minority Shareholder Rights* (OECD Publishing, 2012).
[400] Ungerer F, 45.

These types of conflicts of interest inherently imply the negative consequences for the company that come with the very concept of conflicts of interest.

This list is not exhaustive: for instance, a conflict of interest also arises if a director receives excessive remuneration. At the same time, this could also be described as the use of advantages, given that the difference by which the remuneration exceeds a normal level of pay is clearly an advantage.

Lastly, a director who accepts benefits from a third party does not necessarily have conflicted interests. In fact, it does not matter for the company whether the director is granted any advantages by third parties, as long as this is not harmful for the company. Ignoring the possibility of the director receiving advantages would be overly suspicious and would have a neutral or no effect on the company's functioning. However, if the director's conduct is purposively harmful to the company, then that conduct may indubitably be argued to involve a conflict of interest, and the company would likely be entitled to damages under national laws in compensation for the director's actions.[401]

2.3.5. Intra-group transactions and conflicts of interest

Intra-group transactions occupy a special place among RPTs. Their name is, to some extent, self-explanatory: these transactions are formed between group constituencies, most commonly legal entities. The essence of corporate groups, their features and related issues are discussed at greater length in Chapter 4. This section only briefly explains how conflicts of interest occur in intra-group transactions.

Concerns arising for corporate groups are intrinsically linked to the large numbers of stakeholders whose interests need to be taken into account. At least six groups of stakeholders can be identified surrounding corporate groups, half of them insiders (management, investors and employees) and the other half external stakeholders (creditors, government and the general public).[402] While it is very well possible for the interests of internal and external stakeholders to go hand in hand, at the same time every stakeholder has their own separate interests.

Taking managers as a class of stakeholders, the first comment that must be made is that they are not saints. Their primary concern is for their liability and remuneration. These factors influence their decision-making in the same way as they do in ordinary companies. What is different in groups is that the classical agency conflict between management and shareholders is not particularly relevant for groups of companies: here, unlike for companies with dispersed ownership, the controlling shareholder has more power to decide the company's fate by voting for the preferred decisions in another company's bodies.[403] Managers in groups of companies are consequently unable to act as the guardians of corporate wealth if blockholders follow their own interests and exert their influence over board members by forcing them to follow a particular path.[404]

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[401] An example of a rule entitling a company to claim such damages can be found in the Principles of Corporate Governance, approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955], section II, 3.3.6.

[402] Hadden T, *The Control of Corporate Groups* (Institute of Advanced Legal Studies (University of London) 1983), 20.

[403] Hopt KJ, 'Groups of Companies-A Comparative Study on the Economics, Law and Regulation of Corporate Groups', 4.

[404] Langebucher K, 'Do We Need a Law of Corporate Groups?' in Fleischer H and others (eds), *German and Asian Perspectives on Company Law* (Mohr Siebeck 2016), 358.

The second group of stakeholders are investors. Investors' interests have much in common with the interests of management. It is important for corporate reality to meet their expectations. This is possible if the company in which they have invested is sufficiently profitable, which of necessity excludes the use of any abusive tunnelling techniques by majority shareholders, management or their related parties. The unique status of the investors in groups of companies lies in the fact that they are interested in developing the group as a whole, rather than a specific branch, division or subsidiary.[405] This particular feature sets investors apart from employees, who might be more interested in the profitability and sustainability of a particular subsidiary, in safeguards to ensure working conditions and whether their salary is appropriate. Employees may have specific concerns about the company's development in connection with major corporate events, for example mergers and takeovers.[406]

While the interests of internal stakeholders tend to diverge, they share a desire for the company to be profitable. Of the internal stakeholders, shareholders universally have voting rights in a company, which makes them residual claimants.[407] Unlike employees and managers, they usually have sufficient incentive regarding the company's functioning, as they bear the greatest share of the risk and participate in the final distribution of income.[408] As residual claimants, shareholders tend to force managers to take greater risks.[409] Employees conversely receive only a fixed amount of company assets and bear less risk. The latter feature unites them with creditors under the umbrella of fixed claimants.[410] At the same time, creditors may become residual claimants if the risk to which they are exposed increases significantly due to the conduct of equity holders.[411]

Creditors are by definition external stakeholders. Their main aim is to be paid for their claims.[412] This does not necessarily mean that the company will stay solvent if the creditors achieve their goal. At the same time, creditors are exposed to risks of non-payment of claims on groups of companies more than on other types of companies:[413] in corporate groups, corporate wealth is distributed between separate constituencies. Moreover, even if a company that is part of a group possesses sufficient resources at a given moment, that can change through control transactions and cash-pooling agreements passed down from the group's top. These risks increase with multinational groups, where, even if the corporate veil can be pierced, creditors experience additional issues related to the cost of debt collection in different jurisdictions. That is why creditors often try to keep a close watch on the debtor company's assets by forming additional security agreements and arranging protective mechanisms.

Besides creditors, the government and the general public can also be considered separate stakeholders. Governments are stakeholders inasmuch as they are interested in collecting tax revenue. Major groups of companies usually have high levels of income and large workforces, which makes them attractive taxpayers. However, it is crucial for the government to balance its regulation to retain their taxpayers. Excessively high taxes may force companies to move to another jurisdiction. Similarly, the general public also has an interest in having large groups as taxpayers: more tax money enables the state to improve its infrastructure and to care for socially

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[405] Hadden T, 21.
[406] Hopt KJ, 'Groups of Companies-A Comparative Study on the Economics, Law and Regulation of Corporate Groups', 7.
[407] Easterbrook FH and Fischel DR, 'Voting in corporate law' (1983) 26 The Journal of Law & Economics 395, 403.
[408] Ibid, 403.
[409] Masouros PE, 'Is the EU Taking Shareholder Rights Seriously?: An Essay on the Impotence of Shareholdership in Corporate Europe' (2010) 7 European Company Law 195, 200.
[410] Enriques L, 'The Law on Company Directors' Self-Dealing: A Comparative Analysis' (2000) 2 International and Comparative Corporate Law Journal 297, 331.
[411] Easterbrook FH and Fischel DR, 'Voting in corporate law', 404.
[412] Hadden T, 23.
[413] Langebucher K, 'Do We Need a Law of Corporate Groups?' in Fleischer H and others (eds), *German and Asian Perspectives on Company Law* (Mohr Siebeck 2016), 358.

vulnerable categories of people. Yet tax considerations are not the only factors that will matter to the public: environmental concerns, for example, constitute an important reason for the public to favour or oppose corporate groups. Groups with environmentally unsafe practices risk being red-lighted in some countries.

Last but not least, besides the interests of the separate stakeholders within and outside the group, the interests of the corporate group itself also come into play. The idea of a group's interests concerns the right and duty of the parent company to manage the group and its companies according to the group's best interests.[414] The group's interests provide the subsidiary with a 'safe harbour' of decision-making, where a particular act might be contrary to the subsidiary's own interests, but would further the interests of the group overall. In pursuit of the group's interests, a parent company might issue binding instructions that are to the detriment of the individual subsidiary. The group's interests also justify pooling transactions to withdraw funds from the subsidiary in favour of the parent or another member of the group. The issue of a group's interests has been studied by scholars in Europe, from the recommendations of the Forum Europaeum[415] to the recent findings and recommendations of the Informal Company Law Expert Group.[416] The report of that expert group emphasised that Member States have different approaches to the issue of recognizing the interests of groups, ranging from exclusively favouring the individual company's interests to a standards-based recognition of the group's interests.[417] Chapter 4 elaborates further on the differences in recognizing groups interests in different Member States. For now, it is important to note that, regardless of whether a group's interests are recognized in a particular jurisdiction, it is pointless to deny the existence of certain common objectives in the functioning of multiple legal entities that are in legal and economic proximity to each other.

Bearing in mind how the group's interests impact relations between parents and subsidiaries, managers of subsidiaries may experience a dilemma in deciding which interests to follow first: those of the subsidiary or those of the group. The group's interests might run contrary to the subsidiary's interests, for instance if the subsidiary's director receives instructions to enter into a transaction that has negative consequences for the subsidiary but an overall positive effect for the group as a whole. As is evident from Dutch case law[418] and the LLC Law of Ukraine,[419] the 'conflict of interest' concept indicates that this behaviour does not amount to a conflict, given that no 'personal' interest as such is involved. Furthermore, the notion of a conflict of interest as found in those sources does not make any reference to group interests. That is why, legally, conduct by a director that satisfies his or her personal interest, to the detriment of the group's interest, but with a neutral effect on the individual company's interest, does not constitute a conflict of interest. While this implication is not surprising for the jurisdictions that do not formally recognize the concept of a group's interests (see Chapter 4), it has practical significance for jurisdictions where directors do not incur liability for pursuing the group's interests even if these are at odds with the interests of the separate entity.

Despite these differences between the various interests in traditional companies and in corporate groups, the concept of conflict of interest has the same negative meaning for groups of companies as it does for traditional companies.

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[414] Antunes JE and others, *Report of the Reflection Group on the Future of EU Company Law* (European Commission Internal Market and Services, 2011), 60.
[415] 'Corporate Group Law for Europe by Forum Europaeum' (2000) 1 European Business Organisation Law Review 165, 258.
[416] Armour J and others, *Report on the Recognition of the Interest of the Group (October 30, 2016)*. Available at: https://ssrncom/abstract=2888863, 2016, 47.
[417] Ibid, 5-6.
[418] *Bruil/Kombex* 29 June 2007, JOR 2007/169 (Supreme Court of the Netherlands).
[419] LLC Law of Ukraine, Article 42(3).

2.3.6. Use of business opportunities and competition with the company

The prohibition on using business opportunities and the non-compete obligation are not always clearly distinct. Here they are discussed separately partly due to the fact that the German CGC (both the current 2017 version and the 2019 version) and the Principles of Corporate Governance in Ukraine likewise differentiate between the prohibition on using the company's business opportunities and the non-compete obligation.[420] Similarly, the Dutch CGC also separate its prohibitions on competing with the company and on using business opportunities.[421] However, the doctrine of corporate opportunities as found in German jurisprudence derives from the premise that the ban on using corporate opportunities covers both the duty not to compete and the non-written ban on using corporate opportunities.[422] The legislative definition of a non-compete clause is given in the AktG, and provides that members of the management board may neither engage in any trade nor enter into any transaction in the company's line of business on their own behalf or on behalf of others.[423]

In Poland, the WSE Best Practices of 2002 and 2005 contained an obligation for company officers to present information on available advantageous transactions to their company. In the later versions of the WSE Best Practices, however, this provision was replaced by more abstract conflict of interest prohibitions.[424] Unlike the current version of the WSE Best Practice, the KSH provides more substance: besides preventing board members from engaging in any competitive business, it also prohibits any participation in competing legal entities, except with the company's approval.[425] Based on the wording, competition also arises if the board member is simultaneously a director of a competing entity or owns 10 per cent or more of its share capital. If the board member engages in any of these activities, this would inevitably also mean the use of business opportunities, which constitute an interest for the company and, at the same time, bring financial benefits to the interested person.

Unlike Germany and Poland, the Netherlands do not have specific statutory rules prohibiting the use of business opportunities; it only has the relevant provisions of the Dutch CGC – see below. Despite the lack of specific statutory regulation, courts in the Netherlands have held directors liable for abuse of business opportunities by participating in competing companies, by drawing on the general Articles 2:8 and 2:9 of the BW.[426] In other words, the doctrine of corporate opportunities has found its way into Dutch jurisprudence and extends to non-compete obligations.

This being so, sufficient evidence can be found in literature and case law to justify the conclusion that use of business opportunities also includes competition with the company by the interested person – even though Germany and Poland belong to jurisdictions where the codified regulation of the corporate opportunities doctrine is limited to the non-compete obligation for directors while the Netherlands has no binding regulation on business opportunities at all.[427] Rather, the conclusion that the non-compete rule falls within the scope of the corporate

[420] German CGC, as amended on 7 February 2017, section 4.3.1; German CGC 2019, section E; Principles of Corporate Governance, approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955], section II, 3.3.3, 3.3.4.
[421] Dutch CGC, section 2.7.1 Preventing conflicts of interest.
[422] Gerner-Beuerle C, Paech P and Schuster EP, 132.
[423] AktG, Article 88(1).
[424] Oplustil K and Radwan A, 482.
[425] KSH, Article. 211(1), 380(1).
[426] *For example, see: Decision of 29 March 2011 / 107.002.444/01* JOR 2011/216 (Arnhem-Leeuwarden Court of Appeal); *Decision of 19 February 2014 / C-16-316233 - HA ZA 11-1953* JOR 2014/124 (District Court Midden-Nederland).
[427] Ibid, 151.

opportunities doctrine derives from the essence of the concept: competition with the company implies activity in proximity to the company's business.[428]

Two questions arise in this regard: (a) do any business opportunities exist that cannot be captured under the umbrella of non-competition, and (b) do any examples exist of competing behaviour that does not constitute the use of business opportunities?

For question (a), the answer depends largely on how broadly we define business (corporate) opportunities: if business opportunities are about business activity (narrow approach), then these acts include non-competing behaviour. In a broader approach, where this type of conflict includes using business opportunities both within and beyond the company's business,[429] then some business opportunities certainly fall beyond the scope of competing activity. This broad approach has been confirmed in German case law, where the German Supreme Court dismissed a director's demand to be restored to his directorship. The director had acquired real estate that was offered for sale by the mayor of the community where the company was located, and subsequently sold the real estate to a construction company. The court disagreed with the dismissed director, notwithstanding the fact that the company had not suffered any loss or damage and did not need real estate for its own purposes.[430] For the director to avoid liability, apparently, the company should first have received and declined an offer of sale.[431]

In the Netherlands and Poland the doctrine of corporate opportunities has a narrower application, and does not extend to appropriating business opportunities for private purposes. Moreover, competition in and of itself is not sufficient for director's liability in the Netherlands, given that these relationships are governed both by general provisions on directors' conduct and by tort law.[432] Nevertheless, although the situation may appear ambiguous and lacking legal certainty, by all accounts the principles are applied with sufficient flexibility to provide suitable results.[433]

Besides the provisions regarding business opportunities in the Principles of Corporate Governance,[434] Ukraine has a three-fold prohibition for supervisory board members and members of executive bodies in private companies under the recent LLC Law of Ukraine. These company officers require consent from the general meeting of shareholders or the supervisory board (for members of executive bodies) for the following: (a) to perform economic activity as natural persons/entrepreneurs in the sphere of the company's activity; (b) to be a partner in general or limited partnerships performing acts in the sphere of the company's activity; and (c) to be a member of a supervisory board or an executive body of another economic operator that performs acts in the sphere of the company's activity.[435] It is notable that in this provision the Ukrainian legislature codified only the narrow approach to the doctrine of corporate opportunities. The broader understanding of business opportunities, i.e. to extend beyond the non-compete rule, in the LLC Law of Ukraine is arguably covered by the rules on conflicts of interest[436] and the general provisions of tort law in the CCU.[437] However, insufficient case law has been handed down on

[428] Ibid, 150.
[429] Gerner-Beuerle C and Schuster EP, 28.
[430] German building plot case (Bundesgerichsthof, WM 1967, 679), as quoted by Hopt KJ, 'Self-Dealing and Use of Corporate Opportunity and Information: Regulating Directors' Conflicts of Interest' in Hopt K and Teubner G (eds), Corporate Governance and Directors' Liabilities (Berlin/New York 1985), 295.
[431] Gerner-Beuerle C, Paech P and Schuster EP, 159.
[432] Ibid, 155-156.
[433] Ibid, 158.
[434] Principles of Corporate Governance, approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955], section II, 3.3.4, 3.3.5.
[435] LLC Law of Ukraine, Article 40(5).
[436] LLC Law of Ukraine, Article 42.
[437] CCU, Article 1166.

whether the provisions on conflicts of interest and the tort law provisions should in fact be applied to abuse of business opportunities that extends beyond the non-compete obligation, and the practicability of the broader approach to the corporate opportunities doctrine remains doubtful.

The answer to question (b) also depends largely on the concept of business (corporate) opportunities and how broadly it is interpreted. It can be argued that competing with the company could involve opportunities that do not necessarily ‘belong’ to the company and so are not business opportunities. A different approach has been suggested in literature, with Klaus Hopt suggesting that the duty not to compete with the company should be viewed as a subgroup of corporate opportunities with extraordinary features deserving special attention from the legislature.[438] The idea of the legislators drafting CGCs juxtaposing business opportunities to the non-competition duty may seem surprising, given that business opportunities are broader in scope. The endeavours of the Code’s drafters could still have a logical explanation, since it is always safer to have an over-inclusive provision than an under-inclusive one, giving stakeholder rights more protection from abusive behaviour of directors.

The exercise of identifying inappropriate use of business opportunities faces practical difficulties. If a company is unable or unwilling to utilize a particular opportunity, this does not automatically pave the way for the director to seize that opportunity. It is even more difficult to determine whether a given opportunity is in fact relevant for the company.[439] In Germany, this issue arose with regard to a company’s former director, who had sought to exploit a new idea with a third party after leaving the company. The Federal Supreme Court prevented the director from starting a new project by using only his/her knowledge without any capital.[440] The issue was controversial: opinions on how better to qualify post-employment relationships are not unanimous. If an employment contract specifies restrictions on the use of business opportunities after the end of office, the consequences are quite clear. Otherwise, the interpretation of the relationship might have a different outcome, largely depending on the jurisdiction. Unlike in Germany, the Polish, Ukrainian and Dutch laws do not require resigning directors to be subject to the non-compete obligation, unless of course the employment contract so provides.[441]

Another scenario where it is difficult to evaluate whether it would be appropriate to use a particular business opportunity is in situations where the parent company steals business opportunities from its subsidiary. To understand whether the parent’s conduct is legal, it is necessary to apply both the provisions pertaining to the doctrine of corporate opportunities described above and the relevant regulations for corporate groups, including the respective standards that apply. The legislators drafting the European Model Company Act (EMCA) propose resolving the issue of theft of business opportunities by a parent company by prohibiting exploitation of business opportunities in all cases where the subsidiary is not wholly-owned.[442] The parent company would then be allowed to exploit opportunities of a subsidiary that is not wholly-owned only if it receives approval from the disinterested directors – if that approval is withheld, the subsidiary’s non-controlling shareholders must then agree to the exploitation.[443] For wholly-owned subsidiaries, the EMCA does not require parent companies to seek consent from any other party to exploit business opportunities of their subsidiaries. The regulation of corporate groups in the jurisdictions in focus is discussed further in Chapter 4.

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[438] Hopt KJ, ‘Self-Dealing and Use of Corporate Opportunity and Information: Regulating Directors’ Conflicts of Interest’, 300.

[439] Hopt KJ, ‘Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis’, 179.

[440] *Decision of 23 September 1985* Wertpapier-Mitteilungen, 1443 (Federal Court of Justice).

[441] Gerner-Beuerle C, Paech P and Schuster EP, 139-140.

[442] Andersen PK and others, *European Model Company Act (EMCA) (September 1, 2017)* (Nordic & European Company Law Working Paper No 16-26 Available at SSRN: https://ssrncom/abstract=2929348, 2017), Section 15.13.

[443] Ibid, Section 15.13.

2.3.7. Direct and indirect conflicts of interest

Although conflicts of interest are a commonly discussed topic in company law theory, addressed by both statute[444] and soft law,[445] in practice some ambiguity has emerged about how to phrase the provisions that govern conflicts of interest, if they are in fact to be made legally binding at all. The extent to which rules for conflicts of interest should be formalized in law as legally binding rules is an especially controversial issue for indirect conflicts of interest. Indirect conflicts of interest arise in situations where it is not a director or a shareholder who is involved in a transaction with the company, but the director's or shareholder's related parties, for instance a controlled company.[446]

For a long time, the BW included a provision stating that, if a director had a conflict of interest with the company, the company should be represented by the members of the supervisory board, if the company had one, and granting the general meeting of shareholders the power to intervene.[447] These rules, which were similar for both BVs and NVs, were contained in Articles 2:146 and 2:256 of the BW. However, having been criticized for creating uncertainty, they were repealed.[448] Nevertheless, the discussion about the issues associated with these provisions and their enforcement has practical significance for better understanding how to draft rules for conflicts of interest. It is also important for a proper understanding of the practical consequences to distinguish between direct and indirect conflicts of interest.

Initially, Articles 2:146 and 2:256 of the BW did not attract much attention from practitioners and scholars in the Netherlands, until they were studied in detail in Adriaan Dorrestijn's dissertation.[449] Almost a decade later, the Dutch Supreme Court drew attention to these rules by expanding their scope to include not only direct conflicts of interest, but also indirect conflicts. This meant that even where it was not actually the director who had conflicting interests, but an intermediary company in which the director had a personal interest, the provisions could still be invoked with external effect.[450] At the same time, the Court established a number of barriers to litigation by making enforcement of these provisions contingent on the condition that the contracting party knew or should have known about the existence of the conflict of interest. Therefore, a court claim against the contract would fail if the other party could successfully prove that he or she was a bona fide contracting party.[451]

Steef Bartman described the *Bruil/Kombex* case as highly illustrative of how implementation of legislative requirements led to undesired results.[452] The case concerned an agreement between Bruil Arnhem BV and Kombex BV under which the latter was granted an

[444] See, e.g., KSH, Arts. 209, 377.

[445] This includes the CGCs of Germany, Poland and the Netherlands that have been analyzed above, and for the Principles of Corporate Governance as approved by the Decision of the National Securities and Stock Market Commission of Ukraine of 22 July 2014, No. 955 [Принципи корпоративного управління, затверджені рішенням Національної комісії з цінних паперів та фондового ринку від 22 липня 2014 року № 955].

[446] Andersen PK and Balshøj DK, 'Directors' Conflicts of Interest: A Contribution to European Convergence' in Birkmose HS, Neville M and Sørensen KE (eds), *Boards of Directors in European Companies : Reshaping and Harmonising Their Organisation and Duties* (Wolters Kluwer Law & Business 2013), 63.

[447] Bartman SM, 'Report from the Netherlands' (2006) 3 European Company Law 33, 33.

[448] Ibid, 34.

[449] Dorresteijn AFM, *Tegenstrijdig Belang van Bestuurders en Commissarissen: een Rechtsvergelijkende Studie* (Kluwer 1989).

[450] *Mediasafe, Decision of 22 March 1996* NJ 1996, 568 (Supreme Court of the Netherlands).

[451] This opinion was subsequently confirmed and developed in other cases, where the rules enshrined in Articles 2:146 and 2:256 were recognized as also being obligatory for companies with a single shareholder and requiring explicit approval from the shareholder meeting (SC 2 May 2002, *NJ* 2002, 393 (Joral), SC 9 July 2004, *NJ* 2004, 519 (Duplicado), as quoted by Bartman SM, 'Report from the Netherlands', 34).

[452] Bartman SM, 'Report from the Netherlands', 34; Bartman SM, 'From Autonomy of Interests to Concurrence of Interest in Dutch Group Company Law' (2007) 4 European Company Law 207, 209-210.

option to buy a piece of land. The agreement was signed by Mr Bruil, who at that time was both companies' sole shareholder and director. Years later, Bruil Arnhem BV sold the land to a third party, and by doing so breached its obligation under the contact. Kombex BV filed for damages. The Arnhem Court of Appeal rejected the claim, referring to the breach of the conflict-of-interest rule by the director of Bruil Arnhem BV, who had signed the agreement.[453] However, Bruil Arnhem BV claimed that Mr Bruil at the time of granting the option had a conflicting interest and thus the company was not bound to the option. The Supreme Court of the Netherlands quashed the decision of the Court of Appeal and referred the case to another Court of Appeals to study the specific circumstances of the case more thoroughly to establish a substantive conflict of interest or not. In its judgment, the Supreme Court held to the substantive, rather than the formal, interpretation of a conflict of interest. Following the Supreme Court's reasoning, to establish a conflict of interest on the director's part it was not enough to find a breach of Articles 2:146 and 2:256 of the BW. The director could only be viewed as having conflicting interests if '*due to the existence of a personal interest or through his involvement with another interest that is not concurrent with that of the legal entity, [the director] must be deemed incapable of safeguarding the interests of the company and its business in a manner that may be expected from a trustworthy and unprejudiced director*'.[454] The 's-Hertogenbosch Court of Appeal applied the criteria outlined by the Supreme Court and did not find sufficient grounds to establish a conflict of interest that precluded the director from entering into the transaction.[455]

The *Bruil/Kombex* case revolved around a direct conflict of interest, where the director himself was an interested person. If the persons responsible for drafting and enforcing the agreement had adopted a more careful approach to the law, then these legal issues could have been avoided. It would not have been difficult at the time: the general meeting of shareholders could have appointed anyone to represent the company in the transaction. As such, it was advised that to avoid application of Articles 2:146 and 2:256 the general meeting should explicitly authorize the director to represent the company regardless of the conflict of interest.[456] Although that had not been done here, eventually the 's-Hertogenbosch Court of Appeal did not establish any conflict of interest in the case at hand. By laying down the substantive criteria for the conflict of interest concept, the Supreme Court of the Netherlands limited the external negative effect of Articles 2:146/256 and provided for additional barriers to their successful application. Although Articles 2:146 and 2:256 were subsequently abolished as expected,[457] the concept of an indirect conflict of interest for management and supervisory boards was defined in the BW. Articles 2:239(6) and 2:250(5) now contain rules prohibiting any conduct with conflicting interests for members of management and supervisory boards. Directors and supervisory board members are prohibited from participating in deliberations on and the adoption of resolutions if a direct or indirect conflict of personal interest exists. These legislative provisions originate from pre-existing case law. For instance, in the *Versatel* case the Supreme Court of the Netherlands prohibited both management and supervisory board members from participating in debates and decision-making where indirect conflicts of interest were involved.[458] Today this rule, as developed in *Versatel*, exists at the level of statute. The same cannot be said of the definition of an indirect conflict of interest, which is why, in every single case where this arises the Enterprise Court of Amsterdam must make reference to the phrasing of an indirect conflict of interest in previous judgments. The *Bruil/Kombex* case serves as the guideline for these purposes. The presence of an indirect conflict of interest is essential for establishing corporate malpractice or mismanagement (*wanbeleid*) as

[453] *Decision of 11 October 2005* JOR 2005/294 (Arnhem-Leeuwarden Court of Appeal).
[454] *Bruil/Kombex*, 29 June 2007, JOR 2007/169 (Supreme Court of the Netherlands).
[455] *Decision of 24 March 2009* JOR 2009/126 ('s-Hertogenbosch Court of Appeal).
[456] Martin MR, 'Report from the Netherlands' (2008) 5 European Company Law 195, 195.
[457] De Groot C, *Corporate Governance as a Limited Legal Concept*, vol 4 (Kluwer Law International 2009), 156.
[458] *Versatel, Decision of 14 September 2007* NJ 2007, 612 (Supreme Court of the Netherlands).

regularly claimed by shareholders in the course of inquiry proceedings.[459] The purpose of such proceedings is to evaluate a company's corporate governance, although this has never been an easy task for the courts, which are sometimes unaware of how corporate policy is exercised. This is further evidenced by the fact that the Supreme Court of the Netherlands has handed down multiple decisions in which it disagrees with the opinion expressed by the Enterprise Court with regard to the presence of corporate mismanagement.[460]

Some debate has arisen regarding the statutory provisions governing conflicts of interest among academics and practitioners in the Netherlands, following the Enterprise Court's *Intergamma* decision.[461] This judgment was widely criticized for not being compatible with Article 2:250(5) of the BW, by failing to consider the concept of 'personal interest', which had been added with the 2013 changes.[462] The proceedings before the Enterprise Court were initiated by a number of Intergamma's shareholders. These activist shareholders were dissatisfied with the Guinness project for which Intergamma's majority shareholders had actively lobbied. That project provided, among other elements, for the conclusion and further performance of a multimillion euro agreement between Intergamma and CRH. CRH was the sole owner of Intergamma's shareholder VNG, indirectly possessing 48.6 per cent of the shares in Intergamma.[463] Assessing the conduct of Intergamma's supervisory board members, who had been appointed by VNG, the Enterprise Court acknowledged the absence of any personal interest on their part in a transaction with CRH, though also finding that they should not have participated in the supervisory board's deliberations and decision-making on the Guinness project.[464] These conclusions by the Enterprise Court were criticized for being *contra legem*, and failing to consider the 2013 amendments to the BW.[465] The criticism, based mostly on a literal interpretation of Articles 2:239(6) and 2:250(5) of the BW, could not be accepted as the ultimate truth, however. The reasons for supporting the Court's opinion are clearly expressed in an article by Steef Bartman and Adriaan Dorresteijn.[466] Specifically, those reasons include the specific purpose of inquiry proceedings, the historical interpretation of the 2013 changes to the BW and the effect of the principles of corporate reasonableness and fairness viewed in conjunction with the directors' responsibility for proper performance of their duties.[467] It is especially the effect of those principles that prevents direct and indirect conflicts of interest from being confined to personal interests only. The principles of fairness and reasonableness, coupled with the definition of conflicts of interest introduced in the *Bruil/Kombex* case, will therefore likely be used to deter conflicts of interest beyond the boundaries of Articles 2:239(6) and 2:250(5) of the BW.

In situations involving an indirect conflict of interest, it is not always fully clear where exactly that conflict exists.[468] For the company's representatives, the duty to report conflicts of interest are perhaps not self-evident, especially considering that businesspeople are not always concerned with the legality of transactions, while indirect conflicts of interest always pose difficulties for lawyers to interpret. The problem lies in the fact that indirect conflicts of interest cannot simply be confined to related parties, i.e. to the director or major shareholder. Making lists of related parties by itself requires a significant amount of time and effort, and the completeness

[459] Timmerman V, 'Review of Management Decisions by the Courts, Seen Partly from a Comparative Legal Perspective' in Jitta MJ (ed), *The Companies and Business Court from a Comparative Law Perspective* (Kluwer 2004), 43.
[460] Ibid, 45.
[461] *Intergamma, Decision of 22 December 2017* JOR 2018/210 (Enterprise Court of Amsterdam).
[462] Bartman SM and Dorresteijn AF, 'Commissaris en Tegenstrijdig Belang: Handelt de Ondernemingskamer contra Legem?' [2018] Ars Aequi 913, 915.
[463] Ibid, 913.
[464] *Intergamma, Decision of 22 December 2017* JOR 2018/210 (Enterprise Court of Amsterdam), paragraph 3.35.
[465] Bartman SM and Dorresteijn AF, 'Commissaris en Tegenstrijdig Belang: Handelt de Ondernemingskamer contra Legem?' [2018] Ars Aequi 913, 915.
[466] Ibid, 917-919.
[467] BW, Articles 2:8, 2:9(1).
[468] De Groot C, *Corporate Governance as a Limited Legal Concept*, 196.

will depend on full disclosure of relevant information by the interested persons. In many cases, indirect conflicts of interest are not easily detected using lists of relatives or corporate control schemes, given that people also have friends and classmates. It would hardly be possible for the law to regulate this properly, as tracing relationships between (for example) classmates from university who have become business partners would demand creative thinking and analysis, which involves more than exhaustive lists of persons.[469] This means that indirect conflicts of interest is an area that does not require strict prohibitions, but rather delicate strategies.

Interestingly, the AktG contains a provision similar to those repealed from the BW,[470] although the problems that emerged in the Netherlands have not come to light in Germany. Arguably, the reason is that Articles 2:146 and 2:256 of the BW were posited to have an external effect. Article 112 of the AktG opts to regulate the relationship between the director and the company by having the company be represented by the supervisory board. A literal interpretation of this provision does not offer sufficient grounds to apply it to indirect conflicts of interests. Nevertheless, the prevailing opinion is that it extends to appointed and former managers if they are related to the management board's previous or future activity.[471] Further extension of the scope of the provision is held to be permissible as long as this is not incompatible with the principle of legal certainty, for instance if a transaction is with a company in which the manager is the sole shareholder.[472]

The GmbHG treats relationships between private companies and their management boards differently. In German private companies, it is not necessary for the supervisory board to represent the company in its dealings with the director.[473] Article 35(3) provides that legal transactions between the director and the company are covered by Article 181 of the German Civil Code, if the director is also the company's sole shareholder.[474] Given that Article 181 of the German Civil Code prohibits contracting with oneself, if the agent is involved on both sides of a transaction,[475] legal transactions in violation of Article 35(3) of the GmbHG and Article 181 of the German Civil Code may be voided.[476] For managers of German public companies, Article 181 of the German Civil Code has less effect, as Article 112 of the AktG is more specific.[477]

In Poland, Articles 210 and 379 of the KSH require that, in contracts between the management board and the company, the company must be represented either by the supervisory board or by a representative appointed by the general meeting of shareholders.[478] Unlike in Germany, where Article 112 of the AktG applies only to public companies, the wording of the Polish law means that it applies equally to both private and public companies; however, it is important to bear in mind that Polish private companies are required to have a supervisory boards

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[469] An example of where indirect interests are established on the basis of intellectual examination, rather than formal requirements, can be seen in the diversified criteria for identifying bank-related parties that were introduced by the National Bank of Ukraine in 2015 (Regulation of the Board of the National Bank of Ukraine No. 315 of 12 May 2015 'On Approval of Charter on Definition of Bank-Related Parties' [Постанова Правління Національного банку України № 315 від 12 травня 2015 року "Про затвердження Положення про визначення пов'язаних з банком осіб"], published in Offitsiynyi visnyk Ukrayiny, 2015, No. 82, Stor. 86, St. 2726).
[470] AktG, Article 112.
[471] Ungerer F, 99.
[472] Ibid, 99.
[473] This may be due partly to the fact that a GmbH must have a supervisory board only if the law so dictates (for example, see Article 52(2) of the GmbHG).
[474] German Act on Limited Liability Companies, as consolidated and published in the Federal Law Gazette III, Index No. 4123-1, as most recently amended by Article 8 of the Act of 10 May 2016 (Federal Law Gazette I p. 1142), Article 35(3).
[475] German Civil Code, version published on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), most recently amended by Article 4 para. 5 of the Act of 1 October 2013 (Federal Law Gazette I page 3719), Article 181.
[476] Ibid, Article 134.
[477] Ungerer F, 100.
[478] KSH, Articles 210, 379.

(as an alternative to an auditors' committee) only if the company's share capital exceeds PLN 500,000 and if the company has more than twenty-five shareholders.[479]

When comparing these provisions for direct and indirect conflicts of interest in Germany, Poland and the Netherlands with Ukrainian law, a first important factor is that the rules for Ukrainian companies are different from those of Article 112 of the AktG and Articles 210 and 379 of the KSH. Still, similarly to how Article 181 of the German Civil Code in conjunction with Article 35(3) of the GmbHG applies to relationships involving directors and their companies, the representation rules of Article 238(3) of the CCU come into play in issues of company law. In fact, Article 238(3) of the CCU is not directed primarily at governing corporate relationships; rather, it prohibits representatives from entering into transactions on behalf of the persons that they represent with themselves or with third parties that they also represented, except in matters of commercial representation or in the cases as provided by law. Essentially, two marginally different opinions exist on whether this rule should cover relationships between directors and their companies, i.e. whether the relationships between directors and their companies can be construed as representation.

In a legally binding opinion, the Supreme Court of Ukraine has expressed the view that directors do in fact act as representatives of their companies.[480] Another approach however suggests that these relationships are quasi-representative instead.[481] The logic behind the latter view stems from the idea that the principal and the representative in classical representation are separate entities, whereas these situations lack that separation. This means that, although the director merely enjoys the authority conveyed by the law and the articles of association, he or she should be regarded as an inherent part of the company and its bodies. Still, this theory has not gained many supporters among Ukrainian and Western scholars, and the courts tend to apply the legal provisions on representation to relationships between companies and their management.[482] Little doubt remains, therefore, that Article 238(3) of the CCU can be applied to transactions between directors and their companies, regardless of whether or not the director is the company's shareholder (as in German law). This then prohibits direct conflicts of interest on the part of directors.

Secondly, the JSC Law of Ukraine and, to a lesser extent, the LLC Law of Ukraine contain special provisions for RPTs that are discussed in subsequent chapters,[483] and that encompass both direct and indirect conflicts of interests involving directors and shareholders. At the same time, the list of related parties in the JSC and LLC Laws of Ukraine is not open to interpretation, meaning that indirect conflicts of interest have legally defined ramifications.

Thirdly, Ukrainian company law does not include provisions similar to the rules that Dutch law formerly had in Articles 2:146 and 2:256 of the BW, and currently has in Articles 2:239(6) and 2:250(5). However, private companies have recently become subject to the special requirements on conflicts of interest introduced in the LLC Law of Ukraine.[484] According to the new statute, a conflict of interest arises if an officer's duty to act reasonably and in a company's

[479] Ibid, Article 213(2).
[480] Legal Opinion of the Supreme Court of Ukraine in a Case about the Invalidation of Contract for Purchase of Immovable Property, Concluded between Legal and Physical Entities, due to the Absence of Authorities of the Company's Representative (Director) [Правовий висновок Верховного Суду України у справі про визнання недійсним договору купівлі-продажу нерухомого майна, укладеного між юридичною та фізичною особами, з підстав відсутності у представника юридичної особи (директора товариства) повноважень] of 28 April 2016, available at: http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(print)/F874308E74D9E8A5C2257FA3003B0858, accessed on 20 August 2016.
[481] Цюра В, 'Правова природа представницьких повноважень органів і посадових осіб юридичної особи' [2016] Прикарпатський юридичний вісник 54, 55.
[482] For example, see: *PrJSC 'Kozeletskiy Combicorm Plant' vs. LLC 'Free Group', Decision of 17 January 2017* Case No 927/1364/15 (Kyiv Economic Court).
[483] JSC Law of Ukraine, Article 71; LLC Law of Ukraine, Article 45.
[484] LLC Law of Ukraine, Article 42.

interests is at odds with the private interests of the officer and/or affiliated persons.[485] The statute extends the notion of a conflict of interest to those situations if the officer or affiliated person receives gains from a third party in connection with the performance of the officer's duties.[486] By ascribing the effect of a conflict of interest to situations where an officer's affiliated person transacts with a third party, the statute not only recognizes the concept of an indirect conflict of interest, but also places the undefined list of third parties on the other side of the transaction. This approach is broader than if only transactions between affiliated persons are covered by 'conflict-of-interest' requirements. Of course, for a transaction to be deemed to involve a conflict of interest, it must relate to the performance of the officer's duties; still, the officer might not even be aware of the transaction between the affiliated persons and the third party. As a result, he or she would not be able to disclose the conflict and report the transaction to the company in time. A transaction between an affiliated person and a third party is not necessarily detrimental to the company itself, if it lacks the constituent features of a conflict of interest. It would therefore seem advisable to add the element of a detrimental effect from the gain to the wording of a provision that equates gains received from third parties by company officers and their affiliated persons with conflicts of interest. Otherwise, the broad understanding of conflicts of interest as introduced by the statute places an excessive burden on the shoulders of company officers.

Besides defining conflicts of interest, the LLC Law of Ukraine prohibits company officers from accepting any advantages besides those provided under the contract between the officer and the company, and from disclosing confidential company information. [487] In addition, company officers are obliged to submit a list of their affiliated persons to the company, and to disclose any conflicts of interest to the management board and (if the company has one) the supervisory board.[488] Any failure to comply with these requirements will trigger the company's right to dismiss the officer without paying compensation.[489] Taking into account the broad definition of conflicts of interest, officers could suffer negative consequences for breaching their duties even if the conflict of interest was caused by the actions of an affiliated person.

It follows from the above that indirect conflicts of interest are given less legislative attention in Germany and Poland than direct conflicts, as the legislators drafting the rules were guided by the principle of legal certainty. In the Netherlands, although indirect conflicts of interest are given a brief mention in statute, their clarification is found in cases decided by the courts. In Ukraine, the rules governing direct conflicts of interest co-exist with the rules on indirect conflicts, as given shape in procedural requirements for public companies (and to a lesser extent private companies), and the broad duties of company officers of private companies under which they are obliged to be aware of any transactions of affiliated persons that might be deemed to relate to the performance of the officer's duties. The latter requirements seem to be onerous, and should be relaxed.

It would be naive to claim that indirect conflicts of interest do not pose any threat to a company: it is not difficult to conceive of situations where the company's assets are tunnelled through various contract or company law vehicles to legal entities or natural persons that are closely related to directors or major shareholders. It would therefore also be wrong to close our eyes to indirect conflicts of interests and pretend that they do not exist.

This is where regulation of RPTs comes into play, as in theory RPTs are usually associated with a conflict of interest that arises for someone in the company.[490] The issues of RPTs and

[485] Ibid, Article 42 (3).
[486] Ibid, Article 42 (5).
[487] Ibid, Article 42 (2,7).
[488] Ibid, Article 42 (4,6).
[489] Ibid, Article 42 (8).
[490] McCahery JA and Vermeulen EPM, 'Corporate Governance Crises and Related Party Transactions: A Post-Parmalat Agenda' in Hopt K and others (eds), *Corporate Governance in Context : Corporations, States, and Markets in Europe, Japan, and the US* (Oxford University Press 2005), 228.

indirect conflicts of interest are very much intertwined: exactly who is considered to be a related party depends on how broadly (or narrowly) the concept of an indirect conflict of interest is defined. The following chapters of this thesis look at how extensive the list of related parties should be in terms of the fairness and reasonableness requirements from the perspectives of the different national laws.