LAW OF CORPORATE OPPORTUNITIES: A COMPARATIVE ANALYSIS

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Corporate representatives may try to personally exploit, to the detriment of their company, "corporate opportunities" that they become aware of when discharging their function. This business risk is generally addressed by common law countries, contrary to countries of the civil law tradition. Nevertheless, a comparison between France and the United States puts this affirmation into perspective. The American corporate opportunity doctrine is well-established and developed, but is not exempt from weaknesses. For its part, France has, only recently, instituted a legal instrument adequate to address the diversion of corporate opportunities: a corporate representatives' duty of loyalty owed to their company. This comparison highlights the ability of French law to reinvent itself, which contrasts with the rigidity of the American rules in this area.

Les mandataires sociaux peuvent être tentés d'exploiter personnellement, au détriment de leur société, des « opportunités d'affaires » dont ils prennent connaissance dans l'exercice de leur fonction. Ce risque est généralement traité de manière spécifique par les pays de common law, contrairement aux pays de tradition civiliste. Une comparaison entre les Etats-Unis et la France vient néanmoins relativiser cette affirmation. La doctrine américaine applicable au détournement d'opportunités d'affaires est bien établie et largement développée, mais n'est toutefois pas exempte de faiblesses. De son côté, la France s'est, seulement récemment, dotée d'un instrument juridique pertinent pour adresser la captation d'opportunités d'affaires : un devoir de loyauté des dirigeants envers leur société. Cette comparaison met en exergue la capacité du droit français à se réinventer, ce qui contraste avec la rigidité des règles américaines en la matière.

Managing business risk requires particular attention to corporate law, governance and structure. Companies face internal risk in the form of the *agency problem*. In the economic sense, this situation occurs when "The welfare of one party, termed the 'principal', depends upon actions taken by another party, termed the 'agent'."[1] It arises mainly because the agent (directors or managers) usually has better information than the principal (shareholders). The latter therefore struggles to oversee the performance of the former. This situation might give incentives to

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the agent to act opportunistically in his own interest at the expense of the interest of the shareholders.[2] Managers or directors who try to divert business opportunities that their company would have been interested in exploiting is a prime example of agency problem. Due to the nature of their function, managers and directors are often privy of such business opportunities, and may decide to exploit these opportunities for themselves. Consequently, companies could suffer significant revenue loss resulting from the egoistic action of their managers or directors in that the benefits that could have been realized by the companies are actually realized by those companies' management.

Common law countries directly address this risk of diversion by managers or directors of business opportunities that would benefit their companies, legally referred to as corporate opportunities, by implementing specific rules through the fiduciary duty of loyalty. This is generally not the case in civil law countries, where there is usually no authority specifically designed to address the issue. Interestingly, the example of corporate opportunity regulations has been used by scholars to demonstrate the supposed weakness of French law on this matter.[3] French companies would not be protected from opportunistic behaviors of their directors or officers because of "narrower application of the duty of loyalty largely to transactions with no business purpose" and "a greater reliance on statutes rather than fairness to regulate self-dealing transactions."[4] On a broader perspective, the past few decades have seen a strong increase in the literature supporting the superiority of common law jurisdictions over civil law jurisdictions, and explaining as a corollary that jurisdictions worldwide converge towards the common law system.

I intend to carry out a comparative analysis of corporate opportunity regulations in France and in the United States so as to analyze how these jurisdictions address the risk of diversion of corporate opportunities. I firstly present the current regulation of corporate opportunities in the U.S. and in France. I secondly confront these regulations to assess if one is superior to the other, and if one tends to converge toward the other.

I. LAW OF CORPORATE OPPORTUNITIES IN FRANCE AND THE UNITED STATES

Most U.S. states have adopted some form of the *corporate opportunity doctrine*, which attempts to set forth the rules and limitations regulating fiduciaries efforts to take advantage of business opportunities that would otherwise benefit the companies to which the fiduciary obligations are owed. I focus specifically on

1. R. Kraakman and others, *The anatomy of corporate law* (2nd edn, Oxford University Press 2009), para2.1.
2. *Ibid*.
3. S. Johnson and others, "Tunneling" (2000) 90 American Economic Review.
4. *Ibid*.

Delaware corporate law, which is ubiquitous of U.S. jurisprudence.[5] In contrast, for a long time French law only relied on codified criminal and competition rules, until the weakness of such provisions led the courts to institute a version of the duty of loyalty, which to date has not been codified.

A. The United States and the Corporate Opportunity Doctrine

1. The Leading Delaware Cases

Guth v. Loft.[6] Charles Guth was director and president of Loft Inc., a manufacturing and retailing company. Loft was selling Coca-Cola at its stores. In a nutshell, Guth was made aware of the bankruptcy of Pepsi-Cola Corporation, and obtained effective control of Pepsi-Cola Company for himself. He then used his position in Loft to benefit Pepsi-Cola by, for instance, replacing Coca-Cola with Pepsi-Cola in the stores.

Loft sued Guth years later, claiming that Guth had to refer the opportunity to acquire Pepsi-Cola to Loft. The Delaware Supreme Court agreed with the plaintiff, applying a three pronged test. First, the Court asked whether or not the opportunity was in Loft's line of business, and answered positively. Although Loft was not making cola syrups, it was selling cola products and the potential future expansion of the firm was considered a relevant factor. Second, the court asked if Loft had a prior interest or expectancy in the business opportunity, which the Court also answered in the affirmative as the record showed Loft was considering replacing Coca-Cola products with those of Pepsi-Cola. Third, the capacity in which Guth was made aware of the opportunity was considered relevant: Guth had been approached as president of Loft. The Supreme Court concluded that Guth had no right to take the opportunity for himself.

Broz v. Cellular Information Systems, Inc.[7] Broz, director of cellular phone company CIS, heard outside of his working hours of an opportunity to purchase a telephone license. He advised the board of the opportunity, but the board was not interested in the purchase, and CIS itself was financially unable to exploit the opportunity. Broz finally bought the license through a corporation he controlled. Another mobile phone operator, PriCellular, acquired CIS later. The acquisition process had already started when Broz took the opportunity by purchasing the telephone license. CIS' new board initiated legal action against Broz. The Court of Chancery found Broz liable for breach of his duty of loyalty and failure to consider whether the opportunity was in the interest of PriCellular.

The case later came before the Supreme Court of Delaware, which summarized its corporate opportunity doctrine. When a fiduciary takes a business opportunity,

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5. Delaware is where the vast majority of U.S. publicly traded companies are incorporated and is the leader in the regulation of corporate opportunities.
6. 5 A.2d 503 (Del. 1939).
7. 673 A.2d 148 (Del. 1996).

the question is to determine whether the opportunity is a *corporate* opportunity based on certain enumerated factors. If it is, the opportunity belongs to the corporation. If not, the fiduciary can take it. The Court set forth these factors as follows: "[a] *corporate officer or director may not take a business opportunity for his own if: (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation.*"[8] Every factor must be taken into account to know if the business opportunity is *corporate*. No factor is by itself dispositive.

On this basis, the Supreme Court of Delaware reversed the decision of the Chancery Court. It highlighted that (i) Broz became aware of the opportunity in an individual capacity, (ii) CIS' financial health was precarious, (iii) the purchase of CIS was speculative and uncertain, (iv) CIS did not have a cognizable interest or expectancy in the opportunity, and (v) there was no conflict between the director's interests and his duties to the corporation.

Perhaps the most significant aspect of the judicial tests has been the *line of business test*:[9] Opportunities within a corporation's line of business must be surrendered to the company. This very broad test must be evaluated in the light of what the corporation currently does and what it *could* do.[10] By contrast, the *interest or expectancy test* is narrower. As it has been applied by courts, the test refers to opportunities in which the corporation has a vigorous interest, and that are essential to it.[11] Others factors that are not especially formulated in *Broz* may also be considered. Some courts have put forward the importance of *fairness*, for example.[12]

A number of possible defenses are available to fiduciaries sued for allegedly taking advantage of corporate opportunities. For examples, fiduciaries may argue that they learned about the opportunity in their personal capacity, or that the company was financially or technically unable to exploit the opportunity. Occasionally, fiduciaries argue that the offeror of the opportunity refused to do business with the corporation. Some courts have considered this defense as inefficient unless disclosure of the opportunity was made,[13] whereas other courts have decided that the mere third party unwillingness to contract with the corporation disqualified the opportunity of its *corporate* nature.[14]

8. *Ibid.* 155.
9. F. Gevurtz, *Corporation Law* (2nd edn, West Group 2000), 384.
10. S. Emanuel, *Corporations* (6th edn, Wolters Kluwer Law & Business 2009), 219.
11. R. Clark, *Corporate Law* (1st edn, Little, Brown 1986) 225 ; Gevurtz, *supra*, note 478, 385.
12. *E.g. Durfee v. Durfee & Canning, Inc.*, 80 N.E.2d 522 (Mass. 1948) ; *Miller v. Miller*, 222 N.W.2d 71 (Minn. 1974).
13. *E.g. Energy Resources Corp. v. Porter*, 14 Mass.App.Ct. 296, 439 N.E.2d 391 (1982).
14. *E.g. Science Accessories Corp. v. Summagraphics Corp.,* 425 A.2d 957 (Del. 1980).

If a fiduciary cannot invoke any defense, corporate opportunities must be presented to the board or to the shareholders. The fiduciary will then only be able to take the opportunity if the corporation rejects it or authorizes him to take it.[15] However, it does not work if the latter has conspired to obtain the rejection or if the board is under his domination.[16] A fair rejection, or a rejection made by disinterested directors or shareholders, may be stronger.[17]

2. The Delaware General Corporation Law (DGCL)

The Corporate Opportunity doctrine under Delaware law was modified by section 122(17) of the Delaware General Corporation Law by the Delaware legislature in 2000. Pursuant to that section, a corporation has power to "renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders." Corporations can therefore designate certain business interests, either individually or by class, in which they state not having any interest, through decisions of the board or through the certificate of incorporation.

B. France and the Uncodified Duty of Loyalty

1. The Limits of the Statutory Rules

The diversion of opportunities by officers or directors can constitute a criminal offence through the *abus de biens sociaux* or the *abus de pouvoirs*.[18] Managers and directors can be punished by a five-year prison sentence and a fine of 375,000 euros if they use the company's property, the powers they possess or the votes they hold in bad faith, for personal purposes or to benefit another company or undertaking in which they are involved.[19]

These codified rules are, however, inadequate to deal specifically with opportunities diversion.[20] The mere fact that the corporate opportunity does not integrate the patrimony of the company prevents the application of the *abus de biens sociaux*,[21]

15. E. Orlinsky, *Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability* (1999) 24 Delaware Journal of Corporate Law.
16. M. Feuer and J. Johnston, *Personal Liabilities of Corporate Officers and Directors* (2nd edn, Prentice-Hall 1974).
17. F. Gevurtz *supra*, note 478, 396.
18. R. Kraakman and others, *supra*, note 471, 166.
19. Article L. 242-6 of the French commercial Code.
20. L. Enriques, *Book Review: The Anatomy of Corporate Law* (2004) 52 The American Journal of Comparative Law.
21. P. Mousseron and L. Saucier, *Un dirigeant peut-il profiter d'une opportunité offerte à sa société ?*, Les Échos (2003) ; K. Gre ?vain-Lemercier, *Le devoir de loyauté en droit des sociétés* (1st edn, Presses universitaires d'Aix-Marseille 2013).

and corporate officials diverting opportunities are not using corporate powers, which prevents the application of the *abus de pouvoirs.*[22]

The general prohibition of unfair competition (*concurrence déloyale*) may be more relevant to tackle the diversion of corporate opportunities. The standard under French law is the freedom to do business and to compete with other businesses, within the limits of unfair competition. It generally covers every action against the law, the commercial customs or agreements that harm a competitor. Diversion of corporate opportunities may be encompassed under the scope of the unfair prohibition. However the effectivity is limited, as the prohibition of unfair competition is a general rule that does not specifically aim at tackling corporate opportunities diversion.

2. The Ongoing Development of a Duty of Loyalty

French Statutes are clearly ineffective to capture all situations where conflicts of interests arise, and there is not any clear prohibition on the diversion of corporate opportunities. By contrast, the *Cour de cassation*, supreme civil court, established a duty of loyalty which was extended to the issue of corporate opportunities in 2011.

Kopcio.[23] Mr. Kopcio, employee of a limited liability company, was appointed as manager (*gérant*). This nomination was connected to an agreement not to compete with the corporation after resignation. Later, the company was transformed into a public limited company named SA PIC and the same person appointed general manager. Every previous agreement was expressly extinguished. Two years after this nomination, the manager resigned and established a competing corporation with help from former employees of SA PIC.

SA PIC claimed damages from the civil courts. The *Cour de Cassation* decided that the covenant not to compete was extinguished. However, it then stated that Mr. Kopcio was subject to a *duty of loyalty towards the company* because of his position as manager and then general manager. Pursuant to *Kopcio*, the scope of the duty was limited to prohibit any competition against the corporation from its officers.

Darrès c/ Société Locam.[24] Mr. Darrès, manager of the companies Etablissements Darrès and Locam, resigned from his positions. A notice period of three months had to be respected where Mr. Darrès kept working as manager. During the last month of the notice period, he created a competing business that immediately started its activity. Mr. Darrès used his last name when doing business for

22. For a more optimistic view : G. Helleringer, *Le dirigeant à l'épreuve des opportunités d'affaires* (2012) Recueil Dalloz, 1560.
23. Cass. Com., 24 February 1998, no.96-12.638.
24. Cass. Com., 12 February 2002, no.00-11.602.

its new corporation. Etablissements Darrès and Locam claimed damages for these actions, and sought an injunction to prevent Mr. Darrès to stop using his name.

The *Cour de cassation* held firstly that Mr. Darrès was subject to a duty of loyalty towards the company, which applied until the end of the notice period. Secondly, it held that the use of the corporation's name constituted an act of unfair competition (even though it was also Mr. Darrès' own name).

This ruling illustrates the scope of application of the duty in time. When the corporate representative holds office and until the effective resignation (after the end of the notice period if there is one) he/she must comply with a stringent duty of loyalty. Competitive behavior is strictly forbidden. When the representative ceases to hold office, he/she recovers the ability to undertake economic activities. He can compete with the corporation to the extent of not breaching the unfair competition rules.

DL Finance c/ Albiac.[25] The manager and a shareholder of a limited liability company appropriated, through a partnership, the second tranche of a real estate program originally offered to the company. Another shareholder brought an action for damages against the manager and the accomplice shareholder for breach of their duty of loyalty.

The *Cour de cassation* decided that the manager was in breach of his duty of loyalty because he negotiated business benefiting himself in a similar business area of his corporation. By comparison, the Court decided that the shareholder could engage in a competitive activity without informing the company, within the limits of the prohibition of unfair competition.

This case undoubtedly extended the reach of the uncodified unwritten duty of loyalty to corporate representatives taking for themselves corporate opportunities.[26] Furthermore, the decision made clear that the duty originates from the position of representative. Any person being able to make decisions on behalf of the corporation shall be subject to the duty of loyalty. At last, the *Cour de cassation* seems to apply the duty to business opportunities within the corporation's line of business.[27] This includes the activities described in the object clause of the by-laws and the areas in which the corporation effectively operates.[28]

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25. Cass. Com., 15 November 2011, no.10-15.049.
26. *E.g.* A. Couret and B. Dondero, *La captation des opportunités d'affaires et le droit des sociétés*, (2011) 50 JCPE; H. Le Nabasque, *Obligation de non-concurrence des associés et dirigeants de sociétés* (2012) 2 Bulletin Joly Sociétés.
27. Helleringer, *supra*, note 492.
28. L. Nurit-Pontier, *Devoir de loyauté* (JurisClasseur Sociétés Traité 2013), 35.

Société Clinique Esthétique de Paris Spontini.[29] The shareholders of a simplified joint-stock company (*société par actions simplifiée)* running a clinic wanted to buy a building in their own names in order to establish the clinic there. One of the shareholders, also member of the management committee (*comité de direction)*, bought the building for another company he owned instead. He had been sued for damages, even though he later sold its shares in the purchaser company. Because he did not inform the other shareholders of the purchase, the *Cour de cassation* awarded damages against him for breach of his duty of loyalty that he owed as member of the management committee.

This judgment, although primarily dealing with the duty of loyalty towards the shareholders (and not towards the company)[30] clarifies the contours of the duty of loyalty in relation to corporate opportunities: To be attributed to the company, the business opportunity must be likely to further its interest. In this case, the company is unable to utilize an appropriate building or avoid paying rent.[31]

Furthermore, the decision confirms that corporate opportunities may be taken by shareholders if doing so is in line with the interest of the company. Corporate representatives cannot take an opportunity that the shareholders want to take advantage of as long as the opportunity, if taken by the shareholders, would benefit the company.[32] In this case, the shareholders wanted to buy the building in their own name in order to allow their corporation to use it. The purchase was in the corporation's line of business, which confirms the relevance of this requirement under French law.[33]

State of French law. In the light of the abovementioned decisions, two criteria seem sufficient for the opportunity to belong to the company under French law: (i) the opportunity must be in the corporation's line of business and (ii) must be likely to benefit the company. This means directors or managers are only free to take business opportunities outside of the corporation's line of business or that would not benefit it. Otherwise, they must inform the company or the shareholders to be able to take opportunities. Corporate opportunities could not be diverted from the company without disclosure to the company or the shareholders.

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29. Cass. Com., 18 December 2012, no.11-24.305.
30. Since the 1996 decision in *Vilgrain* (Cass. com., 27 February 1996, no.94-11.241, *Bull. civ,* IV, no.65, *Bull. Joly sociétés* 1996, p,485, note A. Couret), the *Cour de cassation* considers that directors and managers owe a duty of loyalty to the shareholders.
31. M. Roussille, *Responsabilité pour manquement à l'obligation de loyauté* (2013) 3 Droit des sociétés ; Helleringer, *supra*, note 492.
32. B. Dondero and P. Le Cannu, *Le devoir de loyauté du dirigeant de SAS et l'opportunité d'affaires* (2013) RTD Com.
33. *Ibid*.

II. EFFECTIVENESS AND CONVERGENCE OF THE RULES

A. Comparative Analysis of French and U.S. law

Various authors argue that common law jurisdictions grant better legal protection to shareholders, which promotes financial development.[34] This is due in large part to broad fiduciary duties that grant extensive protection to shareholders and to judicial decisions which constantly develop the law and suppress inefficient rules. By contrast, the rules of civil law jurisdictions lack flexibility because of narrow statutory prohibitions unable to effectively protect the investors,[35] and judges are restricted to interpreting the codified law, as opposed to developing the law through judicial decisions.[36] Yet, the comparative analysis of France and the United States on the law of corporate opportunities appear to contradict this rather radical view.

1. Common Ground

Flexible approach. Both Delaware and French courts have adopted flexible approaches towards corporate opportunities.[37] Both jurisdictions apply factors to decide if corporate officials can take opportunities. French courts, for example, do that through an assessment of the official's behavior to consider whether he breached the duty of loyalty and therefore committed a fault, which is close to the U.S. fairness test.[38]

Uncertainty and lack of preciseness. The French duty of loyalty is relatively new, and its contours are uncertain. The criteria identified under French case law are the outcome of interpretations; they require more precision. For example, the line of business criterion remains to be fully developed, and it is not clear whether disclosure to the company is enough for corporate representatives to escape the prohibition or if more is required, such as corporate authorization. Supposing corporate authorization was necessary, should it be given by the shareholders or directors? Should the interested shareholders or directors be restricted from voting? Clarification from the *Cour de cassation* is necessary.

The Delaware doctrine, although well-established, remains open to criticism and contains elements of uncertainty. The factors of the test differ in number, are factual,[39] and sometimes "arbitrary".[40] Furthermore, the fourth factor of the

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34. Clark, *supra*, note 481.
35. R. La Porta and others, *Investor Protection and Corporate Governance* (2000) 58 Journal of financial economics ; 3-27.
36. K. Pistor and others, *Evolution of Corporate Law: A Cross-Country Comparison* (2002) 23 University of Pennsylvania Journal of International Economic Law, 791-871; Th. Beck and R. Levine, *Legal Institutions and Financial Development* [2003] World Bank Policy Research Working Paper 3136.
37. This contrasts, for example, with the strict no-conflict principle of English law.
38. B. Dondero, *La captation des opportunités d'affaires: Regards vers l'étranger* (2012) 42 Gazette du Palais.
39. *Ibid.*
40. S. Bainbridge, *Corporate Law* (2nd edn, Foundation Press 2009), 155.

Delaware test seems to be a description of the consequence of the taking of corporate opportunity instead of a criterion as such.[41] At last, these factors all refer to the ability of the corporation, which is inappropriate considering that officers and directors could secure opportunities out of the reach of the corporation by weakening the financial ability of the corporation or legally limiting its interests through §122(17) DGCL.[42]

The flexible U.S. standard brings "ambiguity and uncertainty, resulting in guessing games as to the boundaries of the corporate fiduciary's freedom of action."[43] It however remains more reliable than the French approach as the main factors taken into account by courts are well-established. The recent creation of the French duty implies that the criteria to identify corporate opportunities are underdeveloped. More case law is needed to understand the factors and the extent of the disclosure required. Nevertheless, French law seems to be moving in the right direction with regard to protection of shareholders. The *Cour de cassation* gave an extensive scope to the regulation of corporate opportunities as it extends the loyalty to the relation between corporate representatives and shareholders (and not only the company like in the U.S.).[44] This exemplifies that "the disclosure gap between the Anglo-Saxon jurisdictions and the civil law jurisdictions is narrowing."[45]

Reliance on case law. Common law judges are supposed to have the ability to create efficient laws and suppress inefficient ones, though it is worth noting that such efforts are constrained by the doctrine of *stare decisis*, actions of the legislatures, and applicable constitutions. In this regard, Delaware courts have indeed created a solid corporate opportunity doctrine that has influenced other American states. Furthermore, the Delaware approach is praised abroad as an example of an efficient approach that inspires judges and legislators.[46] It also lacks of elasticity: Delaware courts are bound by *stare decisis*; they need existing cases to modify laws. This rigidity forced the Delaware legislature to create §122(17) DGCL to restrict the scope of the corporate opportunity doctrine. This legislative intervention gives the impression that the courts failed to adapt the law themselves.

By contrast, French law showed much elasticity and flexibility. French courts established a duty of loyalty, which they are refining case after case. Without being able to literally make law, the *Cour de cassation* adapted the corpus of laws by

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41. B. Dondero, *supra*, note 508.
42. Arguably, such actions from officers or directors would themselves be a breach of fiduciary duties.
43. P. Koh, *Once a Director, Always a Fiduciary?* (2003) 62 The Cambridge Law Journal, 415.
44. K. Grévain-Lemercier, *L'extension du devoir de loyauté du dirigeant envers les associés* (2013) 96 Gazette du Palais.
45. R. Kraakman and others, *supra*, note471, 301.
46. *E.g.* for the UK: J. Lowry and R. Edmunds, *The Corporate Opportunity Doctrine: The Shifting Boundaries of The Duty and its Remedies* (1998) 61 The Modern Law Review.

establishing a duty of loyalty, whereas Delaware courts were unable to adapt their own doctrine.

2. Differences

Representatives concerned. In the U.S., the corporate opportunity doctrine deals with the *fiduciaries*. These are the directors, the officers, and even the controlling shareholders.[47] The higher up a fiduciary is in the corporate hierarchy, the stronger is the requirement of loyalty.[48] In France, every corporate official being able to make decisions on behalf of the company must comply with the duty of loyalty. The situation of the directors remains uncertain as they do not have a day-to-day management power.[49] French and U.S. rules have the same scope: They both aim at reaching agents with broad responsibilities and powers. They also both show weaknesses: French law remains uncertain whereas U.S. law tends to be too factual, each case depending on the actual powers of the fiduciary.

Nature of the duty of loyalty. In the U.S., the duty of loyalty results from the fiduciary relation. In France, the *Cour de cassation* relied on Article L. 223-22 of the commercial code in *DL Finance*, and Article L. 225-251 in *Société CEPS*. These texts relate respectively to the civil liability of managers and directors. These precisions strengthen the idea that the duty of loyalty clearly stems from the function or manager or director, as in the U.S. This is reinforced by the theory of agency (*théorie du mandat*). Any director or manager, as company agent (*mandataire social*), should act in the interest of the principal, the company and the shareholders.[50]

Remedies available. In the U.S., the corporation from which an opportunity has been diverted can be allowed to recuperate the opportunity concerned or the profit made by the person that took it, notably through the imposition of a constructive trust.[51] The fiduciary can also be held liable for damages.[52] In France, the only civil remedy is damages. French courts take into account the probability that the corporation would have taken the opportunity if it had the choice to do so. The courts will therefore not consider compensating the company with the equivalent of the whole profit arising from the opportunity. Criminal law can also, to a limited extent, be relied upon through the offences of *abus de pouvoirs* or *abus de biens sociaux* in the most extreme cases. However, as demonstrated, criminal offenses are inadequate to deal with most corporate opportunities issues. It is therefore very unlikely that criminal courts would use it in such situation.

47. Clark, *supra*, note 481, 223.
48. *E.g. Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E 545 (1928).
49. B. Dondero & P. Le Cannu, *supra*, note 502.
50. M. Cozian, A. Viandier, F. Deboissy, *Droit des sociétés*, 27e édition (2014), LexisNexis, no.279.
51. Clark, *supra*, note 481, 223.
52. Orlinsky, *supra*, note 485.

3. Reassessment of the Superiority of the Common Law Tradition

Two main points have been advanced to justify the higher quality of the common law tradition. First, broad fiduciary duties accord extensive protection to shareholders. The civil law approach, by contrast, is too narrow and lacks flexibility. Secondly, the judges in common law countries have the ability to create efficient laws and suppress the inefficient ones, whereas this would not be the case for civil law judges.

Although French law appears more uncertain than U.S. law, the French duty of loyalty is broad and protects largely the corporation. To some extent, it even goes beyond U.S. law by protecting the shareholders directly. Furthermore, the reaction came from the *Cour de cassation*, which showed how flexible French law can be. From this standpoint, the so-called superiority of the common law is qualified.

B. The Limited Convergence of French Law towards U.S. law

Various authors have argued that corporate laws of developed jurisdictions converge in line with the common law tradition. For example, Hansmann and Kraakman explain that there will be an unstoppable formal convergence towards the Anglo-American model of corporate governance.[53] Yet, the present analysis shows that the convergence is not straightforward.

1. Functional Convergence

With regard to corporate opportunities, numerous elements of convergence between France and the United States can be enumerated. First, there are similarities in the vocabulary: French courts rely on a duty of loyalty (*devoir de loyauté*), akin to the fiduciary duty of loyalty of common law jurisdictions. Furthermore, the vocabulary of corporate opportunities (*opportunités d'affaires*) has become more popular in French legal literature. There are also similarities in legal technique: this duty has been created by case law, it is disclosure-oriented, and some factors such as the line of business test have been adopted by French case law. In addition, French law evaluates the behavior of the representatives to assess whether they committed a fault through non-respect of their duty of loyalty, which is similar to the U.S. fairness test.[54]

These elements reinforce the idea of a convergence of French law towards U.S. law. However, the reach of the convergence is quite limited. The concept of loyalty is deeply rooted under French law, and is notably at the heart of various corporate law principles and rules.[55] Moreover, the *Cour de cassation* neither talked about corporate opportunities, nor made any reference to any foreign law. The

53. H. Hansmann and R. Kraakman, *The End of History for Corporate Law* (2000) 89 Georgetown Law Journal.
54. B. Dondero, *supra* note 508.
55. B. Daille-Duclos, *Le devoir de Loyauté du dirigeant* (1998) 39 JCPE.

regulation is original as it relies on various sources: the duty of loyalty, the prohibition of unfair competition, and criminal offences. By contrast, the U.S. corporate opportunity doctrine is strictly based on the duty of loyalty. Furthermore, no legislative action had been necessary to develop this regulation and the basic organization of French governance institutions has not been modified.

These elements demonstrate that French institutions "are flexible enough to respond to the demands of changed circumstances without altering the institutions' formal characteristics."[56] French law converged toward a common law understanding of the corporate opportunities doctrine on a functional level only, by contrast with a *formal convergence* where "an effective response requires legislative action to alter the basic structure of existing governance institutions."[57] This shows that French law is flexible enough to adapt without legislative intervention.

2. Factors Explaining Convergence and its Limits

Influence of the Anglo-Saxon corporate governance doctrine. The French duty of loyalty has been sometimes expressly analyzed as directly borrowed from the Principles of Corporate Governance of the American Law Institute.[58] These principles arose in the 1990's in a context where the concern was to prioritize the interests of shareholders since they were considered as incurring the greatest risk amongst stakeholders. They have been quickly received in France because they were absent of the financial markets.[59] The corporate governance doctrine had interested many French scholars before *Kopcio*, and this interest strongly increased after the *Kopcio* decision was issued. The decisions of the *Cour de cassation* show that the judges have been influenced by the debate.

Increase of conflicts of interests. The rise of the duty of loyalty has been analyzed as a corporate law response to the increase of conflicts of interests in France. A commission designed to think about the prevention of conflicts of interests highlighted the surge of conflicts.[60] The report points out the various sources of conflicts, such as the increased complexity of the French corporations, the widespread interdependence between social, political and economic actors, or the advent of a largely-accepted liberalism, characterized by an exacerbated individualism and a dilution of ideologies.

Economic crisis. The rise of the duty has also been analyzed as a possible response to recent crisis. The so called Great Recession has brought to light legally, and perhaps morally, questionable conduct of larger corporations' management.

56. R. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function* (2001) 49 The American Journal of Comparative Law.
57. *Ibid.*
58. Daille-Duclos, *supra*, note 525.
59. F. Morin, *A Transformation in the French Model of Shareholding and Management* (2000) 29 Economy and Society, 45.
60. Rapport Sauvé, *Commission de réflexion pour la prévention des conflits d'intérêts* (2011).

Even prior to the Great Recession, scandals such as *Enron* and *Worldcom* led to more skeptical views on managers and directors of corporations in France. Furthermore, there have been various scandals in France related to the excessive salary of general managers of listed companies.[61]

Evolution of ownership structures. France is a jurisdiction with concentrated ownership of companies (*insider model)*. Most of the listed firms are controlled by a shareholder or a group of blockholders. In the U.S., most of the listed companies are characterized by the absence of controlling shareholders (*outsider model*). This might explain why Delaware judiciary elaborated rules to regulate the opportunism of managers very early, including the promulgation of the corporate opportunities doctrine. Dispersed shareholders are not strong enough to monitor officers, and the law is to restore the balance in this disturbed ratio of power. Oppositely in France, shareholders have direct interests to oversee the behavior of managers, and they are strong enough to control them and punish them if they abuse of their powers.

However, the ownership structure of French companies has become more dispersed. From 1986, the ideology of state ownership originally adopted to strengthen the economy post WWII was replaced by the ideology of free enterprise. A network of cross-holdings between French companies first developed since French households were not really interested in owning shares. However, international mutual funds' presence started to grow in the mid-90s. The French concentrated ownership structure started to be altered.[62] An author in 2000 noticed that "the French economy is beginning to operate in the same way as the American and British economies," with a capital market that has grown strongly.[63] Foreign investors owned around 6% of the shares of listed companies in 1985 whereas they crossed the threshold of 40% in 2011. French investment funds and other financial intermediaries owned less than 5% before 1977, whereas they owned 12% in 2011.[64] Dispersed ownership develops in France as well as capital markets. Many national and foreign institutional investors are amongst these new small shareholders of French companies. These investors are usually lobbying for stronger disclosure akin to what common law jurisdictions require.[65] Without becoming a jurisdiction dominated by dispersed ownership, the French concentrated ownership pattern is definitely altered.

This evolution of ownership structure can be analyzed as a factor of convergence of the law. Stronger markets push towards the adoption of stronger legal rules.[66] A

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61. V. Magnier, *Qu'est-ce qu'un administrateur prudent et diligent?*, (2012) 1, Bulletin Joly Sociétés.
62. P. Harbula, *The Ownership Structure, Governance, and Performance of French Companies* (2007) 19 Journal of Applied Corporate Finance.
63. F. Morin, *supra*, note 529, 37.
64. European Commission & FSUG, *Who owns the European Economy?* (2013).
65. R. Kraakman and others, *supra*, note 471, 303.
66. J. Coffee, *The Rise of Dispersed Ownership: The Roles of Law and The State in the Separation of Ownership and Control* (2001) 111 Yale Law Journal.

correlation could be seen between the evolution of ownership structure in France and the rise of the duty of loyalty. French ownership structure becomes more dispersed, which decreases shareholders' ability to oversee management. Some degrees of separation of ownership and control arose from this dispersion of ownership, which implies to some extent a loss of control by the shareholders. This needs to be compensated by stronger legal rules.[67]

This is well illustrated by the example of corporate opportunities: The duty of loyalty was created in France a few years after the concentrated ownership structure started to be slightly altered. Later, the duty was refined and improved, while the ownership structure of companies kept its evolution towards more dispersion.

The correlation between modification of ownership structure and development of corporate opportunities' regulations is also perceptible on a more global level. There has been a recent European trend of regulating more strongly the loyalty of directors and managers. The increase of dispersed ownership in continental European jurisdictions has been pointed out as a strong hypothesis explaining this.[68] The strengthening of the corporate opportunities regulation in France can be analyzed in this context of progressive dispersion of ownership in Europe. For example, Italy introduced a codified opportunities doctrine in 2003 and Spain followed in 2010.

Existence or absence of charter competition. The difference of institutional settings in the U.S. and France might be a contributing factor explaining the divergence of both bodies of law. In the U.S., each corporation is subject to the law of its state of incorporation. The right of fiduciaries to take business opportunities from their company is regulated by State law. As corporations are free to incorporate or re-incorporate in any State, American States have an interest in competing to attract companies to incorporate or re-incorporate in their respective states in order to benefit from the franchise taxes paid by the corporations. This phenomenon is called *charter competition*.

The charter competition may lead to the adoption of rules that are not necessarily value maximizing. Professor Bebchuk[69] notably points out that Delaware, the first U.S. jurisdiction to allow incorporation, refines its corporate law to attract re-incorporation decisions (which are greater than incorporation decisions). The decision to reincorporate is mainly in the hands of the managers, which leads Delaware to "pay substantial attention to the desires of managers." Pressures would come from managers and pro-managers interest groups to encourage lawmakers to adopt pro-management rules.[70] The weaknesses of the Delaware multi-factor

67. *Ibid.*
68. P. Davies and K. Hopt, *Corporate Boards in Europe –Accountability and Convergence* (2013) 61 American Journal of Comparative Law, 351.
69. L. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law* (1992) 105 Harvard Law Review.
70. *Ibid.,* 1461.

test, allowing much liberty to managers, tends to support this argument. The well-known judgment in *Broz* itself has been analyzed as a clear case of managerial bias.

By comparison, there is no charter competition in France or even in Europe, which probably reduces the influence of pro-management constituencies. Likewise, the concentrated ownership of French companies limits managers' influence. The very quick rise of the duty of loyalty confirms the limited influence of pro-management constituencies. Case after case, the duty of loyalty is developed by the *Cour de cassation*. Furthermore, French corporate opportunity regulation has been expanded to include the relationship between directors and shareholders, which is not the case in the U.S. Differences in charter competition between France and the U.S. could explain the limited convergence between French law and U.S. law. This enduring difference will always act as a barrier to stronger convergence.

Consequences for the convergence debate. An author challenged the postulation that the law evolves only as a consequence of extra-legal factors, such as culture, economics or politics.[71] Focusing on the importance of legal doctrine in the development of the law, she explains that if convergence was to occur, it could only be in line with the legal doctrine of the jurisdiction concerned. National legal doctrine prevents convergence on rules that would be against it. Although law must change to adapt to new circumstances, it would only do so by using and adapting existing legal concepts instead of importing and creating new legal instruments. The law can only converge on a functional level in accordance with national legal doctrine. Convergence can only occur if the rules are accepted and in compliance with the legal doctrine of the jurisdiction.

The corporate opportunity example resonates well with the argument that convergence can only be realized consistently with national legal doctrine. French law converged towards U.S. law on a mere functional level, within the limit of French legal doctrine. The *Cour de cassation* used the concept of loyalty, well-known under French law, without any reference to foreign laws or concepts. No legislative action was necessary to adapt the law. The example of corporate opportunities shows that legal doctrine has a particularly strong influence to explain convergence and its limits.

From a broader perspective, this example shows that principles inspired by foreign laws will only be successfully adapted into French law if they can be adapted into the current legal framework or based on existing concepts. This is what happened with the duty of loyalty: Clearly, there was a strong influence of Anglo-American principles of corporate governance, but the duty arose in accordance with French law and the existing concept of loyalty.

71. E. Micheler, *English and German Securities Law: A Thesis in Doctrinal Path Dependence* (2007) 123 Law Quarterly Review.

The American corporate opportunity doctrine appears to lead the way by contrast with French law. On the one hand, the American doctrine is well– established, includes recognized factors and benefits from a developed case law. On the other hand, France lacks a detailed corpus of cases, the factors remain imprecise and the extent of the disclosure required is uncertain. However, French law is catching up. French courts developed a broad duty, which is a promising source of protections for shareholders against opportunistic actions of managers or directors. By comparison, the American doctrine is unlikely to evolve. Significant changes are therefore likely to take place for French law, whereas U.S. law is likely to remain stagnant.

The *Cour de cassation* is free to improve the duty of loyalty, and is supported in this regard by the literature. The French concentrated ownership structure will limit the convergence toward a pro-management duty akin to the American doctrine. In addition, the absence of charter competition in France restricts the ability of pro-management constituencies to pressure the parliaments and the courts. These two factors, together with the fact that French literature lobbies for stronger corporate opportunities regulation, make it unlikely that French law becomes excessively pro-managers, which contrasts with the United States.

Oppositely, it is unlikely that French law leans towards an approach as strict as English law by making it almost impossible for corporate representatives to take corporate opportunities. French courts show great deference to the principle of entrepreneurial freedom (*liberté d'entreprendre*). This suggests that the prohibition for directors or managers to take business opportunities will never become absolute.[72] French law will likely evolve towards better certainty and quality. Albeit a late start, France is now set on the good track. It might achieve what the American doctrine did not: Establishing a balanced regime protecting entrepreneurial freedom of corporate representatives as well as it protects shareholders from opportunistic actions from such representatives.

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72. M. Corradi, *Les opportunités d'affaires saisies par les administrateurs de la société en violation du devoir de loyauté* (2011) 2 Bulletin Joly Sociétés.