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Securing corporate opportunities in Europe – comparative notes on monetary remedies and on the potential evolution of the remedial system

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ABSTRACT

Continental European jurisdictions have introduced corporate opportunities rules inspired by Anglo-American law. Despite a certain degree of homogeneity in substantive law, their monetary remedial systems still differ in common law and civil law jurisdictions. These differences matter because of the deterrence function connected to corporate opportunities remedies – deterrence being the core of fiduciary law. This article explains the divergences embedded in different legal traditions within a law and economics framework. It looks at potential developments of corporate opportunities remedies, drawing inspiration from a sample of European jurisdictions. Whereas UK law uses a vast array of remedies with high potential of deterrence and great flexibility in their application, civil law remedies are fewer, weaker and less flexible than the common law ones. However, the deterrence potential of civil law corporate opportunities remedies could be increased either through the introduction of criminal sanctions or future development of punitive damages doctrines.

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1. Introduction

Worldwide scandals involving widespread fraud, committed at the apex of multinational corporations, have occupied an important place in the debate on corporate governance since 2000.[1] From Enron to Ahold,[2] the widely spread and dramatically welfare-destroying consequences resulting from company directors' dishonesty and malfeasances have entered the

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[1]For a European perspective, see Luca Enriques, 'Bad Apples, Bad Oranges: A Comment from Old Europe on Post-Enron Corporate Governance Reforms' (2003) 38 Wake Forest L Rev 911.
[2]Michael Knapp and Carol Knapp, 'Europe's Enron: Royal Ahold, N.V.' (2007) 22 Issues Account Ed 641.

public domain and provided new points for debate about old corporate law and governance issues, especially on conflicts of interests.[3] Although the taking of corporate opportunities by directors was not the core problem in the Enron and Ahold scandals, the debate on directors' loyalty and on full disclosure is at the centre of post-Enron discourse. This change of perspective has induced jurists to foresee a necessary expansion of the duty of loyalty and of its manifestations.[4] This article seeks to add to that debate, addressing remedies for misappropriations of corporate opportunities – that is, one of the manifestations of directors' duty of loyalty – here analysed within a law and economics framework.[5] The analysis focuses in particular on British, French, German, Italian and Spanish law. These countries have the highest gross domestic products (GDPs) within the EU. Their aggregate GDP is more than two-thirds of the overall aggregate GDP of the 28 states of the EU.[6]

Corporate opportunities rules originated in the US[7] and the UK.[8] In both legal systems, the origins of corporate opportunity doctrines are deeply intertwined with the law of trust.[9] Continental Europe subsequently imported them,[10] either through doctrinal or jurisprudential interpretations of pre-existing doctrines of fiduciary duties[11] or by way of corporate law reforms.[12] The

[3]John Armour and Joseph McCahery, *After Enron* (Hart 2006).

[4]Lyman Johnson, 'After Enron: Remembering Loyalty Discourse in Corporate Law' (2003) 28 Del J Corp L 27.

[5]Self-dealing rules, another manifestation of the directors' duty of loyalty, have been at the center of a much livelier debate. Also, the social and political forces affecting policymaking in this area have been questioned in a very original way by David Kershaw, 'The Path of Corporate Fiduciary Law' (2012) 8 NYU JL & Bus 395, claiming that the UK evolution of self-dealing rules is connected more to legal path dependency than to pressure groups and markets.

[6]See the official data collected by Eurostat at <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=nama_10_gdp&lang=en> accessed 23 September 2016.

[7]See *Lagarde v Anniston Lime & Stone Co*, 126 Ala 496, 28 So 199 (1900). In Delaware law, the seminal case is *Guth v Loft Inc*, 5 A 2d 503 (Del Ch 1939). The importance of a comparative reference to the US system is acknowledged by John Lowry and Rod Edmunds, 'The Corporate Opportunity Doctrine: The Shifting Boundary of the Duty and Its Remedies' (1998) 61(4) Modern L Rev 515, 516.

[8]*Regal (Hastings) v Gulliver* [1942] UKHL 1. The underlying no conflict and no profit principles can be traced back, respectively, to *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461 and *Keech v Sandford* (1726) Sel. Cas. Ch. T. King 61.

[9]For the US, see Joseph Walsh, 'The Fiduciary Foundation of Corporate Law' (2001) 27 J Corp L 27 333. For the UK, see Leonard Sealy, 'The Director as Trustee' (1967) 25(1) CLJ 83, showing the historical difficulties in fitting directors within the fiduciary framework.

[10]For an innovative and very recent contribution to the Theory of Legal Transplants in this field, see Martin Gelter and Geneviève Helleringer, 'Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law' (forthcoming in BBLJ).

[11]In German jurisprudence, awareness of the problem was already revealed in Ernst Mestmäcker, *Verwaltung, Konzerngewalt und Recht der Aktionäre* (Müller 1958) 166ff. Subsequently, the *Bundesgerichtshof* introduced these rules through an extensive interpretation of the principle of loyalty of directors to the company (*die Treuepflicht*), and more specifically of their duty to avoid conflicts of interests (*das Gebot der Vermeidung von Interessenkonflikten*). See BGH WM 1977, 361, 362; BGH WM 1983, 498; BGH NJW 1986, 584, 585; BGH WM 1989, 1335, 1339. In France, a corporate opportunities doctrine with a rather limited reach was developed as a manifestation of the duty of loyalty. See, for instance, Cass com 18 December 2012 [2013] Rev Soc 262.

[12]In Italy, a corporate opportunities rule was introduced in paragraph 5 of Art 2391 Italian Civil Code. See, for instance, Francesco Barachini 'L'Appropriazione delle *Corporate Opportunities*' in Piero Abbadessa and

core aim of corporate opportunities doctrines is to prevent company directors from appropriating, without authorisation, business opportunities in which their company has an economic interest.[13] The taking of corporate opportunities is also, together with self-dealing, one of the typical ways by which directors can appropriate private benefits of control.[14] Hence, efficient corporate opportunities rules can be considered crucial to investors' trust in the fair functioning of the financial system and, when companies are listed, to the overall functioning of financial markets.[15]

In relation to corporate opportunities rules, there are similarities in the legislation of most European jurisdictions. No European jurisdiction prevents directors from taking any business opportunity *tout court*, hence the judicial system must identify those business opportunities that should be treated as 'corporate'.[16] Most jurisdictions employ either a conflict of interest[17] or a line of business test.[18] These two tests are – to some extent – similar. Corporations are particularly interested in business opportunities in their line of business.[19] Obviously, similarity among legal tests does not mean perfect homogeneity.[20] For instance, the approach adopted by UK courts is significantly more sophisticated, although at times more complex, than the one followed by most continental European legal systems.[21] Despite slight variations

Giovan Battista Portale (eds), *Il Nuovo Diritto delle Società, Liber amicorum Gian Franco Campobasso* (UTET 2006); Marco Claudio Corradi, 'Le Opportunità di Affari all'Ultimo Comma dell'Art. 2391 c.c.: Profili Interpretativi tra "Società" ed "Impresa"' (2011) Giurisprudenza Commerciale (I) 597 ff. In Spain, a corporate opportunities doctrine for public companies was first introduced with Article 228 of the Spanish *Ley de Sociedades de Capital* (LSC). The rule was reformed in 2015. For a sophisticated description of the duty of loyalty and its applications in Spanish law, see Candido Paz-Ares, 'Anatomía del Deber de Lealtad' (2015) 39 Actualidad Jurídica Uría Menéndez 43.

[13]David Kershaw, *Company Law in Context* (2nd edn, OUP 2012) 514 ff.

[14]For a definition and comparative analysis of private benefits of control, see Alexander Dyck and Luigi Zingales, 'Private Benefits of Control: An International Comparison' (2004) 59 J Fin 537.

[15]For the connection between investor protection and company law see Guido Ferrarini and Eddy Wymeersch (eds), *Investor Protection in Europe: Corporate Law Making, the MiFID and Beyond* (OUP 2006).

[16]An outright prohibition to take business opportunities has been advocated in the past with regard to listed corporations by Victor Brudney and Robert Clark, 'A New Look at Corporate Opportunities' (1980–81) 94 Harv L Rev 997. Nevertheless, their arguments had no significant on US case law.

[17]For the UK, see CA 2006 175(2), although the tension between the no conflict and no profit rules remains at the core of the UK regime. See for instance David Kershaw, 'Lost in Translation: Corporate Opportunities in Comparative Perspective' (2005) 25 OJLS 603. For Italy, see Italian Civil Code, article 2391 (5), which operates in the general framework of Article 2391, on the interests of directors. For Spain, see LSC Article 228(e), on the conflict of interest within the framework of the duty of loyalty.

[18]German scholars and courts introduced the corporate opportunities doctrine on the basis of a thorough study of the US precedents. Therefore, the line of business test seems to have been adopted in the German doctrine as well. See Wolfram Timm, 'Wettbewerbsverbot und "Geschäftschance", Lehre im Recht der GmbH' (1981) 72 GmbH-Rundschau 177. It is also worth noting that, arguably, part of the UK case law adopts a version of the line of business test. See Kershaw, 'The Path' (n 5) 573 ff.

[19]Marco Claudio Corradi, 'Corporate Opportunities Tested in the Light of the Theory of the Firm – A European (and US) Comparative Perspective' (2016) 27 EBLR 755.

[20]For a sophisticated study of the differences between English and German definitions of corporate opportunity see, for instance, Holger Fleischer, 'Gegenwartsfragen der Geschäftschancenlehre im Englischen und Deutschen Gesellschaftsrecht' in Jürgen Taeger and Andreas Wiebe (eds), *Informatik – Wirtschaft – Recht. Regulierung in der Wissensgesellschaft: Festschrift für Wolfgang Kilian* (Nomos 2004).

[21]Except for the German one, which is also rather sophisticated in this area. It is also the structure of UK judgments that facilitates the expression of articulated opinions by each judge. This introduces many

in these tests, the substantive rationale underlying corporate opportunities rules is identical in common law and in civil law – that is, ensuring directors' loyalty to the company by preventing them from carrying out conflicted transactions.[22] Thus, corporate opportunities rules are a reflection of the directors' duty of loyalty to the corporation and of one of its corollaries, that is, the conflict of interest principle.[23] According to the conflict of interest principle, a director should not pursue their self-interest when it is contrary to the interest of the corporation they serve.

In terms of economic agency theory, the conflict of interest principle can be viewed as a way of reducing agency costs, that is, costs incurred by the company (principal) when delegating its decisional power to directors (agents).[24] On the one hand, the intention is for directors to enjoy a certain degree of freedom in their choices, because freedom will help to ensure that they take flexible and efficient decisions that are in the company's interests.[25] On the other hand, companies need to prevent directors from abusing that freedom. The tension between that freedom and the prevention of abuse is at the core of fiduciary law and, particularly, of corporate opportunities rules.[26]

The wider philosophical and economical framework in which agency theory is embedded is relevant to an understanding of the corporate opportunities remedial system. Modern economic theory and its founder – Adam Smith – have acknowledged the importance of self-interest and greed as the core drivers of the so-called invisible hand.[27] Hence, economic liberalism cannot be consistent with a general aversion to economic actors' individual economic activity and to their pursuit of self-interest.[28] However, when considering economic actors such as directors it cannot be ignored that they are also economic agents. Therefore, it is obvious that directors' unregulated self-interested behaviour may cause significant damage to the overall economic system. The corporate scandals that characterised the first decade of the twenty-first century were a perfect example of the worst risks

nuances and subtleties that do not characterise most civil law judgments. Nevertheless, the inherent complexity of UK law in this specific area is evident in the perpetuation of the no profit versus no conflict debate. See Kershaw, *Lost* (n 17).

[22]Paul Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law* (9th edn, Sweet & Maxwell 2012) 16.143 ff.

[23]In the UK system, the conflict of interest principle is often viewed as being in competition with or complemented by the no profit principle. For a wider perspective on the relationships between no conflict and no profit principles, see Matthew Conaglen, *Fiduciary Loyalty* (Hart 2010) 120 ff.

[24]Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 J Fin Ec 305. Note that this is true also from a wider sociological perspective. See Susan Shapiro, 'Agency Theory' (2005) 31 Annu Rev Sociol 263.

[25]Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (HUP 1996) Chapter 4.

[26]See Tamar Frankel, 'Fiduciary Law' (1983) 71 Cal L Rev 795.

[27]The famous citation of Adam Smith on the invisible hand is in Adam Smith, *The Theory of Moral Sentiments*, in Adam Smith, *The Glasgow Edition of the Works and Correspondence of Adam Smith* (OUP 1976–1983), vol I, 184.

[28]Thomas Carson, 'Self-Interest and Business Ethics: Some Lessons of the Recent Corporate Scandals' (2003) 43 J Bus Eth 389, 391.

connected to directors' uncontrolled greed. Those events prompted a careful reassessment of directors' conflict of interest as an important tenet of a state's public policy, both in the US and in Europe.[29] Hence, the discussion on remedies for misappropriations of corporate opportunities must also consider how these rules are connected to objectives of public interest. Public opinion after Enron demanded and expected harsh sanctions.[30]

Nevertheless, neither can the complexity of this subject be overlooked nor can very harsh remedial solutions – namely imprisonment, but in principle also any other criminal sanction that stigmatises the wrongdoer – be supported without careful analysis.[31] For there to be a rational discussion on the appropriate remedial system for misappropriations of corporate opportunities, the root cause of the damages and economic inefficiencies that may follow misappropriations has to be addressed. Such damages and inefficiencies may need to be kept clearly separate from those arising from the type of financial crime that takes place in the banking and financial industry. In the last decade, legal scholarship has provided a clearer framework for the introduction of criminal sanctions for corporate behaviour that brings colossal financial damage, such as fraud affecting financial services and especially in the banking sector.[32] Such behaviour put at risk the entire financial and economic system and therefore collective welfare. Hence, adequate prevention would seem to be required. Yet, the taking of corporate opportunities cannot be assimilated *tout court* to financial fraud. Although the very broad

[29]Klaus Hopt, 'Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron' (2003) 2 JCLS 221.

[30]See Daniel Richman and William Stuntz, 'Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution' (2005) 105 Colum L Rev 583, 626, describing an increase of social pressure towards criminalisation of white-collar misdeeds. Nevertheless, as it is often the case, a pro-imprisonment trend in public opinion was soon followed by an anti-imprisonment trend, expressed especially by legal scholarship. See, for instance, Jamie Gustafson, 'Cracking Down on White-Collar Crime: An Analysis of the Recent Trend of Severe Sentences for Corporate Officers' (2007) 40 Suffolk U L Rev 685, 701.

[31]The qualification of 'harshness' of a given criminal sanction clearly depends on the socio-cultural context within which it is applied. On the one hand, all criminal sanctions may carry a degree of stigma. On the other, apart from capital punishment and torture, imprisonment looks as the harshest one because it deprives the individual of its liberties. The socio-cultural perception of the harshness of imprisonment varies to a very meaningful extent country by country – also depending on how inmates are treated while in prison. One of the most significant divides is the one between the Anglo-American world and continental Europe. See James Whitman, *Harsh Justice* (OUP 2003). From an inmate perspective, it is highly debated whether such harshness translates into a general deterrent effect. For instance, there is contrasting evidence with reference to imprisonment. See Francesco Drago et al, 'The Deterrent Effects of Prison: Evidence from a Natural Experiment' (2009) 117 J Pol Ec 257; and cf Shelley Johnson Listwan et al, 'The Pains of Imprisonment Revisited: The Impact of Strain on Inmate Recidivism' (2013) 30 Justice Quarterly 144. Hence, the possibility of achieving deterrence effect through criminal sanctions has to be balanced not only against the personal harshness inflicted to inmates, but also against the potential loss in social welfare consequent to the release of prisoners. This is clearly a very old debate in continental Europe. See for instance, Erio Sala, *Sopra il Tema Proposto dalla R. Accademia di Scienze, Lettere ed Arti in Modena ne' Termini Seguenti* (Zanichelli 1864).

[32]Sarah Wilson, *The Origins of Modern Financial Crime: Historical Foundations and Current Problems in Britain* (Routledge 2014).

economic context that surrounds both financial fraud and the taking of corporate opportunities may be similar at times, there are at least three foundational differences that are worth considering. First, in practice, most of the takings of corporate opportunities do not occur in the financial and banking industries. They are breaches of duties of loyalty in companies that are engaged in non-financial activity and they need to be viewed from this (more economically limited) perspective. Second, such breaches *might* also be regarded as efficient at times. Third, in the case of takings of corporate opportunities, the systemic-risk element connected to crimes committed in the financial and banking industry is absent.[33] In its worst version, systemic risk entails potential welfare loss that may affect an entire economic system. But such risk is not obviously present in the case of takings of a corporate opportunity.

On a general basis, a justification might exist for the adoption of criminal sanctions for breach of directors' duties – and especially of the duty of loyalty. In fact, criminal sanctions might contribute to sound corporate governance. Corporate governance in turn – given the magnitude of financial resources involved – often becomes an issue of public interest.[34] However, the taking of corporate opportunities presents peculiarities that require a separate legal assessment and treatment. In fact, even those – such as Michael Whincop – who seem to have advocated for the introduction of criminal sanctions for directors misappropriating corporate opportunities have acknowledged that in certain situations directors' takings can be beneficial to the company and to society as a whole; namely, when the director values a given corporate opportunity more highly than does the company she serves.[35] This is why, in the case of corporate opportunities, the possibility of introducing criminal sanctions has to be weighed against potential hindrance to the efficient allocation of the business opportunity.

It may be asked how one can know whether the company or its director values a given opportunity more highly. The answer to that question is through bargaining. In turn, bargaining is only possible when the insider discloses the existence of a corporate opportunity.[36] From a doctrinal perspective, the duty of full disclosure is one of the most important requirements of the duty of loyalty.[37] It plays an essential role with reference to the prophylactic function of fiduciary duties.[38] Moreover, it can be understood as

[33]See Mary Kreiner Ramirez, 'Oversight and Rule Making as Political Conflict' in Shanna Van Slycke et al. (eds), *The Oxford Handbook of White-Collar Crime* (OUP 2016).
[34]Michael Whincop, 'An Economic Analysis of the Criminalisation and Content of Directors' Duties' (1996) 24 Austral Bus L Rev 273, at 273–274.
[35]Ibid 285 ff.
[36]Michael Whincop, 'Painting the Corporate Cathedral: The Protection of Entitlements in Corporate Law' (1999) 19 OJLS 19.
[37]Conaglen (n 23) 4, 205, 218.
[38]Ibid.

connected to the internalisation of the trustworthiness that is necessary for the long-term bonding between a company and its directors.[39] But, from an economic perspective, it serves at least two different but connected purposes. First, it is a condition for containing agency costs, because it facilitates the detection of misappropriations and it renders them more difficult to pursue.[40] Second, it facilitates bargaining over corporate opportunities.[41] Thus, efficient allocation of corporate opportunities is more likely to occur. Of course, the possibility that directors may spontaneously disclose private information on new business opportunities cannot be excluded. Nevertheless, it has to be acknowledged that the risk is high that they will not disclose the opportunity, given that their misdeed is unlikely to be detected.[42] Because in many cases directors would not voluntarily disclose, sanctions for non-disclosure look particularly important.

As the likelihood of disclosure – and namely deterrence-induced disclosure – is so crucial to the functioning of corporate opportunities rules, the importance of deterrence connected to corporate opportunities remedies has to be considered extremely carefully. In light of the implications outlined above, Sitkoff's opinion is particularly relevant:

> Stripped of legalistic formalisms and moralizing rhetoric the functional core of the fiduciary obligation is *deterrence*. The agent is induced to act in the best interests of the principal by the threat of after-the-fact liability for failure to have done so.[43]

Cooter and Freedman very clearly expressed the core ideas needed to understand deterrence in a fiduciary context:

> Successful deterrence generally requires the expected sanction to equal or exceed the gain from wrongdoing. By definition, the expected sanction equals the probability that a sanction will be imposed multiplied by its magnitude. Thus, the sanction's probability partly determines whether wrongdoing will be deterred sufficiently.[44]

[39]Margaret Blair and Lynn Stout, 'Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law' (2001) 149 U Pa L Rev 1735. See also John Lowry, 'The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure' (2009) 68 CLJ 607.

[40]Robert Sitkoff, 'The Economic Structure of Fiduciary Law' (2013) 91 BUL Rev 1039.

[41]Eric Talley, 'Turning Servile Opportunities into Gold: A Strategic Analysis of the Corporate Opportunities Doctrine' (1998–1999) 108 Yale L J 277; Whincop, 'Painting' (n 36).

[42]David Friedrichs, *Trusted Criminals: White-Collar Criminals in Contemporary Society* (Wadsworth 1996). The author explains that the likelihood that a director is detected is very low.

[43]Sitkoff (n 40) 1043. Clearly, we can interpret Sitkoff's reference according to the multiple concepts of deterrence that are found in criminology, economic and legal literature. This analysis follows an approach based on economics, as framed in a wider sociological perspective. See, for instance, Dan Kahan, 'Between Economics and Sociology: The New Path of Deterrence' (1996–1997) 95 Mich L Rev 2477.

[44]Robert Cooter and Bradley Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 N Y U L Rev 1045, 1052.

Clearly, deterrence is not the only possible approach when analysing remedies. For instance, from a *qualitative* perspective, the so-called internalisation of legal rules is extremely important to understanding whether such rules will become part of the moral system of individuals.[45] A successful internalisation will definitely affect the general preventive success of legal sanctions.[46] Focus on deterrence, however, is the easiest approach from a *quantitative* perspective.[47] This is not intended to detract from alternative approaches in policymaking. Some alternatives are extremely promising and are complementary, especially those that aim to integrate deterrence theory with behavioural economics. Therefore, when necessary, this article will make reference to behavioural variables as a way to provide a refined reading of deterrence.[48] What is worth noting is that company directors can usually be regarded as rational decision makers, given the qualities needed for success in their working environment. Hence, they may think carefully about the consequences of their actions before transgressing.[49] This is why an approach based on deterrence may be particularly appropriate in this area of the law, where objections related to the irrationality of perpetrators are less likely to be well-founded.

According to Cooter and Freedman, as long as the existence of a corporate opportunity is not disclosed, the probability of detection and enforcement of its misappropriation is clearly rather low.[50] There are at least two factors that may negatively affect detection and enforcement. First, a company will need to prove that the director discovered the business opportunity before they resigned, which may be difficult. Indeed, until the existence of the business opportunity is disclosed, it may be unclear when it arose. Moreover, as the facts surrounding the discovery are often in the private sphere of knowledge of the director, collecting concrete evidence may be extremely hard. The director/taker may simply argue that they learned about the corporate opportunity

[45]See generally Herbert Hart, *The Concept of Law* (OUP 1961). With reference to white-collar crimes, Gary Wilson and Sarah Wilson, 'The FSA, "Credible Deterrence", and Criminal Enforcement – A "Haphazard Pursuit"?' (2014) 21(1) J Financial Crime 4, provide an example of how the UK Financial Services Agency tried to enhance the public perception of financial fraud.

[46]See Johannes Andenaes, 'The General Preventive Effect of Punishment' (1966) 114 U Pa L Rev 949.

[47]This is true at least when one tries to calculate deterrence ex ante, basing it on probability and severity of punishment. By contrast, empirical studies can be extremely complex from an econometric perspective. See Isaac Ehrlich and Zhiquiang Liu, 'Sensitive Analysis of the Deterrence Hypothesis: Let's Keep the Econ in Econometrics' (1999) 42 J L&Econ 455. Note that in this introduction I am discussing deterrence in general. For deterrence related to imprisonment, which represents a rather controversial area of criminology, see section 5.

[48]Raymond Paternoster and Ronet Bachman, 'Perceptual Deterrence Theory' in Francis Cullen and Pamela Wilcox (eds), *The Oxford Handbook of Criminological Theory* (OUP 2013). The authors acknowledge the importance of the interaction between perceptual deterrence theory and behavioural economics, and also refer to recent developments such as those in Daniel Nagin, 'Moving Choice to Center Stage in Criminological Research and Theory: the American Society of Criminology 2006 Sutherland Address' (2007) 45 Criminology 259.

[49]Neal Shover, Andy Hochstetler and Tage Alalehto, 'Choosing White-Collar Crime' in Francis Cullen and Pamela Wilcox (eds), *The Oxford Handbook of Criminological Theory* (OUP 2013).

[50]Cooter & Freedman (n 44).

at issue after her resignation.[51] Second, not all takings are equally detectable. If the taking is the setting up of a new business on a lasting basis, evidence is more likely to be available. If the taking is a one-off transaction, evidence may be difficult to find. Finally, even when a corporate opportunities case reaches a court, its outcome may be influenced by the rules of civil procedure – especially those on evidence – and by the parties' ability to employ those rules.[52]

Given that – without disclosure – the probability of a sanction being imposed on the director is likely to be low, a rational lawmaker will tend to impose sanctions that are high enough to make the sanction expected by the director greater than the expected gains from wrongdoing.[53] However, the calculation of the effects of the remedy is not easy. In quantitative terms, one point in particular should be mentioned: there is no absolute quantitative superiority of one remedy over another, because a given corporate opportunity may be valued more either by the corporation or by its director (or another insider to whom the corporate opportunities doctrine applies).[54] Because it depends on parties' personal preferences, the strength of a given remedy can be assessed only on a case-by-case basis. A separate assessment of the two hypotheses resulting from the different evaluations of a given business opportunity by the company and its insiders is needed.

Where the company values the corporate opportunity more than the taker, a remedy based on damages will usually grant the company a higher sum than the one it can obtain through disgorgement of profits (named 'account of profits' in UK law). It may be, however, that the damages are not high enough to produce efficient deterrence, when multiplied by the probability of detection. Vice versa, in the second hypothesis, where the company values the opportunity less than the taker, an account of profits will lead to the transfer to the corporation of a higher sum than a claim for damages because the account of profits will show and lead to the transfer of the gains made by the taker (eventually discounted by an allowance for their activity, as according to some UK case law).[55] Nevertheless, we cannot be sure that the product of probability of detection and disgorgement of profits always amounts to a higher sum than the expected gains, because this depends on the value assigned to the probability of detection. The

[51]This conduct is usually not covered by corporate opportunities rules. In most jurisdictions those rules apply to 'directors', not to individuals who are no longer directors once the opportunity is discovered. If the opportunity is discovered before resignation, corporate opportunities doctrines usually apply to post-resignation takings. See for instance *IDC* v *Cooley* ([1972] 1 WLR 443). See also Kershaw (n 13) 562.

[52]For a common law versus civil law civil procedure analysis, see John Langbein, 'The German Advantage in Civil Procedure' (1985) 52 U Chi L Rev 823.

[53]From here on, I will refer to stronger sanctions and stronger deterrence in terms of quantitative significance, measured on the basis of the Cooter and Freedman test (n 44).

[54]Whincop, 'An Economic' (n 34).

[55]See *Boardman v Phipps* [1966] UKHL 2, in which an allowance was granted. However, in *Guinness Plc v Saunders* [1990] 2 A.C. 663, the court denied any allowance for the work done by directors.

only kind of monetary award that can be deployed to impose an overall higher cost on the taker is punitive damages.[56] The amount of punitive damages can in fact be precisely calculated to produce efficient deterrence.[57] Hence, given that the efficiency of different remedies depends on the valuation that the parties make of a corporate opportunity, a remedial system which is flexible and rich in sanctions is more likely to create adequate incentive to disclosure. In fact, it can be adapted case-by-case to the value assigned by the parties to a given corporate opportunity.

The *de lege lata* part of this article will mainly deal with monetary remedies, which are the most promising remedies from a comparative perspective. It will also touch upon criminal sanctions, but only *de lege ferenda*. To date, none of the jurisdictions in the sample has introduced criminal sanctions expressly for the misappropriation of corporate opportunities.[58] Dismissal of directors might be seen as a remedy, even though it appears to be more a consequence of misappropriation than a remedy. Regardless of its classification as a remedy or as a mere legal consequence, rules on dismissal of directors are homogenous in the sample of European company laws analysed here,[59] so they are not particularly interesting from a comparative perspective. Reputational damages are difficult to quantify in terms of deterrence and, therefore, will not be analysed here either.[60] Finally, injunctions are possible in most systems.[61] However, they are only temporary measures, and hence do not qualify as remedies.

The following sections identify significant trends in the evolution of different remedial models emerging in the case law and in its scholarly interpretation in several EU Member States, and consider future developments. The analysis will address both corporate opportunities remedies and remedies

[56]If we leave aside administrative fines, which may have similar effects when properly calculated. This is true from a merely quantitative perspective. However, when we add behavioral variables, sanctions such as the property version of constructive trust may be equally efficient. See section 2.

[57]See section 2.

[58]They are nonetheless contemplated by some Asian jurisdictions, such as Korea and China. See, respectively, Kyung-Hoon Chun et al, *Corporations and Partnerships in South-Korea* (Kluwer Law International 2014) 68, and Jiangyu Wang, *Company Law in China* (Edward Elgar 2014) 206–07.

[59]All the European jurisdictions in our sample support dismissal both at will and with cause. The main alternative model is represented by the US Delaware and by its declining practice of staggered boards. Lucian Bebchuk, John Coates IV and Guhan Subramanian, 'The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants' (2002) 55 Stan L Rev 885.

[60]For a very interesting analysis of this kind of sanction, see Dan Awrey, William Blair and David Kershaw, 'Between Law and Market: Is There a Role for Culture and Ethics in Financial Regulation?' (2013–2014) 38 Del J Corp L 191, 205ff.

[61]For Germany, see, for instance, Ulrich Noack and Wolfgang Zöllner (ed), *Kölner Kommentar zum Aktiengesetz* vol 2, pt 1, paras 76–94 AktG (Carl Heymanns 2010) comment to AktG § 88, s 7, para 4. For Spain, see Pedro Portellano Diez, *Deber de Fidelidad de los Administradores de Sociedades Mercantiles y Oportunidades de Negocio* (Civitas 1996) 123–24. In Italy, it is open to question whether an injunction can be obtained in the case of misappropriation of a corporate opportunity. On the nature of injunctive remedies in Italian law see generally Lea Querzola, *La Tutela Anticipatoria fra Procedimento Cautelare e Giudizio di Merito* (Bononia University Press 2006) 222.

for the violation of the directors' duty not to compete with their corporation, as these are often concurrently applicable to corporate opportunities cases in continental Europe.

2. Gain-based remedies in common law jurisdictions and their deterrence potential

UK company law has traditionally penalised misappropriations of corporate opportunities with an account of profits (equivalent to a disgorgement of profits in the US), assisted by a constructive trust.[62] A constructive trust is not a separate remedy that is functionally different from an account of profits. It is a way of imposing a gain-based remedy and, depending on how it is formulated, it can produce a number of different legal effects, as explained below. It has been used for centuries in the UK.[63] It is an equitable remedy and also a specific remedy against the misappropriation of corporate opportunities. It has acquired a peculiar flexibility, especially in the UK. In the words of Lord Upjohn in *Boardman v Phipps*:

> Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of the case.[64]

Despite its flexibility, in UK law a constructive trust is not intended as a general remedy.[65] It can be understood either as a proprietary or as a personal remedy. This distinction appears to pertain to two main areas: the effects on creditors in the case of insolvency of the director and the tracing of the assets.[66] As to insolvency, a proprietary remedy grants the proprietor (i.e. the constructive beneficiary) priority over the creditors of the trustees, whereas a personal one does not. As to tracing, a proprietary remedy does not only provide, as does a personal remedy, a disgorgement of the immediate profits of the misappropriation, but also of all the profits derived from subsequent reinvestments.

[62]See, for UK law, Davies and Worthington (n 22) 16.184 ff, and for US law, Eric Orlinsky, 'Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability' (1999) 24 Del J Corp L 451.

[63]See, for instance, *Holt v Holt* (1670) 1 Chan Cas 190, about a testamentary trust and lease renewal.

[64][1966] UKHL 2, 32.

[65]See Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 714–16. In any event, one has to remember that, in cases of taking of corporate opportunities by a company's director, the absence of a remedial constructive trust is generally unimportant; the director is already regarded to be in the position of a trustee in relation to the company's assets, even before an eventual breach of duty. If, therefore, the director acts in breach of her fiduciary duty to the company and as a consequence receives assets that should have been offered to the company, a constructive trust can arise, and this is not a remedial constructive trust, as made clear in *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45.

[66]Such different results are very clear in *A-G for Hong Kong v Reid* [1994] 1 AC 324, where one can read the main features of a proprietary conception of constructive trust.

In the UK, the Companies Act 2006 (CA 2006), when dealing with breaches of directors' duties, refers to the case law on equitable remedies. Section 178 provides that 'the consequences of a breach (or threatened breach) of ss. 171 to 177 are the same as would apply if the corresponding common law rule or equitable duty applied'. In other words, CA 2006 does not codify the remedies for breach of directors' duties. Codification of this part of company law would be a challenge for several reasons. The main source of potential issues is, as noticed by Richard Nolan in his in-depth study on this subject, proprietary remedies in equity, especially in view of the underlying doctrinal orientations.[67]

A significant number of the UK corporate opportunities judicial decisions applied an account of profits,[68] often without specifying whether the remedy was personal or proprietary, and sometimes also included third parties whose liability was explicable only if the remedy was proprietary.[69] Such case law seemed rather confusing. It was also difficult to interpret, especially when read in light of the wider discussion on the distinction between personal versus proprietary remedies as equitable remedies for breach of a fiduciary duty.[70]

The existence of these two contrasting rules led to the Supreme Court's clarification of the position in its decision in *FHR v Mankarious*.[71] In this case, Lord Neuberger adopts a far simpler and pragmatic approach:

> at least in some cases, where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the equitable rule ('the rule') is that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal

[67] Richard Nolan, 'Enacting Civil Remedies in Company Law' (2001) 1 JCLS 245.

[68] *Regal (Hastings) v Gulliver* [1942] UKHL 1; *Boardman v Phipps* (n 55); *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443; *Bhullar v Bhullar* [2003] EWCA Civ 424.

[69] See, for instance, *Cook v Deeks* [1916] AC 554 as explained by Lewison LJ in *FHR v Mankarious* [2013] EWCA Civ 17, para 45:

> [t]he Privy Council did not make any declaration of trust but ordered the taking of an account. On the face of it this would appear to be a personal remedy. But the account was ordered not only against Deeks and his co-directors but also against the Dominion Construction Company. Since the Dominion Construction Company was not itself a fiduciary, the order against it could only be justified on the basis that it was in knowing receipt of trust property. Thus, the principal must have had a proprietary interest in the contract.

[70] See Roy Goode, 'Proprietary Liability for Secret Profits – A Reply' (2011) 127 LQR 493; Andrew Hicks, 'The Remedial Principle in *Keech v Sandford* Reconsidered' (2010) 69(2) CLJ 287; Graham Virgo, 'Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?' (2011) 70(3) CLJ 502; Peter Watts, '*Tyrrell v Bank of London*– an Inside Look at an Inside Job' (2013) 129 LQR 527; William Swadling, 'Constructive Trusts and Breach of Fiduciary Duty' (2012) 18 T&T 98; David Hayton, 'Proprietary Liability for Secret Profits' (2011) 127 LQR 487; Sarah Worthington, 'Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae' (2013) 72(3) CLJ 720.

[71] [2014] UKSC 45.

> remedy against the agent, and the principal can elect between the two remedies.[72]

After having stated the general rule, Lord Neuberger considers several cases, including several corporate opportunities cases, on which he bases his final ruling.[73] He confirms that the fiduciary position of a company's director attracts the rule he previously formulated in rather general terms, without referring to the law of trusts:

> The agent owes a duty of undivided loyalty to the principal, unless the latter has given his informed consent to some less demanding standard of duty. The principal is thus entitled to the entire benefit of the agent's acts in the course of his agency … The agent's duty is accordingly to deliver up to his principal the benefit which he has obtained, and not simply to pay compensation for having obtained it in excess of his authority. The only way that legal effect can be given to an obligation to deliver up specific property to the principal is by treating the principal as specifically entitled to it.[74]

It is also worth noting that, to reinforce his arguments, Lord Neuberger makes express reference to comparative law, citing cases such as *Chan v Zacharia*,[75] which is a corporate opportunity case.[76] This reinforces the idea that he intends this principle to be applied also to corporate opportunities cases, although *FHR v Mankarious* may not be the final word on this subject. Nevertheless, based on that decision, a proprietary remedy looks likely to be granted in cases of misappropriation of a corporate opportunity.

A proprietary version of the account of profits/constructive trust remedy can be a great deterrent, especially if analysed through the lens of behavioural economics.[77] The degree of psychological uncertainty it produces in the mind of the taker has to be considered.[78] The insider may be very successful or very lucky. They would probably not appropriate the opportunity at hand if they did not have confidence in their business acumen. Once they have misappropriated a corporate opportunity, they may engage in further investments and, in some cases, be extremely successful. What matters are the insider's psychological expectations regarding their business success. Because of the risk of

[72]Ibid para 7.
[73]Ibid para 14.
[74]Ibid para 33.
[75]*Chan v Zacharia* (1984) 154 CLR 178.
[76]*FHR v* Mankarious (n 69) para 45. Lord Neuberger reports the following excerpt from *Chan v Zacharia*: 'any benefit obtained in circumstances where a conflict … existed … or … by reason of his fiduciary position or of opportunity or knowledge resulting from it … is held by the fiduciary as constructive trustee'.
[77]For an introduction to behavioural economics, see eg Richard Posner, 'Rational Choice, Behavioral Economics, and the Law' (1998) 50 Stan L Rev 1551.
[78]Often the relationship between law and psychology offers important elements to behavioural economists. It is also an important method of analysis by itself. Jeffrey Rachlinsky, 'New Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters' (1990–2000) 85 Cornell L Rev 739.

declaration of a constructive trust, regardless of their success, the insider will always be subject to the threat that the company will use tracing to recoup all the profits from their further activities. Hence, its deterrence potential may be extremely strong, although difficult to quantify.

Before continuing the analysis of monetary remedies, it is important to understand the underlying reasons for equitable remedies. Sarah Worthington has clarified the distinction between disgorgement for the violation of the duty of loyalty and restitution for subtractive unjust enrichment. She challenges the jurisprudential idea that disgorgement for wrongs is a parasitic category of unjust enrichment,[79] an idea that may imply not only that the two remedies are in some way alternative remedies but also that they have the same function in the legal system. By contrast, Sarah Worthington, after examining thoroughly the UK doctrine on equitable remedies, concludes that:

> [Fiduciary] relationships are seen as sufficiently important that the remedy is designed, as far as remedies can be, to ensure that the imposed obligation is *not* breached, not that a breach does no harm. The aim is to exact particular standards of conduct in protected relationships; to this end, the relevant law is concerned with proscribing certain activities, not with precluding particular outcomes. The appropriate remedial response for breaches of these equitable obligations is disgorgement because this is the remedy which best supports the legal obligation being enforced.[80]

This conclusion is crucial for understanding the peculiarities of the protection granted to fiduciary relationships in Anglo-American law. One of the possible interpretations of Sarah Worthington's conclusion is that the law should set an optimal level of deterrence to preserve the effectiveness of certain fiduciary duties and, in particular, the duty of loyalty; that is, that disgorgement is a deterrent remedy and it is possible to understand how equitable remedies are not only ways of resetting the quantum of restitution but also ways of producing optimal deterrence.

Another author, Jeff Berryman, foresees the possibility of protecting fiduciary relationships by remedies other than disgorgement.[81] He claims that in certain situations further remedies may be needed if greater deterrence is wanted. Delving especially into Canadian case law, Berryman finds that often, from a deterrence perspective, it may be better to impose punitive damages. Therefore, Berryman's approach, which has been adopted in some important Canadian case law, looks particularly innovative and interesting for potential future developments of the remedial system. In the words of Chief Justice McLachlin, in *Strother v 3464920 Canada Inc*:

[79] Ibid 219ff.
[80] Ibid 237ff.
[81] Jeff Berryman, 'Equitable Compensation for Breach by Fact-Based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals' (1999) 37 Alta L Rev 95.

> Underlying this debate is the tension between the need to deter fiduciaries from abusing their trust on the one hand, and the goal of achieving a remedy that is fair to all those affected, on the other. … Where extra deterrence is required, it is better achieved by remedies such as exemplary damages, which unlike account [of profits], can be tailored to the particular situation.[82]

It is clear from the discussion so far that an important part of the common law approach to the problem of violation of fiduciary duties is to increase the potential deterrence of remedies.

3. Gain-based remedies in civil law jurisdictions

From the start of the codification period in the age of Enlightenment, civil law jurisdictions, unlike UK law, have not distinguished between "law" and "equity". Another important difference between civil law jurisdictions and UK law is that, in the UK tradition, the law applicable to a company's directors is to a large extent derived from the law of trusts, which has very little reach in continental European systems.[83]

Restitution for unjust enrichment is the remedy that looks most similar to constructive trust and account of profits. Just as unjust enrichment is not a punitive remedy in common law neither is it in civil law.[84] Therefore, restitution for unjust enrichment does not seem to be open to the evolutionary interpretations that characterise equitable remedies.[85] In the countries that form our main civil law sample, unjust enrichment is more the subject of jurisprudential debate than of practical application in corporate opportunities cases.

Since 1885, a provision in the Spanish Commercial Code (Article 136) has dealt with the misappropriation of business opportunities by members of a partnership. It is not clear how the provision originated, but certainly it contributed to making Spanish legislators, and especially Spanish jurisprudence, sensitive to the discussion on remedies alternative to damages. This provision seems to mandate the application of unjust enrichment rules together with damages and not as an alternative.[86] Spanish statutory provisions on corporate opportunities have recently been introduced for corporations. In the 2014 Spanish company law reform,[87] the possibility of applying a disgorgement of profits for violations of the duty of loyalty was introduced in Spanish Public Company Law paragraph 2 of Article 227. That provision expressly grants the

[82] *Strother v 3464920 Canada Inc*, 2007 SCC 24, [2007] 2 SCR 177.
[83] Sealy (n 9) 85.
[84] Paolo Gallo, 'Unjust Enrichment: A Comparative Analysis' (1992) 40 AJCL 431; Brice Dickson, 'Unjust Enrichment Claims: A Comparative Overview' (1995) 54 CLJ 100, 111 ff.
[85] See section 2.
[86] Candido Paz-Ares, 'La Sociedad Colectiva: Posicion del Socio y Distribucion de Resultados', in Rodrigo Uria and Aurelio Mendez (eds), *Curso de Derecho Mercantil* (2nd edn, Civitas 2006).
[87] Ley 31/2014, de 3 de Diciembre, por la que se Modifica la Ley de Sociedades de Capital para la mejora del gobierno corporativo, in BOE 293, Section I, 99793.

application of unjust enrichment principles in cases of misappropriation.[88] This provision is very innovative and it prevents sterile jurisprudential debates on the viability of unjust enrichment in cases of misappropriation of corporate opportunities. Spanish law allows the alternative application of two remedies: damages and unjust enrichment.[89] This easily solves the conundrum related to the choice of the most efficient sanction, given that *ex ante* it is not possible to know whether the opportunity is valued more by the corporation or its insider. Nevertheless, the protection granted by Spanish law is not as strong as strongest potentially available in common law jurisdictions; that is, not only disgorgement of profits, but also the possibility of obtaining a declaration of a constructive trust on property acquired through the misappropriation of a corporate opportunity and further tracing of subsequent profits.

The Italian law of partnership lacks a remedy like the one provided by Article 136 of the Spanish Commercial Code. Moreover, the Italian Civil Code, unlike the new Spanish Public Company Law Article 227(2), does not expressly mention the possibility of applying unjust enrichment provisions to the takings of corporate opportunities. Article 2041 of the Italian Civil Code provides an action of restitution for unjust enrichment (*azione generale di arricchimento*). However, restitution for unjust enrichment in Italian law, unlike in Spanish law, is a residual remedy, that is, it can only be sought when no other remedy is available.[90] Italian provisions do not allow the company to apply unjust enrichment rules.[91] Hence, not even an analogy with partnership law would be available in Italian law.

German law has a very straightforward approach. This is particularly evident in relation to the remedies provided for the breach of a director's duty not to compete with the corporation (*Wettbewerbsverbot*, *Aktiengesells-cahft* (AktG) § 88). In the case of a director's breach of the duty not to compete, the company, as an alternative to a claim for damages, can revert to the so-called *Eintrittsrecht* (translated roughly as 'subrogation right').[92] This remedy is very similar to an account of profits and gives the company the right to seek their full disgorgement. It looks particularly effective not only because the company enjoys the full right to information about the

[88]LSC, art 227 (2): '[l]a infracción del deber de lealtad determinará no solo la obligación de indemnizar el daño causado al patrimonio social, sino también la de devolver a la sociedad el enriquecimiento injusto obtenido por el administrador.'

[89]Paz-Ares, 'Anatomía del Deber' (n 12) 62–63.

[90]The Italian legal scholarship has recently produced studies on the possible future evolution of the remedial system that might lead to the introduction of remedies such as disgorgement of profits and punitive damages. See Paolo Pardolesi, *Contratto e Nuove Frontiere Rimediali* (Cacucci 2012). Nevertheless, so far, such progressive ideas are confined to academic studies.

[91]See Marco Saverio Spolidoro, 'Il Divieto di Concorrenza per gli Amministratori di Società di Capitali' [1983] Riv Dir Soc 1314, discussing remedies at 1371ff.

[92]See Heribert Hirte, Peter Mülbert and Markus Roth, *Grosskommentar zum Aktiengesetz*, vol 1 (paras 76–91) (5th edn, DeGruyter 2015) § 88, ss 7–8, paras 62ff. See also Wulf Goette and Mathias Habersack (eds), *Munchener Kommentar zum Aktiengesetz,* pt 2, Comment to AktG §88, s 6, para 3.

profits achieved by the competing undertaking, through access to its accounts,[93] but also because it attacks any possible source of profits. The *Eintrittsrecht* targets not only the so-called material profits, but also potential enrichment from acquisition of know-how or a customer list (i.e. the elements that are sources of future profits).[94] It is also interesting that, in Professor Hirte's view, the *Eintrittsrecht* applies by analogy to the misappropriation of corporate opportunities.[95] However, such analogy has not been accepted in German judicial decisions. In fact, a recent decision by the *Bundesgerichthof* denied such analogy based on the fact that the German corporate opportunities doctrine is derived from the duty of loyalty and not from the duty not to compete.[96]

French courts award very limited damages in cases of undisclosed taking of a business opportunity. Since French law does not have a proper corporate opportunities doctrine similar to the Anglo-American one, a functional comparison between French remedies and the UK equitable remedies or (in the case of parallel violation of the duty not to compete) the German *Eintrittsrecht*, or the Spanish unjust enrichment remedies is not possible.[97]

To conclude, both common law and civil law jurisdictions provide gain-based remedies. However, there is a significant difference between common law and civil law remedies. There is also a substantive difference in the remedial approach followed by the civil law jurisdictions in the selected sample. The main differences between UK law and the civil laws analysed here are in the flexibility of UK law and in its rapid evolution through case law and innovative legal scholarship. The UK theory of the law is extremely sophisticated when it distinguishes the functions of equitable remedies for the breach of the duty of loyalty. It provides reformers with suggestions for potential developments that improve deterrence – with the consequence of furthering disclosure. At times, the same intentions are also found in some civil law jurisdictions.[98] Nevertheless, the nature of civil law remedies may mean that at times it is not possible to

[93]See Thomas Wachter, *Kommentar zum Aktiengesetz* (2nd edn, RWS 2014) comment to AktG § 88, s 3.3.
[94]Hirte (n 92) comment to AktG § 88, s 8, para 4(d).
[95]Ibid s 17, para 199. Moreover, German law has developed an extremely sophisticated version of the unjust enrichment remedy. See Gerhard Dannemann, *The German Law of Unjust Enrichment and Restitution: A Comparative Introduction* (OUP 2009). Although the BGH has not yet granted a proprietary remedy on a general basis, debate is open in the academic literature, and the reach of unjust enrichment in Germany seems to be constantly expanding, especially in more recent times. See Dannemann (ibid) 134 ff.
[96]BGH 4.12.2012, II ZR 159/10, DStR 2013, 600=NZG 2013. 216.
[97]Although in other areas of French law there are examples of disgorgement of profits, such as in intellectual property law, disgorgement is not a general remedy under French law. See Michel Sejean, 'The Disgorgement of Illicit Profits in French Law' in Edwoud Hondius and Andre Janssen (eds), *Disgorgement of Profits* (Springer 2015) 121–138.
[98]Paz-Ares, 'Anatomía del Deber' (n 12) has analysed the evolution of Spanish law remedies for the violation of the duty of loyalty, integrating doctrinal scholarship arguments with advanced law and economics tools.

obtain the same type of result as is possible through the application of equitable remedies. One example, provided above, is the behavioural effects of the proprietary version of an account of profits in UK law.[99]

4. Damages in common law and civil law jurisdictions

The main traits of the remedy that grants damages to a corporation seem to be fairly homogenous across different jurisdictions, at least from a functional perspective.

As stated above, the remedy usually granted by UK courts for misappropriation of corporate opportunities is an account of profits. Nevertheless, the possibility may not be excluded that the company will also seek equitable compensation or common law damages.[100] Equitable compensation or common law damages may prove to be more suitable than disgorgement of profits in certain cases.[101]

Equitable compensation is a monetary personal remedy that aims to compensate the claimant.[102] A more general alternative to equitable compensation is common law damages.[103] In other areas of the law, such as breach of duty of care, there can be substantial differences between equitable compensation and common law damages.[104] However, in cases of breach of the duty of loyalty there are no significant differences between these two remedies. What is particularly important to stress with reference to the UK system is that the claimant can seek either damages or an account of profits in its various forms. The same alternative claims are provided in some civil law jurisdictions, where there is more than one remedy for the same breach of the duty of loyalty.[105] This may work on a general

[99]See text accompanying note n 78.

[100]On equitable compensation see Ian Davidson, 'The Equitable Remedy of Compensation' (1982) 13 MULR 349; Lee Aitken, 'Developments in Equitable Compensation: Opportunity or Danger?' (1993) 67 ALJ 596; Derek Davies, 'Equitable Compensation: "Causation, Foreseeability and Remoteness"' in Donovan Waters (ed), *Equity, Fiduciaries and Trusts* (1993); Charles Rickett and Tim Gardner, 'Compensating for Loss in Equity: the Evolution of a Remedy' (1994) 24 VUWLR 19; Berryman (n 81); Charles Rickett, 'Compensating for Loss in Equity – Choosing the Right Horse for Each Course' in Peter Birks and Francis Rose (eds), *Restitution and Equity* (2000) at 173–191; Joshua Getzler, 'Equitable Compensation and the Regulation of Fiduciary Relationships', in Peter Birks and Francis Rose (eds), *Restitution and Equity* (2000) at 235–257; Andrew Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 OJLS 1; Paul S Davies, 'Remedies for Breach of Trust' (2015) 78(4) MLR 681.

[101]This stems from the fact that the beneficiary may be a more productively efficient exploiter of the goods that have been appropriated by the trustee. Therefore, in this case, a mere account of profits would not cover the full extent of the loss of chances caused by a misappropriation. In this sense see Berryman (n 81) 99.

[102]Andrew Burrows, *English Private Law* (3d edn, OUP 2013) para 21.133.

[103]Davies and Worthington (n 22) paras 16–181.

[104]See *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58 and comments by Paul S Davies, 'Remedies for Breach of Trust' (2015) 78(4) MLR 681. For the main differences between the two remedies see Burrows *English Private Law* (n 102) para 21.134.

[105]As it is in the case of Spanish law. See section 3.

basis, as long as a given remedy, such as unjust enrichment in Italian law, is not characterised as residual.[106] The remedial alternative is expressly acknowledged in German law, and German courts have expressly referred to the possibility of granting damages, also in the form of loss of profit (*lucrum cessans*).[107] However, in practice, where there is a violation of the duty not to compete, evidential difficulties in German law seem to favour the use of the *Eintrittsrecht*.[108]

Italian Civil Code Articles 2390 and 2391 expressly impose directors' liability for the violation of their fiduciary duties.[109] A very important rule that provides for flexibility in the awarding of damages is Italian Civil Code Article 1226, according to which the damage can be determined in an equitable way (*via equitativa*)[110] if it is not possible to determine its precise value.[111] This rule is likely to be employed in relation to the taking of corporate opportunities. It may be extremely difficult to determine precisely the value of the loss of business chances as it is not the company that exploits the opportunity (i.e. it is difficult to determine how much the company would have earned from the opportunity). An action for damages is also available to the company in case of the violation of a director's duty not to compete (Italian Civil Code Article 2390).[112] However, Italian courts have stressed the difficulties of providing evidence for violation of directors' duty not to compete, which may render this rule inapplicable in practice.[113]

In Spain, Spanish Public Company Law Article 236 states that directors are to be held liable for acts or omissions contrary to the law or the bylaws of the company and for activities in violation of their duties as directors. The taking of a corporate opportunity would entail, under Spanish law, violation of the duty of loyalty. Spanish legal scholars explain that damages that can be claimed for such a violation may also include 'moral damages' where there is prejudice to the company's reputation, especially when breach of the duty of loyalty has repercussions on the market value of the company.[114]

[106]ibid.
[107]See Karsten Schmidt and Marcus Lutter, *Aktiengesetz Kommentar* (3rd edn, Ottoschmidt 2015) vol 1, comment to para 88, s 3, para 2. Moreover, in some cases conditions may be present for an in tort (Bürgerliches Gesetzbuch (BGB) Paragraph 823). See on this point Hirte (n 92), comment to AktG §, s 15.2.
[108]See Noack Zöllner (n 61), vol 2, pt 1, paras 76–94 AktG (Carl Heymanns 2010) comment to AktG § 88, s 7.1.
[109]For a comment see, for instance, Marco Ventoruzzo, 'Commento all'Articolo 2391 del Codice Civile' in Piergaetano Marchetti and others (eds), *Commentario alla Riforma delle Societa'* (Giuffre' 2006) 490ff, in particular 495.
[110]Note that here the meaning cannot be interpreted in the context of the law of equity and that there is no intention by Italian lawmakers to refer to that context. For some ideas on the potential complexity of this calculation under Italian law, see Ventoruzzo (n 109) 499.
[111]Cass 8 February 2005, n 2538 [2005] *Giur It,* 1637.
[112]See Spolidoro (n 91) 1372ff.
[113]Ibid.
[114]Portellano Diez (n 61).

As suggested above, actions for damages and for unjust enrichment can be exercised alternatively.[115]

Nowhere in French law is it suggested that business opportunities are allocated ex ante to the corporation. Nevertheless, directors have the duty to disclose such opportunities to the corporation. Therefore, it is difficult to define a given business opportunity as 'corporate' under French law, given the absence of a corporate right to exploit business opportunities. However, French case law has introduced directors' liability for damages in cases where directors fail to disclose the existence of a corporate opportunity to their company.[116] Once a corporate opportunity has been disclosed, the company has no right to any preferential exploitation. The opportunity will be appropriated by the economic actor (company or insider) who successfully bargains for the acquisition of those rights from the third party that can dispose of them. But if the company has no right to the exploitation of the opportunity, what damages can it seek in case of no disclosure? Thibaut Massart has not only clearly excluded the idea of a disgorgement of profits,[117] but also clarified that courts must not allow a plaintiff to seek damages for the full loss of chances.[118] The final result is very likely to depend on a discretionary evaluation by the judge.

5. Increasing deterrence to further disclosure: criminal sanctions for misappropriation of corporate opportunities?

Studies that have dealt in depth with the economic rationale of corporate opportunities rules have called for a level of deterrence against misappropriations that is sufficient to ensure disclosure.[119] Disclosure has a central role in the functioning of fiduciary law[120] irrespective of the specific economic environment.

As explained above, common law jurisdictions can generally be said to provide stronger deterrence against misappropriations of corporate opportunities, if only because they provide a wider set of remedies compared to civil law jurisdictions.[121] A wide array of remedies may be necessary for dealing efficiently with corporate opportunity cases. Depending on parties' individual evaluation of a given corporate opportunity, an account of profits may produce stronger deterrence than damages or vice versa.[122] Hence, it may be possible to employ alternative remedies that provide multiple efficient

[115]See section 3.
[116]See, for instance, 'Cass com 18 December 2012', [2013] Rev Soc 262, at 266.
[117]See Thibaut Massart, 'Note to Cass com 12 March 2013' [2013] Rev Soc 689, at 692.
[118]See Thibaut Massart, 'Note to Cass com 18 December 2012' [2013] Rev Soc 262, at 266.
[119]Whincop, 'Painting' (n 36) 19; Talley, (n 41).
[120]Sitkoff (n 40) and Whincop, 'Painting' (n 36).
[121]See section 2.
[122]See section 1.

solutions. Moreover, special deterrence may derive from the behavioural impact of remedies, such as the constructive trust in its proprietary form, that exist exclusively in common law jurisdictions.[123] Finally, the flexible interpretation that can be provided in cases in which equitable remedies apply may be considered as additional strength of the common law systems.

Civil law jurisdictions may need to find alternative ways to modulate the deterrence potential of their remedial systems. One way might be through unjust enrichment rules. However, as we have seen, in some jurisdictions, such as Italy, there may be obstacles to such a choice.[124] The *Eintrittsrecht*, a more specific gain-based remedy, provides stronger deterrence and appears easier to apply than unjust enrichment because it is an ad hoc remedy. This feature would put the German remedial system in a far more favourable position compared to the other civil law systems analysed here. Nevertheless, as explained, *sic stantibus rebus* in German doctrine, this remedy is available only in case of violation of the duty not to compete. Moreover, the *Eintrittsrecht* would not always grant the same exact degree of deterrence as does the proprietary version of an account of profits. It does not seem to provide a profit-tracing system, which is one of the common law remedies.[125] Therefore, it does not have the same psychological impact as a UK account for profits.

If traditional civil law gain-based remedies prove insufficient in terms of deterrence, reform introducing a different remedy providing stronger deterrence may be warranted. But what kind of remedy would that be? It does not seem realistic to think that the full system of common law remedies could easily be imported into civil law systems.[126] The common law system is the fruit of history and is deeply intertwined with the wider architecture of common law (and especially with the law of trust) that is of course substantively different from that of civil law jurisdictions. This area of UK law is extremely sophisticated because of the relationships between common law and equity,[127] something which would be impossible to replicate in civil law traditions with no such distinction. Given such deeply engrained differences, alternative remedies, namely criminal sanctions and/or punitive damages, may be considered. None of the advanced corporate law systems analysed in this article deploys criminal sanctions to punish the misappropriation of corporate opportunities.[128] However, several European jurisdictions impose

[123]See section 3.
[124]Ibid.
[125]See sections 2 and 3.
[126]On the problems related to legal transplant, see Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.
[127]Burrows, 'We Do'.
[128]However, under UK law one might hypothetically consider the application of section 3 of the Fraud Act 2006, on 'fraud by failing to disclose information', to some corporate opportunities cases (i.e. when fraud is evident). Section 3 states:

criminal sanctions in relation to conducts that are similar in function to the ones covered by the corporate opportunities doctrines. Might the rationale underlying current rules lead to the introduction of criminal sanctions for the misappropriation of corporate opportunities?

France and Italy have criminal sanctions, the basis of which is not far from the idea of misappropriation of a corporate opportunity. The French Code of Commerce, in Articles L241-3(4) and L242-6(3), punishes the bad faith use of corporate assets when such use is contrary to the interest of the company and favourable to the director or favourable to a company or firm in which the director is directly or indirectly interested. Directors who breach this rule risk up to five years of imprisonment, depending on the gravity of their conduct. It is quite clear that characterising a corporate opportunity as an 'asset' would be difficult in many civil law jurisdictions.[129] The logic underlying the French provision is not the lack of transparency but the misuse of the asset. Given that the appropriation of a corporate opportunity by a director is not punished under French civil law, it would be difficult to imagine the extension of such a provision to corporate opportunities. Nevertheless, it is interesting to note that in principle French law tends to impose particularly harsh sanctions on any asset diversion. As a matter of pure principle, it may not be difficult to see an analogy between an immaterial asset and a corporate opportunity.

Italian Civil Code Article 2634 on *infedeltà patrimoniale*, a provision similar to the above-mentioned French Code of Commerce provisions, imposes administrative and criminal sanctions on the director who has voted in conflict of interest and thus harmed the company. In addition, Article 2629-bis, which applies only to listed companies and to companies whose shares are

> A person is in breach of this section if he – (a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and (b) intends, by failing to disclose the information – (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss.

So far, there is no decision on corporate opportunities cases under the Fraud Act 2006. Criminalisation of such behaviour might be difficult in terms of identifying the damage to society from undisclosed misappropriations. Nevertheless, an effort should be made in terms of clarification of criminal treatment of directors in violation of corporate opportunities doctrines. Otherwise the concerns expressed by Gary and Sarah Wilson on the a priori difficulties in criminalising white-collar offenders' fraudulent actions may be confirmed. See Gary Wilson and Sarah Wilson, 'Can the General Fraud Offence "Get the Law Right"? Some Perspectives on the "Problem" of Financial Crime' (2006–2007) 71 J Crim L 36, at 45:

> In this climate, the fraud offence is in danger of becoming a dead letter unless British society becomes more prepared to acknowledge both that business people are capable of being criminals, and accept that the activities of respectable middle class 'opportunists' – such as insurance fraud – can be economically and socially injurious, and are not acceptable.

[129]See Marco Claudio Corradi, 'Les Opportunités d'Affaires Saisies par les Administrateurs de la Société en Violation du Devoir de Loyauté' [2011] Bull Joly Soc 157.

'widely diffused among the public', punishes the director who fails to disclose her interest in a transaction, if damage to the company follows therefrom.

Provisions similar to the Italian ones can be found in the UK system, which is probably the toughest one within our sample in terms of criminal sanctions. The CA 2006 provides criminal sanctions at sections 182 and 183. Section 182 states that '[w]here a director of a company is in any way, directly or indirectly, interested in a transaction or arrangement that has been entered into by the company, he must declare the nature and extent of the interest to the other directors in accordance with this section'; section 183 provides for the sanctions for such a violation, and states that '[a] director who fails to comply with the requirements of section 182 … commits an offence' that can be punished with imprisonment. Again, it looks as if the logic underlying the UK criminal provision is based on the purpose of forcing disclosure. It further appears clear that the misappropriation of a corporate opportunity does not fall under sections 182 and 183, because the company is not involved in any transaction or arrangement. The criminal provision applies exclusively to transactions the company has already entered into.[130]

Many questions may arise as to the introduction of criminal sanctions in relation to the taking of corporate opportunities. First, as a point of theory, what would be the possible justifications for such sanctions? Second, what does the EU experience tell us?[131] What does the US experience teach us – as the US is the jurisdiction with the most experience in imposing white-collar sanctions? What kind of conduct should be criminalised? If they were introduced, what would be the appropriate criminal sanctions?

In point of white-collar crime theory, Sutherland highlights the sociological aspects of white-collar crimes – perceived as class crimes – creating the premises for the analysis of the 'special role' that this kind of criminal plays in society.[132] He first develops the idea that white-collar crimes are to be seen and treated as 'real crimes', just the same as 'street crime'. He demystifies the idea of white-collar crime as a 'respectable crime'. Friedrichs also deals with trust and respectability as core aspects of white-collar crimes, adding to his analysis the concept of risk.[133] Susan Shapiro, in her sociological approach to agency[134] and to white-collar crimes,[135] focuses exclusively on breach of trust (in a non-legal meaning) as the core rationale underlying

[130]Davies and Worthington (n 22) para 16.111 and 16.116.
[131]If attention is given to individual states within the European Union, a country like the UK has a lot to teach about white-collar crime policies in historical terms. See Wilson, *The Origins* (n 32); see also Sarah Wilson, 'Fraud and White Collar Crime: 1850 to the Present' in Anne-Marie Kildey and David Nash (eds), *Histories of Crime: Britain 1600–2000* (Palgrave Macmillan 2010).
[132]Edwin Sutherland, *White-Collar Crime* (Holt 1949).
[133]David Friedrichs, *Trusted Criminals: White-Collar Criminals in Contemporary Society* (Belmont 1996).
[134]Susan Shapiro, 'Agency Theory' (2005) 31 Annu Rev Soc 263.
[135]Susan Shapiro, 'Collaring the Crime, Not the Criminal: Reconsidering the Concept of White-Collar Crime' (1990) 55 Am Soc Rev 346.

white-collar criminalisation. Although the element of 'trust' in white-collar crimes is discussed also by Sutherland and Friedrichs, it is interesting to see how Shapiro, in her progressive interpretation of white-collar crimes, elevates trust as *the* core feature of those crimes.[136]

Sarah Wilson undertakes an in-depth historical analysis of white-collar crimes, where she shows the necessity of a revision of the 'respectable crime' label in view of an integrated, modern and fully functional approach to white-collar crime.[137] She adds an important variable to the scientific debate, that is, the historical one. Wilson offers new historical insights on the organisational dimension of financial crime. She explains how social awareness of the problems related to financial crimes was present even before the Victorian era.[138] A clear response to financial crime emerged during the Victorian era and shaped the present reaction to the criminal cases that arose during the global financial crisis.[139] Beside the historical interpretation, Wilson also opens an interdisciplinary perspective that ties together social awareness, economic theory, law and the legal lexicon. In so doing, she shows that a clear understanding of white-collar crime is possible only through an intertemporal and interdisciplinary approach. The continuity between past and present also characterises Friedrichs's recent work. Friedrichs shows that Sutherland's analysis of white-collar crimes is still valuable today. The crimes committed in the verge of the present global crisis seem to be paradigmatic of Sutherland's work, encompassing respectability of the violator, breach of trust and massive financial damage for the purpose of financial gain.[140]

As this article focuses on a sample of European jurisdictions (all of which have been strongly influenced by EU law), a quick look at European policies on white-collar crimes might be useful. The two main areas where European legislation has intervened are market manipulation[141] and insider dealing – although before the entry into force of the new Market Abuse Regulation there used to be no explicit EU position on the use of criminal sanctions by Member States for insider dealing.[142] The legislation relating to insider dealing is not functionally connected to corporate opportunities doctrines. Nevertheless, one may ask whether rationales behind the sets of legislation have points in common with the rationale of corporate opportunities rules.

[136]Ibid.
[137]Wilson, *The Origins* (n 32).
[138]Ibid 49.
[139]Ibid 101 ff.
[140]David Friedrichs, 'Enron Et Al.: Paradigmatic White Collar Crime Cases for the New Century' (2004) 12 Critical Criminology 112.
[141]Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) *OJ L 173, 12.6.2014*, 179–189, respectively, Arts 3, 4, 5.
[142]See Directive 2014/57/EU introducing mandatory criminal sanctions for market abuse and complementing the new Market Abuse Regulation (Regulation (EU) No 596/2014 OJ L 173/1 12.6.2014).

The EU Directives and Regulations on market abuse and insider dealing are clear that the rationale underlying them is the public interest in protecting the correct functioning of financial markets. In the case of insider dealing, from an investor perspective this means not only trusting the allocative function of the market process, but also the fair distribution aim underlying legislation, which should not favour groups or people that have access to confidential information (such as directors). It is interesting to notice that legal theory has also reconnected the rationale of insider dealing to fiduciary loyalty (in this case to investors) and to the need to avoid misappropriations – which are the two main rationales underlying the criminalisation of self-dealing in the sample of European jurisdictions considered in this article.[143] If the main rationale underlying the punishment of white-collar crime is protecting the public good represented by investors' confidence in financial markets, the possible application of these doctrines to the taking of corporate opportunities should be reconnected only to the cases involving listed corporations. Only in those cases (and probably in very few of them) might misappropriations have a potentially severe impact on investors' trust of financial markets.

Regardless of the plausibility of this kind of analogy, the criminalisation of corporate opportunities would probably encounter a series of problems – rooted both in criminal law and in criminology – that would prove difficult to overcome. A first series of problems would be structural. Criminal conduct to punish would need to be identified. It could be asked whether this could be a misappropriation *tout court*, and the reply should probably be negative. As explained above, the goal of an efficient corporate governance system is to grant the allocation of corporate opportunities through bargaining. Therefore, before knowing who among the parties values the opportunity more, an appropriation cannot be depicted as 'misallocation' (that is, an allocation damaging the economic system). Hence, the criminal conduct at issue cannot be depicted as 'misappropriation' per se. The only plausible conduct that may endanger the market-based allocative mechanisms is the absence of disclosure. Absence of disclosure may be perceived negatively for many reasons – not only because it hinders bargaining on corporate opportunities but also because it is a manifestation of a breach of trust. Such breach of trust (in a non-legal meaning) may be private (against the company) when the company is not listed. By contrast, it may be perceived as public – a breach of public trust – when the company is listed. This breach of public trust, when followed by severe harm to the corporation, appears to be the principal value that can be protected by criminal law, at least in a liberal system where a minimalist

[143]Richard Alexander, *Insider Dealing and Money Laundering in the EU: Law and Regulation* (Ashgate 2007) 10 ff.

approach to criminal law should prevail.[144] It might also be proposed that the breach of trust in a private context should be criminalised when it harms multiple shareholders. However, the degree of harm in these cases would be significantly lower than in cases involving listed companies.

The criminalisation of breach of trust by fiduciaries is also the leitmotiv of the core white-collar criminology literature cited above.[145] The approach suggested by this criminological literature makes the debate on European models of criminalisation of self-dealing clearer. When we bear in mind that, in law and economics terms, at times there may be efficient breaches of the duty of loyalty,[146] we understand that a model based on criminal protection of the entitlement would not function properly.[147] A criminal sanction would definitely over-deter potential efficient takings that may occur when negotiation is difficult.[148] By contrast, a model such as the British or the Italian one – based on lack of disclosure – may well add further incentives to disclosure. This would not only increase deterrence but also further efficient negotiations and allocative efficiency. In other words, had the director misappropriated the opportunity (efficiently or not), she would not risk a criminal sanction once she had properly disclosed. This would perfectly fit into the criminological narrative previously explained: the lack of disclosure is precisely an expression of the breach of trust, and the only conduct that would be punished.

Despite the theoretical attractiveness of criminal sanctions for their deterrence potential, criminalisation has been subject to many criticisms. One of the general criticisms is that the introduction of criminal sanctions may not produce the rationally expected deterrence,[149] which may depend on many factors, including general irrational behaviour of potential infringers.[150] As mentioned above, the irrationality argument may be less convincing for white-collar crimes, given the anthropological features of the infringer.[151] Other arguments against criminalisation may come from a comparative criminology and criminal law approach, which may be essential for rebuking ethnocentrism in the lawmaking process – and in fields such as white-collar crime.[152] In recent years in the US, the already intricate debate on white-collar crimes has been complicated by increasing inconsistencies in courts'

[144]Andrew Ashworth, *Principles of Criminal Law* (2nd edn, Clarendon Press 1996) 33.
[145]See text that corresponding to footnotes 134ff.
[146]On the concept of efficient breach of duty, see Daniel Markovits, 'Sharing Ex Ante and Sharing Ex Post: The Non-Contractual Basis of Fiduciary Relations' in Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014).
[147]Whincop, 'Painting' (n 36); Talley (n 41).
[148]See Markovits (n 146).
[149]Paul Robinson and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 OJLS 173.
[150]See section 1.
[151]See section 1.
[152]David Nelken, 'Comparative Criminal Justice: Beyond Ethnocentrism and Relativism' (2009) 6 Eur J Crim 291.

decisions, despite many federal attempts to provide a general framework to courts by legislation.[153] The US experience, which is certainly fascinating but also extremely controversial, should prompt careful consideration of the over-criminalisation of directors' misconducts.[154] In conclusion, with reference to corporate opportunities, criminalisation *might* be considered as a possible way to increase deterrence under three conditions at least: (1) that it is (preferably) limited to listed companies; (2) that it exclusively targets misappropriations not anticipated by disclosure and (3) that the misappropriation is particularly meaningful from a financial perspective.[155]

It has to be noted, however, that introducing the possibility of conviction for such conduct should not be confused with a favourable view of imprisonment. Richard Posner argues that in most cases the courts should try to avoid imprisonment for white-collar crimes.[156] The underlying idea is that imposing a sufficiently high fine (which may well have a criminal connotation) on a well-off individual is socially more beneficial (revenues for society) and less costly (in terms of prison expenses).[157] Posner states that stigma is more usually associated with the conviction than with the imprisonment.[158] Stigma has been connected to recidivism and lower future employment perspectives.[159] Hence, from a behavioural perspective, it may become a source of potential social inefficient disequilibrium.[160] However, when appropriately employed, stigma can be an extremely effective crime deterrent.[161] According to Posner, stigma would be present even where the sanction is not labelled as criminal: 'the stigma or moral revulsion that attaches to certain conduct does so because of the nature of the conduct rather than the fact that it is labelled criminal or proceeded against by the criminal process'.[162] In addition to Posner's position, there are several other arguments against imprisonment. One of the most convincing is that there is little empirical evidence about the effectiveness of imprisonment as a deterrent.[163] Second, there would be the

[153]Kelly Strader, 'White-Collar Crime and Punishment: Reflection on Michael, Martha, and Milberg Weiss' (2007) 15 George Mason L Rev 45.
[154]David Friedman, 'Why Not Hang Them All?' (1999) 107 J Pol Ec 259.
[155]This also sounds in line with Law Commission, *Criminal Liability in Regulatory Contexts*, CP No 195, (HMSO 2010) paras 1.5 and 1.14.
[156]See Richard Posner, 'Optimal Sentences for White Collar Crimes' (1979–1980) 17 Am Crim L Rev 409.
[157]For the catastrophic US imprisonment rate increase and the associated expenses for US budget, see Loic Wacquant, 'The Great Penal Leap Backward: Incarceration in America from Nixon to Clinton' in John Pratt and others (eds), *The New Punitiveness* (Willan 2005).
[158]Ibid 416.
[159]Eric Rasmusen, 'Stigma and Self-fulfilling Expectations of Criminality' (1996) 39 J L&Econ 519.
[160]Kaku Furuya, 'A socio-economic Model of Stigma and Related Social Problems' (2002) 48 J Econ Behav Organ 281.
[161]Patricia Funk, 'On the Effective Use of Stigma as a Crime-deterrent' (2004) 48 Eur Econ Rev 715.
[162]Ibid 417. However, the stigma significantly depends on cultural variables. Therefore, Posner's idea may not apply outside the US context.
[163]Cheryl Lero Jonson, 'The Effects of Imprisonments' in Francis Cullen and Pamela Wilcox (eds), *The Oxford Handbook of Criminological Theory* (OUP 2013). However, for a different interpretation of empirical data, see Ehrlich and Liu (n 47).

perverse rent-seeking effects associated with prosecuting violations, especially in case of conduct where the harm is not that relevant.[164] Third the risk exists that imprisonment periods and *a fortiori* its non-execution (typically the case in continental Europe) may signal the lesser gravity of the conduct instead of producing a shaming effect.[165]

Finally, agreeing with Posner on the inappropriateness of imprisonment does not mean sharing his opinion on the appropriateness of a fine as the only possible remedial solution for misappropriations.[166] Policymakers could explore alternative sanctions, such as unpaid work in the community. Alternative sanctions would also carry a degree of reparative and (limited) restorative value.[167] Conversely, it is true that sanctions such as work in community certainly have some cost, especially in terms of monitoring. Hence, it may be asked whether there is an alternative way forward represented by sanctions with no administrative costs that still have a deterrent effect potentially stronger than damages or an account of profits.

6. Punitive damages: a way forward?

There is at least one sanction that is an alternative to imprisonment and to other criminal sanctions, carrying the *same economic function* without incurring the administrative costs of imprisonment or work in the community: punitive damages – a remedy that may be interpreted as stemming from both tort law and criminal law.[168] From the point of view of deterrence, punitive damages may have similar deterrence effects on the wrongdoer as criminal sanctions. The effect will depend on the amount of the damages. The Cooter and Freedman model contains, in a simplified way, the idea of punitive damages:

> The severity of punishment can be measured by the amount that the sanction exceeds perfect disgorgement. To capture this idea, the 'punitive multiple', denoted m, is defined as the ratio of the total sanction to perfect disgorgement. Thus a punitive multiple of one ($m = 1$) indicates perfect disgorgement and no punishment; in contrast, a punitive multiple of two ($m = 2$) indicates that the

[164]David Friedman, 'Why Not Hang Them All?' (1999) 107 J Pol Ec 259.

[165]Alexander (n 143) 232–33. The author notices that only in the UK is imprisonment for insider dealing for a sufficiently long time to be taken seriously.

[166]Posner rejects the argument in favour of white-collar criminalisation that is based on social discrimination (i.e. only the poor would be jailed), stating that, in his view, 'for every prison sentence there is some fine equivalent; if the fine is so large that it cannot be collected, then the offender should be imprisoned. How then are the rich favored under such a system?' However, it is clear that the process of calculating the equivalent is highly discretionary.

[167]Gill McIvor, 'Reparative and Restorative Approaches' in Anthony Bottoms, Sue Rex and Gwen Robinson (eds), *Alternatives to Prison* (Willan Publishing 2004).

[168]Renée Charlotte Meurkens, *Punitive Damages* (Kluwer 2014) at 185, notes that, at least in the light of Art 6 of the European Convention on Human Rights, 'it is also defensible to label the imposition of punitive damages as a *criminal charge*'.

> sanction is twice as large as perfect disgorgement and therefore embodies punishment.[169]

Cooter and Freedman's ideas show that in a case where the insider is able to make the opportunity *more* profitable than the corporation, an account of profits already represents a weak version of punitive damages. However, asking the insider to disgorge to the corporation the fruits of their own capabilities would not equate to 'perfect disgorgement', as defined by Cooter and Freedman.[170] That said, the question is whether setting *further* punitive damages would produce efficiencies. Cooter and Freedman's analysis contains an answer to that question. The possibility that further punitive damages increase efficiency depends mostly on the probability of detection. The lower the probability of detection, as in cases of failed disclosure, the higher the damages to be set. The idea of imposing this kind of sanction may well work efficiently for the purpose of furthering disclosure. Despite the potential functional advantages inherent in punitive damages, not many jurisdictions have adopted this remedy. It appears that the only cases in which this remedy was provided were decided in the US and not under Delaware law.[171] The fact that European law has not adopted this remedy may well be because the introduction of punitive damages still encounters severe obstacles in European jurisdictions. In her study on punitive damages in Europe, Renée Charlotte Meurkens identifies more than one potential obstacle. First, one should consider the inconsistency of punitive damages with the compensatory function of tort law in civil law jurisdictions.[172] Second, one should take into account the dogmatic division between public law and private law – where punitive damages may be seen as pertaining to public law.[173] Hence, imposing punitive damages in a civil trial would mean bypassing criminal safeguards,[174] in addition to

[169]Cooter and Freedman (n 44) 1052.

[170]UK courts especially tend to award rather limited allowances for the time spent and efforts made by the director to develop the opportunity.

[171]See, for instance, *United Teacher's Associates v MacKeen & Bailey*, 847 F Supp 521 (WD Tex 1994), although it is not clear whether in this case punitive damages derived from a concurrent cause of action.

[172]Meurkens (n 168) 146 ff. But see also Helmut Koziol, 'Comparative Conclusions' in Helmut Koziol (ed), *Basic Question of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015), Par 8/163:

> all the arguments against deterrent function of 'Schadenersatzrecht' – the law of compensation – in the Continental European sense are directed solely against the idea of primary or even only deterrent function, but not against a secondary function … it is broadly accepted that tort law also – as a side effect – has a deterrent function.

[173]Meurkens (n 168) 168 ff. In fact, in the civil law tradition, criminal law is deeply embedded in rigid constitutions that limit the possibility of employing criminal sanctions and that require a detailed description of the cases in which they can be employed and the level of penalty that can be imposed (or precise criteria for the calculation of that amount). See further explanations in Helmut Koziol, 'Punitive Damages – A European Perspective' (2007–2008) 68 La L Rev 741, 751ff.

[174]Such as the *ne bis in idem* principle and heightened standards of proof. Meurkens (n 168) 174 ff.

having undesirable consequences on prosecution policy, which cannot be demanded by private citizens.[175] In particular, the different views on the role of governments within certain jurisdictions may represent obstacles to the implementation of punitive damages. As Meurkens explains, in European jurisdictions, the state dominates law enforcement – which means that European citizens cannot act as attorney-generals through private enforcement as is allowed in the US.[176]

Despite the theoretical obstacles existing in European civil law traditions to the introduction of punitive damages, adoption of this remedy cannot be excluded. In fact, especially in business settings – namely with reference to competition law – this remedy has already had the attention of the European Commission *de lege ferenda*.[177] If the potential of punitive damages within commercial law is better understood on a wider basis, it is not impossible that in the future this remedy will also be used in cases of misappropriation of corporate opportunities. A closer look at the recent evolution of this remedy in Europe helps us to see its potential developments. The only purpose of such a discussion is to appreciate the likelihood that such a remedy will be introduced in European legislation and eventually employed against misappropriations of corporate opportunities.

Although the concept of punitive damage originates in the UK, the practice of imposing punitive damages in a wide range of situations started in the US. The practice has been criticised from many perspectives.[178] Nevertheless, its survival, despite so much criticism, may prove that it is an extremely effective and useful legal tool. Punitive damages are particularly symbolic of how different legal traditions experience different degrees of difficulty in adapting their laws to the need to introduce new policy approaches. In some ways, this example also confirms the hypothesis expressed by Lopes-de-Silanes and others as to the possibility of better aligning common law with policy objectives.[179]

In the US, a constant criticism of this kind of sanction is the low degree of predictability as to the amount.[180] While such an arrangement might be acceptable (to some extent) in the US system, such unpredictability would

[175]Ibid 172 ff.
[176]Ibid 189 ff.
[177]See Green Paper on Damages Actions for Breach of the EC Antitrust Rules Brussels, 19.12.2005 COM (2005) 672 final; White Paper on Damages Actions for Breach of the EC Antitrust Rules, Brussels, 2.4.2008 COM(2008) 165 final. And see comments by Meurkens (n 168) 224 ff.
[178]See David Owen, 'Punitive Damages Overview: Functions, Problems and Reform' (1994) 39 Vill L Rev 363.
[179]Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 J Economic Literature 285.
[180]See Dan Dobbs, 'Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies' (1988) 40 Ala L Rev 831. See also Theodore Eisenberg, 'The Predictability of Punitive Damages' (1997) 26 JLS 623. Problems related to the low degree of predictability have led to experiments intended to provide a rational base for the calculation of damages that often proved too difficult to apply. See Kip Viscusi, 'The Challenge of Punitive Damages Mathematics' (2001) 30 JLS 313. For a general economic approach

conflict with several criminal law principles that are crucial in civil law jurisdictions.[181] Despite the important theoretical and institutional obstacles to the adoption of such remedies in civil law countries, some recent international private law cases decided by the courts of certain EU Member States – and discussed in the following paragraphs – show that, in the future, there might be the possibility of some changes in policy direction. The issue underlying most of the private international law cases in matters of punitive damages is the possibility of granting recognition to US punitive damages awards in an EU Member State. In light of this issue, different jurisdictions have shown very different reactions, demonstrating that, as far as public interest issues are concerned, there is no one fixed position in civil law countries. For the purpose of this analysis, I will leave aside the positions adopted by Italian courts that seem highly contradictory, to the extent that they seem to have created a sort of (very weak) punitive damages domestic law doctrine, in the face of the denial of recognition by the Italian Supreme Court of punitive damages awarded by US courts.[182]

In Germany, strong legal opposition to the recognition of punitive damages awards was expressed when the recognition of a US punitive damage award was denied.[183] In French law, a 2010 decision of the French Supreme Court overruled a lower court decision that had denied the recognition of punitive damages because they seemed to conflict with French public policy. The Supreme Court held that punitive damages are not in principle contrary to public policy. However, what renders them contrary in practice is the eventuality that they are disproportionate to the injury suffered by the victim or to the breach of the debtor's contractual obligations.[184] This decision provides an extremely generic criterion. Nevertheless, it definitely gives some hope for the introduction of punitive damages in the French context, a hope that had been reinforced by the recent proposals for the

see Mitchell Polinsky and Steven Shavell, 'Punitive Damages: An Economic Analysis' (1997–1998) 111 Harv L Rev 869.

[181]That criminal sanctions have to be fully predictable is common tradition in civil law countries, usually expressed through the brocard *'nullum crimen, nulla poena, sine praevia lege poenali scripta et stricta'*, which contains indications both as to the non-retroactivity of the criminal sanction and to its predictability.

[182]See Cass, 19 January 2007, n 1183 [2007] *Giustizia Civile*, 10, I, 2124; cf Tribunale di Torre Annunziata, Sez Stralcio, 24 February 2000 [2000] *Danno e Responsabilità*, 11, 1121; Tribunale di Torre Annunziata, Sez Stralcio, 14 March 2000, [2000] *Danno e Responsabilità*, 11, 1123.

[183]BGH, IXth Civil Senate, 4 June 1992, Docket No IX ZR 149/91 [1992]. Nevertheless, as a matter of domestic law, German law seems to have evolved in the direction of recognising the preventive function of the law of damages in the past two decades. See Ulrich Magnus, 'Punitive Damages in German Law' in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages – Is Europe Missing Out?* (Intersentia 2012). The literature also tends to acknowledge that despite a formal opposition by German courts against the concept of punitive damages, there are cases of damages awards of punitive nature. See Volker Behr, 'Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts' (2003) 78 Chi-Kent L Rev 105, 126.

[184]Cass civ 1 December 2010, *Bulletin 2010*, I, n° 248.

reform of the second part of Article 1266 of French Civil Code – although it was not clear how punitive damages would be calculated if reform happened.[185] Punitive damages have not yet been introduced in the French civil code.[186] As to Spain, its Supreme Court showed a surprising flexibility for a civil law jurisdiction when it recognised an American treble damages award imposed on the Spanish company Alabastres Alfreda.[187] Punitive damages were granted in the US in relation to unauthorised use of intellectual property, violation of a registered trademark and unfair competition. The Supreme Court made it clear that the damages award did not only have a compensatory function, but also a punitive and preventive function. It provided an example of how punitive damages could be used in a complementary way when criminal sanctions provided insufficient deterrence.[188]

A different but equally interesting example is the trend towards the recognition of punitive damages in the UK system. Although in the UK this remedy has not been as successful as in the US, it actually originated there. In the first relevant case, regarding a publisher that had printed a pamphlet that defamed the King, punitive damages were awarded.[189] Since then, punitive damages have often been awarded in tort actions,[190] but not for breach of contract. In the landmark case *Rookes* v *Barnard*, Lord Devlin limited the cases in which punitive damages may be awarded to only three situations; that is: first, cases regarding oppressive, arbitrary or unconstitutional actions by servants of the government; second, cases in which the defendant intentionally attempted to make a profit exceeding the compensation available to the plaintiff and third, actions where statutory law expressly authorised punitive damages.[191] While the first category does not seem to be applicable to corporate opportunities and the third would of course require an Act of Parliament, the second category appears to be extremely relevant. As to the second category, in fact the case of disgorgement of profits seems to fit, at least potentially, the description provided in *Rookes* v *Barnard*, at a

[185]See Matthew Parker, 'Changing Tides: The Introduction of Punitive Damages into the French Legal System' (2013) 41 Ga J Int'l & Comp L 390. And see also Chantal Mahe, 'Punitive Damages in the Competing Reform Drafts of the French Civil Code' in Meurkens and Nordin (n 183) 261–282. Nicolas Rias, 'L'Amende Civile: une Fausse Bonne Idée' (2016) Receuil Dalloz 2072, explains that punitive damages might be incompatible with French legality and *ne bis in idem* principles.

[186]The approved version of the reform of French civil code did not introduce punitive damages. See Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, JORF, n° 0035 du 11 février 2016 texte n° 26.

[187]*Miller Import Corp v Alabastres Alfredo, SL*, Sentencia del Tribunal Supremo, 13 November 2001 (Exequátur No 2039/1999).

[188]Note that, beside the recognition of US punitive damages, Spanish jurisprudence has signalled a progressive introduction of punitive elements in tort law. Marta Otero Crespo, 'Punitive Damages under Spanish Law: A Subtle Recognition?' in Meurkens and Nordin (n 183) 283–310.

[189]*Wilkes v Wood* (1763) 98 ER 489 (CP).

[190]See, for instance, cases involving assault (*Loudon v Ryder* [1953] 2 QB 202 (CA)); false imprisonment (*Dumbell v Roberts* [1944] 1 All ER 326 (CA)); defamation (*Bull v Vazquez* [1947] 1 All ER 334 (CA)); malicious prosecution (*Leith v Pope* (1779) 96 E R 777 (KB)).

[191]*Rookes v Barnard* [1964] AC 1129 (HL) at 1225–1228.

minimum in cases where the insider values the business opportunity more highly than the company. However, there may be two obstacles standing in the way of the application of *Rookes* v *Barnard* to corporate opportunities. First, this kind of remedy has been traditionally awarded in tort claims, whereas the taking of a corporate opportunity would entail the breach of a director's contract with her company. Second, even if such remedy could be awarded in contract claims, it is not that clear in doctrine and in jurisprudence whether it should be proved that the director had made a precise calculation regarding their exceeding profits.[192] If the interpretation requiring proof of the calculation were to prevail, providing such evidence might prove difficult because of the inherent difficulties in actualising the profits from a very risky activity, such as setting up a new business (with all the connected uncertainties).

When compared to other European courts, the UK courts' greater sophistication in terms of punitive damages can be noticed. Therefore, it seems correct to state that *potentially* UK courts are in the best position to modify punitive damages for use in corporate opportunities cases. Nevertheless, when we look at the will of the UK lawmakers so far to expand the use of punitive damages, it is unlikely that there will be any attempt in that direction. As Markesinis makes clear:

> On the whole … one is left with the impression that much thought still needs to be devoted by our system to this part of the law of damages. Until this is done, our courts are likely to remain hostile to claims for punitive damages when they cannot be brought under one of the categories identified by Lord Devlin in his judgment *Rookes v Barnard*.[193]

The evolution of punitive damages in Europe, as outlined above, shows that the corporate opportunities doctrines of civil law countries may one day benefit from the innovations brought about by international private law. It is not unrealistic to think that adaptation to the US tradition will at some point erode the obstacles to the adoption of punitive damages in European jurisdictions.

7. Conclusions

Remedies for misappropriations of corporate opportunities are crucial to ensure that a company's directors give full disclosure of new business opportunities. In turn, full disclosure is necessary for an efficient allocation of corporate opportunities through bargaining. To ensure disclosure, remedies have to be set to a level that provides sufficient deterrence. According to law and

[192]Simon Deakin, Charles Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (7th edn, OUP 2012) 800.
[193]Ibid 803.

economics theory, this is possible only when the expected profits from misappropriations are lower than the expected sanction. Given that the probability that misappropriations are followed by sanctions is usually rather low, sanctions should be set at a level that makes them efficient. The calculation of that level is complicated by the fact that damages and profits from misappropriations depend very much on the evaluation that the company and the director/taker make of the corporate opportunity at issue. Hence, the availability of multiple remedies, flexibility in their application and the possibility of setting them at a level that produces deterrence on a case-by-case basis are essential to the efficient functioning of the remedial system. UK law provides a complete set of remedies – including, the account of profits in its proprietary version – that can be applied in a very flexible way. By contrast, the civil law jurisdictions of our sample provide fewer remedies and with more limited deterrence. In theory, German law would look better endowed than the other civil law jurisdictions, as it provides ad hoc remedy, the *Eintrittsrecht*, designed to grant full disgorgement of profits. Nevertheless, at present this remedy is only available in the case of parallel violation of the directors' duty not to compete. Other jurisdictions provide different responses to the same problems. Spanish law – propelled by a thoughtful jurisprudence – shows increasing levels of awareness of the problem of remedies. It introduced the possibility of applying rules on unjust enrichment to takings of corporate opportunities.[194] Italian law does not provide any sign of vitality in this respect: it limits remedies to damages. In any case, Italian jurisprudential and doctrinal dogmatism may hinder solutions such as the Spanish one.

If one observes the trends regarding potential evolution of the remedial system – such as the possibility of introducing punitive damages – again signs differ across civil law jurisdictions. Spanish judges look particularly open to the recognition of punitive damages when called to recognize the effects of a US decision. German judges are more conservative in terms of employing the term 'punitive damages', but have developed an extremely sophisticated system of tort law that might be interpreted as containing punitive elements. By contrast, Italian law looks rather confused and generally against punitive damages in cases involving the recognition of US decisions. The UK system is where punitive damages originated, although current judicial interpretation of punitive damages doctrine may hinder the possibility of employing this remedy in corporate opportunity cases. France produced an extremely interesting debate *de lege ferenda* on the possibility of introducing punitive damages, which unfortunately did not influence the final version of the reformed French civil code.

It is clear that reactions are different across civil law countries, making the evolution of the law unpredictable. As said above, a potential alternative to

[194]Paz-Ares (n 12).

punitive damages might be criminal sanctions. However, there seems to be no debate on this option. Criminal sanctions should probably be limited to listed corporations and to very serious violations characterized by lack of disclosure. The overall panorama *de lege ferenda* looks uncertain. Nevertheless, increasing awareness of the importance of directors' duty of loyalty may accelerate the debate on sanctions for the misappropriation of corporate opportunities and propel changes in the direction of a better organised, more flexible and more effective system for civil law jurisdictions.

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