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Decoding the fiduciary duty of loyalty

РОЗШИФРОВУЮЧИ ФІДУЦІАРНИЙ ОБОВ'ЯЗОК ЛОЯЛЬНОСТІ

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Abstract

The article focuses on the duty of loyalty, which is fundamental to the fiduciary relationship as a legal concept. The inseparability of fiduciary relationship and the duty of loyalty is revealed through its attributive legal nature, which is related with the exercise of derivative powers delegated to the fiduciaries and appropriation of thereof results by the beneficiaries. The study identifies loyalty as a legal standard rather than a specific duty, emphasizing the need for clarity on what constitutes "acting in the best interests" of the company. It concludes that while fiduciary loyalty involves a framework of prohibitions to safeguard beneficiary interests, the intertwining of fiduciary duties of care and loyalty, by way of introduction the good faith duty in the corporate law, complicates the doctrinal consistency of the context of this term. Ultimately, the conclusions suggest a clearer definition of fiduciary loyalty in general terms and with the incorporation of the duty of good faith in the corporate law in particular.

Keywords: fiduciary duties, recodification of civil law, duty of loyalty, rule of prohibition of conflict of interests, rule of prohibition of unauthorised profits, fiduciary duty of good faith.

Анотація

Статтю присвячено обов'язку лояльності, який є основоположним для фідуціарних відносин як правової концепції. Нерозривність фідуціарних відносин та обов'язку лояльності розкривається через його атрибутивну правову природу, яка пов'язана зі здійсненням похідних повноважень, делегованих фідуціарам, та привласненням результатів їх діяльності бенефіціарами. Дослідження визначає лояльність як правовий стандарт, а не конкретний обов'язок, наголошуючи на необхідності чіткого визначення того, що означає «діяти в найкращих інтересах» компанії. У дослідженні зроблено висновок, що хоча фідуціарна лояльність передбачає систему заборон для захисту інтересів бенефіціарів, переплетення фідуціарних обов'язків турботи та лояльності, шляхом запровадження обов'язку добросовісності в корпоративному праві, ускладнює доктринальну узгодженість змісту цієї категорії. Зрештою, висновки пропонують більш чітке визначення фідуціарної лояльності в цілому та і з врахуванням обов'язку добросовісності в корпоративному праві зокрема.

Ключові слова: фідуціарні обов'язки, рекодифікація цивільного права, обов'язок лояльності, правило неконфліктності, правило заборони отримання несанкціонованого прибутку, фідуціарний обов'язок добросовісності.

Introduction

The doctrine of fiduciary legal relations is an extraordinary phenomenon for Ukrainian law: new and at the same time well-established. As in many countries of continental law, corporate law was the main factor in reception of this legal construction. For the first time the fiduciary obligations were set in the acts of the soft law, namely in the Principles of Corporate Governance (Decision No. 571, 2003), and afterwards in the Corporate Governance Code (Decision No. 118, 2020). In 2007, the National Bank of Ukraine approved Methodological Recommendations for Improving Corporate Governance in the banks of Ukraine

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(hereinafter – Methodological Recommendations), which also contained soft-law norms concerning fiduciary obligations (Resolution No. 98, 2007). However, in practical terms, introduction of the said norms had changed relatively nothing, as fiduciary principles were regarded more as good governance principles rather than an effective legal remedy, which might be applied by the court. The situation had changed in 2021, when the doctrine of fiduciary duties was implemented through the OECD Corporate Governance Principles (OECD, 2023), through references to it in the case law of the Supreme Court (Resolution in case No. 910/11027/18, 2021).

In 2024, a new stage of the development of the fiduciary duty doctrine has been reached, which is associated with the European integration processes, the ongoing recodification of the civil legislation of Ukraine, which "main goal […] is the further "Europeanization" of the code" (Tsiura et al., 2023, p. 306), and the approval of the Ukraine Facility plan by the European Parliament and the Council (European Union, 2024), which contains a plan for reforms, including in the area of corporate governance (The Cabinet of Ministers of Ukraine, 2024). Under the corporate governance term we understand the "complex of relationships between the management of the corporation, the board of directors, shareholders, and other stakeholders (stakeholders - trade unions, the state, consumers, etc.) to manage the activities of the corporation to achieve its strategic objectives" (Hurman, 2023, p. 252).

The expected result of the corporate governance reform (The Cabinet of Ministers of Ukraine, 2024) is creation of one (Management Board) or two levels (Management Board and Supervisory Board) of corporate governance bodies, mainly in the State-owned companies, all of which officers would be bound by fiduciary duties, including the duty of loyalty. Current Ukrainian legislation still doesn't provide a clear understanding either for corporate officers, attorneys or judges of what's within the context of fiduciary loyalty: if an obligation to avoid conflicts is quite clear, there is still a question how the member of the Management or Supervisory Board shall understand if it acts in company's best interests? Is it possible, for instance, to oblige the company's officials to act in its best interests? If there is a behavioral model for fulfilling the fiduciary loyalty's obligation?

The problem is also aggravated by the fact that Ukrainian court practice lacks precise interpretation of the fiduciary loyalty even on the level of Ukrainian Supreme Court (for instance, see Resolution in case No. 902/183/22, 2023; Resolution in case No. 910/7305/21, 2024): the point on duty to act in the best interests of the company is mentioning in number of cases, but Supreme Court still has not managed to elaborate the coherent concept of fiduciary duty of loyalty.

On the other hand, respective doctrinal approaches are also often confusing: Professor Andrew Gold raises the question of whether the concept of fiduciary loyalty can be formulated in general, on the opposite, Professor Matthew Conaglen narrows the scope of loyalty to the number of obligations and Professor Lionel Smith argues that the duty to act in company's best interests is not a legal duty at all. Moreover, the recent studies shows that fiduciary loyalty also contains the good faith obligation in corporate law, which in essence doesn't correspond to the classic civil understanding of the good faith.

Therefore, this article focuses on resolving the practical problem of interpreting the scope and content of the fiduciary loyalty, which becomes even more relevant as a corporate governance reform in Ukraine is ongoing and it would result in creation of corporate bodies in all State-owned companies, with numerous doctrinal approaches, each of them having its advantages and cons. The ultimate goal is to study and formulate approaches to the following points: a) if a fiduciary loyalty shall be regarded as civil obligation. In the other words, is it establishes the existence behavioral model, which company's officer might potentially be obliged to fulfill?; b) to disclose the main features of the duty of loyalty and assess if it should be regarded as the basis of fiduciary relations in general; c) to disclose the place of rule of prohibition of conflict of interests, rule of prohibition of unauthorized profits and other positive rules in the content of fiduciary loyalty; d) to reveal why good faith is regarded as the element of the fiduciary loyalty in corporate law and what is its content; e) to formulate the doctrinal approach of what it means to act in the company's best interest, both in general scope and specifically in the sphere of corporate law, which content is supplemented by number of limitations, set by the good faith duty.

Methodology

Research design. The study is based on a combination of quantitative and qualitative analysis of the doctrine of fiduciary duties in corporate law. The purpose of the study is to provide a detailed examination

of the duty of loyalty as an integral element of fiduciary duties, taking into account its evolution, legal nature and functions in the modern corporate law doctrine, as well as to provide approaches for practical usage by way disclosing the elements of fiduciary loyalty and showing their practical application in foreign jurisdictions.

Time frame. The study covers the legal provisions from 2003 to the present, and Ukrainian courts' practice since 2021, with a special focus on the period of corporate reforms in Ukraine in 2021-2024. The timeframe was determined to analyse the implementation of fiduciary duties in Ukrainian corporate law and the practice of its application.

Specific sources consulted. The main sources used in the course of the research are modern works of scholars, including the studies of Professors Matthew Conaglen, Lionel Smith, Robert Sitkoff, Tamar Frankel, Hillary Sale and others, relating to fiduciary duties, as well as Ukrainian legislation and court practice in this area.

Analysis process. The study was conducted with the usage of both general scientific and special methods of knowledge. Dogmatic method was used to disclose the content of the fiduciary norms and its interpretation. This analysis is based on a systematic review of legal acts, judicial practice, and scientific sources to reveal the essence and scope of legal duties, which establish the auxiliary and preventive mechanism to ensure the officer would act in company's best interests. The basic method of this study was the dialectical method, which was used to evaluate different approaches of scholars to the content and legal nature of the fiduciary duty of loyalty. There were also applied such special scientific methods as the methods of system analysis, which allowed to summarise the features of fiduciary duty of loyalty, the formal legal method was used to analyse case law, and the historical and legal method that made it possible to trace the evolution of the definition of the content of fiduciary loyalty. The comparative legal method was used to identify the peculiarities of the functioning of the institute of fiduciary duty of loyalty in foreign countries. The system and functional method were also used to sum up the results of the research.

Selection criteria. The selection of scientific sources, normative regulations and court practice of the Ukrainian Supreme Court was based on their relevance (from 2003 to the present), scientific level and relevance to the topic of fiduciary loyalty. The Supreme Court cases included in the analysis were selected based on the criterion of references to fiduciary duties and the scope of court's interpretation of the essence of fiduciary loyalty.

Validation methods. To verify the validity of the theoretical conclusions, methodological approaches to validation were applied, including internal validation by comparing data obtained from several sources. In addition, the assessment of the research results was based on the criteria of scientific accuracy, consistency and compliance with case law. Moreover, the results of the research are in full compliance with OECD approaches, the US and UK courts' judicial practice, which ensures that the elaborated conclusions follow the best practices in the sphere of corporate governance and fiduciary law.

Literature and legislation review

So, what does it mean for a fiduciary to act loyally with respect to the principal (beneficiary)? The OECD Principles of Corporate Governance (OECD, 2023) do not explicitly define the duty of loyalty. The Ukrainian Corporate Governance Code (Decision No. 118, 2020) states that "the duty of loyalty to the Company requires the members of the Supervisory Board to act in the best interests of the Company, which is often interpreted as a duty to act in the best interests of shareholders. It requires the Supervisory Board to act without a conflict of interests". The Methodological Recommendations (Decision No. 814-rsh, 2018) also define a number of prescriptive obligations.

And while the prohibitive rules are formulated in a clear and understandable manner and their nature allows court verification of only compliance, the obligation to act in the interests of the company remains vague, which raises the question of how a fiduciary should know whether he acts in the best interests of the company or not?

From a doctrinal perspective, there are several ways to overcome this uncertainty. First, it would be appropriate to consider the approach proposed by Professor Matthew Conaglen. The author has analysed a number of specific fiduciary duties (Conaglen, 2010) and came to the conclusion that only the duty of

prohibition of fiduciary conflict and the principle of (prohibition of) profit are specific ones (Conaglen, 2010, p. 61). Identifying loyalty with these prohibitions, Professor Matthew Conaglen wrote that "the fiduciary concept of loyalty is best explicated by reference to duties that are peculiar to fiduciaries, and which thus comprise the concept of fiduciary loyalty, rather than by reference to some abstract definition of loyalty" (Conaglen, 2010, p. 61).

The author believes that the non-conflict and non-profit rules serve a preventive function, which is to ensure that the fiduciary fulfils its non-fiduciary duties in a conscientious manner (Conaglen, 2010, p. 62).

Proposed approach contains a very simple idea: every fiduciary has fiduciary and non-fiduciary duties, the latter being those duties related to the fiduciary's competence in the area in which he or she exercises discretion. The fiduciary duty of loyalty is replaced by two prohibitions: not to act in a conflict of interest and not to receive unauthorised profit using his / her fiduciary position. The preventive function of fiduciary loyalty is realised through the fact that any actions and transactions of a fiduciary, committed in situation of the conflict of interests are presumed to be illegal and may be declared invalid by a court, regardless of whether they resulted in losses or were committed solely for the benefit of the beneficiary. The severity of these rules is absolute: the invalidity of a transaction entered in violation of the conflict-free rule does not depend on a breach of non-fiduciary duties or the beneficiary's inability to receive income from certain activities.

The second approach seems to be more structured, though not less understandable. Professor Lionel Smith equates loyalty with the duty to act in the best interests of the beneficiary (Smith, 2014, p. 158). The author writes that a legal duty, unlike a duty of virtue, must be clearly defined to be objectively verified if it had been fulfilled. Since the duty to act in the best interests of the beneficiary is formulated too broadly and does not offer a clear model of behavior, he considers it not as a specific requirement (duty) to the fiduciary's decisions, but as *a necessary way* of adopting such decisions. Professor Lionel Smith offers the following definition of fiduciary relations: "fiduciary relationships are all and only relationships in which powers are held that can only be exercised unassailably if they are exercised in what one perceives to be the interests of another", emphasising that loyalty is the defining feature of fiduciary relations, as it is an integral part of the powers of fiduciaries (Smith, 2014, pp. 157-158). Unlike the rules of prohibition of profit and conflict of interests, which might be cancelled or amended by the parties, the exclusion of the duty of loyalty leads to the destruction of the fiduciary relationship as is. Considering on the nature of the rules of loyalty, prohibition of profit and conflict of interests, Professor Lionel Smith writes that they are not actually duties, neither prescriptive nor prohibitive, but are in fact legal rules that regulate the discretionary powers of each fiduciary (Smith, 2014, p. 157). The regulatory effect of, for example, a no-conflict rule is that it prevents a fiduciary from exercising his or her authority in conflict situations. Professor James Penner takes a similar approach, calling the fiduciary's duty to make decisions only in the best interests of the principal a "necessary fiduciary norm" (Penner, 2019, p. 793).

The proposed approach is based on a nuanced understanding of the legal nature of an obligation: the existence of a legal obligation on one person means that another person has the right to demand compliance with the relevant standard of behaviour. At the same time, the author compares fiduciary duties with invalid transactions concluded under the influence of mistake or violence: the relevant legal rules governing the invalidity of such transactions do not require a person not to be mistaken or subjected to violence – they only state that there was a defect of will, which entails the invalidity of such an expression of will. Fiduciary duties perform a similar function: these are rules, the violation of which leads to the invalidity of transactions (and / or other legal consequences), which regulate the scope of the fiduciary's powers, as well as his / her rights to the results of the exercise of delegated powers (Smith, 2014, p. 153).

It is difficult to disagree that a fiduciary, due to the lack of a clearly defined model of behaviour, cannot be obliged to be loyal or not to make decisions in conditions of conflict of interest or not to receive unauthorised profits. The protective function of fiduciary law is aimed at correcting defects in the fiduciary's expression of will (or the scope of his / her powers), and not at his or her behaviour as such.

Professor Robert Sitkoff, relying on the developments of the scientific school of economics and law (in particular, the theory of incomplete contracts), presents a slightly different model of fiduciary duties. The author emphasises that fiduciary relations are one of the ways to reduce transaction costs that inevitably arise because of the engagement of fiduciary by the beneficiary in order for the fiduciary to exercise discretionary powers that affect the beneficiary's welfare.

In the proposed model, it is the court that is obliged to complete the contract ex post, deciding whether the fiduciary acted in accordance with the parties' agreement. The author divides all fiduciary duties into primary and secondary duties. The main fiduciary duties are loyalty and care. These rules are formulated as open standards (Sitkoff, 2019, pp. 424-425).

There are also ancillary fiduciary duties, which are formulated as specific rules of conduct, the variety of which depends on the scope of the fiduciary relationship. The author, for example, refers to the following ancillary fiduciary duties as the rules of prohibition of conflict of interests and profit (Sitkoff, 2019, pp. 426-427).

Ancillary (secondary) fiduciary duties simplify the application of fiduciary rules and thus reduce transaction costs, while primary fiduciary duties ensure compliance with the legal regime of fiduciary relations in all other cases, albeit with higher transaction costs.

Thus, the author proposes a two-tier structure of fiduciary duties which are interrelated as standards (basic fiduciary duties of loyalty and care) and rules (ancillary fiduciary duties).

Professor Andrew Gold also worked on the problems of fiduciary loyalty, namely he had analysed a number of concepts of loyalty in search of the minimum content of this duty. He wrote that loyalty might be regarded as avoidance of fiduciary conflicts, as a positive commitment to the interests of the beneficiary, as truthfulness, as a condition in a hypothetical contract, loyalty as fairness (Gold, 2014, pp. 178-182).

Each of the above theories of fiduciary loyalty has certain weaknesses: for example, loyalty cannot be considered solely in the light of the rule of prohibition of fiduciary conflicts, since, for example, the corporate law of the United States of America allows limiting or even cancelling anti-conflict rules (in particular, in Delaware), which obviously does not mean that fiduciary relations between the members of a partnership or limited liability company cease to exist upon such limitation or cancellation (Gold, 2014, p. 184). Moreover, fiduciary loyalty also includes the obligation to act in good faith (CaseBriefs, 2006), which means that a corporate director may act in the absence of a conflict of interest and at the same time be disloyal if his actions are not in good faith. In fact, the English courts take the same position (Bailii, 1996).

In general, the author believes that there is no specific concept of loyalty that could cover all types of fiduciary relationships, but loyalty remains an integral feature of fiduciary relationships. The fact is that some fiduciary relationships may require unconditional loyalty, regardless of the existence of a conflict of interest, while others will focus on a strict prohibition of conflicts of interest, regardless of unconditional loyalty; some relationships may allow 'white lies', while others do not (Gold, 2014, p. 191). Finally, the author concludes that "directedness toward a beneficiary may ordinarily be a minimal requirement, and perhaps loyalty means that a fiduciary must not breach the trust that is characteristic of a particular relationship, but theorists are usually looking for something more" (Gold, 2014, p. 194).

Does the work of Professor Andrew Gold mean that it is impossible to formulate a minimum definition of the fiduciary duty of loyalty? In our opinion, no. The inclusion or exclusion of certain rules in certain types of relations (for example, the rule to act in the best interests of the principal in corporate relations) changes the scope of the fiduciary's powers but does not change the content of the fiduciary duty of loyalty itself.

Results and discussion

Starting the discussion on the fiduciary duty of loyalty, primarily, it is necessary to determine whether it is a duty. In our opinion, Professor Lionel Smith has provided sufficient arguments to show that the duty of loyalty in the strict legal sense is not a legal duty, as it does not correspond to a particular model of behaviour to which a fiduciary can be obliged to comply through recourse of court proceedings. Loyalty is a legal standard enforced by a number of rules, including rules prohibiting the receipt of unauthorised income and conflict of interests.

The purpose of the legal standard of loyalty is to ensure that the results of the fiduciary's operations are attributable to the beneficiary's property or non-property interests.

This idea is not new: its basis can be found in the work of Professor Julian Velasco, who, during the test of his fiduciary powers theory on the cases of trustees and agents, formulated the following definition of fiduciary relations: "a fiduciary relationship is one in which one party (the fiduciary) *has power, in the form of substitutive exercise of legal capacity*, over the significant practical interests of another (the beneficiary)" (Velasco, 2018, p. 86), and Professor Paul Miller wrote that fiduciaries exercise derivative powers when they make decisions for others who have given them the power to act at their own discretion, which means that the exercise of fiduciary powers is nothing more than *an extension of the capacity of the person establishing the fiduciary relationship* (Miller, 2018, p. 191).

Regardless of whether the beneficiary's legal capacity is being extended or substituted, the main feature of fiduciary relations is that they are performed in the interests of the beneficiaries. In this regard, Professor Paul Miller has written that "fiduciaries "owe" the benefit of their judgment to another (beneficiary or benefactor / grantor) precisely because their powers can best be understood normatively as a means belonging rightfully to the grantor, to be exercised for ends that he has specified (which ends may include creation of a beneficial interest and right in beneficiaries named by the grantor)" (Miller, 2018, p. 191).

The attributive feature of the fiduciary duty of loyalty explains the formation of the non-profit and no-conflict rules: each of these rules protects the beneficiary from the loss of his or her property or non-property interests. The non-conflict rule usually is applied with the aim to prohibit fiduciary from receiving unauthorised profit, and the non-profit principle applies if such profit is received, however the option of conflict of interests without receipt of unauthorised profit is also available.

The attribution of the fiduciary's decisions to the beneficiary's interests also explains why fiduciary loyalty is often associated with the "act in the best interests" rule. However, there is still a discussion whether it should be in the "best" or "sole" interest of the beneficiary.

Professor Tamar Frankel writes that the traditional duty of loyalty required a fiduciary to act not in the "best", but in the "sole" interests of the beneficiary. In the author's opinion, the "sole interests of the beneficiary" required full and unconditional devotion to the beneficiary's interests, and not the fiduciary's own interests. At the same time, the "best interests" focuses not on the beneficiary's personality, but on such features as experience, attention, and avoidance of negligent behavior on fiduciary's side. The change in emphasis leads to the transformation of loyalty into a duty of "care", which is much closer to the fiduciary duty of care, requiring fiduciaries to exercise their powers with care, professionalism, and competence. Professor Tamar Frankel regards the wording "in the best interests" as a threat, because it origins a sense of partnership between fiduciary and beneficiary, which, in its turn, may lead the fiduciary to act on such principles like "what is best for you can be best for me as well", and "what is best for me can be also best for you as well" (Frankel, 2014, pp. 249-250). It appears that the author's criticism is fair, and the difficulty of identifying the minimum content of loyalty is complicated by the partial mixture of its content with the fiduciary duty of care.

However, the application of fiduciary loyalty is not limited to the above examples, as Professor Hillary Sale writes, the duty of good faith as a component of fiduciary loyalty, "grown[ed] over time into a role of policing the space between the duty of care and traditional loyalty duties" (Sale, 2019, p. 763). In our opinion, the duty of good faith has been turned into an antagonist of the duty of care and the business judgement doctrine: the boost for the development of the separate duty of good faith, within fiduciary loyalty, was the court judgment in Smith v. Van Gorkom (CaseBriefs, 1985), that was considered in Delaware, and according to which the case was reversed and remanded for further proceedings in order to assess the personal liability of directors. The said decision attracted such kind of attention that the Delaware state lawmakers responded by adopting the following provision on exemption from liability:

Thus, fiduciary loyalty, in addition to its inherent function of attributing the results of the fiduciary's decisions to the beneficiary's interests, and its part – the duty of good faith, have been opposed to the limitations, imposed on fiduciary duty of care.

Professor Hillary Sale writes that the case law has filled in the gaps in what exactly good faith means as a part of fiduciary loyalty (Sale, 2019), for instance:

1) The behaviour of directors is in a good faith if they have established appropriate monitoring, compliance and internal control systems;

2) The following acts should be regarded as committed not in a good faith: intentional actions "with a purpose other than that of advancing the best interests of the corporation", "acts with the intent to violate positive applicable law" and failure to act "in the face of a known duty to act, demonstrating a conscious disregard for";
3) Intentional violation of the law (namely, an environmental law), even if it is profitable for the company, goes beyond the scope of the duty of good faith of corporate directors;
4) Deliberate neglect by corporate directors to be informed about the business and its risks, despite the creation of a monitoring system;
5) The fiduciary's behaviour was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith", withal in that case the court took into account such factors as the fact that the fiduciary did not keep documentation for the trust, did not charge interest on loans, borrowed from the trust property, invested heavily in a company that depended on one client for 97% of its income, did not insist on obtaining collateral, ignored the steady decline in investment returns.

The said above indicates that a corporate law has formed a duty of good faith as an integral part of the fiduciary duty of loyalty, which has a different content compared to the requirements of good faith used by contract law or as a general principle of civil law, as provided for by the CCU. Fiduciary good faith is functionally aimed at preventing abuse of the right related to the limitation of civil liability for the breach of fiduciary duties. Withal, the content of the fiduciary duties of care and loyalty is being further intermixed and it obviously creates problems in developing a unified concept of the minimum content of the duty of loyalty. Should the principle of good faith supposed to be developed within the framework of fiduciary loyalty? This is a rhetorical question, but it can be said that classical loyalty has always been associated with the identity of the fiduciary and the attribution of his decisions to the interests of the beneficiary, while the duty of good faith in corporate law, as can be seen from the above examples, does not directly concern the identity of the beneficiary, to a lesser extent concerns the fiduciary, and is mainly concerned with the assessment of business decisions of corporate directors *ex post*, which is usually attributed with the scope of the fiduciary duty of care.

Conclusions

The fiduciary duty of loyalty is not a duty in the civil law understanding of the term, but rather a legal standard. This is because loyalty is too broad concept and does not imply a specific model of behaviour, and therefore the court cannot oblige a fiduciary to behave loyally towards the beneficiary. The main feature of loyalty is the attribution of the fiduciary's decisions to the beneficiary's interests, which logically follows from the fact that the fiduciary exercises derivative, delegated powers, and the results of such activities are appropriated by the beneficiary. Traditionally, it was believed that a fiduciary should follow the beneficiary's sole interests, but currently, most legal instruments on fiduciary duties use the term "best interests", which seems to be not the best practice, as it distracts a potential fiduciary from the beneficiary's personality and mixes the substance content of the fiduciary duties of loyalty and care. The non-profit and non-conflict rules, rules on reporting of potential conflicts of interest, return of unauthorised profits and other rules, the specific set of which depends on the sphere of origin of fiduciary relationship, are auxiliary, preventive legal mechanisms designed to ensure that the fiduciary makes decisions in the best interests of the beneficiary. In some jurisdictions, such as the United States of America, corporate law allows for the limitation of corporate directors' liability for the breach of fiduciary duty. The doctrine of the duty of good faith, as an integral part of fiduciary loyalty, has been developed with the aim to prevent the abuse of such limitations. The court practice has formed the content of "fiduciary good faith", which is different from the general civil or contractual understanding of this term. Fiduciary good faith seems to be more functionally focused on *ex post* assessment of corporate directors' decisions, which leads to overlap with the functional scope of the fiduciary duty of care. It appears that the intertwining of the content of the duties of care and loyalty significantly complicates the doctrinal understanding of loyalty as a legal mechanism for appropriation of the results of the fiduciary's activities by the beneficiary. Returning to the question posed at the beginning of this article "what does it mean to act loyally?" or "in the best interests of the principal", the following answer is proposed: in a narrow sense - not to encroach on property and non-property benefits, which were delegated by beneficiary to the fiduciary for the management or obtained as a result of such management, and in a broad sense (however, limited in scope to corporate law only), the proposed answer should be supplemented with the phrase "the fiduciary duty of good faith, which prohibits intentionally breaking the law, even if it is in the beneficiary's interest, deliberately neglecting directors' duties, obliges

to establish effective monitoring and compliance systems and to take other actions aimed at making lawful and informed decisions, shall also be taken into consideration".

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