UCAM

UNIVERSIDAD CATÓLICA
DE MURCIA

ESCUELA INTERNACIONAL DE DOCTORADO

PROGRAMA DE DOCTORADO EN CIENCIAS SOCIALES

Managing cross-border transactions – legal framework, strategies and incentives from the participants‘ perspectives

Autor:
Anne Schröer-Conigliello

Directores:
Prof. Dr. Fernando Edgar Torrejòn Flores
Prof. Dr. Jens M. Schmittmann

Murcia, Septiembre 2018

UCAM

UNIVERSIDAD CATÓLICA DE MURCIA

AUTHORIZATION OF THE DIRECTORS OF THE THESIS FOR SUBMISSION

Prof. Dr. Fernando Edgar Torrejòn Flores and Prof. Dr. Jens M. Schmittmann as Directors of the Doctoral Thesis "Managing cross-border transaction – legal framework, strategies and incentives from the participants' perspective" by Mrs Anne Schröer-Conigliello in the Programa de Doctorado en Ciencias Sociales, authorizes for submission since it has the conditions necessary for her defense.

Sign to comply with the Royal Decrees 99/2011, 1393/2007, 56/2005 and 778/98, in Murcia, Septiembre 2018.

Essen, 20/09/03

Place, Date

Prof. Dr. Jens M. Schmittmann

Place, Date

Prof. Dr. Fernando Edgar Torrejòn Flores

ACKNOWLEDGEMENTS

This work would not have been possible without the constant support, academic exchange and discourse and the motivation that I was fortunate enough to receive from my mentors Prof. Dr. Jens M. Schmittmann and Prof. Dr. Fernando Edgar Torrejòn Flores. I would like to thank both of them before and above all others.

Moreover, the administrative support in this Doctorate Programme of the UCAM – Universidad Católica San Antonio de Murcia and the FOM – Hochschule fuer Oekonomie und Management, allowed me to dedicate my efforts to academic work and particularly the research and writing of my Thesis. In that regard, I would like to thank Prof. Mercedes Carmona Martínez and Prof. Dr. Alexander Zureck.

With regards to the overall organization and existence of the Doctorate Programme of UCAM and FOM, which enabled me to realize this project, which had been on my life's to-do-list for a while already, while continuing my profession and career in parallel, I would like to also express my thankfulness to Professor Gonzalo Wandosell Fernández de Bobadilla and Prof. Dr. Burkhard Hermeier.

The reason for me being fortunate enough to take this opportunity and to be able to realize my dreams in life are my parents Annette and Peter and my brother Frederik. Without them, their love and their support, all my life long, this project and other dreams would not have become reality.

But writing a doctorate thesis is not only a dream. It is mainly hard work and a time-consuming project of unique scope and size. It is a fact that I would not have been able to work until the Closing of this project, the very last line to write in this document, without the constant support and love of Angelo, my husband, my love. He is reason why I was able to make this project happen, every day for the last years. For this, Angelo has all my thankfulness and respect.

I would also like to especially thank my little daughter Eva for being there and for distracting me, whenever she felt that this was appropriate.

* * * * *

“Omnium rerum principia parva sunt”
Marcus Tullius Cicero

[*the beginnings of all things are small*]

CONTENT

LIST OF ABBREVIATIONS

Abbreviation	Full wording
AG	Aktiengesellschaft
AktG	Aktiengesetz
BGB	Bürgerliches Gesetzbuch
Cf.	Confer [lat.; eng.: compare]
DrittelbG	Drittelbeteiligungsgesetz
EU	European Union
Etc.	Et cetera [lat.; eng: and so forth]
et seq.	et sequens [lat.; eng.: and following]
GbR	Gesellschaft bürgerlichen Rechts
GmbH	Gesellschaft mit beschränkter Haftung
GmbHG	Gesetz über die Gesellschaft mit beschränkter Haftung
HGB	Handelsgesetzbuch
InsO	Insolvenzordnung
KG	Kommanditgesellschaft
KGaA	Kommanditgesellschaft auf Aktien
Ltd.	Limited [Liability Company]
n.a.	not available
OHG	Offene Handelsgesellschaft
p.	page
pp.	pages
UWG	Umwandlungsgesetz
WpHG	Wertpapierhandelsgesetz
WpPG	Wertpapierprospektgesetz

LIST OF FIGURES

LIST OF TABLES

1. INTRODUCTION

Managing a company requires taking actions and decisions every day. As being a legal entity, an abstract conglomerate of assets, contracts, rights and obligations, a company can only act and express intention through its managers.

Whereas the company's defined object is the purpose and direction for all actions and decisions taken by its managers, every step regarding the execution of the company's object is in the end conducted by a human being, the manager. And as such, every action and decision, which is taken by the respective manager does not occur in a perfect rational vacuum, but is surrounded by traits, character, communication skills and experience of the respective manager.

Are those actions and decisions really only surrounded by the individual features and factors of the manager, who takes them? Or might there be connections between management behaviour and the managing individual itself? Based on every-day experience, this question appears not to be easily negated.

Are decisions taken on a fully rational basis or are they influenced by the respective individual's current situation, history and character? Does this also count for decisions taken in a professional corporate environment? Can professionalism force back subjective traits and characteristics?

Scientific discurs and academic research is dealing with the question of subjective influences to individual decision-making in depth and for a substantial amount of decades already.[1] Experiments and field research conducted so far has revealed a broad variety of findings, most of them supporting assumptions and hypotheses around decision-making in fact always being influenced and biased by subjective factors from the sphere of the individual, who takes those decisions.[2]

If there is likely to be an impact of subjective factors to decision-making of managers of companies, the question to follow is, what consequences this might

---

[1] Cf. Schlaifer, R. (1959); Tversky, A., Kahneman, D., (1981); von Neumann, J., Morgenstern, O. (1947).

[2] Cf. Tversky, A., Kahneman, D. (1974).

entail for the company and the company's object. Even more so, if decision-making does not concern the daily business-routine only, but touches on untypical, disruptive events in the lifecycle of a company.

One prominent example for such an extraordinary event is the field of Mergers & Acquisitions, which, even though it can be legally conducted in numerous variants, does always substantially and, if conducted successfully, sustainably impact the company's business model, organisational structure and strategic direction.

The central aim of this Thesis is to analyse the above mentioned questions around subjective influence factors on management decision-making with regard to an M&A event of a company – from the perspective of each participant in a corporate transaction: Seller, Buyer and Target Company.

In order to conduct this analysis in a comprehensive and in-depth scientific manner and with a clear focus on a defined Research Question, a descriptive analysis of the relevant theories will build the fundament of this Thesis. This theoretical fundament comprises of both, the legal aspects, which are of relevance here, as well as a close analytical review of the theories around individual decision-making in the fields of Management strategies and Behavioural Economics. Following the theoretical fundament, real-life examples of management behaviour in transactional scenarios will be analysed, in order to generate assumptions and hypotheses to enhance the answer to the Research Question.

Theoretical focus, as well as the path of analysis used for the empirical data will be explained and defended against challenging options, as necessary.

2. SCOPE OF WORK – FOCUS OF ANALYSIS AND DEVELOPMENT OF RESEARCH QUESTION

2.1. GENERAL OVERVIEW

Mergers & Acquisitions, meaning company mergers, share and asset acquisitions, sales, group restructurings and other types of Corporate Transactions, are among the most unique and challenging tasks, which a company's management can have to face. Transactions often include issues, questions, necessities and tasks which require thoughtful management and which are often far away from the company's – and its managers' – day-to-day business.

Apart from the role of the shareholder(s), the management of each participant in a transaction – seller, purchaser as well as the target company – is of essential importance for a corporate transaction. Whereas the shareholders typically stay in the back, giving only the general direction and final blessing to a Corporate Transaction, it is the managers who need to identify, decide and execute the individual steps and issues at various different stages throughout the transactional process.

But which motivations and incentives might influence a manager's decisions and actions? And in what regulatory framework is the transaction conducted and what does this entail for the management's rights and freedom to take individual decisions and actions? Where is management free to decide and where are the next steps and direction, which has to be taken, determined by law or by decisions of the company owners?

Taking a step back into a holistic perspective of human behavior and decision-making, whenever a human being takes a decision, there is at least one reason for it to do so. Decisions and actions constitute the result of a process of consideration and of weighing one alternative against another.

Even though this procedure might often be conducted automatically or without our direct mental awareness, it does exist for every decision and action taken. Otherwise, there is no call for action, no urge for changing the status quo. Arguments and considerations are the drivers for human behaviour. When being confronted with circumstances or situations that enable or force actions, the individual is confronted with the basic question: "Why?".

"Why do something? Why do nothing? Why do this and not that? Why now? Why me?" – The answer to the "Why?" is the fundament for any action taken by the individual.

As the title "Managing cross-border transactions – legal framework, strategies and incentives from the participant's perspective" indicates, this dissertation aims to approach and analyse the scientific dimension of managers' decision-making during corporate transactions. The approach will be two-fold: (1) Where does the legal framework allow for an autonomous decision by the manager at all? And (2) within those fields of autonomous decision-making, what are the factors that influence the manager in his/her process of decision-making?

This work comprises of a comparison of the management decision-making from three different perspectives: (1) the selling company's management, (2) the purchasing company's management and (3) the management of the target company.

In order to structurally develop the answer to the research question, which is developed and worded in Chapter 2.4, and in order to consider all different perspectives described above, this Thesis is divided into three main parts:

(1) analysis of the legal framework (Chapter 3),

(2) assessment of management strategies, individual motivations and management behaviour in the transactional context (Chapter 4), and

(3) analysis of manager's individual behaviour and motivations in practice (Chapter 5).

Each of these chapters will include the identification of a "Research Fragment", which will define the scope and direction of the analysis. Each chapter shall result in a conclusion, in which the particular findings are considered and evaluated in the light of the Research Question. The connection of such findings will then serve as the fundament for the comparative analysis (Chapter 6) and to come to the final conclusion, i.e. the answer to the Research Question (Chapter 7).

SCOPE OF WORK – FOCUS OF ANALYSIS AND DEVELOPMENT OF RESEARCH QUESTION

The overall methodology of the dissertation will be, for the theoretical parts in Chapters 3 and 4, a description, comparative assessment and evaluation of the relevant legal framework, as well as the existing theories and scientific literature of relevance for the answer to the Research Question. Based on the findings made during the comparative analysis in the theoretical fundament parts of this thesis, a series of five selected real-life case studies will then be the source for empirical data to develop thorough assumptions and hypotheses by way of a qualitative data analysis, following the models of Mayring and Gläser[3].

Therefore, the abstract aim of this thesis can be described as deductive analysis for generation of hypotheses on a specific subject matter, which has to the author's knowledge, not yet been in the focus of scientific analysis and research in its specific form and scope.

By that, this thesis is meant to close an existing gap in scientific research and therewith contribute to the further development of sciences located at the intersection of European Legal theories and Economics, namingly Management Theories and Behavioural Economics.

[3] Cf. Bortz/Döring (2006), p. 331 et seq.; Mayring, P. (1990); Mayring, P. (1993); Mayring, P., Gläser-Zikuda, M. (2005).

2.2. INDIVIDUAL SEGMENTS OF THE ANALYSIS

In order to construct the path from the initial Research Question towards the conclusion that aims to answer it, this work will touch and analyse various different aspects from both, the theoretical academic world of discussions and opinions, as well as from the world of empirical data and its analysis by means of methodologies and analytical approaches.

In order to be able to do so in a structured and transparent way, a series of three analytical parts will be introduced and analysed – the Research Fragments.

Resarch Fragment 1 will focus on the relevant question with regards to the legal framework of Corporate Transactions and managerial decision-making in the context of corporate laws and statutorial organisational structures. Thereby, the playing field of decision-making and actions to be taken by Managers of Companies shall be identified. Areas for such decision-making, as well as legal limitations thereto will be assessed and described with the specific view to a Managing Director's role and function within a Corporate Transaction.

Research Fragment 2 will then, in the light of the findings regarding the applicable legal fundament, take a closer look towards theories and models, which might be helpful to set a light to the actual process of human decision-making. Influencing factors for individual decisions, but also the role and perspective of a human being in the position of managing a Company and thereby being bound into various different relationships and organisational aspects, will be described and analysed here.

Those two elements of theoretical knowledge mining will then set the stage for a specific view into the reality of Corporate Transactions and real-life management behaviour. Therefore, Research Fragment 3 will be based upon the findings made in the two previous fragments of analysis and will then go further and lead the path into an analysis of empirical data regarding managerial decision-making in Corproate Transactions.

This three-fold synopsis of a robust and comprehensive theoretical fundament and a detailed and analytical view into reality will allow for a reliable answer to the Research Question, which is able to contribute to the academic discourse by closing a scientific gap, which has been existing until today.

SCOPE OF WORK – FOCUS OF ANALYSIS AND DEVELOPMENT OF RESEARCH QUESTION

2.3. ANALYSED SCENARIOS

The analysis of Manager's decision-making in Corporate Transactions will be conducted with a holistic view towards the nature of Corporate Transasctions in general. Therefore, it will be necessary to focus not only on one perspective therein, but to rather diversify the analysis to capture the perspective of all three participants, which occur in Corporate Transactions:

(1) the Selling Company,
(2) the Purchasing Company, and
(3) the Target Company.

Whereas the first two participants named above exist in every type of Corporate Transaction, the Target Company is a third participant, which is only existing, in case the sale and purchase of shares in a company, namely the Target Company, are subject to the Corporate Transaction. An alternative scenario would be the sale and purchase of certain assets,[4] where only two parties are involved.

The particular interests of the participating Companies and their Managers will be subject to the analysis further down. However, it may be concluded already now that the interests of those three participants are likely to be of very different nature throughout the Corporate Transaction. Whereas the Seller might be mostly interested in disposing its shares in the Target Company and receiving a high purchase price, the Purchaser might be interested in containing and limiting its risks and uncertainties associated with the purchase and might therefore request detailed information and legal securities from the Seller. And the Target Company itself might be mostly interested to preserve its own legal integrity and to be able to foster and pursue its business objectives also in the future after the change in ownership.

Those few aspects and considerations show already that the sphere of interests of every participant in a Corporate Transaction is of very unique nature

[4] Cf. further below for a more detailed description of "Share Deal" and "Asset Deal", Chapter 3.3.1.

– and therefore its Managers are likely to be acting and executing towards those very unique and therefore diverse goals for the benefit of their respective companies.

The following work will therefore analyse the perspectives and frameworks existing for all three participants in a Corporate Transaction – only this approach will allow for an encompassing answer to the Research Question.

SCOPE OF WORK – FOCUS OF ANALYSIS AND DEVELOPMENT OF RESEARCH QUESTION

2.4. RESEARCH QUESTION

In the light of this work's title and the first introductory remarks made above, the aim of the following analysis will be to close an existing scientific gap, as such existing at the intersection of the legal discourse regarding Management rights and duties in the light of Corporate Transactions on the one hand and the theoretical approaches and models, which have been developed to describe and understand human decision-making behaviour on the other hand, the following Research Question is defined:

Which factors and motivations influence the decision-making behaviour of managers in cross-border corporate transactions, within the existing legal framework from a German and European law perspective?

As depicted above, the following path towards answering this Research Question will be structured by different elements of analysis, all leading towards the answer to the Research Question as ultimate goal and justifying reason for their particular description and analysis.

3. THEORETICAL FUNDAMENT - LEGAL FRAMEWORK OF CROSS-BORDER CORPORATE TRANSACTIONS

3.1. SCIENTIFIC INTRODUCTION – RESEARCH FRAGMENT 1

The applicable regulations and laws determine the playing field, in which managers of Companies can take their own decisions and actions – also and in particular with a view to M&A activities. Therefore, an overview and analysis of the existing legal framework is the fundamental first step to identify those areas, in which authentic and independent management behaviour can occur at all.

On the path towards answering the Research Question, the analysis of the existing legal framework is one important step and therefore, the Research Fragment 1 of this work is defined as follows:

Research Fragment 1:

Which rights and competencies exist for the managers of Companies involved in Corporate Transactions, based on the specific nature of the respective Company and the necessary steps and phases of a Corporate Transaction in general?

The following description will focus on the legal framework, which exists for Corporate Transactions with a focus to Europe and selected European jurisdictions. This focus and selection is made in the light of the selected Case Studies, which will be assessed further in Chapter 5 as examples of "real life" management behaviour, meaning that the jurisdictions of Germany, Spain, the United Kingdom and general European laws will be of relevance.[5]

[5] Even though Case Study 3 and Case Study 4 involve also U.S. American companies, the legal framework of those is not in specific focus for the following

The legal fundament serves for the sole purpose of contributing to an all-embracing analysis of this work's Research Question and therefore focuses on legislative facts and theories, which are relevant in that light.

However, in order to fully understand and assess the scope of managerial compentencies in M&A scenarios, first, a review and assessment of the particularities and specifics of the respective types of legal entities involved is required. Only this description and assessment reveals the general scope of competencies for decision-making and actions to be taken by a Company's management. Therefore, a review and analysis of the legal framework for the most common types of Company's will be conducted as a first step (Chapter 3.2), again with a view to those countries and jurisdictions, which are relevant for the assessment of the Case Studies later. Based on the findings and insight gained in this first part of the analysis, a further review and analysis of the particular regulatory framework of M&A will then be conducted as a second part of this work's theoretical fundament of the legal framework.

Together, the basic understanding of corporate and company laws and of rules and regulations applicable to Corporate Transactions, will then allow for a sound conclusion of the Research Fragment 1 in Chapter 3.6. As mentioned previously, this will include the perspective of all three participants to Corporate Transactions – the Seller, the Purchaser and the Target Company.

---

analysis, because in both cases, the U.S. American companies were the Target of a takeover, which revealed only little involvement of their respective management.

3.2. GENERAL FACTS ON EUROPEAN CORPORATE LAW

European corporate laws distinguish between partnerships, being conglomerates of individuals who group together to achieve a certain joint goal on the one side („Partnerships" = *Personengesellschaften*) and corporations, such being legal entities that legally exist independent of the nature and number of their owners („Corporations" = *Kapitalgesellschaften*).[6]

3.2.1. Partnerships

Partnerships are generally founded whenever two or more individuals decide to jointly aim for one defined goal. Both, the act of joining as well as the definition of the goal can be done explicitly or also by way of concluding behaviour of the involved individuals.[7] There is no necessity for a written agreement on the foundation of a partnership,[8] it will also factually come into existence, if and once the essential elements – (1) at least two partners and (2) one common goal[9] - exist.

---

[6] Cf. Grunewald, B. (2014), p. 5 et se q., p. 189; Hüffer, U., Koch, J. (2011), p. 7 et seq.; Schäfer, C. in: MüKo BGB (2017), Vor § 705, margin no. 23 & § 705 margin no. 76 et seq. with further references.

[7] Cf. Fleischer, H., Hahn, J. (2017): p. 2 with further references; Grunewald, B. (2014), p. 9 et seq., Schäfer, C. in: MüKo BGB (2017), § 705, margin no. 1 et seq & 25 et seq.

[8] Cf. Grunewald, B. (2014), p. 9 et seq., Schäfer, C. in: MüKo (2017), § 705, margin no. 1 et seq & 25 et seq.

[9] Cf. Hüffer, U., Koch, J. (2011), p. 2 et seq.; Medicus, D., Petersen, J. (2017), p. 103; Sprau, H. in: Palandt, O. (2018), § 705 margin no. 11; Schäfer, C. in: MüKo BGB (2017), § 705 margin no. 17 et seq. & margin no. 142 et seq.; Westermann, H.-P., Grunewald, B., Maier-Reimer, G. (2017), vor § 705 margin no. 8.

The partners' common goal must not necessarily be related to an economic forthcoming or business,[10] but can be also any other legal[11] objective, as for example two friends who jointly live in an apartment (flat share), several students meeting for the purpose of joining their forces to work on a presentation (teamwork), a man and a woman entering into marriage or two dentists sharing a medical practice (joint practice).[12]

The partners can define rules for their partnership, they can allocate the responsibilities for certain actions, which shall be conducted and they can also define a certain limited timeframe for their partnership. There are hardly any legal limits to the partners' freedom to individually shape and regulate their collaboration.[13]

However, the downside of sharing their forces and expertise is that the partners also share the responsibility for all the actions which each of them conducts in the name or on behalf of the partnership. As a consequence, actions conducted by one partner will lead to a subsequent liability of all other partners vis-á-vis third parties.[14]

Same as many other jurisdictions, German civil and company laws regulate on several different types of partnerships, which all derive from one most basic partnership form, for Germany being stipulated in sec. 705 et seq. German Civil Code (*Bürgerliches Gesetzbuch* – "BGB") as being the "Company constituted under Civil Law" (*Gesellschaft bürgerlichen Rechts*).

---

[10] Cf. Heidel, T. in: Dauner-Lieb, B., Langen, W. (2016), § 705 margin no. 38 et seq.; Schäfer, C. in: MüKo BGB (2017), § 705 margin no. 17 et seq.; Sprau, H. in: Palandt, O. (2018), § 705 margin no. 11.

[11] Cf. Schäfer, C. in: MüKo BGB (2017), § 705 margin no. 134 with further references.

[12] Cf. for further examples Heidel, T. in: Dauner-Lieb, B., Langen, W. (2016), § 705 margin no. 38 et seq.

[13] Heidel, T. in: Dauner-Lieb, B., Langen, W. (2016), § 705 margin no. 38 et seq.;

[14] Cf. Schäfer, C. in: MüKo BGB (2017), § 705 margin no. 293 et seq. with further references.

Other partnership forms derive from this company setup, specifying either certain goals, for which the partners collaborate or certain defined allocations of responsibilities between the partners.

As an example, the General Partnership according to German law (*Offene Handelsgesellschaft*) is a collaboration of two or more partners in order to pursue a commercial goal, such as trading of certain goods or else. This company form is regulated in sec. 105 et seq. German Commercial Code (*Handelsgesetzbuch* – "HGB").[15] Another legal form is the Limited Commercial Partnership (*Kommanditgesellschaft*), according to sec. 161 et seq. German Commercial Code.[16]

One particularity of German company law is that all such specific regulations for the different company forms also make reference of the rules existing for the respective more general company forms. By that, the regulatory frame is generally set up as an elevation from basic general rules, which serve as the common basis, towards more specific rules for the respective company forms.[17]

This approach cannot only be found in German company laws, but is of similar generality also in other European jurisdictions.[18]

---

[15] Cf. Hüffer, U., Koch, J. (2011), p. 129 et seq.; Grunewald, B. (2014), p. 97 et seq.; Roth, M. in: Baumbach, A., Hopt, K.J. (2018), § 105 margin no. 1 et seq. with further references.

[16] Cf. Grunewald, B. in: MüKo HGB (2012), § 161 margin no. 2 et seq.; Henssler in: Henssler, M., Strohn, L. (2016), § 105 margin no. 1; Hüffer, U., Koch, J. (2011), p. 217 et seq.; Grunewald, B. (2014), p. 129 et seq.; Roth, M. in: Baumbach, A., Hopt, K.J. (2018), § 161 margin no. 1 et seq. with further references.

[17] Cf. Grunewald, B. in: MüKo HGB (2012), § 161 margin no. 1; Hüffer, U., Koch, J. (2011), p. 129.

[18] Cf. Schäfers (2015), p. 878 with further references.

3.2.2. Corporate enterprises (Corporations)

In contrast to the Partnerships described above, European company laws also provide for another more elaborated set of company forms – the Corporations. Main characteristic of any Corporation is always its legal independence from the nature and number of its owners, as long as there is at least one owner.[19] The Corporation has its own legal purpose and its own internal decision-making structure, to work towards this purpose, which is not necessarily identical with the purpose or will of its shareholders.

Also, the Corporation will continue to exist even if the identity or the structure of its owners changes. The owners are free to transfer their participation, as abstract and separate legal assets. Such participations are called "shares", their owners are subsequently called "shareholders". In general, European corporate laws distinguish between different forms of Corporations, deviating in form and the structure of their ownership. Such different forms will be highlighted and briefly described in the following from a German and European law perspective and also with a view to the different types of Corporations, which national and European laws set forth, as internal structures of those entites vary and therewith also the room and mechanics for individual decision-making.

3.2.2.1. German corporate law: General facts

German corporate law sets forth two main[20] types of Corporations: The Limited Liability Company (*Gesellschaft mit beschränkter Haftung - GmbH*) and the Stock Corporation (*Aktiengesellschaft – AktG*).

The main differentiating factor between those two types of Corporation is the number of their shareholders and their internal structure: Whereas the GmbH is the Corporation that sets the format for a small number of shareholders only,

---

[19] For the German GmbH, this is fundamentally laid out in sec. 13 para. 1 GmbHG.

[20] There are two additional types of Corporations, namely: *Unternehmergesellschaft (UG) haftungsbeschränkt*, as regulated in the sec. 5a GmbHG and the *Kommanditgesellschaft auf Aktien (KGaA)*, as regulated in sec. 278 et seq. AktG.

often having a personal connection between themselves and the necessity to personally interact for fundamental measures and decisions within the Corporation,[21] the Aktiengesellschaft, on the other hand, provides the appropriate legal format for the interaction of a larger number of shareholders, on a rather anonymous platform.[22] The Aktiengesellschaft can be listed on stock markets,[23] whereas shares of the GmbH *a*re usually not transferred on a market, but in a private forum between individuals,[24] mandatorily only by way of a notarized share transfer.[25]

The initial motivation of the legislator to create to different types of Corporations was the differing economic requirements, necessitating both, a forum for shareholders aiming for a close and private collaboration on the one side and the separate wish to set up a legal structure for an agglomeration of a large number of shareholders in a rather anonymous forum.[26]

Based upon and due to those basic differences and deviating legislative aims, the legal setup and main characteristics of GmbH and Aktiengesellschaft differ with regard to various parameters, which will be displayed in the following description of each such entity's main characteristics, internal structures and decision-making mechanisms. However, the laws concerning GmbH and Aktiengesellschaft are closely connected and the main similarity between GmbH and Aktiengesellschaft is their nature as being Corporations – legal entities, which exist and act through their own organs and based upon their own financing, separate from the existence of their individual shareholder(s).[27]

---

[21] Cf. Grunewald, B. (2014), p. 335; Hüffer, U., Koch, J. (2011), p. 344.

[22] Cf. Grunewald, B. (2014), p. 239; Hüffer, U., Koch, J. (2011), p. 298 et seq.

[23] Cf. Grunewald, B. (2014), p. 239 with further references; Raiser/Veil (2015), p. 20 et seq., p. 931 et seq.

[24] Cf. Grunewald, B. (2014), p. 335; Raiser/Veil (2015), p. 20 et seq.

[25] Sec. 15 para. 3 GmbHG; cf. Raiser/Veil (2015), p. 505 et seq.

[26] Cf. Raiser/Veil (2015), p. 20 et seq.

[27] Cf. Raiser/Veil (2015), p. 9 et seq. with further references.

3.2.2.2. German corporate law: Gesellschaft mit beschränkter Haftung

The GmbH is a legal unit, which exists separately and independent from its owners, as all Corporations do. According to sec. 13 para. 1 GmbHG, the company has its own rights and obligations, it can be the acquirer and owner of assets, land property and hold rights associated therewith and it can pursue legal actions and proceedings in front of a court and be sued by other legal persons. By that, the GmbH has the same rights and obligations as any natural person – and as any other corporate form as well. The company can act on its own – via its management body,[28] and is therewith in the position to pursue its own interest and goal, which might, as a consequence, also differ from the individual interests and/or goals of its shareholders.

The purpose of a GmbH – The "Company's Object"

The GmbH's goal is called the "Company's Object". It is the reason why the Corporation was established, the ultimate goal, which has been defined and named explicitly in its most basic statute – the Corporation's Articles of Association.

The GmbHG sets out only very few rules and restrictions for the definition of a Company's Object – such being, according to sec. 1 GmbHG only that the GmbH is only allowed to pursue an object that is legal. There are no further restrictions set out directly in the law, but indirectly arising from the fact that the GmbH is always considered to be a commercial entity (*Handelsgesellschaft*) within the meanings of the German Commercial Code (*Handelsgesetzbuch – HGB*), according to sec. 13 para. 3 GmbHG.[29] As a consequence, the actions taken by a GmbH are always considered to be actions taken by a commercial trading unit (*Handelsgewerbe*), see sec. 2 HGB, being registered with the Commercial Register (*Handelsregister*) and intending to realize economic profits (*Gewinnerzielungsabsicht*).[30]

---

[28] Which will be further explained below in Chapter 3.2.4.

[29] Fastrich, L., in: Baumbach, A., Hueck, A. (2018), § 1 margin no. 7 et seq.

[30] Sec. 13 para. 3 GmbHG, which does constitute the basic rule that the GmbH is a commercial entity according to sec. 105 para. 2 and sec. 1 para. 2 HGB, which does not apply for the gGmbH as a special legal entity form; cf. Fastrich, L., in:

The Company's Object is a mandatory element to be defined in each GmbH's Articles of Association (*Gesellschaftsvertrag*), which the shareholders need to explicitly set up and resolve upon in order to constitute a GmbH.

Liability limitation via the corporate veil

Besides the freedom to freely define the company's purpose (Company's Object), one of the most essential consequences arising out of the legal independence of the GmbH as being a Corporation is that it is not only legally able to acquire and own rights and obligations, but that it is also an independent subject to potential liability claims from other parties, which might be associated with those rights and obligations. The GmbH's liability is independent from the liability of its shareholders and subsequently, its liability does not pass over or affect the shareholders in any way. By that, the GmbH constitutes a separate "liability shield" for those liability claims, which are connected to the GmbH's rights and obligations. A direct liability of its shareholders for liability, which arises out of or in connection with the GmbH, does generally not exist, except for very limited scenarios, which are often described as "piercing the corporate veil".[31]

This systematic separation of the corporate body and the individuals, who own it, is a basic characteristic of all forms of Corporations and is one of the most important reasons, why people decide to conduct their economic activities via a Corporation. Their private ownerships and assets are being effectively protected against the potential economic downturn of their business adventures. For the analysis of individual's decision-making in Corporate Transactions, this structure is of fundamental importance, as it leads to a separation of the Corporation's purpose and goals from the individual goal(s) of the human beings acting on its behalf.

Baumbach, A., Hueck, A. (2018), § 1 margin no. 10 et seq.; Raiser/Veil (2015), p. 14 et seq.

[31] Cf. Bruns, P., (2003): p. 815 et seq.; Fleischer, H., (2004), p. 1129 et seq.; Freitag, R., (2003): p. 805 et seq.; Raiser/Veil (2015), p. 413 et seq. & p. 488 et seq.; Stöber, M., (2013), p. 2295 et seq.

Basic structures – Articles of Association

In addition to that, the GmbH does also show some other basic characteristics, which mandatorily need to be fulfilled during its entire lifetime:

The GmbH always requires to be incorporated by its shareholders resolving on a set of basic rules and regulations, which is called the "Articles of Association" (*Gesellschaftsvertrag*) of the GmbH. Such Articles of Association require to be in written form and notarized by a German notary public.[32]

The Articles of Association need to display, amongst other elements, an explicit legal Company Object, which is considered to be the goal, the successful achievement of the reason for which the GmbH has been put to life.[33] This could be, for example, the production of certain industrial goods and the therewith related ownership of certain facilities, plants and/or equipment, but also for example the conduct of an Italian restaurant or of a winery in Spain.

Moreover, the Articles of Association are the forum for the shareholders to define a name for the company (*Firma*). The name must include the description of the legal form "GmbH" at the end and needs to be unique and individual, in order to prevent identity/name confusion with other companies.[34]

Also, the shareholders have to implement certain rules and mechanisms for different company organs in the Articles of Association, such being the shareholders' meeting and the management of the GmbH.[35] In case the shareholders decide so, or in case mandatory labour co-determination rights require such,[36] the GmbH can also have a Supervisory Board (*Aufsichtsrat*)[37] or a

---

[32] Sec. 2 para. 1 GmbHG; cf. Fastrich, L., in: Baumbach, A., Hueck, A. (2018), § 2 margin no. 3 et seq.; Grunewald, B. (2014), p. 337; Hüffer, U., Koch, J. (2011), p. 348.

[33] Cf. Hüffer, U., Koch, J. (2011), p. 348; Raiser/Veil (2015), p. 417 & p. 422 et seq. with further references.

[34] Sec. 3 para. 1 no. 1 GmbHG; cf. Beurskens, M., (2016), p. 681 et seq.; Raiser/Veil (2015), p. 422.

[35] Sec. 3 para. 1 GmbHG; cf. Grunewald, B. (2014), p. 337; Raiser/Veil (2015), p. 422 et seq.

[36] The requirements hereto are set out in sec. 1 para. 1 no. 3 Drittelbeteiligungsgesetz (DrittelBetG).

Supplementary Board (*Beirat*)[38]. Both such organs have a supervising and monitoring function towards the management[39] and can be empowered with certain veto- or approval-rights.[40]

In addition to this, the Articles of Association always need to define a geographical seat for the company. Such seat needs to be a city in Germany, according to sec. 4a GmbHG and the company does also require to inform its competent Commercial Register about its valid postal address (*inländische Geschäftsanschrift*), according to sec. 10 para. 1 GmbHG.[41] A controversial question that was recently discussed was the existence of the GmbH's right to relocate its Company Seat to a place outside of Germany and also with regard to other European Corporations, which are comparable to the GmbH, when moving their seat to Germany. In a nutshell, the GmbH is of course free to relocate outside of Germany, but will then loose its status as being a duly registered GmbH under German law.[42]

Instead, the GmbH will then automatically transform into the equivalent local entity of the respective European member state, to which it has moved its seat. The other way around, foreign legal entities, which move their location to Germany, will be registered with the competent Commercial Register in Germany but will not be automatically transformed into a GmbH. Instead, the German

---

[37] According to sec. 52 GmbHG.

[38] Cf. Grunewald, B. (2014), p. 372 et seq.; Raiser/Veil (2015), p. 592 et seq.; Spindler, G., in: MüKo GmbHG (2016), § 52 margin no. 714 et seq. with further references.

[39] Cf. Raiser/Veil (2015), p. 592.; Roth, G.H., in: Roth/Altmeppen, GmbHG (2015), § 52 margin no. 75 et seq. with further references.

[40] Cf. Roth, G.H., in: Roth/Altmeppen, GmbHG (2015), § 52 margin no. 75 et seq.; Sanders, A. (2017): p. 961 et seq. with further references; Uffmann, K. (2015), p. 169 et seq. for specific guidance on a Beirat based on a contractual setup.

41 Cf. Schäfer, C., in: Henssler, M., Strohn, L., (2016): § 10 margin no. 3 et seq.; Tebben, J., in: Michalski, GmbHG (2017), § 10, margin no. 5.

[42] Cf. Berner, K., MüKo GmbHG (2016), § 60, margin no. 205 et seq.; Franz, T., (2016), p. 930 et seq. with further references; Hoffmann, J., in: Michalski, GmbHG (2017), § 53, margin no. 114 et seq.

Commercial Register will, however, register and treat such entity according to the statute set forth by its local law origin.[43]

The Articles of Association of every GmbH also define its basic financial constitution: Upon incorporation of the GmbH, there always needs to be a share capital (*Stammkapital*) of minimum EUR 25,000, which is owned by and available to the GmbH.[44] This needs to be unconditionally available to the managing directors' free and sole discretion.[45]

Registration with the Commercial Register

Moreover, the GmbH will only come into legal existence, once it is registered with the Commercial Register (*Handelsregister*). Such registers are maintained by the Local Courts (*Amtsgerichte*) in Germany and display certain basic corporate information regarding each existing GmbH to the public.[46]

During the lifetime of the GmbH, all events of significant importance to the public will need to be filed or notified with the Commercial Register, such being for example the removal or appointment of a Managing Director or Proxy Holder (*Prokurist*), a change in the GmbH's Articles of Association or an increase or decrease – subject to the above mentioned minimum registered capital of EUR 25,000 – of the registered share capital. Also any share transfer will need to be notified to the Commercial Register by naming the new shareholder with its full name and displaying the number and nominal value of the shares that such has acquired.

One of the main differences between the GmbH and the second important Corporation form in German law, the Aktiengesellschaft, is the fact that shares in a GmbH cannot be freely transferred. Any share transfer always requires to be notarized and then displayed in an updated list of all shareholders, which mandatorily has to be filed with the locally competent Commercial Register.

---

[43] Franz, T., (2016), p. 930 et seq.

[44] Sec. 5 para. 1 GmbHG.

[45] Sec. 8 para. 2 GmbHG; cf. . Fastrich, L., in: Baumbach, A., Hueck, A. (2018), § 8, margin no. 13 et seq. with further references.

[46] Electronically available via: www.handelsregister-online.de.

Basic structures – organs of the GmbH

As a basic principle, and also to be described and specified in each GmbH's Articles of Association, the GmbH by law has at least two corporate organs – (1) the shareholders meeting (*Gesellschafterversammlung*), being the forum in which the owners of the GmbH convene and resolve, amongst other things,[47] on basic strategic matters or e.g. changes of the Articles of Association[48] (and the appointment of Managing Directors[49], as well as (2) the management (*Geschäftsführung*), which decides on the daily business matters of the GmbH and executes those vis-á-vis third parties. The Management can consist of either one or several individual managing directors[50], who can be either shareholders, taking over a double-function (so-called *Gesellschafter-Geschäftsführer*) or contracted Managing Directors, who do not own any shares in the Company.[51]

Next to those two mandatory organs, the GmbH may also have a third organ, serving a supervising function: The Supervisory Board (*Aufsichtsrat*), the existence of which can be stipulated in the Articles of Association or mandatorily defined by German labour laws for GmbHs with more than 500 employees.[52] For the internal and regulatory questions concerning the Supervisory Board, sec. 52 GmbHG makes the respective provisions in the AktG applicable in an analogous way.[53]

Even though not explicitly stated in the GmbHG, it is nevertheless an undisputed and established opinion that the shareholders can also decide to establish another organ, having advisory and supervision functions: The

---

[47] Such as for example mentioned in sec. 45 and in sec. 46 GmbHG.

[48] According to sec. 53 para. 1 GmbHG.

[49] According to sec. 46 no. 5 GmbHG.

[50] Sec. 6 para. 1 GmbHG and sec. 35 para. 2 GmbHG permits the possibility to have either one or several managing directors. Cf. Raiser/Veil (2015), p. 535 et seq.

[51] Raiser/Veil (2015), p. 536.

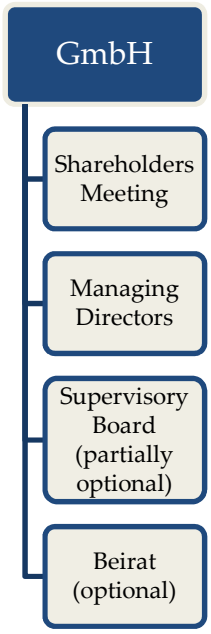
[52] See above in this Chapter - the requirements are set out in sec. 1 para. 1 no. 3 Drittelbeteiligungsgesetz (DrittelBetG); cf. Raiser/Veil (2015), p. 595 et seq.

[53] Noack, U., in: Baumbach, A./Hueck, A., GmbHG (2017), § 52 margin no. 30; Raiser/Veil (2015), p. 592.

Advisory Board (*Beirat*).[54] Based on sec. 45 and sec. 52 para. 1 GmbHG, the legislator has generally permitted the constitution of a supervising forum for the GmbH. In difference from the Supervisory Board, the Advisory Board does not rely on parallel rights than the Supervisory Board of an Aktiengesellschaft would have. The rights and possibilities for the Advisory Board can be determined much more freely than for the Supervisory Board in a GmbH.[55]

In practice, the Advisory Board is often seen as a welcomed possibility to include stakeholders into the constitutional regime of the GmbH, which are no longer part of the shareholders' circle and also not involved in the daily business and corporate decision-making as Managing Directors. In family-owned companies, these boards often consist of family members, who are in some ways (still) associated with the company and its well-being, without being active in those other fori.

Figure 1: Corporate organs of the GmbH



[54] Cf. Huber, H. (2004), p. 17 et seq.; Sanders, A. (2017), p. 961 et seq.; Spindler, G., in: MüKo GmbHG (2016), § 52 margin no. 714 et seq.
[55] Cf. Huber, H. (2004), p. 19 et seq.; Raiser/Veil (2015), p. 593 et seq.; Spindler, G., in: MüKo GmbHG (2016), § 52 margin no. 741 et seq.

THEORETICAL FUNDAMENT - LEGAL FRAMEWORK OF CROSS-BORDER CORPORATE TRANSACTIONS

In a nutshell - GmbH

In a nutshell, the GmbH is to be considered as Germany's most popular corporate organisational form, often established to conduct small or mid-size business ventures with a limited number of shareholders or as one entity in a multi-national group of companies.

The GmbH acts and decides through its Managing Directors, which are by law obliged to conduct the Corporation's business activities in a way that is helpful to flourish the achievement of the Company's Object, as laid out in the Company's Articles of Association.

As being a legal entity, by nature separate from its shareholders, the GmbH has own rights and obligations, which require to be respected and executed lawfully by the Managing Directors. As a matter of fact, the decision-making and execution of decisions in the GmbH, irrespective of whether those are day-to-day usual business activities or more fundamental direction marks, is to be seen separately from the individual goals and objectives, which each Managing Director and/or shareholder of the GmbH might privately or with a view to other business ventures, have.

Therefore, even though the GmbH is dependant on individuals to decide and act (Managing Directors/Shareholders), its nature does always lead to two different layers of decision-making: The decisions taken by the GmbH via its corporate organs (Corporate decision-making) and individual decisions taken by the human beings, who act as Managing Directors and/or Shareholders of the GmbH.

For numerous actions and decisions taken by the GmbH, German corporate law does provide for specific formal or procedural legal requirements, such as the necessity to notarize certain decisions in front of a public notary, the requirement to publish certain decisions in the Commercial Register, as well as procedural requirements concerning the convening and conduct of meetings of the shareholders or the Managing Directors.

For the further analysis of occasions, forms and structures of decision-making in the GmbH, those basic facts will be of central relevance, as to be displayed further below.

3.2.2.3. German corporate law: Aktiengesellschaft

In addition to the above-described GmbH as most commonly used type of Corporation in Germany, German corporate law also sets out another legal corporate form, which is publicly known and frequently used as well: The Stock Corporation (*Aktiengesellschaft*).

Figure 2: Corporations in Germany by numbers – 2016

Kapitalgesellschaften/Corporations	**574,268**
Aktiengesellschaften (AG)	7,862
Kommanditgesellschaften auf Aktien (KGaA)	134
Gesellschaften mit beschränkter Haftung (GmbH)	529,970
Europäische Aktiengesellschaft (Societas Europaea)	180
Unternehmergesellschaft = UG (haftungsbeschränkt)	36,079
Sonstige Kapitalgesellschaften/other Corporations	43

Table according to: Destatis, www.destatis.de – Gesamtwirtschaft & Umwelt – Unternehmen, Handwerk; last check on: 02 August 2018.

Unlike the GmbH, the Aktiengesellschaft is designed to exist also with a large number of shareholders. The necessary interaction between those shareholders is much more limited than with the GmbH, as we will see further below in this paragraph. This makes the Aktiengesellschaft a suitable corporate vehicle for economic ventures of large groups of owners, who know each other hardly or not at all.[56]

As being also a legal corporation, separated from the legal identity of its owners, the Aktiengesellschaft benefits from the same structural advantages as the GmbH, including the fact that it generallyshields away any personal liability

[56] Cf. Raiser/Veil (2015), p. 21 & p. 24 et seq.

risks from their owners and limits it to the value of the particular shares they hold in the company.[57]

Similar to the GmbH, the Aktiengesellschaft is also well-defined and thoroughly regulated in German corporate laws: The German Stock Corporation Act (*Aktiengesetz – AktG*) sets out the structural corset for this entity form.

The key structural elements of the Aktiengesellschaft

Looking at the Aktiengesellschaft more specifically, its internal structure partly differs from the setup within the GmbH, whereas both legal entity forms share a similar legal substratum: Both company forms have a mandatory organ for any executive management activities, strategic and commercial decision-making.

Within the Aktiengesellschaft, this organ is called "*Vorstand"*. The central legal basis for the *Vorstand* is layed out in sec. 76 et seq. AktG, defining the rights, duties and obligations of each member of the *Vorstand.* Similar to the GmbH's Geschäftsführung, also the Vorstand may consist of one or several members, all together constituting the management organ of the company and therefore representing the company vis-á-vis third parties, such as contractual partners or authorities.[58]

Next to the management organ, another mandatory structural element of the Aktiengesellschaft is the general assembly of the shareholders, i.e. the equity representation within the company, which is required to be constituted and shaped in accordance with sec. 118 et seq. AktG. It is called the *Hauptversammlung*. Again, similar to the *GmbH*, the *Hauptversammlung* of an Aktiengesellschaft decides via resolutions about the basic strategy of the company, sets up and changes the company's statutes and resolves on other

[57] Cf. Hüffer, U., Koch, J. (2011), p. 298; Hüffer, U., Koch, J. (2016), § 1 margin no. 8 et seq. & 15 et seq.; Raiser/Veil (2015), p. 11 et seq.

[58] Sec. 78 para. 2 AktG; cf. Hüffer, U., Koch, J. (2016), § 78 margin no. 3 et seq. Raiser/Veil (2015), p. 149 et seq.

matters of general or defined interest.[59] In general, the *Hauptversammlung* will meet whenever necessary due to its obligations to preserve the interests and compliant constitution of the company.[60]

In addition to the strategic (*Hauptversammlung*) and executive (*Vorstand*) organ, each Aktiengesellschaft must also mandatorily have a Supervisory Board (*Aufsichtsrat*), which

(1) oversees the actions taken by the management and

(2) interferes if necessary in order to maintain the compliant internal and external order of the company,

(3) to approve certain listed actions,

(4) to pose questions on certain fields of managerial activities and

(5) to represent the company, in case the company happens not to have a Vorstand or vis-á-vis the members of an existing Vorstand.[61]

According to sec. 102 AktG, the Aufsichtsrat has a supervising function, explicitly delineated from the executive function of the Vorstand.

Central elements of the Company's Statutes

Same as for all types of corporations, the founding of an Aktiengesellschaft requires a written testimony of the (future) shareholders' wish to form a company alongside with the mandatory legal requirements for such structural type. This testimony is conducted by way of a shareholders' meeting, in which the shareholders initially resolve on the fact of founding a company in the

[59] Cf. Bungert, H., in: Münchener Handbuch des Gesellschaftsrechts (2015), vol. 4, § 35 margin no. 1 et seq.; Grunewald, B. (2014), p. 283 et seq.; Hüffer, U., Koch, J. (2016), § 118 margin no. 2 et seq.; Hüffer, U., Koch, J. (2011), p. 318 et seq.

[60] Sec. 121 para. 1 AktG.

[61] Cf. Fischer, H. in: Heidel, Aktienrecht (2014), § 1 margin no. 7 et seq.; Fock, T. in: Spindler, G., Stilz, E., Aktiengesetz (2015), § 1 margin no. 8 et seq.; Grigoleit, H.C. in: Grigoleit, H.C., Aktiengesetz (2013), § 1 margin no. 32 et seq.; Heider, K., in: MüKo AktG (2016), § 1 margin no. 13 et seq. with further references; Hüffer, U., Koch, J. (2016), § 1 margin no. 2 et seq.

format of an Aktiengesellschaft and on resolving upon the foundation Statues of this company.

As required by sec. 23 para 2 AktG, the notarial deed, in which the foundation of the corporation is resolved by the founding shareholders, must include at least the following information:

- Names of the founding shareholders (sec. 23 para. 2 no. 1 AktG);
- Number and type of shares and allocation of shares among the founding shareholders (sec. 23 para. 2 no. 2 AktG);
- Amount of share capital paid into the corporation (sec. 23 para. 2 no. 3 AktG).

In addition, the foundation act also requires the shareholders to set up the Statues (*Satzung*) of the corporation. Such Statutes, similar to the Articles of Association of a GmbH, must, by law, include certain information and content, which the legislator considers to be inevitable for each company of this specific type. The main mandatory features of each Aktiengesellschaft's Statutes according to sec. 23 para. 3 AktG are as follows:

- Name and Seat of the Corporation (sec. 23 para. 3 no. 1 AktG);
- Object of the Corporation, namely specifying the products or goods to be manufactured ad traded, if the Corporation is established as a company for purposes associated with industrial manufacturing and trade (sec. 23 para. 3 no. 2 AktG);
- Amount of the registered share capital (sec. 23 para. 3 no. 3 AktG);
- Allocation of the share capital into shares, such being nominal shares (*Nennbetragsaktien*) or non-par value shares (*Stückaktien*), as well as their nominal value and the number of shares issued from each category and potential types of shares, if such have been established by the founding shareholders in the Statutes (sec. 23 para. 3 no. 4);
- Information about the shares being issued with mentioning the shareholder or the proprietor's name (sec. 23 para. 3 no. 5);

- The statutory number of members of the Vorstand or rules for determining such number (sec. 23 para. 3 no. 6).

In particular, the Statutes do set out the basic principles and guiding boundaries for the Company's actions and its management's economic behaviour. Similar as for the GmbH, strategy is limited by the definition of the Company's Object in the Articles of Association.[62]

The internal decision-making process is structured by mandatory legal requirements (sec. 76 and sec. 119 AktG) and by the additional rulings set out in the Articles of Association, such as e.g. for qualified majorities, specific decision-rights for the Shareholder's Meeting and/or approval rights for the Supervisory Board.

Also similar to the GmbH, the Statutes of the Aktiengesellschaft can only be modified or amended by way of a shareholders' resolution, which is conducted and notarized by a notary public. Moreover, all such changes and modifications need to be filed with the Commercial Register of the respective Aktiengesellschaft, in order to make sure that the Commercial Register can always provide the most recent version of the Statutes to any person who seeks for review of such.

The incorporation of the Aktiengesellschaft – main steps

However, the resolution upon the Articles of Association is the only mandatory requirement for the completion of the incorporation of a Aktiengesellschaft. Once this resolution is passed, the shareholders need to explicitly appoint the first members of the Supervisory Board, as well as the first annual auditor (*Abschlussprüfer*) of the company (according to sec. 30 para. 1 and para. 2 AktG). After being appointed, the first Supervisory Board will then appoint the first members of the *Vorstand,* a right which is granted to the Supervisory Board in sec. 30 para. 3 AktG.

[62] Cf. Pentz, A., in: MüKo AktG (2016), vol. 1, § 23 margin no. 68 et seq.; Raiser/Veil (2015), p. 147 et seq.

As another step, the founding shareholders also require to draft a foundation report (*Gründungsbericht)*. The detailed requirements for this document are laid out in sec. 32 AktG and shall mainly ensure that this report is a comprehensive factual basis for the incorporation audit, which has to be conducted by the appointed *Vorstand*, Supervisory Board and the first auditor altogether.[63]

Still prior to the registration of the company with the Commercial Register, the shareholders are then requested to make their respective payments for the shares they have subscribed to. Such contributions need to be made in cash[64] or in kind[65], depending on the defined nature of each respective contribution. The payment of such cash contributions makes it also necessary that the company has already its own bank account, one of the first actions that the newly appointed *Vorstand* has to conduct.

Even though the incorporation process is not yet completed, the Aktiengesellschaft is already then legally existing (so called pre-Corporation - *Vor-Aktiengesellschaft*) and can conduct valid legal actions via its management organ in the Company's own name. Again, a similarity for all forms of Corporations – parallel for GmbH and Aktiengesellschaft.

Registration with the Commercial Register

Similar to the GmbH, also the Aktiengesellschaft mandatorily requires to be registered in section "B" of the commercial register (*Handelsregister*) of the Local Court of its seat, upon foundation (sec. 36 para. 1AktG). The registration must be filed by all foundation shareholders together with all members of the *Vorstand* and the Supervisory Board (sec. 36 para. 1 AktG) and may only take place, once the necessary capital contributions for each share have been made in cash or in kind, sec. 36 para. 2 AktG.

---

[63] Cf. Raiser/Veil (2015), p. 88.

[64] Not the entire amounts requires to be paid in immediately, but at least one quarter of the nominal value of the contribution: sec. 36a AktG; cf. Raiser/Veil (2015) p. 87.

[65] So-called "S*achgründung*" according to sec. 27 and sec. 33a AktG.

During the lifetime of the Aktiengesellschaft, all modifications of the Statutes require to be filed with the Commercial Register, as well as all changes in the personal structure of the *Vorstand* (i.e. appointment and/or removal of members of the *Vorstand*) and the company's registered address. Certain modifications to the Statues will not only be visible from the updated Statues, but will also be published in the company's registry book – for example changes in the company's name or company's seat.

Stock Corporation particularities – Stock market listing

The Stock Corporation is also the most common corporate form under German law to be listed and traded on the stock markets, which is legally permitted according to sec. 3 para. 2 AktG.[66] As described above, the nature of the Aktiengesellschaft allows for a large number of shareholders to participate in the ownership of the company at the same time. And unlike the GmbH, certain types of shares of the Stock Corporation can also be traded rather easily and without e.g. the requirement to notarize every share transfer.

Sec. 10 para. 1 AktG sets out the basic possibilities for trading shares in listed companies and therewith is one of the key norms to regulate the corporation's suitability for stock market trading.

In order to be listed on a stock market, every Aktiengesellschaft does not only require the suitable internal corporate structure, but must also fulfil the respective existing requirements set out by the market place, on which the listing is pursued. This includes, amongst other specific requirements, the production and publication of a prospectus during the application process which might lead to a listing of the company. Main purpose of the prospectus is to give all relevant information about the Corporation, its business and strategy, so that potential investors are in a position to assess potential risks and opportunities, which would come along with an investment in shares in the Company. The diligent and comprehensive production of the prospectus and its publication in

[66] General definition of Companies being oriented to the stock markets: sec. 264d HGB; cf. Grunewald, B. (2014), p. 239; Raiser/Veil (2015), p. 923 et seq.; next to the Aktiengesellschaft, also the Kommanditgesellschaft auf Aktien (KGaA) and the Societas Europaea (SE) can be listed on stock markets.

accordance with the respective formal requirements is one of the central fields of legal and statutory obligations for the management of a Stock Corporation and as such part of the additional regulatory regime[67] that is applicable for Stock Corporations in addition to the statutory rules set out in the AktG.

In a nutshell – Aktiengesellschaft

In a nutshell, the Aktiengesellschaft is the adequate corporate structure for larger conglomerates of shareholder, who wish to form a joint business enterprise without too close interaction and personal contact. Moreover, the Aktiengesellschaft offers its shareholders the structural possibility to trade their shares via the stock markets. This makes the Aktiengesellschaft an attractive frame for institutional investors, and for those owners who wish to attract public investors and creates and additional layer of statutory duties and corporate obligations for its management.

3.2.2.4. German corporate law: Other corporate forms

Besides the two most commonly used corporate forms, German law does also provide for two alternative Corporate types: The *Kommanditgesellschaft auf Aktien* and the *Unternehmergesellschaft (haftungsbeschränkt*).

Whereas the *Kommanditgesellschaft auf Aktien (KGaA*) is structurally affiliated to the Aktiengesellschaft, the *Unternehmergesellschaft (haftungsbeschränkt) (UG (haftungsbeschränkt))* derives from the GmbH as structurally parallel corporate form.

The KGaA is a defined in sec. 278 para. 1 AktG as a hybrid between the Kommanditgesellschaft as a form of partnership and the Aktiengesellschaft as a Corporation. Its ownership structure consists of one or several General Partners (*Komplementäre*), who are personally liable with their private equity, as always in

[67] Mainly regulated in Germany in the *Wertpapierprospektgesetz (WpPG)* and *Wertpapierhandelsgesetz (WpHG)*; cf. Merkt, H., Rossbach, O. (2003); Raiser/Veil (2015) p. 923 et seq.; Weber, M. (2018) for recent developments in European capital markets laws: Parmentier, M. (2018).

the KG,[68] and of Limited Partner Shareholders (*Kommanditaktionäre*), who are invested in the registered share capital of the Company with liability limited to their respective share value.[69] The decision-making within the KGaA, as well as its representation externally is duty and right of the General Partner(s), with the only exception that extraordinary activities in the meaning of sec. 116 para. 2 HGB require the consensus of all General Partners and of the Shareholders' Meeting, consisting of all Limited Partner Shareholders (sec. 278 para. 2 AktG in connection with § 164 HGB). However, as this process might be rather cumbersome depending on the number of necessary participants, the Shareholders' Meeting can resolve otherwise to a more appropriate and practical procedure for extraordinary decision-making by way of specifiying a suitable rule in the Company's Articles of Association.

The external representation of the KGaA can be limited (by way of specific regulation in the Articles of Association) to only one or certain General Partners (sec. 125 para. 2 HGB), whereas it cannot be limited to specific fields or topics of representation.[70]

The *Unternehmergesellschaft (haftungsbeschränkt*) (*UG (haftungsbeschränkt*) was introduced by the German legislator and new corporate form in 2008[71] and is mainly regulated in sec. 5a GmbHG, including its specific references to other norms of the GmbHG. The UG (haftungsbeschränkt) was often described as the "German response to the UK Limited Liability Company"[72], one of the most popular Corporate forms in Europe.[73] Due to the European High Court's decisions on the free location of a corporate establishment, the UK Limited

[68] According to sec. 128 HGB; cf. Hueffer, U., Koch, J. (2011), p. 234; more specifically for the KGaA: Grunewald, B. (2014), p. 331.

[69] Sec. 278 para. 1 AktG.

[70] Cf. Raiser/Veil (2015), p. 396.

[71] As one element of the changes and additions made to the GmbHG with the so-called "*MoMiG*" – Begr. RegE MoMiG, BT-Drs. 16/9737.

[72] Cf. Drygala, T. (2006), p. 587 et seq.; Raiser/Veil (2015), p. 458 et seq.

[73] Cf. Just, C. (2006), p. 25 et sep.; Kadel, J. (2006), p. 102 et seq. with further references.

Liability Company had become a relevant participant to the legal entity landscape throughout Europe, including Germany.

Main driver for the UK Limited's attractiveness was (and still is[74]) the non-existence of any minimum share capital. The founding shareholders are free to incorporate the UK Limited without any significant capital injection. This central element was translated into the German Corporate legislation with the introduction of the UG (haftungsbeschränkt). Each shareholder of a UG (haftungsbeschränkt) is only obliged to contribute the amount of at least EUR 1 for each share.[75]

As a consequence, the Company's liability and equity value can be significantly below the minimum level of a GmbH.[76] Whereas this adds flexibility to the financial needs for the shareholders, the economic risk of failure or insolvency of the Company is significantly higher than with the "normal" GmbH and occurs as additional economic risk and burden for the business partners of the UG (haftungsbeschränkt), as the possibility to take recourse based on the liability regime of the Company is factually reduced to the amount of the registered share capital, which can be almost nothing.

In addition to this main feature, the UG (haftungsbeschränkt) does also contain several other characteristics, which differ from the GmbH. Those concern mainly formal requirements and serve the goal to reduce the entrance barrier level for individuals to decide to incorporate a legal entity under German Corporate law. Reality proves that this explicit goal of the German legislatior[77] so far has only partly manifestated.[78]

With regard to the decision-making structure and representation of the UG (haftungsbeschränkt), its mandatory legal setup is mostly parallel to the GmbH:

---

[74] See below in more detail in Chapter 3.2.2.5.

[75] Cf. Wachter, T. in: Münchener Anwaltshandbuch des GmbH-Rechts (2014), § 4 margin no. 77 et seq. with further references.

[76] Such being EUR 25,000 according to sec. 5 para. 1 GmbHG, as described above in Chapter 3.2.2.2.

[77] Begr. RegE MoMiG, BT-Drs. 16/9737 for no. 6.

[78] Cf. Raiser/Veil (2015), p. 459 et seq.; Werner, R. (2011), p. 459 et seq.; Wicke, H. (2014), p. 20.

One or several Managing Director(s) conduct the Company's daily business activities and represent the Company in the external world, whereas the Shareholders' Meeting is the central organ to resolve on basic strategic considerations, such as changes of the Company's Articles of Association.

As mentioned above, the two corporate forms of KGaA and UG (haftungsbeschränkt) are only of secondary relevance in the German Corporate landscape. Therefore, the following analysis will continue to focus on the GmbH and the Aktiengesellschaft as main Corporations under German law and will only refer to the KGaA and/or UG (haftungsbeschränkt) in case of any relevant particularities in those corporate forms in the light of the Research Question.

3.2.2.5. Other European national corporate laws: General facts

Other national Corporate forms

The general distinction between Partnerships and Corporations is not a singular phenomenon in Germany, but also structurally existing across the other European jurisdictions.[79]

The specific characteristic of a Corporation as being a separate legal entity, existing independently from its shareholders and therefore also acting in a separate liability sphere, can be found for example in France in the form *Société a Responsabilité Limiteé* (SaRL) and as *Société Anonyme* (SA), showing an internal structure which is parallel to the German GmbH and AG. Italy provides for

[79] And also in most other jurisdictions and judicial regions around the globe, such as China, Japan, the United States of America and in many countries in Latin America and Africa – cf. Raiser/Veil (2015), p. 26 et seq.; instructive also Roth, G.H., Kindler, P. (2013).

similar types of Corporations as well,[80] same as Spain with the *Sociedad Limitada* and the *Sociedad Anónima*.[81]

Even though the laws of the United Kingdom structurally differ in many aspects from the laws of continental European jurisdictions, also UK laws do provide a similar Corporate form, such being the *Limited Liability Company* (*Limited/Ltd*.).[82]

All those types of Corporations do have in common that their foundation requires certain formal aspects to be fulfilled and certain decisions to be made by the future shareholders. Amongst those, the drafting and resolution of written Articles of Association is one central element.[83] Similar as to the provisions set out in German Corporate laws (GmbH: sec. 2 & sec. 3 GmbHG; *AG*: sec. 23 AktG) , those Articles of Association have to define and display basic facts about the Corporation: purpose, name, seat, capital structure, shareholding structure, as well as additional information like external representation and mechanisms for taking decisions, unless such are regulated by law already.

Another similiarity across many jurisdictions is the general setup to enable a corporate structure of "checks and balances", meaning that certain functions or a certain organ are authorized and obliged to conduct the Company's management and executive business activities, whereas a separate instance within the Company is authorized and obliged to monitor and supervise those executive actions.[84]

---

[80] Cf. Falco, A., in: Wegen, G., Spahlinger, A., Barth, M., (2018), Italien, margin no. 12 et seq.; Süß, R., Wachter, T. (2016), Länderberichte Italien, margin no. 4 et seq. with further references.

[81] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 8 et seq. & margin no. 121 et seq.; Süß, R., Wachter, T. (2016), Länderberichte Spanien, margin no. 1 et seq.

[82] Cf. Just, C. (2006), p. 25 et seq.; Kadel, J. (2006), p. 102 et seq.; Reiser/Veil (2015), p. 28 et seq.; Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 11 et seq. with further references.

[83] Cf. Reiser/Veil (2015), p. 28 et seq. with further references.

[84] Cf. Reiser/Veil (2015), p. 28 et seq. with further references.

This aspect is commonly perceived to be resulting from the legal independence of the Corporation from its owners – the existence as separate legal entity requires mechanisms to ensure and enforce the Corporation's rights also vis-á-vis its shareholders and management personnel. Therefore, internally, a division and balancing of power is required.

Even though the foundation process and certain structural elemants do provide for certain similar aspects in different jurisdictions, other more specific characteristics of Corporations differ from jurisdiction to jurisdiction.

For example, the organisation of a Corporation's internal decision-making as well as external execution and representation shows differences, even between jurisdictions in Europe: Many jurisdictions define the "Board of Directors" to be the representative organ of a Corporation, but the actual shape and function of the "Board" is not defined uniformely. Many jurisdictions set out a so-called "one-tier board system", whereas other jurisdictions rule on a "two-tier board system". Coming back to the above-mentioned aspect of an internal regime of "checks and balances" within the Corporation, the main difference of those two board systems is the question, if the internal authority to manage and execute and the internal authority to supervise and monitor such actions are all embedded in one uniform organ of the Corporation (= one-tier board) or if those are conducted by two independent instances within the Corporation (= two-tier board).[85] Other differences can be made regarding the internal structure of the management board, such as for example the installation of "managing directors" and "executive directors" or "non-executive directors" and "executive directors".[86]

Besides the internal organisation, the capital structure of Corporations also reveals differences between many jurisdictions. Whereas, for example, German laws set out minimum requirements for the registered share capital of GmbH[87] and AG[88] and Italian laws do even require a minimum of EUR 120,000 for the

[85] Cf. Reiser/Veil (2015), p. 29 et seq. with further references.

[86] Cf. Reiser/Veil (2015), p. 29 et seq. with further references.

[87] See above, sec. 3.2.2.2; EUR 25,000 according to sec. 5 para. 1 GmbHG.

[88] See above, sec. 3.2.2.3: EUR 50,000 according to sec. 7 AktG.

SpA,[89] a Limited Liability Company under the laws of the United Kingdom can be installed without any minimum capital injection[90] and the French SaRL is required to have a minimum of EUR 1 as capital.[91]

As a result of the European motivation to create a harmonized European domestic market and to provide for equal standards for commercial and trade across all member-states,[92] European legislation has significantly driven changes in its member states corporate law regimes during the last years.[93] For national Corporate forms, such as the examples mentioned above, this has lead to a partial harmonisation and to an increase of the Companies' ability to resolve and execute corporate actions across the EU domestic market.[94] The European-wide freedom of domicile was ruled in various decisions of the European High Court of Justice to be applicable also to Corporations.[95] This has lead to a direct competition of the national corporate forms. If a UK Limited Liability Company can also have its

---

[89] Cf. Falco, A., in: Wegen, G., Spahlinger, A., Barth, M., (2018), Italien, margin no. 12; Süß, R., Wachter, T. (2016), Länderberichte Italien, margin no.4 et seq.

[90] Cf. Just, C. (2006), p. 25 et seq.; Kadel, J. (2006), p. 102 et seq.; Reiser/Veil (2015), p. 28 et seq.; Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 11 et seq.

[91] Cf. Basuyaux, B., Delpech, P., de Labrouh, S. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Frankreich, margin no. 16 et seq.

[92] As stipulated in Art. 26 AEUV.

[93] Cf. Kindler, P. in: MüKo BGB (2018), vol. 12, part 10.A.VI.; Lutter, M., Bayer, W., Schmidt, J. (2017), p. 7 et seq. with further references.

[94] Overview of existing legislative efforts and directives: Kindler, P. in: MüKo BGB (2018), vol. 12, part 10.A.V with further references; Lutter, M., Bayer, W., Schmidt, J. (2017), p. 7 et seq. & p. 147 et seq. with further references.

[95] The so-called "freedom of domicile" was ruled by the European High Court of Justice in various court decisions over the past years – overview to such developments and rulings is provided by: Bayer, W., Schmidt, J. (2012), p. 1481 et seq.; Hirte, H. (2018), p. 1222 et seq.; Kindler, P. in: MüKo BGB (2018), vol. 12, part 10.A.VI. with further references; Lutter, M., Bayer, W., Schmidt, J. (2017), p. 90 et seq.; Verse, D.A. (2013), p. 458 et seq.; Zimmer, D., Naendrup, C. (2009), p 545 et seq.

registered seat in Germany or Spain, then it proves to be a realistic alternative to the respective national corporate forms. In practice, this has lead to numerous case-by-case questions,[96] such as for example, if a UK Limited Liability Company can and/or has to be registered in the German Commercial Register and else.[97]

With those developments in Europe, national corporate laws are in a process of constant change and adaption, even though the basic principles of Corporate forms appear to be reliable and settled already for some time.

Cross-border European Corporate forms and initiatives

Besides the national laws, Corporations are also subject to other means of European legislation. The European Union has developed – by way of Directives[98], which require transformation into the member states' national law systems[99], and by way of Regulations, which apply in all member states without any act of local transformation[100] - not only specific requirements and harmonized standards for local Corporations, but it has also created new forms of Corporations, standardized and available to businesses throughout the European Union.

The most commonly known European legal entity form is the *Societas Europaea (SE)*, which can be briefly described as the European pendant of the national stock corporations.[101]

---

[96] Cf. Kindler, P. in: MüKo BGB (2018), vol. 12, part 10.A.V with further references.

[97] Cf. Holzborn, T., Israel, A. (2003), 3014 et seq.; Just, C. (2006), p. 25 et seq.; Kadel, J. (2006), p. 102 et seq.; regarding the registration of a branch office of a UK Ltd. cf. Klose-Mokroß, L. (2005): p. 971 et seq.

[98] European Directives can be accessed via: www.ec.europa.eu; Overview of Corporate law Directives: cf. Kindler, P. in: MüKo BGB (2018), vol. 12, part 10.A.V; Lutter, M., Bayer, W., Schmidt, J. (2017), p. 7 et seq. & p. 147 et seq. with further references.

[99] According to Art. 288 para. 3 sent. 1 AEUV; cf. Raiser/Veil (2015), p. 33 et seq.

[100] According to Art. 288 para. 2 AEUV; cf. Raiser/Veil (2015), p. 34 et seq.

[101] Cf. Grunewald, B. (2014), p. 334; Hüffer, U., Koch, J. (2011), p. 443 et seq.; Raiser/Veil (2015), p. 34 et seq.; Teichmann, C. in: Münchener Handbuch des Gesellschaftsrechts (2015), vol. 6, § 49 with further references.

Unlike the German Aktiengesellschaft, the internal structure of the SE is a board-system and can be opted either as a monistic one-tier system, where strategic decision-making and supervising function are not held separately, or as a two-tier board system. Another key difference to the German AG is the possibility to significantly limit the employee participation rights.[102]

Next to the SE as main European corporate form for large enterprises, the European Commission has also driven the project of installing another type of Corporation, addressing the needs and structure of small and medium sized companies mainly. The so-called *Societas Privata Europaea (SPE*) has been in discussion and legislative drafting for several years, but so far without implementation.[103] Instead, the European Commission's project to establish a European Corporation for single shareholders only – the *Societas Unius Personae (SUP)* is currently gaining legislative traction.[104] The SUP shall be designed to serve for individuals and legal entities as sole shareholders, to offer an easy foundation procedure and to require a minimum share capital of EUR 1 only.[105]

Regarding the internal structure and corporate decision-making, the SUP would be comparable to other Corporations, same as also the SE does, and constitute an internal instance for strategic decision-making on the level of its owner, but also an executive organ to serve for daily business activities and decision-making associated therewith.

---

[102] Cf. Bayer, W. (2016), p. 1932 et seq.; Raiser/Veil (2015), p. 35; Schmitz, K. in: Heidel, Aktienrecht (2014), part 1, Die Societas Europaea, lit. A; Raiser/Veil (2015), p. 374 et seq.; Spitzbart, B. (2006), p. 369 et seq.

[103] Cf. Teichmann, C. in: Münchener Handbuch des Gesellschaftsrechts (2015), vol. 6, § 50 with further references; Raiser/Veil (2015), p. 35.

[104] Cf. Krauß, W.W., Meichelbeck, H. (2015) p. 1562 et seq.; Omlor, S. (2014), p. 1137 et seq.; Raiser/Veil (2015), p. 35.

[105] Cf. Krauß, W.W., Meichelbeck, H. (2015) p. 1562 et seq.; Omlor, S. (2014), p. 1137 et seq.

3.2.3. Rights and duties of shareholders in Corporations

As briefly described above, each Corporation, as being an abstract legal construction, is required to have certain internal institutional bodies, in order to decide, act and to always stay compliant with its own basic principles, mandatory laws and separate from the actions and decisions taken by the individuals owning and/or managing the Corporation. Such internal bodies are – irrespective of its type and the legislation of its incorporation:

For each Corporation, there is always

(1) a forum for its shareholders, always

(2) an organ to externally and internally conduct actions and

(3) in most cases[106] also a third organ to supervise or advise the management.

Even though the basic internal organisation is similar for all forms of Corporations, there are certain differences with regard to the rights and duties of their shareholders, which will be further highlighted in the following. This basic internal structure of the Corporations does closely connect with the Research Question: The rights and duties of the Companies' shareholder(s) limit and depict the level playing field of a Company's managers and is also an inevitable component in understanding the duties and rights of managers, as well as the legislative purpose behind their scope of responsibility.

A thorough description of the managers' scope of competencies has to be conducted with also looking at the rights and duties of the shareholders and other Corporate organs, in order to reveal the logic of managerial competencies, rights and duties in a comprehensive way.

Again, the description shall focus on some of the most common forms of Corporations in Europe: The GmbH and the Aktiengesellschaft according to

[106] Exception is the GmbH, for which a Supervisory Board or an Advisory Board is only necessary, if required due to mandatory labour law regulations or in case this organ is explicitly constituted within the GmbH's Articles of Association, as described in detail above in Chapter 3.2.2.2.

German law, the Limited Company according to British laws, as well as the [xx] according to Spanish laws.

3.2.3.1. GmbH

The number of shareholders of a GmbH is usually rather low.[107] This typically leads to a relatively close connection and interaction between them, what is also impacting the particular nature of certain rights and duties each one of them have and of the way that each shareholder can request the other shareholders to contribute to the business purpose of the Company.

Duties - Contribution

First and foremost, each shareholder is obliged to pay hiscontribution to the Company's share capital, upon foundation of the Company and in the pro-rata amount equalling the respective shareholder's participation in the Company, sec. 19 para. 1 GmbHG. As the registered share capital forms the financial basis of the Company, this obligation is of central importance for the Company. This obligation strictly applies to the shareholders themselves and cannot be assigned or otherwise transferred to other parties, sec. 19 para. 2 GmbHG.

The contribution can be either paid in cash or in kind. Whereas the contribution in cash is rather straightforward and requires mere payment to the Company's own bank account, the contribution in kind requires some more efforts in order to be a valid performance of the shareholder's obligation. The assets require to be proven and audited, in order to have a certain value, in order to set it in relation to the amount of the shareholder's contribution obligation. The asset's value must be an objective market value, not any kind of affectionary or other kind of subjective value, which would not be beneficial to the Company's economic position.[108]

According to sec. 5 para. 4 GmbHG, any asset contribution also requires the asset value to be assessed and asserted in a respective asset report

[107] Cf. Raiser/Veil (2015), p. 21 et seq.

[108] Cf. Raiser/Veil (2015), p. 431 et seq. & p. 473 et seq.

(*Sachgründungsbericht*), stating adequate reasons why the asset shall inherit the objective value that it claims to have.[109] Moreover, in case a contribution in kind has been valued excessive, then the contributing shareholder is obliged to contribute the delta between the asset's actual value and the amount to be contributed by way of a cash payment to the Company, sec. 9 GmbHG.[110] Those provisions demonstrate the legislator's general reluctance to accept the giving of assets as an acceptable performance of the shareholder's obligation to contribute to the share capital. However, the high standards and formal requirements appear adequate in the light of the outstanding importance of the capital contribution for the Company's factual existence.

In case of a cash contribution, it is of utmost importance that the full amount contributed is freely available to the managing directors on a company-owned bank account upon incorporation of the Company.[111]

If, during the lifetime of the Company, it is found that the original cash contribution was initially too low with regard to the respective shareholder's obligations, or if a contribution in kind is found out to be valued excessively, then the obligation to make the contribution may revive and will oblige the shareholder to contribute further. Nontheless, there is no general duty to make further contributions to the Company's capital, unless under very rare and specific circumstances,[112] if the initial contribution had fully covered the shareholder's respective obligation.

Furthermore, the shareholders may also be required to comply with any other ancillary or extraordinary obligations that might arise out of the Company's Articles of Association. Unlike the obligation to contribute to the share capital,

---

[109] Cf. Fastrich, L. in: Baumbach, A., Hueck, A. (2017), § 5 margin no. 54 et seq. with further references; Leitzen, M. in: Michalski, GmbHG (2017), § 5, margin no. 151 et seq.

[110] Cf. Fastrich, L. in: Baumbach, A., Hueck, A. (2017), § 9, margin no. 2 et seq.

[111] Respective statement is to be given by the Managing Directors according to sec. 8 para. 2 GmbHG.

[112] Such can be the duty to further capitalize the Corporation, in case such is stipulated in the Articles of Association, according to sec. 26 GmbHG – Raiser/Veil (2015), p. 479 et seq. with further references.

such additional obligations are based on an agreement between the shareholders that manifested in the Articles of Association. Such obligations can be, for example, to grant certain usage rights or licenses to the Company, to provide any services to the Company, or the like.[113] Again, such obligations can be imposed on one or all shareholders by way of explicit statement in the Company's Articles of Association, but will always come as a supplement to the obligation to contribute to the share capital, not as a substitution thereof.[114]

Another specific duty might arise for a shareholder from the Company's Articles of Association, in the light of a potential transfer of its share in the Company. The Articles of Association may, by way of explicit wording, oblige each shareholder who wishes to sell its share to make an offer to the other shareholders for purchasing such share, before selling its share to a third party (*right of first refusal*).[115] Such restriction of transferability (*Vinkulierung*) is permitted according to sec. 15 para 5 GmbHG, but requires an explicit regulation and description in the Articles of Association.

Duty of loyalty

Next to the duty to contribute to the share capital, there is a second important duty, which binds all shareholders throughout the entire lifetime of their participation in the Company and eventually even beyond that: The duty of loyalty to the Company (*Treuepflicht*).

In essence, such duty means that each shareholder is always bound to acknowledge and abide to the Company and to foster and enable its Business Object and to work to protect the Company from damages for as long as he is a shareholder in the Company. This general duty of each shareholder is not only

---

[113] Raiser/Veil (2015), p. 478.

[114] The shareholders cannot free themselves from their obligation to contribute to the share capital by way of simply providing services to the company. Such would require qualifying as a contribution in kind and to comply with the therewith related standards and requirements described above – Raiser/Veil (2015), p. 473 et seq.

[115] Cf. Altmeppen, H. in: Roth/Altmeppen, GmbHG (2015), § 15, margin no. 97 et seq.; Raiser/Veil (2015), p. 506 et seq.

typical for the GmbH, but originally derives from – as many basic corporate and structural elements of Corporations do – the concept of the Company constituted under German Civil Law (*Gesellschaft bürgerlichen Rechts*), which is stipulated in sec. 705 et seq. German Civil Code.[116] It is, however, of special importance with the GmbH, as the number of shareholders is here typically rather limited and such few shareholders are usually, unlike with Stock Corporations (*Aktiengesellschaft*), known and connected to each other by personal relationships, including the necessity to resolve on major questions concerning the Company together.[117]

The general duty of loyalty of every shareholder towards the Company is often considered to be a general "catch-all" obligation, in order to make sure that the shareholders' basic interests are always aligned into the similiar direction as the Company's basic interests. Due to a high amount of scientific discussions and practical case law rulings, this phenomenon is nowadays seen as two-fold[118]: There is still a general "catch-all" character within the existing concept of the shareholders' loyalty towards the Company, but there are also very specific peculiarities existing based on this general concept. Such are, for example, certain restrictions to the shareholders' freedom to decide and vote, in specific situations, as well as the prohibition to compete with the Company (*Wettbewerbsverbot*).

The right to resolve and vote freely might be limited due to the general duty of loyalty, in a way that obliges a minority or majority shareholder to vote in a certain way that favours the Company's main interests.

This might even result in an (unwritten) obligation to change the Company's Articles of Association in certain situations.[119] Especially for a shareholder, holding the majority of voting rights in a Company, there might be

---

[116] Cf. Schäfer, C., in: MüKo BGB (2017), § 705, margin no. 226 et seq.

[117] Cf. Liebscher, T., MüKo GmbHG (2016), § 45, margin no. 18 et seq.; Raiser/Veil (2015), p. 21 et seq.

[118] Cf. Lieder, J. in: Michalski, GmbHG (2017), § 13 margin no. 137 et seq.; Merkt, H. in: MüKo GmbHG, § 13, margin no. 88 et seq. with further references; Raiser/Veil (2015), p. 480 & p. 483 et seq.

[119] Cf. Raiser/Veil (2015), p. 483 et seq.

restrictions in the freedom to vote, if a vote could result in a disadvantage for the Company in the light of the shareholder's position within other group companies.

Even though a Company might be part of a group of companies, this does not change its general ambition to act only in its own favour and not to sacrifice its own Company Object in favour of another group company's well-being.[120]

In addition to that, the duty of loyalty does also result in a restriction for the shareholders[121] to not take certain actions, which would be solely in their personal favour, but to the disadvantage of the Company. Such might be, for example, taking business opportunities away from the Company, by responding to those personally and not in the name of the Company – a shareholder might be able to provide certain services on his own and for his own account to somebody, who might have otherwise also been a customer of the Company, in which the shareholder owns a participation. Such so-called "corporate opportunities"[122] must be left for the Company's benefit and not disturbed by personal interests of one of its shareholders.

As a matter of fact, such scenarios, in which the Company's interests and the direct personal interests of one of its shareholders collide or compete, are more likely to occur in case a shareholder is also a managing director of the Company (so-called *Gesellschafter-Geschäftsführer*).

The particular characteristics of the duty of loyalty also depend on the shareholding structure of the respective Company. In case of only few shareholders – e.g. two – the duty of loyalty might lead for each of them to a much higher level of necessary activity for the Company, than might be the case if the Company has a rather high number of shareholders, who all share the work and tasks that practically need to be accomplished in order to foster the Company and work towards the Company's Object. Moreover, in case one shareholder

---

[120] Cf. Raiser/Veil (2015), p. 483.

[121] As well as for the Managing Directors, as will be further described and set forth below in Chapter 3.2.4.

[122] Cf. Noack, U. in: Baumbach, A., Hueck, A. (2017), § 35, margin no. 41 et seq.; Raiser/Veil (2015), p. 485; Wiegand-Schneider, A. in: Münchener Handbuch des Gesellschaftsrechts (2016) vol. 7, part 2, chapter 2, § 37.2.2.e.bb with further references.

owns the majority of voting rights in the Company, he is also obliged to not discriminate any of the minority shareholders, a specific duty deriving from the general rule of equal treatment amongst the shareholders.[123]

In case of one sole shareholder, the general duty of loyalty and its particular manifestations are of specific character: Even though this might seem to be the case at first thought, the Company's own interest might not always run in parallel to its sole shareholders' own interest.

This might, for example, become apparent for questions related to the financial setup of the Company: The Company might have a strong interest to keep the profits it has earned and to re-invest those into an expansion of its business activities, whereas the shareholder might have the deviating interest to resolve on the payout of such profits as a cash dividend, in order to use the money for its private, non-corporate related activities.

Legal consequences in case of non-compliance to existing duties

All duties described above are generally applicable for each shareholder of a GmbH. However, such regime of obligations is effective only because there are also certain consequences attached to the non-compliance.

The Company may, represented by its Managing Director(s), request its shareholder(s) to comply with existing obligations and may also seek for a clarification and enforcement of such obligations in court. As being an independent legal person, the Company is free to do so, based on written obligations, stipulated by law or in the Company's Articles of Association or based on unwritten legal principles, such as the general duty of loyalty. In any case, the Company has the active power to force its shareholder(s) to comply with their obligations.

Moreover, in case a Company has more than one shareholder, the shareholders may also request each other to comply with any existing obligations. The right to claim such is based on an enforcement of the Articles of Association or, again, the unwritten corporate law principles, which ultimately include a

[123] Cf. Hoffmann, J. in: Michalski GmbHG (2017), § 53, margin no. 86 et seq.; Raiser/Veil (2015), p. 487.

component of effective security against discrimination of a shareholder by the non-compliance of another shareholder.[124]

Legal consequences can also be defined in the Articles of Association of the Company: payment of a monetary penalty or even the forfeiture (*Kaduzierung*) or redemption (*Einziehung*)[125] of its share(s) might be permitted consequences of a breach of a shareholder's obligations, in case they are defined as such in the Articles of Association. Again, the enforcement of such can be actively conducted by the other shareholder(s) or by the Company's Managing Director(s).

Piercing the corporate veil

Even though each Corporation is legally defined and considered to be an independent legal subject (sec. 13 para. 1 GmbHG), entering into all its contracts by itself and on its own behalf solely and existing solely on its own, nevertheless, there are certain exceptional situations, in which the shareholder can be exposed to liability for the way they do or do not influence or care for the Company. Such exceptional scenarios are often called a "piercing of the corporate veil", because they result in a financial responsibility of the shareholders for actions or omissions they took "via" the Company.

As being a separate legal person, every Corporation under German law is in a position to make claims, as far as those are substantiated.

This does also include claims of a Corporation against its own shareholders, for example based on contractual obligations existing between Corporation and shareholder,[126] specific civil law claims structures,[127] or also based on tort law (*Deliktsrecht*).

---

[124] Cf. Grunewald, B. (2014), p. 405; Raiser/Veil (2015), p. 470 et seq. with further references.

[125] According to. Sec. 34 para. 1 GmbHG; cf. Raiser/Veil (2015), p. 520 et seq.; Sosnitza, O. in: Michalski, GmbHG (2017), § 34, margin no. 8 et seq. with further references.

[126] The legal basis for such claims will either depend on the specific nature of the contract, for example claims due to defective delivery in the course of a purchase contract would be based upon sec. 434 or sec. 435 German Civil Code, or fall back

The most prominent example of the latter category is the shareholder's liability for fraudulent violation of the Corporation against the principles of good faith (*vorsätzliche sittenwidrige Schädigung*) according to sec. 826 German Civil Code. In several rulings, the German Federal Court has defined the requirements and consequences of this liability instrument, which is often called "liability for extermination"[128]: In case one or several shareholders wilfully interfere with the financial integrity of their Corporation in a way that leads the Corporation into insolvency, then the Corporation has the right to claim reimbursement of all such damages suffered.[129] This liability does not mean to serve as a compensation mechanism for poor or unlucky economic decision-making and management, but only in cases, where the shareholders fraudulently take benefit from the Corporation's legal independency and its liability limitation to the registered share capital.

The scenarios, in which such a piercing of the corporate veil towards the shareholders is legally justified based on jurisdiction, are to be seen as an restrictive set of extraordinary situations. By no means is a direct liability of the shareholders supposed to be a common tool to create additional volume of

---

to one of the general rules on contractual liability, according to sec. 241 para. 1 German Civil Code.

[127] E.g. Culpa in contrahendo according to sec. 241 para. 2 German Civil Code.

[128] In German "*Existenzvernichtungshaftung*" as one prominent category of the personal liability of the shareholders by way of "piercing of the corporate veil" – cf. Fastrich, L., in: Baumbach, A., Hueck, A. (2018), § 13 margin no. 43 et seq.; Grunewald, B. (2014) p. 403; Hüffer, U., Koch, J. (2011), p. 382; Lieder, J., in Michalski GmbHG (2017), § 13, E.III; Merkt, H. in: MüKo GmbHG (2018), § 13, margin no. 343 et seq.; Prütting, J. (2018), p. 409 et seq.; Raiser/Veil (2015), p. 488 et seq.; Schmittmann, J.M. (2018), p. 123 et seq. with further references.

[129] Cf. Regarding the old concept and case law around „Bremer Vulkan": Bruns, P. (2003), p. 815; Freitag, R. (2003), p. 805 et seq.; regarding the recent case law after "Trihotel": Katzenmeier, C., in: Dauner-Lieb, B., Langen, W. (2016), § 826 margin no. 38 et seq.; Kölbl, A. (2009), 1194 et seq.; Schmittmann, J.M. (2018), p. 126 et seq.; Stöber, M. (2013), p. 2295 et seq.; Wagner, G., in: MüKo BGB (2017), § 826, margin no. 165 et seq. with further references.

recoverable assets for creditors of the Company. As often re-emphasized by the courts, these liability constructs pose an *ultima ratio* legal construction only, which shall close the unintentional gap of fraudulent misusage of the Corporation by its shareholders and therewith serves as a protection of the Corporation itself and its creditors in the business environment.[130]

Rights

As a matter of fact, the shareholders do not only face a significant number of obligations, but they are also entitled to numerous rights concerning the Company and their standing as owner of such.

The central right of each shareholder is the right to vote in the shareholders' meeting, according to sec. 47 GmbHG.[131] The voting rights are allocated amongst all shareholders in a pro-rata amount to their particular amount of participation in the Company. However, such proportional allocation of voting rights can be modified by specific agreements between the shareholders – one shareholder might for example accept to have less or no voting rights, but a higher pro-rata dividend payout instead (so-called "preferential shares" = *Vorzugsanteile*). As a logical pre-condition of the voting right, each shareholder is also entitled to be invited to and to participate in each shareholders' meeting, which is convened.[132]

The scope of resolutions to be made by the shareholders by way of voting is determined either by the Company's Articles of Association – which, in this regard, are also the constitutional basis for the allocation of competencies between the shareholders and the management – and/or by statutory requirements, as set out in sec. 46 GmbHG. Such certain competencies stipulated therein cannot be

---

[130] Cf. Grunewald, B. (2014), p. 399; Raiser/Veil (2015), p. 493 et seq.

[131] Cf. Noack, U. in: Baumbach, A., Hueck, A. (2017), § 47, margin no. 32 et seq.; Römermann, V., in: Michalski GmbHG (2017), § 47, margin no. 43 et seq. with further references.

[132] For details regarding the invitation and convening of a shareholders' meeting – see further: sec. 48 - 51 GmbHG; cf. Raiser/Veil (2015), p. 570 et seq.; Seeling, O., Zwickel, M. (2009), p. 1097 et seq.; Wicke, H. (2017), p. 235 et seq.

transferred from the shareholders to any other constitutional body/organ of the Company.[133]

Next to the rights associated with the conduct and participation in the shareholders' meeting, each shareholder also has certain other rights, which directly result from the proportional scope of his participation in the Company. The right to claim and receive a dividend payout, in case the Company has earned profits, is one of the most prominent ones.[134] Again depending on the stipulation set forth in the Articles of Association, such payout might be claimed under certain circumstances only and/or at a certain time – e.g. on an annual basis.[135]

In order to be in a position to always have sufficient knowledge about the Company's status and business, each shareholder has the right to be fully informed by the Managing Directors about all matters related to the Company[136] and to take insight into all books and records of the Company at all times.[137]

Such basic rights are stipulated in sec. 51a and sec. 51b GmbHG. Information is considered to be the basis for any decision to be taken by the shareholders. This right cannot be waived or limited and does exist irrespective of the number, nature and value of the shares held by a shareholder.[138] Its scope is very broad: all information, which the shareholder(s) consider(s) to be of relevance can be requested and all books and records of the Company can be

---

[133] Cf. Raiser/Veil (2015), p. 465 & p. 570 with further references.

[134] According to sec. 29 para. 1 GmbHG; cf. Ekkenga, J., in: MüKo GmbHG (2018), § 29, margin no. 1 et seq.; Raiser/Veil (2015), p. 605 et seq.

[135] Cf. Ekkenga, J., in: MüKo GmbHG (2018), § 29, margin no. 3 et seq.; Raiser/Veil (2015), p. 605 et seq.

[136] Cf. Grunewald, B. (2014), p. 118 et seq.; Hillmann, R., in: MüKo GmbHG (2016), § 51a, marin no. 40 et seq.; Hüffer, U., Koch, J. (2011), p. 378; Raiser/Veil (2015), p. 466 et seq.; Römermann, V. in: Michalski, GmbHG (2017), § 51a, margin no. 20 et seq. with further references; Schneider, B. (2008), p. 638 et seq.

[137] Cf. Hillmann, R., in: MüKo GmbHG (2016), § 51a, marin no. 50 et seq.; Noack, U., in: Baumbach, A., Hueck, A. (2017), § 51a, margin no. 19 et seq. with further references.

[138] Cf. Raiser/Veil (2015), p. 470 with further references.

reviewed. A limitation to only those information, which is relevant to prepare for the agenda items of a shareholders' meeting, as this is the case for Stock Corporations according to sec. 131 AktG, is not existing for the GmbH – the shareholders have the mandatory right to know and see everything related to the Company.[139]

The right to receive insight into the Company's books and records does also include external consultants acting on behalf of the respective shareholder(s), if such consultants have previously signed a Non-Disclosure Agreement and are thereby bound to strict confidentiality concerning all aspects of the information they shall receive.[140]

Limits to the shareholder'(s) rights for information and insight are stipulated in sec. 51 a para. 2 GmbHG and do only capture scenarios, in which the execution of such rights would (1) allegedly be used for interests of the respective shareholders outside of his interests concerning the Company or (2) if the execution of such rights would significantly harm the Company. Moreover, the general legal principles of good faith and proportionality set out certain restrictions as well.[141]

Another important aspect of the legal relations between the shareholders is general rule, by which each shareholder is obliged to treat each other shareholder fair and without discrimination. This legal construct works both ways: Each shareholder is also entitled to claim and receive a fair treatment, which is equal to the treatment and position of all other shareholders.[142]

Again, such right can be enforced by way of a court decision initiated by a claim filed by the affected shareholder, who fears to be treated to his disadvantage, discriminated and therewith violated in his rights of fair and equal

---

[139] Cf. Raiser/Veil (2015), p. 470 with further references.

[140] Cf. Raiser/Veil (2015), p. 469 with further references.

[141] According to sec. 51a para. 2 GmbHG.

[142] Cf. Fastrich, L. in: Baumbach, A., Hueck, A. (2017), § 13, margin no. 31 et seq.; Saenger, I. in: Saenger/Inhester, GmbHG (2016), § 13, margin no. 64 et seq. with further references.

treatment (so-called *actio pro socio*).[143] This right to file a claim against all/several/one of his fellow shareholders sets out a strong control mechanism amongst the shareholders, which is not explicitly set out in the GmbHG, but was developed and defined by jurisdiction in various court decisions,[144] targeted for example to provide for a specific legal instrument to enforce the rights arising out of sec. 31 GmbHG or als sec. 9 and sec. 9a GmbHG, which also include the component of a specific right for each shareholder.

The right to execute an *actio pro socio* cannot be waived.[145] It can be used as the legal vehicle to execute rights to claim performance of certain acts[146] or omissions[147], including specific actions to be taken by one of the Company's organs[148].

3.2.3.2. Aktiengesellschaft

Similar to the GmbH, also the stockholders of a German Aktiengesellschaft live their participation in the context of various specific duties and rights defined by mandatory law and also by various court decisions over the years.

The entire landscape of duties and rights of the shareholders does indirectly shape and influence the position and scope of legal leverage of the Company's management. Therefore, also those aspects are part of the theoretical fundament required to answer the Research Question.

---

[143] Cf. Altmeppen, H. in: Roth/Altmeppen, GmbHG, (2015), § 13 margin no. 15 et seq.; Barnert, T. (2003), p. 63 et seq.; Raiser/Veil (2015), p. 470.

[144] Cf. Altmeppen, H. in: Roth/Altmeppen, GmbHG, (2015), § 13 margin no. 16 et seq.; Raiser/Veil (2015), p. 471 et seq. with further references.

[145] Cf. Altmeppen, H. in: Roth/Altmeppen, GmbHG, (2015), § 13 margin no. 16 et seq.

[146] Cf. Barnert, T. (2003), p. 63 et seq.; Raiser/Veil (2015), p. 472 with further references.

[147] Cf. Barnert, T. (2003), p. 63 et seq.; Raiser/Veil (2015), p. 473 with further references.

[148] Cf. Barnert, T. (2003), p. 63 et seq.; Altmeppen, H. in: Roth/Altmeppen, GmbHG, (2015), § 13 margin no. 18 et seq.

Duties – Contribution in cash or in kind

According to sec. 54 AktG, each shareholder is obliged to fully pay his contribution to the Company. This is the "central obligation"[149] of each shareholder and no release or limitations are permitted, as stipulated in sec. 54 para. 1 and sec. 66 AktG. This includes also the prohibition to set-off claims, which the shareholder might have against the Company, against the duty to fully contribute to the Company's registered share capital.[150] Moreover, the contribution has to be made in cash, unless a contribution in kind is explicitly resolved in accordance with sec. 27 AktG.

Duty of loyalty

Next to the duty to contribute to the Company's financial structure, German courts have also developed a legal construction to further ensure that the Company's interests and existence is properly ensured and not to be put at risk by the shareholders and their potential individual interests[151]: Every shareholder is generally obliged to act in strict loyality towards the Company and the other shareholders. In particular, this loyalty does include the prohibition to harm the Company, to take sufficient care and consideration of the Company's interests and to foster the Company's statutory Object according to the Articles of Association.[152]

---

[149] Sec. 54 para. 1 AktG talks about the *Hauptverpflichtung* [= central obligation] of each shareholder; cf. Grunewald, B. (2014), 305; Hüffer, U., Koch, J. (2011), p. 334; ; Hüffer, U., Koch, J. (2016), § 55, margin no. 2 et seq. with further references.

[150] According to sec. 66 para. 1 AktG; cf. Raiser/Veil (2015), p. 111.

[151] Cf. Cahn, A., von Spannenberg, M.A. in: Spindler, G., Stilz, E., Aktiengesetz (2015), § 53a, margin no. 49 et seq. with further references; Krieger, G. in: Münchener Handbuch des Gesellschaftsrechts (2015), vol. 4, § 70.B.II.2; Raiser/Veil (2015), p. 113 et seq.

[152] Cf. Grunewald, B. (2014), p. 254 et seq.; Lange, K.W. in: Henssler, M., Strohn, L. (2016), § 53a, margin no. 7 et seq. with further references; Raiser/Veil (2015), p. 113 et seq.

Specific duty to compensate

Moreover, sec. 117 AktG sets out a specific duty to compensate the Company and/or the shareholders for any losses suffered because one or several shareholder(s) have used their influence on the Company's management in a fraudulent way to pursue personal interests. Such a misusage of the respective shareholders' powers and position leads to a personal liability for damages suffered and to a right for the Company and/or the suffering shareholders, to claim full compensation of all damages that occurred.

Rights - Administrative rights (Verwaltungsrechte)

German Stock Corporation law distinguishes between Administrative Rights and Property Rights of shareholders. Both categories include and summarize particular aspects that come along with the ownership of participation in a Corporation and are therefore inevitably connected with the ownership in the shares.[153]

Regarding the administration of the Company, each shareholder is entitled to participate in all shareholders' meetings, including the right to speak and vote during the meetings.[154] In order to effectively and actively manage and conduct its participation, each shareholder is also entitled to challenge decisions, which have been taken and to have them checked by the competent courts.[155]

In case a shareholder does own only a minority of the shares in a Company, certain additional rights occur, which aim to protect his particular position as minority shareholder against the power of the majority.[156]

---

[153] Cf. Heider, K. in: MüKo AktG (2016), § 11, margin no. 11 et seq.; Raiser/Veil (2015), p. 101 et seq.; Rieckers, O. in: Münchener Handbuch des Gesellschaftsrechts (2015), vol. 4, § 17.I.3, margin no. 3 et seq. with further references.

[154] Cf. Heider, K. in: MüKo AktG (2016), § 12, margin no. 6 et seq.; Hüffer, U., Koch, J. (2011), p. 326 et seq.

[155] Cf. Hüffer, U., Koch, J. (2016), § 245, margin no. 5 et seq. with further references.

[156] Regulated in particular in sec. 122 and sec. 148 AktG; cf. Cahn, A., von Spannenberg, M.A. in: Spindler, G., Stilz, E., Aktiengesetz (2015), § 53a, margin

In general, the Administrative Rights of the shareholders are designed in a way to be suitable to offer an appropriate level of protection and participation for the shareholders, but at the same time also practical in the light of Stock Corporation's nature as Company with a large number of shareholders – unlike the GmbH, where the number of shareholders is typically rather low.[157]

Rights - Property rights (Vermögensrechte)

Next to the rights for administrative participation in the Stock Corporation, the AktG does also stipulate specific rights for each shareholder to ensure his participation in the economic and financial situation of the Company. First and foremost, this aspect does include the right for each shareholder to claim dividends according to the pro rata amount of his shares. This right is basically stipulated in sec. 58 para. 4 and sec. 60 AktG. For most shareholders in Stock Corporations, this right is the central reason for their participation – they seek for a good investment of their liquidity and this is mainly determined by the financial return they can gain for such investment via the right to claim dividends as participation in the financial success of the Company.

Next to that, each shareholder also has the right to subscribe to new shares, which the Company decides to emit by way of a capital increase.[158] This right does safeguard the shareholder's position in the Company and enables him to ensure that his percentual participation in the company is not factually reduced by the overall increase of existing shares. However, this right to subscribe to new shares can be excluded under certain defined conditions or waived by the shareholder himself.[159]

Right for equal treatment

Sec. 53a AktG rules that all shareholders have to be treated equally. Thereby, this norm creates the basis for each shareholder(s)' right to claim an

---

no. 50 et seq.; Hüffer, U., Koch, J. (2016), § 122, margin no. 2 et seq.; Raiser/Veil (2015), p. 101.

[157] As described above in Chapter 3.2.2.2.

[158] According to sec. 186 para. 1 AktG.

[159] According to sec. 186 para. 4 AktG.

equal treatment. In case of a violation of this basic principle of German Corporate law, the respective resolution or action, which constitutes and manifests the unequal treatment, is contestable by the discriminated shareholder, according to sec 243 para. 1 AktG.[160]

Special rights/primary rights (Vorzugsrechte)

Another more specific category of shareholders rights can be voluntarily created based on the Company's Articles of Association – the Articles can allow e.g. for specific types of shares, which do not offer the full portfolio of rights as "common" shares do, but e.g. limit the respective shareholder's administrative rights in the Company for the advantage of a higher dividend payout right.

Such rights are often called "primary rights" and the respective category of shares is then called "primary shares".[161] Those are of interest especially for publicly listed Companies, which want to attract investors via the capital markets with an "easy" and high return expectancy on their investment.

Right to file judicial claims against the Company

Based on various court decisions, the existing range of shareholders' rights has been further expanded throughout the past years and decades. Amongst others, a specific right of a shareholder to file for a judicial claim against the Company in case an act or omission of the Company would restrict the shareholder's rights more than legally justified.[162] As a matter of fact, this right to file a claim against the Company is seen as an *ultima ratio* of the respective shareholder, but still as a valid instrument to ensure and enforce his statutory legal participation rights in the Company.[163]

---

[160] Cf. Hüffer, U., Koch, J. (2016), § 53a, margin no. 2 et seq. with further references.

[161] Cf. Heider, K. in: MüKo AktG (2016), § 12 margin no. 30 et seq.; Raiser/Veil (2015), p. 103 et seq. with further references.

[162] Cf. Raiser/Veil (2015), p. 105 et seq. with further references.

[163] Cf. Grunewald, B. (2014), p. 323 et seq.; Raiser/Veil (2015), p. 105 et seq. with further references.

In contrast to such rights to make claims against the Company, any enforcement of rights between the shareholders would require to be put on an existing legal basis outside of the pure means of German Corporate law. Such could be for example the existence of a claimable right based on tort law or arising out of or in connection with a contract between the shareholders.[164]

3.2.3.3. UK Limited

Even though the UK Limited structurally differs from continental European legal forms in many aspects, the rights and duties of its shareholders are comparable to those of e.g. German or Spanish corporations. These similarities are not a conincidence. They merely derive from the fact that shareholders, as being the owners and principals of a Corporation, must logically be equipped with certain rights in order to enforce and execute their ownership position as a role of ultimate control. Nevertheless, the shareholders' rights are, also in the UK Limited, limited and fenced by the interests of the Corporation itself, which are mainly represented and safeguarded by its Managing Directors.

Rights – participation, information and attendance

The most important rights of shareholders in a UK Limited Company are

(1) The right to take decisions of general directive and strategic importance for the Corporation,

(2) the right to be informed by the Corporation's management about all relevant events and developments concerning the Corporation, and

(3) the right to participate and vote in the annual and extraordinary general meetings, in order to be able to execute their right described above.[165]

---

[164] Cf. Raiser/Veil (2015), p. 105 et seq. with further references.

[165] Cf. Just, C. (2006), p. 25 et seq.; Kadel, J. (2006), p. 102 et seq. with further references; Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A.,

Such rights constitute the fundamental regime by which the shareholders are legally in a position to execute their ownership rights and to determine and change the objective, towards which the Corporation operates.

In particular, the decisions-making regarding the structural fundaments of the Corporation by way of changes or amendments to the Corporation's articles of association, which is to be resolved by the shareholders' general meeting.[166]

The shareholders' rights to participate and vote in the general meetings might depend on the nature of the shares held by the respective shareholder. By way of specific ruling in the Corporation's articles of association, resolution can be made to create different categories of shares with different rights attached. The most common example is the creating of preferential shares, which are entitled to receive an increased dividend payout, whereas they restrict their owner's voting rights in the annual meeting.

If the respective nature of shares does allow for a full participation and voting of the shareholder in the general meeting, then such will include resolving about the following matters:

(1) Approval of the Corporation's report and annual accounts,
(2) Approval of the directors' remuneration report,
(3) Approval of the Corporation's dividend payout,
(4) Appointment of the Corporation's directors, and
(5) Approval of any amendments or changes to the Corporation's articles of association.[167]

Duties

Similar as for Corporations established under German law, also the shareholders of a UK Limited are obliged to follow any obligations stipulated for

---

Barth, M., (2018), Vereinigtes Königreich, margin no. 43 et seq. with further references.

[166] Cf. Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 29 et seq. with further references.

[167] Cf. Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 43 et seq. with further references.

them in the Corporation's articles of association, such as for example to support the Company's Object. Moreover, the shareholder face a liability, which is, however, limited to the value of the shares they hold.[168] Similar to the German Corporations, this highlights the nature of the UK Limited as a separate legal entity, which is the target of the liabilities it does create alongside its business activities. There is no direct liability of the shareholders for such actions of the Corporation, except for the respective share value and for specific fraudulent scenarios in which a piercing of the corporate veil is permitted.

Moreover, the most important duty of the shareholders of a UK Limited is the duty of loyalty vis-á-vis the Corporation. It is triggered by the binding effect of the Corporation's articles of association and evolves for example in situations, in which one shareholder considers setting up another separate business that would directly compete with the Corporation's business activities. Such behaviour would not be permitted for shareholders.[169]

In a nutshell, the rights and obligations of shareholders in UK Limited Corporations are to some extend comparable to those existing under German Corporate laws, whereas they are also significantly determined by British case law, as such being a typical characteristic of Common Law jurisdictions, such as UK law.[170]

3.2.3.4. Spanish Corporations

Also under Spanish Corporate law, the shareholders' role as owners of the Company is manifestated by a variety of rights, which entitle them to shape and influence the Company with regards to the most fundamental decisions and directions.

Rights

---

[168] Cf. Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 11 et seq. with further references.
[169] Cf. Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 43 et seq. with further references.
[170] Raiser/Veil (2015), p. 26 et seq. with further references.

In particular, each shareholder is entitled to participate and vote in the General Shareholders' Meeting, unless he is owner of a specific class of shares for which voting rights are restricted or excluded (e.g. preferential shares). Unless further expanded in the Company's Articles of Association, the shareholders are required and entitled to at least resolve about

(1) the approval of the Company's annual accounts,
(2) the distribution of the Company's profits and allocation of losses,
(3) appointment and removal of managing directors, and Company auditors
(4) any changes or amendments to the Company's articles of association
(5) any matters of organisational and structural importance, such as transformations of the legal entity, mergers, spin-offs or else.[171]

Moreover, the shareholders have specific rights to challenge and interfere into decisions taken by the management, if such are not in compliance with existing laws and/or not in line with the Company's articles of association.

In order to be in a position to effectively execute their rights, in particular to assess the legal and statutorial compliance, the shareholders also have an encompassing right to receive all relevant information and e.g. to examine the Company's financial statements.[172]

Duties

Inversely to their rights, the shareholders do also have certain duties attached to their position and role. First and foremost, they are bound by the Company's articles of association and the competencies and objectives stated therein (unless they have validly resolved on a change of those).

---

[171] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 33 et seq. & margin no. 148 et seq.

[172] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 33 et seq. & margin no. 148 et seq.

Similar as for the UK Limited and German corporate forms, also the Corporations under Spanish law are to be seen as separate legal institutions, which can defend their rights, even if it is against their owners.[173]

Moreover, the shareholders are again bound by certain unwritten principles of Corporate law, also in Spain – first and foremost the duty of loyalty and care for the Company, which derive as duties out of the property of the shareholders in the Company.[174]

[173] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 18 et seq.

[174] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 33 et seq. & margin no. 68 et seq. with further references.

3.2.4. Rights and duties of management board members in Corporations

As seen above, the internal organisation of Corporations differs, depending on the type and legislative background. However, in all Corporations, the authorities for strategic questions and day-to-day business decision-making are separated into the competencies of the shareholders and of the management of the Corporation. This is the most fundamental expression of the Corporations' independence from its own shareholders.[175]

Moreover, this consequentially leads to the fact that the management of a Corporation has its own, individual rights and obligations, determined by both – the mandatory legal regime, in which the Corporation has been founded and is existing, as well as its internal constitutional basis – the articles of association and perhaps even by special by-laws for the Managing Directors.[176]

From both such regimes, individual rights and duties arise for the managing directors, which shall be further described and analysed in the following, taking into consideration again some of the most typical forms of Corporations in Europe, which will also be of relevance for the analysis of the Case Studies further down in Chapter 5: The German Corporate forms, the *Limited Company* according to British laws, as well as the *Sociedad Limitada and Sociedad Anónima* according to Spanish laws.

3.2.4.1. GmbH

A GmbH incorporated under German law must have one or several Managing Directors.[177] They represent the GmbH in its daily business and also in front of judicial courts.[178] The scope of their rights and duties is partially determined by mandatorily applicable laws and partially also set out by the

---

[175] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 18 et seq.

[176] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 47 et seq. & margin no 166 et seq.

[177] According to sec. 35 para. 2 GmbHG.

[178] According to sec. 35 para. 1 GmbHG.

Articles of Association. This two-fold regulatory regime sets the scene for the assessment of each individual decision and action taken by a Managing Director.

In case the shareholders appoint more than one Managing Director, they can be either authorized to represent the GmbH always alone (Sole Representation Power = *Einzelvertretungsbefugnis*)[179] or always together with a second Managing Director[180] (Joint Representation Power – *Gesamtvertretungsbefugnis*).[181] If the shareholders wish to grant Sole Representation Power to the Managing Directors, this requires being resolved explicitly in the Articles of Association.

If no such resolution is made in the Articles of Association, then any Managing Director will always be automatically granted the power to jointly represent the GmbH, as this is the legal standard constellation, according to sec. 35 para. 2 sent. 1. The type of representation power (sole/joint) also requires to be filed and published with the Commercial Register, in order to allow any third party to be able to verify the nature of the representation power of each Managing Director of a GmbH. This is of particular interest for contract partners, in order to verify, if the other party is validly represented and if, for example, one Managing Director can validly sign a contract alone.

Duties of the Managing Directors

The duties and obligations, which exist for every Managing Director of a GmbH can be segmented into five different groups of duties:

---

[179] According to sec. 35 para. 2 GmbHG; cf. Raiser/Veil (2015), p. 535 et seq.; Schmittmann, J.M. (2018), p. 45 with further references; Stephan, K.-D., Tieves, J. in: MüKo GmbHG (2016), § 35, margin no. 2 et seq.

[180] Cf. Schmittmann, J.M. (2018), p. 45 with further references; in case the shareholders or Managing Directors have also appointed one or more proxy holders (Prokuristen), those have to comply with the same rules as the Managing Directors, but the GmbH can be also represented by one Managing Director and one Proxy Holder in case of multi-representation – Raiser/Veil (2015), p. 538 et seq.

[181] Cf. Raiser/Veil (2015), p. 541 with further references.

(1) duties arising out of the applicable statutory laws and the Company's Articles of Association[182],
(2) the overall duty to always act compliant and in accordance with mandatory laws, orders and binding rules (*duty of legality/compliance duty*),
(3) the duty to cooperate with all other member of the management board,
(4) the general duty of care and
(5) the general duty of loyalty towards the Company.[183]

When now looking closer to each of those groups, it will become apparent that those layers of responsibility create and define a radius for manoeuvres that enables each Managing Director to conduct the Company's business activities with a rather large amount of flexibility.

Duties to comply with statutory laws and the Company's constitution

The number of specific statutory duties for the Managing Directors is high: The general duty to protect the Company's registered share capital as minimum capitalization according to sec. 43 para. 3 GmbHG; the duty to file for insolvency, if the preconditions for insolvency apply to the Company according to sec. 64 GmbHG and sec. 15a InsO; the duty to always conduct adequate and orderly accounting of all business activities of the Company according to sec. 41 GmbHG and to set up and publish[184] the Annual Accounts of the Company according to

[182] Such, themselves being put to existence based on the statutory constitutional regulations which apply for every GmbH and which enable the shareholders to resolve on an allocation of rights and duties for the management – and to modify the specifics of this setup at any later point in time, during the life of the Company – according to sec. 45 GmbHG.

[183] Cf. Raiser/Veil (2015), p. 555 et seq.; v.Woedtke, N. (2013), p. 484 et seq.

[184] After approval of the annual accounts by the shareholders' meeting, according to sec. 42a GmbHG.

sec. 242, 264 HGB, these are only some few and most prominent examples of such mandatory legal duties.[185]

The Managing Directors can never be exempt from the constant compliance with those duties – they exist for as long as the Managing Director(s) is/are in office.[186] Even though they often regulate rather specific legal topics, they form the inevitable basis of the scope of actions that the Managing Director is responsible for. Failure to comply with those rules leads to a direct liability of the Managing Director vis-á-vis the Company and/or any third party, who suffers damages due to such incompliance.

In addition to mandatory laws, the Managing Directors are also directly bound to fulfil the obligations and responsibilities imposed on them in the Company's Articles of Association. Resolution about the content and modifications of the Articles of Association are the sole competency of the shareholders.[187] But "living" the Articles of Association, making sure to always abide with them and to transform the business concept depicted therein into reality, this obligation is partially imposed on the Managing Directors as well.

This includes the alignment and steering of the Company's business activities with the Company's object, as defined in the Articles of Association. The Managing Directors are obliged to conduct the Company's business in a way to foster its defined object and are not allowed to conduct activities which would in no way, neither directly nor indirectly, relate to the Company's object.[188]

---

185 For a general overview see also: Axhausen, M. in: Beck'sches Handbuch der GmbH (2014), § 5, margin no. 177 et seq.; Hüffer, U., Koch, J. (2014), p. 365 et seq.; Raiser/Veil (2015), p. 555 et seq.; Schauf, M. (2017), p. 2883 et seq.

186 Registration with the Commercial Register is not decisive for the existence of such obligations, not even the existence of an employment law agreement or service contract between the Managing Director and the employing Company – cf. Raiser/Veil (2015), p. 555 et seq. with further references; Schmittmann, J.M. (2018), p. 45 with further references.

187 According to sec. 53 GmbHG.

188 Cf. Axhausen, M. in: Beck'sches Handbuch der GmbH (2014), § 5, margin no. 177 et seq.; Raiser/Veil (2015), p. 555; Wicke, H. in: MüKo GmbHG (2018), § 3 B.III.2.b with further references.

Moreover, the Articles of Association can also include certain other explicit duties and responsibilities for the Managing Directors. If so, then all these stipulate mandatory duties, the non-compliance with which would result in a liability of the Managing Directors.

Next to the Articles of Association, many Companies have also specific written by-laws, which further define or narrow down the rights and duties of the Company's Managing Directors, as well as the management's internal setup and organisation. Such by-laws are usually adopted by the Managing Directors themselves. In case they exist, they form an essential part of the constitutional structure of the management organ. However, there is no necessity to always install such additional rules, as they are not a mandatory requirement for the organisational basis of a Company.[189] If such by-laws exist, then they typically define the allocation of duties and responsibilities between the Managing Directors.

In addition to the by-laws, further duties or rights for a Managing Directors can be also defined in its individual employment or service contract.[190] This contract would typically rule on the specific relationship between an individual Managing Director and its employer/principal, such being the Company.

Examples of such individual rights or duties, which might be defined in the service agreement, could be an specific obligation for the Managing Director not to compete with the Company and not to enter into a service agreement with one of the Company's director competitors for a certain period of time after the end of the service agreement.[191]

---

[189] Cf. Leuering, D., Dornhegge, S. (2010), p. 13 et seq.; Ziemons, H.in: Michalski GmbHG (2017), § 43, margin no. 326 et seq. with further references.

[190] Cf. Grunewald, B. (2014), p. 361; Hüffer, U., Koch, J. (2011), p. 363; Raiser/Veil (2015), p. 556; Tebben, J. in: Michalski, GmbHG (2017), § 6, margin no. 152 et seq. with further references.

[191] Cf. Jaeger, G. in: MüKo GmbHG (2016), § 35 margin no. 360 et seq.; Oetker, H. in: Henssler/Strohn, GmbHG (2016), § 35, margin no. 20 et seq. with further references.

Duty of legality

In addition to all the specific obligations imposed onto the Managing Directors by particular regulation or arising out of Company-specific constitutional documents, such as the Articles of Association, each Managing Director does also have the general duty to ensure that the Company always complies with all applicable legal requirements and statutory orders.

For obvious and clear obligations, such as the duty to make all due and payable social security payments for the Company's employees[192] or not to violate the rules of applicable criminal laws[193], this is more a question of a proper and effective company-internal organisation and reporting.

Discussions and concepts regarding such installation and maintenance of an appropriate internal Compliance system has been subject to numerous discussions and court decisions in the last years.[194] In a nutshell, the most crucial elements of a reliable Compliance system are:[195]

(1) an organisational structure that creates and allows for a proper and unfiltered reporting of all relevant means[196] and information about the Company up to the Management's level,

---

[192] Cf. Brand, J., Bentlage, M. in: Handbuch Managerhaftung (2017), § 37, margin no. 30 et seq. with further references; Raiser/Veil (2015), p. 556 with further references.

[193] Cf. Krause, D.M. in: Handbuch Managerhaftung (2017), § 40 with further references.

[194] Cf. Kiethe, K. (2007), p. 393 et seq.; Raiser/Veil (2015), p. 557 & p. 173 et seq.; Schulz, M. (2017), p. 1475 et seq.; Sonnenberg, T. (2017), p. 917 et seq. with further references; Stephan, K.-D., Thieves, J. in: MüKo GmbHG (2016), § 37, margin no. 25 et seq.; Ziemons, H. in: Michalski, GmbHG (2017), § 43, margin no. 174 et seq. with further references.

[195] Cf. Raiser/Veil (2015), p. 557 & p. 173 et seq.; Sonnenberg, T. (2017), p. 917 et seq. with further references.

[196] Such include not only relevant data concerning the Company's business and financial performance, but also related to existing legal requirements e.g. from the fields of Environmental, Health & Safety (EHS), Antitrust and competition laws, anti-corruption and anti-bribery and others.

(2) the installation and roll-out of understandable and focused Compliance policies, in which the most important rules for conduct of daily business activities of the Company are described and explained for the employees – in many Companies this is often supplemented by a "Code of Conduct", in which the most relevant legal regulations and instructions are summarized,

(3) the creation and constant training of a company-wide awareness for existing Compliance policies and risks,

(4) the installation and maintenance of an independent reporting system for Compliance concerns and breaches, ideally via different channels such as a Whistleblowing-Hotline for anonymous information, the existence of ombuds persons at the Company's offices and sites for personal interaction and questions to be raised by the associates or a general availability of the Legal and/or HR department for any kinds of Compliance-related questions.

First and foremost, the installation and proper maintenance of such a Compliance system is a duty of the Managing Directors. In case of failure of such measures, they will be responsible and liable, also on a personal level.[197]

However, the Compliance system and organisation in a Company does provide for general instruments and organisation only.

For any specific cases and circumstances, under which it is not clear and obvious to detect a legal obligation of the Company or a violation of such, the Managing Directors are obliged to always investigate and determine, if a certain obligation or risk of violation exists, or not. Especially in situations, which require deep investigations to gather all necessary facts and a thorough legal assessment to evaluate the Company's duties, the Managing Directors can be obliged to take immediate action, and to even seek for assistance of outside experts.[198]

---

[197] According to sec. 43 para. 2 GmbHG; cf. Vetter, E. in: Handbuch Managerhaftung (2017), § 22 with further references.

[198] Cf. Fuhrmann, L. (2016), p. 881 et seq.; Paefgen, W.G. (2016), p. 433 et seq.; Theusinger, I., Jung, O. in: Münchener Anwaltshandbuch GmbH-Recht (2014), § 24, margin no. 36 et seq.

A field, in which outside legal assessment is often required in order to properly identify the Company's existing rights and duties is the vast field of competition and cartel laws. This aspect of Managerial obligations exists in particular in Corporate Transactions and any form of Mergers & Acquisitions, where the likelihood of relevance in the light of existing competition laws is significantly high.

As a basic principle, the existing competition laws in Germany[199] and throughout Europe[200] aim to protect a free and fair competition on the markets. Whenever certain actions of the market participants put this concept at risk, then competition laws impose certain restrictions to individual and/or collective behaviour.[201] The most prominent examples of such restrictions would be the prohibition of common pricing of several competing market participants[202]. As the prices, which are achievable for certain goods or services, shall be freely determined by the general economic market principles of demand and supply resources,[203] the market participants may not interfere to this mechanisms by way of overruling such market freedom with individual agreements to ask for certain (minimum) prices from all potential customers.[204]

---

[199] Cf. Bosch, W. (2018), p. 1731 et seq.; Dreher, M. in: Handbuch Managerhaftung (2017), § 35 with further references; Glöckner, J. (2017), p. 905 et seq.; Volmar, M., Kranz, J. (2018), p. 14 et seq.

[200] Cf. Bosch, W. (2018), p. 1731 et seq.; Meessen, K.M., Kersting, C. in: Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht (2016), part A, margin no. 3 et seq.; Mühle, J., Weitbrecht, A. (2018), p. 181 et seq.

[201] Cf. Meessen, K.M., Kersting, C. in: Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht (2016), part A, margin no. 3 et seq. with further references.

[202] Cf. Dreher, M. in: Handbuch Managerhaftung (2017), § 35, margin no. 37 et seq. with further references.

[203] According to sec. 1 GWB (German law against market restrictions); cf. Nordemann, J.B. in: Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht (2016), GWB § 1, margin no. 6 et seq.

[204] Cf. Bosch, W. (2018), p. 1731 et seq.; Volmar, M., Kranz, J. (2018), p. 14 et seq.

From the perspective of the Managing Directors, the constant monitoring of Antitrust and Competition law compliance of the Company is of fundamental importance, not only in the context of Corporate Transactions, but then in an even increased way.

The consequences of a violation of existing obligations in this regard are severe – not only the reputational loss in the market,[205] which might mean the ruin for the Company, but also significant fines, which the cartel authorities on a national[206] and a European[207] level may impose on the Company and on the responsible individuals are a realistic threat.[208] Therefore, Managing Directors are well-advised to always actively monitor and operate strict compliance in this regard and to seek for outside expert advice, whenever in doubt.

Duty to cooperate

Moreover, there is another basic duty, which logically only applies in case the Company has more than one appointed Managing Director: Each Managing Director is obliged to always cooperate with all other Managing Directors of the Company for the Company's well-being and advantage.

First and foremost, this general duty implies the specific duty to exchange all information,[209] which is related to the Company and which is helpful and/or important, in order to manage the Company's business activities. Usually, regular meetings of all Managing Directors will form the organisational basis of this information exchange. In addition, significant information must be also shared among all Managing Directors immediately, if required for the well-being of the Company. This can be then either done by summoning and hosting an

---

[205] Cf. Dreher, M. in: Handbuch Managerhaftung (2017), § 35, margin no. 7 et seq.

[206] Cf. Dreher, M. in: Handbuch Managerhaftung (2017), § 35, margin no. 75 et seq. with further references.

[207] Cf. Dreher, M. in: Handbuch Managerhaftung (2017), § 35, margin no. 75 et seq. with further references.

[208] Cf. Dreher, M. in: Handbuch Managerhaftung (2017), § 35, margin no. 7 et seq.

[209] Raiser/Veil (2015), p. 557; Ziemons, H. in: Michalski, GmbHG (2017), § 43, margin no. 324 et seq.

extraordinary meeting of all Managing Directors, or by any other means of information exchange.[210]

Next to the exchange of relevant information, the Managing Director's Duty to Cooperate does also imply the necessity of reciprocal control and supervision among all members of the Management. Even though it is – within certain limits[211] – permitted for the Managing Directors to allocate certain responsibilities and to therewith limit the other Managing Directors' required involvement for certain topics or areas of competence, a general obligation to stay informed and to monitor the particular activities of the other Managing Directors cannot be excluded for any member of the Company's management.[212] Same as with the regular information exchange, this mutual control and monitoring is usually an integrated part of every regular meeting held by all Managing Directors. Each Managing Director will report out on the specific areas of responsibility, which he is in charge of and will therewith give all his colleagues the possibility to question, demand further information and/or make any comments to this. Again, this obligation aims to create a high level of transparency and information equality among the Managing Directors.

In case of reasonable doubt or evidence that an individual Managing Director does not properly manage its areas of responsibility, the other Managing Directors have the duty to interfere and to take necessary actions themselves, as appropriate. Again, the benchmark for the assessment and for any actions taken is the well-being of the Company and the ongoing aim to achieve and fulfil the Company's Object, as defined in the Articles of Association.[213]

---

[210] Main requirement here is that the information exchange has to be done in due course and effectively amongst the Managing Directors; cf. Raiser/Veil (2015), p. 557 & p. 173 with further references.

[211] See above in this Chapter 3.2.4.1; cf. Leuering, D., Dornhegge, S. (2010), p. 13 et seq.

[212] Cf. Fleischer, H. in: MüKo GmbHG (2016), § 43, margin no. 108 et seq.; Raiser/Veil (2015), p. 557; Vetter, E. in: Handbuch Managerhaftung (2017), § 22, margin no. 19 with further references.

[213] See above in this Chapter 3.2.4.1; cf. Raiser/Veil (2015), p. 557; Ziemons, H. in: Michalski, GmbHG (2017), § 43, margin no. 110 et seq. with further references.

Duty of care

One of the most important and vast categories of individual duties for each Managing Director is the general Duty of Care, which is applicable always and to every appointed Managing Director. This duty is commonly regarded as a general category of numerous specific duties, which might arise in specific situations, but which all revert back to the same basic principles.[214]

Fundamentally, every Managing Director of a GmbH is obliged to always conduct all actions for the Company with the due care of a diligent businessman[215], according to sec. 43 para. 1 GmbHG. This principle does apply for any and all actions (and omissions) conducted by the Managing Director for and/or on behalf of the Company. More specifically, this means that the Managing Director is always obliged to be and keep himself properly informed about all relevant facts concerning the Company.[216]

Next to proper information, the Managing Director is also always required to seek for adequate external advice, in case he cannot fully assess a certain risk or situation on his own.[217] Alongside with adequate external advice, if needed, the Managing Director does also have the duty to regularly monitor and receive reports and advice from the Company's internal organisation. Reporting and organisational structures must be set up in a way that enables the Management to

---

[214] Cf. Altmeppen, H. in: Roth/Altmeppen, GmbHG (2015), § 43 margin no. 26 et seq.; Fleischer, H. in: MüKo GmbHG (2016), § 43, margin no. 152 et seq.; Ziemons, H. in: Michalski, GmbHG (2017), § 43, margin no. 204 et seq. with further references.

[215] As set out in sec. 43 para. 1 GmbHG; cf. Altmeppen, H. in: Roth/Altmeppen, GmbHG (2015), § 43, margin no. 3 et seq.; Noack, U. in: Baumbach, A., Hueck, A. (2017), § 43, margin no. 7 et seq. with further referencecs; Raiser/Veil (2015), p. 557 & p. 559.

[216] This ties into the obligation to cooperate with all other Managing Directors, as described above in this Chapter 3.2.4.1 and evidenced above in footnote 209 et seq.

[217] Cf. Raiser/Veil (2015), p. 557 & p. 170; Vetter, E. in: Handbuch Managerhaftung (2017), § 22, margin no. 83 et seq.

constantly receive and know, what is going on in the Company,[218] how responsibilities are allocated on each organisational level within the Company and to give directions, whenever needed to prevent incompliant behaviour or unreasonable risks for the Company.[219]

The main task of each Managing Director is, to actively conduct the Company's business activities in the light of the existing Company's Object.[220] For doing so, each Managing Director has, and may always claim to have[221], a certain scope of discretion (*Ermessensspielraum*), which includes the freedom to take and accept certain economic risks for the Company. The Managing Director does even have the right to realize economic disadvantages for the Company. As long as all his decisions are taken on an adequate information basis, even economic failure is not prohibited.[222]

Taking a general perspective on this, it is apparent that this freedom is evidently required: Only the freedom to also take risks makes it possible for the Managing Director to steer the Company and to make the Company always be an active participant in its microeconomic environment and the markets, in which it participates.[223] Without this freedom, the Company would be immobilized and not able to move and realize its Company's Object, because every management

---

[218] Cf. Vetter, E. in: Handbuch Managerhaftung (2017), § 22, margin no. 72 et seq. with further references.

[219] Cf. Fleischer, H. in: MüKo GmbHG (2017), § 43, margin no. 52 et seq.; Sonnenberg, T. (2017), p. 917 et seq. with further references.

[220] Cf. Fleischer, H. in: MüKo GmbHG (2017), § 43, margin no. 87 et seq. with further references.

[221] Cf. Fleischer, H. in: MüKo GmbHG (2017), § 43, margin no. 66 et seq.; Lücke, O., Simon, S. in: Saenger/Inhester, GmbHG (2016), § 43, margin no. 30 et seq; Oetker, H. in: Henssler/Strohn, GmbHG (2016), § 43, margin no. 27 et seq.; Raiser/Veil (2015), p. 557 & p. 166.

[222] Cf. Fleischer, H. (2011), p. 521 et seq.; Lücke, O., Simon, S. in: Saenger/Inhester, GmbHG (2016), § 43, margin no. 36 et seq.; Schmittmann, J.M. (2018), p. 38 with further references.

[223] Cf. Raiser/Veil (2015), p. 166 et seq.; Schneider, U.H. in: Handbuch Managerhaftung (2017), § 2, margin no. 14 et seq. with further references.

decisions would quintessentially require to be driven by a risk-adverse mitigation strategy. No positive movements, no economic growth would be possible, in fact.

Over past years, the scope and particular shape of this freedom has often been subject to disputes, litigation and court rulings in almost every jurisdiction. Especially for the Stock Corporation, where the Management is exposed to a bigger and mostly anonymous group of shareholders, management decisions were often disputed.[224]

As described further down as well for the Stock Corporation's perspective,[225] jurisdiction and judicial literature has developed a concept, which originally served as a baseline interpretation in the United States of America: The so-called *Business Judgement Rule*:

In essence, the Business Judgement Rule describes the freedom of every manager to take risks and to be mistaken with regard to its business decisions, as long as each of such decisions has always been placed on a sufficient information basis.[226]

Liability shall not occur "only" because of a manifestation of market risks, in losses or a financial downturn of the Company (even if such is as significant as the Company's insolvency), but the Management does only face liability, in case of negligent or fraudulent misconduct.

---

[224] Cf. Raiser/Veil (2015), p. 165 et seq.; Schneider, U.H. in: Handbuch Managerhaftung (2017), § 2, margin no. 14 et seq. with further references; general overview of older court rulings and literature: Roth, M. (2001) with further references.

[225] See below Chapter 3.2.4.2.

[226] Cf. Grunewald, B. (2014), p. 362; Lücke, O., Simon, S. in: Saenger/Inhester, GmbHG (2016), § 43, margin no. 30 et seq.; Raiser/Veil (2015), p. 165 et seq.; Schmittmann, J.M. (2018), p. 38 with further references; Schneider, U.H. in: Handbuch Managerhaftung (2017), § 2, margin no. 14 et seq. with further references.

Duty of loyalty

As a fifth category of the Managing Directors' duties towards the Company, each Managing Director is also always obliged to act with loyalty to the Company. Again, this general duty includes several different sub-categories of specific obligations, which are not explicitly depicted in the applicable laws, but which have been developed by jurisdiction and judicial literature over decades of judging particular disputes and cases.

One of the most prominent sub-categories of the general Duty of Loyalty is the duty of each Managing Director to keep all information related to the Company and all internal facts he gets to know in strict confidence. All information must be kept secret, unless there is an evident interest or an explicit instruction from the Company to share certain information with third parties or to make it generally available to the public.[227]

The duty to always maintain strict confidentiality is closely connected also to the duty of legality with regard to existing competition laws – certain market-sensitive data is not permitted to be shared with competitors.[228] In practice, such obligation will most likely also be re-emphasized by an explicit obligation mentioned in the respective Managing Director's service agreement or in the Company's By-laws.[229]

Next to that, the Duty of Loyalty also requires every Managing Director to refrain from any actions that would be a competition to the Company's business activities during the lifetime of the Managing Director's appointment and for a certain timeframe thereafter.[230] Here again, the aim is to protect the Company's economic and strategic interests and to install a specific layer of protection because of the specific exposure that comes from the fact that the Managing

---

[227] Cf. Ziemons, H. in: Michalski, GmbHG (2017), § 43, margin no. 291 et seq.

[228] Cf. Altmeppen, H. in: Roth/Altmeppen, GmbHG (2015), § 43, margin no. 25 et seq.; Raiser/Veil (2015), p. 557 et seq.

[229] Cf. Noack, U. in: Baumbach, A., Hueck, A. (2017), § 35, margin no. 40 et seq.; Tebben, J., in: Michalski, GmbHG (2017), § 6, margin no. 152 et seq.

[230] Cf. Schneider, U.H. in: Handbuch Managerhaftung (2017), § 2, margin no. 33 with further references.

Director has vast and deep knowledge of all the business activities, strategic plans, strengthens and weaknesses of the Company. The fundamental duty not to compete with the Company is explicitly laid out in sec. 112 HGB and sec. 88 AktG, whereas for the GmbH, such duty is interpreted to apply in analogy of such provisions in conjunction to the unwritten fundamental Duty of Care.

As displayed above,[231] an explicit non-competition clause is often also included in a Managing Directors' service agreement,[232] in order to prevent any misunderstandings in that regard and to simplify the enforcement thereof.

In addition, the Duty of Loyalty of every Managing Director can also lead to the requirement to summon and convene a meeting of the shareholders, in case strategic or fundamental decisions have to be taken, which go beyond the management competencies of the Managing Directors.[233]

Specific obligations

Next to the general obligations described above, Corporations also face various other specific legal obligations, which might arise and apply either by the nature of the specific business and actions the Corporation conducts or because of the nature of the Corporation as being a separate legal entity. Even though most of those legal obligations name the Corporation as their addressee and obligated party, this means de facto that it is the individual Managing Directors, who bear the burden of such obligations, as they are the Corporation's organ for any activities and representation.

Attached to the business and activities of a Corporation are often duties that aim to protect the interests and rights of third parties or specific goods of particular relevance, such as for example the protection of nature and environment against emmissions or pollutions caused by certain methods of industrial production, threats to the health and safety of the Corporation's employees or contract partners or tax and accounting laws, which ensure the financial compliance of the Corporation.

---

[231] See above, Chapter 3.2.2.2.

[232] Cf. Michalski, GmbHG (2017), § 6, margin no. 152 et seq.

[233] According to sec. 49 para. 2 GmbHG; cf. Liebscher, T. in: MüKo GmbHG (2016), § 49, margin no. 43 et seq.

As a matter of fact, the Managing Director must not necessarily know all those specific obligations himself, but again, he is responsible to set up and maintain an organisational structure in the Corporation, which ensures constant and complete awareness and compliance with all such obligations.

Legal consequences of a violation of existing duties

In case of any violation of the existing duties and obligations of the Company, the Managing Directors bear the legal responsibility. For the GmbH, this is mainly stated in sec. 43 para. 2 and para. 3 GmbHG – the Managing Directors are liable for any damages they cause towards the Company. This applies without limitation and as a joint liability of all Managing Directors, in case there is more than one.

The conceptual design of sec. 43 para. 2 GmbHG leads to a right for the Company to claim any damages it might have suffered from its own Managing Directors.[234] A direct claim of any external third party cannot be legally based on this norm, but exists only in case of separate specific legal provisions,[235] arising for example out of the general civil law provisions such as sec. 823 para. 1 German Civil Code or others.

The scope of sec. 43 para. 2 GmbHG is generally unlimited. This means that there is no statutory maximum amount up to which the Managing Director(s) could be held liable or else, unless such is explicitly agreed upon in the Articles of Association or in the service agreement between the Company and the Managing Director.[236] Whatever damages are proven to exist, the Managing Director(s) will have to compensate for, with their own private equity.

Moreover, the non-compliance of existing legal obligations of the Company – and thereby its Managing Directors – can also trigger not only civil law liability

[234] Cf. Fleischer, H. in: MüKo GmbHG (2016), § 43, margin no. 214 et seq.; Grunewald, B. (2014), p. 362 et seq.; Schmittmann, J.M. (2018), p. 29 et seq.; Schneider, U.H. in: Handbuch Managerhaftung (2017), § 2, margin no. 6 et seq.;

[235] Cf. Raiser/Veil S. 562; Schmittmann, J.M. (2018), p. 93 et seq. with further references.

[236] Cf. Schneider, U.H. in: Handbuch Managerhaftung (2017), § 2, margin no. 50 et seq. with further references.

to financially compensate for damages, but can also result in criminal law consequences for the individual Managing Director.

One category of specific importance in that regard is the liability for "organisational failure" (*Organisationsversagen*),[237] which has been developed by courts over the years to capture and legally reason liability of Managing Directors in case the internal compliance organisation and structures, which they were obliged to install, did fail to work successfully. This consequence, threat, brings an immediate urge and personal interest for the Managing Directors to ensure that their Compliance organisation is working most effectively.

As a result of the above description, analysis can be made that Managing Directors are, in contrast to the shareholders, exposed to the risk of unlimited liability for misconduct and non-conformance to existing legal obligations of the Corporation. The "corporate veil", which does exist as a protective shield for the shareholders and keeps their liability fenced into the scope of their respective investment in the Corporation, does not grant any positive effects for the Managing Directors.

Therefore, their motivation to keep the Corporation in compliance with existing legal requirements and obligations in all aspects of daily business, organisational measures as well as extraordinary projects, such as Corporate Transactions and other instruments of Mergers & Acquisitions is much more direct and apparent than for the shareholders.

Rights of the Managing Directors

As the natural opposite to the extensive duties and liability threat of the Managing Directors, each of them does also have defined rights, which is may always rely on and enforce, in case other Company organs challenge those.

The most fundamental right of each Managing Director is the right to fully manage the Company's business activities, free from any illegal interference from

[237] Cf. Raiser/Veil (2015), p. 562 et seq. with further references.

the shareholders, the Company's employees or any other stakeholders.[238] As being the central organ to take actions and decisions for the Company in the fields of its daily business activities in the scope of the Company's Object, as defined in the Articles of Association, the Managing Directors are also the sole organ that is fully entitled to represent the Corporation to the outside world for any such daily business dealings.[239] There is no legal possibility for the shareholders to limit this right of representation vis-á-vis third parties, according to sec. 36 and sec. 37 para. 2 GmbHG.

However, the logic of clear allocation of responsibilities between the different organs of a Corporation brings along the factual limitation of the Managing Directors' rights by the nature of the sphere of sole rights of the shareholders: The Managing Directors' rights and competency ends, where those of the shareholders begin. Therefore, any changes or amendments to the Articles of Association, the appointment and/or removal of other Managing Directors or most fundamental decisions on the direction and strategy of the Corporation are not within the catalogue of rights for the Managing Directors. Their level playing field is the day-to-day business activities and the representation of the Company in business related means.

Looking more specifically to this field of daily business activities, the Managing Directors are to be seen as the instance that takes decisions. Even though the Company's Object as defined in the Articles of Association might set out the general guidance to that, there is only little framing and instructions to the specific execution of this right in the circumstances of daily business.

Is one specific contract with a customer benefitial for the Company? Is a specific price offered by a vendor for a needed raw material appropriate and should be paid by the Company? All those daily descisions have to be taken, in the absence of specific instructions that might serve as guidelines to the Managers who have to take them. Here, the above-mentioned "Business Judgement Rule" comes into play again:

---

[238] Cf. Grunewald, B. (2014), p. 359 et seq.; Raiser/Veil (2015), p. 534 et seq. & p. 538 et seq.; Stephan, K.-D., Tieves, J. in: MüKo GmbHG (2016), § 35, margin no. 79 et seq. with further references.

[239] Cf. Hüffer, U., Koch, J. (2011), p. 363; Raiser/Veil (2015), p. 538.

A Managing Director is entitled to take a risk for the Company, to make a decision that could also turn out to be a disadvantage for the Company. It is the Managing Director's right to take risky decisions without the threat of personal liability. As described above, the key lies within the proper information basis and objective consideration of facts, the weighing of pros and cons.

The Managing Director's right to manage the Corporation also includes, as often called the "Business Judgement Rule"[240], the freedom to take certain commercial risks for the Company, as long as such decision is taken on a robust information fundament, as described in more detail above.

3.2.4.2. Aktiengesellschaft

In the light of the Case Studies to be described and analysed further down in this work, also the second form of Corporations under German law is of interest. Whereas the description of structure, legal framework and specific rights and duties of the organs of the GmbH was conducted to achieve a comprehensive understanding of German corporate law in general, the specific insight into the rights and duties of Managing Directors (*Vorstände*) of the Aktiengesellschaft now concentrates on those elements, which differ from or add to the legal setup of the GmbH.

Duties

The duties of Managing Directors of an Aktiengesellschaft generally include

(1) the duty to execute and foster the Corporation's business purpose (*duty of care*),

(2) the duty to ensure the Corporation's compliance with existing laws, contractual obligations and the means set out in the Articles of Association (*duty of legality*),

(3) the duty to always act I n loyality towards the Corporation (*duty of loyality*) and

[240] See above in this Chapter 3.2.4.1.

(4) the duty to always cooperate with any other Managing Director of the Corporation for the Corporation's well-being.[241]

The Corporations business activities are conducted by the Managing Directors in their full and own responsibility and again, shaped and structurally depicted by the Business Judgment Rule.[242]

The duty of legality in particular also includes the compliance with any specific legal obligations which apply for the Corporation or more specifically for the Managing Directors as direct addresses of the norm, such as in sec. 92 AktG.

Attention is hereby drawn to the fact that it must not necessarily be a "corporate law" provision, which includes a specific obligation for the Corporation and/or its management, but can also be part of any other existing legal code, such as for example sec. 15a para. 1 sent. 1 InsO. This specific norm from the German Insolvency Code does set out an explicit obligation for the Managing Directors to apply for insolvency of the corporation without undue delay, in case the corporation is illiquid or overindebted.[243]

---

[241] Cf. Fleischer, H. in: Fleischer, Vorstandsrecht (2006), § 8 with further references; Mertens, H.-J., Cahn, A. in: Kölner Kommentar AktG (2004-2017), § 76, margin no. 4 et seq.; Raiser/ Veil (2015), p. 149 et seq. & p. 151 et seq.

[242] Cf. Fleischer, H. (2004), p. 1129 et seq.; Fleischer, H. in: Spindler G., Stilz E., AktG (2015), § 93, margin no. 59 et seq.; Hüffer, U., Koch, J. (2018), § 76, margin no. 28 et seq. & § 93, margin no. 16 et seq.; Mertens, H.-J., Cahn, A. in: Kölner Kommentar AktG (2004-2017), § 76, margin no. 15 et seq.; Fleischer, H. in: Spindler G., Stilz E., AktG (2015), § 93, margin no. 59 et seq. with further references.

[243] Cf. Schmittmann, J.M. (2018), p. 101 et seq.; Schmittmann, J.M. (2014), p. 607 et seq.; such liability is, however, the external element of the corporate duty according to sec. 64 sent. 3 GmbHG and sec. 92 para. 2 sent. 3 AktG, cf. thereto Schmittmann, J.M. (2018), p. 75 et seq. with further references, and such liability is also complementary to a potential liability of external advisors in the light of the factual insolvency of the Corporation – cf. Schmittmann, J.M. (2004), p. 308 et seq.; Schmittmann, J.M. (2014), p. 536 et seq. with further references.

Rights

Whereas the Managing Directors' duties set the stage for specific actions, which are required to be taken or intentional omissions, their rights define the scope of their options and possibilities, again also in distinction and separation from the other organs of the Corporation, such being the Shareholders' Meeting and the Supervisory Board.

Especially with a view to decision-making in connection with Corporate Transactions, this distinction and the rights of the Managing Directors plays a critical role – how far can the Management go without interfering into the sphere of strategic decision-making, for which only the shareholders hold the central competence? This is one of the more specific questions to be answered later and analysed in the Case Studies, but to do so, first a basic understanding of the setup and structure of the Managing Directors' rights is required.

A view into this basic setup and structure reveals similarities to the rights and competencies of Managing Directors of a GmbH:

The Managing Directors have the right to independently conduct the Company's business activities,[244] meaning to enter into agreements, source and sell products, create an internal organisational structure, employ staff and give specific instructions to those, in order to execute the business. Bound solely by the Company's object and their general duties as depicted above, the Company's daily business execution is the main reach of play for the Managing Directors.

Moreover, the Managing Directors are also entitled to receive any information and to gather insight into any of the Company's books and records, if and as they deem appropriate in order to conduct their managerial responsibilities.

---

[244] Cf. Dauner-Lieb, B. in: Henssler, M., Strohn, L. (2016), AktG § 76, margin no. 3 et seq.; Hüffer, U., Koch, J. (2018), § 76, margin no. 8 et seq. with further references; Raiser/Veil (2015), p. 144; Mertens, H.-J., Cahn, A. in: Kölner Kommentar AktG (2004-2017), § 76, margin no. 81 et seq.; Vedder, E. in: Grigoleit, AktG (2013), § 76, margin no. 8 et seq. with further references.

3.2.4.3. UK Limited

The duties and rights of Managing Directors in the UK Limited are, similar to the German law corporations, determined from two angles: First, the applicable laws regulate certain duties and rights for the Limited's management,[245] and secondly, also the Company's Statutes contain a variety of duties and rights, which are to some extend even flexible to be individualized by the shareholders' meeting.[246]

Duties

Besides the catalogue of specific duties and responsibilities of the Company's Managing Directors, statutory UK laws also provide for more general requirements and expectations towards the behaviour of a Company's Managing Director.

These are as follows:[247]

(1) to promote the success of the Company for the benefit of its members,

(2) to always exercise an independent objective judgement,

(3) to always exercise reasonable care, skill and diligence,

(4) to avoid conflicts of interest,

(5) to disclose any personal interest in transactions involving the Company,

(6) not to accept any benefits from third parties, and

[245] Cf. Just, C. (2006), p. 25 et seq.; Kadel, J. (2006), p. 102 et seq. with further references; Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 51 et seq. with further references.

[246] Cf. Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 29 et seq. with further references.

[247] Cf. Just, C. (2006), p. 25 et seq.; Kadel, J. (2006), p. 102 et seq.; Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 51 et seq. & margin no. 68 et seq. with further references.

(7) to always act in accordance with the Company's constitution and to use their Managing Directors' powers only for the purposes for which they were conferred.

The last obligation mentioned above interconnects the statutory duties with the duties arising out of the Company's Articles of Association and thereby elevate them to the same level of authority than any explicit statutory obligation.

The more specific duties and responsibilities of the Managing Directors largely depend on the business activities and customer sectors, in which the Company is engaged in. Whereas, for example, the duties for Managing Directors in industrial companies would include also specific requirements regarding Environmental laws, workers' health and safety and requirements as to the technical standards of the manufacturing assets, the duties for Managing Directors of banking or finance institutions will be more centered around the requirements as to the institutions' net equity base, stability and security of the Company's IT infrastructure and requirements as to the privacy of any personal data collected, used and/or processed.

However, some specific legal obligations will be applicable for any Managing Director of a Company, such as for example to ensure that the Company does pay its taxes and file its annual financial accounts timely and correctly.

Rights

The Managing Directors of a UK Limited, again similar to other Corporate forms based on European jurisdictions, are mainly a manifestation of the Managing Directors' general function in the interplay between the different corporate organs: The Managing Directors have the right to conduct the Company's business and to take all decisions thereto related without interference from outside.[248]

[248] Cf. Rothenburg, V., Walter, M., Platts, T. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Vereinigtes Königreich, margin no. 51 et seq. with further references.

3.2.4.4. Spanish corporations

Spanish Corporate law sets out different standards for the two Corporate forms, the Sociedad Limitada (S.L.) and the Sociedad Anónima (S.A.):

Whereas the shareholders of a S.L. can decide and subsequently resolve in the Company's Articles of Association, to establish

(1) only one sole Managing Director or

(2) several Managing Directors or a

(3) Board of Directors.[249]

The S.A. is always incorporated with a Board of Directors, always in the form of a one-tier Board system, meaning that the Board consists of managers only, who all have executive powers and duties but can be Company-internal or external individuals, and no supervisory obligation, as it would be the case in a two-tier Board system.[250]

Irrespective of those structural differences, the obligations and rights existing for Managing Directors are similar for S.L. and S.A. The only variance can be the allocation of specific responsibilities in case of the existence of several Managing Directors or a Board of Directors.

Duties

Again, the obligations of the Managing Directors in S.L. and S.A. arise from two sources: Obligations based on the Company's Articles of Association and obligations based on specific regulations that require the Company and/or its

[249] With a minimum of three and maximum number of twelve members to the Board; cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 40 et seq. with further references.

[250] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 155 et seq. with further references.

Managing Directors to certain acts or omissions. Some of the most fundamental and important obligations are:[251]

(1) to always conduct any actions and tasks for the Company with the diligence of a prudent businessman,

(2) to always be sufficiently well-informed about the current status and activities of the Company,

(3) to always clearly differentiate between the professional sphere of their actions for the Company and their private sphere of actions in personal interest,

(4) to always inform about any direct or indirect conflict between personal interests of the respective Managing Director and the interests of the Company,

(5) to always keep all information and data concerning the Company in strict secrecy, unless such information is meant to be disclosed to the public or required for disclosure by law,

(6) not to compete with the Company and/or engage in business activities, which would be competing with the Company, unless such is explicitly authorized,

(7) to always act in true loyalty towards the Company and in the Company's best interest and in compliance with all requirements set out in the Companies Articles of Association.

The last point mentioned does constitute the bridge towards the set of specific obligations for the Managing Directors, which might be set in the Company's Articles of Association and which thereby receive the same binding character as any statutory legal duty.

[251] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 40 et seq. & margin no. 155 et seq. with further references.

Rights

Again, as a flipside to the existing duties, the Managing Directors of Spanish Corporations also possess certain rights. Those are mainly designed to enable and protect the constitutional function which they have: The Managing Directors have the right to conduct the Company's business activities without illegal interference from other organs.[252]

Within the daily execution of this right, this entails many facets and specific factors, such as, for example, the right to be always informed about all relevant facts and developments within the Company, but also the right to change the organisational structure of the Company, if such is deemed to be necessary or helpful by the Managing Directors to foster the Company's business goals and/or to install and maintain an effective Compliance and reporting structure.

As a matter of fact, the question of the definition and scope of the Managing Director's right to conduct the day-to-day business activities of the Company is often a field for discussion and dispute. Is a decision taken still within the scope of normal business operations or is it an extraordinary decision of strategic importance? Such question might not always be easy to be answered and is therefore then subject to a specific judicial interpretation and decision on a case-by-case basis.

[252] Cf. Fischer, K.C., Grupp, M., Baumeister, B.M. in: Wegen, G., Spahlinger, A., Barth, M., (2018), Spanien, margin no. 40 et seq. & margin no. 155 et seq. with further references.

3.3. GENERAL FACTS ON MERGERS & ACQUISITIONS

In general, the well-established buzzword „Mergers & Acquisitions" is in itself misleading with regard to the field of action that it aims to describe. As the pure wording tells, this term describes two possible ways of transactions of companies: The merger of one company into another company and also the acquisition of a company or certain assets by another company. Nevertheless, this term is often used, inside and outside the legal or economic expert communities, in order to describe the more general fields of company transactions, share transfers and takeovers of one legal entity by another.[253]

However, when looking at the mere wording first, there are two general categories of corporate measures described, which shall now be highlighted in more detail:

Mergers (of one company into another company)

One possibility to change a company's constitutional character and/or to transfer its shares from one shareholder to another is the so-called merger of one legal entity into another legal entity. European corporate laws provide for various different possibilities in this context, such as for example:

(1) Merger by way of absorption (*Verschmelzung im Wege der Aufnahme*),[254]

(2) Merger by way of foundation of a new legal entity (*Verschmelzung im Wege der Neugründung*),[255] and

---

[253] Cf. Gran, A. (2008), p. 1409 et seq.; Picot, G. in: Münchener Anwaltshandbuch GmbH-Recht (2014), § 21, margin no. 1 et seq.; Richardt, W. in: Hauschild/Kallrath/Wachter, Notar-Handbuch (2017), part 2, § 3.V.4 with further references; Schiessl, A. in: Beck'sches M&A-Handbuch (2017), § 1 with further references.

[254] According to sec. 2 para. 1 UmwG; cf. Stengel, A. in: Semler/Stengel, Umwandlungsgesetz (2017), § 2, margin no. 23 et seq. with further references.

[255] According to sec. 2 para. 2 UmwG; cf. Raiser/Veil (2015), p. 825; Stengel, A. in: Semler/Stengel, Umwandlungsgesetz (2017), § 2, margin no. 28 et seq. with further references.

(3) Merger by way of a spin-off (also called de-merger) of certain parts of a legal entity (*Abspaltung*)[256].

In comparison to the fields of share acquisitions, the different types of mergers are widely regulated and described by European legislation by now.[257] In Germany, the German Transformation Act (*Umwandlungsgesetz – UmwG*) displays and describes chapter by chapter the different forms of a merger and sets out certain formal and factual requirements for the participating legal entities, also legally applicable and incorporated into local laws in Spain and in the United Kingdom.[258]

The common legal construction, which is underlying all types of merger is the transfer of certain assets from one legal entity into the property and corporate body of another legal entity, may such be a long-existing entity, or a newly established one.

The assets are assumed by the absorbing legal entity and thereby become a part of its own assets, books, financial and factual properties.[259] For Corporations, this also has an implication on the public existence and registration of the transferring legal entity.

In case of a merger of all assets of one legal entity, such will cease to exist as legally independent entity, but will be absorbed by the assuming entity. The commercial register will take a final note of this merger and will then hold public the files of the company only as being an inactive, terminated one, no longer actively existing. The legal body of the transferring entity ceases to exist, its shareholders cease to be shareholders, as there are no shares anymore and its organs cease to be active, as there is no corporate body to constitute and represent any longer.

---

[256] According to sec. 126 et seq. UmwG; cf. Raiser/Veil (2015), p. 825 et seq.; Schröer, H. in: Semler/Stengel, Umwandlungsgesetz (2017), § 126, margin no. 1 et seq. with further references.

[257] Cf. Behme, C. (2018), p. 32 et seq. with further references.

[258] European Merger Directive, no. 2009/133/EU, available via: www.eur-lex.europa.eu.

[259] Cf. Raiser/Veil (2015), p. 825 with further references.

In practice, the corporate instruments offered by the European transformation laws are often used as a restructuring tool, for example within company groups or in the course of other corporate transactions, in order to "clean up" group entity structures afterwards.

Company mergers can be either described as "downstream" or "upstream" on the one hand or "side-ways" on the other hand. Within a multi-level group of companies, all such ways are permitted: the merger of a subsidiary into its shareholding company is permitted ("upstream")[260] as well as the merger of a shareholder into (one of its) subsidiary companies ("downstream")[261], or the merger of two sibling-companies.[262]

The legal construction and consequences of such measures remain similar, irrespective of the "direction" of a merger within a group.[263]

Acquisitions (of one company by another company)

The alternative way of modifying a legal entity's strategic positioning and its financial and legal status vis-á-vis other legal entities is an acquisition, i.e. a purchase. This can be conducted either by way of a purchase of certain defined assets, which are owned (and then transferred) by a legal entity (*Asset Deal*) or by way of a purchase of certain shares in the company from its owners (*Share Deal*).

For both alternatives, the basic scenario is the same: As for all situations, in which something, which is a definable piece, may it be tangible or intangible, and which is associated with a certain economic/financial value, is transferred from somebody to somebody else, subject to the transfer of a defined counter-

[260] Cf. Jäckle, C., Strehle, E.P., Claus, A. in: Beck'sches M&A-Handbuch (2017), Chapter 10, § 51, margin no. 94 et seq; Schröer, H. in: Semler/Stengel, Umwandlungsgesetz (2017), § 5, margin no. 128 et seq.

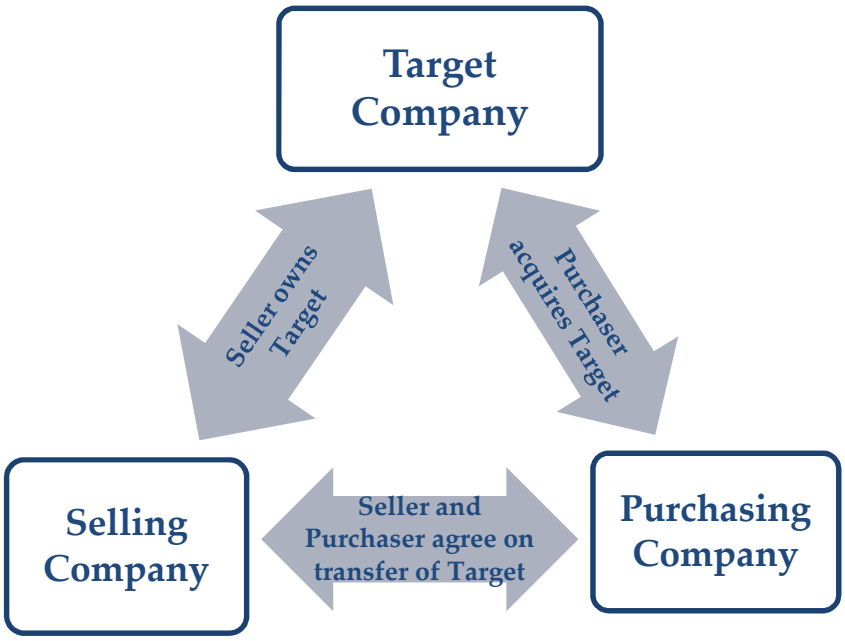
[261] Cf. Sagasser, B., Luke, A. in: Sagasser/Bula/Brünger, Umwandlungen (2017); part 3, § 9, margin no. 347 et seq.; Schröer, H. in: Semler/Stengel, Umwandlungsgesetz (2017), § 5, margin no. 134 et seq.

262 Cf. Sagasser, B., Luke, A. in: Sagasser/Bula/Brünger, Umwandlungen (2017); part 3, § 9, margin no. 352 et seq.

[263] Cf. Sagasser, B., Luke, A. in: Sagasser/Bula/Brünger, Umwandlungen (2017); part 3, § 9, margin no. 334 et seq.

performance, there are at least three (3) parties involved – a seller, a purchaser and a target, which is being transferred.

Figure 3: Overview of the Acquisition Triangle



In addition, there is an altnerative to the conduct of an acquisition for certain scenarios: In particular in situations, where two or more companies seek for collaboration in certain dedicated fields of their activities only and not for a full acquisition and integration into one another, the foundation of a Joint Venture can be an alternative worth considering, instead of a merger or an acquisition between those companies. The most common approach in such scenarios is to set up a new legal entity for the joint adventure that the partners intend to make reality. The shares in the Joint Venture company will be held by the Joint Venture

partners, proportionate to the scope of their individual participation in the collaboration.[264]

As being a separate legal entity, the Joint Venture company will be established according to basic corporate law principles, including the necessity to set up Articles of Association, to implement a management organ and all other mandatory requirements for the specific type of corporation, which the Joint Venture partners have chosen for.

Next to the Articles of Association, the Joint Venture partners will most likely also establish an additional contractual connection between each other – the Joint Venture Agreement. This contract is made to rule out and define the basic principles of the planned collaboration, decision and collaboration mechanisms, as well as all other principles and goals, which the Joint Venture partners wish to agree upon.[265] In practice, the discussions and negotiations regarding the Joint Venture Agreement are often the most crucial element during the foundation and realisation of a Joint Venture. In this context, the reaching of a consensus on basic mechanisms for a potential future exit from the Joint Venture should not be underestimated.[266]

Of course, Joint Ventures are not a fixed legal category of cooperations between legal entities. The word stands as a synonym for an open type of contractual connection and factual purpose of certain companies. Based on the basic principle of contractual freedom, the Joint Venture parties are free to agree upon any possible and legal way of collaboration – but once they decide to conduct this collaboration in the way of a separate, dedicated legal entity, such

---

[264] Cf. Goethel, S.R. (2014), 1475; Risse, J., Kästle, F. (2018), "Joint Venture"; Wirbel, B. in: Münchener Handbuch des Gesellschaftsrechts (2014), vol. 1, § 28, margin no. 1 et seq. with further references.

[265] Cf. Thurn, O., Ziegenhain, H-J. in: Beck'sches Formularbuch Ziv-, Wirt- und UnternehmensR (2018), N.5; Wirbel, B. in: Münchener Handbuch des Gesellschaftsrechts (2014), vol. 1, § 28, margin no. 27 et seq. with further references.

[266] Cf. Giesen, H.-M. in: Beck'sches Formularbuch M&A (2018), G.I. with further references; Goethel, S.R. (2014), 1475 et seq.; Willms, N., Bicker, E. (2014), p. 1337 et seq.

legal entity is bound to the basic corporate law requirements, according to its legal type (GmbH, Limited, or else).

The foundation of a Joint Venture can be a suitable option for partners, who wish to collaborate without a direct ownership connection between each other or for defined fields of activities only – a common example for this are Joint Ventures, which are set up in order to pool resources and expertise in the fields of Research & Development of two or more companies.[267]

Away from the particularities of Joint Ventures, also the different ways of corporate acquisitions leave room for various ways and forms of acquisitions, depending on the nature and amount of assets or shares transferred, the constitutional (voting) rights associated therewith, as well as on the nature of future contractual cooperation between the acquisition partners.

National and European corporate and takeover laws set the scenes for these different ways of acquisitions.

[267] Cf. Risse, J., Kästle, F. (2018), "Joint Venture"; Wirbel, B. in: Münchener Handbuch des Gesellschaftsrechts (2014), vol. 1, § 28, margin no. 1 et seq.

3.3.1. Types of corporate transactions

As briefly mentioned above, Corporate Transactions can be conducted in different forms. Once the decision to conduct an acquisition, either as Seller or Buyer, is taken, the next logical question is always: What exactly shall be purchased or sold? Are there only certain assets, which the Seller wishes to place on the market and sell for a good price, or is it the entirety of a Company, which shall be sold as Target of the Corporate Transaction?

In case the Seller and Purchaser decide to transfer only certain dedicated assets by way of a sale, this procedure is described as an "Asset Deal". The agreement about and contractual description of the particular assets to be transferred is of crucial importance, because the basic regulations of national sales laws, which apply to such a construction, require a clear and affirmative description of the actual object of the sales agreement.[268] Particularities in Asset Deal scenarios can arise due to the nature of the assets to be transferred, if such, for example cannot be freely transferred, but require a certain formal transfer process.

One of the most prominent examples is the transfer of real property, which cannot be done by way of a private contract, but is required to be notarized by a notary public and registered with the competent land register.[269]

In case the Purchaser is interested in the acquisition of more than only certain defined assets, but wishes instead to get hold of the entire legal entity, which the Seller holds shares in, then the transaction would be named to be a "Share Deal". Here, not specific assets, such as machinery, contracts, patents or other is transferred, but it is solely the shares in a (target) Company, which are subject to the sale.

---

[268] Such legal requirement to identify and describe the contractual objects in a way that is adequately certain and clear (so-called principle of legal certainty – Bestimmtheitsgrundsatz) in derived in German Civil law based on the general clause of sec. 214 para. 1 BGB – cf. Bachmann, G. in: MüKo BGB (2016), § 241, margin no. 12 et seq.; Krebs, D. in: Dauner-Lieb, B., Langen, W. (2016); § 241, margin no. 8.

[269] According to sec. 311 b para. 1 BGB.

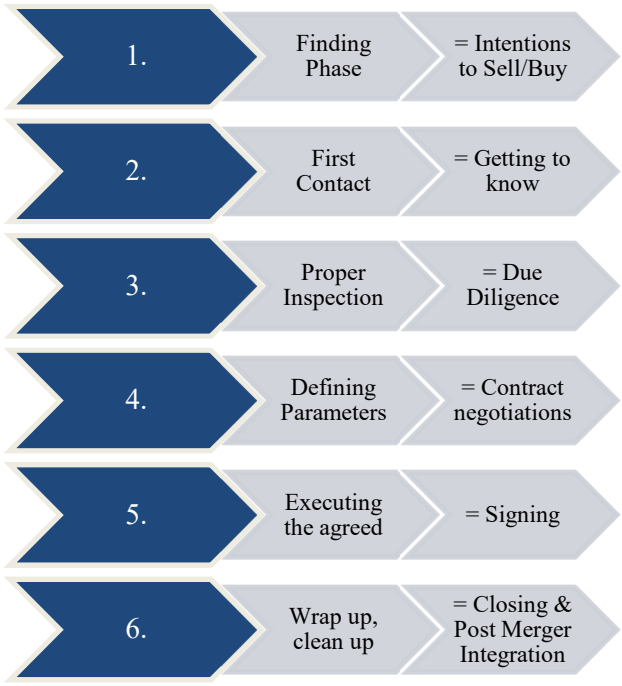
As mentioned previously, certain formal requirements have to be fulfilled in order to conduct a transfer of shares in a Corporation, most specificially, the purchase contract requires to be notarized.[270]

[270] According to sec. 15 para. 3 GmbHG.

3.3.2. Transaction project steps and timelines

Although the individual structure of each Corporate Transaction might vary from other transactions, there are certain key elements and steps in the "lifecycle" of an Acquisition, which allow a categorization on a general descriptive level.

Figure 4: Project Steps of a Corporate Transaction



3.3.2.1. Finding phase – the Parties define their intentions

As mentioned above[271], a transaction always requires the existence of at least three participants: Seller, Purchaser and a Target Company[272] or a respective

[271] See above, Chapter. 2.3.

[272] At least in case of a Share Deal, where the Target is a company, or a certain share participation therein and not only mere assets to be transferred.

agglomeration of Target Assets[273]. And even before those three participants require finding and contacting each other, the existence of their intention to conduct a transaction is the most basic precondition for any kind of corporate transaction.

The intention to sell and the Vendor Due Diligence

One company may develop the intention to sell certain shares or assets it owns. The reason for this might be either strategic or purely monetary – a certain current investment might no longer fit into a company's general business strategy or might be an adequate way to gain liquidity by selling such assets. An example for a strategic intention to sell is the sale of the shares in a subsidiary, which, due to changes in the market environment, does no longer fit into the asset and business portfolio of a company and the company might therefore decide to divest from this business adventure by way of selling its shares in the respective subsidiary to a third party.[274]

An example for a purely monetary intention might be the sale of certain assets, for example of manufacturing equipment, which a company decides to do in order to generate cash income in order to be able to purchase other, new or different pieces of equipment or to pay back its debts to its creditors. There are, of course, countless other examples and for some of those, the underlying intention to sell something (assets or shares) might also be complex and serve multiple purposes at the same time. Nevertheless, the intention to sell something is always the necessary precondition for entering into a transactional scenario.

This also includes that the seller has defined the particular "something" that he intends to sell and has made some first basic investigations and assumptions already. In the reality of many corporations, such definition of a potential "target" requires a rather extensive internal review and analysis. In case this process is

[273] Such a transfer of tangible or intangible assets would qualify as an Asset Deal.

[274] Prominent examples for such strategic divestitures are, amongst others, Siemens AG's divestiture from Osram and Bayer AG's divestiture from Lanxess AG and Covestro AG – all such cases resulted in IPOs, in which the former sole shareholder sold certain parts of its majority in the subsidiaries shares.

conducted in a concerted and organized way, it is often described as a so-called "Vendor Due Diligence"[275].

In particular, in case a company or certain shares in a company shall be sold, the Seller will need to develop a clear knowledge of the shares, their financial value and the factual steps that would need to be taken in order to sell those to a third party. Especially in case the Target Company is part of a company group structure, the Seller is well-advised to consider the impact and necessary preparatory steps of the sale prior to its execution.

The intention to buy and the finding phase on the purchaser's side

Looking more closely to the second active participant in a transactional scenario – the Buyer – one might easily spot that the intention to acquire certain assets or shares might be driven by various different circumstances: The Buyer might be searching for a potential target to be acquired for strategic reasons or the Buyer might discover the opportunity to invest incidental, without actively searching for it.

In case of a strategic search for potential acquisition targets, the Buyer might be driven by the intention to broaden the geographical scope of its business activities, by the wish to secure further know-how or developments, which the Target Company owns, or even by the idea to endeavour business segments and market fields, which have not been yet within the Buyer's radius of activities.[276] In such situations, the Buyer might rely on external advisors or business facilitators or brokers in order to define and locate a suitable investment target.[277]

---

[275] Cf. Beisel, W. in: Beisel/Klumpp, Unternehmenskauf (2016); § 2 margin no. 6 et seq.; Elfring, C. (2007), p. 3 et seq.; Pfeiffer, G., Timmerbeil, S. in: Herrler, Gesellschaftsrecht (2017); § 13, margin no. 75 et seq.; Risse, J., Kästle, F. (2018), "Vendor Due Diligence".

[276] Such would be often described as "Expansion Strategy" or "Diversification" – cf. Munkert, M.J. (2008), p. 2501 et seq. with further descriptions of these approaches in the context of planning a Corporate Transaction; Seibt, C.H. in: Beck'sches Formularbuch M&A (2018), A.I.2. with further references.

[277] Cf. Beisel, W. in: Beisel/Klumpp, Unternehmenskauf (2016), § 1 margin no. 34 et seq.

Alternatively, the Buyer might also develop the intention to conduct an acquisition by accident, by chance, without having strategically planned to develop this opportunity. In such situations, outside brokers, advisors or other third parties might even function as incubators of the investment intention, if they inform the Buyer of an opportunity to invest for the first time and therewith catch its interest.

The Buyer's general decision to invest will consequentially be connected with a general decision on the most basic parameters of such investment: Even though the Buyer might not yet have a detailed knowledge of the potential target company, it might well know its own needs and financial limits. The reason to do an investment necessitates a definition of its most basic characteristics, limits and opportunities.

3.3.2.2. First contact

Once, Seller and Buyer have found each other, may that be by connection via a broker or other third party business facilitator or also by way of a direct contact based on market connections or previous business relationships, and once Seller and Buyer have also indicated each other that they would be generally interested to further investigate on the opportunity for a corporate transaction, they often aim to express their general intention and their first basic outlines for a potential structure of a potential transaction in a legal frame that allows for a minimum amount of certainty and significance already. If that is done in written form, such an express of a general intention is of called "Letter of Intent" or a "Memorandum of Understanding".[278]

Two of the key aspects of a Letter of Intent are often (1) the Buyer's wish to secure exclusivity for a certain time, in order to eliminate potential competing

[278] Cf. Gran, A. (2008), p. 1409 et seq.; Holzapfel, H.-J., Pöllath, R. (2017) p. 142 et seq.; Schönhaar, T. (2014), p. 273 et seq.; Korch, S. (2018), p. 521 et seq.; Risse, J., Kästle, F. (2018), "Letter of Intent"; Seibt, C.H. in: Beck'sches Formularbuch M&A (2018), B.VIII. & B.IX.1; regarding the agreement of a break-fee in an LoI: Hilgard, M.C. (2008), p. 286 et seq.; v. Hoyenberg, P. in: Münchener Vertragshandbuch WirtschaftsR (2015), part I.1 with further references.

bids and (2) the Parties view and willingness to agree upon a binding or non-binding character of the Letter of Intent.

It depends on the particular wording, if a Party's expression of general intent is to be interpreted as a binding offer to sell or buy, or if such expression is made as a general statement only, without binding legal consequences.[279]

The Letter of Intent often captures general topics like the following:

(1) General outline of the envisaged transaction, with regard to participants, scope and possible financing structures;[280]

(2) Estimated timeframe for the transaction, or even a first suggestion for explicit dates for Signing and Closing;

(3) Explicit confirmation of exclusivity of discussions between Seller and Buyer, often linked to a certain defined timeframe or subject to other factual requirements.[281]

As such topics already outline a possible future transaction in a substantial way, the therewith related discussion between the Parties can be rather controversial and time-consuming already.[282]

Moreover, already in this early stage of a possible transaction, both Parties have a vital interest to keep all information exchanged, including the general expression of their intention to perhaps enter into a corporate transaction, strictly confidential to competing market participants, other third parties and also their internal stakeholders, such as employees, works council and others.

In order to achieve an adequate level of reliable confidentiality, Buyer and Seller often enter into a written Non-Disclosure Agreement[283], signed by

---

[279] Cf. Gran, A. (2008), p. 1409 et seq; Korch, S. (2018), p. 521 et seq.

[280] Cf. Gran, A. (2008), p. 1409 et seq.

[281] Cf. Tophoven. A. (2010), p. 2919 et seq. with further references; v. Hoyenberg, P. in: Münchener Vertragshandbuch WirtschaftsR (2015), part I.A.3 with further references.

[282] Cf. Gran, A. (2008), p. 1409 et seq.

[283] Cf. Linke, J., Fröhlich, M. (2014), p. 449 et seq.; von Werder, A., Kost, T. (2010), p. 2903 et seq.

authorized representatives of both parties and valid to cover at least the envisaged timeframe in which discussions and negotiations of a potential transaction might take place, but often also securing an additional time frame thereafter.

3.3.2.3. Proper inspection of the object in question

Due Diligence, question process and DD reporting

The potential Buyer will only be in a position to take an appropriate investment decision, if a broad information basis is available. The Buyer must know in detail, what it is about to consider purchasing. This process of getting to know the target is often called "Due Diligence".

Depending on the scope and type of transaction, this information requirement is as wide-spread or narrow in scope, as the assets which are targeted to be purchased – in case of an asset deal of certain very limited assets only, similar to any kind of sale and purchase agreement, the potential Buyer will want to inspect such assets, will want and need to know their constitution, features, age, maintenance status and any legal or factual boundaries that might affect its usage. The very same basic rule also applies in case of a share transfer, but only shows a larger amount of information and details to be provided.[284]

Data Room

It is most common for the Seller to provide any such information, which it deems to be relevant in order to achieve a possibly high purchase price and to give a comprehensive overview of the acquisition target, in the form of a data disclosure, which is often called a "Data Room".

[284] Cf. Gran, A. (2008), p. 1409 et seq.Holzapfel, H.-J., Pöllath, R. (2017), p. 157 et seq.; Hölters, W. in: Hölters, AktG (2017), AktG § 93, margin no. 176 et seq.; Meurer, T. in: in: Beck'sches M&A-Handbuch (2017), § 5 with further references.

Whether such room is a physical place,[285] where the Seller locates certain hard-copy information and makes it available to the potential Buyer, or whether such room is a virtual place, where the information to be provided is stored and accessible in electronical form,[286] the potential Buyer will always have an interest to receive as much information as possible, in order to depict an encompassing overview of the key features, information and data. Based on this information, the potential Buyer will then be able to assess and evaluate the strategic and factual value that the target might have from its point of view and in the light of its strategic plans and considerations.

In case of a Share Deal of an entire company, such information might for example include the constitutional and corporate documents of the company, including its Articles of Association, shareholders' resolutions, board minutes, correspondence with the commercial register, as well as the Target's most essential commercial sales contracts, agency agreements, service and purchasing agreements, as well as information regarding the physical and immaterial assets held by the company, such as manufacturing facilities, patents, trademarks, inventory and raw material stocks, as well as data regarding the Target's employees, pension obligations, internal financial records, annual accounts, current sales and purchasing figures, cash flow projections, profit and loss related information, strategic outlook, R&D related information, as well as the Target's internal organisation as to compliance, corporate functions and reporting lines.

Depending on the amount and available form of the information, the Data Room can bei either set up physically or virtually, for example via an internet platform.[287] Those different options give both parties, Buyer and Seller, also

---

[285] Cf. Hanke, K., Socher, O. (2010), p. 829 et seq.; Seibt, C.H. in: Beck'sches Formularbuch M&A (2018), B.VI.1 with templates for Physical Data Room Rules and further references.

[286] Cf. Hanke, K., Socher, O. (2010), p. 829 et seq.; Seibt, C.H. in: Beck'sches Formularbuch M&A (2018), B.VI.2 with templates for Online Data Room Rules and further references.

[287] Cf. Grub, M., Krispenz, S. (2018), p. 235 et seq.; Hanke, K., Socher, O. (2010), p. 829 et seq.; Seibt, C.H. in: Beck'sches Formularbuch M&A (2018), B.VI.2 with templates for Online Data Room Rules and further references.

different possibilities to mine the data, to track the other party's actions and/or to streamline the further process of investigations and negotiations.

The Due Diligence process is often split into different steps and phases of the data and document disclosure. Because of the strong interest of the Target and the Seller to keep all information provided under strict confidentiality, the seller might perhaps only be willing to disclose them, if the likelihood that the transaction might be successfully conducted afterwards is considered to be rather high. On the other hand, the potential Buyer might only be willing to really consider purchasing the Target, if it has gained a sufficiently deep insight into the Target's interna, in order to be able to assess, if it really is an attractive acquisition target.

These antagonistic interests will find their balance in the scope of the information provided in the Data Room and requested and disclosed in the further ongoing Due Diligence process.

Due Diligence Report

The potential Buyer will very often have the main workload of reviewing and analysing the documents and information provided by a team of external advisors, which have expert knowledge in conducting such review and assessment processes from the legal and/or financial point of view. The outcome of such review, as well as the advice given by the external project counsels on potential so-called "findings"[288] of the Due Diligence will form the basis for the Buyer's assessment of whether it is generally interested in purchasing the Target or not.[289] In the latter case, the transaction will come to an end during or right after the Due Diligence phase.

If, however, the Purchaser is interested in the acquisition, then the assessment made during the Due Diligence, and most often condensed and displayed in a so-called Due Diligence Report[290], will form the basis for the Purchaser's discussions and further negotiations with the Seller.

---

[288] Cf. Holzapfel, H.-J., Pöllath, R. (2017), p. 157; Gran, A. (2008), p. 1409 et seq.

[289] Cf. Gran, A. (2008), p. 1409 et seq.

[290] Cf. Andreas, F.E. in: Handbuch Due Diligence (2017), § 10 margin no. 4 et seq.; Risse, J., Kästle, F. (2018), "Due Diligence Report".

The Due Diligence Report is not a fixed format, but a general description for a document that is worded and designed as a resume, assessment and description of all information disclosed in the Data Room and during the Due Diligence phase, as well as a list of all open issues, unanswered questions or potential information gaps, which would be of potential importance for the future steps of the transaction process for the Buyer.

Typical topics covered in a Due Diligence and the thereafter produced Due Diligence Report are:

(1) Commercial Due Diligence,

(2) Corporate Due Diligence,

(3) Financial Due Diligence,

(4) Compliance Due Diligence,

(5) Tax Due Diligence,

(6) Environmental Due Diligence,

just to name a few.[291]

Due Diligence question process

In most transactions, the Due Diligence process is not a static process of providing one set of information, which is then subject to the inspection by the Buyer's advisors. In most cases, the Seller will set out certain rules and regulations for the conduct of the Due Diligence, which the Buyer will most likely sign off on – so-called Data Room Rules.[292] Amongst other topics, such as a confidentiality obligation for the Buyer and all its advisors, rules on the availability of documents, restrictions or allowances to technically use them (copy, print, etc.), these Data Room Rules might also define a process for the Buyer to ask questions or to request additional information.

---

[291] Cf. Beisel, W. in: Handbuch Due Diligence (2017), § 1 margin no. 49 et seq.; Risse, J., Kästle, F. (2018), "Due Diligence".

[292] Cf. Risse, J., Kästle, F. (2018), "Data Room Rules"; Seibt, C.H. in: Beck'sches Formularbuch M&A (2018), B.VI.1 & B.VI.2 with templates for Online Data Room Rules and further references.

Such information requests are often channelled by the Seller into a certain defined format and frame. For example, the Seller might allow the Buyer to raise additional questions, but only if such are collected and displayed in a Due Diligence Q&A list and submitted to the Buyer once per day or only at the end of a defined Data Room opening period.

There are no mandatory restrictions for this, but reality shows that the Buyer might severely streamline the information flow, in case a practical Q&A format is defined. Moreover, it is also of crucial importance to monitor and restrict the accessibility to the Data Room, in order to serve the Seller's confidentiality needs and to divert all information requests to certain dedicated persons within Seller's or the Target's own organisation.

Moreover, most Data Rooms are opened for a fixed period of time only. Thus extensions might be granted, this has proven to be an effective way for the Seller to shape the transaction timeline and to avoid that the potential Buyer has too much time to analyse and reflect upon the data provided in the Data Room. On the contrary, the Seller might even request the Buyer to issue an indicative bid or estimated purchase price range for the Target shortly after the closure of the Data Room, or might as well provide the Buyer with a draft Purchase Agreement and a fixed negotiations timeline straightaway.

In any case, the Due Diligence is the information fundament of every transaction. It sets the scene for the detailed discussions of Seller and Purchaser and provides a detailed insight into the live and being of the Target – irrespective of whether such Target is a company or an agglomeration of assets.

3.3.2.4. Defining parameters – Contract negotiations

In case the Due Diligence has led to the outcome that the potential Purchaser is interested in acquiring the Target, then the Parties might wish to start negotiating about a Purchase Agreement, in order to bring this transaction to live. The nature and type of the Purchase Agreement is determined by and does reflect the overall structure of the envisaged transaction, also coming back to the general distinction between an Asset Deal or a Share Deal.

One of the Parties, in most cases this is the Seller, as he is also in the driver's seat steering the transaction at its own gusto, will prepare an initial draft of a Purchase Agreement regarding the sale and purchase of the Target. This initial draft will then form the basis for the discussions and negotiations between the Parties. The initial draft should already include all essential provisions, which the Seller wishes the Buyer to agree upon. Depending on the Seller's negotiation strategy, he might be also willing to grant a rather balanced set of rights and responsibilities to the Buyer.

However, as a principle embedded in most negotiation strategies, the initial drafting in most cases sets the maximum frame for what the party, proposing such, can achieve as a compromise and outcome of negotiations.[293]

Parties to the Purchase Agreement and participants to the discussions thereabout will be the Seller and the Buyer. In most cases, the Target itself is not represented in the discussions. Alongside with the Seller and Buyer, potential financing parties or guarantors are often involved in the negotiations in an indirect way or as a result of specific talks about financing and financial securization of the deal.

The negotiations about a potential transaction are often conducted in a hybrid way – partially by way of exchanging written drafts and countering such with so-called "mark-ups", in which the respective other party indicates and introduces the changes to the wording, it deems necessary. Such written negotiation rounds are often accompanied by oral negotiations, typically in the form of face-to-face meetings of the principals or negotiation delegates from each Party, as well as their external advisors (legal, tax and/or finance).[294]

The final goal of the negotiations between the Parties is to reach an agreement on the main commercial and legal parameters of the transaction, which will be fixed and described in the Transaction Contracts, mainly consisting of a Purchase Agreement – depending on the nature of the transaction, this can be

---

[293] Cf. Bücker, T., Kulenkamp, S. in: Handbuch Managerhaftung (2017), § 29, margin no. 94 et seq.; Gran, A. (2008), p. 1409 et seq.; Kästle, F., Oberbracht, D. (2018), A.I.5.c; Korch, S. (2018), p. 521 et seq.; Lips, J. in: Handbuch Unternehmenskauf (2013), § 3, margin no. 29 & 54 et seq.

[294] Cf. Lips, J. in: Handbuch Unternehmenskauf (2013), § 3, margin no. 65 et seq.

named and shaped either as a Share Purchase Agreement (Share Deal) or as an Asset Purchase Agreement (Asset Deal) and exhibit contracts and documents, relating thereto.

The main content of the Purchase Agreement[295] will be, for example:

(1) Description of transaction and assets to be transferred;

(2) Display of transaction process – obligation of Seller to sell and transfer and obligation of Buyer to accept and pay for;

(3) Purchase Price – amount, financing structure and payment terms;

(4) Warranties given by the Seller regarding the Target and its legal and factual status;

(5) Warranties given by both Parties as to their legal status and ability to conduct the Transaction;

(6) Conduct of the Target's business by the Seller between the signing of the Purchase Agreement and the factual and legal hand-over of the assets;

(7) Termination rights and rights to withdraw from the Transaction under certain defined circumstances;

(8) Conditions precedent and/or conditions subsequent for the execution of the Transaction;

(9) Scope of liability of Seller

(10) Scope of indemnity granted by the Parties to each other;

(11) Governing law of the Transaction;

(12) As well as any other circumstances or requirements which the Parties agree to insert into the Purchase Agreement.

The nature of the Purchase Agreement is to form the extensive and single legal basis for the transfer of the shares or assets from the Seller to the Buyer. Given this, the agreement needs to contain all information, which is necessary to

[295] Cf. Gran, A. (2008), p. 1409 et seq.; Holzapfel, H.-J., Pöllath, R. (2017), p. 186 et seq.; Kästle, F., Oberbracht, D. (2018), B.III. et seq. with further references; Korch, S. (2018), p. 521 et seq.

fully describe the Target, which shall be transferred, as well as the way this transfer shall be conducted and the commercial conditions, under which it takes place.

This makes is in most cases necessary to supplement the Purchase Agreement with a number of exhibits, such being additional documents that contain information which is of essential nature for the validity and comprehensiveness of the Purchase Agreement.

Such exhibits are typically:

(1) Wholesale and detailed description of the transferring assets or shares;
(2) Powers of Attorney based on which certain individuals are authorized to conduct the transaction;
(3) Ancillary Agreements between the Parties, for example regarding the licensing of certain intellectual property;
(4) lists with names and details of the employees affected by and involved in a transaction;
(5) as well as any other documents or agreements, which the Parties would want to be physically separated from the main body of the Purchase Agreement, in order to facilitate its usage or amendment at a later point in time.

Moreover, the Due Diligence Report prepared by the Buyer is often incorporated as being an integral part of the Purchase Agreement in such a way as it describes the disclosed information and knowledge of the Buyer at the time of the signing of the Purchase Agreement. Such information is often the basis for excluding certain warranties given by the Seller in the sense that the information which was already know to the Purchaser at the time of signing, could not form the basis of a warranty claim of the Purchaser against the Seller at a later point in time.[296]

[296] Cf. Kästle, F., Oberbracht, D. (2018), B.III.7; Lips, J. in: Handbuch Unternehmenskauf (2013), § 3, margin no. 185 et seq.; Schmitz, C. (2006), p. 561 et seq.; Weißhaupt, F. (2013), p. 783 et seq.

The Parties' negotiations about the terms and conditions worded in the Purchase Agreement are likely to consume a rather huge amount of time and capacities for Seller and Purchaser. Moreover, the mere fact that Seller and Buyer are negotiating a Purchase Agreement does not (yet) have any generally binding effect. Still, the negotiations can be terminated by either Party at any point in time.

Such discussions are often conducted at various different levels of competence and decision-making-power of both Parties. It will often not be directly the principals, the managing directors of the Selling Company and of the Purchase Company, who directly negotiate the deal, but it will be most likely negotiation delegations from each side. This has a huge advantage with regard to the Parties' agility to negotiate and discuss a potential transaction alongside with each their general conduct of its daily business[297].

Moreover, this modus operandi gives the Parties an additional leverage to resolve on disputed or even dead-locked situations by way of escalating certain questions or discussions up to their respective senior management. From a dispute resolution and negotiation standpoint, such an option provides for a flexible and effective possibility to conduct and manage contractual negotiations.

3.3.2.5. Executing the agreed

If and when the Parties have found common grounds regarding all issues, which require it to be discussed and agreed and once the drafting of the Transaction agreements and ancillary documents is finalized, then the Parties can execute the Transaction agreements by signing them. Usually, the date on which this "Signing" takes place is agreed between the Parties upfront[298] and it often

[297] Cf. Imagine the CEO's of two DAX-listed companies meeting on a daily basis for weeks, in order to discuss a possible transaction of one of its subsidiaries and draft contracts to execute it – this would strongly limit both Parties' ability to also conduct its daily business decisions and actions in the meantime and the core business of the Parties might suffer during these times – cf. Stratz, R.-C., Hettler, S. in: Handbuch Unternehmenskauf (2013), § 1, margin no. 25 et seq.

[298] Cf. Risse, J., Kästle, F. (2018), "Signing".

serves as a deadline to work against with all necessary discussions and drafting work. Here again, the external counsels, especially the external M&A lawyers, often play an important role in preparing all the paperwork that requires to be set up and ready from a legal point of view.[299]

For Transactions, which are conducted under German law, the Signing date will be the time at which the contractual obligation (*schuldrechtliche Übertragung*[300]) of the Target from the Seller to the Buyer takes place by way of signing the Purchase Agreement.

From that moment on, the Buyer has the right to claim also the factual hand-over (*dingliche Übertragung*[301]) of the Target, which is, however, from a German law point of view, a different legal step. Such latter step is usually called the "Closing" of the Transaction,[302] meaning that all necessary actions and handover steps are then finally closed. The ownership of the Target will transfer at Closing.[303] Consequentially, also the purchase price is usually paid upon Closing only.

In case the transfer of the Target Company or the Targeted Assets can be done immediately and without any interim steps, then Signing and Closing can take place at the same time. This structure would be also equivalent to any purchases of goods in daily life – the contractual obligation to transfer a certain good and the execution of this obligation fall into the very same "legal second".

There might be certain formal requirements or other interim or preparation steps necessary, in order to execute the transfer, even though the contractual obligation to do so has already been created by way of the signing of the transaction agreements.

---

[299] Cf. Stratz, R.-C., Hettler, S. in: Handbuch Unternehmenskauf (2013), § 1, margin no. 25 et seq.

[300] Cf. Holzapfel, H.-J., Pöllath, R. (2017), p. 286 et seq.; Kleinheisterkamp, T., Schell, M. (2010), p. 833 et seq.; Risse, J., Kästle, F. (2018), "Signing".

[301] Cf. Jacques, H. in: Handbuch Unternehmenskauf Mittelstand (2017), D.VIII.3, margin no. 175 et seq. & D.VIII.3 margin no. 200 et seq. with further references.

[302] Risse, J., Kästle, F. (2018), "Closing".

[303] Cf. Jacques, H. in: Handbuch Unternehmenskauf Mittelstand (2017), D.VIII.3, margin no. 175 et seq. & D.VIII.3 margin no. 200 et seq. with further references.

Signing

Depending on the complexity and structure of the Transaction, the Signing of the transaction documents might be either a short signing exercise or a time-consuming multi-step requirement for both Parties and their external advisors.

In case the Transaction is structured as a Share Deal, certain basic formal requirements are to be complied with – which also need proper preparation and consideration of the Parties upfront. For example, the transfer of shares in a German Limited Liability Company (GmbH) cannot be legally conducted by way of a plain purchase agreement, but requires a notarized share transfer agreement, according to sec. 15 para. 3 GmbHG.[304]

A similar requirement is of relevance in case the Transaction includes the transfer of real estate located in Germany: According to sec. 311b BGB, such transfer can only be executed in a notarized form. As such formal requirements effectuate an immediate transfer of the ownership in the respective GmbH-shares or real estate, such notarized transfer will usually take place at Closing date only.

Whereas at Signing, the Parties will then commit and enter into preparatory agreements, agreements regarding other assets to be transferred or the Parties might as well decide to conduct Signing and Closing of the Transaction at the very same time, if all other particularities of the Transaction permit it.

Upon Signing, all participants to the Transaction need to be present and duly represented by their authorized representatives (Managing Directors or Proxy Holders, as far as the latter are permitted to conduct the Transaction[305]) or by other individuals, who are authorized to act on their behalf based on a Power of Attorney covering the entire Transaction.

For some smaller Transactions or in situations, in which no last-minute discussions or open issues are to be expected, the principals from Seller and/or

---

[304] Cf. Jacques, H. in: Handbuch Unternehmenskauf Mittelstand (2017), D.VIII.3 margin no. 201 et seq. with further references; Jaletzke, M. in: Jaletzke/Henle M&A Agreements (2011), I.5 with further references.

[305] Cf. Gran, A. (2008), p. 1409 et seq; Holzapfel, H.-J., Pöllath, R. (2017), p. 286 et seq.; Jaletzke, M. in: Jaletzke/Henle M&A Agreements (2011), I.4.

Buyer might even not be present at the Signing at all, but might as well authorize any other person, for example their respective external counsels, to act on their behalf, according to instructions given in advance.

For Transactions which inherit a high level of complexity or where a large number of contracts and documents require to be signed and executed upon Signing, the Parties would be well-advised to agree on a formal "Step Plan" for the Signing process upfront. This creates transparency and clarity for the involved individuals and serves as a double-check to make sure that no necessary steps are omitted. Due to legal requirements, there might be even a certain timing for the chain of events necessary. For example, a pledge agreement regarding certain assets would ideally only be executed, once the assets have been factually transferred to the respective party.

Nevertheless, irrespective of the complexity and individual structure of the deal, any Signing of a Transaction constitutes quintessentially the mutual agreement of the parties to a purchase agreement regarding certain assets, may such be physical, immaterial or of legal nature only (i.e. shares in a company). According to German law, such a purchase agreement is defined in sec. 433 BGB, which also applies to any corporate transaction, governed by German law.[306]

As such mutual agreement is binding for both parties, each of them has to ensure that they really wish to enter into the agreement. Once this is done, there would be almost no way to manoeuvre back.

This internal decision-making process on the Seller's and on the Buyer's side, the reasons and motivations behind the final steps of approving and executing a transaction, this forms the subject matter of this thesis and the details around such will be the analytical heart of the following Chapter 4 and Chapter 5. Whereas, for this first glance at the general structure of a corporate Transaction, the mere fact that there is to be an internal process of decision-making by way of approval of the transaction shape, structure and agreements by the respective Participant's internal decision-making authority (Board of Directors,

[306] Cf. Büdenbender, U. in: in: Dauner-Lieb, B., Langen, W. (2016), § 433 margin no. 5 et seq. & § 453 margin no. 17 et seq.; . Gran, A. (2008), p. 1409 et seq; Westermann, H.P. in: MüKo BGB, § 453, margin no. 17 et seq. with further references.

Shareholders' meeting, or another equivalently empowered internal institution), is sufficient.

The interim period

The reasons that Signing and Closing have to take place at different times, can be diverse:

Depending on the structure and size of the Transaction and its Participants, a filing with the cartel authorities can be necessary. The assessment, whether such filing is required or not, is usually conducted prior to the signing, but the filing can often only be obtained, once the Signing has taken place.

Moreover, also some other corporate law related preparation steps might need to be conducted, before the Target can be transferred from the Seller to the Buyer. Sometimes, the Target Company is at Signing not yet in a corporate shape in order to be separated from the Seller and transferred as a stand-alone corporate construct. Such scenarios are often described as a "Carve Out" of the Target out of the Seller's corporate structure.[307]

In case of an Asset Deal, the Seller often needs to prepare the physical hand-over of the assets and before being even able to do so, the Seller might require to make such assets redundant and to structure its own business activities in a way that does no longer include or rely on such assets.

Also, the Parties might have conditioned[308] the Closing on any other circumstances they deem to be appropriate and necessarily to be fulfilled prior to the conduct of the Closing. Such conditions can be, for example, related to securing the Buyer's ability to finance the Transaction – obtaining of external financing from banks or else.

---

[307] Cf. Gran, A. (2008), p. 1409 et seq.; Holzapfel, H.-J., Pöllath, R. (2017), p. 295 et seq. & p. 544 et seq.; Jacques, H. in: Handbuch Unternehmenskauf Mittelstand (2017), D.VIII.2,f margin no. 199 et seq.; Jäckle, C., Strehle, E.P., Claus, A. in: Beck'sches M&A-Handbuch (2017), § 52, margin no. 68 et seq.

[308] Cf. Kästle, F., Oberbracht, D. (2018), B.III.6 with further references and template wording; Picot, G. in: Münchener Anwaltshandbuch GmbH-Recht (2014), § 21, margin no. 172 et seq.; Risse, J., Kästle, F. (2018), "Closing Conditions".

From a management and business perspective, the time period between Signing and Closing can be a difficult time. The Seller is still responsible for the Target Company, for the ongoing daily business and all therewith related decisions, which need to be taken. However, the prospect of transferring the Target Company to the Buyer shifts the strategic aims for the Target Company away from its previous positon as an integral part of the Seller into the new hemisphere of the Buyer.[309] Previously obtained interests of the Seller and new or future interests of the Buyer might lead to a conflict concerning the basic daily management decisions and steps.

In order to prevent conflicts and to streamline the ongoing management and economic success of the Target Company in the interim period, the Parties often agree on explicit management rules, which apply for as long as the Seller is still in charge of steering the Target's activities after the Signing. By that, that the Buyer can – as far as possible – assure that he will indeed receive at Closing, what he has purchased upon Signing.

In that regard, the Parties may, for instance, secure in the Purchase Agreement certain boundaries for the Seller's management of the Target Company by way of defining explicit scenarios, in which the Seller is obliged to consult the Buyer or to seek for its approval.[310] Clauses like these are of called "Conduct of Business"-clauses.[311] The scenarios such clauses aim to capture can be, for example, concluding sales or sourcing contracts above a certain financial value (e.g. EUR 100,000) or the acquisition or sale of any real property owned by

[309] Cf. Gran, A. (2008), p. 1409 et seq.; Holzapfel, H.-J., Pöllath, R. (2017), p. 295 et seq.

[310] Cf. Picot, G. in: Münchener Anwaltshandbuch GmbH-Recht (2014), § 21, margin no. 172 et seq.

[311] Cf. Henle, W. in: Jaletzke/Henle M&A Agreements (2011), II.17 with further references and template wording.

the Target Company.[312] Legal contractual freedom sets few boundaries to the Parties' intentions and wishes in this regard.[313]

In addition to the day-to-day management of the Company, the time between Signing and Closing of a Transaction is also the point in time, when agreed Closing conditions require to be fulfilled or its execution to be fulfilled. Apart from obtaining a secured financing, merger control clearance and other external circumstances, the Parties might have also agreed on other individual Closing conditions in the Purchase Agreement – such as, for example, certain preparatory corporate steps to be taken, i.e. conduct of a capital increase or issuance of new shares in the Target Company, but also agreement to any kind of commercial contract between the Parties, which shall be executed and cherished after the Closing, as for example a license agreement, toll manufacturing agreement, sales agreement or any other kind of commercial connection between the two Parties.

What else?

Moreover, the upcoming Closing might also make it necessary for the Parties to agree on certain other preparatory steps. The Closing documentation, including a Closing Memorandum[314], by which the Parties document the steps conducted at Closing and the agreements signed thereupon.

---

[312] Cf. Henle, W. in: Jaletzke/Henle M&A Agreements (2011), II.8 & II.17 with further references and template wording.

[313] Only factual boundaries such as the general principle of good faith prohibiting discriminating behaviour according to sec. 242 and sec. 138 BGB as a central guideline hereto.

[314] Cf. Bormann, J., Seebach, D. in: Herrler, Gesellschaftsrecht (2017); § 15, margin no. 285 et seq.; Gran, A. (2008), p. 1409 et seq.; Kästle, F., Oberbracht, D. (2018), A.I.5.d.

Closing

As the Signing constitutes the creation of the legal obligation for the Seller to transfer the Target to the Buyer, the Closing of the Transaction then constitutes the factual hand-over and the transfer of the Target between the parties.[315]

Typically, the occurrence of the Closing itself is subject to the fulfilment of certain conditions by one or both parties, such as obtaining merger clearance, certain restructural or organizational measures at the Target Company or else. Closing will only occur, once those conditions are fulfilled, unless there is an agreement to do so only afterwards.[316]

Moreover, the Seller will have a vital interest to receive the purchase price, before the actual Closing occurs and the Target Company is thereby legally transferred into the ownership of the Purchasing Company. Typically, the Closing would therefore be a defined sequence of events, with the Purchasing Company initiating the purchase price payment as one of those. In order to document the agreements found and the occurrence of the Closing, the concluding of a Closing Memorandum is a common instrument to have a clear and transparent documentation.[317]

3.3.2.6. Wrap up, clean up and implementation of the change

Once the Closing has successfully occurred, particularly in case of a Share Deal, the Purchaser would want to integrate the Target Company into its own group structure, in a legal and in a commercial and factual way. The particular setup and level of integration and inter-company conjunctions will of course depend on the Purchaser's strategic setup and future plans.

The Purchaser might want to manage and maintain the Target Company as a separate unit, from a corporate and/or commercial perspective or the Purchaser

---

[315] Gran, A. (2008), p. 1409 et seq; Risse, J., Kästle, F. (2018), "Closing".

[316] Cf. Gran, A. (2008), p. 1409 et seq.; Kästle, F., Oberbracht, D. in: Kästle, F., Oberbracht, D. (2018), B.III.6.

[317] Cf. Gran, A. (2008), p. 1409 et seq; Risse, J., Kästle, F. (2018), "Closing Memorandum".

might also want to fully integrate the new acquisition into its existing corporate and strategic setup.

Post-merger integration

But in any event, and irrespective of the intended level of integration into the Purchaser's structure, it will be of crucial importance for the Purchaser to create a strengthened and unified corporate culture and corporate identity within the Target Company. Such cultural integration and the realisation of synergies are vital to the mid- and long-term strategic success of the entire transaction.

Essential steps of a successful post-merger integration of the Target Company are, amongst others: The swift and thorough information of business partners, potential future customers and contract parties, the swift and thorough internal information strategy, in order to calm down, safeguard and incentify the key work force that has been acquired within the Transaction, as well as the transition and integration of all technical and factual requirements of the Target Company, in order to stay active and profitable.

A successful post-merger integration of the Target Company is the basis for the actual pay-off of any transaction.[318] Only then, if the acquisition turns out to lift synergies between the Target Company and the Buyer itself, is the Transaction going to be a sustainable economic success for the Buyer.

There are numerous examples of "failed" Transaction, which did not melt down during the actual acquisition process, but which turned out to be ineffective post Closing.[319]

---

[318] Cf. Bücker, T., Kulenkamp, S. in: Handbuch Managerhaftung, § 29, margin no. 98 et seq. with further references.

[319] Cf. Holzapfel, H.-J., Pöllath, R. (2017), p. 322 et seq.; Risse, J., Kästle, F. (2018), "Post Merger Integration"; Rosengarten, J. in: Beck'sches M&A-Handbuch (2017), § 4.II.10 with further references.

3.3.3. Key aspects of M&A contracting

Throughout the full lifetime of the Transaction, there are a number of different contracts, which the Parties may want or are required to enter into. Such contracts will always reflect the structure and scope of the Transaction and will be also subject to the negotiation positions and bargaining powers of the Parties.

Overall, the most common contracts within the context of M&A Transactions are the following:

- Non-Disclosure Agreement
- Letter of Intent/Memorandum of Understanding
- Data Room Rules (one-sided, counter signing only)
- Purchase Agreement (including Exhibits)
- Closing Memorandum
- Ancillary contracts: Local Transfer Agreements, IP Transfer Agreements, etc.

The Non-Disclosure Agreement

To be signed at the very beginning of every information disclosure or exchange, the Non-Disclosure Agreement is designed to ensure the confidentiality of each Party's proprietary information, to which one Party grants the respective other Party access in the course of the discussions and negotiations regarding an envisaged corporate transaction. Such agreements can either obliged both Parties to keep the respective information received from the other Party confidential, or might be designed to work one-way only. The question, which design of a Non-Disclosure Agreement is suitable, does primarily depend on the planned information disclosure – if both Parties are to distribute information, then a mutual Non-Disclosure Agreement should be concluded.[320]

Due to the potentially sensitive nature of the information, the Non-Disclosure Agreement should be entered into for a rather long term, not only covering the envisaged timeframe to negotiate the Transaction. The term does

[320] Cf. Linke, J., Fröhlich, M. (2014), p. 449 et seq.; von Werder, A., Kost, T. (2010), p. 2903 et seq.

determine the time period during which the receiving Party is obliged to maintain strict confidentiality regarding the received data. After the end of such confidentiality obligation term, the information is often required to be either destroyed or any documents to be handed back to the revealing Party.[321]

However, the Non-Disclosure Agreement is not a typical M&A Transaction Document. It is a general commercial contract, which is often concluded, if the collaboration or discussion between two or more Parties might potentially involve information that is not fully deemed to be known in public.

Moreover, the signing of a Non-Disclosure Agreement is often regarded as a first and formal step towards closer discussions in the light of a potential Transaction.[322]

Letter of Intent

Also timed for the very beginning of the Transaction, the Letter of Intent, often also called Memorandum of Understanding,[323] is a format that enables the Parties to express their first and most basic intentions for the ongoing discussions. There are no fixed elements that must govern such a contract.[324] It is open to whatever content and binding or non-binding character the Parties wish to include.

Same as for the Non-Disclosure Agreement, the Letter of Intent is also not a specific M&A Transaction contract, but a general commercial contracting format, which can serve the Parties intentions and benefits in a Transactional scenario well.[325]

Data Room Rules

---

[321] Cf. Linke, J., Fröhlich, M. (2014), p. 449 et seq. with further references.

[322] See above, Chapter 3.3.2.2 with further references

[323] See above, Chapter 3.3.2.2 with further references.

[324] See above, Chapter 3.3.2.2 with further references.

[325] Cf. Hanke, K., Socher, O. (2010), p. 664 et seq.; Jacques, H. in: Handbuch Unternehmenskauf Mittelstand (2017), C.II.1, margin no. 45 et seq.; Kästle, F., Oberbracht, D. (2018), A.I.5.a.

In case the Transaction involves the installation and review of a Data Room with information regarding the Target Company or the Target Assets, then the Seller might have a strong interest to define certain rules and conducts for the review and usage of this Data Room. Irrespective, whether it is a physical data room or an electronic platform or folder, the Seller can set out certain boundaries for the Buyer's possibility to review, copy, print or safe the documents contained in the Data Room.[326] These boundaries are often explicitly written down and collected in a document called "Data Room Rules".

As it is usually set up by the Seller, it is not by all means a contract between the Parties, but more a one-sided definition of rules. However, Sellers often require the potential Buyer and all individuals, which shall be accessing the data room on its behalf, to counter-sign a declaration stating that they will comply with all rules set out for the usage and access to the Data Room.[327]

Purchase Agreement

The most important contract for any kind of Corporate Transaction is always the Purchase Agreement, by which the Parties agree to sell, purchase and transfer the Target Company or Target Assets. The content and structure of this contract depends on the structure, scope and nature of the Transaction and the agreement found between the Parties.

In case the Buyer wishes to acquire shares in the Target Company, the Purchase Agreement will be called a Share Purchaser Agreement (SPA). Consequentially, in case the Buyer wishes to acquire certain assets, the Purchase Agreement will be called an Asset Purchase Agreement. In despite of certain differences, some of the most basic elements are similar for both types of Purchase Agreements:

As the Purchase Agreement will form the contractual heart of the Corporate Transaction, the Parties should always aim for an explicit and clear wording, in order to leave little room for misleading interpretation or misunderstandings.

---

[326] See above, Chapter 3.3.2.3 with further references.

[327] See above, Chapter 3.3.2.3 with further references.

The Purchase Agreement - Transaction Object

The Purchase Agreement is always to name and list all Parties to the Corporate Transaction,[328] explicitly name and describe the Transaction Object, the Price, the Transfer mechanism, warranties, liability and indemnity assumed by the Transaction Parties, termination rights, as well as any potential conditions for the Closing and rules on how to conduct the business related to the Target Company or the Target Assets, which shall govern the time period between Signing and Closing. Moreover, the Parties will also choose the applicable law, which shall be applicable to the entire contract and Transaction in the Purchase Agreement.

With regard to the definition of the Transaction Object, there is a substantial difference between Asset Deal and Share Deal: German contract laws provide for the basic mandatory requirement that every contract always needs to include an explicit definition of its object.[329]

This means, in case of an Asset Deal that all assets, which shall be transferred as part of the Transaction, require to be named and listed. Such listing needs to be explicit and unambiguous, so that every third party, being not familiar with the details of the Target Assets and the Transaction, would still be able to identify the assets without any doubts. If the Parties intend to transfer not only one asset, but several, then all such assets require to be named and to be listed. Especially in case of the transfer of large numbers of equipment, contracts or inventory stock, such lists can become rather long. It might be advisable to choose a list format that can be attached to the main body of the Agreement as an Exhibit.

In case of a Share Deal, the Transaction Object will be the respective share(s). Similar to any other assets, which are being contractually transferred, also those shares require to be explicitly named or to be described in the Purchase Agreement. For shares of a German GmbH, an identification of the shares would be possible, if their respective numbers from the Shareholders' List[330], which requires to be filed with the Commercial Register and to be updated in case of any

---

[328] Cf. Kästle, F., Oberbracht, D. (2018), B.II. with template and further references.

[329] See above, Chapter 3.3.2.3 with further references.

330 Cf. Baumbach, A., Hueck, A. (2017), § 40, margin no. 13 et seq.

changes in the ownership structure[331] and which is considered to be the decisive source for any information regarding a GmbH's shareholding data[332], are mentioned.

The Purchase Agreement – Warranties and Liability

Another central aspect of each Purchase Agreement is the warranties given by the Parties and the liability and indemnity that might be associated therewith. Even though the Purchaser will have conducted a Due Diligence in most cases, certain commercial and legal uncertainties and risks will unavoidably exist. In order to cover the legal disadvantages associated therewith, the Parties are free to agree on a catalogue of certain warranties, which the Seller gives and assures to the Purchaser.[333]

The legal nature of such declarations is a binding statement, like a guarantee, given separately from the rest of the Purchase Agreement and the legal effect thereof.[334] Such statements, according to sec. 311 para. 1 BGB are in most cases directly, combined with the right to claim restitution or damage compensation, in case they are violated.[335]

The legal consequence of a breach of a contractual duty or a warranty statement is called "liability". German and European laws generally provide for a concept of rather broad and unlimited liability. As this is rather disadvantageous for the Seller, the Seller might often seek to limit its liability, which is legally permitted with some few exceptions: The Parties are free to limit their liability

[331] According to sec. 40 para. 1 GmbHG.

[332] Cf. Damm, M. (2017), p. 2 et seq. with further references.

[333] See above, Chapter 3.3.2.4 with further references.

[334] Cf. Büdenbender, U. in: Dauner-Lieb, B., Langen, W. (2016), § 433 margin no. 5 et seq. & § 453 margin no. 17 et seq.; . Gran, A. (2008), p. 1409 et seq; Korch, S. (2018), p. 521 et seq.; Schmitz, C. (2006), p. 561 et seq.; Westermann, H.P. in: MüKo BGB, § 453, margin no. 17 et seq. with further references.

[335] Cf. Mellert, C.R. (2011), p. 1664 et seq with further references.

towards each other for damages arising due to simple negligent behaviour[336] and may also limit the amount of liability that arises in such situations, for example by agreeing on a fixed maximum amount or certain baskets of monetary compensation to be paid in case of a contract violation. However, they may not exclude or limit any liability for the injury of a person, death, fraudulent behaviour or certain other types of liability.[337]

The Purchase Agreement – Structure and setup

As the case may be, the structure of the Transaction may also necessitate alterations in the contractual setup: Especially for Corporate Transactions, which involve assets and/or shares to be transferred in several different countries, the Parties may choose for an "Umbrella"-type structure of their Purchase Agreement. This structure consists of one main agreement, in which all commercial essentials of the Transaction are outlined and agreed. Moreover, this main agreement serves as a joint basis and reference point for several different local transfer agreements, which serve as contractual basis for the sale, purchase and transfer of the assets and/or shares which are located at various different locations.

In general, due to the contractual freedom, there are no mandatory setups or boundaries for the structure of Purchase Agreements to Corporate Transactions. The Parties are free to design whatever setup they deem most appropriate for their needs.[338]

Moreover, as every individual contract should, the Purchase Agreement should contain some general "mechanical" wording that covers any potential current or future invalidities of contract clauses, as well as potential gaps and

---

[336] Cf. Bücker, T., Kulenkamp, S. in: Handbuch Managerhaftung (2017), § 29, margin no. 98 et seq.; Picot, G. in: Münchener Anwaltshandbuch GmbH-Recht (2014), § 21, margin no. 129 et seq. with further references.

[337] Cf. Picot, G. in: Münchener Anwaltshandbuch GmbH-Recht (2014), § 21, margin no. 129 et seq. with further references.

[338] As long as the general legal boundaries of contracting laws are respected, based on German law or the respective other applicable jurisdictions, such as, in German law, sec. 242 and sec. 138 BGB.

omissions in the regulatory scheme of the contract. Such a mechanical clause under German law is called a salvatorious clause and shall make sure that the rest of the Purchase Agreement is not affected by the invalidity or unenforceability of certain clauses therein. It will also make sure that such invalid and/or unenforceable clause is then replaced by a valid and enforceable clauses that reflects the Parties' intention as well as legally possible.[339]

[339] Cf. Kästle, F., Oberbracht, D. (2018), B.III.19; Korch, S. (2018), p. 521 et seq.

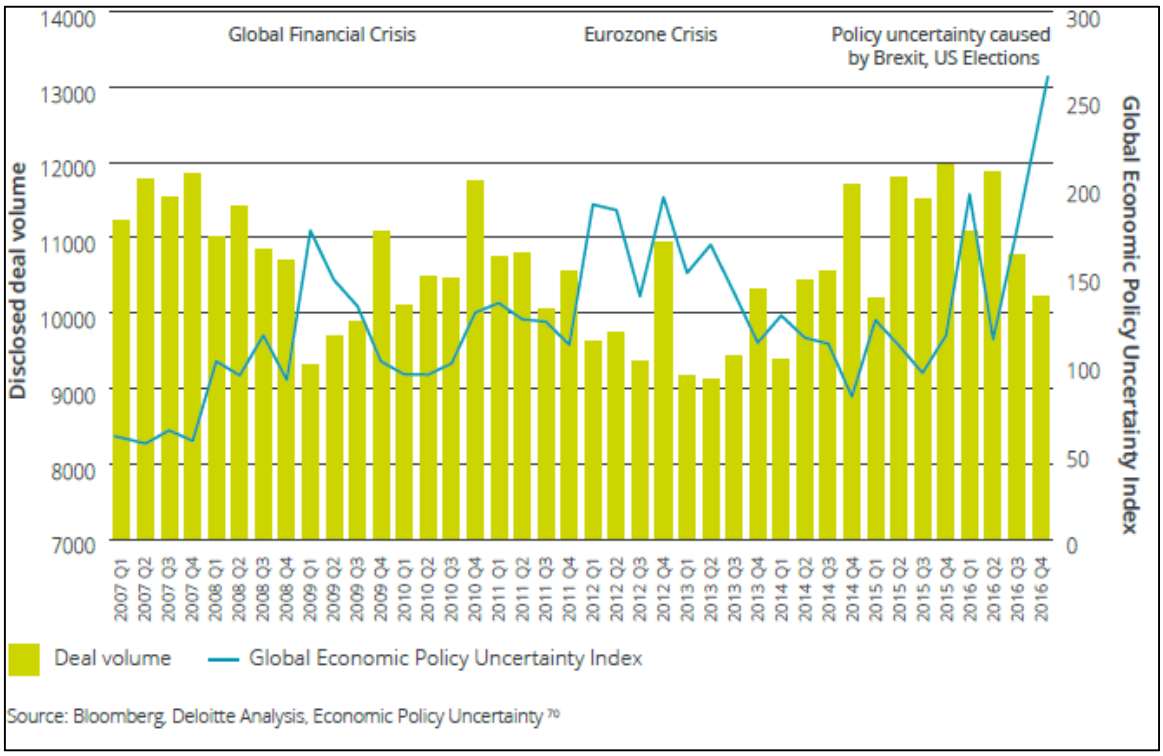
3.3.4. Why M&A? The importance of the economic environment for the success of a Corporate Transaction

Having taken a close look to the legal framework for the conducts of and decision-making within a Corporate Transaction, there is now also another factor worth considering for any analysis of the shape and fate of Corporate Transactions and the individual management behaviour related thereto: The macroeconomic environment, in which M&A activities take place.

A Corproate Transaction is an extraordinary, sometimes even singular, event for all three participants. It takes time, thorough planning, sometimes even external financing and a certain level of risk appetite of the managers of the purchasing and selling entity. The initial decision, to either start or not start into proceedings that might result in a deal, is not taken in a vacuum, but always in a certain momentarily economic environment. This might play out either in favour or in disadvantage of the deal and the decisions associated thereto.

It is generally visible that the overall M&A activities in various regions and on a global scale are cyclic. Whereas in certain years, the number of successfully closed M&A deals is exploding and the services and consulting industries associated therewith are booming, a significant downturn is visible for certain other years. This is quintessentially visible in the Figure below:

Figure 5: Global M&A Deal volumes vs. Global uncertainty development 2007 until 12/2016



Source: The Deloitte M&A Index 2017, Part I, p. 2, https://www2.deloitte.com/de/de/pages/mergers-and-acquisitions/articles/m-and-a-index-2017.html (last check on 15 August 2018)

Various external factors come into play here, such as[340]

- standard interest rates for debt financing,
- the gross domestic product (GDP) and
- growth rates of the participants' home turf and target markets,
- changes in international trade barriers, for example customs and other tariffs and duties, as well as
- overall stability of the political and cultural environment of the participants as well and

[340] Cf. Eisenbarth, I. (2013), p. 120 et seq. with further references.

- the absence of natural catastrophes manifestating in monetary disadvantages for the relevant regions.

Such factors might play a role for the initial question, if a Corporate Transaction is conducted at all. Any changes to those factors might also be relevant for existing Corporate Transactions and might necessitate one or several deal participants to either urge for changes in the setup or contractual basis of the Corporate Transaction, or the deal might be even so deeply impacted by the external changes that the parties decide to pause or abandon the deal or are even forced to accept that the deal is not going to be successful.

In the light of the central questions and aspects for the Research Fragment 1, it is important to note that any relevant changes to external factors can also impact the decision-making of managers, where such a free range exists based on the applicable legal framework. The managers might well consider such factors and changes in their assessment on the likelihood that the deal will be advantageous. It might change the personal risk-appetite of a manager, if he encounters changes in relevant aspects of his or his Company's environment, which he either considers to be negative or at least a threat to the current status quo, or if such change creates an uncertainty, because the effects are not yet predicable.

Allthogether, the overall question of the existence of a Corporate Transaction, as well as the specific decisions to be taken by the Managing Directors at the different stages and phases of a Corporate Transaction, might be influenced positively or negatively by changes in the macroeconomic environment of the participants. This might also have an impact on the further processing and the behaviour of the Management and might lead towards an increasingly risk-averse or risk-friendly behaviour in the context of particular decision-making. This might also play a role for the contracting dimension of a Corporate Transaction – for example, the Purchaser could demand a termination right or a post-Closing true up of the Purchase Price, in case of a significant deterioration of an external factor, such as a decline of the GDP by a certain percentage or the weakening of the economic outlook for the Target's relevant market and customer base visible as a decline of a significant index.

Based on those ascpects, a theoretical impact of external economic factors to the Management's decision-making in Corporate Transactions is to be considered as existing. The later analysis of practical real-life Case Studies below in Chapter 5 will reveal, if such theoretical assumption can be also evidenced in reality.

3.4. LEGAL FRAMEWORK FOR DECISIONS TAKEN BY THE MANAGEMENT OF THE PARTICIPATING COMPANIES IN CORPORATE TRANSACTIONS

The description and analysis of the legal framework for (i) the existence and conduct of Corporations and their organs, and for (ii) the conduct of Corporate Transactions as well as (iii) the brief overview of potential macroeconomic influences to those do now allow for a comprehensive description and understanding of the specific legal framework, in which the Management of the participants executes and decides in a Corporate Transaction.

The following description aims to destille the combined essence of the legal leeway, rights and duties of Managing Directors in general and of the requirements applicable to Corporate Transactions, from each participant's perspective. This will be decisive for concluding on the Research Fragment 1, as depicted above in Chapter 3.1.

3.4.1. Legal framework for Seller's Management

What are the specific phases and steps of a Corporate Transaction, in which the Seller's Management is freely entitled to take a genuine management decision, without determination by specific legal requirements or a dictate from the shareholders?

So far, there seems to be no comprehensive answer to this question visible in German and European academic literature. Therefore, the following description is a distillation of the descriptions and conclusions drawn in the previous parts of this Chapter 3.

Looking at the Management of the Selling Company and the different steps of the Corporate Transaction, in which it is actively involved, there are some specific phases in which the Managing Directors can take genuine management decisions.

During the early stage of the Corporate Transaction, the Seller's Management has only limited influence on the decision of whether a certain part of the Seller's corporate portfolio is sold or not. Typically, such a decision would require and de facto occur to be made by the Selling Company's shareholders.

The Management might be invited by the shareholders to join such considerations or it might even trigger such a thought process initially, but the decision to aim for a sale of a certain part of the business or not is not covered by the scope of responsibility mentioned in sec. 43 GmbH, sec. 93 AktG and their respective equivalents in UK and Spanish laws.

Once the decision to aim for a sale is made by the shareholders, the Corporate Transaction enters into a second stage: The establishing of a first contact to potential buyers. Here, the Management might well be able to make suggestions or facilitate contacts, but there is no specific legal right or scope attached thereto, by which the Management could decide on the path forward and the potential purchasers selection.

However, after or in parallel to the identification of potential Purchasers, the phase of "Proper inspection" also requires to be well-prepared and carefully conducted and supervised. This is one of the first areas, where the Purchaser's Management can directly influence and shape the form and fate of the deal. The collection of all relevant data and the assembly of the (virtual) data room for the Due Diligence, requires broad knowledge about the Target Company's daily business activities but also a strategic mindset to select the information in a senseful manner and in a way that will turn out to be benefitial for the Seller – for example, in case the potential Purchaser is a competitor of the Target Company, the information made available in the data room requires to be selected with a view to avoid unnecessary or illegal disclosure of information, which would put the Target Company's market position at risk, should the deal fail.

As a matter of fact, the data room requires to give an open and comprehensive overview of the Target Company's business activities, potential risks and opportunities. The sequence of disclosure can be largely determined by the Seller's Management. For example, the Due Diligence can be staged with an increasing level of information and documents to be disclosed, e.g. upon signing of a Letter of Intent or after receipt of a first binding offer or else. To consider, which approach is most suitable in the light of the potential Purchaser, the Target's attractiveness and the external market conditions at the time and in the industry, in which the Target conducts its business, is one of the main fields, which is considerably free for considerations and influence of the Seller's Management.

Moreover, it is the Management's obligation and interest to ensure a proper level of confidentiality amongst all deal participants, company-internal and external.

With regard to Defining the crucial parameters for the Corproate Transaction during the contract negotiation phase, the Seller's Management does also have various means to influence the nature and scope of the deal and is supposed to take various decisions. As visible in the Case Studies described and analysed below in Chapter 5, it is in most cases the Seller's Management, who actually conducts the negotiations about the sales contract and any ancillary agreements. Of course, this is mostly done with a team from various internal departments such as Legal, Strategy and others, and often including the support of external advisors, the Managing Director is as a matter of corporate institution the ultimate decision-maker for any such "groundwork" and specific questions, which are not as strategic or important enough for the shareholders to resolve or interfere themselves.

In many cases, the shareholders set out the overall boundaries and general principles, by which the Management then executes the Selling Company's negotiation strategy. This leaves huge parts of the work and decisions to be taken during the negotiation phase to the Management's sole discretion and competency. Even though such decisions are often told to be "subject to final shareholder approval", the shareholders do in most cases not revert back and re—negotiate specific clauses of the agreements, but rather check, if the key parameters that they had initially identified are appropriately reflected in the transactional agreements – those will be most likely general setup, purchase price, general scope of the warranties and closing conditions.

The Management's main guideline for the negotiation phase of a deal are, next to the principles set out by the shareholders, the interests of the Selling Entity, which they represent. As always, the Company's Object as set out in the Articles of Association defines the field of possible actions and the general direction for managerial behaviour. The outcome of the negotations must be benfitial for the Selling Company, otherwise the Management would need to exit the Corporate Transaction. In that regard, almost every clause in the transactional agreements can be "tagged" with a certain scope of acceptable outcomes, which the Management has to identify and work towards: What is the minimum

purchase price that the Purchaser needs to pay in order for the deal to be advantageous for the Seller? Which warranties can be given without creating an unbearable liability exposure for the Seller? How is the development of the overall costs of the deal and are they still reasonably acceptable for the Selling Company?

All those questions determine the room for decision-making of the Seller's Management. The question, which purchase price is "acceptable" for the Selling Company and which scope of liability exposure is still appropriate in the light of the advantages which the deal brings, all those considerations are required to be made by the Management and result in the decisions it takes. And here again, as described above, the general requirement to always conduct all actions and decisions with the due care of a prudent businessman and in compliance with existing laws, is the central guideline and obligation for Managers in all Corporations in the European law context.[341]

When it comes to real-life decision-making on specific questions, this guideline turns out to be of very general nature. Therefore, it leaves a considerable room for the Manager to influence and form the decision, as long as it is based on objective considerations and a reliable information basis.

After the transaction agreements are successfully negotiated, the Seller's management is most likely also heavily involved in the preparation of the actual handover of the Target Company. When it comes to the practical questions on how to separate the Target Company's business and organisation from the Seller's own sphere, the main guiding principle is again that the Seller's Management has to ensure that the Selling entity can continue its own activities without any unacceptable interference or disadvantages. Whether this concerns the split of IT systems, the separation of contract directories or the contact of customers for information about the coming transfer, the Management will always have to ensure that the Selling Company's interests are respected. But again, this task leaves quite some room for individualism in specific decisions, which have to be taken.

Another major responsibility of the Seller's Management is the assessment and potential notification of authorities, if necessary. Especially the notification of

[341] See above, Chapter 3.2.4.

competition authorities might require the involvement of experts, who can advice on the competition law specifics and whether a notification is necessary or not. Again, in case there is room to argue pro or con a notification, it is the Management, who is obliged and entitled to take the ultimate decision and bears the consequences thereof. Here again, the risk appetite of the Managing Director might come into play. The same counts for publication requirements to authorities or to the public, e.g. if the Seller is listed on a stock market. Again, it is the Managing Director, who is responsible and takes the decision what to publish and when, even if the room to decide one or the other way might be rather limited due to the very specific nature of legal requirements set out in that regard.

In a nutshell, the overall view to the different steps of a Corporate Transaction reveals that the Seller's Management has signifant room to take decisions and ultimately act and shape the deal, especially during the phase of "Proper Inspection" and "Defining parameters". The obligations, which limit their decision-making here are of rather general nature and often still allow for individual connotation and subjective factors in the decision-making of the respective Managing Directors.

3.4.2. Legal framework for Purchaser's Management

Inversely as for the Seller's Management, also the Purchaser's Management is likely to not play a decisive role in the initial phase of considering, if an acquisition shall be at all conducted or not. A decision of such strategic importance is likely to be taken by the shareholders of the Purchasing Company. The shareholders will then instruct their Managing Directors to conduct the steps towards an acquisition, in the light of particular instructions given.

However, during the phase of "Proper inspection" of the Target Company, the Purchaser's Management might play a decisive role, if they lead the project team, preparing the potential acquisition.

Again lead by the general requirement to foster the Purchasing Company's interests and objectives, the Managing Directors have to ensure that a sufficient level of information and data is collected about the Target Company, in order to allow for a sound and reasonable decision to either move forward with the deal or not. Therefore, the Managing Director does have a strong interest to ensure that the Due Diligence is conducted in a thorough and detailed way and that the results and findings of potential interest are reported comprehensively.

The Managing Directors do often rely on external advisors to conduct the Due Diligence or at least parts thereof – for example to have an external law firm checking the Target Company's contracts and/or a Financial advisory firm assessing the financial data available in the Data Room.

The Managing Directors will need to rely on the findings and content of the Due Diligence report during the further phases of the Corporate Transaction. Therefore, they have a strong interest to ensure that the Due Diligence is conducted as named – with due diligence and strong care.

Moreover, the Due Diligence phase does also deliver the necessary data points for the Management to assess, if the Target Company is indeed a suitable acquisition candidate and a benefitial fit into the Purchasing Company's portfolio.

In case the Managing Directors identify any major disadvantages or negative surprises during the Due Diligence, they will need to take a decision to protect their Company's interests, even if this means that the deal has to be abandoned. Typically, such decision will be ultimately taken by the shareholders, but it is the Managing Directors who are in the position and have the sufficient

level of information to identify such dealbrakers and to bring them to the shareholders' attention. Again, the assessment of whether a certain aspect is to be classified as major obstacle to the Corporate Transaction or not, is a decision which the Managing Directors take in their own discretion.

Similar to the position of the Seller's Management, also the Purchaser's Management is likely to be heavily involved in the negotiation of the transactional agreements. Here again, the shareholders are likely to give only general instructions or minimum requirements, which have to be negotiated towards by their Managers. In addition, the shareholders might also reserve the right, or be entitled by the Articles of Association, for a final approval of the contract drafts prior to Signing. Again, this setup leaves significant room for the Managing Directors to take the specific decisions on deal structure and contract wording.

As the deal progresses, the Purchasing Company's Management does resume several additional obligations, such as potential notification requirements vis-á-vis authorities or the public, as well as to assess, if the strategic focus of the Purchasing Company is altered by the deal in a way that makes a change or addition to the Company's Object defined in the Articles of Association necessary. If so, the shareholders will resolve about this ultimately.

It is also the Managing Director's responsibility and right to adequately prepare the Purchasing Company's organisation to be ready to connect and integrate the Target Company after the Closing of the Corporate Transaction. This includes very specific questions, for example the future setup and staffing of the Company's corporate functions, the integration of the two Companies' IT infrastructure and the overall level of integration of the Target Company going forward. Will there be only one legal entity in the future? Will the Target Company continue to exist as separate legal entity and separate organisational unit? Will there be a joint corporate services backbone for functions like Legal, Procurement, IT, HR and others? Many answers to those very practical questions will not be resolved upon by the shareholders, but will be upon the Managing Directors to decide.

Next to the responsibilities and decision-making in the light of the Corporate Transaction, the Managing Directors of the Purchasing Company must at the same time also continue to conduct their Company's usual business

activities. This might lead to an enhanced workload for the time of the Corporate Transaction and the Target Company's integration post-merger and might also necessitate certain additional managerial tasks to be done, such as the internal communication to the Purchaser's own staff, as well as retention or incentives planning and execution, depending on the level of integration planned post-merger and the future setup and staffing of the Company.

As a result to the above, the Purchaser's Management can be seen to be significantly engaged in the transactional phase of "Proper inspection" and have an own interest that the Due Diligence of the Target Company does produce reliable results and deliver a realistic and comprehensive picture of the Target Company. Moreover, also the specific definition of the contractual parameters is likely to be conducted by the Managing Directors by taking own decisions on acceptability of clauses and constructions in the agreements.

Another main field of responsibility for the Purchaser's Management will be the post-merger integration of the Target Company into the Purchasing Company in a way that releases the synergies and advantages that had driven the shareholders' initial decision to conduct the acquisition.

3.4.3. Legal framework for Target's Management

Whereas the Legal framework and rooms for individual decision-making of Managers in the Selling Company and in the Purchasing Company reveal similarities, the scope of possible actions for the Target Company's Management significantly differs from this.

Again, the basis for any assessment and finding of areas and scope of individual decision-making is the applicable legal framework that sets the stage and expectations for the Managing Directors legal actions and decisions. Here, the general principle to conduct all actions and business activities for the Company with the reasonable care of a prudent businessman is again central. In addition, the specific obligations and duties arising out of various different laws might also play an indirect role in the light of a Corporate Transaction. As an example, information duties might apply, if the Target Company is listed on a stock market and receives a takeover offer.

But with a view to the different phases and stages of a Corporate Transaction, the Target Company's Management has only little room to freely manoeuvre and decide.

Preventive actions, which aim to preserve the Company's independence in the first place are permitted, as far as they are in alignment with the overall strategy of the Company and to the Company's undisputed benefit only.[342] The same applies for defensive measures in the light of an upcoming acquisition attempt. Here, the question or adequacy of the measures taken and costs occurred will be of relevance for the assessment, if such specific actions are still considered to be legally covered by the Target Company's interest and object or not.

Such defensive measures can be for example the inititation with another "friendly" new investor,[343] in the light of a threatened hostile takeover or the

---

[342] Cf. Bücker, T., Kulenkamp, S. in: Hanbuch Managerhaftung (2017), § 29, margin no. 50 et seq. with further references.

[343] Cf. Risse, J., Kästle, F. (2018), "White Knight"; Schlitt, M. in: MüKo AktG (2016), WpÜG, § 33, margin no. 152 et seq. with further references.

acquisition of another entity in order to make the Target Company "too big to be consumed"[344].

However, preventive measures, such as the blocking or destruction of relevant company-related information in order to spoil the preparation and conduct of a Due Diligence or the abandoning of manifest business opportunities in order to make the Company financially less attractive, have to be considered as illegal actions, because they would be a violation of the Managing Directors fundamental duties of loyalty and care.

More specifically, during the different stages of a Corporate Transaction, the Management of the Target Company is again bound by the general principle to act in the Company's best interest and on a proper information basis. Therefore, the Managing Directors might already consider taking preparatory steps to enable the new ownership structure or postpone organisational changes or reorginsations, which were initially planned to be conducted, had the Corporate Transaction not occurred. Moreover, the Target Company has a clear interest to keep its most valuable "human capital" on board in order to continue to be able to successfully conduct its business activities. Financial incentives for important employees might be one tool to be used in order to make sure that the Company's staffing after Closing is still comparable to the staffing during the intitial phase of Proper Inspection of the Target Company.

Another aspect is the potential obligation of the Target Company's Management to inform the Company's contract partners, in case the deal is signed. Commercial contracts often include a "change-of-control" clause, meaning that each contracting party is obliged to inform the respective other party of a change of its own majority shareholding structure, and the other party is then entitled to either continue the contract as is or to execute an extraordinary termination right.[345] Such clauses are of huge importance also from the Purchaser's point of view, because they might result in a significant impact to the

[344] Cf. Klemm, D., Reinhardt, W. (2010), p. 1006 et seq.; Schanz, K.-M. (2007), p. 927 et seq.

[345] Cf. Maidl, J. (2018), p. 726 et seq. with further references.

Target Company's business activities, and thereby to the market share and future cash flows, which the Purchaser is effectively buying.[346]

One specific scenario with a view to the Target Company's Management rights and duties during a Corporate Transaction is the Management Buy-Out.[347] In case the Managing Directors are not only the representative and main decision-making instance with regard to the Company's business activities, but at the same time also the Purchasers, then specific attention has to be given to the scope and direction of interests of the Target Company and the Purchasers and a potential conflict of such interests.[348]

As a result, the Management of the Target Company has various areas for specific decision-making during a Corporate Transaction. However, in comparison to the Managing Directors of the Selling Company and the Purchasing Company, they have less means to influence the deal structure and outcome – due to the nature of their Company being the target of such conduct "only".

---

[346] The Management of the Purchasing Company might therefore want to secure its future business interests by avoiding any such termination of commercial agreements and might want to reach out to the Target Company's business partners as early as possible already to clarify or urge them to waive such termination right.

[347] Cf. Baumbach, A., Hueck, A. (2017), § 35, margin no. 48 et seq.; Beisel, W. in: Beisel/Klumpp, Unternehmenskauf (2016), § 13 with further references.

[348] Beisel, W. in: Beisel/Klumpp, Unternehmenskauf (2016), § 13, margin no. 3 with further references.

3.5. CONCLUSION

In this Chapter 3, the basic legal rules for Corporations in various jurisdictions in Europe have been described and assessed, as well as the legal framework and specific sequence of events of Corporate Transactions. This has lead to the identification of various specific areas and aspects, for which the Managing Directors have the power and competency to take individual decisions.

Boundaries and scoping of such areas and aspects have been identified and described in the light of the institutional setup of Corporations and the specific role that a Corporation might have in a M&A transaction.

Research Fragment 1:

Which rights and competencies exist for the managers of Companies involved in Corporate Transactions, based on the specific nature of the respective Company and the necessary steps and phases of a Corporate Transaction in general?

With a view to the Research Fragment 1, which was introduced above in Chapter 3.1, the conclusion can be drawn that the rights and competencies of Managing Directors of Corporations, which are involved in Corporate Transactions particularly exist in the areas and scope as depicted in the following table:

Table 2: Areas of individual decision-making of Managers in Corporate Transactions

Transaction Phase	**Selling Company**	**Purchasing Company**	**Target Company**
Finding Phase			
Define Intention	n.a. (shareholders' decision)	n.a. (shareholders' decision)	n.a. (shareholders' decision)
Vendor Due Diligence	X	n.a.	X
First Contact			
Letter of Intent	X	X	n.a.
Proper Inspection			
Due Diligence	X	X	X
Due Diligence Question Phase	X	X	X
Due Diligence Report	n.a.	X	n.a.
Defining Parameters			
Contract negotiations	X	X	n.a.
Executing the agreed			
Signing	n.a. (shareholders' decision)	n.a. (shareholders' decision)	n.a.
Pre-Closing requirements	X	X	n.a.
Closing	n.a. (shareholders' decision)	n.a. (shareholders' decision)	n.a.
Wrap-up			
Post-merger integration	n.a.	X	X

4. THEORETICAL FUNDAMENT - INDIVIDUAL BEHAVIOUR AND MANAGEMENT STRATEGIES IN CORPORATE TRANSACTIONS

4.1. SCIENTIFIC INTRODUCTION – RESEARCH FRAGMENT 2

Knowing and capturing the legal framework of a Corporate Transaction is one basic element to answer the Research Question depicted above. However, laws, provisions, orders and requirements set out general standards only – in the mere sense of a framework, defining the scope and radius for human behaviour, for manoeuvres taken by individuals.

In order to have a more detailed view and understanding of decisions, which are taken by Managers in Corporate Transactions, the analysis and understanding of this legal framework is one central element, but as such solely not sufficient. It does only constitute the first step.

As a second step, the analysis will now focus not any more on the legal radius of possible actions, but on the analysis of behaviour of the individuals, who take decisions within this legal radius. Such individuals are, as set out above, the decision-makers in Corporate Transactions, such being (i) the individuals constituting the shareholders' meeting of a corporation involved in a Corporate Transaction (Shareholders), as well as (ii) the individuals, who manage the daily activities of a corporation involved in a Corporate Transaction (Managers).

For both such groups, there is one key word, which also opens up parts of the fields of scientific review and analysis, which will be part of this journey in this Chapter – this magic key word in called "Management".

But what exactly is "Management"?

The ethymologic perspective leads back to the Latin term "manus", meaning "hand" and the Italian verb "maneggiare", meaning to conduct or lead something or an animal with a hand. Another linkage can be suspected to the latin term "mansionem agere", meaning to conduct the household.[349]

---

[349] Cf. Toor, S.-U.-R., Ofori, G. (2008), p. 61 et seq.

The concept of "management", as to be seen close to leadership of a certain entity or household, can be found already back in Aristoteles' writings, dating to the years 384 until 322 B.C..[350] Aristoteles defined economic behaviour to be essentially oriented towards a goal of welfare maximisation and always led by ethical standards[351] – not only perhaps one of the first concepts of management and leadership, but also of Compliance in the true sense of the word.

Modern definitions and descriptions of "Management" are diverse and focus on various different aspects, such as depicting Management as a mere clever mastering and allocated leadership of the different assets and value of a business enterprise, such as human workforce, capital, market share and contractual relationships.[352] Other definitions focus on the separation of Management from Leadership and find a descriptive approach in isolation of pure management features from the world of leadership or on the transformation of knowledge into value.[353]

In accordance with the assessment that Management does, from the individual's perspective, constitute not more and not less than a multitude of decisions taken in the course of time and in dependence to previous decisions taken and external factors,[354] the close analysis of such individual decisions is of critical importance in order to fully develop the Research Fragment 2 and to answer the Research Question.

Therefore, the following will focus on human behaviour and the fields of individual decision-making and actions. This will allow for a thorough assessment of theoretical behaviour structure and models and of actions of individuals within the scope of the legal framework, which was assessed to be existing for Corporate Transactions.

---

[350] Cf. Dirksmeier, C., Pirson, M. (2009), p. 417 et seq. with further references.

[351] Cf. Dirksmeier, C., Pirson, M. (2009), p. 417 et seq. with further references.

[352] See further below, Chapter 4.3 for an overview of specific Management styles and approaches.

[353] Cf. Drucker, P.F. (1986), p. 8 et seq.; Drucker, P.F. (2007); p. 3 et seq. with further references; Malik, F. (2010), p. 39 et seq. with further references.

[354] Cf. Drucker, P.F. (2007), p. 304 et seq.

This following assessment will include a close look to the basic assumptions of Behavioural Economics and Experimental Economics and will allow for an analysis of the nature and reasons for individual decision making with a view to the existing theoretical fundament, including e.g. the "Principal-Agent-Theory", theories on Management styles and the critics and biases that each such theories and models face in real life.

Research Fragment 2:

Which factors are likely to influence the decisions taken by Managers in Corporate Transactions?

As a complement to the assessment made above regarding Research Fragment 1, this Research Fragment 2 will be the second element of the theoretical fundament of this work. The combination of the findings made in both parts will then set the basis for the Research Fragment 3 and analysis of empirical data that is to follow in Chapter 5 below.

Here, for the Research Fragment 2, the approach will be a descriptive analysis on relevant economic theories and concepts, from the general approach towards the more specific theoretical models and by way of combining elements from the fields of individual decision-making on the one hand and management and business organisational theories on the other hand. Only this combination will allow for the holistic assessment and comprehensive analysis, also in the light of the findings made above with regards to the legal framework for such individual decision-making and managerial behaviour.

4.2. THEORIES AND MODELS ON ECONOMIC BEHAVIOUR

Alongside the evolution of human behaviour, scientists aim to analyse and explain actions taken by individuals since decades.[355] The academic discourse does meanwhile include several different approaches, most of which do not stand in a contradictory relation towards each other, but are more evidence of an ongoing development from one theoretical concept to the next level of complexity,[356] providing each another layer of analysis and explanation than the previous status did inherit.

As will be visible in the following, the theoretical approaches in this field, which is nowadays often described as "Behavioural Economics"[357] has evolved from a pure theoretical model,[358] being derived from ideal assumptions and concepts, towards models, theories and approaches, which more and more dared to incorporate a realistic view – or at least elements thereof – on human beings, its respective situative environment and individual decision-making in general.[359]

With regard to decision-making in the above mentioned context of Corporate Transactions, the following will then also lead to a view on specific circumstances for this setup, as this forms the second decisive cornerstone of the theoretical fundament of this thesis, which is to be fact-tested by reality in the following Chapter 5 below.

In general, practical scientific research in the fields of Behavioural Economics is mainly conducted by way of experiments in order to verify or falsificate theoretical assumptions or, more exploratively, to generate new

---

[355] Cf. as early as 1822: Smith, A. (1822), p. 105 et seq. & p. 125 et seq.; overview of more recent literature and discussion: Ashraf, N., Camerer, C., Loewenstein, G. (2005); Beck, H. (2014), p. 9 et seq. with further references; Chlupsa, C. (2017), p. 22 et seq. with further references.

[356] Cf. Beck, H. (2014), p. 9 et seq. with further references; Henrich, J., Boyd, R., Bowles, S., Camerer, C., Fehr, E., Gintis, H., McElreath, R. (2001), p. 73 et seq.

[357] Cf. Beck, H. (2014), p. 9.

[358] Cf. Beck, H. (2014), p. 9 et seq.; Tversky, A., Kahneman, D. (1974), pp. 1124 et seq.

[359] Cf. Henrich, J., Boyd, R., Bowles, S., Camerer, C., Fehr, E., Gintis, H., McElreath, R. (2001), p. 73 et seq.

conclusions and hypotheses about specific questions or problems concerning individual human behaviour. The design of such experiments has advanced over the years, always with the aim to receive more accurate and reliable data. Therefore, experiments are meant to be conducted in a well-controlled environment, in order to exclude any "noise", i.e. unwanted interference or influences to the data.

The theories and models described below regarding the fields of Behavioural Economics[360] and the Principal Agent Model[361] are to be considered as the outcome and milestone reached after various experiments with different design and focus. Whilst describing the theories and models as an overview of the current status of scientific discourse, the experiments, which have led the path towards such will be referenced with the respective literature in the following.

However, at first, the focus is now first on a merely theoretical construct, which has to be considered as the starting point for nowadays' discussions about economic behaviour of decision-makers in a corporate environment and in Corporate Transactions, more specifically.

4.2.1. Homo Oeconomicus

The analysis and assessment of human behaviour and decision-making was traditionally always closely linked to the philosophic and psychological discourse in various disciplines of science.[362] Against such scientific background, it was only logical and by nature unavoidable that human actions itself would one day gain a piece of central attention of scientific discourse and research.

---

[360] See below Chapter 4.2.2.

[361] See below Chapter 4.2.4.

[362] Cf. Camerer, C.F. (1999), p. 10575 et seq. with further references; Frey, B., Benz, M. (2001) with further references; Henrich, J., Boyd, R., Bowles, S., Camerer, C., Fehr, E., Gintis, H., McElreath, R. (2001), p. 73 et seq.; Simon, H.A. (1987), p. 57 et seq.

First and foremost, academic discourse put a focus on the basic question of "Why?" – why do individuals behave the way they do? What do they aim for and what do they pursue to achieve?

Philosophically spoken, the answer to the question of life's meaning, being perhaps one of discussed and thought-through topics of philosophical discourse,[363] is very close to the question about an individual's motivation and drivers behind actions taken and behaviour shown.

Economic behavioural theory evolved early in the 20th century[364] and identified human beings first as being purely driven by the goal to maximize its individual advantages – rational, economic behaviour – therefore, this basic concept is being called "Homo oeconomicus".[365]

4.2.1.1. General concept

The general concept of "Homo Oeconomicus" is based on the idea that all human action is driven by three key factors only:[366]

(1) Unlimited rationality in every human being,
(2) Unlimited strength of will in every human being, and
(3) Unlimited strive for self-interest in every human being

Based on this, every human being is motivated and driven by the same factors and, as a matter of consequence, its behaviour will always be predictable in every instance.[367]

---

[363] Cf. Henrich, J., Boyd, R., Bowles, S., Camerer, C., Fehr, E., Gintis, H., McElreath, R. (2001), p. 73 et seq. with further references to such context.

[364] Cf. Ashraf, N., Camerer, C., Loewenstein, G. (2005), p. 131 et seq.; Camerer, C.F., Loewenstein, G., Rabin, M. (2004), p. 3 et seq. with further references.

[365] Cf. Beck, H. (2014), p. 1 et seq.; Kirchgässner, G. (2013), p. 13 et seq. with further references; Rost, N. (2008), p. 50 et seq.

[366] Cf. Beck, H. (2014), p. 2; Henrich, J., Boyd, R., Bowles, S., Camerer, C., Fehr, E., Gintis, H., McElreath, R. (2001), p. 73 et seq.

Unlimited rationality in every human being (1) is an assumption based on the hypothesis that every human being strives for the possible optimum in each and every situation. The rationality drives the human being to maximize individual benefits and it can therefore completely rely on its ability to always act rationally, without any cognitive limitations and always based on correct and fully available information.[368] This basic assumption goes back to each individual's instinctive will to survive and to find the best possible status of being, which humans have included in their fundamental behavioural roots for thousands of years already.[369]

Unlimited strength of will in every human being (2) was identified as the second driving factor for human decision-making, meaning that human beings are not at all influenced by emotions, irrationalities or wrong assumptions. As a matter of fact, every human being – the comparison to Starship Enterprise's Mr. Spock is often made in literature in this regard[370] - is always able to transform its own will into exactly mirroring actions in reality. Every decision made, is made because it is rational and the individual is willing to maximize its personal advantages by that.[371] There are no hurdles existing that would hinder the individual to transfer a theoretical, internal decision taken into external, real behaviour, based on this theoretical approach. Where does this assumption find its theoretical roots? Human beings have proven to have the ability to decide rational and rational behaviour is perceived to have proven as being the superior logical determination factor for actions[372] – superior to emotional influences,

---

[367] Cf. Beck, H. (2014), p. 2; Kirchgässner, G. (2013), p. 13 et seq. with further references.

[368] Cf. Beck, H. (2014), p. 2; Kirchgässner, G. (2013), p. 13 et seq.; Rost, N. (2008), p. 50 et seq. with further references.

[369] Cf. Beck, H. (2014), p. 2; Rost, N. (2008), p. 50 et seq.

[370] Cf. Beck, H. (2014), p. 1.

[371] Cf. Kirchgässner, G. (2013), p. 13 et seq.; Rost, N. (2008), p. 50 et seq. with further references.

[372] Cf. Kirchgässner, G. (2013), p. 13 et seq. with further references.

which are generally hard to predict and often described as illogical and unable to constantly and predictably lead to the best possible outcome.[373]

Unlimited strive for self-interest in every human being (3) is the third fundamental assumption on which the theory of Homo Oeconomicus is based.[374] This assumption mainly leads to a view of mankind consisting of self-caring individuals only, seeking their personal interest and wealth maximization, making actions in a social context non-existent. Human beings are not part of a collective, unless this is the most favourable way to again maximize personal advantages. There is no inherent wish for social actions or caring about others embedded in human decision making.[375]

All those factors together create the theoretical model of the *Homo Oeconomicus*, the perfect rational decision-maker. Based on these factors, Homo Oeconomicus was said to be also the pure founding principle and reason for economic markets[376] – individuals striving to maximize their individual benefits by way of interacting amongst each other and therefore sharing those specific assets (tangible and/or intangible), which were of minor importance to them, but the transfer of which to another individual could be beneficial still with a view to reaching the central aim of maximizing individual advantages. Markets enable individual participants to seek for personal benefit maximization, to trade off values and assets, which are of expedient benefit for them only.

The basic idea of a rational individual was first mentioned and elaborated by John Kells Ingram, when he introduced the term and description of an "economic man" around 1888 in his academic discourse named "A History of

---

[373] Cf. Kirchgässner, G. (2013), p. 13 et seq. with further references.

[374] Cf. Beck, H. (2014), p. 2; Kirchgässner, G. (2013), p. 13 et seq.; Rost, N. (2008), p. 50 et seq. with further references.

[375] Cf. Beck, H. (2014), p. 2; Kirchgässner, G. (2013), p. 13 et seq. with further references.

[376] Cf. Ashraf, N., Camerer, C., Loewenstein, G. (2005), p. 131 et seq.; Camerer, C.F., Loewenstein, G., Rabin, M. (2004), p. 3 et seq. with further references; Beck, H. (2014), p. 2; Henrich, J., Boyd, R., Bowles, S., Camerer, C., Fehr, E., Gintis, H., McElreath, R. (2001), p. 73 et seq.

Political Economy".[377] It then took academic discussion still until 1906, before the term "homo oeconomicus" first appeared in economic literature.[378]

Descriptive theory or normative ideal construction?

It did not last long, until first sceptical questions were raised about, whether the "Homo Oeconomicus" was really a descriptive theoretical approach to reality, or whether it was rather a normative construction, depicting an ideal model that was never actually to be seen and met in reality.[379]

Those supporters of the idea of a descriptive theory often drew comparisons to nature sciences, e.g. physics, where assumptions and concepts were often developed as pure theory, hard or impossible to verify in reality in the fields.[380] Moreover, they held the argument that there were multiple examples for human behaviour in reality, which was reflecting all aspects of the theoretical description of Homo Oeconomicus.[381] As an economic agent, Homo Oeconomicus was often seen in reality as a participant in the various different markets existing due to human decision-making.[382]

In contrast to this, another assessment of the concept was also frequently stated: the Homo Oeconomicus was often perceived and understood not as a descriptive theory, aiming to translate reality into a theoretical concept, but more as a normative construction. Supporters of this approach explained that the Homo Oeconomicus was the perfect theoretical model, the ideal human being, which in theory was derived from logical conclusions, but was not at all present in reality.[383] In fact, no existence of a pure and full Homo Oeconomicus seems to be ever reported in academic literature.[384]

---

[377] Cf. Ingram, J.K., Scott, W.A. (1919), p. 105 et seq.

[378] Cf. Pareto, V. (1919), p. 15.

[379] Cf. Beck, H. (2014), p. 2 et seq.

[380] Cf. Beck, H. (2014), p. 8 et seq.; Rost, N. (2008), p. 50 et seq.

[381] Cf. Beck, H. (2014), p. 7 et seq.

[382] Cf. Camerer, C.F., Loewenstein, G., Rabin, M. (2004), p. 3 et seq. with further references; Beck, H. (2014), p. 8 et seq.

[383] Cf. Beck, H. (2014), p. 7 et seq.; Kirchgässner, G. (2013), p. 13 et seq.

[384] Cf. Beck, H. (2014), p. 7 et seq.

Of course, this approach raised immediate discussions and concerns – the scientific value of a theoretical model, which would never be proven or even traced in reality, was questioned in the academic discourse.[385] What was the added value of the Homo Oeconomicus concept? Supporters of the theory stated that, even though only a normative construction, elements and certain aspects of behaviour of the Homo Oeconomicus were traceable in numerous aspects and examples of human behaviour.[386] Moreover, it was held that the concept of the Homo Oeconomicus did in fact create a reference point, a baseline assumption for other disciplines, such as economic policies,[387] for example, which were not able to exist without such basic assumptions, may they be completely correct or not.

4.2.1.2. Critical review

Despite the early discussions about the nature of the Homo Oeconomicus being rather a concept of descriptive theoretical nature or a normative approach to picture the "perfect man", the concept was always subject to critical comments. Some of those comments focused on the concept's descriptive nature only, some other critical review also challenged the Homo Oeconomicus as a normative approach.

As a matter of fact, reality shows that human beings do not always act rational, but that they nevertheless tend to do so from time to time. Reality proofs the Homo Oeconomicus to be at least not real in all instances. Even though human beings often achieve tremendous success, are able to solve highly critical tasks, make inventions and push developments, which appear to be of extraordinary scope and dimension, human beings at the same time often struggle with completing easy tasks, having often an obvious advantage, even in a short-term view.

---

[385] Cf. Beck, H. (2014), p. 7 et seq; Rost, N. (2008), p. 50 et seq. with further references.

[386] Cf. Beck, H. (2014), p. 8 et seq.

[387] Cf. Beck, H. (2014), p. 2 et seq.; Rost, N. (2008), p. 50 et seq.

Beck[388] gives the illustrious example of human beings being able to fly to the moon, to make developments in neurosciences, to execute breakthrough thinking on a considerable complex level, whereas at the same time, simple tasks like personal time management, management of individual capacities and the like appear to be tremendous challenges in which human beings often fail. Why is this the case? And how do those real examples connect with the theory of the Homo Oeconomicus?

The answer is given on a multifold layer: Human beings are generally rational, but at the same time they do not always act rational. Their rationality is challenged by emotional aspects, by external and internal factors that bias the strict execution of rational behaviour.[389]

This is the intersection, where the theoretical concept of the Homo Oeconomicus, which clearly has a huge scientific and strategic importance and value, requires to be combined with the individual's situative environment, which appears to play a role in the light of individual decision making: this expanded view on an individual as being generally equipped with the fundamental ability to act rational, whereas at the same time being intergrated in a reality that triggers quick solutions and situative thinking, which does not always take full advantage of this general ability. This is, where the scientific research and academic discourse named "Behavioural Economics" comes into play.

4.2.2. Behavioural Economics

The criticism that was brought up against the theory of "Homo Oeconomicus" is directly connected with another scientific field of discourse and consideration: If human beings prove to not always act rationally, the question is,

---

[388] Cf. Beck, H. (2014), Preface.

[389] Kahneman describes this two-fold approach of human behaviour as "System I" and "System II", which generally control actions and decision-making: Kahneman, D. (2011), p. 19 et seq. & p. 89 et seq.

what reasons do exist that prevent them from such rational decision making. What does trigger "irrational" decisions to be taken?

Over more than the last fourty (40) years, economic scientists have examined and discussed this question in various different aspects and perspectives.[390] The outcome so far is, at least, a status quo of a discussion which is neither yet fully explored, nor to be further elaborated without the direct view also to the changing external environment, in which human actions and decisions are taken.

As mentioned before, the critical discourse about the "Homo Oeconomicus" has led to the creation of a new layer, a new level of discussion, such being closely linked to the original theoretical concept and being often named and described as the "Behavioural Economics".[391] The current status of this discussion is to be described and analysed in the following, always in consideration of the central Research Topic of this thesis and therefore with a view to human beings' actual decision making in Corporate Transactions.

4.2.2.1. Heuristics and biases and the Prospect Theory

In essence, the concept of "Homo Oeconomicus" was mainly criticized for not matching with reality. The assumption of a human being as behaving always and completely rational, only directed by the strength of his/her own will and being only driven to optimize its own benefits, critics alleged that this was simply not the behaviour that human beings showed in the real outside world. Therefore, the claim was often made that the "Homo Oeconomicus" theory was proven to be wrong by reality.[392]

---

[390] It all started with: Kahneman D., Tversky, A. (1974), p. 1124 et seq.; further overview provided by: Beck, H. (2014), p. 9 et seq.; Camerer, C.F. (1999), p. 10575 et seq.; Camerer, C.F., Loewenstein, G., Rabin, M. (2004), p. 3 et seq.; Mullainathan, S., Thaler, R.H. (2000) with further references.

[391] See above, Chapter 4.2.1.

[392] Cf. Beck, H. (2014), p. 9 et seq.

However, defenders of the "Homo Oeconomicus" model on the other hand hold that indeed their model was a theoretical approach only.[393] They argued that it was the description of an "ideal" decision-maker and that the assumption was made under "ideal" circumstances, such being a bias-free environment for each action and decision taken. Similar to physical or chemical experiments taking place in a scientific laboratory where any real and unforeseeable external factors could be excluded, also the "Homo Oecomomicus" was only the theoretical model, not claiming to be fully existing with every aspect in the daily lives and decision-makings of human beings.[394]

Critics therefore claimed that another layer required to be added to the study of human actions and decision-making: The Homo Oeconomicus had to be brought into a reality-check and had to face the existing external factors of real life.[395]

In order to determine the influence and importance of external factors for human decision-making, the scientific discourse led to a clustering of such factors in accordance with the impact or result they would produce in the behaviour of the human being.[396] Therefore, the academic discussion in the fields of "Behavioural Economics" does not only focus on the general assumption that the "outside world" might have an impact on each individual's behaviour, but instead took a closer look and discussion for the different types of heuristics[397] and biases, which were to be observed in reality and in experiments, which aim to depict and rebuild such reality.

However, not all human actions and decisions, also not in the "real world", are biased or influenced by a heuristic reaction of the actor. The question, if a

---

[393] See above, Chapter 4.2.1.2 with further references.

[394] See above, Chapter 4.2.1.2 with further references.

[395] See above, Chapter 4.2.1.2; cf. Beck, H. (2014), p. 9 et seq. with further references.

[396] Cf. Mullainathan, S., Thaler, R.H. (2000) with further references; Beck, H. (2014), p. 9 et seq. with further references.

[397] Camerer, C.F. (1999), p. 10575 et seq.; Camerer, C.F., Loewenstein, G., Rabin, M. (2004), p. 3 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.; Mullainathan, S., Thaler, R.H. (2000) with further references.

decision-making is determined all or in parts by a bias or not, is again one that can be answered only on the individual level: this depends on the individual, who is acting, his psychological setup and structure, as well as on the specific circumstances of the particular situation, in which an action or decision is to occur. Therefore, the entire scientific discourse about "Behavioural Economics" is not positioned and not aiming to find the recipe or key that is perfect and captured for each and every human action and decision that takes, place, but this academic discipline aims for a rich and realistic discourse about all the multiple possible factors and influences, which might well come into play for specific situations. Nevertheless, such specific situations would still require an individual assessment to explain human behaviour.

In that regard, "Behavioural Economics" has so far led to the development of a "tool box" of possible explanations and analyses, which might prove well to fit and set in certain specific situations. A tool box with potentially helpful explanations, but not the full description and solution of the entire world of human activity and decision making.

The scientific research and experiments, which have led to the discovery and formulation of such heurstics and biases over the years, has been significantly driven by the work conducted by Daniel Kahneman and Amos Tversky. Their research, did not only allow for the formulation and definition of the specific heuristics and biases, which will be described in the following, but did also result in the formulation of a basic theory that closely ties in to the rational and reasoning of such individual heuristics and biases: the Prospect Theory.

In a nutshell, this theory is the descriptive result of various experiments conducted by Daniel Kahneman and Amos Tversky[398] (and other to follow their initial work later[399]) and aims to describe the behaviour of individuals in situations in which a decision has to be taken, revealing the general risk aversion of individuals and that future prospect and current risk are not valuated equally

[398] Cf. Beck, H. (2014), p. 101 et seq. with further references; Kahneman, D., Tversky, A. (1979), p. 263 et seq.; Kahneman, D., Tversky, A. (1984), p. 342 et seq.

[399] Cf. Beck, H. (2014), p. 101 et seq. with further references.

in case of uncertain conditions.[400] The basic assumption is the individuals' striving to maximize own profits, but not at all costs, but rather in close consideration of the risks that might manifestate otherwise. Individuals will thereby evaluate the likelihood of occurrence of the possible alternatives in a subjective way, influenced by their own current position and risk aversion.[401]

Prospect theory aims to provide a theoretical instrument to predict human decision making behaviour by way of calculation of the factors and subjective probabilities.[402]

In 2002, Kahneman was awarded with the Nobel Prize for Economics for his work and research on the Prospect Theory and the fields of Heuristics and biases.[403]

The following shall provide a thorough overview of the specifics of such biases, by which reality interferes and influences human decision-making. This shall then serve as basis for a more detailed investigation of managers' decision-making in the M&A Transaction scenarios painted above.

4.2.2.2. Availability Bias

"We believe only, what we see" – this could be an easy statement that serves well in explaining the rationale behind what is often called to be an

---

[400] Cf. Beck, H. (2014), p. 101 et seq. with further references; Kahneman, D., Tversky, A. (1979), p. 263 et seq.

[401] Cf. Beck, H. (2014), p. 101 et seq. with further references; Kahneman, D., Tversky, A. (1979), p. 263 et seq.; Kahneman, D., Tversky, A. (1984), p. 342 et seq.

[402] Cf. Beck, H. (2014), p. 101 et seq. with further references; Kahneman, D. (2011), p. 278 et seq.; Kahneman, D., Tversky, A. (1979), p. 263 et seq.; Kahneman, D., Tversky, A. (1984), p. 342 et seq.

[403] Press note of the Royal Swedish Academy of Sciences on the awarding of the Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel to Daniel Kahneman, dated 9 October 2002 available via https://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2002/press.html; last check on 14 August 2018.

"availability bias".[404] The basic assumption behind is that individuals will well remember situations, events or factors, which they have experienced on their own already and will

When being asked, whether the occurrence of a specific situation, event or factor is likely or not, their assessment of the likelihood will be influenced by the individual's respective own experience. If he/she has experienced such a situation, event or such a factor already personally, then this fact is likely to overlay an objective assessment of the likelihood of its occurrence and might well lead to a biased, because objectively influenced, assessment. Various experiments have proven human beings' tendency to the "overprediction" of the likelihood of its occurrence.

Economists have traced and evidenced this bias alongside various experiments and studies[405]. They have identified personal experience to be not the only factor, by which remembrance can deteriorate an objective assessment. One more element of importance is also the question, at what point in thime this personal experience was made. The more recently is was made, the more vital is it still and that in itself constitutes another element to influence the assessment. Moreover, the question, if a certain experience was made personally or reported only, will also bias the assessment of its general and objective likelihood. If a certain event happened recently, perhaps even multiple times already and to the individual itself, this is likely to influence his/her assessment in a subjective way. In essence, the individual's reasoning behind this would be probably along the following lines: "It that has happened to me, then it must have happened to many others already".

---

[404] Cf. Beck, H. (2014), p. 38 et seq. with further references; Folkes, V.S. (1988), p. 13 et seq.; Kahneman, D. (2011), p. 129 et seq.; Kahneman, D., Tversky, A. (1973), p. 207 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq. - Kahneman promoted the abbreviation "WYSIATI" – What you see is all there is" as a brief explanation of his concept of Availability as a bias to human decision-making: Kahneman, D. (2011), p. 129 et seq.

[405] Cf. Beck, H. (2014), p. 38 et seq. with further references; Kahneman, D., Tversky, A. (1973), p. 207 et seq.

With a view to managerial decision-making in Corporate Transactions, this bias is likely to occur in two aspects:[406]

First and foremost, past experiences of Managers might impact their view and assessment of a current Corporate Transaction. For example, certain aspects that used to be roadblocks or problems in past transactions, are likely to be considered by the respective Manager as major aspects also in any following transaction, although an objective assessment of the current deal setup and constitution might not support this view.

Managerial decisions might therefore be taken in the behavioural pattern of concluding that the specific feature or situation is comparable to a past experience. Such perceived comparability might lead to inappropriate decisions taken, because they are based not on an objective assessment of the current situation, but rather on a misunderstood or overly hasty assessment in the light of a similar, but not identical, past experience.

Another angle, by which the Availability Bias might find its way into a Corporate Transaction could be general availability of data and information throughout the lifetime of the Corporate Transaction itself. Hence, no remembrance of past deals and situations is likely to influence the Manager's behaviour in this regard, but rather the information that he had encountered and learned at an earlier stage of the very same Corporate Transaction. The most important phase for information collection and learnings about the Target Company's setup and thereby necessary particularities for the structure of the Corporate Transaction, is the phase of "Proper Inspection", which includes the Due Diligence of the information made available.

Here, the Purchaser's Management might learn facts and information that it considers to give an all-embracing picture of the Target Company. As described above, this is the original and pure goal of a Due Diligence, to come to a sound and proper knowledge level about the Target Company. However, in case certain facts cannot be made available at the early stage of "Proper Inspection", e.g. due to such information being relevant in the light of competition and antitrust laws, or even because such information is sensitive to time and does change throughout

[406] Cf. also Dhir, S., Mital, A. (2012), p. 59 et seq. with further references; Langevoort, D.C. (2011) with further references.

the further steps and progressing of the deal, then the initial learning of this information might still lead to a biased consideration of any such later changes.

Therefore, the Availability Bias could occur during a Corporate Transaction, related to information learned at a rather early phase and influence managerial actions at a later stage of the same Corporate Transaction.

4.2.2.3. Confirmation Bias

Experiments and analysis with regard to human behaviour and decision-making have revealed another potential bias, which might be of relevance in various situations: The so-called "Confirmation Bias".[407]

This behavioural pattern is connected to human beings' often-perceived struggle to adapt to changes and to accept a transformational process of surrounding factors.[408] Now, when asked to value a certain outcome or factor, humans often tend to allow the thought that this factor, outcome or new development does actually support an earlier view, position or argumentation line that they had already developed. In simple words: Humans want to be proven to be correct - individuals tend to believe that their previous opinion is supported by new facts, then to accustom to the fact that a new fact would actual require us to give up our previously held position or opinion.[409] Confirming facts are over-valued, whereas facts to challenge or counter-evidence an existing thought position, are likely to be considered with too little impact and importance.[410]

---

[407] Cf. Beck, H. (2014), p. 47 et seq. with further reference; Doherty, M.E., Mynatt, C.R., Tweney, R.D., Schiavo, M.D. (1979), p. 111 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.; Klayman, J. (1995), p. 385 et seq.; Nickerson, R.S. (1998), p. 175 et seq.

[408] Cf. Beck, H. (2014), p. 47 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.; Nickerson, R.S. (1998), p. 175 et seq.

[409] Cf. Nickerson, R.S. (1998), p. 175 et seq.

[410] Cf. Kahneman, D., Tversky, A. (1974), p. 1124 et seq.

As such preference to seek and find a confirmation strongly appears to exist,[411] human beings tend to also incorrectly allocate certain results or facts into the category of supporting a position or opinion, even though this might not be exactly correct. This is, what scientists in Behavioural Economics do call a "Confirmation Bias". A certain factor is erroneously assessed to support a previously taken position or opinion.[412]

The risk that a certain circumstance or development is falsely categorized as confirming an earlier assessment, might also manifest in the scenario of a Corporate Transaction. As a general shortcut used for judgements made by humans, also Managing Directors might be influenced in such a way.[413] An earlier assessment made is perceived to be confirmed by facts or develpments occurring at a later stage of the transaction. Such risk might lead to improper decision-making, eventually even disadvantageous for the Manager's own position or that one of his Company. To effectively prevent such disadvantages, a general awareness of the respective Manager is necessary that things like these can happen – also to him. If that awareness is given, the introduction of e.g. a four-eyes-principle can be an effective tool to mitigate such risks by having considerations checked and openly discussed by two knowledgable individuals at least.

Nevertheless, in reality such a risk mitigation instance is likely not to be used, also due to politicial reasons: A Managing Director who is competent to take strategic decisions during a Corporate Transaction is likely to receive only "political" feedback, when sharing his thoughts and considerations, unless from managerial peers, who view themselves as equal partners and not further down in the hierarchy.

---

[411] Cf. Beck, H. (2014), p. 47 et seq. with further reference; Doherty, M.E., Mynatt, C.R., Tweney, R.D., Schiavo, M.D. (1979), p. 111 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.; Nickerson, R.S. (1998), p. 175 et seq.

[412] Cf. Beck, H. (2014), p. 47 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.

[413] Cf. Dhir, S., Mital, A. (2012), p. 59 et seq.

4.2.2.4. Overconfidence

Human beings have a natural tendency of being confident about their own skills and talent, especially if they had experienced earlier events that made them believe or reason that this was the case.[414] Even if that might not always seem obvious for everyone, confidence in one's own skills is an inevitable requirement for each human being to be able to stay alive and to function within scenarios he/she does face.

However, confidence is of different level for each individual and the scale can vary significantly, even for human beings who face comparable situations.

Based on such general results proven by early studies and assessments,[415] scientists in the fields of "Behavioural Economics" have identified this natural tendency to overconfidence to be another potential bias, which might deteriorate objective and efficient human decision-making.[416] This bias might apply to various factors and abilities, which individuals assess themselves to have the skillset to rely on – some of the most prominent examples would be communication skills, time management, physical abilities, just to name a few.[417]

In case a human-being does overrate the quality of its own skills and talent for a certain ability, then this might mislead him/her also on the predication of the most likely outcome of applying such skills and might base any other action on faulty, because overly positive, predictions. Especially in situations, where interaction between individuals takes place and one individual needs to rely on an action taken or a factor influenced by another human being, this might lead to problems and inefficient results, if the passive individual had trusted the active

---

[414] Cf. Beck, H. (2014), p. 58 et seq.; Kahneman, D. (2011), p. 199 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.; Kahneman, D., Slovic, P., Tversky, A. (2008), p. 287 et seq.

[415] Cf. Beck, H. (2014), p. 58 et seq.; Kahneman, D. (2011), p. 199 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq ; Oskamp, S. (1965), p. 265 et seq.; Russo, J.E., Schoemaker, P.J.H. (1992) with further references.

[416] Cf. Beck, H. (2014), p. 58 et seq.; Oskamp, S. (1965), p. 265 et seq.; Russo, J.E., Schoemaker, P.J.H. (1992) with further references.

[417] Cf. Beck, H. (2014), p. 58 et seq.; Oskamp, S. (1965), p. 265 et seq.

individual's assessment of its own skills and those turn out to be based on groundless overconfidence.

The bias of being overly confident in own skills and learnings is relevant in a Corporate Transaction as well. The research that has been conducted in that regard so far, has lead to the same conclusion.[418] The reason for this appears to be closely connected to personality and main character traits of many Managers: To make a way into an influential position with decision-making power in a multi-national Company, such individuals are likely to show certain personality aspects which might at the same time also expose them to the bias of Overconfidence. Strong belief in own skills, the ability to win argumentations and to lead and persuade others, scientific research has proven those characteristics to be found with individuals in management functions more often than usual.[419]

Moreover, an overly strong trust in own abilities and skills is often also linked to a certain management style, which will be further assessed and described below in Chapter 4.3.2.

In concreto, the Overconfidence Bias might lead to unrealistic expectations for the timing and outcome of contract negotiations in a Corproate Transaction, for example. Managers might simply overestimate their negotiation skills and the results they will be able to produce during a negotiation. Another risk associated thereto is an improper assessment of risks associated to failure.

A CEO who believes that he will succeed in all relevant aspects of the contract negotiations of a Corporate Transaction might not be properly prepared to also accept and finance a purchase price that is higher than he initially expected. Also, strategic considerations of the Purchasing Company's Management might be biased by individual Overconfidence and might result in an acquisition of a Target Company that does either not enhance or support such strategy or accelerate the failure of a strategic direction. For example, the strategic aim to transform a regionally successful company into a global player, might not necessarily turn out to be successful, only because of an acquisition conducted in

---

[418] Cf. Dhir, S., Mital, A. (2012), p. 59 et seq. with further references; Langevoort, D.C. (2011) with further references.

[419] Cf. Beck, H. (2014), p. 58 et seq.; Dhir, S., Mital, A. (2012), p. 59 et seq. with further references.

another region, if the Purchasing Company itself is not yet fit for its integration and or the cultural and organisational challenges, which come along the path of globalisation.

Therefore, the bias of Overconfidence is likely to be of significance in the context of decision-making in Corporate Transactions.

4.2.2.5. Hindsight bias

Human beings are skilled with the enormous ability to remember past events and experiences. This forms the most basic precondition and basis for the development and re-shaping of individual behaviour over time, which is called "experience". It is not only the pure ability to remember, but also the ability to adjust current behaviour based on learnings made by past events. Experience is a process of remembering and learning.

However, the process of remembering does not always go an objective path. Memories can become subjective, can change over time and can be influenced by later events, behaviours and reflections.[420] This "adjustment" of memories, this hidden or unconscious modification can cause another bias for human decision-making: the so-called "hindsight bias". If the outcome of a certain situation or scenario is known and memorized, then this is likely to become a relevant factor in the decision-making in comparable situations or scenarios thereafter.[421]

This bias can manifestate in various different ways, as for example the effect, which is often described as "Knew it all along"[422]: Once the individual has knowledge about the outcome of a particular event, he will likely tend to believe that he anticipated this outcome from the very beginning on. Experiments have given evidence that such a retroactive and hypothetic design is often caused and

[420] Cf. Beck, H. (2014), p. 69 et seq.; Hawkins, S.A., Hastie, R. (1990), p. 311 et seq. with further references.

[421] Cf. Beck, H. (2014), p. 69 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.

[422] Cf. Beck, H. (2014), p. 69 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.

likely to create a biased memory of the individual's own thought and decision process prior to experiencing the actual outcome.[423]

Another likely way for this bias to occur is the so-called "outcome effect", which, in fact, describes the observation made in various experimental studies that a human being tends to overestimate the likelihood of other individuals in prediction an outcome of a situation correctly, if he himself had been proven right in his prediction before. A similar bias could also occur with regard to the prediction of the likelihood of a certain outcome for a situation, if oneself had been proven correct in the prediction of an outcome to a similar event previously.[424]

The actual varieties in which the Hindsight Bias can occur and influence a decision can also be transplanted into Corporate Transaction scenarios. In case that decision-makers experience and undergo situations, which are in some or all ways similar to events they had previously experienced, the Hindsight Bias might influence the actual decision-making in the situation. This might lead to false decisions, based on biased memories or the overassessment of the likelihood of a certain outcome. One potential scenario might be for example that a decision-maker overestimates the likelihood that his decision will turn out to be beneficial to the company, only because he had made positive experiences in similar situations in the past. This might lead to a biased risk-assessment, taking into account past experiences which might create an unjustified confidence in taking a/the right decision.

Here again, this specific bias is likely to play a role also in the context of Corporate Transactions and decision-making of Managers associated therewith. The experience and learning from Corporate Transactions conducted in the past can set the stage for improper or indistinct assessment of current situations in a "new" Corporate Transaction.

As an example, the Hindsight Bias might lead to an improper risk assessment in a current Corporate Transaction, based on the biased hindsight to a part Corporate Transaction, where a certain risk did not manifestate. Past success

---

[423] Cf. Fischhoff, B. (2007), p. 10 et seq. with further references.

[424] Cf. Beck, H. (2014), p. 69 et seq.; Hawkins, S.A., Hastie, R. (1990), p. 311 et seq. with further references.

might be visible and remembered overly clear and glorious and this might affect the current risk disposition, time management or expectations for the negotiations of a contract.

4.2.2.6. Anchoring

An individual's view of the world does always depend on the respective individual's current position and perspective.[425] This is true also for opinions and for assessments made by Managers. Their existing knowledge and experience is what they build on for any actions they take and also for any predictions, assessments or evaluations they make.[426] The reason for this is rather simple: A human being's brain will make him rely on memories and past actions, as this process is called "experience", built and developed automatically over the years throughout our lives.[427]

Nevertheless, as depicted above,[428] the process of remembering past events, decisions and thought processes is not always happening in an objective and realistic way, but memories are subjective and often vary from the actual past events, they are biased.[429]

When is a bias likely to occur and to influence behaviour? Whenever an action or decision is to be made, which contains or appears to have similarities or parallel factors to situations or decisions, which the individual did already make and manage at an earlier occasion. During the process of assessing and thinking about a specific situation or challenge, individuals do automatically scan their memories for similar events in the past.

---

[425] Cf. Beck, H. (2014), p. 145 et seq. with further references.

[426] Cf. Beck, H. (2014), p. 145 et seq.; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.

[427] Cf. Beck, H. (2014), p. 145 et seq.; Furnham, A., Hua Chu, B. (2011), p. 35 et seq. with further references.

[428] Cf. above Chapter 4.2.2.5 with further references.

[429] Cf. Beck, H. (2014), p. 145 et seq.

In experiments and assessments, Tversky and Kahneman[430] collected data that the Anchoring Effect is significantly visible in situations, in which prices or conditions are negotiated or estimated. Experiments showed that the price, which was mentioned at first, was most likely to serve as an anchor in the later assessment of price suitability. Especially, whenever an assessment or decision has to be made, human beings have proven to be willing to rely on frames, base assumptions or similar past events.[431]

Especially in advertisement and marketing, the Anchoring Effect is often used as a tool to influence human behaviour and the perception of certain pricing or special offers.[432] Experiments have e.g. also proven school teachers to being open for influencing by past results and grades, when they are about to make their own assessment of a pupil's performance.[433]

Based on such examples, it is apparent that the Anchoring Effect can occur in two different ways: (1) A person can be influenced in a decision or statement scenario by previous experiences, by connecting a present situation, faulty or for good reasons, with an earlier experience made or outcome received or (2) the circumstances of the specific present situation can provide an anchor that influences the decision taken, e.g. the first price offer can determine the value assessment that the individual bases its own price finding and justification on.

For both alternatives, the influence of the Anchoring Effect can turn out to be either advantageous or disadvantageous for the individual. However, both ways, the actual decision taken is biased. Not stating that such influence does occur in every decision taken by individuals, but if a certain experience or fact serves as anchor, then the respective decision is influenced by a factor, which is subjective and potentially hard or impossible to predict or to logically account for.

---

[430] Cf. Kahneman, D., Tversky, A. (1974), p. 1124 et seq.

[431] Cf. Kahneman, D., Tversky, A. (1974), p. 1124 et seq.; Orr, D., Guthrie, C. (2006), p. 597 et seq. with further references.

[432] Cf. Beck, H. (2014), p. 147; Furnham, A., Hua Chu, B. (2011), p. 35 et seq. with further references; Orr, D., Guthrie, C. (2006), p. 597 et seq. with further references.

[433] Cf. Beck, H. (2014), p. 147 et seq. with further references.

The question if and how an Anchoring Effect might influence a particular situation or assessment, might depend on various different factors, most of which are subjectively embedded in the sphere of the individual decision-maker: adjusting a decision or prediction on the basis of experiences collected in the past is only possible, if the individual does have any such experience from previous events, which it may recall and deem suitable as an anchoring fact. If an individual is confronted with an unprecedenced situation, where no linkage or assumed linkage to earlier events can be found, then no anchoring is possible.

Moreover, experiments give rise to the fact that the Anchoring Effect is more likely to occur, if the anchor element is a numeric figure or number, which is easier to be remembered than another fact or word.[434] This strengthens the assumption that only those types of data can serve as a strong anchor, which are rather easy to be recognized and which derive from a category of facts, which is comparable to earlier collected data.

With a view to Corporate Transactions, the Anchoring Effect can have an influence on decisions taken and assumptions made in both ways described above: The existence of characteristic anchoring facts can either be experiences, which influence an decision-makers actions during a Corporate Transaction or can also be the occurrence of certain facts or information elements in the respective present situation, which frame or adjust an assessment, which is to be made.

Therefore, the Anchoring Effect is likely to occur during the early stages of a Corporate Transaction, hence, during the "Proper Inspection" of the Target Company by the Purchaser and/or during the negotiation of the contractual basis of the Corporate Transaction. In both such stages, the Anchoring Effect can lead to disadvantageous positions or faulty assumptions of the respective party's Management.

---

[434] Cf. Furnham, A., Hua Chu, B. (2011), p. 35 et seq. with further references; Kahneman, D., Tversky, A. (1974), p. 1124 et seq.

4.2.2.7. Framing

Another potentially influencing factor for decisions and actions might arise from formulation of the problem statement or question itself: Even though the content might be the same, responses or results might vary due to the nature of phrasing a question or problem-statement. Experiments show that the wording of a question or proposal is likely to influence the answers given and the actions derived from it.[435]

This factor is another element that might influence, bias, the answer given, decision taken or action executed on an individual situation basis. It might have an impact on the result and might therewith trigger a consequence, bring a Corporate Transaction forward into an unpredicted or illogical direction. In real life the most well-known example of this influence factor is the usage of so-called "leading questions", whereby the wording of the question itself implies and influences the choice and articulation of a specific answer thereto.[436]

However, the influence of the "framing" of a question or problem statement might not always be direct, but can be also rather consequential, indirect. This phenomenon might especially occur, if the framing and wording of a question would merely strengthen or exclude only certain argumentation lines, aspects or a general direction for the decision. In that case, the setup would not be a clear suggestive question, but rather the implicit setting of a frame for a decision or answer, in which different variances of answers or actions are still open to be found.

Literature regarding the "Framing Effect" does mainly distinguish between different types of framing: (1) attributive framing, (2) risky goal framing and (3) goal framing.[437]

Attributive framing is the intentional usage of explicitly positive or negative descriptions and attributes for particular object or problem-statement. Both such

---

[435] Cf. Beck, H. (2014), p. 153 et seq. with further references.

[436] Cf. Beck, H. (2014), p. 153 et seq.; Kahneman, D., Tversky, A. (1981), p. 453 et seq.; Kahneman, D., Tversky, A. (1986), p. 5251 et seq.

[437] Cf. Beck, H. (2014), p. 153 et seq. with further references.

descriptions are in obvious opposition to each other and cannot both be chosen at the same time in a decision making or opinion statement. In general, individuals have proven in experiments to more tend to agree with the positive description, as if they "wanted to believe" in the positive aspect in everything.[438]

Risky goal framing does mainly refer to the risk aversion that the majority of the individuals has and shows, whenever a specific earning is set out to be expected. Here again, it depends on the formulation and wording, if individuals will decide to take a risk or whether they aim to secure a benefit or expected earning. In case the description of a question or problem-statement refers mainly to the potential losses and threats, then the individuals are more likely to take a risky approach, risking to face the losses and manifestation of the threats which were described. If, however, the description of the decision to be taken does mainly focus on the potential advantages and benefits, then the decision-maker is more likely to act risk-adverse, aiming to secure the benefit and to minimize the existing threats.[439]

The third type is Goal Framing. Here again, the basic assumption is that individuals aim to avoid negative consequences and the manifestation of risks.[440]

With a view to Management behaviour and decision-making in Corporate Transactions, the Framing Effect might play a role in the light of the Proper Inspection of the Target Company, e.g. with regard to the way how questions are formulated in order to receive further information beyond the content of the Data Room during the Due Diligence.

4.2.2.8. Status Quo Bias

In addition to the above mentioned biasses, there is also another influencing factor, which experiments have revealed in practice: Human beings have shown

---

[438] Cf. Kahneman, D., Tversky, A. (1986), p. 5251 et seq.; Levin, I.P., Schneider, S.L., Gaeth, G.J. (1998), p. 149 et seq. with further references.

[439] Cf. Beck, H. (2014), p. 153 et seq.; Kahneman, D., Tversky, A. (1986), p. 5251 et seq.

[440] Cf. Beck, H. (2014), p. 153 et seq.

in experiments to be sceptical and negative towards change.[441] If they are allowed to chose between either keeping an existing status or changing it, they prefer to preserve the existing status instead of facing changes to it.

A very illustrative and often cited example for the Status Quo Bias is an experiment in which an individual is confronted with receiving a certain amount of money as heir, such money being currently invested in a certain type of investment.[442] The investment was made by the individual's uncle, a person known to him. The individual is now asked to invest the money again with the choice of either investing it in a different way or re-investing it similar to what the uncle had invested in previously (e.g. a certain type of stock shares). In the vast majority of the cases, the individuals choose to invest the money similar to uncle's previous investment.

In contrary to this behaviour, if no information about the uncle's previous investment had been revealed, but the heir had simply received the amount in cash, then no preference for either types of investment was visible.

Another common example for the Status Quo Bias is the phenomenon that an elected person, who is currently in charge of a political function, e.g. president or minister, is very likely to have a higher chance of being re-elected than his opponent to be newly elected.[443] As always, there are exceptions to this rule,which more proves to be a major likelihood, but of course not a set prediction. Various other factors might also influence a politican's chances of being re-elected, such as its current popularity or un-popularity and external factors such as unforseens events and the profile of the respective opponent.[444]

However, both such experiments are practical examples of the theoretical finding that individuals often show a strong tendency to preserve the existing and to face changes and transformations in a rather sceptical way.

Another important factor in the individual's process of decision-making is often also the aspect of time: If a current status has been unchanged already for a

---

[441] Cf. Beck, H. (2014), p. 163 et seq. with further references.

[442] Cf. Beck, H. (2014), p. 164; Samuelson, W., Zeckhauser, R. (1988), p. 7 et seq. with further references.

[443] Cf. Beck, H. (2014), p. 163 et seq. with further references;

[444] Cf. Samuelson, W., Zeckhauser, R. (1988), p. 7 et seq. with further references.

rather long time (there is no objective definition to „long" in this regard, but this would be again determined by the particularities of the respective scenario), then the individual is more likely to have a tendency to preserve this status, whereas a status, which is existing only for a reasonably short time so far, often appears not to have a strong effect on the individual's decision.[445] The longer a Status Quo exists, the more likely it is that the individual will aim to preserve it and therewith bias a decision scenario with it.

The academic discourse considers various different reasons and explanations for the Status Quo Bias. A linkage to the Prospect Theory is drawn via findings that individuals have a strong aversion towards loosing existing properties.[446] Any change of the status quo can have a negative effect to such properties and is therefore considered as a risk of loosing, of weakening the individual's current position. Even though changes do also contain the possibility to improve an existing position, the risk of loss is in most cases valuated higher than the manifestation of a positive risk in an improvement. During its process of decision making, the individual will consider all (likely) outcomes of the different options and therewith undergo a valuation and risk consideratiaon proecess. As a matter of fact, the more complex a decision scenario is, the more complex the valuation and risk consideration process has to be.

Based on the Prospect Theory's aspect of risk aversion, also the complexity of the decision scenario itself is likely to have an impact on the decision taken. Should the individual consider the complexity of the scenario to be detrimental or risky to its goal of taking the „best" or most appropriate decision (which is to be viewed from a subjective standpoint, of course), then the individual is even more likely to take a conservative, risk-minimalizing position. Complexity increases uncertainty, the residual level of the unknown, which in itself is considered to be a negative risk.

Another explanation approach does focus on the individual's aversion of regret.[447] Individuals have proven in experiments to calculate and consider the

---

[445] Cf. Samuelson, W., Zeckhauser, R. (1988), p. 7 et seq. with further references.

[446] For details and references regarding the Prospect Theory see above, Chapter 4.2.2.1.

[447] Cf. Loomes, G., Sudgen, R. (1982), p. 805 et seq with further references.

regret they might possibly feel, if a decision turns out to be made „wrong“[448] and would be reluctant to face a regret. Regret is considered to be a cost, a negative consequence that an individual would seek to avoid, if ever possible.[449] If now the current status is considered to be of high value and little risk, then any change thereto inherits the risk that the individual might regret the decision taken afterwards, if the the situation turns out to have worsened after the decision manifestates.

In the scenario of decision-making in Corporate Transactions, the Status Quo Bias is likely to occur in different types and stages:

The Management of the Target Company is likely to be exposed to the Status Quo Bias and therefore to negatively view and reject the potentially upcoming change of ownership. As described above in Chapter 3.4.3, the Target Company's Management does have certain effective instruments to either delay, complicate or even prevent the Corporate Transaction from successful completion. Therefore, a strong motivation to preserve the Status Quo at their end might pose a significant risk to the entire transactional efforts of Seller and Purchaser, still within the legal boundaries and limitations describred above.

Especially with regard to the post-merger integration of the Target Company into the Purchasing Company's organisational structure, economic success should be seen as a process of constant transformation, which requires a mind-set and willingness to change. One of the main challengedes for the Management of the Purchasing Company will be, to identify this and to successfully overcome or prevent this rejection of change.

For the Purchasing Company, the Status Quo Bias might lead to an improper integration of the Target Company post the Closing. In case the Management and staff of the Purchasing Company view their pre-transactional Status as strong and successful, this might put at risk the potential for positive developments and synergies of the Corporate Transaction. The economic value of the acquisition might then be partially lost due to improper confidence and Overconfidence in the Purchasing Company's Status Quo.

---

[448] Cf. Beck, H. (2014), p. 168 with further references.

[449] Cf. Loomes, G., Sudgen, R. (1982), p. 805 et seq with further references.

For the Selling Entity, the Status Quo Bias might come into play already prior to the actual transaction. A general scepticism towards changes and towards definite decisions that lead the path towards change, might result in an improper delay of the decision to sell the Target Company. Economic disadvantages of selling too late might be e.g. a cooling-down of the relevant market atmosphere that leads to a lower Selling Price for the Target Company.

Moreover, it is important to be aware of the fact that the Status Quo Bias might not only occur in the major decision making of the Management, but that this might also impact decisions taken in the companies on lower levels in the decision hierachy and thereby might jeopardize the success of the Transaction in the end.

4.2.2.9. Endowment effect

In contrast to most of the biasses and effects mentioned, above, experiments have also revealed another phenomenon, which is sets a different perspective for influencing human behaviour and decision making[450]: A human being tends to evaluate an asset, which it holds in ist ownership as more precious than such asset might actually, objectively, be.[451] The objective value is biassed by the subjective view of the individual that derives from the fact of personal ownership. This perspective differs from other biasses mentioned above, because it is linked mainly to an objective fact – the ownership in a certain asset. The bias then derives from this fact on a second level only, which is the question of adequate valuation of this asset.

This effect, often described as „Endowment Effect"[452], becomes apparent e.g. in situations, in which an individual negotiates to resell the asset: The price, for which the individual might be willing to sell the asset often shows to be significantly higher than the objective market value of the asset. Such subjective

[450] Cf. Beck, H. (2014), p. 170 et seq.; Kahneman, D., Knetsch, J., Thaler, R. (1991), p. 193 et seq. with further references.

[451] Cf. Beck, H. (2014), p. 170.

[452] Cf. Beck, H. (2014), p. 170 et seq.; Kahneman, D., Knetsch, J., Thaler, R. (1991), p. 193.

effects might be softened or circumvented by market and price scale research of the individual in advance. But still then, the inidividual might still feel that market prices appear to him to be too low in the light of his perceived, subjective value for the asset. This might then even influence the individual's decision, if to sell the asset at all.

The Endowment Effect ties in with elements of the basic economic theory: The valuation factor of an object and the owner's subjective base price and willingness to negotiate in order to facilitate a match between market and demand.[453]

Why is the Endowment Effect taking place and influencing human behaviour and asset valuation in experminetal practice?

The root cause discussions again go back to elements of the Prosepect Theory: Human beings experience losses and disadvantages as more significant and more costly than success and benefits.[454] Therefore, the loss of an asset must be consequentially also reimbursed with a higher price than the objectively reasonable, as it includes a „subjective loss" component in pricing.

An additional contributing factor might also be the fact that the individual has chosen this specific asset over other assets in the acquisition process and has therewith made the decision for this very asset. In order to verify and reason this decision also retroactively, it comes as a natural reaction to valuate the asset as more precious and superior to other assets, which were available and/or comparable at the time of the acquisition. Here, the reason and explanation of this effect might reveal a connection to the Confirmation Bias, as described above.[455] The individual would again, also in the pricing and valuation of an asset, seek for a confirmation of its earlier decision to chose and acquire exactly this one asset.

However, the reasonable line of differentiating between an over-pricing due to the Endowment Effect and a strategically high first offer is hard to draw in practice. Pricing, especially the first pricing offer made by the Seller, will most likely also include a strategic element to gain a most suitable starting point for the price negotiations. Therefore, the Endowment Effect should be considered and

[453] Cf. Kahneman, D., Knetsch, J., Thaler, R. (1991), p. 193 with further references.
[454] Cf. Beck, H. (2014), p. 173; Kahneman, D., Knetsch, J., Thaler, R. (1991), p. 193.
[455] Cf. above, Chapter 4.2.2.3.

taken into account in the analysis of pricing and decision-making scenarios, but should not be interpreted as the main driving factor of human behaviour as such, because there are most likely other aspects influencing the decision or price determination at the same time as well. The theoretic discussion and experimental science around the Endowment Effect[456] should not be minoritzed, but should be, same as for all categories and forms of biasses, only seen as one reference point, one possible element of theoretical explanation of a practical phenomenon and not as the ultimate conclusion.

Taking the theoretical concept and explanations of the Endowment Effect into consideration, this bias might also be relevant in Corporate Transactions:

With a view to the Selling Company's Management, the Endowment Effect might result in an over-estimation of the value of the Target Company. The Seller might not be considering an objectively reasonable price, but might instead be seeking for a "loss reimbursement" and a compensation that is considered to be adequate to the prior investments made in the Target Company. This is relevant especially in Private Equity constellations, where the Selling Company seeks for a return on its investment and does have a very clear view of what was originally paied for the acquisition of the Target Company.

With regard to the Purchasing Company, the Endowment Effect should be considered as one element that is likely to play a role in the intial pricing considerations of the Seller. The Purchaser should not consider the pricing considerations made and communicated by the Seller to be of purely objective nature, but should well take into account what has been descibred above: the Seller is likely to put the price tag on its own investments and not on the objective value of the Target Company. Therefore, the Purchasing Company's Management is well-advised to verify offers, pricing and calculations made by the Seller thouroughly and to conduct an objective valuation of the Target Company, if possible. If and once the Purchaser is able to locate and quantify the existence of an Endowment Effect on the Seller's side, this can play out as a strong argument in the purchase price discussions.

---

[456] Cf. Beck, H. (2014), p. 170 et seq.; Kahneman, D. (2011), p. 289 et seq.; Kahneman, D., Knetsch, J., Thaler, R. (1991), p. 193.

For the Target Company, there should be a general awareness that its owner might not objectively valuate it, but might rather consider own costs and investments as the actual value of the Target Company. In the light of the information and data collection for the Due Diligence, this might be of relevance for the nature and scope of the documents and data produced to substantiate the Seller's pricing expectations.

4.2.2.10. Mental accounting

Next to the effects and biasses mentioned above, the concept of Behavioural Economics does also include a theoretical model that seeks to explain the process of evaluating and human decision-making – this concept is often described as Mental Accounting.[457]

As a quintessence from the above described effects and biasses, it can be stated that Behavioural Economics have moved away from the pure concept of the Homo Oeconomicus[458]. Behavioural Economics rather accepts the Homo Oeconomicus as a theoretical concept, depicting the ideal human decision-maker in theory, but then takes a further step to bring this theoretical ideal into reality and accepting the biasses and effects, by which reality interferes into such.

One central element that is inherint in all the effects and biasses mentioned above is the element of an individual economic approach of the human being to every decision-making scenario in reality.[459] All such biasses and effects show the aim of a human being to draw interconnections between present decisions to be taken and past events and experiences. The individual seeks to connect past and present by a learning curve, letting past events influence present behaviour.

The past value of a presently existing asset influences the individual's current valuation thereof (Endowment Effect),[460] the individual evaluates his own present abilities too optimistic, based on past experiences and a lack of negative

---

[457] Cf. Beck, H. (2014), p. 178 et seq. with further references.

[458] Cf. above, Chapter 4.2.1.

[459] Cf. Kahneman, D., Tversky, A. (1984), p. 342 et seq.

[460] Cf. above, Chapter 4.2.2.9.

experiences in the past (Overconfidence),[461] the individual has experienced a certain good or category of goods to be available in the past and therewith comes to the conclusion that a change thereof, a shortage of this good or category of goods is rather unlikely to occur in present or future (Availability Bias),[462] just to give a view examples, where human beings draw connections, make learnings – such being correct or false, but still existing – from past to present or future events. These learnings, this gain of experience, however, is, as experiments show[463], not leading to a perfection of human decision-making. It is not constantly improving the decisions made in their quality and is not leading the human being towards becoming a perfect decision-maker that takes into account each and every aspect, significant or little, in its process of finding the „correct" decision.

On the contrary, the constant learning curve and gain of experiences in decision scenarios leads towards more efficiency in future decisions. Human beings develop an ability of not becoming the perfect decision-maker, the pure Homo Oeconomicus, but to become the most efficient decision-maker, by making use of past experiences, drawing conclusions and making assumptions and decisions based on likelihood only.[464] By that, human beings trade off the possibility to always make the best possible decision against the gain of spending the optimum resources and mental capacities on a certain subject matter. This allows to make parallel decisions and to spend mental capacities on different subjects, not exactly at the same time, but in a short sequence.

Whatever factors bias a decision-making process from the decider's subjective position, is one element that the decider does account for mentally and the efficiency of which he does calculate mentally, according to the concept of the so-called „Mental Accounting" aspect of the theoretical construction of Behavioural Economics.[465]

---

[461] Cf. above, Chapter 4.2.2.4.

[462] Cf. above, Chapter 4.2.2.2.

[463] Cf. Kahneman, D., Tversky, A. (1984), p. 342 et seq.

[464] Cf. Beck, H. (2014), p. 178 et seq.; Thaler, R. (1985), p. 199 et seq.; Thaler, R. (1999), p. 183 et seq. with further references.

[465] Cf. Beck, H. (2014), p. 178 et seq.; Thaler, R. (1985), p. 199 et seq.; Thaler, R. (1999), p. 183 et seq. with further references.

In brief, the concept of Mental Accounting describes a human being's tendency to categorize available options, potential consequences and aspects with regard to a certain aspect or problem statement that requires a decision. Categorization herewith serves as a way to summarize and therewith simplify the process of considering different aspects relevant to the decision at hand.

The categorization itself is done in accordance with a priorization pattern, which is mainly based on individual experiences and past learnings. Therewith, the mental account created for a specific decision to be made, serves as a frame, as a structure that interconnects the necessities of the current scenario with past experiences and abstracted learnings therefrom. Categorization serves as the main basis for efficiency in that regard and makes every decision scenario become part of a sequence, an interwoven network of decisions and experiences.

Moreover, Mental Accounts are not only a tool to solve individual scenarios, but similarily also contributes to the individual's banking of risks and advantages, costs and benefits. Any such information is the basic setup of this account.

Typically, Mental Accounting is not only the manifestation of Behavioural Economists, the reality-updated version of the Homo Oeconomicus, but with its general approach of efficiency maximisation does also come a certain element of abstraction and generalisation, which often leads to a lack or disregarding of specific details of the respective individual scenarios.[466] Efficiency comes at a cost. There is a certain, minor but existing, likelihood that the negative risk does manifestate in a cost, i.e. a disadvantage. This negative risk is the cost for the ability to take a considerably easy and quick decision and forms the delta between the individual according to Behavioural Economics and the Homo Oeconomicus. The latter would, by the investment of more time and consideration decrease such negative risk to zero.

As depicted above, Behavioural Economics and Mental Accounting provides for a bypass, an efficient short-route, at the cost of the ultimate accuracy

[466] Cf. Beck, H. (2014), p. 178 et seq. with further references.

and a reasonable and linear increase of the negative risk in decision-making,[467] also in scenarios associated to a Corporate Transaction.

4.2.2.11. Critical review

Taking the various aspects about the concepts of biases and heuristics and their particular meaning and importance on Corporate Transactions into a critical review, it is to be concluded that, although rationality appears to be the starting point and general behavioural pattern for human beings and their decision making in general, each decision taken has to be considered in its respective context. Theories and models of Behaviroural Economics have found their way into the fields of M&A and Corporate Transactions as well, thus, so far, apparently only with a specific view to particular heuristics and biases, but not in the broader context of the decision-maker's overall management style and personality.

In the light of the legal framework and natural process of a Corproate Transaction, the following biases appear to be of specific relevance:

(i) Availability Bias,

(ii) Overconfidence,

(iii) Hindsight Bias,

(iv) Anchoring Effect, and

(v) Status Quo Bias.

Whereas the Prospect Theory provides for the fundament and theoretical background of most of those biases, here, especially the specific nature and manifestation in reality is of relevance. Can such biases influence the decision-making of Managers in Corporate Transactions? In the light of the Research

[467] Cf. Thaler, R. (1985), p. 199 et seq.; Thaler, R. (1999), p. 183 et seq. with further references.

Fragment 2 and the overall Research Question of this work, those aspects are to be considered further, whereas the theoretical legal background is valid and important, but not to be closely re-confirmed with the empirical data analysis.

The Research Question makes it necessary to generate new hypotheses and assumptions, rather than to verify existing theories. Those merely serve as the overall playground for the analysis that will follow.

Specific focus will need to be drawn to the empirical data search for occurrence of the above mentioned biases in Corporate Transactions and the comparative analysis, whether decisions that were taken by Managers in the Case Studies, were of pure rational nature or whether also subjective and context-driven biases played a role in conjunction with the individual managers' overall strategy and management style. If we cannot find a Homo Oeconomicus in reality, whom to we then find instead?

4.2.3. The theoretic modelling of Principal-Agent scenarios

4.2.3.1. General concept

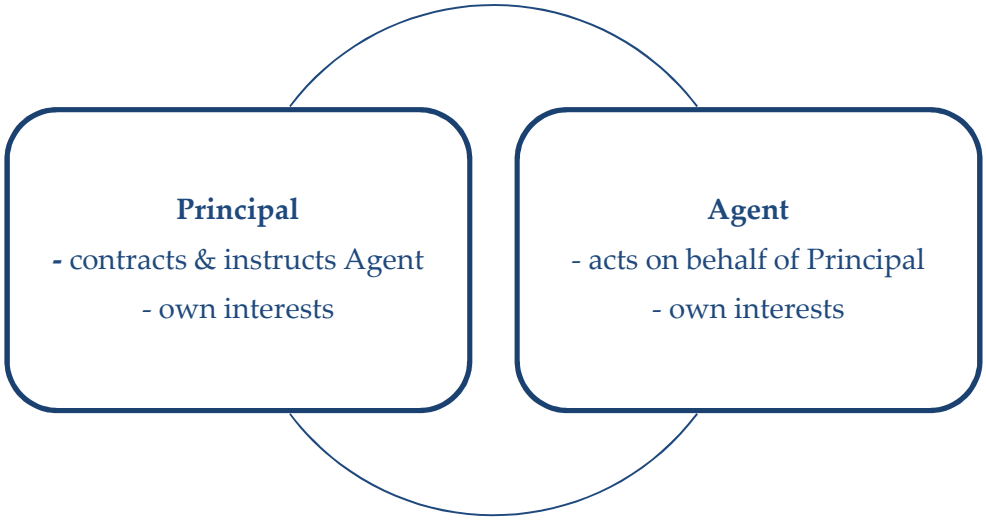
In addition to the influence that the above-depicted heuristics and biases might have on the individual decision-making of Managers in Corporate Transactions, also the so-called "Principal-Agent-Model" can serve as another theoretical element to understand and decipher the underlying drivers for such behaviour.

The Principal-Agent-Model aims to describe the potential problems which might arise in constellations, in which one individual performs a certain task (agent) upon instruction of another individual (principal) and delivers possible solutions to such problems.[468] It is a widely used theoretical basis for the analysis

[468] Cf. Akerlof, G. A. (1970), p. 488 et seq.; Grossman, S. J., Hart, O. D. (1983), p. 7 et seq.; Jensen, M., Meckling, W. (1976), p. 305 et seq.; Ross, S. A. (1973), p. 134 et seq. with further references.

and conduct of interpersonal relationships in a hierarchic environment.[469]

Figure 5: Principal-Agent-Model



Typical examples of principal-agent relationships are the relationship between an employer and its employees, between a party to a litigation court proceeding and its lawyer and also the relationship between a Managing Director and the owners of the Company, which he represents (unless the Managing Director is an owner of shares in the Company at the same time as well).[470]

As such, the model was developed in the 1970s, mainly by Jensen and Meckling,[471] as part of the scientific fields of the New Institutional Economics.[472]

[469] Cf. Alparslan, A. (2006), p. 13 et seq.; Jost, P.-J. (2001), p. 11 et seq. with further references.

[470] Cf. Eisenhardt, K.M. (1989), p. 57 et seq.; Jensen, M., Meckling, W. (1976), p. 305 et seq.

[471] Cf. Jensen, M., Meckling, W. (1976), p. 305 et seq.

[472] Cf. Erlei, M., Leschke, M., Sauerland, D. (2016), p. 67 et seq. with further references; Wenger, E., Terberger, E. (1988), p. 506 et seq. with further references.

The Principal-Agent-Model works with some general assumptions on human behaviour, such being in particular:[473]

(i) individuals always aim for maximization of their own profits;

(ii) individuals are opportunistic and therefore will use every available opportunity for the maximization of their own profits;

(iii) in hierarchic relationships, information is not equally available to everyone; and

(iv) individuals have different risk-taking profiles, such being either neutral towards risks, risk-averse or risk-friendly.

With a view to the above description of the theories regarding the Homo Oeconomicus, Prospect Theory and the heuristics and biases, which might determine human behaviour, such assumptions seem to derive from the same theoretical sphere: Also here, the basis of the Principal-Agent-Model is the model of a rational human being, which is striving for maximization of personal benefits and which wheighs and considers different elements, such as also the risk of a negative outcome, during the process of acting and taking decisions.

The assumption number (i) shows a connection between the Principal-Agent-Model and the concept of the Homo Oeconomicus[474], as well as towards the Prospect Theory[475]. The latter can be also found as an underlying concept in the assumption number (ii). Whereas assumption number (iii) incorporates a practical and fact-based element into the basis of the modelling, assumption number (iv) does interconnect with certain elements of the concept of heuristics and biases,[476] in particular the individual reliance on experience and individual

[473] Cf. Alparslan, A. (2006), p. 13 et seq.; Eisenhardt, K.M. (1989), p. 57 et seq; Jost, P.-J. (2001), p. 11 et seq. with further references.

[474] Cf. above, Chapter 4.2.1.

[475] Cf. above, Chapter 4.2.2.

[476] Cf. above, Chapter 4.2.2.

character traits leading towards a general risk-aversion, risk-friendliness or risk-neutrality.

Based on these assumptions, the following theoretical problems are identified to likely occur in Principal-Agent scenarios:[477]

(i) Hidden characteristics of the agent

(ii) Information asymmetries between principal and agent, as well as

(iii) Hidden actions and moral hazard of the agent.

Hidden characteristics of the agent are those, which have remained unknown to the principal until after the concluding of the contract, which serves as a binding legal basis of the instruction of the agent to perform a certain task on behalf of the principal.[478] Those pose a specific risk to the principal, as they might be disadvantageous or even destructive in the light of the principal's interest. The principal might even have chosen another agent, had he known the hidden characteristics prior to contract signature. Hidden characteristics are therefore often considered to be the outcome of an adverse selection process of the agent.[479]

In practice, the principal will aim to reduce the risk of such negative surprises by conducting an exhaustive selection process. In case of principal-agent scenarios of employer and employee, this might be for example the conduct of a series of interviews with the applicant for a certain position or the hosting of an assessment center, in order to get to know the characteristics of the applicants and to avoid negative surprises later.

With regards to potential information asymmetries between principal and agent, the structural disadvantage for the principal is that he is likely to be less

[477] Cf. Alparslan, A. (2006), p. 13 et seq.; Eisenhardt, K.M. (1989), p. 57 et seq; Jost, P.-J. (2001), p. 11 et seq. with further references.

[478] Cf. Alparslan, A. (2006), p. 13 et seq. with further references.

[479] Cf. Alparslan, A. (2006), p. 13 et seq.; Jost, P.-J. (2001), p. 11 et seq. with further references.

informed about the performance and actual development of the task than the agent. The agent is closer to the events than the principal.

However, information asymmetries can exist between principal and agent both ways, even at the same time: Whereas the principal is likely to be more knowledgeable and experienced regarding the general context and environment, in which the task he has given to the agent has to be performed – e.g. an employer typically has more knowledge about the company's history and overall business structure than a new-entry employee in low- or mid-level function – the agent on the other hand is likely to receive a more detailed overview of the specific circumstances of the task that he performs. For both such information differentials, the surplus of information vis-á-vis the respective other party can play out as a strong advantage and open the possibility to realize own advantages or maximize own profits.[480] As to be discussed in more detail later, the availability of information and asymmetries in such between the parties are of significant relevance in the fields of Corporate Transactions.

Another potential problem in the relationship between principal and agent can be hidden actions of the agent, which might result in a so-called "moral hazard". The specific risk for the principal is that the intial instruction given is not fully performed or that the agent otherwise uses his position to conduct additional actions in his own interest.[481]

More specifically, this can be for example, an employee or Managing Director of a Company, who uses Company-own assets for private purposes, e.g printing invitation letters for a birthday party or taking office inventory for private use. The keyword "moral hazard" is often used in this context to describe the fact that the agent hereby violates ethical – sometimes also mandatory legal – rules or standards, which might apply without explicit mentioning in the environment, in which the performance of the instructed task is done.[482]

---

[480] Cf. Alparslan, A. (2006), p. 13 et seq. Erlei, M., Leschke, M., Sauerland, D. (2016), p. 67 et seq. with further references; Wenger, E., Terberger, E. (1988), p. 506 et seq. with further references.

[481] Cf. Alparslan, A. (2006), p. 13 et seq. Erlei, M., Leschke, M., Sauerland, D. (2016), p. 67 et seq. with further references.

[482] Cf. Holmström, B. (1979), p. 74 et seq. with further references.

With a view to those problems, which can possibly occur in principal-agent scenarios, various potential solutions and preventive actions have been discussed in the scientific literature over time.[483] Already when first developing and describing the model in the 1970s, some of those solutions were discussed as being an integral part of the model itself.[484] The potential solutions can be categorized as follows:

(i) Control mechanisms

(ii) Deleveraging information asymmetries

(iii) Corporate Culture and reputation

(iv) Incentives to rightful behaviour of the agent and sanctions for misconduct

As visible, these solutions aim to address the problems stated above from different angles. Whereas control and monitoring mechanisms target the limitation or even exclusion of hidden actions of the agent prior and after signing the instruction contract, the deleveraging of information asymmetries is considered as a helpful aim for the principal to structurally enhance the level of influence on the agent and to thereby even prevent hidden actions and moral hazard.

The existence of a strong and positive Corporate Culture and an open leadership on values of structural importance – such as for example Compliance, open feedback culture, high ethical standards regarding loyalty, honesty and trust in a Company – can also contribute to the reduction of potential problems between principals and agents. The main rationale here is to strengthen the focus and awareness of common interests, which principal and agent share in general.

---

[483] Cf. Eisenhardt, K.M. (1989), p. 57 et seq.; Jensen, M., Meckling, W. (1976), p. 305 et seq.

[484] Cf. Akerlof, G. A. (1970), p. 488 et seq.; Jensen, M., Meckling, W. (1976), p. 305 et seq.; Ross, S. A. (1973), p. 134 et seq.

Also, the positive reputation of the company as an employer might be a joint interest of employer and employee and might therefore be an aspect that reduces the risk of hidden actions or moral hazard, if the agent would otherwise risk to deteriorate such reputation.

The most important, thus also most complicated, solution and/or preventive measure for the avoidance of obstacles in the principal-agent relationship is the installation of effective incentives, which strongly motivate the agent to show the behaviour and performance that the principal wishes for.[485]

Based on the assumption that the agent will always strive to opportunistically maximize its own benefits, an incentive makes use of this character trait and instrumentalizes it for the purposes of the principal. An effective incentive can be a win-win constellation for principal and agent: the principal can be more certain to see his instructions followed and his task performed in compliance thereto and the agent gains a direct and personal advantage by doing so.[486]

Incentives align the interests of principal and agent. However, they always come at a cost for the principal[487] – often being the monetary reward that he promised to the agent for the due fulfilment of a certain task. Complementary to an effective system of incentives, the principal might also consider the introduction of a regime of effective sanctions for case of misconduct or non-alignment with the instructions. Here, sanctions serve a preventive function and decrease the attractiveness for the agent to follow own goals and paths offside the given instructions.

As a first conclusion of the above, the problems depicted in the Principal-Agent-Model can be effectively addressed by the principal by application of specific instruments for (i) monitoring and information collection and for (ii) aligning interests and motivations between principal and agent. What typically goes alongside with those instruments, is the aim to strongly build a reliable level

---

[485] Cf. Akerlof, G. A. (1970), p. 488 et seq.; Eisenhardt, K.M. (1989), p. 57 et seq.; Jensen, M., Meckling, W. (1976), p. 305 et seq.

[486] Cf. Eisenhardt, K.M. (1989), p. 57 et seq.; Jensen, M., Meckling, W. (1976), p. 305 et seq.

[487] Cf. Jensen, M., Meckling, W. (1976), p. 305 et seq.

of trust between principal and agent, especially important in longer-term relationships.

4.2.3.2. Specific aspects in Corporate Transactions

Taking now a more specific view onto the Principal-Agent-Model in the context of Corporate Transactions, there are several aspects to be considered:

First, the Principal-Agent-Model is generally suitable to be applied onto the relationship between a company's shareholders and its Managing Directors, i.e. a scenario where ownership and control over a Company are separated.[488]

Second, the above described problems and risks can occur in the context of a Corporate Transaction in various forms, because there are numerous different constellations of principal-agent relationships within the course of a Corporate Transaction. Such constellations can be, amongst others, as follows:

[488] Cf. above, Chapter 3.2.2.

Figure 6: Examples of Principal-Agent constellations in a Corproate Transaction

Selling Company

- Internal: Shareholders - Management
- Internal: Supervisory Board - Management
- Internal: Management - subordinated staff
- External - information availability: Selling Company - Purchasing Company

Purchasing Company

- Internal: Shareholders - Management
- Internal: Supervisory Board - Management
- Internal: Management - subordinated staff

Target Company

- Internal: Shareholders - Management
- Internal: Supervisory Board - Management
- Internal: Management - subordinated staff
- External - information availability: Target Company - Selling Company

Due to the nature of a Corporation as being a separate legal entity,[489] every Company has ownership and control executed separately, i.e. by separate organs, namely the shareholders' meeting and the Management, except for decisions and questions or overall strategic relevance.[490] Therefore, the problems and discrepancies between principal and agent can theoretically occur within every single participating company in a Corporate Transaction. In fact, not only shareholders and Management can be defined to be in a principal-agent

[489] Cf. above, Chapter 3.2.2.

[490] For details see above, Chapter 3.2.2.

constellation, but also the Supervisory Board does act as a principal in the fields of its competencies.

Moreover, the principal-agent constellation is of special importance between the Target Company and the Selling Company. The Selling Company as the (major) shareholder of the Target Company is likely to have deviating interests with regard to the conduct and outcome of a Corporate Transaction – whereas the Selling Company is likely to be most interested in achieving a high purchase price and only limited liability risks and in a smooth and seamless transfer of the ownership in the Target Company, the Target Company itself might be mostly interested in preserving its legal integrity and keeping focus on the company's business object and organisational unity, also after the Closing of the deal. The Selling Company's management is well-advised to consider those deviating interests and to potentially reduce negative effects by setting effective incentives, as far as possible. Such might be, for example, bonus or premium payments for key employees and management of the Target Company linked to the Signing and/or Closing of the deal or linked to certain specific tasks, which have to be conducted in order to foster the success of the Corporate Transaction. In this context, bonus payments to senior managers of the Target Company are often described as "golden parachutes",[491] which make them land softly on the grounds of a successful deal, with or without an ongoing employment contract post-Closing.

Next to those constellations of principals and agents, also the relationship between the participating companies' Managements and external stakeholders in the Corporate Transaction can imply elements of principal-agent scenarios. Namely, the relationship between the Management and its external advisors can contain elements of agency, same for the relationship between authorities, such as the Cartel authorities, which have the power to instruct the Management to give certain information or to comply with certain conditions in order to gain merger clearance.

Another element of strategic importance might be the implementation of an effective monitoring and control system during the Corporate Transaction, in order to reduce information asymmetries in existing principal-agent

[491] Cf. Gran, A. (2008), p. 1409 et seq.

constellations. This aspect will be further described below in Chapter 4.4.1 of this work.

Both elements,

(i) the implementation of effective control systems in order to reduce the risk of moral hazard by way of e.g. strict report outs in close-meshed structures, as well as
(ii) the intelligent setting of incentives,

do come at a cost in a Corporate Transaction. The overall transactional costs are likely to increase significantly, if, for example, huge signing bonuses are promised to the Management of the participating companies. Irrespective of the specific responsibility for such costs, the participants will aim to "price in" those factors into their financial rationale and strategic negotiation in the course of the deal. Overall, each participating company and each individual Managing Director involved in a Corporate Transaction will only work towards the deal's successful Closing, if the entire project is still calculated to be ultimately benefitial from his respective perspective.

4.2.4. Conclusion

In a nutshell, the Principal-Agent-Model is of significant importance for Corporate Transactions. The model's general assumptions are to be considered to exist also in the light of M&A activities and the problems identified as a result thereof, are likely to be also traced later in the empirical data analysis of the Case Studies in Chapter 5.

What appears to be of outstanding importance for the success of a Corporate Transaction in the light of the theories depicted above, is the intelligent and effective introduction of incentives and a clear focus on the reduction of information asymmetries between the different stakeholders in a transaction.

As a conclusion, the Principal-Agent-Model does introduce a realistic view to existing relationships, setups and typical problems in hierarchic constellations. Therefore, this model and the specifics and details it conveys, can be considered

as a benefitial element of the theoretical fundament for the analysis of Manager's individual decision-making in Corporate Transactions.

4.3. THEORIES ON MANAGEMENT STYLES AND THEIR RELEVANCE FOR DECISION-MAKING IN CORPORATE TRANSACTIONS

Where Behavioural Economics and the Principal-Agent-Model teach us about the general outline of human behaviour and influencing factors to decision-making, also in the context of Company Management and Corporate Transactions in particular, there is also another set of Economic theories, which specifically focus on the particularities of the nature and profession of Managers: The theoretical description and modelling of Management theories and individual Manager's stylistic approaches to manage and organize the corporate structure of a company.

4.3.1. Overview of existing Management theories

At first, a general differentiation in Economic sciences is made between theories concerncing "Management" and theories and models concerning "Management Styles".

Whereas theories concerning Management aim to develop and describe the overall organisational approach within a Company, theories and models concerning the style of a Manager aim to address the personal dimension of a Manager of a Corporation.

First theories regarding Management of Companies have been discussed already back in the 1920s, when questions regarding the organisation and administration of large business enterprises came along with the increasing industrialization and first approaches to serial production in the automotive industry.[492] Since then, numerous theories have been developed and discussed, whereas the following four approaches are commonly considered to be of leading importance in the academic discourse:[493]

---

[492] Cf. the major publication in this context: Taylor, F.W. (1903).

[493] Cf. above, Chapter 4.1 with further references and additional to that: Gulick, L. (1965), p. 7 et seq.; Jung, R.H., Bruck, J., Quarg, S. (2018), p. 13 et seq. with further references.

(i) Scientific Management Theory[494]:

This is often described to be the classical management theory, developed by F.W. Taylor in the early 1920s. In general, this theory describes Management as a process of constant monitoring and assessment of the Company in all its different aspects and organisational divisions. The Manager observes the organisation, collects data and is thereby able to measure the Company's current status and identify areas for enhancing efficiency and profitability of the Company. Also, the constant collection of data and measurement of key performance indicators (KPIs) allows for a standardized approach to performance management and the introduction of a performance-oriented system of rewards and sanctions.[495]

(ii) Bureaucratic Management Theory[496]:

Based on the classical management theory developed by F.W. Taylor, the Bureaucratic Management Theory developed by M. Weber does not only focus on the enhancing of efficiency and profitability, but applies a systematic and hierarchic approach to the organisation and management of human beings and their roles within the Company.[497]

(iii) Human Relations Theory[498]:

Whereas the first two theories focus mainly on the organisational structure of the Company as a profit-oriented enterprise, the Human Relations Theory puts the human being, i.e. the employee into the center

---

[494] Cf. Ebbinghaus, A. (1984), p. 1 et seq.; Schulte-Zurhausen, M. (2010), p. 9 et seq.; Taylor, F.W. (1911); Shafritz, J.M., Ott, J.S., Jang, Y.S. in: Shafritz/Ott/Jang (2015), p. 66 et seq. with further references; Volpert, W., Vahrekamp, R. (1977), p. XII et seq. with further references.

[495] Cf. Steinmann, H., Schreyögg, G., Koch, J. (2005), p. 531 et seq.

[496] Cf. Shafritz, J.M., Ott, J.S., Jang, Y.S. in: Shafritz/Ott/Jang (2015), p. 78 et seq. with further references.

[497] Cf. Shafritz, J.M., Ott, J.S., Jang, Y.S. in: Shafritz/Ott/Jang (2015), p. 78 et seq. with further references.

[498] Cf. Shafritz, J.M., Ott, J.S., Jang, Y.S. in: Shafritz/Ott/Jang (2015), p. 126 et seq. with further references.

of Management actions. The needs and relationships between the individuals are perceived to be of central relevance for the economic success of the Company and therefore the main focus of the Management.[499]

(iv) Systems Theory[500]:

The Systems Theory describes a holistic approach towards the management of systems in general, including also Company Management. The Manager's main function is considered to be the alignment of all different elements of the Company and the balancing of their interests and needs alongside with the joint objective of economic success.[501]

All such Management theories are based on the assumption that the internal organisation of every company can be split into (i) a strategic body, (ii) an administrative body, as well as (iii) an operational body.[502]

Whereas the operational body creates value for the company by producing tangible and/or intangible goods in compliance with the Company's business object, the administrative body serves as the organisational heart of the enterprise and the strategic body sets out the general strategic direction of the Company and takes decisions of overarching importance.

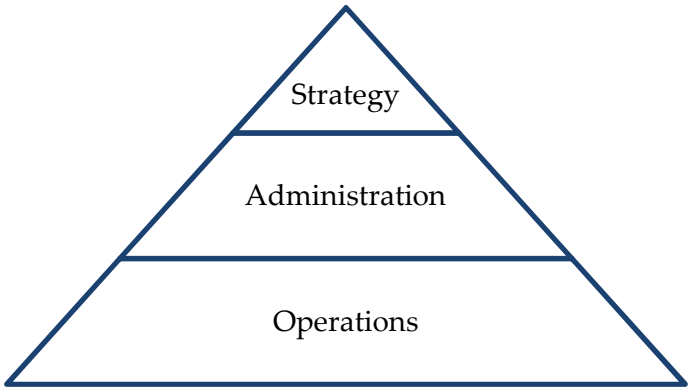
[499] Cf. Shafritz, J.M., Ott, J.S., Jang, Y.S. in: Shafritz/Ott/Jang (2015), p. 126 et seq. with further references.

[500] Cf. Diesner, T. (2015), p. 140 et seq.; Staehle, W.H. (1999), p. 41 with further references.

[501] Cf. Diesner, T. (2015), p. 140 et seq.; Staehle, W.H. (1999), p. 41 with further references.

[502] Cf. Shafritz, J.M., Ott, J.S., Jang, Y.S. in: Shafritz/Ott/Jang (2015), p. 314 et seq.

Figure 7: Organisational divisions of a Company



Being positioned at the top of the organisational pyramid, the Management of a Company acts in clear execution of the overall strategy. As such is mainly determined by the Company's Object defined in the Articles of Association[503] and by fundamental decisions, which have to be taken by the Company's shareholders,[504] the Management is the vital instance to translate the overall object and vision of the Company into specific day-to-day business activities.[505]

However, the specific way in which a Manager conducts this function, depends on his individual Management Style and is directly linked to its personality. This way of managing, of conducting strategic actions for the company is closely linked also to the respective managers' way of considering and evaluating risks and of taking decisions.

As being located at the intersection between Economic Sciences and Psychology, the theories around specific Management styles have developed into the direction of three main types of Management styles, each consisting of various different sub-types and specifics: Managers' actions and behaviour can be categorized as being either

[503] Cf. above, Chapter 3.2.2.

[504] Cf. above, Chapter 3.2.2 and Chapter 3.2.3.

[505] Cf. above, Chapter 3.2.2 and Chapter 3.2.4.

(i) autocratic,
(ii) democratic or according to the approach of
(iii) laissez-faire.[506]

The main characteristic of an autocratic management style is the Manager's constant aim to gain and exercise full control over his organisation. Decision-making is centralized towards the function of the Manager itself, no diversification or delegation of authorities or responsibilities takes place. If the Management of a Company consists of several Managing Directors, an autocratic management style can either lead to a centralized organisation of the respective Managers' own fields of competence only – for example, a Managing Director, who is in charge for Human Resources would organize this function alongside his autocratic management and decision-making style.

As an alternative, an autocratic management style can also lead to a respective streamlining amongst the Managang Directors, especially if the autocratic personality is actually the Chairman of the Management.

Autocratic Managers are likely to organize their Company's structure in a hierarchic and top-down manner, with clear reporting lines and explicitly defined functions and competencies. Autocratic Managers are likely to have a vast and detailed knowledge about the Company and tend to force their organisation to involve and inform them on all kinds of matters.[507] Variations of this Management style can be an authorative approach,[508] a persuasive approach[509] or a paternalistic approach.[510] Whereas the first of those does not tolerate any discussions or interference, Managers acting alongside the second approach do care and rely on feedback and appreciation of their staff, but aim to achieve it by way of persuading them to agree.[511] Managers, who show a paternalistic approach will

[506] Cf. Lewin, K., Lippitt, R., White, K. (1939), p. 271 et seq.; Staehle, W.H. (1999), p. 328 et seq. with further references.
[507] Cf. Staehle, W.H. (1999), p. 328 et seq. and p. 698 et seq.
[508] Cf. Staehle, W.H. (1999), p. 328 et seq. with further references.
[509] Cf. Staehle, W.H. (1999), p. 328 et seq. with further references.
[510] Cf. Staehle, W.H. (1999), p. 328 et seq. with further references.
[511] Cf. Staehle, W.H. (1999), p. 328 et seq. with further references.

typically not validly consider othe opinions, but merely see a need to solve and decide on their own for the overall benefit of the organisation.[512]

Autocratic management styles are often conducted by individuals, who have a strong or even egoistic personality, an overwhelming trust in the own skillset and a strong urge to control their surroundings. Hence, their behaviour and decision-making are likely to be biased by Overconfidence, Framing and Anchoring Effects as well as a Status Quo Bias, in case these Managers are confronted with a need for change or transformation that was not inititated by them, but imposed onto their fields of responsibility.

In contrast thereto, a democratic Management style does strongly rely on cooperation, open communication and participation as basic elements of a Company's management. Here, the Manager takes the role of an active moderator of different views and functions and ultimately decides based on a consideration of the different aspects which have been identified and brought up by the organisation. Whereas this Management style is likely to lead to a high level of acceptance of the respective Manager within the organisation, the decision-making process itself might be much more time-consuming and still not immune against individual heuristics and biases.

The third approach to Managerial Behaviour is the so-called "laissez-faire" style. Here, the Manager does not even take an active role as moderator or decision-maker, but rather trusts that the organisation itself will progress into the right direction and solve occurring problems or questions.[513] This approach might lead to stagnation, if problems and questions remain unsolved and strategic decisions are not actively taken. Economic success turns out to become more an accidental development than the result of planful strategic decision-making.

4.3.2. Critical review

With regards to the existing theories concerning Management types and styles, the ongoing scientific research and discourse reveals that overall

[512] Cf. Staehle, W.H. (1999), p. 328 et seq. with further references.

[513] Cf. Staehle, W.H. (1999), p. 357 et seq. and p. 459 et seq. with further references.

categorization of Management styles as either autocratic, democratic or according to the approach of laissez-faire are not to be seen as separate alternatives.

Research and experiments reveal that Managers tend to combine elements from the different categories.[514] As an example, a Manager can show democratic and cooperative behaviour with regards to certain responsibilities or aspects of the Company, but rather follow an autocratic and controlling style for certain other elements or projects.

Therefore, a strict application of the different categories of Management styles might be misleading and not appropriate to real-life scenarios. Hence, the existence of those categories allows for a more structured analysis and discussion of specific features and characteristics of Management behaviour with regards to decision-making and corporate strategy execution.

4.3.3. Application and relevance in Corporate Transactions

The general criticism outlined above in Chapter 4.3.2 does hold true also in the light of Corporate Transactions. Due to the importance of such projects in the Company's dimension, as well as on an individual professional level for the respective Manager, such Manager might behave and decide differently from the style he would apply to day-to-day standard business operations. A Corporate Transaction brings along unique opportunities and risks, not only for the participating companies but likewise also for their respective Managers.

This can impact the Managers' decision-making style. For example, Managers might act more risk-averse in the light of the liability threats associated with a Corporate Transaction and the enhanced level of direct control and interference of the shareholders. Contrasting to that, Managers might also become more open to take risks, being enchanted by an efficient set of incentives placed by their shareholders.

It does depend on the specific circumstances of a Corporate Transaction to determine, in which way the personal Management style of the involved

[514] Cf. Staehle, W.H. (1999), p. 348 et seq.

Managers does influence their decision-making. However, it is likely that an influence does in fact turn out to exist. This will be one of the aspects to be analysed further in Chapter 5 during the empirical data analysis.

4.3.4. Conclusion

Overall, it can be concluded that the theories regarding Managers' individual style of acting and executing corporate strategy are likely to be of relevance for managerial decision-making, also in the context of Corporate Transactions.

The close linkage to other economic theories and models, such as the theories of Behavioural Economics,[515] will allow for an enhanced analysis of empirical data and is likely to result in findings and assumptions, which can depict the reality of managerial decision-making in Corporate Transactions in a holistic and comprehensive way.

All such theoretical elements described and analysed above are complementary to each other and together form a theoretical fundament, which is robust and does reflect the widespread variety of relevant aspects for the analysis of individual Managers' decision-making in Corporate Transactions.

[515] Cf. above, Chapter 4.2.2.

4.4. CORPORATE TRANSACTION SPECIFICS REVIEWED – INFORMATION, COMPLEXITY AND DEFINITENESS OF MANAGERIAL DECISIONS

The following sub-chapters describe specific problems and circumstances, which, based on the analysis of relevant theories and models made in this Chapter 4 so far, are considered to be of relevance in Corporate Transactions. Those will be additional contributors to the overall conclusions made in Chapter 4.5 below.

4.4.1. Information – availability, costs, value and asymmetries

Corporate Transactions are the sale and acquisition of information and expectancies. Having the purchase price often being based on a valuation of the Target Company that quintessentially considers the expected future earnings as the main element of the Company's price tag (so- called Discounted Cash Flow method of company valuation[516]), information is of key relevance for a Corporate Transaction.

This holds true for every step and phase of a Corproate Transaction: Without sufficient information, the Seller cannot build any intention ot sell the Target Company[517] and the Purchaser will not be interested in the deal at all.

During the later stages,[518] information serve as key motivation for the Purchaser (i.e. knowing that the Target is a suitable fit for his own corporate strategy) and for the Seller the key argument to positively market the Target Company. The level of information available is of central importance for the contract negotiations,[519] especially the level and catalogue of warranties given by

---

[516] Cf. for a general overview and understanding of the Discounted Cash Flow method of corporate valuation: Copeland, T., Koller, T., Murrin, J. (2002), Part II; Drukarczyk, J., Schüler, A. (2016), p. 237 et seq. with further references; Kruschwitz, L., Loeffler, A. (2006) with further references.

[517] Cf. above, Chapter 3.3.2.1.

[518] Cf. above, Chapter 3.3.2.2 until Chapter 3.3.2.6.

[519] Cf. above, Chapter. 3.3.2.4.

the parties and for the purchase price, which the Purchaser is willing to pay and the Seller is willing to accept.

And for the Target Company, information about its own business conduct and financial status is at the same time the insurance police to its own separate legal existence and preservable display of its own uniqueness that it wishes to keep secret to a large extend.

Clearly, the participants in a Corporate Transaction all have a different perspective towards the strategic value of the relevant information and aim for diverging interests.

For the Seller, information about the Target Company is the basis for its decision to aim for a sale and at the same time the main strategic instrument towards the Purchasing Company. The Seller decides, which information is released and shared at what point in time and in what format. To do so, an open and comprehensive flow of information from the Target Company towards the Selling Company is of huge importance for the Selling Company. Equally important is the full control over the flow of information towards the potential Purchaser.

For the Purchasing Company, information about the Target Company is the basis for every decision-making in the context of a Corporate Transaction, may it be the structural decisions to initiate and/or continue negotiations or the discussions about the content of the transactional agreements with the Seller.[520] The entire assessment, if the deal is likely to bring added value to the Purchaser is based on the information available about the Target Company and about the Purchaser's negotiation counterpart, i.e. the Selling Company.

The Target Company is the central element of importance in the deal.[521] Its Management has access to all relevant information. Full cooperation on their side is of huge interest for the Selling Company and if the Target Company's Management is aware of its own strategic relevance, it might use this position and

---

[520] Cf. above, Chapter 3.3.2.

[521] In case of a Share Deal – in the alternative case of the conduct of an Asset Deal, no Target Company will be existing, but only a Selling Company and a Purchasing Company – cf. above, Chapter 3.3.1.

seek for a maximization of its own benefits, either momentarily or with a view to the future after the Corporate Transaction.

As visible, asymmetries in the availability of information are existing in a Corporate Transaction. Even though the Due Diligence, which is conducted during the phase of "Proper Inspection"[522] does typically reveal a broad fact basis about the Target Company, this will not lead to a equalization of the information levels of Seller, Purchaser and Target Company. The Target Company is closest to the information, the Seller is strongly motivated to control the information flow and the Purchaser wishes for a broad disclosure of all relevant information and can use its strategic position vis-á-vis the Seller to achieve this.

The respective level and form of the information asymmetries determines the strategic negotiation positions of Seller and Purchaser. For example, if the Purchaser has information about pending law suits or liability claims, which the Target Company is currently facing, he might well instrumentalize the knowledge about this negative aspect in the negotiations and require the Seller to accept a reduction of the purchase price or to give additional legal comfort by way of additional warranties.

In a Corporate Transaction, every lack of information leads to an increased level of uncertainty, which has to be considered as a potential economic risk and thereby have an effect on the purchase price. Thereby, information, information availability and information asymmetries between the participants are to be considered as a central precondition for the decision-making of Managers during the entire lifetime of a Corporate Transaction and from every participants' point of view.

The above considerations mostly derive from the theoretical background described and analysed before. They will become a part of the empirical data analysis later.

[522] Cf. above, Chapter 3.3.2.3.

4.4.2. The inevitable level of complexities – increased uncertainty as basis for individual decisions

As depicted above, information decrease uncertainty in a Corporate Transaction. However, uncertainty about the specific economic risks associated with the conduct of a Corporate Transaction does not only derive from a (partial) lack of information, but is also the result of other factors.

For all participants, the conduct of a Corporate Transaction, irrespective of the availability of relevant information, is typically a project of extraordinary or even unique, nature, which is usually far away from the participants' daily business activities.[523]

The successful conduct of such a project requires an organised approach with regard to its leadership, as well as to the actual administration of sub-projects, tasks, relationships between the parties and the management of the respective stakeholders' expectations.[524] In a nutshell, a successful management of a M&A project requires to keep the following three aspects in close consideration and successful management:[525]

(i) project steps and tasks;

(ii) people and stakeholders;

(iii) adherence to timeline or external drivers and limitations to the project timing.

Whether the Project Manager of a respective participant in a Corporate Transaction is the respective Company's Managing Director himself, or if the latter has decided to instruct and supervise a separate individual with the

---

[523] Except for Private Equity investors, which have the acquistion, administration and exit of their portfolio companies as business object.

[524] Cf. Meckl, R. (2004), p. 455 et seq. with further references;Junni, P., Sarala, M. in: Cooper, C.L., Finkelstein, S. (2014), p. 181 et seq. with further references.

[525] Cf. Meckl, R. (2004), p. 455 et seq.

conduct of this position, the key decisions for the project will always have to be taken by the Managing Director(s) of the Company.[526]

In any case, the above mentioned aspects of managing a Corproate Transaction as a project each contain a substantial amount of complexity, which the Management is required to wisely navigate.

Another element of complexity is the existing uncertainty with regard to the behaviour and potential strategy of the other participants in the Corporate Transaction. Whereby the Management typically has a good set of experiences on the expectations and strategic approach of its Company's shareholders, the behaviour of the other participants will be mostly unknown to him. However, in order to develop and execute a successful strategy towards the maximization of the Company's benefits, the Managing Director will have to consider and aim to predict potential strategies and behaviour of the other participants.

Will the Target Company's Management try to block its Company's sale? Will the Purchasing Company's shareholders interefere with its Managements negotiations and acceptance of certain clauses of the Purchase Agreement? Such questions are likely to be of relevance for the strategic considerations of the Seller's management and thereby, for the decisions it takes during the different phases of the deal.

Whereas the above described factors can be considered as "internal" aspects of the management of a Corporate Transaction, which all arise from the internal sphere of the project's participants and the interactions and negotiations between them, there is another sphere of aspects, which are to be considered for the successful management of a Corporate Transaction, most importantly for the Selling Company and the Purchasing Company, but indirectly relevant also for the Target Company: the Managers also have to conduct and consider additional factors, requirements and influences from the "external sphere".

Such are, for example, the application for and receipt of clearance from competition authorities, which are legally required to be involved, but also the

[526] See above, Chapter 3.2.4 for the general responsibility of the Managing Directors to conduct and execute the Company's position in a Corporate Transaction.

behaviour of other stakeholders, such as the Target Company's customers and/or vendors.

To manage the expectations and various different sub-tasks of those stakeholders in a way which is ultimately benefitial for the respective participant, is another structural layer of complexity and a key responsibility of the Managing Director(s).

In a nutshell, the conduct of a Corporate Transactions can be generally considered to be one of the most complex projects that a Managing Director can be instructed to execute. In order to be successful, general skills and instruments for Project Management are important, but a clear focus on the overall goal of maximizing benefits for the respective Company will set the compass for the numerous individual decisions, which the Managing Director will have to take during the lifetime of the deal and with regard to all its various aspects and sub-projects.

In the light of the above mentioned theories on economic behaviour of individuals,[527] the high level of complexity and the unique character of a Corporate Transaction for the involved Managers should not be underestimated. Individual biases, such as Overconfidence[528] might lead to inappropriate estimations of a Managing Director with regard to timing or his ability to multitask on the various different workstreams, which have to be aligned and fostered in parallel. The Availability Bias[529] might lead to an improper neglection of questions, which remain unanswered after the Due Diligence phase or a partial disregard of aspects, which are not apparent at first sight.

Also with a view to the specifics and problems arising out of the principal agent constellation between the respective Managing Director and various different stakeholders, the high level of project complexity can result in an increased risk of information asymmetries, which give room to hidden actions of the Managing Director or open the path towards the strive for individual benefit maximization instead of pursuing the Company's interests.

---

[527] Cf above, Chapter 4.2.2.

[528] Cf. above, Chapter 4.2.2.4.

[529] Cf. above, Chapter 4.2.2.2.

Therefore, the high level of complexity of M&A projects can make the installation of effective control and incentive mechanisms by the respective principals in the various constellations even more important.

4.4.3. Acceptance and reversibility of decisions

As described above,[530] the process of individual decision-making is, on an abstract level, the selection of one option out of several alternatives. The goal for every decision is to identify and chose the respective option, which allows for a maximization of the benefits and brings the biggest step into the direction of the defined goal. In reality, decisions are often based on a sound, but not all-embracing information basis and often also taken under time pressure and/or the factual pressure of organisational or "political" circumstances.

Especially in Corporate Transactions, Managing Directors are often required to decide quickly, with a lack of time for an all-encompassing consideration and valuation of all potential influences and risks. As depicted above, taking business risks and risky decisions that might turn out to be disadvantageous for the Company, are legally permitted, as long as the decision is taken on an appropriate information basis.[531]

On this path, decisions lead to consequences which are often not completely reversible. Whether the outcome is positive or negative in the light of the overall goal to pursue, the decision-maker will be bear the responsibility. Taking into account that Managing Directors, who take decisions in the context of a Corporate Transaction, are in most cases acting as agent, instructed by the principal, i.e. the Company's shareholders, this responsibility might lead to severe negative personal consequences, including the risk of termination of the managerial service contract.

Here again, information appears to be of central importance: If the Manager takes decisions on an appropriately strong information basis, the risk of negative

---

[530] Cf. above, Chapter 4.2.1. and Chapter 4.2.2.

[531] Cf. above, regarding the Business Judgement Rule: Chapter 3.2.2.2, Chapter 3.2.2.3 and Chapter 3.2.3

consequences for the Company is reduced significantly. Also, the threat of negative personal consequences is reduced likewise.

This allows again for the conclusion that the principals are well-advised to incentify their decision-making agents to collect and assess all relevant information and to then take appropriate decisions with adequate timing. Principals should thereby also take into account, any data points they might have with regard to their agent's individual tendency to manifest any biases or heuristics, which could impact the outcome of his decision-making process.

Again, the theoretical findings of the Principal-Agent-Model[532] and the theories from the fields of Behavioural Eonomics[533] turn out to be of huge importance in the context of managerial decision-making in Corporate Transactions.

[532] Cf. above, Chapter 4.2.3.

[533] Cf. above, Chapter 4.2.2.

4.5. CONCLUSION - THEORETICAL FINDINGS COMBINED: THE BASIS FOR MANAGER'S DECISION-MAKING IN CORPORATE TRANSACTIONS

The legal corridors and areas for original decision-making of Managing Directors are already identified above and thereby constitue the Research Fragment 1.[534] The then-following above description and discussion of Economic theories and models concerning human behaviour and decision-making now give way to a concluding assessment of the factors, which influence Managing Directors in the process of making decisions during a Corporate Transaction, especially in the fields described above as outcome of Research Fragment 1. Thereby, the findings made in relation to the Research Fragment 2 are the second element to the overall theoretical fundament of this work.

Research Fragment 2:
Which factors are likely to influence the decisions taken by Managers in Corporate Transactions?

The above described theories reveal a set of several different aspects, which appear to be of relevant nature for the decision-making of Managing Directors in Corporate Transactions. Moreover, those aspects are connected to each other and therewith form a network of potential influencing factors.

In particular, there are influencing factors to managerial decision-making to be found in and as a combination of the following areas of Economic Theories:

(i) Specific Heuristics from the fields of Behavioural Economics

(ii) Aspects to be found in the Principal-Agent Model

(iii) Aspects regarding the subjective style of Management

To some certain extent, the effect or likelihood of occurrence of those factors is in itself influenced by certain particular aspects of Corporate Transactions, as concluded here in the following:

[534] Cf. above, Chapter 3.5.

Table 3: Overview of influencing factors to particular steps & participants in Corporate Transactions, based on economic theories

#	**Influence factor = description/name**	**When? = phase of the Corporate Transaction**	**Who? = participant of the Corporate Transaction**	**Connection to other influence factors?**
1.	Availability Bias	Proper Inspection	Seller Purchaser Target	Incentives to certain managerial behaviour
2.	Overconfidence	Defining Parameters	Seller Purchaser	Individual Management style
3.	Hindsight Bias	Defining Parameters	Seller Purchaser Target	Individual Management style
4.	Anchoring	Proper Inspection & Defining Parameters	Seller Purchaser	Individual Management style
5.	Status Quo Bias	Defining Parameters	Target	Overconfidence Incentives to certain managerial behaviour
6.	Level of shareholders' control	All	Seller Purchaser Target	Overconfidence
7.	Incentives to certain managerial behaviour	Proper inspection & Defining Parameters	Seller Purchaser Target	n/a

#	**Influence factor = description/name**	**When? = phase of the Corporate Transaction**	**Who? = participant of the Corporate Transaction**	**Connection to other influence factors?**
8.	Individual Management style	All	Seller Purchaser Target	Incentives to certain managerial behaviour
9.	Objective context: availability of relevant information	Proper inspection & Defining Parameters	Seller Purchaser Target	Availability Bias Incentives to certain managerial behaviour
10.	Objective context: complexity of Corporate Transaction	Defining Parameters	Seller Purchaser	Individual management style

As the above table depicts, certain influence factors occur only during one or several specifc phase of a Corporate Transaction and are also dependant on the respective participants.

Availability Bias

The Availability Bias can influence Management decision-making in a Corporate Transaction in two ways, as analysed above.[535] Both such potential influences,

(i) the over-valuation of occurrences and particularities from past transactions, and

(ii) general managerial experience and also the overrating of available information without sufficiently questioning, if further data should be relevant,

[535] Cf. above Chapter 4.2.2.2.

can possibly occur and interfere to decisions of Managers of all three participants of the Corporate Transaction – Seller, Purchaser and Target Company. Whereas Management of the Target Company is likely to be exposed to biased decision-making regarding the experience from past transaction or managerial activities in general, the Management of the Selling Company and of the Purchasing Company are likely to be also exposed to consider the available information as constituting the entire horizon of available data. In case they base their decisions solely on the data available, information, which was initially not considered to be relevant or which occurred only at a later point in time during the deal, will not be adequately considered as valid component of the information basis for their decision-making.

Shareholders, who consider this bias to be likely to occur as a risk to the transaction, can aim to limit this effect by setting specific incentives or sanctions as preventive actions. Such incentives could be for example the promise of a bonus payment to the Purchasing Company's Management for the delivery of a comprehensive Due Diligence Report that the shareholders consider to be all-embracing regarding its information basis and content.

An alternative for the Seller's Management and the Target's Management, the shareholders could ask the Managers to explicitly confirm the Company's compliance with any warranty or representation given in the Purchase Agreement regarding the full disclosure of all relevant information about the Target Company. Such might have a disciplinary effect for the Managers with regards to ensuring that the information basis of the deal is strong and thourougly collected.

Such measures to potentially limit the occurrence of the Availability Bias show the direct connection to the Principal-Agent-Modell and its toolbox of solutions to align the interests of principal and agent – here, such are first and foremost a benefitial and strong information basis for the Corporate Transaction.

Overconfidence

As a second result of the analysis of the Economic Theories conducted above,[536] also the Bias of so-called Overconfidence has to be considered as a factor

[536] Cf. above, Chapter 4.2.2.4.

that might potentially influence Managers' decisions in Corporate Transactions. This applies specifically to Managers of the Selling Company and of the Purchasing Company, because these are the two active parties in the course of a Corporate Transaction, who will negotiate and thereby stage and form the deal. Here, a specific risk for negative effects due to Overconfidence occurs particularly in the phase of "Defining Parameters", i.e. during the drafting and negotiation of the relevant agreements for the Corporate Transaction.

Examples for the occurrence of this bias were given above,[537] hence, the interconnected analysis of Economic theories and models above reveals that a Manager's structural tendency to act overly confident might be closely linked to a merely autocratic management style in general. Connecting elements of both concepts are the strong reliance on hierarchic organisational and reporting structures, a preference for individual decisions over democratic consortium decisions and a personality that generally focuses and circles mainly on issues concerning himself instead of acting altruistic or for the sole benefit of others.

Hindsight Bias

Similar to the connection between Overconfidence and the individual Manager's style, the Hindsight Bias[538] might also have its root cause in the individual's general approach towards managing an organisation. The risk of an overly positive remembrance of past events is apparent for Managers in all three positionso of a Corporate Transaction, however, also here, an autocratic management style might serve as explanation for a strong Hindsight Bias and at the same time be also further strengthened by the autocratic style.

An autocratic Manager with a strong self-confidence might well remember past events even more glorified than a balanced or doubtful personality, and might at the same time also receive little or no feedback from within his organisation, which would allow for a different or more objective view to the past. Autocractic leaders in hierarchic organisations receive only "policitical" feedback, in most cases no open challenge or criticism, except from equally strong peers.

---

[537] Cf. above, Chapter 4.2.2.4.

[538] Cf. above, Chapter 4.2.2.5.

Anchoring Effects

Also the Anchoring Effect might be of influence to a Manager's decision-making in the context of a Corporate Transaction. And also here, a connection towards other Economic theories can be observed, again furthering the existence of a network of interconnected influence factors to [539]Management decision-making.

Being merely a false categorization of a specific situation or circumstance, the Anchoring Effect might again be either caused by and/or also fuelled further by the Manager's individual management style and the therewith connected level and quality of feedback and open discourse that the Manager in able and willing to engage in.

The occurrence of an Anchoring Effect in the course of a Corporate Transaction is likely to influence the decisions taken by Managers of the Selling Company and/or the Purchasing Company, which are both shaping the overall direction and nature of the Corporate Transaction. This is likely to happen especially during the contract negotiations, where all relevant issues and questions for the deal are discussed and either stipulated and agreed in writing or considered to be non-constructive for the ongoing process of the Corporate Transaction.

Status Quo Bias

Even the Status Quo Bias, which is most likely to occur for the Target Company's Management and to be of relevance for its general opinion towards the Corporate Transaction, should be considered always in close connection to other factors of importance for the Manager's individual behaviour, such as, especially Overconfidence and the Manager's individual approach towards Management in general. Here again, a strong personality with an autocratic management approach is likely not only to be influenced by his own Overconfidence and thereby trap into a Hindsight Bias regarding past events, but

[539] Cf. above, Chapter 4.2.2.6.

at the same time also likely to over-valuate its current position and reject changes – i.e. the Status Quo Bias.

Individual Management style

As visible above, the overall approach to managing a Company is likely to also have an impact on the occurrence of specific biases for an individual Manager. This connection is caused by the fact that individual heuristics and biases to not occur only situative or due to circumstances, but are one component of a "bigger picture" of the individual Manager's overall personality and character traits visible in professional management positions.

Therefore, an assessment of individual managerial decisions and decision-making should always take the Manager's individual style into consideration and base potential outcomes on a theoretical fundament that comprises of both, the specific theories around individual decision-making, as well as the general approach and style of professional company managements.

Level of shareholders' control

The manifestation of individual heuristics and biases of a Manager and the fact that those directly influence a decision, which the respective Manager takes in the name and on behalf of the Company is of particular interest for the shareholders. As depicted by the Principal-Agent-Model and its application to those constellations in the corporate world,[540] the principal has certain instruments to prevent the deviation of managerial behaviour from the general interests of the shareholder. However, even if the Manager will always take certain decisions in a Corporate Transaction in his own discretion, he is directed and motivated by factors, such as individual heuristics and biases and his general Management style. Knowing this risk and proactively setting incentives and/or sanctions to direct the Manager's interest is the free discretion and decision of the shareholders and principals in such scenarios.

Therefore, an appropriate level of control and information imposed upon the Management by the shareholders is of key relevance for the moderation of

[540] Cf. above, Chapter 4.2.3.

such principal-agent relationship. With a view to the later assessment of real-life Corporate Transactions and managerial decision-making behaviour therein, the specific behaviour of the shareholders will be one particular element to be analysed and which is likely to influence the intensity and quantity of influencing elements to the Managers' decision-making behaviour.

Incentives to certain managerial behaviour

In close connection to the shareholders' level of control and information, also the setting and existence of inventives and/or sanctions can have a direct consequence on subjective factors, which might influence managerial decision-making.

The effect that such incentives can have on a Manager will much depend on his overall Management style and personal character trait. It might well be that a specific Manager is very open to show the intended behaviour upon setting of effective incentives by his principal. However, an overly strong personality, managing a company with a clear view to his ow benefit maximiziation and considering the company to be merely a vehicle thereto and a Corporate Transaction a welcoming opportunity to gain even further personal advantages, might not easily change his overall approach or alter his specific decision-making behaviour, if not for a very good reason, i.e. a very strong incentive, such as a high premium payment or similar benefits.

Overall, it can be concluded that the interpersonal relationship between principal and agent is of strong importance for the existence and intensity of individual heurstics, biases and specific features of general managerial behaviour. Shareholders, who act passively, can give way to an extended radius of individual decision-making of a Manager in his own interest, as far as legal boundaries permit.

Objective context

As also depicted above, Managers' decision-making and the factors, which influence it, do not occur alongside the same logic for every Corporate Transaction. They depend on the specifics of the respective deal and on its objective context. Here, the availability of information and its allocation amongst

the deal participants is of huge importance, same as the general level of complexity, which might urge the respective Manager to either consider its decisions even more thoroughly or might lead to a mental and managerial overload, leading to inappropriate decision-making of the Manager.

As a consequence, the objective context of a Corporate Transaction should also be well-considered, whenever Managers' decision-making behaviour is practically assessed.

The above findings constitute the quintessence of Research Fragment 2. In addition and in synopsis with Research Fragment 1, the theoretical fundament for the answer to this work's Research Question is now complete and can therefore form the basis for the search and generation of assumptions and hypothesis by way of an empirical data analysis.

5. EMPIRICAL DATA ANALYSIS – ACTIONS AND DECISIONS OF MANAGERS IN CORPORATE TRANSACTIONS IN PRACTICE

5.1. SCIENTIFIC INTRODUCTION – RESEARCH FRAGMENT 3

In the above Chapters, the theoretical fundament of actions and decisions of managers in Corporate Transactions has been described and analysed, from the legal and the economic angle. The analysis of the legal framework of management behaviour in Corporate Transaction has revealed certain areas and phases of a Corporate Transaction, where decision-making of the Management is legally permitted and necessary for the progress of the Corporate Transaction.

Those phases are namely

(1) the phase of "Proper Inspection" of the Transaction Target Company, in which the Management of all three participants are in a position to subjectively influence the further transactional process with high impact and

(2) the phase of "Defining Parameters", in which mostly the Management of Seller and Purchaser can influence the form and fate of the Corporate Transaction by their own actions and decisions.

After that, the analysis of the economic framework of Managers' decision-making has lead to the theoretical conclusion that Management decisions, which are taken in the course of a Corporate Transaction, can be influenced by subjective factors, such as

(1) the individual strategy and style of the Manager, who is involved in the Corporate Transaction either on the side of the Seller, Purchaser or Target Company, and

(2) heuristics and/or biases, which influence the decision-making process of the individual, who manages, but also

(3) the relationship between the manager and his/her shareholder as a principal by nature of the equity holding structure in the legal entity.

However, these theoretical findings and analyses do not yet deliver any hint or evidence of what reality looks like. They constitute the "should-be" scenario of pure theory, but not the "this-is-it" revelation that only empirical data can bring. Therefore, the following passages of this work will focus on empricial data with the aim to connect the findings and know-how from the theoretical fundament in the above Chapters with facts from reality, which will then allow for the generation and construction of a set of robust hypotheses and assumptions.

This view into reality and the collection and analysis of empirical data constitutes the third Research Fragment of this Thesis. It will complement the first two Research Fragments with a look into reality. In order for this work to constitue an embracing scientific analysis of the Research Question, the inclusion of empirical data and an analysis of this empirical data is an inevitable element.

Research Fragment 3:

Are the theoretical findings made in Research Fragment 1 and Research Fragment 2 to be found in reality?

The empirical data collection and analysis will focus on a search for evidence not only for the theories of Management Strategies or Behavioural Economics or other single-theory approaches, but will be an analysis based on the combination of such, with a specific view to the conclusions made on the legal framework of Management behaviour in Corporate Transactions. By that, this work does create a novum, fill a gap in scientific research, which has been existing until now.

The set of hypotheses and assumptions generated based on the empirical data collection and analysis might contribute to setting the stage for a more holistic interpretation of Management behaviour in the future, not only focussing on either the legal requirements and framework of a Corproate Transaction or Management strategies or Behavioural Economics. It is the combination of those theoretical concepts, which contributes to a more thorough and enhanced interpretation and understanding of Managers', i.e. individuals', behaviour in M&A scenarios.

5.2. RESEARCH PLAN

5.2.1. Research Strategy

The following data collection and analysis has been conducted on real Corporate Transactions, i.e. M&A deals, which have taken place during the last years. The data available about those Corporate Transactions is drawn from different information sources and for each case, the data collection and analysis process will be described alongside the findings in the light of the theoretical fundament developed above in the previous Chapters of this work. Each set of data collected regarding one real Corporate Transaction will be described as "Case Study" throughout the description and analysis of such. A set of five such Case Studies forms the scope of the empirical research.

Each of the five Case Studies is selected alongside the parameters described below in Chapter "5.2.2 Research Methodology" in order to ensure sufficient quality of the data to allow for a valid and reliable analysis and interpretation.

Why to choose this Research Strategy? Why should a data collection via research on such Case Studies be considered as preferreable to other means and instruments of data collection, such as e.g. expert interviews, questionnaires or biographical research on managing individuals involved in Corporate Transactions?

Different factors come into play for the consideration, which data collection approach to take for the specific subject matter of this work's Research Question:

(1) objectivity and accurateness of the data,

(2) the aim for an encompassing nature of the data sets, as well as

(3) the general availability of the data

are of relevance here. First and foremost the data to be collected has to be of accurate nature, without faulty or fictional elements. Therefore, the data collection approach should be focusing on evidence-based information only and restrict subjective elements, such as personal opinions of the data transporters or fictional additions without realistic grounding. This factor will also be important for the quality control elements in the data interpretation conducted at a later stage of this work.

Moreover, Corporate Transactions are a staged process, which is conducted by the participants over a certain period of time. Therefore, relevant data regarding Corporate Transactions will comprise of various data points, if the entire Corporate Transaction is concerned and not only one specific element or time thereof. As an ongoing process, data regarding each phase, each participant and the overall timespan is available. The data collection process for this work was conducted with the aim to collect data sets that include all those elements, in order to have a valid and substantial fact base for the research to be done on those data points in the light of the theoretical fundaments drawn above in Chapter 3 and Chapter 4.

Moreover, the general availability of data regarding Corproate Transactions is also of relevance. Whereas the existence of a Corproate Transaction in most cases becomes public knowledge at some point in time (often retrospectively, once the deal is signed or closed), the detailed information concerning the considerations of the participants, the decisions taken and the outcome of the different phases and negotiations often remains secret, due to confidentiality agreements between the parties and often driven also by the aim not to make certain facts or information available to the participants' respective competitors or the public in general.

The conduct of questionnaire-based interviews of participants in Corporate Transactions has been considered as an alternative option for the generation of empirical data as well.[541] Especially, because this approach had been choosen and executed for research in the fields of Behavioural Economics, also with a view to Mergers & Acquistions in general.[542] However, this work here aims to analyse the way in which not only heuristics and biases determine Management behaviour in the light of the existing legal framework of Corporate Transactions, but also to look beyond to the context of Management Theories and the relationship between the respective Manager and his/her principal. Production of data on those integrated elements, which always constitute a very personal and reflective perspective of the acting individual manager, interviews and direct communication with the involved individuals inherits the risk of subjective

[541] Cf. Bortz, J., Döring, N. (2005), p. 308 et seq.

[542] Cf. Langevoort, D.C. (2011), paper no. 10 with further references.

reporting and the inability to self-reflect in an abstract objective way.[543] Whereas such risks in data collection can be mitigated to some extend by specific means of data categorization and interpretation, the risk here for this specific Research Question of highly integrated nature, is very high that the data collected by way of interviews of participants would be too subjective and/or not sufficiently reflective to allow for a comprehensive and in-depth analysis in the light of the Research Question.

Another alternative would be the conduct of interviews not with participants, but with experts,[544] who have been involved in Corporate Transactions and could therefore report on the Management behaviour and decision making, as well as on the structure and specifics of the respective deal. However, those experts would only be in a position to report data, if they had been directly involved in the respective Corporate Transaction themselves. As such, they would always have played a specific and active role, for example as an advisor to one of the participants. And as such, the same risks would exist as described above for the data collection from interviewing the participants: the data sets to be received might be too subjective and not at all open for objective analysis, because they derive from an individual, who is not able to abstractly report and reflect about his/her own behaviour.

Based on those considerations, the most appropriate approach for the collection of suitable data appears to be the collection of data from "outside" the specific Corporate Transaction. The approach to do so is by collecting a variety of data points from reliable sources available and the assortment of this data towards a "deal biography" for each Case Study.[545] Emphasis is taken towards the availability of reliable data concerning factors like especially the applicable jurisdiction(s), general structure of the deal, ownership structure of the participants, decisions taken by the management, content of transactional

---

[543] Cf. Bortz, J., Döring, N. (2005), p. 325 et seq. describes the advantages of non-reactive methods of qualitative data analysis against interviews.

[544] Cf. Bortz, J., Döring, N. (2005), p. 308 et seq.

[545] Such data collection was conducted based on the methodology described in: Bortz, J., Döring, N. (2005), p. 325 et seq.

agreements as well as the management strategy of the respective managers involved.

The approach of data collection by way of real-life M&A Case Studies allows for an inductive approach[546] for the empirical analysis. Observations of real Corporate Transactions allow, in the light of the theoretical fundament developed above, to draw conclusions in the form of hypotheses and assumptions regarding individual Managers' behaviour in Corporate Transaction scenarios. This will be the final and comprehensive step towards answering the Research Question of this work.

5.2.2. Research Methodology

The execution of the Research Strategy described above in Chapter 5.2.1 is conducted based on the methodolgy of a qualitative data analysis. The answer to the Research Question requires the generation of hypotheses on how individual Management behaviour is determined in the light of the existing and applicable legal framework of a Corporate Transaction. Inductive analytical progress, which aims towards the generation and definition of hypotheses is often conducted by way of qualitative data analysis[547] and there are strong arguments for that.

Qualitative data analysis aims to interprete and reveal the latent data content of material, taking into account also the respective context of the data material and the acting subjective's perspective.[548] This allows to consider various pieces of material and information in different format and nature at the same time and delivers a comprehensive analytical outcome, whereas the generation of hypotheses can be one of those.[549] Here, sets of information material of different

---

[546] Cf. Bortz, J., Döring, N. (2005), p. 30 et seq. and p. 300 et seq.; Mayring, P. (2010), p. 22 et seq. with further references.

[547] Cf. Jensen, O. in: Mayring, P., Gläser-Zikuda, M. (2005), p. 255 et seq. with further references.

[548] Cf. Bortz, J., Döring, N. (2005), p. 329; Mayring, P. (2016), p. 46 et seq.

[549] Cf. Mayring, P. (2016), p. 41 et seq.; Mayring, P. in: Mayring, P., Gläser-Zikuda, M. (2005), p. 7 et seq.

formats are available for every Case Study via different information sources. Those sets form the "biographical data"[550] of the respective Corporate Transactions.

Another argument to support the approach of qualitative data analysis for the generation of reliable hypotheses on robust empirical and theoretical grounds is the flexibility, those approaches offer, with regard to the possible reconstruction of the target individuals' perspective and the understanding and analysis thereof:[551] the path via the Research Fragments towards finding the answer to the Research Question of this work does necessitate an interpretative, hermeneutical view into the reality of Corporate Transactions by using various sets of available data points for the respective Case Studies. Here, qualitative data analysis allows for drawing such conclusions and explanations in an explorative any open way, still sensefully structured and logically grounded in order to produce an outcome of high academic reliability.

Moreover, there is also one more specific argument in favour of using qualitative data analysis here instead of quantitative analytical instruments: the world of M&A, of Corporate Transactions is a world, in which not all types of data can be produced in large numbers. For example, the number of managers, who are actively involved in cross-border Corporate Transactions is likely to be smaller than e.g. the number of consumers for many products or e.g. the number of people who take the subway to go to work every morning.

Also, the number of reliable data points available regarding Purchase Agreements of Corporate Transactions is rather limited, due to the above described wish of the participants, to keep such information confidential. Also with a view to the actual process and individual decision-making during Corporate Transactions, the information available is to be considered as rather restricted in volume, even when considering various different sources, such like

---

[550] Such term is typically used in the context of data available concerning individuals, but also well describes the nature of the data collections here: cf. Bortz, J., Döring, N. (2005), p. 325 et seq.; Mayring, P. (2010), p. 52 et seq. with further references.

[551] Cf. Bortz, J., Döring, N. (2005), p. 301 et seq.

press releases and corporate communication, participants interviews, as well as indirect information sources via internet and else.

Nevertheless, the data collected for the means of this work and analysed in the following Chapters, is objective, robust and substantial enough to be considered as reliable as well as at the same time externally valid and therewith fit to allow for a generation of hypotheses of general value and relevance.[552]

Objectivity of both, the input data as well as the interpretation thereof is ensured by the sourcing of primary, direct data whenever available and by conducting the interpretation alongside structured categories, which are described in more detail below in Chapter 5.3. Regarding the objectivity of the sourced information, indirect information sources are only considered, if additional value is likely to be brought into the interpretation and if such information still suffices the quality standards set out in the following.

Same as for quantitative data analysis, also qualitative data analysis has to live up to the standard of validity – internally and externally.[553] Therefore, the analysis of the collected data will include an assessment of the internal and external validity as well, meaning that the data requires to be logical, free from contradictions and errors in itself (internal validity[554]) and at the same time suitable to build the basis of generalisation and universal value (external validity[555]).

Within the fields of qualitative data analysis, the tools to process the data collected in the following will be (1) a qualitative content analysis according to the principles developed by Mayring,[556] in combination with (2) the approach of the

[552] Such requirements to the data chosen as a basis for any kind of empirical data analysis are considered to be of central relevance: cf. Bortz, J., Döring, N. (2005), p. 329 and p. 53; Mayring, P. (2010), p. 22 et seq.

[553] Cf. Bortz, J., Döring, N. (2005), p. 327 et seq.

[554] Cf. Bortz, J., Döring, N. (2005), p. 327 et seq.; Mayring, P. (2010), p. 116 et seq.

[555] Cf. Bortz, J., Döring, N. (2005), p. 327 et seq.; Mayring, P. (2010), p. 116 et seq.

[556] Mayring, P. in: Mayring, P., Gläser-Zikuda, M. (2005), p. 7 et seq.

so-called "Grounded Theory" developed by the "Chicago School" in the 1960s.[557] Why are those tools most suitable here?

The nature and formats of the data sets available as Case Studies are diverse with regard to context and content. Here, Mayring's qualitative content analysis allows for a dedicated interpretation, whereas the Grounded Theory allows for a constructive inclusion of the respective data set's context into the assessment.

5.2.3. Research Design

The empirical data collection was conducted mainly by way of internet and newspaper research for direct and indirect data regarding Corproate Transactions. As a first step, the search parameters were directed to identifying Corporate Transactions in general and to detecting cases, which took place during the last years. A search back until the 1990s was conducted.

As a second step, the search was elaborated towards cross-border Corporate Transactions only and to those, where the managing individuals were not at the same time also the majority shareholders of the Company.

In order to ensure a high level of completeness of the data sets, only Corporate Transactions were considered as potential case studies, for which data was available for all phases of the Transaction process and capturing the perspective of all three particpants of the Corporate Transaction. Another filter was then to identify those Corporate Transactions, where data also included the fields of the involved managers behaviour and decision-making. Therefore, both, primary sources, such as press notes, transaction agreements, interviews of the acting managers themselves as well as secondary sources, such as press articles, interviews and statements from other involved individuals and outside experts was considered.

This distillation of available data points towards comprehensive data sets led to the finding of the following five Case Studies:

---

[557] Cf. Bortz, J., Döring, N. (2005), p. 304 et seq. & p. 332 et seq; Charmaz, K. (2006), p. 123 et seq.; Cho, J.Y., Lee, E.-H. (2014), p. 1 et seq. with further references.

Case Study 1: Vodafone plc – Mannesmann AG

The acquisition of Mannesmann AG by Vodafone plc dated 1999

Case Study 2: ABN Amro – RFS Holding

The acquisition of ABN Amro Holding N.V. by the RFS Holdings B.V., constituting a consortium of RBS Bank, Fortis Bank and Banco Santander dated 2007

Case Study 3: Daimler AG – Chrysler Corporation

The acquisition of Chrysler Corporation by Daimler-Benz Aktiengesellschaft dated 1998

Case Study 4: Bayer AG – Monsanto Company

The acquisition of Monsanto Company by Bayer AG dated 2018

Case Study 5: Banco Santander – Banco Popular España S.A.

The acquisition of Banco Popular España S.A. by Banco Santander dated 2017

As visible now, those selected Case Studies all constitute cross-border transaction, with one exemption of Case Study 5, which has a Spanish domestic scope only. Also, those Case Studies mainly include corporations, such being legal entities set up under European national jurisdictions (Germany, UK, Spain). This selection of empirical data sets available as Case Studies in the course of answering the Research Question has also set the stage for the focus and scope of the descriptive analysis of the legal framework above in Chapter 3. Key jurisdictions described therein were selected based on the availability of these Case Studies in order to be able to support the empirical research with the most appropriate theoretical legal fundament.

With regard to the data management, all collected data was stored electronically in suitable data formats, such as pdf or jpeg documents, in order to allow for an easy analysis and further processing of such data.

5.3. DATA – COLLECTION AND DESCRIPTION

5.3.1. Data Collection per each Case Study

In the following, a brief summary of each Case Study will be provided, same as an abstract overview of the documents and sources found and analysed. Based on such "Case Biography", a categorization and coding of the data will follow and lead the path towards the interpretation and analysis.

5.3.1.1. Case Study 1 – Vodafone/Mannesmann

Case Biography[558]

The acquisition of the majority of shares of Mannesmann AG by Vodafone Airtouch plc is well-documented, due to the fact that the acquisition included the attempt of a hostile takeover by Vodafone Airtouch plc via the German stock market.

In 1999, Mannesmann AG was a German stock corporation, listed as one of the most valuable companies in the German stock market index "DAX". Its business units included a variety of industrial activities, such as pipe manufacturing (known as "Mannesmann Röhrenwerke"), manufacturing and sale of steel products (a Mannesmann group company known as "VDO"), cranes and others, but also telecommunications, in particular mobile telecommunications technology and consumer markets, including, for example the hosting and management of Germany's mobile communications network "D2". Since May 1999, Dr Klaus Esser represented and managed the company as Chief Executive Officer ("Vorstandsvorsitzender").

In autumn 1999, Mannesmann AG had negotiated and succeeded in the acquisition of the majority of shares of the UK-based telecommunications provider Orange plc. With that, Mannesmann AG announced to continue its

[558] All information depicted in this Case Biography have been derived from the Information and Documents, depicted below. This general reference serves in lieu of specific references to each data point, which forms a part of the analysis of this Case Study 1.

strategy to expand business in the telecommunications sector with a European-wide focus. After Mannesmann AG's announcement of the takeover of Orange on 13 October 1999, rumours spread that Vodafone Airtouch plc was interested in acquiring the majority of shares in Mannesmann AG.

On 14 November 1999, Vodafone Airtouch plc published an offer to take over publicly traded shares in Mannesmann AG with an overall volume of circa EUR 100 billion. Mannesmann AG's management rejected the offer and told their shareholders in public that the offer was completely inappropriate, compared to the positive growth outlook that Mannesmann AG had for the coming years. Following the publication of the offer, the value of the shares of Mannesmann AG were rising significantly at the German stock markets. On 19 November 1999, Vodafone Airtouch plc even inceased its offer.

What followed were several weeks, during which Vodafone Airtouch plc tried to attract and convince Mannesmann AG's shareholders to accept their offer by way of intensive marketing campaigns, roadshows and press statements. The management of Mannesmann AG was still objecting the offer and therefore promoted against the offer, aiming to convince their shareholders that Mannesmann AG would be better off without Vodafone Airtouch plc, continuing to exist as a separate legal entity, stand-alone with focus on its current expansion strategy. While Vodafone Airtouch plc publicly stated that Mannesmann AG would exaggerate the risks associated with the takeover offer and thereby threaten away its shareholders, rumours spread that Mannesmann AG was also approaching other companies in the telecommunications sector, in order to form an alliance or to conduct another takeover that would make it impossible for Vodafone Airtouch plc to succeed with its takeover attempt.

Mannesmann AG entered into separate talks about strategic cooperations with Bertelsmann – a German media company -, with the French media and telecommunicatios company Vivendi and with AOL Europe, with the aim to thereby repel the threat of the hostile takeover by Vodafone Airtouch plc. Talks with AOL Europe were close to be final, but then ended suddenly early in 2000. Also the negotiations with Vivendi were close to signature, when they also suddenly ended on 30 January 2000. Still on that same day, Vivendi then announced to enter into a Joint Venture with Vodafone Airtouch plc, in case the latter would acquire more than 50% of the shares of Mannesmann AG.

Reportedly, throughout all the talks and negotiations to competing telecommunication companies, it became obvious that management decisions in Mannesmann AG were solely to be taken by its CEO Dr Klaus Esser and that other company representatives had no authority to enter into binding decisions during negotiations.

On 31 January 2000, the chairman of Mannesmann AG's Supervisory Board promised to Dr Klaus Esser to keep his driver, secretary and a company office for lifetime.

While Mannesmann AG's CEO Dr Klaus Esser spent much time in talks and discussions with their shareholders, he always aimed to convince them that Mannesmann AG would be more successful, if they continued as a separate legal entity and not be taken over by Vodafone Airtouch plc. However, on 02 February 2000, the representative of one of Mannesmann AG's largest shareholders Hutchinson Whampoa, strongly argued towards Dr Klaus Esser to agree to the takeover offer made by Vodafone Airtouch plc. Late on 03 February 2000, Dr Klaus Esser talked directly to Chris Gent, Chief Executive Officer of Vodafone Airtouch plc and they both agreed to arrange for a friendly takeover of the majority of shares in Mannesmann AG by Vodafone Airtouch plc.

After their verbal agreement was made, a formal transaction agreement was negotiated by the teams of each party's consultants in the days thereafter.

As part of the transaction agreements, Dr Klaus Esser is appointed as Vice Chief Executive Director of Vodafone Airtouch plc, a position that he will only have until 31 July 2000.

Prior to the closing of the Corporate Transaction, Dr Klaus Esser and members of his management team are rewarded by Mannesmann AG with substantial bonus payments, such amounting to EUR Million 15 for Dr Klaus Esser alone. Additional bonus payments are agreed and made later, in connection to his early retirement from the position of Vice Chief Exuective Officer of Vodafone Airtouch plc. Overall, Dr Klaus Esser receives around EUR Million 30 as extraordinary payments next to his usual salary in connection with the takeover of Mannesmann AG by Vodafone Airtouch plc.

Based on the high amount of bonus payments, Dr Klaus Esser and members of the Supervisory Board, who also received high bonus payments, get into the

focus of the German criminal investigations authorities. The public prosecutor in Düsseldorf brings an action against Dr Klaus Esser and others, accusing them of embezzlement (*Untreue*) to the disadvantage and contradiction the interests of Mannesmann AG. During those court proceedings, Dr Klaus Esser appears and states in court, always insisting on the lawfulness of all payments received and that he had always acted solely motivated by the interests and well-being of Mannesmann AG.

After the takeover is agreed, Mannesmann AG ceases to exist as a separate legal entity, but is partly integrated into the Vodafone Airtouch group of companies and partly – mainly the industrial business units of Mannesmann AG – sold to other companies.

Table 4: *Case Study 1 - Analysed documents and information*

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
1.	Written court decision	Detailed legal assessment of actions and statements made by Dr Klaus Esser and members of Mannesmann AG's supervisory board and other corporate functions.	www.bundesgerichtshof.de (search: Court Decision date 21 December 2005, no.3 StR 470/04) Last check on: 15 August 2018	1
2.	Written court decision	Detailed description of the chronology of events of the takeover of Mannesmann AG by Vodafone Airtouch plc and the statements made by Dr Klaus Esser	www.justiz.nrw.de (search: Court decision dated 22 July 2004, no. XIV 5/03) Last check on: 15	1

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
		and other members of the management and Supervisory Board during that period, same as a brief overview of Mannesmann AG's company history and a legal assessment of the criminal allegations raised by the public prosecutor.	August 2018	
3.	Written press note of German Federal High Court of Justice	Brief statement that the German Federal High Court of Justice has suspended the verdict of of acquittal ruled by the Local Court of Düsseldorf.	www.bundesgerichtshof.de (search: Press note no. 179/2005) Last check on: 15 August 2018	1
4.	Written press note of European Commission	Brief statement about the announcement and main arguments for the legal assessment of the acquisition of the majority of shares in Mannesmann AG by Vodafone Airtouch plc in the light of European merger control and competition laws.	www.ec.europa.eu/competition (search: Press release dated 12 April 2000, no. IP/00/373) Last check on: 15 August 2018	1
5.	Newspaper article	German newspaper article published by Deutsche Welle, reporting the chronology of events of the	www.dw.com/de/die-schlacht-um-mannesmann/ Last check on: x15	2

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
		takeover.	August 2018	
6.	Newspaper article	German newspaper article published by Sueddeutsche Zeitung, reporting the chronology of events of the takeover.	www.sueddeutsche.de/wirtschaft/2.220/mannesmann-die-uebernahmeschlacht.html Last check on: 15 August 2018	2
7.	Newspaper article	German newspaper articled published by Manager Magazin on the criminal investigations on Dr Klaus Esser.	www.manager-magazin.de/unternehmen/karriere/a-122119.html Last check on: 15 August 2018	2
8.	Newspaper article	German newspaper article published by Frankfurter Allgemeine Zeitung on the bonus payment made to Dr Klaus Esser.	www.faz.net/aktuell/wirtschaft/mannesmann-prozess-16-millionen-fuer-esser-aus-mitleid.html Last check on: 15 August 2018	2
9.	Newspaper article	German newspaper note published by Der Tagesspiegel on citation of interview with Dr Klaus	www.tagesspiegel.de/wirtschaft (search: "Mannesmann-	2

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
		Esser regarding likelihood to succeed against Vodafone Airtouch plc in the takeover battle.	Chef Klaus Esser gibt sich siegessicher") Last check on: 15 August 2018	
10.	Newspaper article	German newspaper article published by Manager Magazin on review of takeover agreement.	www.manager-magazin.de/unternehmen/artikel/a-339489.html Last check on: 15 August 2018	2
11.	Newspaper article	English newspaper article published by Euromoney regarding the takeover as a success story for Vodafone Airtouch plc.	www.euromoney.com/article (search: "Vodafone takeover of Mannesmann the bid that couldn't fail?") Last check on: 15 August 2018	2
12.	Newspaper article	German newspaper article published by Manager Magazin on the chronology of the takeover.	www.manager-magazin.de/unternehmen/artikel/a-242161.html Last check on: 15 August 2018	2

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
13.	Newspaper article	German newspaper article published by Die Welt regarding the takeover and the fall of the "Deutschland-AG"	www.welt.de/wirtschaft/article (search: "Wie ein Brite die Deutschland-AG sprengte") Last check on: 15 August 2018	2
14.	Newspaper article	English newspaper article published by The Economist on influence of the Mannesmann AG acquisition by Vodafone Airtouch plc on the development of the telecommunications market in Europe.	www.economist.com (search: "Vodafone-Mannesmann – What's next?") Last check on: 15 August 2018	2
15.	Newspaper article	German newspaper article published by Manager Magazin regarding preventive measures during takeover battle and roadshows.	www.manager-magazin.de/finanzen/artikel/a-54348.html Last check on: 15 August 2018	2
16.	Newspaper article	German newspaper article published by Heise Online on takeover chronology.	www.heise.de/-24006 Last check on: 15 August 2018	2

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
17.	Newspaper article	German newspaper article published by Kolnische Rundschau on interviews with Dr Klaus Esser, Klaus Zwickel and Dr Josef Ackermann.	www.rundschau-online.de/zitate-11206432 Last check on: 15 August 2018	2

5.3.1.2. Case Study 2 – RFS Holdings B.V./ABN Amro Holding N.V.

Case Biography[559]

In comparison to Case Study 1, this Corporate Transaction sequence of events is much more brief: During the timeframe of February 2007 until July 2007, RFS Holdings B.V. did successfully offer and negotiate the acquisition of the majority of shares of the Dutch banking group ABN Amro Holding N.V. .

RFS Holdings B.V. itself was a consortium of three banking institutions, such being (1) the Royal Bank of Scotland, (2) Fortis Bank and (3) Santander Bank, who had joined forces in order to execute the takeover of ABN Amros Holding N.V. by way of a jointly held legal entity.

As a publicly traded and listed stock corporation, ABN Amro Holding N.V. was targeted to be sold to Barclays Bank at the time, when RFS Holdings B.V. published their bid to acquire the majority in shares. Their bid directly competed with the offer made by Barclays Bank and was attractive to ABN Amro Holding N.V.'s shareholders, because of the higher value offered for each share.

[559] All information depicted in this Case Biography have been derived from the Information and Documents, depicted below. This general reference serves in lieu of specific references to each data point, which forms a part of the analysis of this Case Study 2.

Because of the ongoing negotiations for the sale of ABN Amro Holding N.V. to Barclays Bank, the consortium members pressed the preparatory steps of the envisaged Corproate Transaction to be conducted very quickly and thereby conducted only a very limited inspection of the target company, with a high-level Due Diligence based on a small information basis only. The main external advisors, who were engaged to support RFS Holdings B.V. during the transactional process were mainly remunerated with success fees.

In April 2007, the majority of ABN Amro's shareholders decided in favour of the offer made by RFS Holdings B.V. and abandoned the offer made earlier by Barclays Bank.

Table 5: *Case Study 2 - Analysed documents and information*

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
1.	Offer Memorandum	Public takeover offer made by RFS Holdings B.V. for the purchase of shares in ABN Amro Holding N.V. including details around the economic nature of the offer and outlook towards the post-merger integration and deal structure dated 20 July 2007.	http://files.shareholder.com/downloads/rbs/1119557641x0x262634/01f747c3-ec22-467f-88e6-44d3edc4d851/offer_memorandum_preference_shares.pdf Last Check: 15 August 2018	1

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
2.	Official investigation report on the failure of Royal Bank of Scotland	Detailed report issued by the Financial Services Authority Board ("FSA") on the failure of the Royal Bank of Scotland, including an analysis of the takeover of ABN Amro Holding N.V. by RFS Holdings B.V., which was partially held by Royal Bank of Scotland.	https://www.fca.org.uk/publication/corporate/fsa-rbs.pdf Last check: 15 August 2018	1
3.	Newspaper article	Newspaper article published by Thomson Reuters with citatios and interview of ABN Amro Holding N.V.'s CEO Rijkman Groenink on merger offers.	www.thomsonreuters.com (search: "ABN CEO says merger with Barclays is better") Last check: 15 August 2018	2
4.	Newspaper article	Newspaper article published by CNBC on the launch of the bid for ABN Amro Holding N.V. by RBS lead consortium and conditions of the bid.	www.cnbc.com (search: "RBS Consortium Launches $95.7 Billion Bid for ABN Amro") Last check:	2

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
			15 August 2018	
5.	Newspaper article	English newspaper article published by Finance on IPO conducted by ABN Amro in November 2015 included review of takeover by RFS Holdings B.V. in 2007.	www.en.finance.sia-partners.com (search: "The ABN AMRO story continues; IPO set for November 20th 2015") Last check: 15 August 2018	2
6.	Newspaper article	English newspaper article published by Business Today on RBS role in the takeover of ABN Amro Holding N.V., the FSA report and the limited conduct of a Due Diligence and role of external advisors during the transaction.	www.businesstoday.com (search: "RBS 'gamble' on ABN Amro deal: FSA") Last check: 15 August 2018	2
7.	Newspaper article	English newspaper article published by BBC News on the takeover of ABN Amro Holding N.V. by RBS and other consortium members.	www.news.bbc.co.uk/go/pr/fr/-/2/hi/business/7033176.s	2

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
			tm Last check: 15 August 2018	
8.	Newspaper article	English newspaper article published by Market Watch on the chronology of the takeover.	www.marketwatch.com (search: "Timeline of the battle for ABN Amro") Last check: 15 August 2018	2

5.3.1.3. Case Study 3 – Daimler/Chrysler

Case Biography[560]

Often described as "marriage in heaven" and named a "merger of equals", the Corporate Transaction which is hereby described as Case Study 3, is the takeover of Chrysler Corporation by Daimler-Benz Aktiengesellschaft, dated May 1998.

The Chief Executive Officer of Daimler-Benz Aktiengesellschaft, Jürgen Schrempp, and Chrysler Corporation's Chief Executive Officer, Robert Eaton, had

[560] All information depicted in this Case Biography have been derived from the Information and Documents, depicted below. This general reference serves in lieu of specific references to each data point, which forms a part of the analysis of this Case Study 3.

announced that their companies would merge to become the new DaimlerChrysler group to manufacture cars on a global scale and with strong market presence in North America and Europe on 07 May 1998. Whilst the Business Combination Agreement that was signed between the Parties did already reveal a clear dominance of Daimler-Benz Aktiengesellschaft in the partnership, the Corporate Transaction was still promoted as a "merger of equals".

Only years after the Closing of this deal, in an interview given on 30 October 2000, Jürgen Schrempp would reveal in an interview that he had not seen nor planned the merger to be "of equals" from the start, but that he had simply conducted a strategic approach to convince the shareholders of Chrysler Corporation to agree to the deal.

The two car manufacturers were both strong and important players in their respective regional markets, Chrysler mainly in North America and Daimler mainly in Europe, but Daimler aimed to become a global player in the Automotive sector. Various acquisitions and joint ventures had complemented to this strategy already and the merger with Chrysler was now another important milestone to that.

Whereas the Corporate Transaction itself did not include public hostile actions or measures to prevent the takeover, one specific particularity of this deal is the independence, by which Daimler-Benz Aktiengesellschaft's Chief Executive Officer Jürgen Schrempp executed on the strategic approach of a global expansion of the company and thereby structurally shaped and changed the company, in his sole competence as top manager. Even though the shareholders resolved on the merger with Chrysler Corporations after the main outlines of the deal were negotiated already in a shareholders' meeting on 18 September 1998, Jürgen Schrempp did openly communicate this to be his very own vision.

Whereas the transaction steps leading towards the Signing and public announcement of the deal were conducted by all particpants without major disruptions, the deal turned out to be of negative nature and economic disadvantage for Purchaser and Target Company in the years after the Closing. Analysis has revealed a lack of post-merger integration and deviating company cultures as one of the main reasons, why Daimler sold most of its shares in Chrysler again in October 2007, after years of restructuring the newly merged

company and facing severe financial losses. The DaimlerChrysler group was unwinded again and Daimler re-named into Daimler Aktiengesellschaft, focussing on its key brands and areas of luxury car manufacturing again.

On 27 November 2000, one of the most important shareholders of DaimlerChrysler, the investor Kirk Kekorian, files a lawsuit against DaimlerChrysler, alleging the company's Chief Executive Officer Jürgen Schrempp to have betrayed the shareholders and not told the truth regarding the merger.

The years after the merger in 1998 were for DaimlerChrysler mostly marked by financial results, which did not at all match with the promises and plans made by Jürgen Schrempp. As a result thereof, he announced his resignation as Chief Executive Officer on 28 July 2005.

Table 6: *Case Study 3 - Analysed documents and information*

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
1.	Transaction agreement	Business Combination Agreement entered into by Daimler-Benz Aktiengesellschaft AG and Chrysler Corporation regarding the merger of the two groups of companies and the future structure of the combined group.	https://www.sec.gov/Archives/edgar/data/791269/000095012398004713.txt Last Check: 25 July 2018	1
2.	Press note	Press note issued by the European Commission regarding the approval of the merger procedure between	http://ec.europa.eu/competition/mergers/cases/decisions/m	1

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
		Daimler-Benz Aktiengesellschaft and Chrysler Corporation.	1204_en.pdf Last check: 25 July 2018	
3.	Investor Relations report	Report outlining milestones in the history of Daimler-Benz Aktiengesellschaft, pubslihed by the company itself.	https://www.daimler.com/konzern/tradition/geschichte/1995-2007.html Last check: 25 July 2018	2
4.	Newspaper article	Newspaper article published in German by BrandEins regarding Jürgen Schrempp and his role in the merger of Daimler-Benz Aktiengesellschaft and Chrysler Corporation.	https://www.brandeins.de/magazine/brand-eins-wirtschaftsmagazin/2007/spitzenkraefte/pruegelknabe-rambo Last check: 25 July 2018	2
5.	Newspaper article	Newspaper article published in German by Manager Magazin regarding the chronology of the merger between Daimler-Benz Aktiengesellschaft and Chrysler Corporation.	www.manager-magazin.de/unternehmen/artikel/a-105209.html Last check on:	2

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
			25 July 2018	
6.	Newspaper article	Newspaper article published in English by Harvard Business Review on the chronology of events and reasons why the merger of Daimler-Benz Aktiengesellschaft and Chrysler Corporation turned out to be unsuccessful.	https://hbr.org/2007/05/why-the-daimlerchrysler-merger Last check on: 25 July 2018	2
7.	Newspaper article	Newspaper article published in English by Financial Times citing an interview made with Jürgen Schrempp.	https://www.ft.com/content/3645b436-8c23-11d9-a895-00000e2511c8 Last check: 25 July 2018	2
8.	Newspaper article	Newspaper article published in English by Tagesspiegel regarding the consequences of the interview given earlier by Jürgen Schrempp to Financial Times.	https://www.tagesspiegel.de/wirtschaft/daimler-chrysler-die-moeglichen-rechtsfolgen-eines-interviews/182316.html Last check: 25	2

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
			July 2018	
9.	Newspaper article	Newspaper article published in German by Sueddeutsche Zeitung regarding the chronology of the merger and its aftermath.	https://www.sueddeutsche.de/wirtschaft/gescheiterte-fusion-von-daimler-und-chrysler-pleite-nach-lehrbuch-1.1666592 Last check: 25 July 2018	2
10.	Newspaper article	Newspaper article published by Frankfurter Allgemeine Zeitung in German delivering an interview made with Jürgen Schrempp	http://www.faz.net/aktuell/wirtschaft/dokumente-ein-schachspieler-redet-111763.html#void Last check: 25 July 2018	2

5.3.1.4. Case Study 4 – Bayer/Monsanto

Case Biography[561]

The announcement was made in September 2016: The German Bayer Aktiengesellschaft, known as inventor of Aspirin and other well-established pharmaceuticals and meanwhile one of the largest and most profitable global players in the Life Sciences sector, will acquire Monsanto Company, the crop and seeds specialist from St. Louis, USA.

However, even if the announcement was made and the Merger Agreement was signed, the particpants knew and expected the timeframe between Signing and Closing to be long in this case. This was mainly due to the fact that the acquisition triggered notification and approval requirements for competition law authorities in various different countries and regions, including Europe, the United States of America, Brazil and others. In the light of those hurdles, which were to be overcome, the Merger Agreement did include an obligation for Bayer Aktiengesellschaft, to pay a "Antitrust Break-Up Fee", in the amount of USD 2 billion in case one of the competent cartel authorities would not approve and permit the acquisition. Later than expected, in June 2018, the US cartel authorities finally agreed on a compromise with Bayer Aktiengesellschaft, permitting the Closure of the acquisition subject to various conditions: Bayer Aktiengesellschaft will divest from certain parts of its business units, especially in the fields of crop science activities and crop protection products, in an amount of approximately USD 9 billion, mainly by selling those business units to one of its key competitors in the global markets – BASF Aktiengesellschaft.

The Signing of the Merger Agreement followed an inspection phase, which was reported to be brief and not all-embracing, which was mainly argued to be the case because of the public nature of the Bayer's acquisition offer made via the stock markets.

---

[561] All information depicted in this Case Biography have been derived from the Information and Documents, depicted below. This general reference serves in lieu of specific references to each data point, which forms a part of the analysis of this Case Study 4.

Financing of the transaction's purchase price of approximately USD 66 billion was planned to be a mixture of equity expenditure of Bayer Aktiengesellschaft by way of a capital increase via the stock markets and of debt financing, based on loan constructions given by a variety of different banks, including Bank of America and JP Morgan.

Bayer's Chief Executive Officer Werner Baumann described the acquisition as a key milestone to execute against Bayer Aktiengesellschaft's strategy of constant growth and profitability in the company's three different sectors, being Pharma, Consumer Health and Crop Sciences. Bayer's management also expressed clear expectations regarding synergies and growth rates, which the acquisition would release for the advantage of Bayer within a short- and mid-term perspective. Werner Baumann, same as Bayer Aktiengesellschaft's Management Board Member for agriculture, Liam Conden, also both announced that Bayer Aktiengesellschaft would not continue to promote or use the brand name "Monsanto", but would strengthen the Bayer trademark portfolio instead.

Since years, the trademark "Monsanto" had been again and again gathering media attention with various scandals and negative press connotation regarding negative side effects of the company's products, such as, most prominently, the weed killer Glyphosat, which is in discussion to be banned from usage within the European Union. As of the time of drafting this work, the Closing of the acquisition is still in progress. Future will tell, if the expected synergies and growth rates will become reality or not.

Table 7: *Case Study 4 - Analysed documents and information*

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
1.	Transaction Agreement	Merger Agreement and Plan of Merger between Bayer Aktiengesellschaft and	https://www.sec.gov/Archives/edgar/data/1110783/0	1

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
		Monsanto Company regarding the acquisition of all shares in Monsanto Company by Bayer Aktiengesellschaft and the particularities regarding such acquisition, such as warranties, Closing Conditions and organisational measures to integrate the Target Company into the Purchaser's corporate structure.	0011931251671491 5/d234658dex21.h tm Last check on: 25 July 2018	
2.	Press note	Press statement released by Bayer Aktiengesellschaft and Monsanto Company regarding the acquisition of the latter by Bayer Aktiengesellschaft, expected financial developments and outline of the acquisition's structure and Closing conditions.	https://media.bay er.com/baynews/ baynews.nsf/id/A DSF8F-Bayer-and-Monsanto-to-Create-a-Global-Leader-in-Agriculture Last check: 25 July 2018	1
3.	Press note	Press statement issued by the European Commission on the granting of merger clearance for the Closing of the acquisition of Monsanto Company by Bayer Aktiengesellschaft.	http://europa.eu/r apid/press-release_IP-18-2282_en.htm Last check: 25 July 2018	1
4.	Newspaper	Article published by Manager	http://www.mana	2

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
	article	Magazin in German regarding the chronology and retrospective of the acquisition of Monsanto Company by Bayer Aktiengesellschaft	ger-magazin.de/unternehmen/industrie/bayer-kapitalerhoehung-soll-uebernahme-von-monsanto-finanzieren-helfen-a-1210987.html Last check: 25 July 2018	
5.	Newspaper article	Article published by Deutsche Welle in German regarding the acquisition details and Closing conditions set by the US cartel authorities.	https://www.dw.com/de/bayer-monsanto-deal-ist-fast-perfekt/a-43984347 Last check: 25 July 2018	2
6.	Newspaper article	Article published by Frankfurter Allgemeine Zeitung in German citing an interview with Bayer Aktiengesellschaft's Management Board Member for Agricultural Business Liam Conden on the acquisition in general and Bayer Aktiengesellschaft's company	http://www.faz.net/aktuell/wirtschaft/unternehmen/der-bayer-agrarvorstand-im-interview-nach-der-uebernahme-von-monsanto-14435388.html#vo	2

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
		culture.	id Last check: 25 July 2018	
7.	Newspaper article	Aricle published by Manager Magazin in German citing an interview with Bayer Aktiengesellschaft's Chief Executive Officer Werner Baumann regarding the Due Diligence and the acquisition of Monsanto Company in general.	http://www.manager-magazin.de/unternehmen/industrie/interview-mit-bayer-chef-baumann-nach-dem-monsanto-deal-a-1112390.html Last check: 25 July 2018	2

5.3.1.5. Case Study 5 – Banco Santander/Banco PopularEspaña S.A.

Case Biography[562]

The acquisition which is described here as Case Study 5 is a deal of extraordinary nature: Early in June 2017, the Spanish bank Banco Santander announced to acquire its domestic Spanish rival Banco Popular España S.A., after

[562] All information depicted in this Case Biography have been derived from the Information and Documents, depicted below. This general reference serves in lieu of specific references to each data point, which forms a part of the analysis of this Case Study 5.

less than 24 hours of inspection and negotiation and for a purchase price of only EUR 1.

Banco Popular España S.A.had been significantly struggling in connection with the economic crisis on the Iberian Peninsula. In 2017, the situation worsened and liquidity problems arouse, after the bank's customers had withdrawn almost EUR 2 billion from their bank accounts, apparently in fear that they might not be able to access their savings, if the bank further struggled. As a reaction to stabilize the European financial markets, the European Single Resolution Board – an institution that had been installed in order to concentrate all competencies for decisions related to the financial and structural support for banking institutions and thereby connected to the European Rescue Fund - had inititated an auction process to sell the shares in Banco Popular España S.A..

In an overnight session of 06 June 2017, Banco Santander's Chief Executive Officer Ana Botín and her team had assessed the situation and then prepared a bid, which was handed in to the European Single Resolution Board early on 07 June 2017. Still prior to the opening of the financial markets on that day, the European Single Resolution Board and Santander jointly announced that Santander would be permitted to acquire Banco Popular España S.A. under the conditions and construction outlined in their bid.

The construction of the acquisition and plans on intergrating Banco Popular España S.A.'s business into Banco Santander, was planned to take place without the request for any state guarantees and Santander nevertheless expected to gain synergies and strengthen its market position in the domestic Spanish market, as well as in Portugal, with a specific focus on Small and Medium Sized Entitites, which had formed a significant part of Banco Popular España S.A.'s customer basis.

Ana Botín stated that it was a "good deal", that Banco Popular España S.A.was a "good strategic fit" and that the acquisition was "good for Spain and good for Europe". Moreover, emphasis was made to the fact that all of Santander's previously made targets, such as dividend payments, and others, would be met and not deteriorated by the acquisition. Also, Banco Santander's management stated that it did consider the risks associated with the deal to be "manageable".

Even Ana Botin had previously stated that Banco Santander's mid-term strategy would be to grow organically. For the integration of the acquired rival, the plan was now made to retract focus on the Spanish domestic market and to sell circa 50% of Banco Popular España S.A.'s property soon after the acquisition.

Ana Botín became Chief Executive Officer of Banco Santander in September 2014, as successor of her father, who had been in the role of Banco Santander's Chief Executive Officer until he died.

On 08 August 2017, the European Commission approved the acquisition of Banco Popular España S.A. based on the conclusion that the transaction would not raise competition concerns in the European Economic Area.

Table 8: *Case Study 5 - Analysed documents and information*

#	**Document/ information format**	**Content description (=data)**	**Source**	**Direct (1)/ Indirect Data Source (2)**
1.	Press relese	Press release issued by the European Commission on the approval of the acquisition of Banco Popular España S.A. by Banco Santander from a European competition law perspective.	http://europa.eu/rapid/press-release_IP-17-2421_en.htm Last check: 25 July 2018	1
2.	Press release	Press release issued by Banco Santander dated 07 June 2017 regarding its acquisition of the shares in Banco Popular España S.A. including an overview of the advantages to be expected from the deal and citations of Banco Santander's Chief Executive Officer Ana	https://www.santander.com/csgs/Satellite/CFWCSancomQP01/en_GB/Corporate/Press-room/Santander-News/2017/06/0	1

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
		Botín.	7/Santander-acquires-Popular--becoming-the-leading-bank-in-Spain.html Last check: 25 July 2018	
3.	Shareholders presentation	Presentation prepared to inform shareholders of Banco Santander about the details and outlook of the acquisition of Banco Popular España S.A.	https://www.santander.com/csgs/Satellite/CFWCSancomQP01/en_GB/Corporate/Press-room/Banco-Popular-acquisition.html Last check: 25 July 2018	1
4.	Newspaper article	Newspaper article published by Financial Times in English regarding the acquisition of Banco Popular España S.A. by Banco Santander including citation of the latter's Chief Executive Officer Ana Botín.	https://www.ft.com/content/4cf8a400-4b4b-11e7-a3f4-c742b9791d43 Last check: 25 July 2018	2
5.	Newspaper article	Newspaper article published by Financial Times in English	https://www.ft.com/content/31bc	2

#	Document/ information format	Content description (=data)	Source	Direct (1)/ Indirect Data Source (2)
		regarding the chronology of events in the acquisition of Banco Popular España S.A. by Banco Santander.	018a-4b8e-11e7-919a-1e14ce4af89b Last check: 25 July 2018	
6.	Newspaper article	Newspaper article published by Thomson Reuters in English regarding chronology and overview of main points of the acquisition of Banco Popular España S.A.by Banco Santander.	https://www.reuters.com/article/us-popular-m-a-santander-idUSKBN18Y0IU Last check: 25 July 2018	2

5.3.2. Categorization of data per each Case Study

In order to process the data points included in the Case Biographies, at first, a categorization of such data is conducted, including categories, which have been inductively derived from the Case Biographies as well as categories, which are deductively mounted to the Case Biographies and which result from the analytical review of the theories conducted above in Chapter 3 and Chapter 4.

As such, the categorization for each Case Study does contain inductive elements, as well as deductive elements and thereby allows for a valid and thourough interpretation of the data alongside those categories below in Chapter 5.4. As visible in the summary tables below, the information contained in each Case Biography is assigned to either a deductive category or assessed for potential inductive categories it might contain.

Table 9: *Categorization of Data - Case Study 1:*

#	**Category name**	**Category description**	**Case Biography material assigned to this Category** **(numbers refer to enumeration in table showing analysed information above)**
Deductive Categories			
1.	Corporate Transaction Lifecycle	Category collects data concerning the different phases of a Corporate Transaction	1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15, 16
2.	Management Strategy	Category collects data concerning the strategic approach of the participating companies' Managers	1, 2, 5, 6, 7, 8, 9, 12, 13, 15, 17
3.	Individual Behaviour	Category collects data	1, 2, 5, 6, 7, 8, 9,

	of Manager	concerning individual behaviour and decision-making of individuals, who act as Managers of one of the Participants during the Corporate Transaction	12, 13, 15, 17
4.	Individual interaction between Manager and Shareholder(s) (Principal - Agent)	Category collects data concerning the interaction between the respective Manager of one of the participants and his Shareholder(s)	1, 2, 5, 6, 7, 13
5.	Information availability for Manager and Shareholder(s)	Category collects data concerning the availability of relevant information about the Corporate Transaction for the respective Manager and his Shareholder(s)	1, 2
Inductive Category(ies)			
6.	Context of the Corporate Transaction	Category collects relevant information about the context, in which the Corporate Transaction was conducted	1, 2, 13, 14

Table 10: *Categoriation of Data - Case Study 2:*

#	**Category name**	**Category description**	**Case Biography material assigned to this Category**
Deductive Categories			
1.	Corporate Transaction Lifecycle	Category collects data concerning the different	1, 2, 4, 5, 6, 7, 8,

		phases of a Corporate Transaction	
2.	Management Strategy	Category collects data concerning the strategic approach of the participating companies' Managers	2, 3, 5, 6, 8
3.	Individual Behaviour of Manager	Category collects data concerning individual behaviour and decision-making of individuals, who act as Managers of one of the Participants during the Corporate Transaction	2, 3, 5, 6
4.	Individual interaction between Manager and Shareholder(s) (Principal - Agent)	Category collects data concerning the interaction between the respective Manager of one of the participants and his Shareholder(s)	2
5.	Information availability for Manager and Shareholder(s)	Category collects data concerning the availability of relevant information about the Corporate Transaction for the respective Manager and his Shareholder(s)	2
Inductive Category(ies)			
6.	Context of the Corporate Transaction	Category collects data concerning the context in which the Corporate Transaction took place	2, 3, 4, 5, 6, 7, 8

Table 11: *Categorization of Data - Case Study 3:*

#	**Category name**	**Category description**	**Case Biography material assigned to this Category**
Deductive Categories			
1.	Corporate Transaction Lifecycle	Category collects data concerning the different phases of a Corporate Transaction	1, 2, 3, 4, 5, 9
2.	Management Strategy	Category collects data concerning the strategic approach of the participating companies' Managers	4, 5, 6, 7, 8, 10
3.	Individual Behaviour of Manager	Category collects data concerning individual behaviour and decision-making of individuals, who act as Managers of one of the Participants during the Corporate Transaction	4, 6, 7, 8, 10
4.	Individual interaction between Manager and Shareholder(s) (Principal - Agent)	Category collects data concerning the interaction between the respective Manager of one of the participants and his Shareholder(s)	1, 2, 5
5.	Information availability for Manager and Shareholder(s)	Category collects data concerning the availability of relevant information about the Corporate Transaction for the	1, 2, 5

		respective Manager and his Shareholder(s)	
Inductive Category(ies)			
6.	Context of the Transaction	Category collects data concerning the context in which the Corporate Transaction took place	2, 3, 4, 5, 6, 9

Table 12: *Categorization of Data - Case Study 4:*

#	**Category name**	**Category description**	**Case Biography material assigned to this Category**
Deductive Categories			
1.	Corporate Transaction Lifecycle	Category collects data concerning the different phases of a Corporate Transaction	1, 2, 3, 4, 5,
2.	Management Strategy	Category collects data concerning the strategic approach of the participating companies' Managers	1, 6, 7
3.	Individual Behaviour of Manager	Category collects data concerning individual behaviour and decision-making of individuals, who act as Managers of one of the Participants during the Corporate Transaction	4, 5, 6, 7

4.	Individual interaction between Manager and Shareholder(s) (Principal - Agent)	Category collects data concerning the interaction between the respective Manager of one of the participants and his Shareholder(s)	-
5.	Information availability for Manager and Shareholder(s)	Category collects data concerning the availability of relevant information about the Corporate Transaction for the respective Manager and his Shareholder(s)	-
Inductive Category(ies)			
6.	Context of the Corporate Transaction	Category collects data concerning the context in which the Corporate Transaction took place	3, 4, 5, 6, 7

Table 13: *Categorization of Data - Case Study 5:*

#	**Category name**	**Category description**	**Case Biography material assigned to this Category**
Deductive Categories			
1.	Corporate Transaction Lifecycle	Category collects data concerning the different phases of a Corporate Transaction	1, 2, 4, 5, 6

2.	Management Strategy	Category collects data concerning the strategic approach of the participating companies' Managers	4, 5, 6
3.	Individual Behaviour of Manager	Category collects data concerning individual behaviour and decision-making of individuals, who act as Managers of one of the Participants during the Corporate Transaction	4, 5, 6
4.	Individual interaction between Manager and Shareholder(s) (Principal - Agent)	Category collects data concerning the interaction between the respective Manager of one of the participants and his Shareholder(s)	-
5.	Information availability for Manager and Shareholder(s)	Category collects data concerning the availability of relevant information about the Corporate Transaction for the respective Manager and his Shareholder(s)	-
Inductive Category			
6.	Context of the Corporate Transaction	Category collects data concerning the context in which the Corporate Transaction took place	1, 3, 4, 5, 6

5.3.3. Coding of data per each Case Study

Based on the categorization of the data as displayed above, the specific data points have then been coded, in order to allow for a structured analysis and interpretation. In detail, such coding was conducted by way of assignment of specific text passages of press releases and articles, citation phrases and clauses and formulations made in the transactional agreements to the inductive and deductive data categories.

The coding was made in written form and with usage of a colour code system to review and work through the material of the Case Biographies.

As a summary, this preparatory step towards a structured data analysis revealed the following findings:

(1) Each document collected per Case Study did reveal certain data points that were open for coding alongside the categories;

(2) Most of the documents did not contain data points to be coded for each category, but rather agglomerated data for one or only few data categories;

(3) Those passages of documents, which were not open for coding did contain only filling phrases or other items without information content; and

(4) The process of coding the data did reveal an uneven allocation of data points per the category system, thus, at least seven data points per each category were identified.

5.4. DATA ANALYSIS

5.4.1. Data Interpretation

The following interpretation of the data collected, will be conducted in a two-fold approach: The data collected, categorized and coded per each Case Study will be interpreted alongside the principles of qualitative data analysis developed by Mayring and combined with a interpretation of the data in their respective context according to the parameters of the "Grounded Theory".[563]

This does include in particular an explicating analysis of specific data points, such as descriptions, citations or contract clauses, for example, by way of agglomerating such data points with supplementary data from the same category and/or coding. Whereas this method allows for a detailed and deep analysis of particular data points, the "Grounded Theory" will provide for an interconnected interpretation of the data, close to its respective semantic content.

Moreover, the applicable legal framework, which has been described above as part of the theoretical fundament of this work,[564] will be considered as the playing field of the respective Case Biographies and will thereby serve as one central aspect of each Case Study's context. In particular, the above assessment in the theoretical parts of this work have led to the conclusion that the phases of "Proper Inspection" and "Defining Parameters", i.e. due diligence information collection and the negotiation of the relevant transactional agreements, and the European legislative surroundings of those phases, are the main stages of individual decision-making of Managers in Corporate Transaction and therefore of high relevance for the analysis and interpretation of the data collected per each Case Study.

The above made assessment of the theoretical fundament regarding Economic theories and models[565] will be further considered later to allow for the Comparative Analysis of theoretical approaches and real-life data, which will

[563] Cf. Above, Chapter 5.2.2.

[564] Cf. above, Chapter 3.

[565] Cf. above, Chapter 4.

then lead the path towards the generation of reliable assumptions, which will answer the Research Question[566].

Moreover, the internal and external validty of the data interpretation will be discussed further below.[567]

5.4.1.1. Case Study 1

The sequence of events in the acquisition of Mannesmann AG by Vodafone Airtouch plc[568] as visible from the collected data and the categorization[569] and coding[570] thereof, reveals several aspects, which connect to the above made analysis of theories and principals of potential relevance.

Overall, a considerable amount of the data available regarding this Case Study 1 can be attributed to the individual Management behaviour and decision-making of the Target Company's Chief Executive Officer Klaus Esser and to the overall chronology of the acquisition.

Most of the data available regarding individual Management behaviour and decision-making is attributable to the phases of information collection and negotiation of the basic parameters of the Corporate Transaction, meaning the general deal phases of "Proper Inspection" and "Defining Paramters". Moreover, the available data points support the assessment that here, the Target Company's influence and managerial behaviour within its applicable legal framework is of central relevance for the shape and outcome of the deal. Specific analysis will therefore be made with regard to the Target Company's legal obligations and rights.

---

[566] Cf. above, Chapter 2.4.

[567] Cf. below, Chapter 5.4.2 and 5.4.3.

[568] Cf. above, Case Biography in Chapter 5.3.1.1.

[569] Cf. above, Chapter 5.3.2.

[570] Cf. above, Chapter 5.3.3.

Autocratic Management Style

As the collected data reveals,[571] the organisational structure within the Target Company was set up in a way that channelled all major decisions to be solely taken by the CEO himself. Even though Klaus Esser was reportedly not present in most of the direct face-to-face meetings and negotiations between Vodafone Airtouch plc and Mannesmann AG, he did conduct the decisive meeting with Vodafone Airtouch plc's CEO Chris Gent on 03 February 2000, where the general decision was finally made that Mannesmann AG would no longer fight against the acquisition by Vodafone Airtouch plc, but rather join forces to work on a reliable compromise agreement for both companies.

Also during previous meetings with other companies, which were approached by Mannesmann AG as potential Joint Venture partners, the CEO Klaus Esser was reported to always take all relevant decisions himself and on several instances also decided at short notice to cancel important meetings.

Moreover, also during the intense marketing campaign by which Mannesmann AG tried to convince its shareholders not to accept the share purchase offer made by Vodafone Airtouch plc, it was reportedly in most cases Klaus Esser himself, who led the meetings and discussions with key shareholders or press representatives.

Status Quo Bias

Being the Chief Executive Officer of the Target Company, Klaus Esser was in a position of significant influence to the participants in the Corporate Transaction, as well as towards other stakeholders, including the media. Several explicit statement he made during the progressing of the deal show that he was not at all in favour of the acquisition of Mannesmann AG by Vodafone Airtouch plc.

---

[571] Cf. above, Chapter 5.3.1.1, also with specific listing and reference to the data sources, which here serve as a basis for the data interpretation conducted in the entire Chapter 5.4.1.1. This reference will be in lieu of specific references of the very same Chapter and data source basis for all individual data points referenced here in this Chapter 5.4.1.1.

On the contrary, based on the acquisition of the UK-based telecommunications company Orange and the progressing talks about strategic partnerships with Vivendi in France and Bertelsmann Media in Germany, the overall strategy of Mannesmann AG's management can be rather interpreted to be an expansive growth strategy, focussing on dominance in strategic partnerships and on increasingly strong market presence and innovation leadership throughout the European telecommunications market.

This strategy was based on the enduring legal independence of Mannesmann AG and its subordinated group companies. Klaus Esser was quoted by several newspapers to have rejected Vodafone Airtouch plc's offer for an acquisition of the shares in Mannesmann AG with the statement that such offer was "completely inappropriate". Even when Vodafone Airtouch plc did further increase its monetary offer per share, he held and further articulated this opinion.

Moreover, the available data set reveals that Mannesmann AG's management had established and fostered the existence of a company-internal project named "Project Friedland" already long prior to the takeover attempt by Vodafone Airtouch plc. The central objective of "Project Friedland" was to identify possibilities to strengthen Mannesmann AG's status as an independent legal entity and to take appropriate proactive measures to prevent any possible future takeover attempt from another company.

The synopsis of the above mentioned aspects strongly indicate the existence of a Status Quo Bias at Mannesmann AG's management, and namely its CEO Klaus Esser. The current corporate status of legal independence was aimed to be preserved at substantial costs, same as the overall strategic approach within the company.

And even in the light of the existence of a real and apparent alternative, being the acquisition by Vodafone Airtouch plc, Klaus Esser did apparently only change his view and gave up managerial resistance in the light of an attractive incentive, namely a bonus payment of Deutsche Mark 15,000,000 in case of a supportive behaviour throughout the progressing of the transaction.

Overconfidence

Mannesmann's Chief Executive Officer Klaus Esser stated that the offer made by Vodafone for an acquisition of shares in Mannesmann was "completely inappropriate" and therefore should be rejected by the shareholders.[572] He was strongly convinced that a stand-alone future would be the most benefitial setup for Mannesmann AG going forward. This aspect does not only indicate the existence of a Status Quo Bias, but it might also well give room to suspect a certain level of Overconfidence at the CEO's position.

In the light of Vodafone Airtouch plc's attempt to acquire shares in Mannesmann AG, Klaus Esser is also cited to have made the statement that such offer would only be acceptable for Mannesmann AG, if Vodafone Airtouch plc was prepared to give up its own telecommunications market activities in the UK. Only then, Mannesmann AG's own subsidiary Orange could continue to strongly grow into the British telecommunications market and thereby the acquisition offer would only become acceptable.

As Vodafone Airtouch plc is incorporated as a UK company, having its corporate origins and strongest market presence in the UK at the time of the acquisition, such a proclamation made by Klaus Esser must be interpreted either as a substantial overrating of Mannesmann AG's own importance in the telecommunications market and in the balancing of powers in this particular transaction, or as a tactical statement in order to make the takeover attempt by Vodafone Airtouch plc appear even more negative and inappropriate.

Moreover, as described above, the data set also includes indication that Mannesmann AG's internal organisation was structured in a hierarchic, top-down approach, allowing for an autocratic management and decision-making style of its CEO. During the above analysis of the theoretical fundament of Behavioural Economics and Management styles, strong arguments were found to expect an Autocratic Management Style and the individual bias of a Manager's Overconfidence to often occur in parallel and foster each other.[573] In conjunction with the other factors above, which support the assumption of Overconfidence here, the existence of such cannot be substantially excluded.

---

[572] Cf. above, Chapter 5.3.1.1.

[573] Cf. above, Chapter 4.5.

Principal-Agent-scenario

The data set extracted from the available documents and information also reveals certain aspects of relevance with regard to the Principal-Agent-Modell:

Klaus Esser acted as CEO of Mannesmann AG in clear rejection of the attempted acquisition of the company by Vodafone Airtouch plc and often articulated that he perceived this takeover to lead into a less benefitial and more risky future for Mannesmann AG. His position was clearly visible from several actions and statements.

However, one of Mannesmann AG's largest shareholders, the Chinese investment company Hutchinson Whampoa, did not always support its company's rejection of the offer, but was rather open to accept it and to sell its shares to Vodafone Airtouch plc after some time. In order to achieve this, Hutchinson Whampoa needed Mannesmann AG's management to give up its resistance and to rather contribute to the negotiation of a benefitial set of transactional agreements. Therefore, a representative of Hutchinson Whampoa offered a bonus payment to Klaus Esser in exchange for his support and constructive behaviour during the acquisition. Such bonus payment being offered amounted to reportedly Deutsche Mark 15,000,000 and was supplemented by a second payment in a similar amount at a later point in time. Here, the Hutchinson Whampoa, in its position as principal vis-á-vis its own company's management, made use of a direct incentive in order to achieve an alignment of its own interests with those of its agent. As a consequence of this incentive, Klaus Esser gave up his resistance against the upcoming takeover and supported the successful conduct of the transaction.

As another aspect worth analysing with a view to elements of a Principal-Agent scenario, is the relationship between Supervisory Board, Management and shareholders of Mannesmann AG: As described above, one of the Company's largest shareholders did incentify the Management to act in its interest by promising a significant bonus payment.

Already prior to this, the Supervisory Board had set out an incentive in order to ensure the CEO's full and enduring dedication to the Company, also after a potential takeover by Vodafone Airtouch plc. In particular, the

Supervisory Board had resolved that the Company's CEO Klaus Esser should be life-long entitled to have a corporate office, including his own secretary and a private driver. Why did the Supervisory Board do so? The analysed documents give rise to the interpretation that the Supervisory Board intended to act in the Company's own interests and to ensure the ongoing full support of its CEO by setting an effective incentive. In the aftermath, Klaus Esser instrumentalized this promise and made the Supervisory Board agree to "buy back" this promise of enduring services against the payment of Deutsche Mark 1,000,000. Irrespective of this, the incentive itself has to be considered to be only partially successful. Mannesmann AG was consumed by and integrated into the corporate group structure of Vodafone Airtouch plc. Thereby the interests of the Company itself could no longer be identified or separated from the Purchasing Company's own interests.

Another element that might potentially be explained on the basis of the Principal-Agent-Model is the behaviour and resolutions made by Mannesmann AG's Supervisory Board: The board did agree to make the bonus payment to Klaus Esser, which had been promised by the Company's shareholder Hutchinson Whampoa. However, the Supervisory did approve this bonus payment to be made by the Company itself – and not by the shareholder for his own account. More so, the Supervisory Board did also approve additional bonus payments in the amount of altogether more than Deutsche Mark 30,000,000 to (i) the management team around the CEO as "non-compensatory appreciation payments" – same description as was also used to name the payments made to the CEO - and also to (ii) members of the Supervisory Board.

Those resolutions were passed by the Supervisory Board in a situation, in which the acquisition of their company by Vodafone Airtouch plc was already agreed in principle. The payments pere named to be pure "non-compensatory appreciation payments". An element of incentivation or underlying motivation to align interests or nudge a particular behaviour of the payments' recipients, cannot be detected therein at all. Moreover, the Supervisory Board did distribute Company-owned money, but at least for those payments received by Supervisory Board members, the board did appear to act mainly in its own members' personal interest and not mainly in order to further pursue or foster the Company's statutorial objective. As this constellation was later perceived to be a potential

breach of trust and misusage of company-owned assets, the Regional Court of Düsseldorf and the Federal High Court of Justice did closely assess the circumstances under which those payments were made from a legal perspective, both corporate law and criminal law.[574] In the light of the theoretical aspects of the Principal-Agent-Model, the behaviour of the Supervisory Board of Mannesmann AG with regard to the resolutions on bonus payments to be made by the Company to board members and to the Company's management, cannot be considered to be ultimately of incentivizing nature, but rather of disadvantage to the Company's financial integrity.

Relevance of legal framework for managerial decisions

The Corporate Transaction displayed here as Case Study 1 was structurally determined by the behaviour of the Purchasing Company and mainly by the actions and statements made by the Target Company's Management. Especially after the first announcement of the takeover offer by the Purchasing Company and the phase of "Defining Parameters", the Target Company's Management actively pursued the goal to prevent the acquisition from happening.

This was done with a constant referring and public assurance of acting solely in the interests of the Target Company, which was considered by its Management to be better off alone as an independent legal entity.

The Target Company's Management did even initiate negotiations with third parties, who might take the role of a "white knight" and thereby defend the Target Company against the unwanted takeover.

This behaviour of the Management of a Stock Corporation incorporated under German law and being listed on the German stock market, is relevant especially in the light of sec. 93 para. 1 AktG.

As described above in Chapter 3.2.4 and Chapter 3.4.3, the Management of the Target Company is entitled to take actions to prevent the acquisition, as long as those are adequate and compliant with applicable laws. Moreover, the Management is even legally entitled to take decisions, which inherit a significant economic risk for the Company, as long as those are conducted on a proper

[574] Cf. documents and references above in Chapter 5.3.1.1.

information basis. Even though the above assessment of specific aspects and managerial behaviour in the context of decision-making does support the assumption of certain biases and other influences to individual Management decision-making, these data points do not give rise to the conclusion that the actions and decisions taken were not in compliance with the applicable legal framework thereto.

As a matter of fact, the compliance of the specific decisions made by the Management of the Target Company has been subject to the court proceedings and decisions made by the Regional Court of Düsseldorf and the Federal High Court of Justice, both depicting the specific decision-making behaviour in detail in the respective judgements, but thus arguing in favour of compliance with applicable takeover laws and civil and corporate law requirements as applicable to the respective Corporate Transaction at hand.

5.4.1.2. Case Study 2

The data points derived from the information and documents regarding Case Study 2,[575] also give reason to assume the existence of certain influence factors to the decision-making of individual managers, who have been involved into this Corporate Transaction.

Overconfidence

First, specific citations of statements made by the individuals, who acted as Managers on the side of the Purchasing consortium, support the assumption that their decision-making behaviour was biased by Overconfidence. In particular, the former Chief Executive Officer of the purchasing consortium's member Royal Bank of Scotland made the statement that "at no stage did any board member propose that we should not proceed".[576] Board members later described the situation of decision-making in favour of proceeding with the deal as "group-think" and the deal itself to be named as a "trophy deal".

[575] Cf. Above, Chapter 5.3.1.2.

[576] Cf. above, Chapter 5.3.1.2. and the information and documents referenced therein as a basis for the Case Biography and the data collection.

In connection with the fact that the transactional negotiations took place without having conducted an in-deep Due Diligence and information collection regarding the Target Company before, it is likely that the decision-makers were influenced by an element of Overconfidence in their own negotiation and management skills, which would ensure that the Corporate Transaction itself and the later integration and management of the Target Company would turn out to be benefitial for the Purchasing Company.

However, even though such factors give reason to believe in the existence of Overconfidence as an influencing factor, there is no overly strong data point to make this conclusion unambiguous. A certain level of uncertainty thereto remains.

Availability Bias

Another particularity of the acquisition of ABN Amro Holding N.V. by RFS Holdings B.V. was the fact that the purchasing RFS Holdings B.V. did not conduct a deep and all-embracing Due Diligence of the Target Company, but instead proceeded further with the negotiation of the deal on the basis of very limited and rudimentary information only.

The analysis of the acquisition, which was conducted by the Financial Services Authority Board later in the light of the fall of Royal Bank of Scotland during the financial crisis around the years 2008 and 2009, did reveal that the decision-makers on the side of the Purchasing Company based their decision on the little information, which was available at first hand during the phase of inspecting the Target Company.

Even though the Purchasing Company's management did also involve external advisors for the conduct of the Corporate Transaction, those advisers were apparently not successfully emphasizing the risks associated with relying only on the information, which was easily available, instead of questioning and conducting a deep Due Diligence. One contributing factor to this lack of critical advice and cautious behaviour on the side of the external advisors could be the fact that those were incentivized to support the successful Closing of the Corporate Transaction with the promise of a significant success fee, i.e. a payment to be received only upon successful Closing of the deal.

As depicted above with regard to the specific elements of the Principal-Agent-Model, incentives can serve as helpful tool to ensure the reaching of certain goals. However, here, the achievement of a Closing of the deal appears to have been traded off or facilitated by a lack of diligence in the inspection phase of the deal. In conjunction with the above made citations of board members, who did not at all question, if the deal would happen or not, the decision-makers and their advisors were biased by the availability of a certain limited level of information about the Target Company and did not question the sufficiency thereof.

Execution of Management strategy

Even though the acquisition of ABN Amro Holdings N.V. was conducted by the purchasing consortium did overall take from February until July 2007, the fact that the decision to pursue and execute the acquisition was taken on a very limited information basis only and that Management board members of the Purchasing Company stated that there was an overall wish and urge to make this transaction happen, support the assumption that the overall Management Strategy and the particular Management Style of the involved individual decision-makers was neglected in the situation of the specific acquisition option, and the acquisition was merely urged and pressed towards its Closing.

One contributing factor could be the existence of a second interested bidder for the same target – Barclays bank was in parallel negotiations to purchase ABN Amro Holdings N.V.. This might have furthered the impression of RFS Holding B.V.'s management that the deal would be at risk if any time was spent on additional information collection or other preparatory measures.

Information availability – transactional context

One major particularity of the Corporate Transaction depicted as Case Study 2 is the limited level of available information, which served as a basis for the Purchasing Company's decision-making to acquire the Target Company. Whereas the individual factors that contributed to the acting Managers' accepting this circumstance as a given fact, are likely to be found in the fields of the above described Availability Bias and a certain level of Overconfidence, the transactional context appears to be of relevance here as well.

Why was the information basis so limited? Why did the Selling Company not incentify the Target Company and/or its own Management to disclose even more data to the potential Purchasing Company? The answer to this might be the fact that there were two competing bidders interested in acquiring the Target Company at the same time. Whereas Barclays Bank was in negotiations concerning the acquisition of ABN Amro Holdings N.V. already for some time, RFS Holdings B.V. stepped in as a second interested party only at a later point in time.

Nonetheless, the Purchasing Company's Management would have been supposed do not take any uncalculated risks and rather find a suitable compromise between a timely conduct of the information collection and bidding process on the one hand and a proper risk mitigation and detailed assessment of the Target Company on the other hand. Apparently, this was not the case.

In a nutshell, the decisions made by the individual Managing Directors of the Purchasing Company in this Case Study 2 are likely to be substantially influenced by the occurrence of the Availability Bias, most likely in conjunction with Overconfidence of some of the acting individuals. In addition thereto, the lack of information collected and the therewith related high economic risk for the Purchasing Company shows that general approach to manage and mitigate risks by appropriate Project Management approaches and thereto related managerial decisions were not taken here, but the Closing of the Corporate Transaction was rather pursued by all means, lacking a rational decision-making process and by exluding senseful external advice by giving inappropriate incentives.

5.4.1.3. Case Study 3

The acquisition of Chrysler Corporation by Daimler-Benz Aktiengesellschaft serves as third Case Study on the search for empirical evidence in the light of the overall Research Question. Here again, the data derived from the documents and information available does open up for an interpretation in the light of the theories and models displayed above in Chapter 4 of this work.

Autocratic Management Style

As a first aspect to be derived from the data set regarding Case Study 3,[577] several data points concern the overall management style of the Purchasing Company's Chief Executive Officer, Jürgen Schrempp. Data related to the Purchasing Company's history of events in the years prior to the acquisition of Chrysler Corporation in 1998 depicts that Jürgen Schrempp had an overarching objective of forming a global player in the automotive market, being present and first to market with innovations in various different business segments, such as luxury cars, mid-level commodity cars, trains, trucks, schoolbuses and other vehicle classes.

In a newspaper article, Jürgen Schrempp was depicted as a central figure in the entire world of Daimler-Benz AG, colleagues and subordinated employees are quoted to have named Jürgen Schrempp unofficially as "Rambo". This complements further to the perception of him acting like the only strong man in the Company and having organized internal reporting lines and decision-making structures all to lead towards him as a central figure in the entity.

Overconfidence

The data points derived from the available information and documents about the Case give robust evidence to the existence of an individual bias, namely Overconfidence, in the person of Daimler-Benz AG's Chief Executive Officer Jürgen Schrempp. In an interview, he made the statement that "Daimler needs me more than I need Daimler", showing and proclamating that he believes, or at least wants to transport the external image that he is the decisive success factor for Daimler-Benz AG and that the company is dependent on him as a person, not only on someone in his position.

Moreover, he frequently described himself as a personality like a chess-player, always considering the next steps and never to be beaten or outplayed. His skillset, which he perceived to be sufficient for the successful management of

[577] Cf. above, Chapter 5.3.1.3.

a global automotive company, proved retrospectively to be rather not appropriate to objectively and rationally value and consider the risks and opportunities at hand.

Status Quo Bias

Data points identified regarding the setup and internal corporate culture at Chrysler Corporation give rise to the assumption that the majority of decision-makers and employees in the Company was critical towards the changes and transformatory process that was initiated due to the acquisition by Daimler-Benz AG.

The apparent cultural differences between the US-american mid-level commodity car manufacturer and the German high-end automotive manufacturer of luxury brand cars with a three-digit number of years as cutting-the-edge innovation track record, lead to an atmosphere of rejection of the acquisition at Chrysler Corporation. This picture as visible from the data collected, indicates the existence of Status Quo Bias on the level of the key managers and influencers within the Chrysler Corporation's organisation. Not during the conduct of the Corporate Transaction, but in the aftermath of such, during the years of post-merger integration attemps, this influence to managerial decisions taken in the organisation of the Target Company can be clearly identified.

Hindsight Bias

Speaking of the aftermath of the actual Corporate Transaction, additional data points give rise to the assumption of a Hindsight Bias as one parameter that influenced the decisions taken by Daimler-Benz AG's CEO Jürgen Schrempp: Even though the acquisition of Chrysler Corporation appeared to be a risk to Daimler-Benz AG's actual corporate strategy, Jürgen Schrempp strongly pursued and promoted the idea of a "global scale car manufacturer". Even though the acquisition of Chrysler Corporation turned out to be a strongly disadvantageous decision for Daimler-Benz AG, leading into years of Company's recession,

negative financial developments, which made cost-cutting and lay-offs of employees inevitable on both sides of the Atlantic Ocean. However, in an interview given years after the acquisition, Jürgen Schrempp made the statement that the negative effects towards the deal participants were not a surprise, but that it was instead the expectations, which were in his view largely created by the media and public sources, had been unrealistic from the very beginning, expecting too much growth and too little challenges for the integration of Chrysler Corporation into Daimler-Benz AG.

These statements reveal a position and mindset, even if only promoted as an excuse for his own failure, which contradicts the public announcements made by Jürgen Schrempp earlier, when the acquisition was announced. "Marriage in heaven" and a "merger of equals" were the terms by which he intitially described the deal and which were apparently not designed to lower investors' and the public's expectations in the mid-term success of the transaction.

This does not constitute a "classical" Hindisght Bias, where past events would retrospectively shine with more glory, but the specific characteristic here is more an adjustment of aspects in remembrance to a more comfortable position in present.

Principal-Agent-Constellation

The acquisition of Chrysler Corporation by Daimler-Benz AG does also reveal several aspects of interest in the light of a Principal-Agent-Model.

One first aspect thereto is the relationship between the Purchasing Company and the Target Company. Initially, the acquisition was announced and promoted to be a "merger of equals", a combination of two enterprises, which were equally strong and would therefore also have equal participation in the new corporate setup after the acquisition. However, the Business Combination Agreement, which had been signed between the deal participants, reveals a clear structure and to-be organisation post-Closing in favour of the Purchasing Company. The integration of Chrysler Corporation into Daimler-Benz AG's corporate structure and business portfolio was envisaged as a staged approach.

Reporting lines and the allocation of responsibilities between the Companies in internal committees and decision-making functions were to change towards a clear dominance of Daimler-Benz AG in all aspects. Nevertheless, Daimler-Benz AG's management, acting as principal towards its agents, the mid-level managers at Chrysler Corporation did not in all aspects achieve its goal of a unified corporate culture and an alignment of company objectives. The later failure of the acquisition and subsequent divestiture of Daimler-Benz AG from the remains of Chrysler Corporation was reported by experts and former executives to be mainly caused by a lack of integration of the two companies into each other after the Closing of the transaction.

In a nutshell, Daimler-Benz AG did act as principal vis-á-vis Chrysler Corporation's individual management, but struggled to manage the alignment of interests and the creation of a unified corporate culture in a successful way.

Another aspect of relevance in the light of the Principal-Agent-Model is the relationship between Daimler-Benz AG's CEO Jürgen Schrempp and the Company's shareholder Kirk Kerkorian. In connection with the statements made by the CEO in interviews after the Closing of the deal with regards to the down-playing of expectations, which allegedly had been created by the media, Kerkorian accused Jürgen Schrempp to have betrayed the Company's shareholders about the true nature and economic risks associated with the Transaction. He filed a lawsuit against Jürgen Schrempp in that regard. From the perspective of relationship-management between principal and agent, Kerkorian's accusations can be interpreted in a way of severe non-alignment of the interests between him and his agent. More so, he did activate the existing sanctions regime to receive a compensation for the damages he told to have suffered because of the agent's activities. In the light of the above made conclusions about the personal Management Style and potentially existing biases in the personal sphere of Jürgen Schrempp, the apparent deviation of his own behaviour and decision-making from the interests of his principal contribute further to the assumption that the style, by which Jürgen Schrempp did manage Daimler-Benz AG was in various aspects to be considered as autocratic.

Legal framework

With a view to the applicable legal framework of this Case Study 3, German corporate law, in particular regarding the Purchasing Company being a listed Stock Corporation, is of relevance. In particular, the question of scope of responsibility and decision-making competencies of the Chief Executive Officer are to be highlighted here. According to sec. 93 para. 1 AktG and thereby incorporated so-called Business Judgement Rule[578], the acceptance of economic risks for the Company was to be conducted on an appropriate information basis.

Moreover, decisions of fundamental strategic importance for the Company were reserved to be solely taken by the Company's shareholders. Here, it was mainly Daimler-Benz AG's CEO driving and shaping the corporate strategic of global expansion, as the available data reveals. The Company's shareholders were only involved to the absolute minimum, but did not play a constructive or directory role. Here, one of the central aspects of the relationship between Management and shareholders in a listed stock corporation becomes visible: Due to the typically high number of shareholders and the scope of their participation rights in the Company, the Management can grow into a much stronger position also with regard to the strategic positioning of the Company. In comparison to that, the setup in the GmbH, where the number of shareholders is typically much more limited, does generally restrict the Management much more to the conduct of the daily business and allows for a strong and consequent execution of the shareholders' rights and competencies. In essence, the general legal framework of a Stock Corporation allows the Management to grow much stronger than it can be in the GmbH.

5.4.1.4. Case Study 4

The data points collected[579] regarding acquisition of the US-based Monsanto Company by Bayer AG indicate the existence of certain influencing factors

[578] Cf. above, Chapter 3.2.4 and Chapter 3.4.2.

[579] Cf. above, Chapter 5.3.1.4 – this reference to the information and documents collected and assessed as a basis for the data, which is now interpreted in this

towards the decision-making of the Management in relation to the above assessed theories and models. Next to aspects related to the Principal-Agent-Model, also indications for a partial Overconfidence Bias, as well as an inclination towards a potential future Status Quo Bias have been identified.

Principal-Agent-Model

The acquisition of Monsanto Company was only approved by the competent cartel and antitrust authorities against the execution of certain restrictions for the Purchasing Company. This includes the sale of certain business units and group companies of the Purchasing Company, in order to avoid a dominant or even monopolistic position of the Purchasing Company in certain markets or market segments. The overall economic volume of the business units, which Bayer AG is obliged to sell in order to execute the acquisition of Monsanto Company amounts to approximately USD Billion 9.

Here, it appears to be at least questionable if a sale of business units of this size and economic relevance is still covered by the overall interests of the Purchasing Company itself and its shareholders, or whether a discrepancy between the shareholders' interest in a flourishing, profitable and economically diverse Company and the Management's aim to proceed with the Closing of the acquisition of Monsanto Company is to be presumed.

As the acquisition is at the time of this work still under progress towards Closing, this question has to be left open. However, an analysis of the transaction in the light of the particular aspects of the Principal-Agent-Model is likely to produce interesting results, if conducted in the future after the full Closing of the deal and all its conditions.

Chapter 5.4.1.4 serves as a general reference instead of particular references for each single data point.

Overconfidence – timing & US cartel authorities

Another aspect of relevance in the light of the Economic theories and models described above is the likelihood of a certain level of Overconfidence of the Management of the Purchasing Company with regards to the overall timeline of the acquisition and the impact that the requirements set out by the US cartel authorities would pose to the overall transaction.

Statements made by Bayer AG's Chief Executive Officer Werner Baumann, as well as the Company's responsible Executive for Crop Sciences, Liam Conden, give rise to the assumption that the time-consuming negotiations with the US cartel authorities were not considered or expected to occur in that particular nature. The overall timing of the transaction's Closing had to be postponed because of this aspect. The data points are not strong enough to fully evidence the existence of an Overconfidence Bias for those two managers and/or their teams, but the nature of such delay as being unexpected, does at least give room to this general consideration in that regard.

5.4.1.5. Case Study 5

The particular nature of the acquisition of Banco Popular España S.A.by Banco Santander in 2017[580] contains indiciators for the existence of certain particularities with regards to the theoretical fundament depicted above. Here, the Purchasing Company's Management style appears to be of specific interest.

Management style

Banco Santander's Chief Executive Officer Ana Botín was strongly involved in the various aspects of the acquisition of her Company's domestic rival Banco Popular España S.A. and her statements reveal a clear conviction that the acquisition would turn out to be benefitial for the Purchasing Company. More so, Botìn also stated that "the dedal is good for Spain and good for Europe" and thereby created a supplementary dimension of aligned interests and benefits beyond the direct interests and benefits of the Company. Moreover, she described the acquisition as a "very good strategic fit" for Banco Santander. Nevertheless, the acquisition was reported to contrast Banco Santander's actual strategic approach at that time, which was to focus merely on the international growth of the Company and not mainly on the domestic Spanish market.

This gives reason to conclude that the Company's CEO did pursue a strategic mission for the Company, while at the same time being open and flexible to adapt to new developments and the potential strategic advantages associated therewith.

Ana Botìn's management style is reported to be hierarchic and the internal organisational structure of Banco Santander at the time of the acquisition was said to be top-down and structured alongside the objective of full information and competencies of Ana Botìn as CEO of the Company. This gives rise to the

[580] Cf. above, Chpater 5.3.1.5 – this reference to the information and documents collected and assessed as a basis for the data, which is now interpreted in this Chapter 5.4.1.4 serves as a general reference instead of particular references for each single data point.

assumption that her Management Style was autocratic and did include only few to no elements of democratic consent with other managers within the Company's structure.

Moreover, the fact that the fundamental decision to acquire Banco Popular España S.A. was made at Banco Popular's senior management in less than 24 hours, shows a strong disposition for risk-friendly decision-making, at least in this particular situation. This assumption is also supported by the fact that Banco Santander's CEO decided not to ask for any state-guarantees in the light of the acquisition, even though the Target Company was in a state of severe economic deterioration at that time.

5.4.2. Internal validity of data interpretation (Data Quality Control)

Does the data collected for each Case Study constitute a plausible basis for the interpretation and conclusions made?[581]

The data was collected from real-life events and the information and documents available thereto.[582] The Case Studies had been selected according to certain specific parameters identified upfront.[583] This selection process and also the Research Methodolgy, which has been applied, resulted in a generation of data from various different source types. Systematic biases of the information basis for the data collection are thereby minimized.

Therefore, the data sets available for the interpretation of each Case Study can be well-considered to be of high quality and reasonable diversity regarding its origins and the therewith connected risks of subjective influences to the selection.

Another indirect plausibility check for the data is the existence of not only one but five Case Studies and the application of the same data collection approach

---

[581] Cf. also Bortz/Döring, p. 334 et seq. for an overview of the internal validity of data, its assessment and definition.

[582] Cf. above, Chapter 5.2.1 and Chapter 5.2.3.

[583] Cf. above, Chapter 5.2.1.

in all those cases. The data sets generated for the different Case Studies appear to be of similar nature and type.

Based on these arguments, the data can be considered to be of sufficient internal validity.

5.4.3. External validity of data interpretation

Are the specific elements of interpretation and the conclusions made for the Case Studies of general validity and therefore open to be generalized beyond the scope of the specific Case Studies?[584]

The interpretation made above and the conclusions derived from the analysis of the available data include various different aspects of individual behaviour and decision-making. The data points, which serve as a basis for the interpretation were derived from Case Studies of very ambivalent and different nature and each relate to specific elements of relevance therein. However, the basis for the data points were only five Case Studies, which is a limited quantity, considering the huge variety of possible constellations for managerial decision-making in Corporate Transactions. Therefore, an overall generalization of the interpretation will be factually limited to cases and real-life constellations with comparable circumstances for the individual decision-making.

However, the interpretation of the data derived from real-life cases is only one substantial element that leads towards the conclusions made in Chapter 5.5 of this work. As a fundamental precondition thereto, the analysis and discussion of the legal framework and of relevant theories and models made in the previous Chapters 3 and 4 contribute to the quality and content of the interpretation and the conclusions as well. The data interpretation was conducted within the perspective delivered by the theoretical fundament. This structurally enhances the external validity of the interpretation made, as it does not solely originate from the data points, but is made in a theoretical context that has itself evolved

[584] Cf. also Bortz/Döring, p. 335 et seq. for an overview of the external validity of data, its assessment and definition.

and been developed based on the interpretation and analysis of numerous case studies and experiments as well.

Therefore, the external validity of the interpretation conducted in Chapter 5.4.1 and the conclusions to be made in the following Chapter 5.5. are considered to be externally valid, within the limits of scenarios of comparable nature.

5.5. CONCLUSION RESEARCH FRAGMENT 3

Concluding on the above made identification and interpretation of the data for each Case Study, both elements of the theoretical fundament, (i) the legal framework applicable to these Case Studies, as well as (ii) the Economic theories and models regarding factors of potential influence for individual Manager's decision-making, are proven to be of relevance in practice.

Research Fragment 3:

Are the theoretical findings made in Research Fragment 1 and Research Fragment 2 to be found in reality?

In particular, the above made data interpretation allows for the following conclusions:

1. Individual behaviour and decision-making of managers in Corporate Transactions is not always rational, but influenced by subjective factors.

2. The subjective factors, which might be of influence to the decision-making of Managers in Corporate Transactions are likely to occur not as a singular aspect, but as an agglomeration of different aspects, some of which might even be connected with each other.

3. The existence of an autocratic Management Style is likely to be interconnected with the existence of Overconfidence of the respective Manager

4. The occurrence of a Hindsight Bias and its influence to the decision-making of a Manager going forward might be triggered or intensified by criticism addressed by third parties in the light of past activities and decisions taken by a Manager. The Hindsight Bias might then be the individual's reaction to disqualify the criticism by negating its actual cause.

5. The shareholding structure in Stock Corporations is likely to be an element of contributing nature towards the evolution of an autocratic Management Style and overly confident behaviour of the Company's senior Management, whereas the shareholding structure in a Limited Liability Company is more likely to ensure constant respect to the allocation of competencies and responsibilities between shareholders and management.

6. The nature and intensity of heuristics and biases, which influence the decision-making of Managers in Corporate Transactions depends on the external circumstances of the transactional situation, the role of the respective company therein and the relationship between the Manager and the Company's shareholders acting as principal towards the Manager.

7. The existence of information asymmetries between a Manager and his respective principals (as the case may be, this can be either the Supervisory Board or the shareholders) is likely to lead towards a deviation of interests between principal and agent. This deviation can be even more intense in case of an autocratic Management Style of the respective managerial decision-maker.

6. CONCLUSION

The above analysis was made in a three-fold structure, alongside the particularly defined Research Fragments. Starting point was the Research Question, formulated above in Chapter 2.4 as follows:

> Which factors and motivations influence the decision-making behaviour of managers in cross-border corporate transactions, within the existing legal framework from a German and European law perspective?

The path towards answering this Research Question did commence with the description and analysis of the existing legal framework to managerial behaviour in the light of the general circumstances of applicable corporate laws and the specific requirements and the legal scope existing for Corporate Transactions in particular. After that, an analysis of the theories and models concerning human decision-making behaviour was given, including specific considerations and aspects with regards to Corporate Transactions and the particular nature of decisions to be taken by Managers therein.

The aspect of particular interest and focus here was not only each theory and model in itself, but also foremost the combination and the potential conjunctions and connections between those different theories and models, again with a view specifically to Management decision-making behaviour in M&A.

After that, as a third element to complement the answer to the Research Question, an analysis of empirical data was conducted, such being a qualitative analysis of real-life Corporate Transactions.

This empirical analysis revealed that indeed certain aspects of the theories and models, which had been identified in the earlier theoretical parts of this work, were to be traced and evidenced in reality. More so, also the connections between those theories and models, which were assumed to be of particular importance in order to come to an encompassing and broad understanding of Managers'

decision-making behaviour in real-life Corporate Transactions, were proven and found to be existing in reality.

In particular, the following conclusions can be made, based on both, the theoretical fundament, as well as the empirical data analysis made in the foregoing:

The analysis of the legal framework of management behaviour in Corporate Transaction has revealed certain areas and phases of a Corporate Transaction, where decision-making of the Management is legally permitted and necessary for the progress of the Corporate Transaction. Those phases are namely

(1) the phase of "Proper Inspection" of the Transaction Target Company, in which the Management of all three participants are in a position to subjectively influence the further transactional process with high impact and
(2) the phase of "Defining Parameters", in which mostly the Management of Seller and Purchaser can influence the form and fate of the Corporate Transaction by their own actions and decisions.

After this, the analysis of the economic framework of Managers' decision-making has lead to the theoretical conclusion that Management decisions, which are taken in the course of a Corporate Transaction, can be influenced by subjective factors, such as

(1) the individual strategy and style of the Manager, who is involved in the Corporate Transaction either on the side of the Seller, Purchaser or Target Company, and
(2) heuristics and/or biases, which influence the decision-making process of the individual, who manages, but also
(3) the relationship between the manager and his/her shareholder as a principal by nature of the equity holding structure in the legal entity.

CONCLUSION

The empirical data analysis of qualitative nature, which was conducted in Chapter 5 on the basis of those theoretical conclusions, then gave way to the following specific conclusions, such being of integrative nature towards the above theoretical findings:

(1) Individual behaviour and decision-making of managers in Corporate Transactions is not always rational, but influenced by subjective factors.

(2) The subjective factors, which might be of influence to the decision-making of Managers in Corporate Transactions are likely to occur not as a singular aspect, but as an agglomeration of different aspects, some of which might even be connected with each other.

(3) The existence of an autocratic Management Style is likely to be interconnected with the existence of Overconfidence of the respective Manager

(4) The occurrence of a Hindsight Bias and its influence to the decision-making of a Manager going forward might be triggered or intensified by criticism addressed by third parties in the light of past activities and decisions taken by a Manager. The Hindsight Bias might then be the individual's reaction to disqualify the criticism by negating its actual cause.

(5) The shareholding structure in Stock Corporations is likely to be an element of contributing nature towards the evolution of an autocratic Management Style and overly confident behaviour of the Company's senior Management, whereas the shareholding structure in a Limited Liability Company is more likely to ensure constant respect to the allocation of competencies and responsibilities between shareholders and management.

(6) The nature and intensity of heuristics and biases, which influence the decision-making of Managers in Corporate Transactions depends on the external circumstances of the transactional situation, the role of the respective company therein and the relationship between the Manager and the Company's shareholders acting as principal towards the Manager.

(7) The existence of information asymmetries between a Manager and his respective principals (as the case may be, this can be either the Supervisory Board or the shareholders) is likely to lead towards a deviation of interests between principal and agent. This deviation can be even more intense in case of an autocratic Management Style of the respective managerial decision-maker.

Those specific conclusions and analyses appear to reveal the fact that, indeed, the theories and theoretical fundament, which had been described and introduced in Chapter 3 and Chapter 4 of this work, does match with reality, as analysed in Chapter 5. Thereby, the above can be considered as an encompassing and substantial answer to the Research Question. Theoretical assessments and empirical data analysis reveal to be of supplemental nature here and the legal framework and Economic theories and models can be considered to be no antithesis, but rather complementary towards a comprehensive understanding of the processes, drivers and considerations, which occur during Corporate Transactions.

As an outlook to further scientific activities with regards to the Research Question and the answer given thereto, further analysis can be helpful to further specify and substantiate the conclusions made above. Moreover, as the above analysis does strongly rely on the applicable legal framework as a fundamental cornerstone to the assessments made, any changes in such legal framework could necessitate a further analysis and potential adjustment, if such changes turn out to be of relevance for the theoretical conclusions made in the foregoing.

* * * * *

LIST OF LITERATURE

Akerlof, G. A. (1970): The market for "Lemons": quality uncertainty and the market mechanism, in: The Quarterly Journal of Economics, 1970, vol. 84, pp. 488–500

Alparslan, A. (2006): Strukturalistische Prinzipal-Agent-Theorie - eine Reformulierung der Hidden-Action-Modelle aus der Perspektive des Strukturalismus, Wiesbaden 2006

Ashraf, N., Camerer, C., Loewenstein, G. (2005): Adam Smith, behavioural economist, in: Journal of Economic Perspectives, 2005, vol. 19, pp. 131-145

Baumbach, A., Hueck, A. (2016) (editors): Gesetz betreffend die Gesellschaften mit beschränkter Haftung, 21st edition, Munich 2016 (cited: [*author*] in: Baumbach, A., Hueck, A. (2018))

Baumbach, A., Hopt, K.J. (2018) (editors): Handelsgesetzbuch: mit GmbH & Co., Handelsklauseln, Bank- und Kapitalmarktrecht, Transportrecht (ohne Seerecht), 38th edition, Munich 2018 (cited: [*author*] in: Baumbach, A., Hopt, K.J. (2018))

Barnert, T. (2003): Die Gesellschafterklage im dualistischen System des Gesellschaftsrechts, Tübingen 2003

Bayer, W. (2016): Die Erosion der deutschen Mitbestimmung, in: NJW – Neue Juristische Wochenschrift, 2016, vol. 27, pp. 1930-1936

Bayer, W., Schmidt, J. (2012): Das Vale-Urteil des EuGH: Die endgültige

Bestätigung der Niederlassungsfreiheit als „Formwechselfreiheit“, in: ZIP – Zeitschrift für Wirtschaftsrecht, 2012, vol. 31, pp. 1481-1492

Beck, H. (2014): Behavioural Economics – Eine Einführung, Wiesbaden 2014

Behme, C. (2018): Europäisches Umwandlungsrecht – Stand und Perspektiven, in: ZHR – Zeitschrift für das gesamte Handelsrecht & Wirtschaftsrecht, 2018, vol. 1, pp. 32-62

Beisel, W., Andreas, F.E. (2017) (editors): Beck’sches Mandatshandbuch Due Diligence, 3rd edition, Munich 2017 (cited: [*author*] in: Handbuch Due Diligence (2017))

Beisel, W., Klumpp. H.-H., (2016) (editors): Der Unternehmenskauf, 2nd edition, Munich 2016 (cited: [*author*] in: Beisel/Klumpp, Unternehmenskauf (2016))

Beurskens, M. (2016): What’s in a name? – Rechtsformzusatz und Haftungsbeschränkung, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2016, vol. 18, pp. 681-686

Bortz, J., Döring, N. (2005): Forschungsmethoden und Evaluation für Human- und Sozialwissenschaftler, 4th edition, Heidelberg 2005

Bosch, W. (2018): Die Entwicklung des deutschen und europäischen Kartellrechts, in: NJW – Neue Juristische Wochenschrift, 2018, vol. 24, pp. 1731-1738

LIST OF LITERATURE

Bruns, P., (2003): Existenz- und Gläubigerschutz in der GmbH – das Vulkan-Konzept, in: WM 2003, vol. 17, pp. 815-823

Camerer, C.F. (1999): Behavioural Economics: Reunifying psychology and economics, in: Proceedings of the National Academy of Science, 1999, vol. 96, pp. 10575-10577

Camerer, C.F., Loewenstein, G., Rabin, M. (2004): Advances in Behavioural Economics, New York 2004

Charmaz, K. (2006): Constructing Grounded Theory: A practical Guide through Qualitative Analysis, London 2006

Chlupsa, C. (2017): Der Einfluss unbewusster Motive auf den Entscheidungsprozess – Wie implizite Codes Managemententscheidungen steuern, Munich 2017

Cho, J.Y., Lee, E.-H. (2014): Reducing Confusion about Grounded Theory and Qualitative Content Analysis: Similarities and Differences, in: The Qualitative Report, 2014, vol. 19, no. 32, art. 2

Cooper, C.L., Finkelstein, S. (2014) (editors): Advances in Mergers and Acquisitions, Bingley 2014 (cited: [*author]* in: Cooper, C.L., Finkelstein, S. (2014))

Copeland, T., Koller, T., Murrin, J. (2002): Unternehmenswert, Frankfurt 2002

Damm, M. (2017): Die GmbH-Gesellschafterliste acht Jahre nach dem MoMiG, in: BWNotZ – Zeitschrift für das Notariat in Baden-Württemberg, 2017, vol. 1, pp. 2-15

Dauner-Lieb, B., Langen, W. (2016) (editors): Bürgerliches Schuldrecht, 3rd edition, Cologne/Mönchengladbach 2016 (cited: [*author*] in: Dauner-Lieb, B., Langen, W. (2016))

Dhir, S., Mital, A. (2012): Decision-Making for Mergers and Acquisitions: The Role of Agency Issues and Behavioural Biases, in: Strategic Change: Briefings in Entrepreneurial Finance, 2012, vol. 21, pp. 59-69

Diesner, T. (2015): Die Allgemeine Systemtheorie bei Ludwig von Bertalanffy – Eine Begründung interdisziplinärer Wissenschaftspraxis, Berlin 2015

Dirksmeier, C., Pirson, M. (2009): Oikonomia Versus Chrematistike: Learning from Aristotle About the Future Orientation of Business Management, in: Journal of Business Ethics, 2009, vol. 88, pp. 417-430

Doherty, M.E., Mynatt, C.R., Tweney, R.D., Schiavo, M.D. (1979): Pseudodiagnosticitiy, in: Acta Psychologica, 1979, pp. 111-121

Drucker, P.F. (1986): Management – Tasks, Responsibilities, Practices, New York 1986

Drucker, P.F. (2007): The Practice of Management, Revised Classic Collection edition, New York 2007

Drukarczyk, J., Schüler, A. (2016): Unternehmensbewertung, 7th edition, Munich 2016

LIST OF LITERATURE

Drygala, T. (2006): Stammkapital heute – Zum veränderten Verständnis vom System des festen Kapitals und seinen Konsequenzen, in: ZGR – Zeitschrift für Unternehmens- und Gesellschaftsrecht, 2006, vol. 5, pp. 587-637

Ebbinghaus, A. (1984): Arbeiter und Arbeitswissenschaft: Zur Entstehung der „wissenschaftlichen Betriebsführung“, Opladen 1984

Eisenbarth, I. (2013): Zeitliche Optimierung von M&A-Entscheidungen: Eine Analyse pro- und antizyklischen M&A-Verhaltens in Deutschland, Bayreuth 2013

Eisenhardt, K.M. (1989): Agency theory. An assessment and review, in: Academy of Management Review, 1989, vol. 14, pp. 57-74

Elfring, C. (2007): Legal Due Diligence Reports, in: JuS – Juristische Schulung, 2007, vol. 5 special edition, pp. 3-16

Erlei, M., Leschke, M., Sauerland, D. (2016): Institutionenökonomik, 3rd edition, Stuttgart, 2016

Ettinger, J., Jacques, H. (2017) (editors): Beck’sches Handbuch Unternehmenskauf im Mittelstand, 2nd edition, Munich 2017 (cited: [*author*] in: Handbuch Unternehmenskauf Mittelstand (2017))

Fischhoff, B. (2007): An early history of hindsight research, in: Social Cognition, 2007, vol. 25, no. 1, pp. 10-13

Fleischer, H. (2004): Legal Transplants im deutschen Aktienrecht, in: NZG – Neue Zeitschrift für Gesellschaftsrecht , 2004, pp. 1129-1138

Fleischer, H. (2006) (editor): Handbuch des Vorstandsrechts, Munich 2006 (cited: [*author*] in: Fleischer, Vorstandsrecht (2006)

Fleischer, H. (2011): Das unternehmerische Ermessen des GmbH-Geschäftsführers und seine GmbH-spezifischen Grenzen, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2011, vol. 14, pp. 521-528

Fleischer, H., Goette, W. (2016) (editors): Münchener Kommentar zum GmbHG, 3rd edition (vol. 1) and 2nd edition (vol. 2 & vol. 3), Munich 2016 (cited: [*author*] in: MüKo GmbHG (2016))

Fleischer, H., Hahn, J. (2017): Das Gesellschaftsrecht der Tippgemeinschaft – ein Lehrstück der Innengesellschaft bürgerlichen Rechts, in: NZG - Neue Zeitschrift für Gesellschaftsrecht, 2017, pp. 1-9

Folkes, V.S. (1988): The availability heuristic and perceived risk, in: Journal of Consumer Research, 1988, vol. 15, pp. 13-22

Franz, T. (2016): Grenzüberschreitende Sitzverlegung und Niederlassungsfreiheit – eine systematische Betrachtung offener und geklärter Fragen, in: EuZW – Europäische Zeitschrift für Wirtschaftsrecht, 2016, vol. 24, pp. 930-936

Freitag, R., (2003): §§ 30, 31 GmbHG, „Bremer-Vulkan-Urteil“ und „Limitation Language“ – (Ab)Wege in der Konzernfinanzierung?, in: WM 2003, vol. 17, pp. 805- 815

LIST OF LITERATURE

Frey, B., Benz, M. (2001): Ökonomie und Psychologie: eine Übersicht, in: Institute for Empirical Research in Economics, working paper no. 92, University of Zurich 2001

Fuhrmann, L. (2016): Internal Investigations: Was dürfen und müssen die Organe beim Verdacht von Compliance-Verstößen tun?, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2016, vol. 23, pp. 881-890

Furnham, A., Hua Chu, B. (2011): A literature review of the anchoring effect, in: The Journal of Socio-Economics, 2011, vol. 40, pp. 35-42

Glöckner, J. (2017): Kartellrecht und Compliance - Institutionalisierte Rechtseinhaltung zwischen Professionalität und Potemkinschen Dorf, in: JuS – Juristische Schulung, 2017, special edition „Compliance", pp. 905-913

Goethel, S.R. (2014): Vertragsgestaltung bei internationalen Joint Ventures, in: BB – Betriebsberater, 2014, vol. 25, pp. 1475-1479

Goette, W., Habersack, M., Kalss, S. (2016) (editors): Münchener Kommentar zum Aktien-Gesetz, 4th edition, Munich 2016 (cited: [*author*] in: MüKo AktG (2016))

Gulick, L. (1965): Management is a science, in: Academy of Management Journal, 1965, vol. 1, pp. 7-13

Gran, A. (2008): Abläufe bei Mergers & Acquisitions, in: NJW – Neue Juristische Wochenschrift, 2008, vol. 20, pp. 1409-1415

Grigoleit, H.C. (2013) (editor): Aktiengesetz, 1st edition, Munich 2013 (cited: [*author*] in: Grigoleit, H.C., AktG (2013))

Grossman, S. J., Hart, O. D. (1983): An analysis of the principal-agent problem, in: Econometrica, 1983, vol. 53, pp. 7–45

Grub, M., Krispenz, S. (2018): Auswirkungen der Digitalisierung auf M&A-Transaktionen, in: BB - Betriebsberater, 2018, vol. 5, pp. 235-240

Grunewald, B. (2014): Gesellschaftsrecht, 9th edition, Tübingen 2014

Hanke, K., Socher, O. (2010): Fachbegriffe aus M&A und Corporate Finance – Der Unternehmenskauf in der Due Diligence Phase, in: NJW – Neue Juristische Wochenschrift, 2010, vol. 12, pp. 829-831

Hauschild, A., Kallrath, J., Wachter, T. (2017) (editors): Notarhandbuch des Gesellschafts- und Unternehmensrechts, 2nd edition, Munich 2017 (cited: *author*] in: Hauschild/Kallrath/Wachter, Notar-Handbuch (2017))

Hawkins, S.A., Hastie, R. (1990): Hindsight: Biased judgements of past events after the outcomes are known, in: Psychological Bulletin, 1990, vol. 107, pp. 311-327

Heidel, T. (2014) (editor): Aktienrecht und Kapitalmarktrecht, 4th edition, Baden-Baden 2014 (cited: [*author*] in: Heidel, Aktienrecht (2014))

LIST OF LITERATURE

Henrich, J., Boyd, R., Bowles, S., Camerer, C., Fehr, E., Gintis, H., McElreath, R. (2001): In Search of Homo Oecnomicus: Behavioural Experiments in 15 small-scale societies, in: American Economic Review, 2001, vol. 91, pp. 73-78

Henssler, M., Strohn, L. (2016) (editors): Gesellschaftsrecht, 3rd edition, Munich 2016 (cited: [*author*] in: Henssler, M., Strohn, L. (2016))

Hettler, S., Stratz, R.-C., Hörtnagl, R. (2013) (editors): Beck'sches Mandatshandbuch Unternehmenskauf, 2nd edition, Munich 2013 (cited: [*author*] in: Handbuch Unternehmenskauf (2013))

Herrler, S. (2017) (editor): Gesellschaftsrecht in der Notar- und Gestaltungspraxis; Munich 2017 (cited: [*author*] in: Herrler, Gesellschaftsrecht (2017))

Hilgard, M.C. (2008): Break-up Fees beim Unternehmenskauf, in: BB – Betriebsberater 2008, vol. 7, pp. 286-294

Hirte, H. (2018): Die Entwicklung des Unternehmens- und Gesellschaftsrechts im Jahr 2017, in: NJW – Neue Juristische Wochenschrift, 2018, vol. 17, pp. 1221-1227

Holmström, B. (1979): Moral Hazard and Observability, in: The Bell Journal of Economics, 1979, vol. 10, pp. 74-91

Hölters, . (2017) (editor): Aktiengesetz, 3rd edition, Munich 2017 (cited: [*author*] in: Hölters, AktG (2017))

Hoffmann-Becking, M. (2015) (editor): Münchener Handbuch des Gesellschaftsrechts, 4th edition, Munich 2015 (cited: [*author*] in: Münchener Handbuch des Gesellschaftsrechts (2015))

Holzapfel, H.-J., Pöllath, R. (2017): Der Unternehmenskauf in Recht und Praxis, 15th edition, Cologne 2017

Holzborn, T., Israel, A. (2003): Internationale Handelsregisterpraxis, in: NJW – Neue Juristische Wochenschrift, 2003, vol. 42, pp. 3014-3020

Huber, H. (2004): Der Beirat, Cologne 2004

Hüffer, U., Koch, J. (2011): Gesellschaftsrecht, 8 th edition, Munich 2011

Hüffer, U., Koch, J. (2016): Aktiengesetz, 12th edition, Munich 2016

Ingram, J.K., Scott, W.A. (1919): A history of political economy, London 1919

Jaletzke, M., Henle, W. (2011) (editors): M&A Agreements in Germany, Munich 2011 (cited: [*author*] in: Jaletzke/Henle M&A Agreements (2011))

Jensen, M., Meckling, W. (1976): Theory of the firm. Managerial behaviour, agency costs, and ownership structure, in: Journal of Financial Economics, 1976, vol. 3, pp. 305-360

Jost, P.-J. (2001): Die Prinzipal-Agenten-Theorie in der Betriebswirtschaftslehre, Stuttgart 2001

LIST OF LITERATURE

Jung, R.H., Bruck, J., Quarg, S. (2018): Allgemeine Managementlehre: Lehrbuch für die angewandte Unternehmens- und Personalführung, 7th edition, Berlin 2018

Just, C. (2006): GmbH versus Limited – Praxisempfehlungen, in: BC – Zeitschrift für Bilanzierung, Rechnungswesen & Controlling, 2006, vol. 2, pp. 25-29

Kadel, J. (2006): Die englische Limited, in: MittBayNot – Mitteilungen des Bayerischen Notarvereins, 2006, vol. 2, pp. 102-111

Kästle, F., Oberbracht, D. (2018): Unternehmenskauf – Das Share Purchase Agreement, 3rd edition, Munich 2018

Kahneman, D. (2011): Thinking, Fast and Slow, London 2011

Kahneman, D., Knetsch, J., Thaler, R. (1991): Anomalies: The Endowment effect, Loss Aversion and Status Quo Bias, in: The Journal of Economic Perspectives, 1991, vol. 5, pp. 193-206

Kahneman, D., Slovic, P., Tversky, A. (2008): Judgement under Uncertainty: Heuristics and biases, 24 th edition, Cambridge 2008

Kahneman, D., Tversky, A. (1973): Availability: A heuristic for judging frequency and probability, in: Cognitive Psychology, 1973, vol. 4, pp. 207-232

Kahneman, D., Tversky, A. (1974): Judgement under Uncertainty: Heuristics and biases, in: Science, New Series, Vol. 185, No. 4157, pp. 1124-1131

Kahneman, D., Tversky, A. (1979): Prospect theory: An analysis of decision under risk, in: Econometrica, 1979, vol. 47, no. 2, pp. 263-291

Kahneman, D., Tversky, A. (1981): The Framing of Decisions and the Psychology of Choice, in: Science, Vol. 211, pp. 453-458

Kahneman, D., Tversky, A. (1984): Choices, Values and frames, in: American Psychologist, 1984, vol. 39:4, pp. 342-350

Kahneman, D., Tversky, A. (1986): Rational Choice and the framing of decisions, in: Journal of Business, 1986, vol. 59, pp. 5251-5278

Kiethe, K. (2007): Vermeidung der Haftung von geschäftsführenden Organen durch Corprate Compliance, in: GmbHR – GmbH-Rundschau, 2007, vol. 8, pp. 393-400

Kirchgässner, G. (2013): Homo oeconomicus. Das ökonomische Modell individuellen Verhaltens und seine Anwendung in den Wirtschafts- und Sozialwissenschaften, 4th edition, Tübingen 2013

Klayman, J. (1995): Varieties of confirmation bias, in: The psychology of leaning and motivation, 1995, vol. 32, pp. 385-418

Kleinheisterkamp, T., Schell, M. (2010): Der Übergang des wirtschaftlichen Eigentums an Kapitalgesellschaften beim Unternehmenskauf, in: DStR – Deutsches Steuerrecht, 2010, vol. 17, pp. 833-839

LIST OF LITERATURE

Klose-Mokroß, L. (2005): Die Eintragung der Zweigniederlassung einer englischen „private limited company“ in das deutsche Handelsregister (Teil I) – in: DStR – Deutsches Steuerrecht, 2005, vol. 23, pp. 971-975

Kölbl, A. (2009): Die Haftung wegen existenzvernichtenden Eingriffs: gesicherte Erkenntnisse und Entwicklungen seit Trihotel, in: BB – Betriebsberater, 2009, vol. 23, pp. 1194-1201

Korch, S. (2018): Der Unternehmenskauf - Eine Einführung in Theorie und Praxis, in: JuS – Juristische Schulung, 2018, vol. 6, pp. 521-526

Klemm, D., Reinhardt, W. (2010): Vorbereitungshandlungen für eine erfolgreiche Übernahmeverteidigung, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2010, vol. 26, pp. 1006-1011

Krauß, W.W., Meichelbeck, H. (2015): Die Societas Unius Personae (SUP) insbesondere steuerliche Aspekte, in: BB – Betriebsberater, 2015, vol. 26, pp. 1562-1568

Krieger, G., Schneider, U.H. (2017): Handbuch Managerhaftung – Vorstand – Geschäftsführer – Aufsichtsrat – Pflichten und Haftungsfolgen – Typische Risikobereiche, 3rd edition, Cologne 2017 (cited: [*author*] in: Handbuch Managerhaftung (2017))

Kruschwitz, L., Loeffler, A. (2006): Discounted Cash Flow: A Theory of the Valuation of Firms, Chichester 2006

Langevoort, D.C. (2011): The Behavioural Economics of Mergers and Acquisitions, in: Georgetown Business, Economics & Regulatory Law Research October 2010, Paper no. 10-17

Leuering, D., Dornhegge, S. (2010): Geschäftsverteilung zwischen GmbH-Geschäftsführern, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2010, vol. 1, pp. 13-17

Levin, I.P., Schneider, S.L., Gaeth, G.J. (1998): All Frames Are not Created Equal: A Typology and Critical Analysis of Framing Effects, in: Organizational Behaviour and Human Decision Processes, 1998, vol. 76, pp. 149-188.

Lewin, K., Lippitt, R., White, K. (1939): Patterns of aggressive behaviour in experimentally created social climates, in: Journal of Social Psychology, 1939, vol. 10, pp. 271-301.

Linke, J., Fröhlich, M. (2014): Gestaltungsoptionen für Vertraulichkeitsvereinbarung bei Unternehmenstransaktionen, in: GWR – Gesellschafts- und Wirtschaftsrecht, 2014, vol. 21, pp. 449-454

Loomes, G., Sudgen, R. (1982): Regret Theorey: An alternative Theory of Rational Choice under Uncertainty, in: The Economic Journal, 1982, vol .92, pp. 805-824

Lutter, M., Bayer, W., Schmidt, J. (2017): Europäisches Unternehmens- und Kapitalmarktrecht, 6th edition, Berlin 2017

Maidl, J. (2018): Rechtsbeziehungen des Zielunternehmens in der M&A Transaktion – Change of Control Klausel als neue Spaltungsbremse?, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2018, vol. 19, pp. 726-729

LIST OF LITERATURE

Malik, F. (2010): The Essence of the Craft (Management: Mastering Complexity, Part 1), Frankfurt am Main 2010

Mayring, P. (2010): Qualitative Inhaltsanalyse. Grundlagen und Techniken, 11th edition, Weinheim 2010

Mayring, P. (2016): Einführung in die qualitative Sozialforschung, 6th edition Munich 2016

Mayring, P., Gläser-Zikuda, M. (2005) (editors): Die Praxis der qualitativen Inhaltsanalyse, Weinheim 2005 (cited: [*author*] in: Mayring, P., Gläser-Zikuda, M. (2005))

Meckl, R. (2004): Organising and leading M&A Projects, in: International Journal of Project Management, 2004, vol. 22, pp. 455-462

Medicus, D., Petersen, J. (2017): Bürgerliches Recht, 26th edition, Munich 2017

Meessen, K.M., Riesenkampff, A., Kersting, C., Meyer-Lindemann, H.-J. (2016): Kartellrecht, 3rd edition, Munich 2016 (cited: [*author*] in: Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht (2016))

Mellert, C.R. (2011): Selbständige Garantien beim Unternehmenskauf – Auslegungs- und Abstimmungsprobleme, in: BB – Betriebsberater, 2011, vol. 27/28, pp. 1667-1674

Merkt, H., Rossbach, O. (2003): Zur Einführung: Kapitalmarktrecht, in: JuS – Juristische Schulung, 2003, vol. 3, pp. 217-224

Meyer-Sparenberg, W., Jäckle, C. (2017) (editors): Beck'sches M&A-Handbuch, 1st edition, Munich 2017 (cited: [*author*] in: Beck'sches M&A-Handbuch (2017))

Michalski, L. (2017) (initial editor): Kommentar zum Gesetz betreffend die Gesellschaft mit beschränkter Haftung (GmbHG), 3rd edition, Munich 2017 (cited: [*author*] in: Michalski, GmbHG (2017))

Mühle, J., Weitbrecht, A. (2018): Die Entwicklung des europäischen Kartellrechts 2017, in: EuZW – Europäische Zeitschrift für Wirtschaftsrecht, 2018, vol. 5, pp. 181-188

Mullainathan, S., Thaler, R.H. (2000): Behavioural economics, NBER – National Bureau of Economic Research, Working Paper, no. 7948, October 2000,

Munkert, M.J. (2008): Unternehmenstransaktionen erfolgreich managen, in: DStR – Deutsches Steuerrecht, 2008, vol. 51/52, pp. 2501-2509

Nickerson, R.S. (1998): Confirmation bias: an ubiquitous phenomenon in many guises, in: Review of general Psychology, 1998, vol. 2, no. 2, pp. 175-220

Omlor, S. (2014): Die Societas Unius Personae – eine supranationale Erweiterung der deutschen GmbH-Familie, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2014, vol. 29, p. 1137-1142

LIST OF LITERATURE

Orr, D., Guthrie, C. (2006): Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis, in: Ohio State Journal on Dispute Resolution, 2006, vol. 21, pp. 597-628

Oskamp, S. (1965): Overconfidence in case-study judgements, in: Journal of Consulting Psychology, 1965, vol. 29, pp. 261-265

Paefgen, W.G. (2016): „Compliance" als gesellschaftsrechtliche Organpflicht?, in: WM – Wertpapiermitteilungen Zeitschrift für Wirtschafts- und Bankrecht, 2016, vol. 10, pp. 433-444

Palandt, O. (2018) (initial editor): Bürgerliches Gesetzbuch: BGB, 77th edition, Munich 2018 (cited: [*author*] in: Palandt, O. (2018))

Parmentier, M. (2018): Die Entwicklung des europäischen Kapitalmarktrechts in den Jahren 2016-2017, in: EuZW – Europäische Zeitschrift für Wirtschaftsrecht, 2018, vol. 2, pp. 53-60

Pareto, V. (1919): Manuale di economia politica con una introduzione alla scienza sociale, Milan 1919

Prinz, U., Winkeljohann, N. (2014): Beck'sches Handbuch der GmbH – Gesellschaftsrecht – Steuerrecht, 5th edition, Munich 2015 (cited: [*author*] in: Beck'sches Handbuch der GmbH (2014))

Prütting, J. (2018): Existenzvernichtungshaftung, in: JuS – Juristische Schulung, 2018, vol. 5, pp. 409-415

Raiser, T., Veil, R. (2015): Recht der Kapitalgesellschaften: Ein Handbuch für Praxis und Wissenschaft, 6th edition, Munich 2015

Rieder, M.S., Schütze, R.A., Weipert, L. (2015) (editors): Münchener Vertragshandbuch Band 2. Wirtschaftsrecht, 7th edition, Munich 2015 (cited: [*author*] in: Münchener Vertragshandbuch WirtschaftsR (2015))

Risse, J., Kästle, F. (2018): M&A und Corporate Finance von A-Z, 3rd edition, Munich 2018

Römermann, V. (2014) (editor): Münchener Anwaltshandbuch GmbH-Recht, 3rd edition, Munich 2014 (cited: [*author*] in: Münchener Anwaltshandbuch GmbH-Recht (2014))

Ross, S. A. (1973): The economic theory of agency: the principal's problem, in: American Economic Review, 1973, vol. 63, pp. 134–139

Rost, N. (2008): Der Homo Oeconomicus – Eine Fiktion der Standardökonomie, in: Zeitschrift für Sozialökonomie, 2008, vol. October 2008, pp. 50-58

Roth, G.H., Altmeppen, H. (2015): Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG, 8th edition, Munich 2015 (cited: [*author*] in: Roth/Altmeppen, GmbHG (2015))

Roth, G.H., Kindler, P. (2013): The Spirit of Corporate Law, Munich, 2013

Roth, M. (2001): Unternehmerisches Ermessen und Haftung des Vorstands, Cologne 2001

LIST OF LITERATURE

Russo, J.E., Schoemaker, P.J.H. (1992); Managing Overconfidence, in: Sloan Management Review, 1992, vol. 33, pp. 7-17

Säcker, F.J., Rixecker, R., Oetker, H., Limpberg, B. (2017): Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 6, 7th edition, Munich 2017 (cited: [*author*] in: MüKo BGB (2017))

Saenger, I., Inhester, M. (2016): GmbHG, 3rd edition, Cologne 2016 (cited: [*author*] in: Saenger/Inhester, GmbHG (2016))

Sagasser, B., Bula, T., Brünger, T. R. (2017) (editors): Umwandlungen, 5th edition 2017 (cited: [*author*] in: Sagasser/Bula/Brünger, Umwandlungen (2017))

Samuelson, W., Zeckhauser, R. (1988): Status Quo Bias in Decision making, in: Journal of Risk and Uncertainty, 1988, vol. 1, pp. 7-59

Sanders, A. (2017): Der Beirat als Instrument der Family Business Governance in der Entwicklung des Familienunternehmens, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2017, vol. 25, pp. 961-968

Schäfers, D. (2015): Einführung in die Methodik der Gesetzesauslegung, in: JuS 2015, vol. 10, pp. 865-960

Schanz, K.-M. (2007): Verteidigungsmechanismen gegen feindliche Übernahmen nach Umsetzung der Übernahmerichtlinie im deutschen Recht, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2007, vol. 24, pp. 927-933

Schauf, M. (2017): Rolle und Kompetenzen des GmbH-Geschäftsführers in einer Matrixstruktur, in: BB – Betriebsberater, 2017, vol. 49, pp. 2883-2889

Schlaifer, R. (1959): Probability and Statistics for Business Decisions, New York 1959

Schmidt, K. (2012) (editor): Münchener Kommentar zum HGB, 3rd edition, Munich 2012 (cited: [*author*] in: MüKo HGB (2012))

Schmittmann, J.M. (2018): Haftung von Organen in Krise und Insolvenz, 2nd edition, Cologne 2018

Schmittmann, J.M. (2014): „Si tacuisses, philosophus manisses" oder: Der Steuerberater einer insolvenzantragspflichtigen Gesellschaft zwischen Skylla und Charybdis, in: StuB – Unternehmenssteuern und Bilanzen, 2014, vol. 14, pp. 536-537

Schmittmann, J.M. (2014): Beurteilung des Vorliegens von Insolvenzeröffnungsgründen: Entwurf eines IDW Standards (IDW ES 11), in: StuB – Unternehmenssteuern und Bilanzen, 2014, vol. 16, pp. 607-611

Schmittmann, J.M. (2004): Strafrechtliche Risiken in der Steuerberatung bei Insolvenznähe, in: ZSteu – Zeitschrift für Steuern & Recht, 2004, pp. 308-314

Schmitz, C. (2006): Mängelhaftung beim Unternehmenskauf nach der Schuldrechtsreform, in: RNotZ – Rheinische Notar-Zeitschrift, 2006, vol. 12, pp. 561-602

LIST OF LITERATURE

Schneider, B. (2008): Informationsrechte von GmbH-Gesellschaftern – Inhalt und Grenzen., in: GmbHR – GmbH-Rundschau, 2008, vol. 12, pp. 638-643

Schönhaar, T. (2014): Verfahrensabläufe bei Unternehmenskaufverträgen im Mittelstand, in: GWR – Gesellschafts- und Wirtschaftsrecht, 2014, vol. 13, pp. 273-277

Schulte-Zurhausen, M. (2010): Organisation, 5th edition, Munich 2010

Schulz, M. (2017): Compliance-Management im Unternehmen – Grundfragen, Herausforderungen und Orientierungshilfen, in: BB – Betriebsberater, 2017, vol. 26, pp. 1475-1483

Seeling, O., Zwickel, M. (2009): Typische Fehlerquellen bei der Vorbereitung und Durchführung der Gesellschafterversammlung einer GmbH, in: DStR – Deutsches Steuerrecht, 2009, vol. 22, pp. 1097-1104

Seibt, C.H. (2018) (editor): Beck'sches Formularbuch Mergers & Acquisitions, 3 rd edition, Munich 2018 (cited: [*author*] in: Beck'sches Formularbuch M&A (2018))

Semler, J., Stengel, A. (2017) (editors): Umwandlungsgesetz, 4th edition, Munich 2017 (cited: [*author*] in: Semler/Stengel, Umwandlungsgesetz (2017))

Shafritz, J.M., Ott, J.S., Jang, Y.S. (2015) (editors): Classics of Organization Theory, 8th edition, New York 2015 (cited: [*author]* in: Shafritz/Ott/Jang (2015))

Simon, H.A. (1987): Making Management Decisions: The role of Intuition an Emotion, in: The Academy of Management Executive, 1987, vol. 1, February 1987, pp. 57-64

Smith, A. (1822): The Theory of Moral Sentiments, or, an essay towards an analysis of the principles by which men naturally judge concerning the conduct and character, first of their neighbours and afterwards of themselves, in: The Whole Works of Adam Smith, LL.D. in five volumes, vol. I, London 1822

Sonnenberg, T. (2017): Compliance-Systeme in Unternehmen - Einrichtung, Ausgestaltung und praktische Herausforderungen, in: JuS – Juristische Schulung, 2017, special edition „Compliance“, pp. 917-922

Spindler, G., Stilz, E. (2015) (editors): Aktiengesetz, 3rd edition, Munich 2015 (cited: [*author*] in: Spindler, G., Stilz, E., Aktiengesetz (2015))

Spitzbart, B. (2006): Die Europäische Aktiengesellschaft (Societas Europaea – SE) – Aufbau der SE und Gründung -, in: RNotZ – Rheinische Notar-Zeitschrift, 2006, vol. 9, pp. 369-424

Staehle, W.H. (1999), Management, 8th edition, Munich 1999

Steinmann, H., Schreyögg, G., Koch, J. (2005): Management: Grundlagen der Unternehmensführung, 6th edition, Wiesbaden 2005

Stöber, M. (2013): Die Haftung für existenzvernichtende Eingriffe, in: ZIP – Zeitschrift für Wirtschaftsrecht, 2013, vol. 48, pp. 2295-2303

LIST OF LITERATURE

Süß, R., Wachter, T. (2016): Handbuch des internationalen GmbH-Rechts, 3rd edition Bonn 2016

Taylor, F.W. (1903): Shop Management, London 1903

Taylor, F.W. (1911): The Principles of Scientific Management, London 1911

Thaler, R. (1985): Mental accounting and consumer choice, in: Marketing Science 4, 1985, pp. 199-214

Thaler, R. (1999): Mental accounting matters, in: Journal of behavioural decision making, 1999, vol. 12, pp. 183-206

Toor, S.-U.-R., Ofori, G. (2008): Leadership versus Management – How they are different and why, in: Leadership and Management in Engineering, vol. April 2008, pp. 61-71

Tophoven. A. (2010): Anspruch auf Ersatz der Kosten einer Due Diligence wegen Verstoßes gegen eine Exklusivitätsvereinbarung – ein Praxisbericht, in: BB – Betriebsberater, 2010, vol. 48, pp. 2919-2923

Tversky, A., Kahneman, D. (1974): Judgement under Uncertainty: Heuristics and Biases, in: Science, 1974, vol. 185, pp. 1124-1131

Uffmann, K. (2015): Überwachung der Geschäftsführung durch einen schuldrechtlichen GmbH-Beirat?, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2015, vol. 5, pp. 169-176

Verse, D.A. (2013): Niederlassungsfreiheit und grenzüberschreitende Sitzverlegung – Zwischenbilanz nach „National Grid Indus“ und „Vale“ -, in: ZEuP – Zeitschrift für Europäisches Privatrecht, 2013, vol. 3, pp. 458-495

Volpert, W., Vahrekamp, R. (1977): Frederick Winslow Taylor: Die Grundsätze wissenschaftlicher Betriebsführung, Weinheim 1977

Volmar, M., Kranz, J. (2018): Einführung ins Kartellrecht, in: JuS – Juristische Schulung, 2018, vol. 1, pp. 14-18

Von Neumann, J., Morgenstern, O. (1947): Theory of Games and Economic Behaviour, 2nd edition, Princeton 1947

Von Werder, A., Kost, T. (2010): Vertraulichkeitsvereinbarungen in der M&A-Praxis, in: BB – Betriebsberater, 2010, vol. 48, pp. 2903-2912

Von Woedtke, N. (2013): Entwicklungen der GmbH-Geschäftsführerhaftung in der neueren Rechtsprechung, in: NZG – Neue Zeitschrift für Gesellschaftsrecht, 2013, vol. 13, pp. 484-489

Walz, R. (2018) (editor): Beck’sches Formularbuch Zivil-, Wirtschafts- und Unternehmensrecht, Deutsch-Englisch, 4th edition, Munich 2018 (cited: [*author*] in: Beck’sches Formularbuch Ziv-, Wirt- und UnternehmensR (2018))

Weber, M. (2018): Die Entwicklung des Kapitalmarktrechts in 2017/2018, in: NJW – Neue Juristische Wochenschrift, 2018, vol. 14, pp. 977-982

LIST OF LITERATURE

Weißhaupt, F. (2013): Haftung und Wissen beim Unternehmenskauf – über Gestaltungsspielräume im M&A-Recht, in: WM – Wertpapiermeldungen Zeitschrift für Wirtschafts- und Bankrecht, 2013, vol. 17, pp. 782-789

Wegen, G., Spahlinger, A., Barth, M., (2018) (editors): Gesellschaftsrecht des Auslands, 2nd edition 2018, Munich 2018 (cited: [*author*] in: Wegen, G., Spahlinger, A., Barth, M., (2018))

Wenger, E., Terberger, E. (1988): Die Beziehung zwischen Agent und Prinzipal als Baustein einer ökonomischen Theorie der Organisation, in: WiST – Wirtschaftswissenschaftliches Studium, 1988, vol. 10, pp. 506-513

Werner, R. (2011): Aktuelle Entwicklungen des Rechts der Unternehmergesellschaft, in: GmbHGR – GmbH-Rundschau, 2011, pp. 459-464

Westermann, H.-P., Grunewald, B., Maier-Reimer, G. (2017): Erman Bürgerliches Gesetzbuch, 15th edition, Cologne, 2017

Wicke, H. (2014): Aktuelle Fragen der GmbH-Praxis, in: MittBayNot – Mitteilungen des Bayerischen Notarvereins, 2014, vol. 1, pp. 13-24

Wicke, H. (2017): Fallstricke bei der Einberufung und Durchführung von Gesellschafterversammlungen, in: notar - Deutscher Notar Verlag, 2017, vol. 07-08, pp. 235-246

Willms, N., Bicker, E. (2014): Shoot-Out – der wirksame Ausstieg aus einem partiätischen Joint Venture, in: BB – Betriebsberater, 2014, vol. 23, pp 1347-1353

Zimmer, D., Naendrup, C. (2009): Das Cartesio-Urteil des EuGH: Rück- oder Fortschritt für das internationale Gesellschaftsrecht?, in: NJW – Neue Juristische Wochenschrift, 2009, vol. 9, pp. 545-550

Zoellner, W., Noack, U. (2004-2017) (editors): Kölner Kommentar zum Aktiengesetz, Cologne 2004-2017 (cited [*author*] in: Kölner Kommentar AktG (2004-2017)

* * * * *