Eva Feldbaum | Stefanie Kisgen | Werner G. Faix (Eds.)

International Business Law Projects. Volume 1

Steinbeis-Edition

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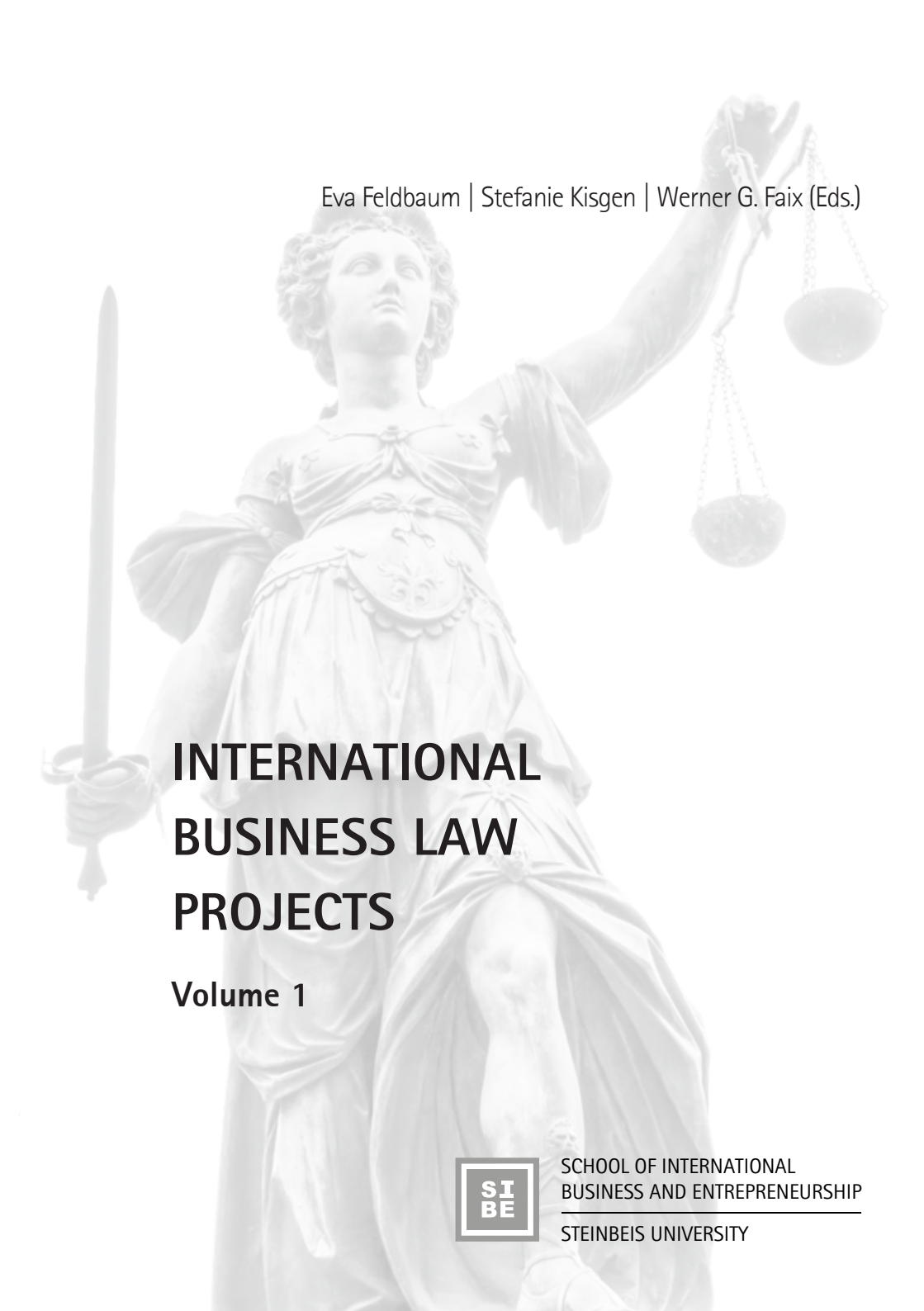

INTERNATIONAL BUSINESS LAW PROJECTS

Volume 1

SCHOOL OF INTERNATIONAL BUSINESS AND ENTREPRENEURSHIP

STEINBEIS UNIVERSITY

Imprint

Eva Feldbaum, Stefanie Kisgen, Werner G. Faix (Eds.)
INTERNATIONAL BUSINESS LAW PROJECTS Volume 1

1st edition, 2019 | Steinbeis-Edition, Stuttgart
ISBN 978-3-95663-220-4

Editorial staff: Tina Burgel, Katsiaryna Kaliayeva
Layout and cover design: Katsiaryna Kaliayeva
Cover picture: Frank Wagner / stock.adobe.com
Production: WIRmachenDRUCK GmbH, Backnang

209800-2019-09 | www.steinbeis-edition.de

FOREWORD

SIBE Law School, Steinbeis University Berlin presents with great pleasure a selection of law projects worked out by our LL.M. students during their 16 months study time.

With this compendium, we intend to give an insight into one of the LL.M. program`s essentials, the law project, and to show the high actuality and their particular importance in the fields of international business law.

Our LL.M. program which is carried out totally online and in English language combines the study with practical relevance and the individual professional interests of the participants. The book gathers summarized works in selected fields of international business law.

The subjects of the works presented in this compendium refer to a great variety of important topics: unification tendencies in international sales law, the developments of competition law and the specific fields of its application such as sports, the harmonization in international intellectual property law, the piercing of the veil doctrine in corporation law, post-merger integration, business successions in a comparative view, public-private partnership as a new cooperation form, and transnational data protection. These topics are examples and show the broad orientation of the program in the multiple and dynamically developing area of international business law.

We thank very much the students and alumni for their contributions to this book. It is a pleasure for us, teaching staff as well as coordinators, to accompany the elaboration of the works during the study time, with supervisory help and practical advice.

Eva Feldbaum, Stefanie Kisgen, Werner G. Faix (Eds.)
October 2019

TABLE OF CONTENTS

INTERNATIONAL CONTRACT LAW

1 INTERNATIONAL SALES LAW:

THE VIENNA CONVENTION OF 1980 AND THE EUROPEAN COMMISSION'S PROPOSAL FOR A COMMON EUROPEAN SALES LAW IN A CRITICAL PERSPECTIVE

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TABLE OF CONTENTS

1 INTRODUCTION

There are many issues in the legal field today regarding international contracts for the sale of goods, differences of legal regimes, religion, culture and language, for instance, come as a barrier to cross-border transactions carried by and between companies and entrepreneurs from all over the World. These hindrances serve as constant discouragement to companies to globally expand their activities and, consequently, prevent economies to thrive.

The main world organizations involved in the process of unifying business law recognize the importance of given initiatives, specially to underdeveloped and developing economies, given that an unified body of international business law might increase their competitiveness in the global market, granting economic stability and social development, which are basis for a desired sustainable progress. Therefore, the unification of international sales law has been understood as indispensable to commerce's integration and development. Some argue that because sale is the most important and frequent type of commercial transaction it was the forefront of the unification process and the many initiatives carried on throughout the past and current century. Also, such initiatives arose from the Globalization phenomenon (Bridge, 2003), which is the interdependent relationship between countries while interchanging services, products, ideas and even aspects of local culture. This phenomenon is a result of important advances in technology, transportation and telecommunications infrastructure, from the beginning of the nineteenth Century up until today. It has not only changed the way people interact with one another, but also transformed the way businesses across the World are carried out and, consequently, the way Countries and organizations act and perform internationally.

The unification of international sales law aims at equalizing cross-border commercial relations, simplifying the rules of commerce and integrating the most varied social, economic and legal perspectives, granting a higher degree of foreseeability and legal certainty to commercial transactions all over the World.

The unification of law itself is a very ambitious goal and based upon good ideals, nonetheless, there are many obstacles to be yet overcome. Business law grows old rapidly due to commercial relations' dynamism, which translates as challenge the development of a body of rules capable of being applied to all types of sales' transactions and also to stay contemporary in the light of the constant changes that commerce undergoes daily. Given its importance, it is no coincidence that during the past centuries and more intensely in the past five decades, the unification of international sales law has been at the center of legal discussions worldwide.

The unification of international business law can be divided in four groups: the first, regarding binding instruments such as conventions, treaties, directives and regulations in the European Union's level; the second encompasses the uniform projects drafted as non-binding instruments carried out by international organizations seeking to establish an international contract law; the third comprises instruments that consolidate practices already deeply-rooted in daily businesses to act as guide to judges, practitioners and also to entrepreneurs when interpreting situations derived from international businesses; and the forth consists in the so called *lex mercatoria*, namely the law of the merchant, which had its origins in the middle age as a result of the absence of written and/or encrypted law to regulate commerce. Provided that, it consists in practices, usages and customs defined by merchants to regulated their own businesses (Schwenzer et. al., 2012, p. 33-35).

Despite the many endeavors, as of now not one uniform law has been completely successful at accomplishing the unification and harmonization goals upon which it was created. Some have failed in a larger scale than others, some have succeeded only to provide partial unification of law, not granting the desired legal certainty to sales transactions.

The questions arising out of the unification of international sales law are the most varied. Many addresses its necessity, considering that commerce seems to self-regulate, developing and standing by its own customs and principles, which, indeed, are widely respected and observed by companies and entrepreneurs everywhere. Others inquire whether it is even possible to enact such body of rules, capable of regulating all

trades carried out in the most varied ways and locations. It is also often questioned whether the harmonization of a uniform law can be achieved, under the undeniable influence of national law concepts and definitions already consolidated in practice. Are judges and practitioners ready for applying and interpreting a uniform law without regional attachment and without harming its own objectives? In order to fully address those questions, the present work will analyze the historical aspects of international commercial law, its development and advancements, which have outburst the unification initiatives. Further, the issues regarding the United Nations Convention on Contracts for the International Sale of Goods of 1980 will be explored, approaching the main praises and critics made by scholars and practitioners.

At last, the role performed by European Union's Member States in the many projects for the sales law's unification and the projects promoted within its territory will be considered, analyzing briefly their accomplishments and setbacks, as to assess the proposal of the European Commission on the matter, regarding the establishment an Common European Sales Law.

2 HISTORICAL DEVELOPMENT

Commercial law had its main origin in ancient Rome with the compilation of important and famous legal sources, such as the Twelve Tables and the *Corpus Iuris Civilis* (Schwenzer et. al., 2012, p. 8). Roman law has helped in high degree to shape commercial law as known today, introducing essential concepts, such as bankruptcy, mercantile contracts, civil responsibility, marine transportation and many others (Schwenzer et. al., 2012, p. 14).

After the fall of the Roman Empire, the World was facing the decline of the sovereignty and going through a period of social and political collapse. This scenario resulted in the formation of the first mercantile organizations, built by merchants to establish a body of rules apt to govern

cross-border trades. These organizations were also entitled with the right to enforce their own rules and judge disputes arising out of international sale transactions carried out according with their norms. These new rules were created and enforced based on common customs and practices, having, therefore, strong customary and corporative aspects.

It was not until the end of the eleventh century that the *Corpus Iuris Civilis* was reawakened, closed examined and widely studied by Italian jurists. It was the rebirth of Roman law. At due time, Roman law was diffused through continental Europe, reaching the northern parts of France and Germany, combining itself with the customary law applied at the time in those areas. This combination received the name of *ius commune*, which dominated these areas until the turn of eighteenth to nineteenth century, when the first codifications were formulated, starting with Prussia, in 1794, France, in 1804, and then Austria, in 1811 (Schwenzer et. al., 2012, p. 14).

In the aftermath of World War I (July 1914 – November 1918), there were only a few international structures developing cross-border transactions and there were no specific rules accepted in the market to govern commercial relations. Provided this scenario, the private sector soon realized that it should start developing a global system of rules able to fill the many existing gaps, without relying on governmental initiatives. In 1919 the International Chamber of Commerce (hereinafter designated 'ICC') was created in Paris by entrepreneurs determined to help a devastated World to prosper economically. Over the years, the ICC has become essential to international trades and businesses of all sorts and its rules influence significantly daily transactions all around the globe, that are performed today in a far more complex environment than the one known in 1919.

In 1926 the International Institute for the Unification of Private Law (hereinafter designated 'Unidroit') was founded in Rome aiming at providing a new degree of modernization and harmonization of international commercial transactions. Unidroit was held responsible for coordinating interests and formulating uniform law instruments, principles and rules, to be applied in commerce worldwide. Unidroit was first created as an auxiliary organ of the League of Nations (predecessor of the United Nations) and,

after its demise, was reestablished in the 1940's as the result of a multilateral agreement[1].

In 1929, the pioneer German jurist named Ernst Rabel, appointed head of the Kaiser-Wilhelm Institute for Comparative and International Private Law in Berlin and a member of the Unidroit's Council, asserted that Unidroit should first and foremost focus on unifying international sales law. His work entitled *Recht des Warenkauf,* is considered by some scholars the first draft of an international sales law convention (Magnus, in Ferrari, 2008).

However, the unification's attempts were put on hold with the onset of World War II and resumed by Unidroit only after its end, in 1945, leading to two instruments of great value: the Convention relating to a Uniform Law on International Sale of Goods (hereinafter designated 'ULIS') and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (hereinafter designated 'ULFC'), both signed at the Hague Convention of 1964, sponsored by the Dutch Government.

Despite all the effort put together in the course of almost thirty years, neither the ULIS nor the ULFC have reached the expected success. Since before the final drafts were concluded by Unidroit, the World's scenario had already indicated that the conventions would not obtain great acceptance. At that time, the two biggest economies, United States of America and the former Union of Soviet Socialist Republics, had engaged in a period of strategic disputes and indirect conflicts aiming at securing political, economic and military hegemony in the World, called as the Cold War, which had its end only in 1991 with the extinction of the Union of Soviet Socialist Republics, almost five decades after the end of World War II. Given that, the United States of America and the Union of Soviet Socialist Republics did not adhere to the Hague Conventions and, due to their influence in the World, many other countries had the same conduct.

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[1] See [http://www.unidroit.org/about-unidroit/overview].

Also, the Hague Conventions received a low number of signatures and an even lower number of ratifications among the few signatory States[2] due to their scope of application, which was strongly criticized for being too wide, once formulated in accordance with a universalist approach (Bridge, 2007, p. 514). Given this approach, the referred uniform laws were conceived to apply to contracts of sale of goods even if the contracting parties were not placed in any of the contracting States[3]. This amplitude resulted, as well, in many reservations made by the signatory States, an attitude that is not remotely compatible with the uniform goal.

Another factor that may have been decisive for the low acceptance of both ULIS and ULFC was the influence of the six members[4] of the European Economic Community (hereinafter designated 'EEC'), created by the Treaty of Rome of 1957 with the aim of transforming trade and manufacture activities within its territory and build a political unified Europe[5], in the developing of such legal instruments.

Due to the expressive role of such countries in the drafting and implementation of the Hague Conventions, these considered unattractive to nations outside the EEC's zone. Furthermore, the idea of unifying sales law within the EEC's territory by the enactment of the Hague Conventions also failed, given that, in spite of adopting such conventions, its Member States presented a high number of declarations and reservations, making it impossible to coherently and harmonically apply they norms.

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2 See [http://www.unidroit.org/status-ulfc-1964] and [http://www.unidroit.org/status-ulis-1964].

3 For example, Article 1 of ULIS prescribes: '1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases: (a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another; (b) where the acts constituting the offer and the acceptance have been effected in the territories of different States; (c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.'.

4 Belgium, France, Italy, Luxembourg, the Netherlands and West Germany have agreed at the time to adopt the ULIS and the ULFC within EEC's territory in an attempt to unify, at least among themselves, the law applied to cross-border sales (Schroeter, 2009).

5 See [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:xy0023].

In 1966 the United Nations Commission on International Trade Law (hereinafter designated 'Uncitral') was created and introduced to the World as an institution focused on unifying sales law, once it was recognized that the existing disparities in national legal systems created hindrances to the development of the international trade's market, serving as a discouragement to commerce and economic growth.

Over the years, Uncitral has carried out an important and active role on reducing and removing these hindrances[6]. Soon after its foundation, Uncitral devoted solely to unifying international sales law, compiling a new set of rules, which was formulated and widely discussed by nations for almost a decade, until its signing at the Vienna Convention of 1980. This new body of rules is known as the United Nations Convention on Contracts for the International Sale of Goods (herein designated 'CISG' or simply the 'Convention'), which has reached an unprecedented acceptance worldwide.

3 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The CISG was signed at the Vienna Convention held in 1980 and has officially entered into force on January 1st, 1988, and, as of now, 88[7] countries have already ratified its terms, introducing the Convention's norms and concepts to their national legal systems. With the exception of United Kingdom and India, all of the World's biggest economies adopted the CISG as the law regulating contracts for international sale of goods.

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6 See [http://www.uncitral.org/uncitral/en/about/origin.html].

7 See [http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html].

Attempting to secure harmony among the many existing different legal systems and cultural patterns, as well as to avoid committing the same mistakes of the aforementioned ULIS and ULFC, Uncitral decided to allow the Member States to deliberate about the content of both Hague Conventions and submit their suggestions and critics prior to the drafting of the new legislation.

In 1975, the draft of the CISG was finalized and sent to all Member States, with the due commentaries, consolidating the basis for the debates that took place in the Vienna Convention, held in the months of March and April of 1980. As a result of all the discussion and careful drafting, the CISG was signed on April 11th, 1980.

The CISG was drafted aiming at unifying and harmonizing the applicable law to contracts for international sale of goods, through the adoption of norms and concepts capable of providing equal treatment to seller and buyer, simplifying the rules of commerce. As mentioned in its preamble[8], the CISG's main goal is to promote the development of commerce by integrating the most varied social, economic and legal perspectives and engaging emergent economies in global trades. This ambition is also expressed in the Explanatory Notes of the CISG, as Uncitral expressed its concern in providing a document 'capable of wider acceptance by countries of different legal, social and economic systems'[9].

It is now irrefutable, almost thirty years after its enforcement, that the CISG represented an important milestone to international contract law and consists in the most successful attempt, so far, regarding a uniform law to international trades. Nevertheless, there are still many questions

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[8] 'The States Parties to this Convention, Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order, Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the ¬removal of legal barriers in international trade and promote the development of international trade, [...]'. See [https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf].

[9] See [http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf].

and doubts about the capacity of the CISG in fulfilling its initial goals. Is it being really applied on daily transactions? Did practitioners truly accept the legislation? Has it fulfilled the intentions upon its norms were created, unifying and harmonizing sales law? The answers to these questions are not simple and are, indeed, the most diverse.

3.1 TERRITORIAL SCOPE OF APPLICATION

As already stated above, the Hague Conventions of 1964 were hardly criticized for their extremely wide scope of application, as it comprised even contracts for sale celebrated between parties with no connection with the signatory Member States. Therefore, trying to avoid the same fate of the Hague Conventions, Uncitral modified the rules of application in the CISG's text, abandoning the universalist approach.

The rules of application of the CISG are placed on articles 1 to 6 of Chapter I, of the first part of the Convention. Article 1[10] of the CISG establishes in its paragraph 1, subparagraph '(a)', that it will only be applied to contracts for international sale of goods when celebrated between parties with places of business in different contracting Member States. The subparagraph '(b)' of the same paragraph and article, allows the CISG to be yet applied to commercial relations by following the rules of conflict of law established by international private law, when it results on the adhesion of a contracting Member State's national law.

Evidently that the Convention has, or will, enter into force in distinct dates for each contracting Member State, given this, considering the joint analysis of articles 1 and 100 of the CISG, the contract celebrated by the

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[10] Article 1 of CISG prescribes: '(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State. (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract. (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.'

parties must be concluded after the CISG's enforcement date on each national legal system to secure CISG's application to such business relation.

Furthermore, paragraph 2 of article 1 provides that if the contracting party holds different places of business in different contracting Member States this shall not be taken into consideration when this situation does not arise out of the contract or the previous negotiations.

Likewise, paragraph 3 of article 1 also stands that 'neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention'.

Articles 90[11] and 92[12] determine, respectively, that the CISG does not prevail upon international treaties celebrated between Member States that regulate the same subject addressed by the Convention and, still, that the Member States can issue reservations to the Convention's text in order to exclude the application of its second and/or third parts.

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[11] Article 90 of the CISG prescribes: 'This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.'

[12] Article 92 of the CISG prescribes: '(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention. (2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.'

Article 93[13] settles the application of the CISG to Member States' territorial units and, lastly, article 94[14] provides the possibility of two or more contracting Member States emit a declaration to establish that the norms of their domestic laws will overrule the norms of the CISG, provided that both legislations have identical or similar content. Norway, Iceland, Sweden, Denmark and Finland submitted the declaration mentioned at article 94 and, consequently, the CISG will not be applied to commercial relations carried out between these nations.

3.2 SUBSTANTIVE SCOPE OF APPLICATION

In relation to the CISG's substantive scope of application there can be no doubt that it is not applicable to all and each international contract, but only those concerning an international sale which the object is goods. Thus, as to properly address the issues regarding the substantive scope

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[13] Article 92 of the CISG prescribes: '(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends. (3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends. (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.'

[14] Article 94 of the CISG prescribes: '(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations. (2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. (3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.'.

of application of the CISG, it is necessary, at first, to conceptualize the terms 'contracts for sale' and 'goods' according to the CISG's text.

3.2.1 CONCEPT OF CONTRACTS FOR SALE

The CISG does not bring a definition of what is to be considered a 'contract for sale' or 'goods' inside its text. Taking this into account, in an attempt to establishing an adequate definition or meaning to such terms, the autonomous interpretations of the CISG must be considered according to the premises of article 7[15] and the Convention's Preamble, specially by a joint analysis of articles 30[16] and 53[17] (Diedrich, 2002).

Considering the wording of both articles aforementioned, it is possible to extract that the term 'contracts for sale', for the purpose of the Convention's application, must be understood as those contracts in which the seller is obliged to deliver certain goods, transferring its property to the buyer, whom, by contrast, is obliged to pay the price agreed for the goods acquired.

3.2.2 CONCEPT OF GOODS

The concept of the term 'goods' must also be defined autonomously, without any interference, relation or reference to national law's concepts, analyzing both articles 30 and 53 of the CISG, respecting the adjustments needed and exemptions expressed in the text of the Convention.

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[15] Article 7 of the CISG establishes: '(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.'

[16] Article 30 of the CISG establishes: 'The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.'

[17] Article 53 of the CISG establishes: 'The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.'

As mentioned above, article 30 determines that the seller must deliver the goods, as well as any document related, transferring the property to the buyer. Based solely in such disposition, it can be extracted that goods must be thought as a movable asset, therefore capable of being delivered. Additionally, it must be possible to transfer its property to the buyer.

Given that, article 3 of the CISG, which will be carefully examined in the following chapter, clarifies that 'goods' object of the contract for sale do not need to be ready-made or fully fabricated. This referred article provides that contracts for the supply of goods to be manufactured or fabricated must be equivalent to contracts for sale for the purposes of the Convention's application, while imposing some limitations.

Additionally, as to achieve a proper definition of the term 'goods', it is essential to observe the exemptions provided by article 2, concerting which the CISG cannot be applied to contracts for sale involving: (a) goods bought for personal, family or household use; (b) by auction; (c) on execution or otherwise by authority of law; (d) stocks, shares, investment securities, negotiable instruments or money; (e) ships, vessels, hovercraft or aircraft; and (f) electricity[18].

Regarding to subparagraph '(a)' of article 2, the CISG can be applied to contracts for sale involving goods bought for personal, family and household use, as long as the seller do not have knowledge of the purchase's finality, or could not have known or foresee it at any time before or at the conclusion of the contract[19].

Another important observation concerning article 2 is the fact that it encompasses tangible and intangible assets. In this regard, although some scholars defend the application of the CISG solely to tangible goods, excluding therefore virtual goods, this position is at the very least contradictory (Schlechtriem, 2005; Ferrari, 2002). Following this direction, the

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[18] The limitations included on this paragraph regard the order provided by article 2.

[19] For the purpose of the Convention, it is not relevant whether the seller or the buyer are natural persons. The analysis regarding subparagraph '(a)' of article 2 must concern exclusively to the finality/destination of the transaction. A sale performed by a natural person with the objective of trading go into the scope of the Convention.

CISG is currently being applied to contracts for sale of intangible goods, such as software, for instance, and other virtual goods, but not without controversy.

3.2.3 MIXED CONTRACTS

Aiming at restricting the CISG's substantive scope of application, article 3 brings the figure of contracts for supply of goods to be manufactured or produced, labor and other services, leveling them with contracts for sale, for the purposes of the Convention's application, but imposing some limitations.

According to paragraph 1 of such article, the Convention can be applied to mixed contracts whereas the buyer does not provide a substantial part of the materials/inputs needed to the manufacturing or production. In compliance with this provision, paragraph 2 determines that contracts for sale which the preponderant part of the obligations consists on the supply of labor or other services are as well excluded from the CISG's application.

On the matter, the CISG is intentionally silent concerning the definition of the terms 'substantial part' and 'preponderant part', inserted in the abovementioned paragraphs of article 3. As a result, many different understandings were, and unfortunately still are, applied by Courts worldwide, impeding the harmonization goals to be fully achieved. Acknowledging this disparity in Courts' decisions, the CISG's Advisory Council (hereinafter designated 'CISG-AC') enacted the Opinion number 4[20] (hereinafter designated 'Opinion n. 4') to pacify the interpretative divergence regarding article 3.

Consonant to the referred Opinion n. 4, when interpreting the term 'substantial part' the interpreters must consider, initially, the economic value criteria. Otherwise, when this criterion is not apt to solve the controversy, the interpreters must resort to the criteria of essentiality. The CISG-AC also orients that to determine the substantiality or essentiality of the

[20] Official version available at [http://www.cisgac.com/default.php?ipkCat=128&tifkCat=146&tsid=146].

materials or inputs necessary to the manufacturing or production of the goods, one must not apply predetermined percentages, but think about the goods as a unity.

The controversies regarding the application and interpretation of paragraph 2 of article 3 of the CISG concern to situations in which one single contract regulates the sale of goods and also the supply of services. Once there are two distinct contracts to regulate each aspect separately, no doubt remains that the CISG will be apply solely to the contract that regulates the sale of goods, without embracing the supply of service.

According to section 4.4 of the Opinion n. 4's commentaries, the CISG-AC also recommended that paragraphs 1 and 2 of article 3 are to be interpreted independently, acknowledging, however, that these provisions can influence the interpretation and application of the Convention reciprocally, stating that 'it might be that in complex transactions there may be some reciprocal influence in their interpretation and application. In those situations, the transaction as a whole should be analyzed considering the pro Convention' principle, that is to say, that if any doubt should arise concerning the matter, the one that leads to the application of the Convention is to be preferably considered. That is to say that, when faced with a complex transaction and existing doubt concerning the application or not of the CISG, the Convention must be applied to secure the uniformity objective and the harmonization of the applicable law.

3.3 CISG'S ACCEPTANCE, UTILITY AND NECESSITY

In order to overcome the rapid aging of business law and be adequate to the dynamism of commerce, Uncitral brought many wide and undetermined concepts to the text of the CISG, allowing its norms to be flexible and adapt to as many transactions as possible. This strategy was an intelligent approach on behalf of the proposed text's acceptance by Member States. Although this drafting strategy has shown to be effective, as the Convention has been enforced for almost three decades and it is still

contemporary, some of the main critics towards the CISG fall upon the existence of too many wide concepts.

Cuniberti (2006), of the Paris Val-de-Marne University, highlights that CISG's rules were drafted to make them acceptable to nations with different backgrounds and, in some cases, vague language was used so that some countries would agree on adhering the Convention. The scholar emphasizes that vague terms do not provide precise answers and, therefore, it threatens legal certainty. Additionally, if these vague concepts are introduced in instruments for international use, they will face different interpretation from different national courts. This is, according to Cuniberti (2006), highly contradictory with the idea of harmonizing international law.

It is important to clarify that there is no final interpretation to the matters governed by the CISG, once no court was entitled as an ultimate legal instance to judge and harmonize the CISG's jurisprudence. As a result, no interpretation is really binding, heavily jeopardizing CISG's main goals.

Briefly analyzing CISG's database[21], it is easy to ascertain the existence of many different understandings provided by Courts all over the World, concerning not only issues pursuant to its scope of application, both territorial and substantive, but in all matters governed by it. This scenario, in conjunction with the different opinions expressed by scholars, does not grant the legal certainty expected from a uniform piece of legislations and sought by Uncitral.

Another critic towards the CISG relies upon the exclusion of some important subjects of its scope of application, namely the validity and enforcement of the contract, as pointed out by Bridge (2007, p. 505-509). Member of the CISG's Advisory Council and renown scholar, Bridge (2007, p. 14) expressed his concern about the interpretation of the term validity and other wide concepts, such as good faith, arguing that there is a 'homeward tendency' that cannot be overlooked, in other words, Judges tend to interpret these terminologies according to their own understandings, which many times derive from concepts of regional law and customs.

[21] See [http://www.cisg.law.pace.edu/] and [http://www.cisgac.com/].

This situation is highly prejudicial, because some courts may interpret provisions in a broader sense than others. In his opinion, the lack of legal certainty is the main cause for English practitioners and trading associations to often opt to exclude the CISG from their contracts, as permitted by its Article 6[22].

Cuniberti (2006) mentions that the CISG has only partially harmonized sales law. Therefore, it is still necessary to determine in a choice of law clause which law will be applied for the matters not covered by its scope of application, such as, for instance, issues regarding validity of the contract.

The application of two different set of rules for the same contract – legal relation – is not desirable, even though possible, because many inconsistencies can arise from splitting the choice of law. Schwenzer et. al. (2012, p. 61) asseverates that cases of *dépeçage* are rare and it is quite difficult to comprehend the reasons that could draw the parties to choose to split the governance of their contract, even by inattention, provided that the CISG, once ratified by a Member State, integrates the national law of the country, being automatically applied[23]. Schwenzer et. al. (2012, p. 37) also recognize the incompleteness of the CISG, but accentuates its worldwide success.

Finally, it is also relevant to address that the intended reduction of transactions' costs with the enactment of the CISG might be difficult to achieve, once the parties have to exhaustedly analyze whether to apply or not the CISG, and to choose a supplementary national law to govern important matters that were left out of its scope of application. By the conclusion

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[22] Article 6 CISG states that: 'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.'

[23] 'Although dépeçage is a general issue in conflict-of-laws discussions, it is a particular problem which may arise in the international sale of goods. Dépeçage is a concept under which aspects of a transaction are governed by different laws; in this context the laws of different jurisdictions. While dépeçage has been discussed at a theoretical level, cases on décepage are rarely reported. Indeed it is difficult to conceive of reasons why parties would wish to split the governance of their sales contract in this way. Nonetheless it appears permissible in many jurisdictions for parties to choose different laws to govern different parts of their contract. Jurisdictions differ on whether adjudicators should assume that parties intended the one law to govern their entire contract.' (Schwenzer et. al., 2012, p. 61-62).

of the contract, it will still be necessary to discuss the applicable law and to mitigate as much as possible the costs involving a possible litigation abroad. As yet another option of legislation (CISG) has to be carefully examined the costs of the transaction pursuant the choice of governing law and venue might be even higher than the ones already present in international contracts.

On the contrary, there are opinions that the unification of international sales law indeed reduces, though it is not clear on which extent, the costs of transaction resulting of researching and understanding a different law, other than the contracting parties' national legislation, litigating in an unknown jurisdiction, using a different and many times equally unknown language, and a many other issues arising out of international contracts.

When dealing with international sales, it is difficult and many times costly to estimate the probable reflexes and outcomes of future conflicts and disputes. Provided the arguments disclosed in the section above, the CISG does not necessarily reduce those costs and, in many situations, does not grant the degree of legal certainty expected.

However, Magnus (in Ferrari, 2008, p. 147) asserts that 'the view that the CISG does not guarantee sufficient legal certainty is based on prejudice', claiming that for the vast majority of questions concerning the dispositions of the Convention and its applicability are relatively pacified by international jurisprudence, being possible to identify the prevailing understandings. Magnus (in Ferrari, 2008) also stands against the allegations that the vague terms inserted in the CISG deprives it of legal certainty[24].

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[24] '[...] For most questions which may arise under the CISG there exists today international case law and regularly a clearly prevailing view which if followed by the great majority of decisions. Moreover, the majority view can be rather easily taken from (Draft) UNCITRAL Digest which presents the international case law on the CISG in an objective and neutral way. If this material is presented to the court seized with the case in question it can be forecasted with the same certainty as in a purely domestic case that the court will follow the majority view. It is therefore the task of the respective practitioner to prepare the case sufficiently. Also the further critique that the CISG uses too many vague terms does not really fit with the CISG, for this criticism applies to most national sales law. In order to cover all possible different sales situations a modern sales law has to provide and secure sufficient flexibility. For this end, it must use flexible terms like "reasonable" or "substantial". And again, the core meaning of most if not all uncertain terms used in the CISG has been already specified by international case law.' (Magnus, in Ferrari, 2008, p. 149).

Another argument in favor of the application of the CISG, is the one set by Uncitral in the purposes for the Convention[25], recognizing that small and medium-sized enterprises, as well as traders of underdeveloped or developing economies, do not have the adequate legal guidance when celebrating international sales contracts, being, therefore, exposed to impositions of parties with higher bargain power and vulnerable to all kinds of problems derived from it. It can be, thus, of great difficulty to the weaker party to ensure the contractual balance is sustained. Provided that, the CISG can come to those parties as a great benefit and also as an essential mean to maintain certain level of equality in treatment between the contracting parties.

Cuniberti (2006), although very critical regarding the CISG, mentions that in many countries the legal system is not reliable, a factor that serves as a hindrance to international transactions and, consequently, economic development. In such situations, the usage of the CISG can be beneficial, once these countries would be offering their trading partners a developed set of rules, already known by the majority of the global traders.

Brödermann (2007) criticizes the practice of excluding the CISG adopted by practitioners, saying that the main reasons behind such behavior are ignorance, because many lawyers are just not aware of the CISG, fear, as they do not want to take the risk of giving an advice on a set of rules that not even they can evaluate properly, and reluctance of changing existing and consolidated patterns.

In 2008, Fitzgerald (2008) evaluated the utility of the CISG in United States of America, reaching some interesting conclusions, which support Brödermann's analysis. According to his studies, the CISG is still identified by some practitioners, jurists and legal academics of United States as a foreign law, in spite of being part of the national legal framework. The professor also noted a reluctance of the United States' Judges to apply the CISG. In his opinion, the primary motivation to CISG's opt outs appears to be the lack of familiarity with the law itself, which leads practitioners to not even consider the possibility of applying the CISG to a

[25] See [http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html].

determined transaction, what is made without a reasoned analysis on whether the CISG would be actually beneficial and suitable to the clients' interests.

Despite of the many reasoning given by scholars and practitioners for opting in or out, it is undeniable that the CISG is, nowadays, the most important and successful attempt of a uniform law regarding international sales. Even though its acceptance in practice is not seen very often, for the many reasons given above, there is still hope that its use will increase, once it takes time to a piece of legislation to carve its way into consolidated behaviors.

In a globalized world, instruments such as the CISG, able of accommodating different views, economies, social and legal regimes, tend to become more and more attractive, notably to countries with high levels of legal insecurity, a factor that pushes investments away, preventing the economy to flourish.

It is also irrefutable that the CISG represented an important milestone to international contractual law, once it introduced a new legal regime to contracts for international sale of goods and, also, a needed distinction, at that time, between commercial and civil legal relations, that sometimes earned similar or the exact same treatment by Courts worldwide.

4 EUROPEAN UNION AND THE UNIFICATION OF INTERNATIONAL SALES LAW

Before analyzing the European Union's attempts of unifying commercial law within its territory, it is necessary to evaluate if this goal is compatible to the principles in which the European Union is based upon. A reference must be made, therefore, to the Treaty establishing the European Com-

munity[26], as it expresses the European Union was founded to ensure the economic and social progress of its members, eliminating barriers. The removal of national barriers is indispensable to guarantee progress, sustainable expansion, and to balance trades, based upon fair competition. The mentioned Treaty also established that the Member States of the European Union should approximate their laws, to enhance the functioning of the European common market. Also, the Treaty recognized the importance of ensuring the development of least favored regions[27], a goal already traced by Uncitral and one of the main concerns of the organization when drafting the CISG, as set out above.

Regarding the approximation and unification of law within the European Union's territory, the European Union Member States were since the very beginning involved in the such projects. As mentioned above, it was a German jurist that first suggested that sales law should be the main focus of Unidroit, laying the basis for the Hague Conventions of 1964. After the Conference held in The Hague in 1964 the six members of European Economic Community, the predecessor of the current European Union, agreed on the adoption of ULIS and ULFC, with the sole objective to unify, at least among themselves and their territory, the law applied to international trades (Schroeter, 2009). However, the idea of unifying sales law within the European Economic Community failed, given that in spite of adopting The Hague Conventions of 1964 the Member States presented a high number of declarations and reservations, which made it impossible to effectively apply such legislations and harmonize the law applied to cross-border trades. The European countries have played a more timid role, but nonetheless important, in the developing of the CISG, once the interest of unifying law within European countries was still on display, as explicated in the recorded statements given in the closing moments of the Vienna Conference of 1980 (Schroeter, 2009). In spite of only par-

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26 See [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT].

27 See Article 158, which prescribes: 'In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas.'

tially harmonize the rules applied to international sales, the CISG has exercised some influence inside the European Union, once almost all its Member States have ratified its norms, integrating CISG norms in their national legal systems.

Another important step taken by European Union towards sales law unification was the enactment of the Resolution on the Approximation of the Civil and Commercial Law, of 2001. This Resolution explicitly addressed that the CISG is considered to be 'a basis for a future common body of laws[28].

In order to diminish the existing legal barriers within European territory and increase cross-border trades among the Member States, strengthening the common market, a non-binding set of rules started to be developed by the European Union in 1970, a few years after the Hague Conventions were signed and already in the face of its failure. At that time, it was envisioned that a uniform law would indeed assist on the formation of a single market within Europe. This initiative was entrusted to the First Commission on European Contract Laws, in 1980. In 1992, almost a decade after the begging of the studies and works, a Second Commission on European Contract Law was formed to continue the previous efforts. The project received the name of Principles of European Contract Law[29] (hereinafter designated 'PECL'). Today, the PECL consists in three volumes and deals with varied aspects of business law, such as rules of performance, formation of contracts, validity, interpretation, and assignment of claims (Schwenzer et. al., 2012, p. 46).

Subsequently to the PECL, European academics undertook another similar quest, named the Draft Common Frame of Reference[30] (hereinafter designated 'DCFR'). This academic effort started in 1998 without political endorsement and was very ambitious, as it encompassed nor only gener-

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[28] See [http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2001-0609].

[29] See [http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/].

[30] See [http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf].

al contract law, but also almost all matters typically covered by civil codes concerning commercial affairs (Schwenzer et. al., 2012, p. 47).

The PECL and the DCFR are optional instruments, thus non-binding to European Union's Member States. Nowadays, the DCFR has been much discussed, as the European Commission has taken it as a model for an action plan published in 2003 for the development of the Common Frame of Reference, with purposes of creating and enacting a European Civil Code. Eventually, the European Commission started developing the idea of making it also as an optional instrument, provided the many critics concerning even the legitimacy for the creation of such bold endeavor. The optional nature of the project increased the debates surrounding the effectiveness and usefulness of such instrument (Schwenzer et. al., 2012, p. 48), as it seems unlikely that a non-binding instrument will grant the envisioned uniformity.

Despite scholars' skepticism, the European Commission developed a new initiative on the matter, in the form of an optional instrument, which led to the Proposal submitted in 2011 of a Regulation for a Common European Sales Law (hereinafter referred as 'CESL').

5 EUROPEAN COMMISSION'S PROPOSAL FOR A COMMON EUROPEAN SALES LAW

The CESL was formulated as an opt-in legislation, that is to say that the contracting parties interested in making the CESL the governing law of their contract must expressively choose the CESL. Therefore, the CESL, if approved and enacted, will have to coexist with national laws on the matter, including the CISG that is already part of most European countries' national legal systems. The CESL would function as a 'second' contract law within the national law system of each Member State – or third, given the fact that most of the Member States have already their own national business law and the CISG.

The idea of the European Commission id that traders should be able to apply the CESL to all their cross-border businesses instead of having to adapt to all the different national contract laws[31].

The CESL's proposal is part of the Single Digital Market Strategy, and, as so, aims at regulating the sale of digital content and tangible goods across Europe by the promotion of a higher consumer protection when buying products or contracting services online. It is an attempt to regulate virtual goods' trades across Europe. The Single Digital Market Strategy comprises three main policies for providing better access to online services and digital goods, securing the growth of digital networks and infrastructure, and ensuring that Europe achieves the full potentials of the digital market.

5.1 CESL'S SCOPE OF APPLICATION

The CESL is to be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where

[31] See [http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52011PC0635].

the parties to a contract agree to do so, according to the norms set out in Article 1[32] of Annex II of the proposed regulation.

In order to prevent misinterpretations, article 4 of Annex II of CESL brings a definition of cross-border contracts within the regulation, establishing that a contract between traders is considered a cross-border contract if the parties have their habitual residence in different countries, of which at least one is a Member State. The paragraph 3 of the same article further clarifies that, for the purposes of the regulation, a contract between a trader and a consumer is a cross-border contract if: (a) either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence; and (b) at least one of these countries is a Member State. The concept of habitual residence is also laid down in Article 4, in paragraph 4, which establishes that habitual residence is the place of central administration or, if the trader is a natural person, that person's principal place of business[33]. Pursuant to the scope of application, article 5 demarcates that the CESL can be applied for the following contracts:

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[32] Article 1 of CESL prescribes: '1. The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules as set out in Annex I ('the Common European Sales Law'). These rules can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so. 2. This Regulation enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty. 3. In relation to contracts between traders and consumers, this Regulation comprises a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders.'.

[33] Article 4 of CESL prescribes: '1. The Common European Sales Law may be used for cross-border contracts. 2. For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State. 3. For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if: (a) either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence; and (b) at least one of these countries is a Member State. 4. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a trader who is a natural person shall be that person's principal place of business. 5. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment of a trader, the place where the branch, agency or any other establishment is located shall be treated as the place of the trader's habitual residence. 6. For the purpose of determining whether a contract is a cross-border contract the relevant point in time is the time of the agreement on the use of the Common European Sales Law.'.

(a) sales contracts; (b) contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price; (c) related service contracts, irrespective of whether a separate price was agreed for the related service.

Article 6[34] of the proposed CESL implies further limitation to its substantive scope of application excluding the mixed-contracts, defined as those which present elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of article 5 and contracts linked to a consumer credit, from the CESL's applicability.

Another important provision of CESL, regarding its scope of application, is stipulated in article 7[35], as it establishes that the CESL can be applied not only to business-to-consumer transactions, but also to business-to-business trades carried out across European Union's territory. Such article, however, establishes that the CESL is applicable to business-to-business transaction when at least one of the parties involved is a small or medium-sized enterprise. As many Member States uses different criteria to determine whether a company is classified as small or medium-sized, article 7 brings some parameter to this classification.

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[34] Article 6 of CESL establishes that: '1. The Common European Sales Law may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 5. 2. The Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The Common European Sales Law may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of installments.'.

[35] Article 7 of CESL prescribes that: '1. The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the Common European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise ('SME'). 2. For the purposes of this Regulation, an SME is a trader which (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country.'.

A company is, therefore, considered small or medium-sized for the purposes of the application of the CESL if it (a) employs fewer than two hundred (250) people; and (b) has an annual turnover not exceeding fifty million Euros (50.000.000 Euros) or an annual balance sheet total not exceeding forty-three million Euros (43.000.000 Euros). If the company has its habitual residence outside the Euro's zone, the equivalent amount in the currency of that Member State or third country must be considered to this classification.

It is also important to highlight that, according to Article 3[36] of the CESL, it is up to the Member States to decide whether to expand the application of the proposed regulation to companies that are not considers small or medium-sized, according to the requirements imposed by article 7, aforementioned.

5.2 CESL'S ACCEPTANCE, UTILITY AND NECESSITY

The European Commission's CESL faced, since the early stages of developing, strong critics from academics, businesses and practitioners.

The European Commission's initiative faced, since the early stages of developing of the CESL, strong critics from academics, businesses and practitioners. Some argue that the CESL will ensure only a partial harmonization, as it leaves important matters to be yet govern by national law (Bridge, 2013). This is an argument that also does not favor the usage, in practice, of the CISG and the Hague Conventions of 1964, as seen above in this work.

Other scholars state that this initiative focused too much on electronic commercial activities, being draft to comprise mainly consumer protection issues. As mentioned by Ilieva (2015) 'the CESL in its current form has

[36] Article 3 of CESL prescribes that: 'The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.'.

the potential to create new barriers within EU in the form of competing harmonized national laws and predominantly supranational law of consumer protection (CESL), as well as unnecessary additional complexity'. Ilieva (2015) concludes that the initiative, in spite of being an innovative project at the European Union level, is 'both limited end farther-reaching'.

Schroeter (2009) goes further and casts his doubts over the necessity for yet another legislation on the matter, providing that the CISG already presents rules for sales contracts and have been applied in Europe for almost three decades. The utility of the CESL if also weighed by Schwenzer et. al. (2012, p. 49), given that the CISG already covers cross-border transactions, stating that is difficult to extract the benefits that the legal community would have from specific rules on sales that are merely optional. In fact, a non-binding instrument will unlikely find acceptance, as observed from the low acceptance of other known uniform legislations drafted in the same manner.

As a consequence of the many debates concerning the proposed CESL, the European Commission withdrew the proposal for the CESL in the middle of 2015, understanding that there are issues yet to be widely discussed and improved in the proposed text, in order to fully discharge the potential of e-commerce and the advance of the Digital Single Market Strategy in Europe. For this purpose, the Commission released a public consultation on contract rules for online purchases of digital content and tangible goods for all those interested in contributing, in a form of a questionnaire – annexed to this work –answered in the period from July 12th to September 3rd, 2015. Some of the responses given will be analyzed in order to gather the mains arguments in favor and against the CESL, as well as suggestions for the improvement of cross-border trades within European Union and, consequently, of the text and content of the proposed regulations.

In response to the European Commission's Public Consultation, the BSA – Software Alliance (hereinafter designated 'BSA'), situated in Belgium, understands that a regulation on digital content purchase and sale is desirable, as the existence of fragmented national consumer rules applicable to digital products and services impose a barrier to innovation.

Therefore, it asserts that 'the software industry's success depends on consumer goodwill. First and foremost, BSA supports strong consumer protection for digital products and efforts to pursue this objective in an effective way'[37]. Given that, the BSA acknowledges that any new regulation should aim at tackling that fragmentation, otherwise the harmonization would be unachievable. Though the harmonization could come from the mechanism suggested by the European Commission – a Resolution –, the BSA believes it is unlikely to be achieved through such method. Thus, the organization defends that it would serve the better purpose to adopt the principle of the 'country of origin', by reviewing the Rome I Regulation, which would remove significant barriers to all traders in Europe and especially the small and medium enterprises acting on the market of digital content, as there would be no longer a need to comply with different set of legislations. With a 'country of origin' principle, the cross-border trade would be regulated by the rules of the Member State where the businesses have their respective establishment. The BSA refers to this situation as to 'sell like at home'[38].

In addition, the organization also believes that the Commission should develop a deeper and solid analysis of the digital market, once it seems not to be clear whether consumer protection should be increased regarding digital content products. Also, in the organization's point of view, there is no ground for surely assert that the lack of specific rules concerning this matter is actually holding back growth and increasing significantly the costs of such transactions.

The German Bar Association recognizes that the existing rules on European Union's level are neither adequate nor sufficient to address the issues arising out of digital content products and services, being ultimately necessary to provide a quicker and practicable mechanism to solve consumers' disputes regarding digital content, compatible to the market where those products and services are offered[39].

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37 See folder 'businesses' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

38 Idem.

39 See folder 'legal professions' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

The Council of Bars and Law Society of Europe (hereinafter designated 'CCBE') has the same understanding, affirming that users of digital content are not sufficiently and adequately protected by the existing laws[40].

In spite of the such arguments, many businesses, legal entities and academics casted serious doubts concerning the actual need for a common European sales law as proposed by the European Commission.

The multinational giant Orange pointed out that the reason behind the decision of national traders not to expand their activities to other countries, and also of consumers not to enter into e-commerce purchases are the most varied. Therefore, the barriers go way beyond diverging rules regarding consumer protection. According to the company, there are many other legal obstacles to be yet overcome in order to fully integrate the digital market, such as lack of uniform national copyright laws, an uneven playing field for both traders and consumers, the different languages and the high costs of providing the proper attention to customers' complaints in several idioms, tax regulations, and others. Orange also states that the existing consumer law in European Union level is already capable of ensuring consumers protection when acquiring products online and could be applied to digital content with the due adaptations and revision[41].

This issue was also brought out by Digitaleurope, as it recommended to foster the existing European Union's rules on consumer's protection, strengthening consumer trust in cross-border commercial activities. Digitaleurope also defends that a revision in the Rome I Regulation would suffice, introducing the 'country of origin' principle, aligned with BSA's opinions. Furthermore, the company arguments that the European Commission should be cautious and wait for the outcomes of reviews that are being carried out in the fields of general data protection, copyright, and the upcoming review of the Consumer Rights Directive, before adding 'new layers of regulation'. It is also noted by the company that the CESL provides a minimum harmonization approach what would unlikely reach

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40 Idem.

41 See folder 'businesses' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

the goal to 'improve the conditions for the functioning of the internal market'[42].

In accordance with CEDED, the introduction of the 'country of origin' principal through a modification on Rome I Regulation rules is also more rapid and an effective improvement to the functioning of the internal market. The CEDED also stands that any measure taken now towards the enactment of a new set of rules regarding the sale of tangible goods would anticipate the Consumer Rights Directive review scheduled for the year of 2018[43].

In response to the questionnaire, the British and Irish Law Education and Technology Association (hereinafter designated 'Bileta') likewise agrees with the fact that a non-binding instrument could become purely advisory, not fulfilling the objectives intended.[44]

The Association of Commercial Television in Europe, place in Belgium, believes that there is no need for a new legal instrument on the matter, once the Consumer Rights Directive already provides clarification of consumer rights to digital content and there are already solidified legislations, such as CISG, that can be used to business to business transactions[45].

Concerning the scope of application, both territorial and substantive, it is important to highlight the following divergence of opinions. In response to the public consultation, the BSA, already cited above, proposes that the CESL ought to be focused only in business-to-consumers transactions, as business-to-business trades present a different reality and need. Also, BSA supports deeply the principle of freedom of contract among such transactions[46].

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42 Idem.

43 Idem.

44 See folder 'academics' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

45 See folder 'businesses' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

46 See folder 'businesses' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

The European Committee of Domestic Appliance Manufacturers (hereinafter designated 'CEDED') shares the same opinion, stating that business-to-business should fall outside the scope of the CESL, because contracts regulating such trades are more complex and specific, and, therefore, the principle of freedom of contract should prevail in order to satisfy those types of contracts' needs[47].

Digitaleurope, place in Belgium, defends as well that the CESL should cover only business-to-consumer transactions, mentioning that 'imposing regulation on B2B contracts would cause an unnecessary increase of regulatory burden on businesses and prevent competition and slowdown innovation'[48].

The Association of Commercial Television in Europe equally professes that the initiative should not extend to business-to-business contracts, as well as the Eurocommerce, which address the issue stating that even though, in certain situation, the small and medium enterprises may be under the imposition of big market players, it does not mean that these companies take on a consumer like condition[49].

The German Federal Bar mentions that the CESL should not enter into the scope of application of the CISG, once this uniform law already provides the degree of protection necessary to business-to-business transactions, consisting in comprehensive set of rules applied almost all European Union's Member States. Thus, there would be no need for a Common European Sales Law, to act in the same affairs of the CISG[50].

Orange, one of the largest operators of mobile and internet services in Europe[51], considers that business-to-business trades should be further evaluated and investigated, as to grant a mechanism, or a piece of leg-

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47 See folder 'businesses' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

48 See folder 'businesses' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

49 Idem.

50 See folder 'legal professions' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

51 See [http://www.orange.com/en/About/Orange-at-a-glance].

islation, fit to its needs and expectations, resulting in an action to bring more balance to such transactions. Orange mentions that there are already harmonized rules for consumers' protection in the European Union level, which can be applied also to online purchase of goods[52], demanding only a proper revision of their text.

Contrary to the positions quoted above, the German Bar Association believes that the CESL should encompass as many types of contracts and transactions as possible, in order to avoid unnecessary fragmentation. Moreover, the association understands that the limitation of the scope to certain types of contracts is also detriment to its main objectives and would likely make the regulation obsolete from the very start, unable to accompanying the new and constant technological developments[53]. It is important to cite that the German Bar Association and the German Federal Bar are not aliened on their speeches regarding the CESL scope of application, once they are currently representing different thoughts on the matter.

The Law Society of England and Wales also comment that 'the nature of the contract parties is not ideal in this context and will inevitably lead to unnecessary complexity'[54].

The Council of Bars and Law Societies of Europe (herein designated CCBE) agrees with the proposal to cover both business-to-consumer and business-to-business transaction, acknowledging that these different types of trades are often interrelated with each other and that small and medium-sized enterprises often appear in a disadvantageous position in contracts celebrated with big players. CCBE mentions that 'such new legal regimes should be as all-embracing as possible in order not to confuse market participants'[55].

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52 See folder 'businesses' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

53 See folder 'legal professions' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

54 Idem.

55 See folder 'businesses' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

At last, the European Law Institute (hereinafter designated 'ELI') defends that the CESL should widen its scope of application, encompassing all kinds of transactions, business-to-consumer, business-to-business and also consumer-to-consumer transactions[56].

The ELI arguments that the restriction to small and medium-sized enterprises should as well be abandoned to secure a higher level of uniformity and harmonization across Europe, making the proposed regulation more attractive to potential users. The ELI recognizes that measures should be taken to make the proposed regulation more 'user friendly', as to ensure its utility to traders and consumers. The CESL in envisioned as an opt-in law and the low acceptance in practice could lead to the termination of the common European contract law's ideal, at least for the near future.

The ELI compiled a number of practical recommendations to the European Commission, in order to maximize the CESL utility, making it simpler, more coherent and more certain so as to enhance its potential benefits.

ELI also orients that the European Commission should rethink the balance of consumer rights and legal certainty, acknowledging that: 'the CESL affords the consumer very far-reaching rights which in then renders subject to limitation by vague general clauses. This ought to be revised so as to avoid excessive divergence of results which EU/EEA and not to deter consumers from exercising their rights'[57]. The ELI recommend the establishment of a case law database of courts' decisions surrounding the CESL and, also, measures for judicial co-operations between the many Member States' courts to ensure the harmonization of CESL application and interpretation.

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[56] See folder 'academics' at [http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm].

[57] Idem.

6 CONCLUSION

The unification of international law has been for long envisioned and pursued, and it appears to be a step forward to a truly globalized world, at least when it comes to international commercial trades. It is irrefutable that among all the attempts analyzed above, the CISG is the most successful.

Nonetheless, in spite of all advancements regarding the CISG, it faces many criticisms, mainly concerning its drafting process and its incompleteness. The decision of excluding important subjects of contract law was crucial to CISG's great acceptance, comprising the vast majority of international traders. However, as noted, the usage of the CISG in practice faces resistance, which maculates the idea of a uniform law. When parties agree to define the CISG as the governing law of their contract, they must still be aware that the many questions not approached by the CISG will be submitted to national laws. The discussion of another choice of law only increases the transaction's costs. Given that, many practitioners prefer to just choose a national law and expressively exclude the CISG, to scape its incompleteness and prevent the application of different set of rules to the same contractual relation, as it only increases the level of legal uncertainty, given the highly probable misinterpretations by national Courts. Thereby, national laws are considered to be more complete and experienced, grating a higher degree of foreseeability to international transactions.

On the other hand, apart from all criticism, CISG can be beneficial to traders from countries with legal regimes that lack credibility. To these traders, the CISG can be attractive and favors the development of international trade.

Analyzing the center role developed by European countries in the history of the unification of sales law, it does not come as a surprise that the European Commission is working on establishing a Common European Sales Law. The utility and necessity of such norm, however, are still on debate.

The proposed CESL is set to be a mean of engaging the least developed economies in international transactions with European countries, increasing their competitiveness in the global market. The CESL is as well compatible with the fundamental freedoms upon which the European Union was based and also with the approximation of national legal systems.

Notwithstanding the merits of European Commission's proposal, it seems unlikely that a (another) optional instrument is going to be sufficient to fulfill the unification goals. Provided all the data analyzed though the present work, it is undeniable that the idea of a Common European Sales Law must yet to mature, with the review of the European Commission's proposal content and its pertinence.

Even though it might be an important step towards the envisioned European Digital Single Market, it can impose an additional legal barrier to cross-border trades. The excessive protection of consumers can result in distortions of the market, elevating general products' prices.

It has to be also considered that the European Union legislation already addresses issues of consumers' protection, harmonizing the standards to be followed and respected by all traders dealing within its territory. Maybe a first step could be the revision of such rules, so they can also be applied to digital content and electronic commerce, and their unification in one single instrument, preventing the fragmentation to continue. This would certainly simplify and clarify the mechanisms available to consumers and traders, increasing the confidence in digital market and legal certainty. Therefore, there would be no need to yet another instrument on European Union's level to deal with such matters.

Also, the European Commission did not seem to analyze satisfactorily the matters regarding such transactions, which currently already respond to a uniform body of rules, namely the CISG, present in almost all European national legal systems. Although the CISG has an opt-out mechanism and the CESL an opt-in mechanism, both are optional, non-binding instruments and as such provide only a minimum degree of harmonization. The CESL, just like the CISG, also leaves some important types of con-

tracts and subjects outside its scope of application, what is understood to be detrimental to the unification of sales law.

Notwithstanding, it must be acknowledged that there are a vast number of economic, business, operational and legal reasons why certain traders do not expand their businesses to outside their national markets, which go beyond the scenario taken into account by the European Commission when thinking and drafting the CESL. For example, different languages, cultures, currency, price standards, copyright protection, delivery costs, tax regulations, and many others, are all obstacles and barriers towards a fully integrated European market, imposing an impediment to the functioning of the internal market and blocking the realization of the Digital Market Strategy. Besides, many of the issues addressed by the proposed Regulation for a CESL are, as aforementioned, already incorporated into European Union's territory through the many ongoing directives and regulations on consumer rights, data protection, guarantee and unfair terms in contracts for the purchase of goods, and on matters of digital content and electronic commerce, many of which are being, or will soon be, revised.

As the CESL acquired some traction, it would be appropriate to at least postpone the discussion surrounding the CESL for after the review of the Directive on Consumer Rights or simply to review the Rome I Regulation, as proposed above by many companies and academics during the public consultations concerning the CESL.

Additionally, a clearer understanding on European Union's necessities is both crucial and essential to the enactment of any body of uniform rules regarding cross-border trades within its territory.

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II COMMERCIAL & CORPORATE LAW

2 PPP AS A NEW COOPERATION FORM IN LAW:

THE NATIONAL (GEORGIAN) AND INTERNATIONAL PERSPECTIVE

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TABLE OF CONTENTS

1 PUBLIC PRIVATE PARTNERSHIP IN THE EUROPEAN UNION

This summary is related to the very important issues of the experience and perspectives of public – private partnership in different countries. I have paid attention to different conditions and different methods of approach of public – private partnerships in European Union countries, in the USA as well as in Georgia.

First of all, two main objectives of legal control of the partnership between the public and private sectors should be distinguished; the first aim is to promote the development of the private sector, and by achieving the other goal, the public order in the private legal relationships will be provided by the government. That is why, such kind of control is conducted both through the public and private legal norms and as a whole it's worth noting that such a research of partnership is the same as the interdisciplinary study of law.

In the juridical literature various classifications according to different forms are suggested; Among them the most diffused is the opinion, according to which on the basis of the origin such partnership is divided into two parts, they are: institutional and contractual.[1]

Institutional is the partnership when the public and private sectors are presented together with the third entity which is often created exactly for this concrete project and the liability for the management of the third entity is accepted by the representatives of the private sector, although the public and private sectors have the equal share (50-50).

As for the contractual PPP there are involved two parts and accordingly, the agreement is signed by two parties. The agreement accurately determines the liability, rights and duties for each of the parties. It also states the level of service which must be provided in the investment plan; in addition, the agreement may or not contain the rules for unpredictable

[1] Carlos Oliveira Cruz, Rui Cunha Marquez – Infrastructure Public Private Partnerships, p. 4.

circumstances in case they exist and the agreement must also include the rules for the termination of the agreement before the deadline and the terms for sanctions and compensation.

For the purpose of researching and solving the problems referring to the legal control of the partnership between the public and private sectors, first of all, the attention should be drawn to the history of developing this very kind of partnership. In foreign countries the team-work in certain issues of public and private sectors may count a 100-year history. However, in order to implement the needful projects for the society, financing the private sector in PPP relationships has gained in particular popularity in the fields of transportation, infrastructure and etc.[2]

It's worth noting that the road and water projects have gained the most prolonged experience in PPP fields. It is true that the term itself – PPP (Public Private Partnership) – is new, but the signs of activities corresponding to PPP, and the fact that the capital of the private sector may be used for the social needs are quite old. For example, in the 18th – 19th centuries in Great Britain the local magnates used to borrow money from investors so as to build or repair bridges having been built by applying these methods.[3] The Brooklyn Bridge in New York was built with the private investors' capital.[4] In 1980 a certain part of the representatives of British public sector strictly prohibited the usage of finances of the private sector in behalf of the social infrastructure and they supported the idea of using only the governmental budget for this purpose. However, this opinion was certainly opposed and in 1993 for the purpose of developing and working out the new ways of investing finances by private sector in the infrastructural projects, which had been planned by the public sector, there was established the private financial group enlisting the representatives of both private and public sectors and then in 1994 the leaders of the public sector started the discussions about the forms that would make it possible to use the finances of the private sector for the public projects in

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2 E.R. Yescombe-Public Private Partnership, XV, introduction.

3 E.R. Yescombe-Public Private Partnership, p. 33.

4 E.R. Yescombe-Public Private Partnership, p. 39.

some of the fields, such as transport, education and health care and this fact was soon followed by carrying out several transport projects.

The example of France showing the development of the partnership between public and private sectors is very interesting. In this country the use of the capital of private sector began in the 17th century and the irrigation channels were built with this amount of money. It may be said that France has the long history of this field of partnership.[5] In the 19th and the first half of the 20th century there was established the public-private sector partnership in regularization of water tubes and sewerage system. But organizing the typical PPP projects has actively started since 2002 and it mainly refers to prisons and health care. Since then 1.4 billion Euro has been allocated for prisons and 1.3 billion Euro – for hospitals.

Spain is the country having the experience of more than a year in the partnership between public and private sectors. In this country the public and private sector partnership has been formed since the 19th century when the construction of bridges and railway stations started with the help of the private investments. For example, in Spain the motorway program was launched by the private sector in 1967 and by 1976 it had been extended over about 1500 km distance.[6]

In Central and Eastern European countries the application of PPP mechanism first started in the 90s, although in most countries of the region it is still in the initial stage. Hungary is the only country of the region where the mechanism of PPP is used most actively, which is partially caused by the budget deficit existing in the country. The PPP programs in the country comprise: the projects on students' hostels, sports fecilities, road and railway, prisons, waists, sewerage and urban development.[7]

In Baltic countries several projects in the field of Partnership are still at the stage of realization, although the project on the bridge in the South-

5 E.R. Yescombe-Public Private Partnership, p. 43.

6 E.R. Yescombe-Public Private Partnership, p. 47.

7 www.bankwatch.org/publication/ppp in Central and Eastern Europe.

ern part of Riga caused the serious concerns because of the constantly increasing expenditure.

In Bulgaria the current PPP projects include mainly the transport infrastructural sectors.

In Croatia PPP is applied to the road projects as well as to the project of wastewater treatment plant in Zagrebi.

In Czech Republic some of the projects, especially the road projects, are at the stage of the development.

In Poland the construction of the motorway section and the first motorway of Dansk- Torun were implemented using PPP contract

In Romania the project on water supply and the waistwater treatment plant in Bucharest is under PPP concession

In Slovakia the motorway project was implemented as a pilot project of PPP. The Government was criticized as the obligation of the State expertise assessment on several motorway sections, where the use of PPP had been planned, was removed.

European Bank for Reconstruction and Development has been involved in the transport projects since 1993, and since 1996 it has started financing the municipal and environmental – infrastructural projects.

Before 2002 the investment portal for PPP of the European Investment Bank had consisted of the transport projects, however, in recent years the share of PPP projects in the fields of health care and education has significantly increased. The most part of the PPP projects having been financed by European Investment Bank was implemented within the framework of European Union.[8]

[8] Cambell Thompson, Judith Goodwin, Evaluation of PPP Projects financed by the Eib. p. 15.

European Investment Bank declares that in contrast to European Bank for Reconstruction and Development and the World Bank it takes the neutral position referring to using the PPP mechanism.[9]

2 PPP IN THE UNITED STATES OF AMERICA

In general, the private sector has always played the significant role in the United States of America in comparison with other countries. For example, a number of social activities had been developed by the private sector which became especially apparent and effective in the 20th century. Within the scopes of PPP the great part of activities is occupied by water and recycling of water. In addition, since 1980 in America the penitentiary institutions, where the private sector has played the active role, have efficiently been working. Also within the scopes of PPP it is popular to work on the transport projects, it also may be said that in the scope of PPP the greatest experience has been accumulated in the transport projects. As yet since the 19th century the road constructions had been actively made by the private sector participating in it. The partnerships between the public and private sectors were obvious in the first part of the 20th century, when the bridges and road constructions were jointly performed and financed, but the subsidiary system has radically changed since 1950, when there was established the system of inter-state federal financing. The federal financing provides on average 80 % of cost, but the project is conducted by one particular state.[10]

As it was mentioned above the PPP has the great history in the States and it refers mainly to roads, water and penitentiary institutions, although the public and private sectors actively collaborate with each other in other fields as well.

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[9] Cambell Thompson, Judith Goodwin, Evaluation of PPP Projects financed by the Eib. p. 15.

[10] Yescombe E.R.: Public Private Partnership, p. 39.

For example: Type of project No. of PPP projects that reached financial closure 1986–2012 Building 161 Water and waste water 105 Waste water 104 Toll road 95 Motorway 69 Rail 45 Airport 32 Water 23 Toll bridge 22 Parking 14 Seaport 13 Miscellaneous 6 Toll Tunnel 5.[11]

It is true that in the States PPP projects are not so few but against the background of the expenses being spent on the infrastructural projects in the country, the PPP volume is quite low, for example, in 2007-2013 within the scopes of collaboration of PPP there were expended more than 22 billion dollars, however, it is only 2 % of the investments that was actually expended on the road and transport projects exactly in that period.

Through the PPP contracts the government allows the private sector to make investments, use its own capital, management, and technical expertise as well in a particular project. Within the scopes of the typical American PPP projects, the private sector makes total or partial financing, which is also impacted by the volume of risks and liability which is connected with initiating of the mentioned project.

As it is known, in 2008-2009 the United States experienced the significant economic downturn. Exactly since that period of time all the units of the government of the USA: federal, state and local, have paid great attention to and emphasized the fact that there should be transferred as many investments to the infrastructural projects as possible.[12]

One of the most important mechanism of PPP, which will be even more actively continued in the future, was the result of the effort made by President Obama's administration in 2014 and its essence is to focus on as much more investments in the infrastructural projects as possible. This initiative was the effort made by the government to increase the infrastructural investments and establish the complete collaboration among the representatives of the state and local governments and business sector so as to create much broader and richer market for the PPP contracts.

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[11] Robert H. E. Jr.: The Public-Private Partnership Law Review, p. 171.

[12] Robert H. E. Jr.: The Public-Private Partnership Law Review, p. 175.

3 THE LEGAL NATURE AND ESSENTIAL TERMS OF PUBLIC-PRIVATE PARTNERSHIP CONTRACT

Nowadays Public- private partnership is heard quite frequently and we more and more often witness the representatives of the private sector trying to collaborate with the public sector and be involved in the activities which are usually administered by the government.[13] The idea of creating, developing and increasing the number of PPP projects has been caused by the fact that the desire and interest of the private sector to execute more projects are obvious and if making observations, in many cases the certain services are being performed more qualitatively and effectively by the private sector than it would have been implemented by the public sector, i.e. in case of the governmental management.

According to the current situation, in order to apply the capital of the private sector in the useful for the government activities and to make the necessary investments, PPP is the most appropriate and convenient formula.

The international experience has revealed that the compulsory condition for the development of the efficient market economy is the active interaction between the governmental authorities and business.

When realizing the essence of the Public – private partnership there has been outlined several approaches. Within the scopes of the economic approach the Public- private partnership is compared with the indirect privatization.[14] The subject matter concerns the distribution of the authorities between the government and business in those strategic fields, the privatization of which is impossible because of the various reasons (so-

[13] Tiganescu A.M.: Legal aspects of the contract of public-private partnership, p. 519.

[14] Georgian Young Lawyers Association. Public Private Partnership, p. 18.

cial field, transport, the improvements of the populated areas, the objects of the cultural inheritance and etc.), but for the development of which the government does not have any financial resources. It's also worth noting, that one of the important conditions for the effectiveness of the Public – private partnership is to retain the significant doze of the economic activeness and some of the authorities over the property by the government. Otherwise, the realization of Public-private partnership may lead to the total or partial privatization of the objects of partnership by business.

This kind of understanding of the partnership between the government and business has been based on the experience of the countries having created the advanced economy, where the private companies executing the joint projects along with the government have been delegated the wide authorities: ownership, exploitation, financing and etc.

Public – private partnership is also defined as the type of full replacement of privatization programs, which allows, on the one hand, to be realized the potential of the private enterprise initiative, and on the other hand – to be retained the controlling functions of the government over the socially significant sectors of the economy.[15] The government doesn't lose the right to ownership; at the same time it attracts the business resources to solve the wide circle of problems. It's worth noting, that the participation of business in the implementation of the projects requires the legal substantiation of the partnership as the particular type of the relationship between the state and business. This in turn causes the significant institutional changes inside the system of "State-business" relationships, which allows enhancing the participation of entrepreneurs in performing the economic, organizational, managerial and other functions. At the same time it is important to make the legally exact assessment of the role of the government not only as of the main regulator but as the defender and representative of the social interests and requirements as well, this is exactly what is meant in the form of the public law, public interest, public service, public-legal property relationships and public- legal properties in the European legal traditions.

[15] CruZ, C. O. / Marques, R. C. (2013): Infrastructure Public. Private Partnerships, p. 89.

According to the second approach, which concerns the state policy and management, the Public-private partnership is on the border of the relationships between the government and business, at the same time it is neither the institution of the privatization nor of the nationalization, but it is the form of optimizing the fulfillment of the existing obligations towards the society by the state. And these obligations are to provide the population regularly with the public welfare.

There also exists the wide understanding of the state – private collaboration, as the constructive relations between the government and business not only in the economics but in politics, culture, science and so on. In this case the Public- private partnership is realized to be a kind of form of the partnership between the government and the entrepreneurial body. At the same time, devolving the authorities by the government and managerial bodies is not limited only to the rights to ownership: it should also include delegating some of the functions of decision -making at the time of developing the expertise, consultations, normative- legal acts and targeted programs jointly.[16]

4 THE EXPERIENCE OF GEORGIA IN THE PUBLIC-PRIVATE PARTNERSHIP

Georgia is not as experienced in the field of PPP as the United States and some of the European countries. Despite acknowledging it as the specific form of regulating the entrepreneurial activities of PPP in the foreign countries, these forms of partnership are being introduced at an extremely slow pace in the practice of Georgia. This is conditioned by the failure to resolve a number of methodological issues about switching the government and business to the partnership relations, by the absence of the proper experience in PPP, by the bureaucratic obstacles; The fact,

[16] Georgian Young Lawyers Association. Public Private Partnership, p. 20.

that in Georgia the legislative and normative basis hasn't been developed at any levels, conditions the actuality of the problems existing at the modern stage. At this stage, establishing the management system of the parties of the public-private partnership in Georgia is in the process of formation. Considering the experience of the developed countries the legislative- normative basis is improving, the modern management bodies of the public- private partnership are creating and there are being developed the investment projects, the realization of which is possible in the process of the partnership between the government and private business.

The major problems in Georgian PPP are considered to be the imperfect legislative basis for the public-private partnership and the absence of the qualified staff. However, there are certain projects, which fit into the PPP framework and functions successfully as well, the example of which is the realization of the project of Tbilisi international airport, in implementation of which the authorities of central and local governments have actively participated. It is considered to be the best project of the public-private partnership. The owner of the international airport of Tbilisi is LTD "TAV Urban Georgia". Its management has been devolved to LTD TAV Urban Georgia since October 31, 2005. Turkish transport TAV group started the reconstruction of Tbilisi international airport and the constructions of the new terminal and landing strip in February, 2007. TAV Airports is one of the leading Turkish companies in the business of operating the airports in the world.[17]

The "Partnership foundation" itself can be considered to be a shining example of the public- private partnership, because in consequence of their activities the collaboration of the state and private sector is obvious.

The stock-company "Partnership Foundation" is the state investment foundation that was established in 2011. The foundation granted the rating of the international rating agency Fitch – "BB", which is equal to the credit rating of Georgia. The "Partnership Foundation" was established on the basis of the consolidation of the large state enterprises existing in the field of transport, energetics and infrastructure. The main purpose of

[17] Georgian Young Laywers Association. Public Private Partnership, p. 23.

the foundation in Georgia is encouraging the development of the investment projects at the initial stage through the co-participation (co-investing in the capital, subordinated loans and so on).

The activity of the "Partnership Foundation" is implemented in two main directions:

1. The management of assets- the portfolio of the assets of the foundation consists of the following companies of strategic importance:
   - Georgian railway – 100 % share
   - Georgian oil and gas corporation – 100 %
   - Georgian state electricity system – 100 %
   - The commercial operator of the electricity system – 100 %
   - Stock-company Telasi – 24.5 %
2. Investment activity – at present in the portfolio of the foundation there are several projects referring to the different sectors of economy, the total value of which exceeds 1 billion dollars. The foundation is authorized to invest only in Georgia and its strategy is focused on attracting and supporting the private investors. It is important for the foundation to support the commercially profitable projects in the priority sectors of the economics of Georgia, which are distinguished by the great potential of the development, among them in the following sectors: energetics, agribusiness, production, real estate and tourism, infrastructure and logistics.[18]

The perspectives of development of public and private sector partnership

As it was already mentioned, the member countries of the European Union have gained much longer experience in the partnership of public and private sectors than Georgia; According to the Association Agreement there have been stipulated a number of important terms, the purpose of which is the improvement of such partnership and its further enhancement. One of such kind of conditions is the willingness of Euro-

[18] http://fund.ge/geo/projects.

pean Union to contribute to the implementation of economic reforms in Georgia, among them within "European Neighboring Policy" and "Eastern Partnership"; Moreover, the European Union has also taken the commitments towards Georgia which are focused on achieving the economic integration through creating the especially deep and comprehensive free trade area (DCFTA), as the indispensable part of the foregoing agreement, including the regulative approximation and according to the rights and duties of the member parties of World Trade Organization (WTD). In Georgia the significant term of the mentioned agreement, such as achieving the gradual economic integration of Georgia with the inner market of European Union, can be implemented only by developing the partnership between public and private sectors, through establishing particularly deep and comprehensive free trade area, which will provide Georgia with the sufficient admission to market on the basis of stable and comprehensive regulative approximation and protecting the rights and duties of membership of World Trade Organization.[19]

The governments on a world scale try to attract the investors because the foreign investments obviously have a positive impact on the joint inner product, workplaces, taxes and the various aspects of economics. The major infrastructural projects require a great number of investments, which open the ideal possibility for attracting the foreign investments in case the corporate managerial, tax and other issues, are acceptable.[20]

Some of the countries put priority on providing the convenient investment climate, and other countries set various kinds of stimulating conditions so as to attract the foreign direct investments.

Some of the projects are appropriate to be implemented in those economic zones which have been created exactly for attracting the foreign investments.

The encouragement of the foreign investments for having invested the public-private projects is the highly effective means to attract the potential investors in the country.

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[19] European Union – Georgia Association Agreement.

[20] www.bankwatch.org/publication/ppp in Central and Eastern Europe.

Any country is interested in gaining access to both the capital and loan at the international markets. Taking into consideration the complicated and large-scale financial structure, the projects of Public- private partnership create the ideal possibility to use the mentioned markets in the appropriate conditions.

The targeted use of the international financing makes it easier for the country to get access to the resources existing at the international financial markets in the increased duration and at a low interest rate, although this, first of all, depends on the individual project.

The use of Public –private partnership for the access to the international financial markets enhances the profile of the country on the mentioned markets, helps the country to gain the independence and provides getting the long-term loan at a low interest rate.

In most countries there exists the department of Public-private partnership, which exercises the supervision over the projects. However, the functions and location of these departments significantly differ. And the mentioned above is the critical factor determining the final success of the projects of the Public-private partnership.

The necessity of the specific department is conditioned by the factor that the corresponding skills and practices belong to the private and not the public sector. In order to execute the project of the Public-private partnership the government needs to have developed the appropriate skills so that the way of drawing up the project and distributing the risks is appealing for the private sector. It is also necessary for the government to have gained the experience of the contract management so as to supervise over the various aspects of the project. The analysis of the international practice having been performed by the “World Bank” revealed that the types of provided services may significantly differ from each other and include everything – from the basic to almost total functions.

Almost in all the countries the departments of the Public-private partnership offer other governmental agencies the consultations and information that may include the standard contracts or the detailed procedures for

revealing, assessing and purchasing the projects of the Public-private partnership. Accordingly, in respect of assessing the project opportunities and regulating rules of analysis, the projects of the Public-private partnership are similar to the projects of purchases, as the same regulative rules of purchases are applied to them. For example, in Canada the department of the Public-private partnership promotes the popularity of the mentioned practice, as the countries, for which the Public-private partnership is unknown, object to this kind of approach. However, as soon as they are better informed about PPP, their attitude radically changes.

As it is well known, on 27 June, 2014 Georgia signed the EU-Georgia association agreement, under which in the nearest perspective the legislative basis of Georgia shall be harmonized with the legislation of European Union. Thus, when forming the new legislative basis of the public- private partnership, the experience of the developed countries of European Union in this field must be necessarily taken into consideration. In this respect, the Spanish experience is quite acceptable for Georgia. In Spain there operates the law "About state contracts" which was adopted in 2007 and has been in force since January 1, 2008. The mentioned law has already been harmonized with the legislation of the European Union and it provides for the existence of two forms of the public-private partnership- "institutional" (establishing the enterprises with the mixed capital to perform the work necessary for the society) and "contract" (the contracts in the field of the work performance, concessions, supply, management of the public services, providing the service).[21]

Such kind of partnership should be based on the transparent, nondiscriminatory and proportional, coordinative rules applied by the governmental agencies and protecting the principles of good faith in relationships with public sector by the private sector.

For the purpose of improving the legal regulation of public and private partnership the great interest is taken in the 113th article of the mentioned agreement, which stipulates the necessity of gradual approximation of

[21] European Union – Georgia Association Agreement.

the applicable and future legislation of Georgia to the corresponding legislation of European Union for the further liberalization of service trade.[22]

According to Spanish legislation the main form of the public-private partnership is concession, in addition, the Spanish legislation is appealing in respect of regulating PPP in the autonomous formations. In the autonomous parties the PPP is regulated by the Royal Decree, and in the municipalities it is regulated by the local normative acts, which are applied to conclude the contract with the representative of the private business.[23]

In view of the above mentioned, the appropriate changes should be made in the Georgian legislation, in particular, in the Civil Code. In PPP the forms of the contract relationships between the state and private business must be improved and regulated at the Civil Code level.

Despite some of the not so large-scale projects, the majority of the Ministries haven't implemented the projects within the framework of the public-private partnership, and the activities performed by a part of them don't correspond to the notion and forms of the public-private partnership.

Most of the departments understand the public- private partnership in its direct sense and they identify it with any kind of relationship between the administrative body and the private sector despite its contents.

At the same time, if the expediency of implementing the various projects within the framework of the public-private partnership becomes the actual issue of the agenda, it will be necessary from the government to develop the appropriate legislative framework and determine the body which will be competent to discuss and then develop the issues concerning the implementation of the similar projects. In addition, in case of the introduction of the public-private partnership, as an institution, in Georgia it is important to consider the already existing international experience comprising the advantages and the drawback as well of the institution.

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22 European Union – Georgia Association Agreement.

23 CRUZ, C. O. / MARQUES, R. C. (2013): Infrastructure Public. Private Partnerships, p. 8.

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3 PIERCING OF THE CORPORATE VEIL ON THE BASIS OF GEORGIAN, GERMAN AND THE U.S. LEGAL DOCTRINE

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TABLE OF CONTENTS

1 INTRODUCTON

On the basis of the limited liability principle, shareholders in most cases are immune from the liability of the corporation, this principle makes so-called corporate veil, which separates shareholders and corporation from each other.[1]

Limited liability principle can be disregarded with help of the corporate veil piercing doctrine.[2] This doctrine is the special legal remedy which allows courts to strip shareholders from the corporate veil and personally hold them liable for the corporation's debts. The corporate veil can be pierced, when the limited liability of the corporation is used abusively, e.g. when shareholders commit knavery, fraud and other illegal actions behind the corporate veil.

The issues of piercing of the corporate veil in Georgia is arranged by the 'Law of Georgia on Entrepreneurs', this statute contains 3.6 article, which stated that shareholders shall be personally liable to creditors of the corporation if they abuse the legal forms of limitation of liability.[3]

In spite of this statutory regulation, the corporate veil piercing doctrine is not fully studied and developed in Georgia; court cases regarding this subject are extremely rare as well. There are no clear opinions, what kind of preconditions must be existed to pierce the corporate veil under Georgian law.

In this article, on the basis of the U.S. and German approaches, will be defined concept and grounds of the corporate veil piercing doctrine. Moreover, in connection to this issue some practical and theoretical recommendations will also be made, e.g. on how the corporate veil piercing

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1 Ustiashvili G., The Impact of the Doctrine Piercing Corporate Veil on the Georgian Corporate Law, I Project Study Paper (PSP), Conducted Under the School of International Business and Entrepreneurship of the Stenbeis University Berlin, 2015, 1.

2 Dictionary of Legal Terms, Fourth Edition, New York, 2008, 380.

3 'Law of Georgia on Entrepreneurs', 1994, #21-22. (13.06.1996). Available at: <https://goo.gl/llnpuj>[visited 20.08.2017].

doctrine can be used in court practice of Georgia and on how approach regarding this matter should be improved.

2 CONCEPT OF THE CORPORATE VEIL PIERCING

The corporate veil piercing is a legal remedy which allows creditors of the corporation to reach assets of its shareholders.[4] Through the corporate veil piercing an obligation of the corporation is casted over its shareholders and they become personally liable to cover the corporation's debts. Thus, piercing of the corporate veil circumvents the limited liability features of the corporation in order to satisfy the claims of creditors.[5]

The corporate veil piercing doctrine is not an ordinary and clear legal mechanism; there is no unified explanation of this doctrine.[6] Hence, the corporate veil piercing falls into the subject of legal grey area.[7] The corporate veil piercing doctrine comes into the collision with the bedrock principles of the corporate law; it contradicts with the limited liability rule and separate legal personality traits of the corporation.

Thus, when court makes a decision to pierce the corporate veil it makes an exception from the two fundamental pillars of corporate law, court disregards – limited liability rule and separate legal personality principle of the corporation; at this moment, shareholders of the corporation experience the so-called legal exposure, as they are stripped from the imaginable legal veil, separating them from the liabilities of the corporation. After

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4 Örn P., Piercing the Corporate Veil – a Law and Economics Analysis; Faculty of Law, University of Lund, Master Thesis, 2009. 23. Available at: <http://goo.gl/7OPVPa> [visited 20.08.2017].

5 Ibid.

6 Injia B., Particularities of the Corporate Veil Piercing in Arbitration, Journal #1, Association of Law Firm of Georgia, Tbilisi, 2015,93. Available at: <http://goo.gl/x32uWX> [visited 20.08.2017].

7 Örn P., Piercing the Corporate Veil – a Law and Economics Analysis; Faculty of Law, University of Lund, Master Thesis, 2009. 23.

piercing the corporate veil, the limited liability rule of the corporate law is canceled and creditors of the corporation receive an opportunity to satisfy their demands through the personal property of the shareholders.[8]

The corporate veil piercing is performed by the court, in some cases by the arbitration too.[9] The corporate veil piercing doctrine mostly has punishment nature; however, in some situations there are exceptions, and the corporate veil piercing legal mechanism does not have punitive features, in such cases, the parent corporation can pierce its subsidiary's corporate veil in order to reach its assets or get insurance or other types of compensations.[10]

Claims of the corporate creditors may be based on the contractual or non-contractual grounds; in the piercing claims, creditors of the corporation are divided by the contractual and tort creditors. In regard to this issue, some countries have an inclination to pierce the corporate veil concerning the contractual disputes; while, others give preference to tort creditors and have a tendency to pierce the corporate veil more frequently in the tort claims.

The corporate veil piercing can be divided into several types, direct corporate veil piercing; triangular corporate veil piercing; reverse corporate veil piercing; horizontal and vertical corporate veil piercing and so on. This classification is mainly made in the countries of common law, especially in the U.S. In addition, in civil law countries, the corporate veil piercing can also be divided into general piercing and bankruptcy piercing, etc.[11]

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8 Migriauli R., Legal Aspects of the Bankruptcy of the LLC (Comparison Analysis with the German Insolvency Law), Submitted for PhD Degree, TSU, Tbilisi, 2004, 24. Available at: <http://goo.gl/Xi6p0z> [visited 20.08.2017].

9 See R. Kryvoi y., Piercing the Corporate Veil in International Arbitration Available at: <http://goo.gl/UjNLmo> [visited 20.08.2017].

10 Navarro J., The piercing of the corporate veil in Latin American jurisprudence, with specific emphasis on Panama, Unpublished Doctoral thesis, City University London, 2013,28. Available at: <http://goo.gl/NEhwvlf> [visited 20.08.2017].

11 Vandekerckhove K., Piercing the Corporate Veil, European Company Law, Kluwer Law International, Volume 4, Issue 5, 2007,191.

The corporate veil piercing doctrine generally is used regarding for-profit limited liability corporations. However, in the legal practice there is a some exception, when the corporate veil piercing doctrine may be applied against non-profit organizations too.[12]

3 THE CORPORATE VEIL PIERCING DOCTRINE IN THE U.S.

3.1 GENERAL OVERVIEW

The United States can be considered the place where the corporate veil piercing doctrine is created;[13] the corporate veil piercing doctrine has a long standing history in the U.S., this doctrine can be traced to as far back as 1839,[14] one of the first corporate veil piercings was on March 15, 1809 in the case ***Bank of U.S. v. Deveaux***.[15] Since this time, courts of the U.S. enjoy broad discretionary latitude for application of the above-mentioned doctrine.[16]

In spite of the facts that the corporate veil piercing is the most litigated issues in the U.S.[17] it still remains the least understood area of the corpo-

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[12] See Caudill Matthew D., Piercing the Corporate Veil of a New York Not-For-Profit Corporation, Fordham Journal of Corporate & Financial Law, Volume 8, Issue 2, Article 4. 2003. Available at: <http://goo.gl/g35qXy> [visited 20.08.2017].

[13] Vandekerckhove K., Univesiteit Leuven, Rechitsfaculteit, Piercing the Corporate Veil a Transnational Approach,59.

[14] Figueroa D., Comparative Aspects of Piercing the Corporate Veil in the United States and Latin America (September 18, 2012), 687. Available at :< http://goo.gl/paOlt5> [visited 20.08.2017].

[15] Ibid at 710.

[16] Ibid at 687.

[17] Vandekerckhove K., Piercing the Corporate Veil, European Company Law, Kluwer Law International, Volume 4, Issue 5, 2007,191.

rate law of this country.[18] In accordance with the U.S. corporate law general principle, a corporation is recognized as an independent legal entity, separate from its shareholders, officers and directors;[19] thus, obligation of the corporation remains liability of the entity and not its shareholders.[20] Hence, the legal doctrine of the corporate veil piercing means a judicial exception to this general principle; in such cases court disregards the corporate personality and holds shareholders responsible for the corporation's actions as it were the shareholders' own.[21]

3.2 ELEMENTS OF THE CORPORATE VEIL PIERCING

3.2.1 GENERAL PRINCIPLES

In accordance with the U.S. legal doctrine to pierce the corporate veil, there must be a unity of necessary legal and factual circumstances. For these reasons, a plaintiff who initiated the piercing claims goes through several reasoning stages.

To initiate the piercing process, there must be proven that shareholders have excessive control over the corporation, and due to such control the legal separateness between shareholders and the corporation shall not be existed any more.

In order to perform piercing, there also must be the particular grounds (preconditions) for the corporate veil piercing, e.g. undercapitalization of the corporation; disregarding corporate formalities; overlapping of the corporate managements; milking of the corporations, disregard of corporate formalities; and so on.

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18 Thompson, R B., Piercing the Corporate Veil: An Empirical Study, 76 Cornell L. Rev. 1036 (1991), 1036. Available at: <http://goo.gl/vo0Rov> [visited 20.08.2017].

19 Ibid.

20 Ibid.

21 Ibid.

In addition, there also shall be relevant evidences that the corporation was used abusively by the shareholders, i.e. it was used as a tool, a legal partition and behind of this legal veil shareholders committed crimes, frauds, cheated corporation's creditors and made other illegal actions.

3.2.2 GROUNDS OF THE CORPORATE VEIL PIERCING

One of the important elements in the corporate veil piercing is the piercing grounds, i.e. preconditions of the corporate veil piercing. The corporate veil piercing grounds mean particular negative situations of the corporation. In the corporate law doctrine and court practice of the U.S. there is no unified list of veil piercing grounds and these ones vary from state to state.

The mostly widespread grounds for the corporate veil piercing are: (1) undercapitalization of the corporation; (2) disregarding of the corporate formalities; (3) commingling of partner's and corporation property; (4) overlapping the management of the corporation; (5) milking of the corporation; (6) 'placing funds in and taking them out from the corporation, for personal rather than corporate purposes';[22] (7) 'common office space for the corporation and the individual owners';[23] (8) 'common address, telephone and fax numbers, and internet site for the corporation and the individual owners';[24] (9) 'restriction on the business discretion displayed by the allegedly dominated (subsidiary) corporation';[25] (10) 'the related entity (e.g. partner and subsidiary corporations, the individual owner and his/her corporation) do not deal with each other at arm's length';[26] (11) 'the related entity are not treated as independent profit centers';[27] (12) 'payment or the guarantee of a dominated corporation's debts by the

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22 Emerson R.W. J.D., Business Law, p. 343–345.

23 Ibid.

24 Ibid.

25 Ibid.

26 Ibid.

27 Ibid.

other person';[28] (13) 'the dominated corporation has property that the other person used as if it were his/her own property'.[29]

4 SUPPORTIVE THEORIES FOR THE CORPORATE VEIL PIERCING

4.1 GENERAL OVERVIEW

In order to pierce the corporate veil the existence of only piercing grounds are not enough, to justify piercing claims; there must be facts of abusive usage of the corporation by the shareholders and the fact that as a result of this misuse, shareholders committed crime, fraud, cheated corporate creditors and committed other wrongful actions. Thus, in the piercing trails the corporate creditors shall be represented relevant evidences and proved facts of causation between the committed wrong and experienced damages.

4.2 TESTS FOR THE CORPORATE VEIL PIERCING

To prove the above-mentioned circumstances and facts of fraudulent behaviors of shareholders, plaintiffs and courts use special supportive theories, the so-called piercing tests. With the help of these tests, court can determine whether the corporation was used abusively and the illegal/wrong actions had taken place against the corporate creditors or not.

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[28] Ibid.

[29] Ibid.

4.2.1 ALTER EGO TEST

The Alter Ego theory firstly was mentioned in 1898 by Justice Taft in the case of ***Harris v. Youngstown Bridge Co***.[30] The mentioned legal metaphor means unacceptable close relationship between a parent and subsidiary corporations, resulting in disregarding subsidiary's independent corporate identity.[31] In Alter Ego relationships, shareholders have an excessive influence and control over the corporation and the legal boundaries, between shareholder and corporation, which proceeds from the doctrine of a separate legal personality, is actually demolished. Mostly, such test is used towards parent-subsidiary corporations, but this test can also be employed regarding the entity which has one or two partners.[32]

The facts, which confirms the existence of Alter Ego conditions between shareholders and the corporations, are undercapitalization of the corporation, disregarding the corporate formalities, commingling of partners' and corporate property, large withdrawals corporation assets,[33] etc. The Alter Ego theory is closely intertwined with the instrumentality theory and as usually leads to the same results.[34]

4.2.2 EQUITY TEST

The Equity Test has been created trough the court practice, courts have considered Alter Ego and Instrumentality test insufficient and created its

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30 Örn P., Piercing the Corporate Veil – a Law and Economics Analysis; Faculty of Law, University of Lund, Master Thesis, 2009. 27.

31 Blumberg, (1993a),81-82. Cited: Örn P., Piercing the Corporate Veil – a Law and Economics Analysis; Faculty of Law, University of Lund, Master Thesis, 2009. 27.

32 Rudorfer M., Piercing the Corporate Veil, A sound Concept. New York: New York University. 2006. At page 3. Cited: Navaro J., The piercing of the corporate veil in Latin American jurisprudence, with specific emphasis on Panama, Unpublished Doctoral thesis, City University London, 2013, 82.

33 Rudorfer M., Piercing the Corporate Veil, A sound Concept. New York: New York University, 2006. At page 3. Cited: Navaro J., The piercing of the corporate veil in Latin American jurisprudence, with specific emphasis on Panama, Unpublished Doctoral thesis, City University London, 2013, 83.

34 Vandekerckhove K., Univesiteit Leuven, Rechitsfaculteit, Piercing the Corporate Veil a Transnational Approach, 65.

own Equity test.[35] Equity test implies the existence of the following circumstances: (a) undercapitalization of the corporation,[36] (b) disregarding the corporate formalities,[37] (c) nonpayment and/or excessive payment of dividends,[38] (d) siphoning off of founds/assets by the majority shareholder; (e) guarantee of corporate liabilities by the dominant shareholders.[39]

4.2.3 PUBLIC POLICY TEST

Courts use the Public Policy test to confirm violation of public policy by the shareholders of the corporation.[40] Courts pierce the corporate veil, when shareholders utilize corporation to violate a statute, perpetuate fraudulent acts or violate a public policy.[41] In addition, 'the violation of public policy may consider the case of discharging unwanted obligations by creating new business entities with the same controlling shareholders while hindering the ability of the previous entity to pay off its debts'.[42]

Public policy is also violated, when shareholders of the corporation try to avoid labor, ecological and anti-trust regulations with the help of different illegal manipulations.[43]

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35 Caudill Matthew D., Piercing the Corporate Veil of a New York Not-For-Profit Corporation, Fordham Journal of Corporate & Financial Law, Volume 8, Issue 2, Article 4. 2003,466.

36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.

40 Ibid.

41 Ibid.

42 Cohen M. S., Grounds for Disregarding the Corporate Entity and Piercing the Corporate Veil, in 45 AMERICAN JURISPRUDENCE PROOF OF FACTS 3d § 1 (1998). Cited: Caudill Matthew D., Piercing the Corporate Veil of a New York Not-For-Profit Corporation, Fordham Journal of Corporate & Financial Law, Volume 8, Issue 2, article 4. 2003,466.

43 Caudill Matthew D., Piercing the Corporate Veil of a New York Not-For-Profit Corporation, Fordham Journal of Corporate & Financial Law, Volume 8, Issue 2, article 4. 2003, 466.

4.2.4 AGENCY TEST

Agency theory can be used with regard to parent-subsidiary corporations. The concept of Agency has been considered as an alternative means for imposition of liability upon a parent corporation for the acts of its subsidiary.[44] According to Agency theory, a subsidiary corporation is considered a representative-agent of a parent corporation, thus all proceeding from legal relations is addressed by the parent corporation. Agency theory is frequently criticized by the American scholars and as a rule it is rarely used in the practice. Thus, the issue of liability in case of parent-subsidiary corporations is defined with the help of Alter Ego and Instrumentality Tests.[45]

4.2.5 SINGLE ECONOMIC UNITY TEST (ENTERPRISE LIABILITY)

The Enterprise liability means a situation when different corporations are considered as a one business unity. In such a situation they have jointly and severally liability to each other's obligations. Accordingly, liability of the one corporation can be enforced against to other group member entities.[46] Thus, the Single Economic Unity test deals with the corporate personality issues in context of the corporate groups.[47] So, under this approach, a parent or controlling corporation may hold liable for its subsidiaries or affiliated corporations.

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[44] Blumberg Ph., Accountability of Multinational Corporations: the Barriers Presented by Concepts of Corporate Juridical Entity. Hastings Internationa and Comparative Law Review. (Issue 24). 2001, 307. Cited: Navaro J., The piercing of the corporate veil in Latin American jurisprudence, with specific emphasis on Panama, Unpublished Doctoral thesis, City University London, 2013, 90.

[45] Henn H., Laws of Corporations and Other Business Enterprises. 3 rd Edition. U.S.A: Student Edition. West Pub. Co.;1983. At page 258. Cited: Navaro J., The piercing of the corporate veil in Latin American jurisprudence, with specific emphasis on Panama, Unpublished Doctoral thesis, City University London, 2013, 91.

[46] Vandekerckhove K., Univesiteit Leuven, Rechitsfaculteit, Piercing the Corporate Veil a Transnational Approach, 66.

[47] Navaro J., The piercing of the corporate veil in Latin American jurisprudence, with specific emphasis on Panama, Unpublished Doctoral thesis, City University London, 2013, 91.

In practice, affiliated corporate groups may have different forms of corporate interrelations, e.g. affiliated corporations may have parent-subsidiary structure or common economic grounds. Sometimes, corporations are organized by the more complicated system e.g. in multi-tiered form.[48] The relation between the corporations' group members may be divided into horizontal and vertical forms.[49] In case of interrelation organized by a horizontal form, there is no parent or controlling corporation;[50] Each corporation is connected with others with small cross-shareholding entity.[51] In a corporate group, decisions are made by the meeting of directorate.[52] In case of vertical interrelations between the corporations, the relation is built on the corporate control;[53] interrelation between the corporations is organized on the basis of parent-subsidiary relations.[54]

In order to confirm the single economic unity relationship of the affiliated corporations, there is a need to be the fact of affiliation of the several corporations and such affiliated relation can be based on vertical or horizontal relationships. These corporations and their shareholders shall have common economic grounds and business interests. In addition, affiliated corporations may have the same or interconnected managers, members of supervisory board, directors and so on.

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48 Avgitidis D. K., Groups of Companies, The Liability of the Parent Company for the Debts of its Subsidiary, Athens – Komotini, 1996, 73 – 77. Cited: Yazicia H., Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law Set a Precedent? Law & Justice Review, Year: 5, Issue: 9, December, 2014,134.

49 Ibid.

50 Yazicia H., Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law Set a Precedent? Law & Justice Review, Year: 5, Issue: 9, December, 2014,134.

51 Ibid.

52 J. Dine and M. Koutsias, Company Law, Palgrave Macmillan, 7th edition, 2009, 40. Cited: Yazicia H., Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law Set a Precedent? Law & Justice Review, Year: 5, Issue: 9, December, 2014,134.

53 Yazicia H., Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law Set a Precedent? Law & Justice Review, Year: 5, Issue: 9, December, 2014,134.

54 Andenas M., and Wooldridge F., European Comparative Company Law. 1st ed. Cambridge: Cambridge University Press, 2009. Cambridge Books Online. Web. 05 August 2014. http://dx.doi.org /10.1017/CBO9780511770494,448. Cited: Yazicia H., Lifting the Corporate Veil in Group of Companies: Would the Single Economic Unit Doctrine of EU Competition Law Set a Precedent? Law & Justice Review, Year: 5, Issue: 9, December, 2014, 134.

5 TYPES OF THE CORPORATE VEIL PIERCING CREDITORS

Creditors who initiated corporate veil piercing claims can be divided into contractual and tort creditors.[55] Contractual creditors are persons who have various contractual relationships with corporations and grounds of the corporate veil piercing are derived from the breach of the contracts; while, tort creditors are persons who do not have a contractual relationship with the corporation but their claims against corporation derived from the tort acts. Sometimes courts make a distinction between experienced and inexperienced contractual creditors.[56] People who have little barging powers, such as employees, workers and small-scale entrepreneurs can be treated as involuntary i.e. tort creditors.[57]

In piercing disputes, there no unified court's practice regarding voluntary and involuntary corporate creditors, sometimes courts give preference to involuntary creditors but sometimes courts prefer voluntary creditors.

6 TYPES OF THE CORPORATE VEIL PIERCING

The corporate veil piercing legal mechanism can be divided into several forms. In general, the corporate veil piercing is initiated by the corporate creditors and such piercings have a punishment characteristic, punitive piercings are: direct corporate veil piercing; horizontal corporate veil piercing; vertical corporate veil piercing; triangle corporate veil piercing and outside reverse corporate veil piercing.

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55 Alting C., Piercing the Corporate Veil in American and German Law – Liability of Individuals and Entities: A Comparative View, 2 Tulsa J. Comp. & Int' l L. 187 (1994), 204.

56 Ibid at 205.

57 Ibid at 205.

However, there also are some forms of the corporate veil piercing which do not have punitive nature. These types are: voluntary corporate veil piercing and inside reverse corporate veil piercing. Such types of piercings are initiated by the corporate shareholders itself and they do not have a character of a legal sanction. These forms of the corporate veil piercing are determined by the economic grounds and have the aim to solve particular business obstacles during the corporation's operation.

7 THE CORPORATE VEIL PIERCING DOCTRINE IN GERMANY

7.1 GENERAL OVERVIEW

The principle of a limited liability is one of the pillars of the German corporate law. Limited liability principle has derived from the general development of the European law.[58] However, this principle does not have an absolute character in German corporate law; In some cases, the limited liability principle can be disregarded and shareholders shall be personally liable for the corporation's debts.

One of the legal mechanisms to disregard limited liability principle is a concept of the ‚Durchgriffshaftung'.[59] This concept comes very close to the U.S. term of piercing the corporate veil.[60] The issue of shareholders personal liability in Germany, besides of the ‚Durchgriffshaftung' concept, is also defined by the German Stock Corporation Act (Aktiengesetz), Ger-

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58 Thummel H. (1978): Piercing the Corporate Veil"-Germany, International Business Lawyer, Vol. 6 (iii), 282.

59 Ibid at 283.

60 Ibid.

man Civil Code (BGB) German Tax Law and general principles of German law.

7.2 GROUNDS OF ‚DURCHGRIFFSHAFTUNG' CONCEPT IN GERMAN LAW

In German corporate law doctrine and court practice, the most reasonable grounds to use ‚Durchgriffshaftung' concept and pierce the corporate veil are: (a) commingling of corporate and personal assets; (b) disregarding the corporate formalities; (c) undercapitalization of corporation; (d) institutional abuse, (i) mingling of business spheres, etc.

In the German law system, these aforementioned corporate veil piercing circumstances have the same meanings as they have under the U.S. corporate law.

7.3 OTHER GROUNDS FOR THE CORPORATE VEIL PIERCING

7.3.1 VOLUNTARY PIERCING

In Germany, it is also possible to pierce the corporate veil at the request of the shareholders.[61] Personal liability of the shareholders can be caused by the shareholders' own actions, when shareholders create an impression that they will be personally liable for the obligations of the corporation by direct declaration or actual behavior.[62] In such case, shareholders by their own actions disregard the limited liability principle and they act

[61] Vandekerckhove K., Univesiteit Leuven, Rechitsfaculteit, Piercing the Corporate Veil a Transnational Approach, 52.

[62] Thummel H. (1978): "Piercing the Corporate Veil"-Germany, International Business Lawyer, Vol. 6 (iii), 285.

as the guarantors for the corporation's obligations. The most widespread form of such voluntary piercing is a letter of comfort.[63]

7.3.2 TAX LAW

In German tax law, shareholders and the corporation are considered as separate tax entities.[64] However, when shareholders' assets are not clearly separate from the corporations' assets, in such cases on the basis of the Business Point of View Doctrine (Wirtschaftliche Betrachtungsweise) aforementioned separateness, can be canceled and shareholders shall become personally liable for the corporation's obligations.[65]

7.3.3 TORT LAW

One of the legal grounds to define shareholders personal liability under the German law is §826 of German Civil Code (BGB). There were some cases in German court practice, when courts have not shown willingness to pierce the corporate veil and courts have achieved the same results by granting the separate claims creditors of the corporation against shareholders by reason of the shareholders own conducts.[66]

In such cases, courts have not pierced the corporate veil and shareholders personal liability was defined on the basis of the §826 of the German Civil code (BGB).

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63 M. LUTTER, l.c. (ZGR 1982). Cited: Vandekerckhove K., Univesiteit Leuven, Rechitsfaculteit, Piercing the Corporate Veil a Transnational Approach, 52.

64 Thummel H. (1978): "Piercing the Corporate Veil"-Germany, International Business Lawyer, Vol. 6 (iii), 286.

65 Ibid.

66 Schiessl M., The Liability of Corporations and Shareholders for the Capitalization and Obligations of Subsidiaries under German Law, 7 Nw. J. Int' l L. & Bus. 480 (1985–1986), 492. Available at:<http://goo.gl/OhlPw0> [visited 20.01.2016].

7.4 COMPANY GROUP LAW (KONZERNRECHT)

7.4.1 GENERAL OVERVIEW

The issues regarding affiliated corporations in Germany are regulated by the provisions of the German Stock Corporation Act (AktG). The AktG created legal footage of the German corporate group law. In German legal doctrine, corporate group law is called – Concern Law (Konzernrecht). The German corporate group law (Konzernrecht) was introduced in 1965.[67] The aim of this Concern Law is to protect the minority shareholders and outside creditors of the corporation.[68] The Concern Law (Konzernrecht) is applicable only to stock corporations, but also a vigorous body of developing law applies it to other corporations.[69]

Concern relations between the affiliated entities are established when, on the on hand, there is a controlling corporation and on the other hand, there is a controlled entity.[70] Control means the ownership of majority of the share.[71] However, sometimes control can be carried out without majority shares, when minority shareholders via contractual relationship have direct influence on company or they have significant representatives in the supervisory board of the company.[72]

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67 Vandekerckhove K., Univesiteit Leuven, Rechitsfaculteit, Piercing the Corporate Veil: a Transnational Approach, 36.

68 H.-G. Koppensteiner, Kolner Kommentar zum Aktiengesetz, Band 3, Koln/Berlin/Bonn/ Munchen, Carl Heymanns Verlag KG, 1971, Vorb. § 291, par. no. 5. Cited: Vandekerckhove K., Univesiteit Leuven, Rechitsfaculteit, Piercing the Corporate Veil a Transnational Approach, 36.

69 Dine J., Company Law, 5th edition, Eastbourne, 2005, 35.

70 Zubitashvili N., Standard of Appreciation of Paragraph 6 of Article 3 of Law Georgia On Entrepreneurs in Light of the Corporate Veil Piercing Doctrine, Law Journal #2, 2014, TSU, law faculty, 42.

71 Ibid.

72 Miller S., Piercing the Corporate Veil: Among Affiliated Companies in the European Community and the U.S.: a Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches, 36 Am. Bus. L.J., 1998,101. Cited: Zubitashvili N., Standard of Appreciation of Paragraph 6 of Article 3 of Law Georgia On Entrepreneurs in Light of the Corporate Veil Piercing Doctrine, Law Journal #2, 2014, TSU, law faculty, 42.

There are several types of the concern in the German Law: (a) contractual concern; (b) factual concern; (s) de facto qualified concern.

7.4.2 CONTRACTUAL CONCERN

The contractual concern (Vertragskonzern) is formed on the basis of the voluntary ground; Contracts connected with a concern are concluded between the controlling parent corporation and with controlled subsidiary corporations.[73] In a contractual concern the subsidiary corporation's management and business operations are controlled by the parent corporation. Contracts connected with the establishment of the concern relationships should be beneficial for all business groups,[74] and contractual concern should not harm the separate existence of the subsidiary corporation.[75] So, in contractual concerns the parent corporation may have control over its subsidiary if the corporate group is interested in such a control and it does not cause insolvency of subsidiary entity.[76]

The most widespread contractual relations forms are the so-called domination contracts (Beherrschungsvertrag) and profit transferring contracts.[77] On the basis of the domination contract, the parent corporation gives instructions to the controlled subsidiary corporation.[78] While, in profit transferring contracts the subsidiary corporation is obliged to give its own profit to another corporation.[79]

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73 Reich-Graefe R., Changing Paradigms: The Liability of Corporate Groups in Germany, 37 Conn. L. Rev. 785, 2005,788. available at:<http://goo.gl/Vq2W9B> [visited 20.01.2016].

74 Ibit at 789.

75 Ibid.

76 Ibid.

77 Zubitashvili N., Standard of Appreciation of Paragraph 6 of Article 3 of Law Georgia On Entrepreneurs in Light of the Corporate Veil Piercing Doctrine, Law Journal #2, 2014, TSU, law faculty, 46.

78 Ibid.

79 Miller S., Piercing the Corporate Veil Among Affiliated Companies in the European Community and the U.S.: a Comparative Analysis of U.S., German, and U.K. Veil-Piercing Approaches, 36 Am. Bus. L.J. 73,1998,101.Cited: Zubitashvili N., Standard of Appreciation of Paragraph 6 of Article 3 of Law Georgia On Entrepreneurs in Light of the Corporate Veil Piercing Doctrine, Law Journal #2, 2014, TSU, law faculty, 42.

Period of the contractual concern the controlling parent corporation has a wide range of legal obligations towards its subsidiary entities. The controlling parent corporation is obliged to create sufficient assets reserves;[80] contract about creation of affiliated relations shall be registered and it also can by publicly available.[81] In accordance with §302 AktG, the controlling parent corporation is liable to compensate annual losses and economical damages of its subsidiaries.[82] In addition, after termination of contractual relationships, this fact also needs to be registered.[83] In the event of termination contractual concern relationships, interests of the creditors are protected under the §303 AktG; In accordance with this provision, the controlling parent corporation is obliged to provide to the subsidiaries' creditors an adequate guarantee. Thus creditors can apply for compensation to the parent corporation and this latter will be obliged to fully cover all debts of its subsidiary.[84]

7.4.3 FACTUAL CONCERN

The second type of corporate group in German law is the factual concern or de facto concern.[85] In the de facto concern (faktischer Konzern) parent corporation exercise influence on the management of the subsidiary corporation, but no domination contract exists between them, such combination is called de facto concern.[86] In the de facto concern, rights and duties of affiliated entities are regulated only on the basis of the AktG's provisions. In the period of de facto concern relationships, the board of

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80 Zubitashvili N., Standard of Appreciation of Paragraph 6 of Article 3 of Law Georgia On Entrepreneurs in Light of the Corporate Veil Piercing Doctrine, Law Journal #2, 2014, TSU, law faculty, 42.

81 Ibid.

82 German Stock Corporation Act (Aktiengesetz), English translation as at September 18, 2013.

83 Zubitashvili N., Standard of Appreciation of Paragraph 6 of Article 3 of Law Georgia On Entrepreneurs in Light of the Corporate Veil Piercing Doctrine, Law Journal #2, 2014, TSU, Law Faculty, .

84 Reich-Graefe R., Changing Paradigms: The Liability of Corporate Groups in Germany, 37 Conn. L. Rev. 785, 2005,790.

85 Ibid.

86 Schiessl M., The Liability of Corporations and Shareholders for the Capitalization and Obligations of Subsidiaries under German Law, 7 Nw. J. Int' l L. & Bus. 480 (1985–1986), p. 498.

director of controlling corporation is obliged to provide annual report on relationship with affiliated corporations,[87] this report shall cover all transactions with the affiliated entities,[88] in such reports shall be explained whether these transactions were favorable or not for the controlled corporations.[89] In addition, under the AktG the controlling parent corporation is obliged to compensate all losses incurred by the subsidiary caused by the detrimental transactions entered into under the parent corporation's instruction.[90] Thus, controlling corporation shall compensate only these losses which were caused by the parent corporation's instructions.[91] Unlike to contractual concern, in de facto concern the rights and obligations of affiliated corporations are not clearly defined[92], hence, in order to get compensation controlled corporation shall prove that controlling corporation placed it under unfavorable situation. In such cases the burden of proof is on the controlled entity's side.[93]

7.4.4 DE FACTO QUALIFIED CONCERN

In the late 70s, in Germany by the court practice was invented qualified de facto concern doctrine *(qualijizierter faktischer Konzern*).[94] The German Stock Corporation Act applies only to stock corporations (AktG), but court extended application sphere and this provision also concerned to

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87 Zubitashvili N., Standard of Appreciation of Paragraph 6 of Article 3 of Law Georgia On Entrepreneurs in Light of the Corporate Veil Piercing Doctrine, Law Journal #2, 2014, TSU, Law Faculty, 2.

88 Ibid.

89 Ibid.

90 Dearborn, "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups", Cited: Melikishvili T.,"Parent Company Liabilities for the Debts of its Subsidiaries – A Comparison between the UK and the German Law", The University of Manchester School of Law. A Research Paper Submitted to the University of Manchester for the Degree of LL.M Masters, (International Business & Commercial Law) in the Faculty of Humanities: School of Law, 18.

91 Ibid.

92 Zubitashvili N., Standard of Appreciation of Paragraph 6 of Article 3 of Law Georgia On Entrepreneurs in Light of the Corporate Veil Piercing Doctrine, Law Journal #2, 2014, TSU, Law Faculty, 43.

93 Ibid.

94 Reich-Graefe R., Changing Paradigms: The Liability of Corporate Groups in Germany, 37 Conn. L. Rev. 785, 2005, 795.

limited liability corporations (GmbH). Thus, under the court practice qualified de facto concern relationships were characterized, when instead of the controlled joint stock corporation there was a dependent limited liability company (GmbH).[95]

In September, 2001 the German Federal Supreme Court (Bundesgerichtshof) in the landmark case ***Bremer Vulcan*** changed, existing practice and ruled out its old approaches regarding the de facto qualified concerns that were established more than 20 years ago.[96] In the above-mentioned decision court has stated that the provision of the German Stock Corporation Act (AktG) regarding affiliated corporations should not be used any more as analogue in connection to the limited liability companies (GmbH). So, on basis of this cases German court with the single stroke and without much explanation abandoned de facto qualified concern doctrine.[97]

German Federal Supreme Court (Bundesgerichtsho) in 2002 made significant decisions ‚Bremer Vulkan II and KBV', which refined liability approach of the corporate group not governed by the German Stock Corporation Act (AktG).[98] According to these decisions, in Germany the direct liability of the parent corporation vis-à-vis the creditors of its subsidiary can be imposed in cases when interference of controlling corporation into the subsidiaries affairs breaches subsidiaries independent existence (Existenzvemichtender Eingriff).[99]

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95 Ibid.

96 Reich-Graefe R., Changing Paradigms: The Liability of Corporate Groups in Germany, 37 Conn. L. Rev. 785, 2005, 801.

97 Ibid.

98 Ibid at 802.

99 Ibid.

8 CORPORATE VEIL PIERCING DOCTRINE IN GEORGIA

8.1 GENERAL OVERVIEW

The corporate veil piercing doctrine in Georgia is regulated by the ‚Law of Georgia on Entrepreneurs', In spite of the statutory regulation, the corporate veil piercing doctrine is not fully studied in Georgian law. Court cases regarding this subject are extremely rare as well. Hence, due to this situation, right of the corporate creditors is not effectively protected in Georgia.

In the very beginning, when 1994 'Law of Georgia on Entrepreneurs' was first adopted it contained the same preconditions for personal liability of shareholders as they were in German law. Georgian grounds to personally hold liable shareholders of corporation were: (a) undercapitalization of corporation; (b) commingling of corporate and shareholders assets; (c) improperly keeping financial and accountant books, etc.

In addition, the strong influence of the German corporate law was on the Georgian Company Group regulations, 'Law of Georgia on Entrepreneurs' dealt with affiliated corporations like German *Konzernrecht*, in accordance with Georgian law, parent corporation was liable for debts and obligations of its subsidiaries and in certain situations parent corporation was obliged to compensate losses of its subsidiary's creditors too.

Gradually, many reforms have been implemented in Georgian corporate law, due to such reforms; Numerous amendments were made in this statute. Georgian corporate law got closer to common law; Especially the Georgian reforms were strongly influenced by the U.S.[100] and U.K. law. The conducted changes also affected the German model of shareholders' personal liability, including the concept of piercing of the corporate veil.

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[100] Tsertsvadze L., Duties of directors, according to US (State Delaware) corporate law and corporate law of Georgia (Comparative Analysis), 4.

Due to provided amendments, the 'Law of Georgia on Entrepreneurs' no longer contains German doctrinal prerequisites of the corporate veil piercing.

However, Georgian legislator did not refuse the opportunity to regulate shareholders' personal liability issues under Georgian law; The amendment of the 'Law of Georgia on Entrepreneurs', enacted in 2008, contain a new 3.6 article, which indicates that 'a limited partner of a limited partnership, and partners of a limited liability company, joint-stock company and cooperative, shall be personally liable to creditors of the company if they abuse the legal forms of limitation of liability'.[101]

8.2 GEORGIAN COURT PRACTICE REGARDING THE CORPORATE VEIL PIERCING

On May 6th, 2015 the Supreme Court of Georgia performed the corporate veil piercing and made two decisions about piercing issue first time in the Georgian legal history.[102] In these decisions, the court made a very important and at the same time, significant explanations about the corporate veil piercing doctrine.

In the aforementioned decisions, the Supreme Court of Georgia has explained the concept of corporate veil piercing. The court stated that: '**the necessity of using a 'piercing liability' as a rule arises in the case when the obligation has arisen towards the corporation, but this corporation is not solvent. In search of a solvent person, the creditor complains about the shareholders of the company and indicates that, due to some reasons he/she is personally liable for the obligations arisen in the name of the corporation. In such case, when the corporation is insolvent and the creditor requires payment from the**

[101] Law of Georgia on Entrepreneurs, 1994, #21–22. (13.06.1996). Available at: <https://goo.gl/llnpuj>[visited 20.08.2017].

[102] Decision of the Supreme Court of Georgia, Civil Chamber, 6 May 2015, case #as-1307-1245-2014; Decision of the Supreme Court of Georgia, Civil Chamber, 6 May 2015 case # 1158-1104-2014.

corporation, the court has to decide whether to impose the payment for the loss caused by the violation of obligations upon the partner or upon the third party. In all such cases, unconditional use of the principle of limited liability would lead to the consequences, which always cause damage to the creditor'.[103]

The Supreme Court has also, stated that: '**in the context of tax obligations, the piercing liability is used when the activity of the shareholders of the corporation is oriented to creating the schemes of tax payment prevarication and when the corporation is used as an instrument for tax evasion'.**[104]

In addition, the court also talked about the corporate veil piercing grounds; and in the decision indicated: **'one of the most common ground for using the 'piercing liability' is 'inadequate capitalization' of the corporation. With the purposes of using 'piercing liability', 'inadequate capitalization' does not imply minimum charter capital prescribed by Law. (In many countries including Georgia, such requirement is no longer valid). Inadequate capitalization implies the case, when the capital of the company is very small and inadequate for the type of the activities of the company and for insuring the risks, which are arisen from business activities of the company. In other words, it implies expected economic needs and not formal-legal requirements. The element of 'inadequate capitalization' is especially important in using piercing liability towards the involuntary creditors'.**[105]

The Supreme Court of Georgia has also named disregarding of the corporate formalities as one of the grounds for piercing of the corporate veil. According to the court explanation, disregarding of the corporate formality means: **'when meetings of the directors and shareholders are not call or convened, when management and representation rights of the directors and partners are not clearly demarcated, when the partner's and corporate property are commingling, when the funds**

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103 Ibid.

104 Ibid.

105 Ibid.

of the company are used by shareholders for the personal purposes and for the personal expenses, or when accounting and financial reports and related documents are not made in a proper way'.[106]

The Supreme Court has also defined types of creditors, the court stated, that initiation of the piercing claims may come from both a voluntary-contractual creditor and an involuntary i.e. tort creditors. In accordance with the court explanation, the contractual creditors have the contractual relations with the corporation. While, non-contractual creditors i.e. tort creditors enter into the legal relation with the corporation involuntarily, on the basis of various torts acts.

However, Georgian Supreme Court defined crucial aspects of corporate veil piercing doctrine in its decision, court's explanation is not exhaustive, court did not explain its approachs regarding contractual and tort creditors, court did not talked about types of corporate veil piercing claims; court did not define supportive tests of the corporate veil piercing. In addition, responsibility issues regarding corporate group also was not defined in court's decision.

9 CONCLUSION

The corporate veil piercing doctrine is applied when shareholders of the corporation abusively use limited liability forms. With help of this doctrine court can ignore corporate limited liability form and impose personal liability upon the shareholders.

The corporate veil piercing doctrine is the well developed legal institution of the U.S. corporate law; There are solid scientific ground and rich case law tradition regarding this issue. To confirm circumstances of abusive usage limited liability forms the U.S. courts use special corporate veil

106 Ibid.

supportive theories, i.e. tests, such tests mostly were developed by court cases.

The corporate veil piercing doctrine is also practiced in the civil law countries, one of the brightest examples of this conception is Germany; In Germany shareholders' personal liability issues were developed partly by the court cases, partly it has the statutory footage. In addition, Germany has a specific approach towards parent-subsidiary and affiliated corporations, these subjects are regulated by the Stock Corporation Act (AktG).

In connection to the shareholders' personal liability issues, there are very specific situations In Georgia, on the one hand, Georgian lawmaker statutory resolved this subject and stated that in case of shareholders abusively use limited liability form, they can be personally liable for the corporations' debts. On the other hand, despite this regulation this issue is not developed in Georgia and there is very low rate of the corporate veil piercing claims in Georgian courts.

In order to solve all the above-mentioned legal issues, it would be better to focus attention on the European and American experience about these subjects. These countries have a long standing history and experiences how to deal with shareholders' personal responsibility issues, thus with the help of their experience, similar legal subjects can be solved in Georgian legal practice.

Based on the review and analysis of the German and the U.S. approaches regarding the corporate veil piercing issues, the Georgian scholars, courts and practitioner lawyers, will have the chance to cast the light on the problematic areas of the Georgian corporate veil piercing doctrine and answer the questions existing around these matters.

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4 THE ONGOING DEVELOPMENT OF TRANSFORMATION LAW FROM A GERMAN AND EUROPEAN AS WELL AS COMPARATIVE LAW POINT OF VIEW

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TABLE OF CONTENTS

A. PREAMBLE

My master thesis is entitled “The ongoing development of transformation law from a German and European as well as comparative law point of view” (hereinafter also referred to as “***Master Thesis***”).

The Master Thesis is divided into three main parts, namely the transformation law from a German point of view including some aspects with regard to the German Transformation Act (“Umwandlungsgesetz”) (hereinafter also referred to as ”***Transformation Act or UmwG***”) and the German Conversion Tax Act (“Umwandlungssteuergesetz”) (hereinafter also referred to as “***Transformation Tax Act or UmwStG***”), further the transformation law from a European point of view as well as, the third main part, the transformation law from a comparative law point of view.

In the following I would like to give a short overview respectively a brief summary about the matters mentioned in the Master Thesis, in particular with regard to the European influence on transformation law.

B. OVERVIEW OF THE THREE MAIN PARTS OF THE MASTER THESIS

I. FIRST MAIN PART: TRANSFORMATION LAW FROM A GERMAN POINT OF VIEW

The first part of the Master Thesis is mainly focused on issues concerning any transformations based on German Law. It deals with the German Transformation Act, in particular with the historical development, the system and the mechanism of the regulations of the Transformation Act as well as the types of transformations according to and outside of the Transformation Act.

Moreover, the Master Thesis mentions the Transformation Tax Act. In this context, the development of the Transformation Tax Act, especially the historic development and the influence of European law to the Transformation Tax law will be presented.

II. SECOND MAIN PART: TRANSFORMATION LAW FROM A EUROPEAN POINT OF VIEW

The second part of the Master Thesis deals with important European matters resulting from the jurisdiction of the European Court of Justice (hereinafter also referred to as "***ECJ***") regarding cross-border transformations and the impact of the freedom of establishment ("Niederlassungsfreiheit") of Section 49 of the Treaty on the Functioning of the European Union ("Vertrag über die Arbeitsweise der Europäischen Union" or "AEUV") (hereinafter also referred to as "***TFEU***") established over several years, particularly with the Vale-judgement[1] of the ECJ influencing the transformation law.

Additionally, the implementation of the European Cross-Border Merger Directive ("Internationale Verschmelzungsrichtlinie"[2]) into German law and the role of the European stock corporation "Societas Europaea" or "SE" (hereinafter also referred to as "***SE***") are pointed out.

It could be assumed, that the aforementioned matters are considered among the significant aspects, which influenced the development of transformation law. Furthermore, the Master Thesis shows current views, especially the enactment of miscellaneous European directives, for example a directive concerning the transfer of the seat of a company ("Sitzverlegungsrichtlinie") as well as the introduction of further supranational company structures.

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1 ECJ judgement of July 12th, 2012, C-378/10.

2 Directive 2005/56/EC of the European Parliament and of the Council of October 26th, 2005 on cross-border mergers of limited liability companies from several member states of the European Union and the European Economic Area.

III. THIRD MAIN PART: TRANSFORMATION LAW FROM A COMPARATIVE LAW POINT OF VIEW

The third main part of the Master Thesis is about transformation law from a comparative law point of view. Herein the consequences of the ongoing development and the influence of European Law, as mentioned in the second part of the Master Thesis, are constituently based on a specific example. Thus, the example describes the cross-border merger of two affiliated companies and therefore the merger of a Belgian partnership with limited liability ("besloten vennootschap met beperkte aansprakelijkheid" or "B.V.") (hereinafter also referred to as "***B.V.***") to a German company with limited liability ("Gesellschaft mit beschränkter Haftung" or "GmbH") (hereinafter also referred to as "***GmbH***") as the B.V. is the comparable legal form regarding the GmbH.

C. SELECTED ASPECTS OF THE TRANSFORMATION LAW FROM A EUROPEAN POINT OF VIEW

In the following, I would pick up some selected aspects, also subjects to the Master Thesis and explain more detailed.

I. THE VALE-JUDGEMENT OF THE EUROPEAN COURT OF JUSTICE

At the present, the Vale-judgement forms probably the final point of a series of judgements of the ECJ, as in particular the Sevic-judgement[3] or the below-mentioned Cartesio-judgement[4]. In its decision, the ECJ dealt

[3] ECJ judgement of December 13th, 2005, C-411/03.

[4] ECJ judgement of December 16th, 2008, C-210/06.

once more with the freedom of establishment according to articles 49, 54 TFEU.

The Vale-judgement is based on the following facts:

VALE Costruzioni Srl (a company with limited liability under Italian law), established in 2000, was registered in the commercial register of Rome, Italy (hereinafter referred to as "***VALE Costruzioni***"). On 3 February 2006, VALE Costruzioni asked to be removed from the Italian register since it intended to discontinue business in Italy and rather to transfer its seat and its business to Hungary. Thus, the responsible authority deleted the entry of VALE Costruzioni from the commercial register on 13 February 2006 with the remark "Removal and transfer of seat", stating that the company had moved to Hungary.

Given that the company decided to transfer its seat and its business to Hungary, the director of VALE Costruzioni and another natural person adopted the articles of association of VALE Építési kft, a company with limited liability governed by Hungarian law (hereinafter referred to as "***VALE Építési***") in Rome, with regard to the registration in the Hungarian commercial register. Moreover, the share capital was paid up to the extent required under Hungarian law for registration.

On 19 January 2007, the representative of VALE Építési applied to the so-called Fővárosi Bíróság (Budapest Metropolitan Court), acting as the so-called Cégbíróság (Commercial Court), to register the company in accordance with Hungarian law. In the application, it was stated that VALE Costruzioni was the predecessor in law to VALE Építési.

The Hungarian commercial court rejected the application for registration. Thus, VALE Építési lodged an appeal before the so-called Ítélőtábla (Regional Court of Appeal of Budapest). The Regional Court of Appeal of Budapest upheld the order rejecting the registration. The court stated that a company that was incorporated and registered in Italy cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there. According to that court, only particulars listed in Sections 24 to 29 of the Hungarian Law V of 2006 could be shown in

the commercial register. Therefore, a company, which is not Hungarian, cannot be listed as a predecessor in law.

VALE Építési brought an appeal on a point of law before the Legfelsőbb Bíróság (Supreme Court), seeking the annulment of the order rejecting the registration and an order that the company be entered in the commercial register. It submits that the contested order infringes Articles 49 TFEU and 54 TFEU, which are directly applicable.

Concerning this fact, VALE Építési states that the order fails to recognize the fundamental difference between the international transfer of the seat of a company without changing the national applicable law to that company, on the one hand, and the international conversion of a company, on the other. In this context, it pointed out the case Cartesio of the ECJ[5], where the ECJ has recognized the decisive difference.

The referring court states that the transfer of the seat of a company governed by the law of another member state, here Italy, entailing the reincorporation of the company in accordance with Hungarian law as well as the reference to the original Italian company, as requested by VALE Építési, cannot be regarded as a conversion under Hungarian law. National law on conversions applies only to domestic situations. However, the court has doubts concerning the compatibility of such legislation with the freedom of establishment. Further, it stressed that the present case differs from the case, which the Cartesio-judgment was based on, since the issue here is a transfer of the seat of a company with a change of the applicable national law, while maintaining the legal personality of the company, that is to say, a cross-border conversion.

In those circumstances, the Supreme Court decided to stay the proceedings and to refer the following questions to the ECJ for a preliminary ruling:

1. Must the host member state pay due regard to Articles 49 and 54 TFEU when a company established in another member state transfers its seat to that host member state and, at the same time and

[5] ECJ judgement of December 16th, 2008, C-210/06.

for this purpose, deletes its entry in the commercial register in that member state, and the shareholders adopt a new instrument of constitution under the laws of the host member state, and the company applies for registration in the commercial register under the laws of the host member state?

2. If the answer to the first question is yes, have the Articles 49 and 54 TFEU to be interpreted as meaning that they preclude legislation or practices of such a (host) member state, which prohibit a company duly established in any other member state from transferring its seat to the host member state for continuing to operate under the laws of this member state?

3. With regard to the response to the second question, is the basis on which the host member state prohibits the registration of the company of any relevance, specifically:

   - If, in its instrument of constitution adopted in the host member state, the company designates as its predecessor the company established and deleted from the commercial register in the original member state, and applies for the predecessor to be registered as its own predecessor in the commercial register of the host member state?

   - In the event of international conversion, when deciding on the company's application for registration, must the host member state take into consideration the instrument recording the fact of the transfer of the company seat in the commercial register of the original member state, and, if so, to what extent?

4. Is the host member state entitled to decide on the application for company registration lodged in the host member state by the company carrying out international conversion in accordance with the rules of company law of the host member state as they relate to the conversion of domestic companies, and to require the company to fulfil all the conditions (as e.g. drawing up lists of assets and liabilities and property inventories) according to the company law of the host member state in respect of domestic conversion, or is the host member state obliged under the Articles 49, 54 TFEU to distinguish

international conversion from domestic conversion and, if so, to what extent?

The ECJ responded the first two questions to such extent, that the Articles 49 and 54 TFEU have to be interpreted as precluding national legislation enabling companies incorporated under national law to convert but does not allow, in general, companies governed by the law of another member state to convert to companies, which are governed by national law by establishing such company.

Further, the answer of the ECJ regarding the third and fourth questions could be summarized in the following way:

The Articles 49 and 54 TFEU must be interpreted with regard to cross-border conversions of companies, that the host member state is entitled to determine the applicable national law concerning such operations. Further, it is entitled to apply the provisions of its national law on the conversions of national companies governing the establishment and function of the companies, as in particular requirements relating to the drawing-up of lists of assets, liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, exclude the host member state, with regard to cross-border conversions, from refusing the record of a company, which has applied to convert as the "predecessor in law" in the commercial register, if the predecessor company has made such record. Further, it is excluded from refusing to take due account of documents obtained from authorities of the original member state, when examining the application of the company for registration in the commercial register.

With the foregoing in mind, the ECJ rules the following:

1. Articles 49 TFEU and 54 TFEU must be interpreted as precluding national legislation which enables companies established under national law to convert, but does not allow, in a general manner, companies governed by the law of another member state to convert to companies governed by national law by incorporating such a company.

2. Articles 49 TFEU and 54 TFEU must be interpreted, in the context of cross-border company conversions, which means that the host member state is entitled to determine the national law applicable to such operations and thus to apply the provisions of its national law on the conversion of national companies governing the incorporation and functioning of companies, such as the requirements relating to the drawing-up of lists of assets and liabilities and property inventories. However, the principles of equivalence and effectiveness, respectively, preclude the host member state from

   - refusing, in relation to cross-border conversions, to record the company which has applied to convert as the "predecessor in law", if such a record is made of the predecessor company in the commercial register for domestic conversions, and

   - refusing to take due account, while examining a company's application for registration, of documents obtained by the authorities of the member state of origin.

II. THE IMPLEMENTATION OF THE EUROPEAN CROSS-BORDER MERGER DIRECTIVE IN GERMANY

A further aspect constituting another milestone in the ongoing development of transformation law was the adoption of the European Cross-Border Merger Directive by the European Commission as well as the implementation of it in national law. The result of the implementation of the aforementioned directive is the establishment of the norms Sections 122a – l UmwG. These provisions have been included in the Transformation Act by the second amending law of the Transformation Act. In this context, it should be emphasised, that Sections 122a – l UmwG only apply in cases of cross-border mergers and only under the conditions regulated therein.

III. CROSS-BORDER MERGER

With the foregoing in mind, it could be stated that cross-border merger becomes increasingly popular. Thus, a cross-border merger will be more and more implemented in practice.

Therefore, I would like to give a short summary about the implementation of it under national law.

From a German corporate law perspective, the following aspects are relevant:

1. Scope of application of Sections 122 subsequent of the Transformation Act

Sections 122a and b UmwG determine the scope of application. Thus, the Sections 122 subsequent of the Transformation Act are special regulations for cross-border mergers of companies able to be merged according to Section 122b UmwG.

a. The cross-border merger, Section 122a UmwG

Section 122a para. 1 UmwG defines the cross-border merger.

Thus, a cross-border merger is a merger in which at least one of the involved companies is subject to the laws of another member state of the European Union or of another contracting party of the agreement creating the European Economic Area.

According to Section 122a para. 2 UmwG the regulations of part 1 and those of chapters 2, 3, and 4 of part 2 shall apply mutatis mutandis to the involvement of a company limited by shares (Section 3 para. 1 no. 2) in a cross-border merger, unless otherwise provided for in the present chapter. Therefore, in particular Section 2 UmwG defining the merger applies.

The scope of the regulations Sections 122 subsequent UmwG are limited to cross-border mergers of corporations governed by

the law of the European Union or the European Economic Area.[6] These regulations not apply for cross-border merger participating a company of non-member countries as well as partnerships or cross-border splits, changes of the legal form and assignments of assets.[7]

b. Companies able to be merged, Section 122b UmwG

Further, Section 122b UmwG regulates which legal forms of companies are able to participate on a cross-border merger.[8] Thus, in Germany a company with limited liability, an entrepreneurial company, a stock corporation, a partnership limited by shares as well as a Societas Europaea ("SE") with seat in Germany could participate.[9]

2. The merger plan, Section 122c, d UmwG

The merger plan replaces the well-known merger agreement according to Section 4 subsequent UmwG.[10]

a. The preparation of the merger plan, Section 122c para. 1 UmwG

The preparation of the merger plan occurs by the representatives of the participating companies.

b. Common merger plan/Applicable law

According to Section 122c para. 1 UmwG, the cross-border merger requires a common as well as homonymic merger plan.[11] The document has to be uniform; unfortunately, two separate doc-

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6 Drinhausen in: Semler / Stengel, Transformation Act; Sec. 122a no. 6.

7 Hörtnagl in: Schmitt / Hörtnagl / Stratz, Transformation Act, Transformation Tax Act, Sec. 122a UmwG no. 5.

8 Polley in: Henssler / Strohn, Corporate law, Sec. 122a UmwG no. 1 subs.

9 Krüger in: Handbook of Beck regarding international transformations, Part 2 no. 354 subs.

10 Kiem in: Habersack / Drinhausen, Law of Societas Europaea, Sec. 122c Transformation Act no. 1 subs. with further proofs.

11 Pohle, To merge limitless, page 130 subs.

uments with the same content are not sufficient.[12] Further, with regard to the prevailing opinion, the merger plan has to consider cumulative the legal systems of the participating companies.[13]

c. Content of the merger plan, Section 122c para. 2 UmwG

The mandatory content of the merger plan is regulated in the numbers 1 to 12 of Section 122c para. 2 UmwG. Additionally the parties could add further optional regulations respectively have to add specific rules needed under the respective legal systems.[14]

That is why, the following issues have mandatory to be named in the merger plan according to Section 122c para. 2 UmwG:

- Legal form, name and seat of the participating companies (No. 1);
- Conversion ratio of the company shares and where appropriate the amount of payments in cash (No. 2);
- Details concerning the absorbing or new company with regard to the transfer of the company shares (No. 3);
- Expected effects of the cross-border merger to the employment (No. 4);
- Date from which the company shares grant the right to the shareholders of participating in the profits as well as any special regulation influencing this right (No. 5);
- Effective date of the merger from which on the acts of the transferring company have to be considered as for the account of the absorbing or new company (No. 6);

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12 Marsch-Barner in: Kallmeyer, Transformation Act, Sec. 122c no. 6.

13 Simon / Rubner in: Commentary of Cologne, Transformation Act, Sec. 122c no. 8 with further proofs.

14 Justification of the government draft regarding Sec. 122c para. 2 Transformation Act, German parliament printed matter 16/2919 page 15.

- Information regarding the rights granting by the absorbing or new company to shareholders having privileges or to holders of securities, which are not company rights (No. 7);
- Details regarding specific advantages granting by the participating companies to the experts examining the merger plan or to administrative, management, supervisory or control bodies. (No. 8);
- Articles of Association of the absorbing or new company (No. 9);
- Information concerning the procedure regulating details of the codetermination of employees in the absorbing or new company (No. 10)[15];
- Details regarding the valuation of the assets and liabilities, which will be transferred to the absorbing or new company (No. 11); and
- Date of the balance sheets of the participating companies taking the basis of the cross-border merger (No. 12).

d. Form and language of the merger plan, Section 122c para. 4 UmwG

According to Section 122c para. 4 UmwG the merger plan shall be notarized. In case, the law of the other participating company has foreseen the notarization of the merger plan as well, the merger plan could be notarized several times.[16] Consequently, it is recommended to prepare the merger plan bilingual or in multiple language pursuant to the participating companies. The merger plan should be submitted to the shareholders of the participating companies in their national language. The same applies to the publication and application for registration in the commercial register

[15] This information in the merger plan is dispensable.

[16] Heckschen in: Widmann / Mayer, Transformation Act, Sec. 122c no. 209.

as well as to any other authorities.[17] For the application for registration in the German commercial register, a certified translation of the merger plan made by a sworn translator is sufficient.[18]

e. Works council

The merger plan has not to be forwarded to the work's council, since the basis of information of the works council respectively of the employees is the merger report.[19]

f. Publication of the merger plan, Section 122d UmwG

Furthermore, the merger plan or its final draft such as it will be resolved in the shareholders meeting as well as the additional information required according to Section 122d sent. 2 no. 1 to 4 UmwG have to be published by the participating companies. For this purpose, the documents have to be filed with the responsible register. The competent court is the court whose district the registered office of the German company is located, see Sections 376, 377 para. 1 of the German Act on the Procedure in Family Matters and in Matters of Non-contentious Jurisdiction ("FamFG"), 23a para. 1 no. 2, para. 2 no. 3 of the German Courts Constitution Act ("GVG"), 7 GmbHG. The merger plan and any further documents have to be filed electronically and at the latest one month before the shareholders meeting resolving about the consent to the cross-border merger according to Section 13 UmwG. Afterwards, the register court publishes the merger plan and any further documents electronically at www.handelsregisterbekanntmachung.de.

3. The merger report, Section 122e UmwG

Further, the representatives of the participating German company have to prepare a merger report according to Section 122e UmwG. The report states the legal and economic aspects of the cross-border

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17 Polley in: Henssler / Strohn, Corporate law, Sec. 122c UmwG no. 8.

18 Tebben / Tebben, DB 2007, 2355, 2357.

19 Bayer in: Lutter / Winter, Transformation Act, Sec. 122c no. 32.

merger as well as the resulting consequences to the shareholders, creditors and employees.

Section 122e UmwG complements Section 8 UmwG. Thus, the report has to be prepared in written form and signed by a proper number the managing directors authorized to represent the company.[20]

The content of the report should in particular concerning the consequences of the cross-border merger to the creditors of the participating German company, the protection of the creditors including the conditions according to Section 22 UmwG as well as the individual and collective labour law consequences for the employees of the participating German company.[21]

The report should also mention the change of the employer because of the universal succession[22] as well as the changes in the operational and corporate codetermination.[23]

The preparation of the merger report could in general not be waived due to the protection of the employees; however, it will be recommended to avoid such waiver in practice.[24]

Moreover, the merger report has to be made accessible to the shareholders and the work's council of the participating German company at the latest one month before the shareholders meeting resolving about the merger. In case there is no work's council, the merger report has to be made accessible to the employees.

For making accessible, the report should be on display in the business premises for the inspection according to Section 64 para. 1 sent. 4 UmwG.[25] However, according to Section 47 UmwG the merger report should be sent to the shareholders together with the merger

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20 BGH judgement of May 21st, 2007 – II ZR 266/04.

21 Polley in: Henssler / Strohn, Corporate law, Sec. 122e UmwG no. 2 subs.

22 Dzida / Schramm, NZG 2008, 521, 525.

23 Frenzel, Cross-border mergers of corporations, pages 285 subs.

24 Freundorfer / Festner, GmbHR 2010,195, 198.

25 Becker in: Commentary of Heidelberg, Transformation Act, Sec. 122e no.14.

plan or whose final draft in order to preserve the time period of one month.[26]

4. The merger audit, Section 122f UmwG

Furthermore, the completeness and correctness of the merger plan, the of the appropriateness of the suggested conversion ratio and payments in cash as well as the offer of compensation in cash have to be audited by a merger auditor noted down in a report about the merger audit according to Section 122f sent. 1, 9 to 12 UmwG. The audit is mandatory to all domestic companies participating in the merger, regardless of their legal form, see Section 122f sent. 1 UmwG.

The report of the merger audit has to be in German language and finished until one month before the shareholder meeting resolving about the consent to the merger plan, see Section 13 UmwG. According to Section 122f sent. 1, 9 para. 3, 12 para. 3, 8 para. 3 UmwG the shareholders could waive the merger audit as well as the report of the merger audit. The same applies in case of a mother-daughter merger. The waiver has to be notarized.[27]

5. The consent of the shareholder, Section 122g UmwG

Thereafter, according to Section 122a para. 2, 13 para. 1 sent. 2 UmwG the shareholder's meeting of the participating German company has to resolve regarding the cross-border merger and the consent thereof, whereby the consent could be predicated on the consent of the absorbing or new company concerning the manner of the codetermination of the employees, see Section 122g UmwG. The shareholders resolution regarding the cross-border merger is dispensable for the transferring company in case of a mother-daughter-merger, Section 122 para. 2 UmwG. With regard to the shareholder's meeting, no special regulations apply. Therefore, Sections 46 to 78 UmwG as

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[26] Hörtnagl in: Schmitt / Hörtnagl / Stratz, Transformation Act, Transformation Tax Act, Sec. 122e UmwG no. 16.

[27] Hörtnagl in: Schmitt / Hörtnagl / Stratz, Transformation Act, Transformation Tax Act, Sec. 122c UmwG no. 2 subs.

well as Sections 50, 51 of the German Limited Liability Companies Act ("GmbHG") are applicable.[28]

6. Improvement of the conversion ratio, Section 122h UmwG

In case the shareholders crack down on the conversion ratio, Section 122h UmwG stipulates the regulations applicable concerning the legal proceedings according to Section 14 para. 2, 15 UmwG.

7. Offer of compensation in the merger plan, Section 122i Transformation Act / Protection of the creditors, Section 122j Transformation Act

For the sake of completeness should be pointed out that if the absorbing company is not such incorporated and governed under German law, the Sections 122i and j UmwG have to be considered.

8. Formal execution and effectiveness of the cross-border merger, Sections 122k, l Transformation Act

The execution of the registration of the cross-border merger will be implemented in two steps according to Sections 122k, l UmwG. Thus, each register court will prove this part of the cross-border merger relating to the company registered at this court.[29]

Therefore, in a first step the register court of the transferring company will prove the compliance of the regulations and, if these are satisfied, immediate provide a certificate regarding the valid merger. The second step will be the audit of the compliance of the regulations by the register court of the absorbing company.

Section 122k UmwG regulates the case, that the German company is the transferring company, while Section 122l UmwG states the rule if the German company is the absorbing company.

From a German point of view, the procedure for filing the application with the commercial register is as follows:

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[28] Polley in: Henssler / Strohn, Corporate law, Sec. 122g UmwG no. 1 subs.

[29] Bayer / Schmidt, NJW 2006, 401, 404.

The representatives of the company have to file the application with the commercial register electronically in officially authenticated form according to Section 12 of the German Commercial Code ("HGB"). To this application, the documents mentioned in Section 122l para. 1 sent. 2 and 17 UmwG as well as a negative declaration ("Negativerklärung") according to Section 16 para. 2 UmwG have to be attached.[30]

If the register court agrees with the fulfilment of the conditions of a cross-border merger, the merger will be registered. Afterwards, the register court informs the other involved register court.

The cross-border merger is effective at the date of the registration of it in the register of the absorbing company.[31]

D. CONCLUSION

In conclusion, it could be stated that the European law, in particular the main aspects as mentioned above have had a decisive influence to the transformation law. That is why, there are many regulations in the field of the transformation, especially in a cross-border context. However, there are still gaps, which have to be filled by the European legislator or which will be closed by the jurisdiction of the ECJ over time. Thus, the ECJ has made an important decision regarding cross-border conversions of companies, however there are still rules for the implementation and application missing, in particular for the national courts dealing with it. As a further gap, the adoption of the directive on the transfer of seat, which has been discussed for several years but not been enacted, should be pointed out.

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30 Zimmermann in: Kallmeyer; Transformation Act, Sec. 122l no. 10.

31 Klein, RNotZ 2007, 565, 607.

5 BUSINESS SUCCESSIONS IN GERMANY AND GREAT BRITAIN

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TABLE OF CONTENTS

1 PREAMBLE

The purpose of my thesis is to analyze how business successions can be realized in Germany and in Great Britain. The reason for my research is to illustrate different aspects of business successions in these two different European countries through using the corporate form of a German GmbH and the British Limited Liability Company as examples. Furthermore, the aim of this thesis is also to depict how the European unification of inheritance law has an influence on corporate law in the framework of business successions.

The thesis is composed of three chapters dealing with different aspects of successions in Germany and in Great Britain.

2 OVERVIEW OF THE CHAPTERS A, B AND C

I. Chapter A is introductory and reveals principles of inheritance law in both countries. It deals with a German and British inheritance case and ends with the differences and repercussions of the two distinct inheritance systems.

German inheritance law is specifically regulated by the German Civil Code, beginning with the 5th book “Inheritance Law”. The fifth book starts with § 1922 German Civil Code[1] which also provides the most important principle of German Inheritance Law: upon the death of a person, the so-called devolution of an inheritance, that person’s property, namely the inheritance passes as a whole to one or more than one other person – the heir. The rules of intestate succession apply if, there is no will; the will is invalid or the will does not cover the whole estate.

[1] subsequently GCC.

The German intestate succession law is based on family succession. The first rank heirs are the descendants - and when the children have already died their children - inherit equal shares of the assets as first rank heirs[2]. A very important role in the framework of German Inheritance Law does the wife of the decedent play. The surviving spouse (or the registered partner according to the LPartG) possesses the status of co-heir beside the children. The size of the share of inheritance depends on the applicable matrimonial regime which is a peculiarity in the German inheritance law[3]. Testamentary succession overrides intestacy succession. A main principle in the framework of testacy rules is the freedom of testifying which means that the heir is free to make a will and is free to appoint whoever he wants to appoint in his testament[4]. According to German inheritance law close relatives have a right to claim a portion of the estate, even if the testator did not want to leave them anything and has consequently disinherited them.

A uniform Inheritance Law in the United Kingdom does not exist it rather consists of different partial right areas. In my thesis I focused on the British and Welsh Inheritance Law system in which the freedom to make a will is one of the main principles. There exist seven orders of heirs, the spouse does not obtain such an important role as she/he would have according to German Law. Nevertheless, the spouse receives all personnel belongings[5] and a 'statutory legacy' of £250,000 free from tax. Statutory share – well known in German law - does not exist in the British and Welsh inheritance system. Since British inheritance law requires a personal representative, many testators in the United Kingdom appoint an executor of will who administers the assets[6].

There exist fundamental differences between the inheritance law principles of the United Kingdom and Germany. Since British inheritance law

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2 § 1924 GCC.

3 § 1931 GCC in synergy with § 1371 GCC.

4 § 1937 GCC.

5 55 (1) A.E.A.

6 Frank, J.H. / Atkinson, J., 2015, p. 698.

requires a personal representative, many testators in the United Kingdom appoint an executor of will who administers the assets. In Germany, however where a “personal representative” is unknown due to the concept of universal succession named in § 1922 GCC, the heirs directly and automatically come into ownership as well as into possession of the estate.

One can say that there are great differences between the two inheritance law systems but you can also find similarities. Both systems want to protect the deceased spouse or registered partner and the children, the deceased family, in a special way.

II. Chapter B examines company successions and the interplay of inheritance and corporate law in the German and British legal systems. It focuses on the German form of a GmbH and on the British equivalent, the Limited Liability Company.

The GmbH is the most widely used legal form for corporations in Germany[7]. According to § 15 GLLCA (German Limited Liability Company Act) the company shares are freely heritable. A direct singular succession title towards only one specific heir or a specific third person is completely excluded[8].

A private limited liability company in Great Britain can be defined as a type of a company that offers limited liability, or legal protection for its shareholders but that places certain restrictions on its ownership. In general, as the shares of a GmbH in Germany, the shares of a private limited company in the UK are basically freely heritable. According to the English inheritance law, shares of a company, as well as every asset of the deceased initially are being transferred to the personal representative who carries on the heritage of the deceased[9]. The transmission of the shares directly to the personal representative does not give him automatically the position of a shareholder of the company.

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7 Reimann, Zekoll, 2005, p. 143.

8 Oppenländer, Trölitzsch, 2011, Rec. 64.

9 Peitsmeyer, 2004, p. 73.

In both corporate forms, the Limited in the United Kingdom and the GmbH in Germany the shares of the company are freely heritable. Whereas in a British Limited the grant of a certificate of the shares, the so-called share certificate is common, in a German GmbH the grant of share certification is rather rare. Concerning the legal consequences in case of a succession, provisions in the articles of association can be provided in a German GmbH as well as in a British Limited.

The International Private Law concerning the administration of the estate is also of great difference but nevertheless similarities can be found as well. The German Law does not know the automatic engagement of an administrator or a personal representative without an official appointment. The English way of administrating the estate through a personal representative or administer finds its continuance in the International Private Law of the UK through the principle that the administration of the estate always follows the lex fori of the state. Therefore, the law which has to be applied regarding English inheritance cases has to be the law from which the personal representative derives his authority. Consequently, English courts would apply English law regarding cases in which an official engagement of a personal representative took place.

III. Chapter C concentrates on problems involving the taxation upon succession. It reveals the inheritance taxation system in Germany and focuses on the 2016 Reform of the Inheritance and Gift Tax Act. Furthermore, the taxation of successions in Great Britain as well as tax exemptions are described.

There exist two kinds of inheritance taxes in Germany. The donation tax during lifetime as well as the inheritance tax after death, both ruled in the so called “Erbschafts- und Schenkungssteuergesetz”. Inheritance tax is imposed on any transfer of property at death or by gift. The basis of assessment is the benefit accruing to the done or beneficiary. Any transfer of worldwide net property either at death or by a donation is usually subject to unrestricted taxation in case the decedent or the beneficiary has a domicile in Germany. There are certain reliefs and exempts, as well as there are tax favoured assets.

These allowances will only be granted once within a 10-year period of each transfer. The spouse and the partner of a registered same-sex partnership for example have an allowance up to € 500,000[10]. Children, stepchildren and children of deceased children have a personnel allowance of € 400,000[11]. An asset related tax allowance would be the family home. The purchase of a family home as a lifetime gift is tax free if it is given to the spouse or the registered partner.

On October 2016 the German upper house of parliament (Bundesrat) has approved the reform of the German Inheritance Tax law which finishes the parliamentary process of legislation[12]. The new legislature has direction to grant preferential treatment to small and medium-sized companies managed by their owners in order to ensure their continued existence and to preserve jobs.

In general, Germany has the reputation of being a high tax jurisdiction. This reputation comes particularly because of the high income tax rates. The maximum income tax rate is 45% plus solidarity surplus charge of 5.5% on income tax. Therefore the combined maximum rate is 47.5%. In contrast to that, the tax burden on lower or average income is endurable. An international comparison of the tax burden especially on business assets is very difficult because of the diverse valuation methods and asset transfer schemes. Using an example of a typical family business which is large by European standards and comparing the effective tax burden then Germany ranks in a mid table position underneath the United Kingdom according to the ZEW model calculations[13]. Regarding inheritance and gift tax, it can be said that in case that in one of the European country an inheritance and gift tax does not exist, a substitute can always be found within the tax system.

Inheritance Tax in the United Kingdom applies uniformly for the entire country and therefore is not subject to the local laws of England, Scotland,

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10 § 16 I Nr. 1 ErbStG.

11 § 16 I Nr. 2 ErbStG.

12 BVerfG 17.12.2014, 1 BvL 21/12.

13 Heymann, Möbert, Peters, Rakau, Schneider, 2014, p.18.

Wales or Northern Ireland. In the United Kingdom there are three types of transfer for inheritance tax purposes. These are exempt transfers, potentially exempt transfers and chargeable lifetime transfers. All these three types of transfers must include a transfer of value. Dispositions which are not a transfer of value, were not indented, and were not made in a transaction intended, to confer any gratuitous benefit on any person are exempt from inheritance tax[14].

Germany has very strong trade and investment relations with the United Kingdom. In 2010 the Germany-UK double taxation agreement was amended and it today incorporates the Organization for Economic Co-operation and Development's requirements about the exchange of tax information[15]. According to the amended agreement, dividends no longer include all rights, which means that a German investment fund from then on benefits from reduced rates when distributing dividends to an UK business entity.

As a current issue in Europe, the thesis also focuses on the British withdrawal from the European Union and the possible consequences of such a withdrawal. On 23, June 2016 a referendum was held and the British people voted to leave the European Union. According to Art. 50 of the European Union Contract a two-year transition period is necessary to negotiate its withdrawal. In order to answer the arising questions that come along with a British resignation the status of Great Britain is going to be of great importance: conceivable would be an accession to the European Economic Area. In case of the accession to the European Economic Area, problems concerning the inheritance and succession planning could be eliminated because the European Economic Area is put on the same level as the European Union within the German Inheritance and Tax Law. However, without this entrance to the European internal market, the British people and the British estate will not profit from the privileges that the German inheritance and gift tax Act might offer.

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14 Süß, 2015, p. 623 ff.

15 Deutsch-britisches Doppelbesteuerungsabkommen (DBAGB); https://www.bundesfinanzministerium.de/Web/DE/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Grossbritannien/grossbritannien.html

3 CONCLUSION

Conclusions are drawn in the last chapter. The main aim of the thesis is to reveal the differences of inheritance systems in a unified Europe using examples of Germany and Great Britain. Hereby, I come to the conclusion that despite the basic principles the two systems have in common there exist a lot of decisive differences.

In order to answer the arising questions that come along with a British resignation the status of Great Britain is going to be of great importance: conceivable would be an accession to the European Economic Area. In case of the accession to the European Economic Area, problems concerning the inheritance and succession planning could be eliminated because the European Economic Area is put on the same level as the European Union within the German Inheritance and Tax Law. However, without this entrance to the European internal market, the British people and the British estate will not profit from the privileges that the German inheritance and gift tax Act might offer.

Concerning business successions, the foregoing comparative legal analysis has shown that the working out of same principles in the law of business successions can also cause difficulties, but however is not dead-ended. The special role of the personal representative in the English law causes a lot of special configurations within the process of business succession that are not common to the German law of business succession. A similarity in both systems of business successions can be seen through the fact that they take place in the area of tension between inheritance and corporate law. It cannot be stated that inheritance law has a higher precedence before corporate law and also not vice versa. In fact, in both business successions systems it has to be examined whether the provisions of inheritance or corporate law are applicable.

Both countries have different forms of taxation within their inheritance systems. Nonetheless, the taxation forms vary immensely between the two countries, same principles can be found as basis of the systems.

Unfortunately, Germany and Great Britain have not signed a double tax agreement in the framework of inheritance tax.

Great Britain is not part of the unification of the inheritance law as it has not signed the EU Regulation 650/2012. Germany has signed the EU Regulation of succession which is a big step towards making successions easier concerning cross-border inheritance cases.

All the European effort to unify the law in Europe has not been very successful when looking at the British law and the upcoming withdrawal from the European Union. Of course, it can be seen as a lot more difficult to unify the law of a country that itself has three different legal orders within one country.

The Scottish law, for instance is distinctively different from the English and Welsh law. Therefore, a European law unification cannot be considered as simple as it could be conducted in Germany with just one legal order within the Federal Republic of Germany.

The British withdrawal from the European Union has to be seen with a high index of suspicion. It would be only a political decision if Great Britain remains in the European Economic Area. In case of a withdrawal from both institutions, the European Union and the European Economic Area, it remains unpredictable how the British economy and the British law will handle the new situation and what the consequences for the European International Private Law will be.

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6 POST-MERGER INTEGRATION RISK MITIGATION PLAN

ALINA MOISE-BALASA
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TABLE OF CONTENTS

For several decades mergers and acquisitions (M&A) have known a significant growth and combined strategies concerning internal growth of companies by enabling a fast penetration of new markets, a faster economy of scales, acquirement of the cutting-edge knowhow, and the intention to enjoy all other benefits from their expansion. Stricto sensu is that mergers involve two entities coming together and taking the best of each company (in order to) to form a completely new organization.

As many researches of M&A have used several different theoretical perspectives to examine the M&A integration process, the purpose of this article will be to delimitate the basic components of an M&A process, their reflection on labor and corporate processes, possible frictions between business and legal and eventually an analysis of risks with possible solutions. This way an integrated theoretical framework should make any systematic empirical examination of the integration process more comprehensible.

This article also presents the post-merger integration (hereinafter “PMI”) process by highlighting integration on the employment relationship level. Only certain labor and corporate law aspects will be introduced in a combined focus on management aspects, particularly from the perspective of international mergers.

As far as a literature review is concerned, indeed, the area of PMI has been often examined in the last years often based on a single case study, and suggested the finding as a generalizable prescription for the effective management of integration processes. As a result, countless mergers-related practices have been prescribed for successful organizational integration post merger, but without sound legal and business theoretical and empirical basis.

It is precisely why, this article aims to fill the gap by highlighting options for action, and identifies the correct programs and decisions that will result in a successful integration, or in the accomplishment of the final goal of wisely transposing the business principles of two different companies into the newly created one. The PMI will be envisioned as a multi-phase process, characterized by numerous group dynamics and a high degree of

conflicts between the business and legal facets of two different systems. The challenge would be to create many new connections and interdependencies, formal and informal, between individuals, groups and departments within this new reality to emerge and be integrated according to a new organizational structure. The goal is to prevent the whole system to become unstable at a certain point where people feel disconnected, so that they do not rely on their old networks any more, a state of edge of chaos.

1 THE TRANSITION FROM M&A TO PMI

Due to the increasing importance and relevance of some various legal aspects upon the overall post-merger integration process, i.e. employment law, labor law, competition law, corporate law, tax law etc. PMI will be presented as a hybrid process but the focus will remain on the two protagonists- the company and the employee.

Mergers and divisions of legal entities are governed in Germany by The German Transformation Act. Accordingly, a merger can be defined as the combination of at least two legal entities by way of transferring all assets and liabilities of the transferring entity, the transferor, to the receiving company, the transferee.

The Act distinguishes between two basic types of merger: merger by acquisition and merger by formation of a new company. In the first case, the transferee already exists while in the second case the transferee will be established by the merging transferors. The interest holders of each transferor receive shares or memberships in the transferee in return for shares or memberships in the transferor being dissolved by the merger.

It is important to note that true merger, merger of equals, takes place quite rarely.[1] By default, a certain merger type affects the level of changes taking place at the labor-corporate level. Specifically, three types of mergers are distinguished:

1. extension mergers taking place when an acquirer does not really change the other party (hands off policy). The impact on personnel is low and therefore there will be a little change in personnel policy.

2. collaborative mergers, when companies join to generate profits to both or to one party, based on blending major operation and managerial functions, i.e., firm's name, geographical location, staff operations (synergy merger); or based on exchange of skills, e.g., technological (exchange merger).

In terms of personnel practices the changes might be significant in both companies. In case of a synergy merger, new practices and policies must be developed out of the existing ones, and in the event of exchange merger one party will adapt policies from the other one. Last but not least,

(3) redesign mergers taking place when both parties operate in related business areas and one party wants to gain control over the other party. Therefore, on the personnel level (and other levels) a redesigned company will adopt practices, procedures, policies of the other party.[2]

According to existing practice and literature, depending on the need of strategic interdependence and organizational autonomy during integration, four PMI strategies are possible: preservation, absorption, symbiosis, and holding.

1. The "preservation" approach involves selective engagement in areas in which there are interdependencies or opportunities for

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1 Hogan & Overmyer, 1994, The psychology of Mergers and Acquisitions, International Review of industrial and organizational psychology 1994.

2 Cited in Post-Merger Integration (PMI): Overview and Identification of Main Problems in People Management Context, Dissertation of the University of St. Gallen, School of Management, Economics, Law, Social Sciences and International Affairs to obtain the title of Doctor of Philosophy in Management, submitted by Nella Foley and approved on the application of Prof. Dr. Thomas Gutzwiller and Prof. Dr. Martin Hilb, Dissertation no. 4267 Difo-Druck GmbH, Bamberg 2014, page 27.

learning, while the acquirer manages the target's other functions at arm's length.

2. The "absorption" approach involves complete consolidation, resulting in dissolution of the boundary between acquirer and target.

3. The "symbiotic" approach involves a gradual progression from autonomy to full "amalgamation," in which the two organizations create a "new, unique identity."

4. The "holding" approach involves virtually no operational changes, with the target firm remaining essentially independent.

The change of the name, strategic realignment, integration of sales forces, consolidation of accounting, plant shutdowns, management audits – and every step done under tight deadlines and the watchful eye of employees, customers and the financial community. This is just a small sample of the challenges and tasks that managers must face after an acquisition. No other managerial project is as complex as a post-merger integration and poses such a high risk of error.[3]

2 RISK MANAGEMENT TOOL TO ADDRESS THE MAIN THREATS FOR A SUCCESSFUL PMI PROCESS

Every legal professional would go back to the applicable law as a first step.

3 Editorial Post-merger integration A tailored approach to sustainable transaction success, Oliver Wyman, by Thomas Kautzsch Henning Thormählen, page 3, www.oliverwyman.com.

2.1 GERMAN REGULATORY FRAMEWORK WHICH IGNORED COULD MAKE THE PURCHASE AGREEMENT VOID

Theoretically, any private individual, partnership or corporation, irrespective of nationality or place of residence, can set up a company in the Federal Republic of Germany or acquire shares in an existing company in the Federal Republic of Germany. The Federal Republic of Germany does not have any specific investment legislation. A company in the Federal Republic of Germany does not need a minimum percentage of German shareholders.

Please note, however, that the Federal Ministry for Economy and Energy is entitled to review and – in extraordinary cases – prohibit the (direct or indirect) acquisition of 25 % or more of the voting rights in a German company by private individuals or legal entities seated outside the territory of the European Union, Iceland, Liechtenstein, Norway or Switzerland if the transaction would endanger public order or safety. Rules on merger control in Germany, as part of competition law, are set out in the seventh chapter of the Act against Restrictions of Competition ("ARC").

For acquisition of German companies whose field of business concerns sensitive sectors, reporting to the Federal Ministry for Economic Affairs and Energy (Bundesminsterium für Wirtschaft und Energie, hereinafter: "BMWi") is required by the foreign investor to hold 25 % or more voting rights. BMWi will examine the acquisition and can order any kind of prohibitions or restrictions if the essential security interests of the Federal Republic of Germany will be endangered by the acquisition or participation. Throughout the entire examination procedure, the legal transactions are provisionally ineffective, meaning the purchase contract remains invalid until the competent authority has approved the acquisition explicitly or has not ordered any restrictions within one month following the receipt of all documents. Sensitive sector means that the company manufactures or develops: weapons of war within the meaning of Part B of the War Weapons List; engines or gears to drive battle tanks or other armored military tracked vehicles or products with IT security functions to process

classified state information or components essential to the IT security function of such products.

Some restrictions and/or specific requirements may apply with regard to businesses acting in certain sectors, including the following sectors: defense, pharma and offering of financial services and banking.

In addition to the regulatory framework, mergers and acquisitions in Germany are regulated by a framework of laws related to civil, corporate, tax and merger control. The most relevant corporate regulations are the Civil Code (Burgerliches Gesetzbuch: BGB), the Limited Liabilities Company Act (GmbH – Gesetz), the Stock Corporation Act (Aktiengesetz (AktG), the Commercial Law (Handelsgesetzbuch (HGB), the Corporate Income Tax Law and the Individual Income Tax Law and the Foreign Trade and Payments Act (Außenwirtschaftsgesetz – AWG), the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung – AWV),the Takeover Act (Wertpapiererwerbs und Ubernahmgesetz: WpUG), the Transformation Act (Umwandlungsgesetz: UmwG), the Securities Trading Act (Wertpapierhandelsgesetz: WphG), Co-determination Act (Gesetz uber die Mitbestimmung der Arbeitnehmer: MitbG), One-Third Participation Act (Gesetz über die Drittbeteiligung der Arbeitnehmer im Aufsichtsrat- DrittelbG), the Work Constitution Act (Betriebsverfassungsgesetz: BetrVG), the Act against restraints on Competition (Gesetz gegen Wettbewerbsbeschraenkung: GWB) and the Insolvency Code (Insolvenzordnung: InsO).

2.2 APPLICABLE EU REGULATORY FRAMEWORK

EU merger control is governed by Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation). Subject to limited exceptions, under the Merger Regulation the European Commission has exclusive jurisdiction within the EU over „concentrations “that have a „Community dimension”. These transactions require prior notification to, and clearance by, the Commission. A concentration exists where one or more undertakings acquire whether by purchase of securities (shares, interests, etc.) or assets, by contract or any other means, direct

or indirect control of the whole or part of one or more other undertakings. Therefore, a concentration can include:

1. An acquisition of sole control.
2. A pure merger.
3. An acquisition of joint control.

Control is the possibility of exercising decisive influence. A concentration only arises where there is a change of control on a lasting basis. The key issue in assessing whether a transaction constitutes a concentration is whether or not the possibility of exercising decisive influence over strategic commercial behavior is conferred. The Commission considers cases involving legal and de facto control as giving rise to a concentration. Assuming that there is a concentration, and subject to the possibility of referral between member states and the Commission the Merger Regulation only applies if the transaction has a Community dimension. This is determined by reference to two sets of turnover.

The primary thresholds are satisfied if:

1. The combined aggregate worldwide turnover (in the preceding financial year) of all the undertakings concerned exceeds EUR 5 billion and
2. The aggregate Community-wide turnover of each of at least two of the undertakings concerned exceeds EUR 250 million.

Where these thresholds are not met, the secondary thresholds apply and are satisfied if all of the following criteria are fulfilled:

1. The combined aggregate worldwide turnover of all the undertakings concerned exceeds EUR 2.5 billion;
2. In each of at least three-member states, the combined aggregate turnover of all the undertakings concerned exceeds EUR 100 million;
3. In each of those three-member states, the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR 25 million;

4. The aggregate Community-wide turnover of each of at least two of the undertakings concerned exceeds EUR 100 million. However, even where the primary or secondary thresholds are met, there is no Community dimension if each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state (the „two-thirds "exception).[4]

After having taken into consideration the legal framework applicable before the conclusion of a purchase agreement and having possible repercussions on the merger and post-merger plan, establishing the nature of the purchase the is the next logical step within the merger strategy.

3 SHARE OR ASSET DEAL?

After the prospective purchaser has decided to acquire a certain business, such purchaser has two alternatives. He may either acquire the company running the business (the "Share Deal"), or acquire assets and assume liabilities comprising the business (the "Asset Deal").

A. In case of a Share Deal, the company running the business is the target. The purchaser acquires the company from the seller by acquiring the shares in the company. The shares are transferred by the seller assigning the shares to the purchaser. The seller and the purchaser consummate the acquisition by means of a Share Purchase Agreement ("SPA") or, more generally, a "Sale and Purchase Agreement." After consummating a Share Deal, the purchaser is the shareholder of the company running the business. He acquires the company running the business "as a whole" with all assets and all liabilities, including employment relationships, commercial relationships, as well as unknown liabilities.

4 Legal Article: Cross-border Mergers & Acquisitions in Germany, A Transaction Guide for Foreign Investors, Heuking Kuhn Luer Wojtek- Lawyers and Tax Advisors, March 2014, Dr. Martin Imhof, page 26, source: www.heuking.de.

An important part of the SPA are the representations and warranties the seller is giving to the purchaser in relation to the business, in particular regarding the non-existence of unknown liabilities.

B. In case of an Asset Deal, the business itself is the target. The purchaser enters into a transaction with the company running the business, and not with the shareholder of such company. The seller and the purchaser consummate such acquisition by means of an Assets Purchase Agreement(“APA”). After consummating an Asset Deal, the purchaser is the owner of the assets and the debtor of the liabilities comprising the business. By means of an Asset Deal – as opposed to the Share Deal – the purchaser does not acquire the desired business “as a whole”, but only the assets and liabilities specified in the APA. Employees allocated to the desired business (and their employment contracts) transfer to the purchaser by law, including all liabilities allocated to the respective employment relationships (including pension commitments), provided individual employees do not object to the transfer.

To sum up, in share purchases, all rights, duties and liabilities owed by, or to, the employees of the target company continue to be owed by, or to, the target company and the purchaser therefore inherits all those rights, duties and liabilities by virtue of being the new owner of the target company. Thus, if there is an integration of the target company’s business with the purchaser’s business post-acquisition, this is likely to constitute an acquisition of assets or a business transfer, and the considerations set out below will be relevant. If a business (or a part of it) is transferred to another entity, as is the case in most asset deals, the latter is bound to enter into the same rights and obligations provided under an employment relationship existing at the time of the transfer, assume all existing liabilities towards transferring employees, and recognize seniority.

4 PHASES OF THE PMI PROCESS

There is an agreement in the niche literature that integration is an interactive and gradualist process in which both sides learn to work together and to cooperate in the transfer of strategic capabilities. Integration is required not only on the hard level, encompassing the integration of operations, systems and procedures but also it requires a consideration of those hard factors in relation to the soft side of two organizations.[5]

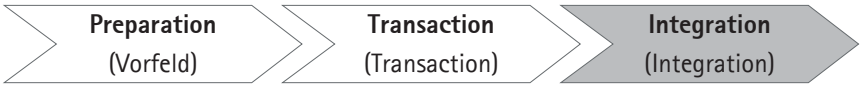

Fig. 1. Phases of M&A process[6]

1. Forming and organizing stage consists of the pre-merger and the phase immediately after the merger is announced. Organization finds itself uncertain and questioned by its stakeholders, due to plan, and decisions on company's location and facilities;

2. Transforming and integrating corresponds with actual implementation of various strategies and actions. At this stage tensions arise as there are positive and negative feedbacks, formal and informal structures exist and management's main task is to demonstrate the evaluation of the success or failure of integration activities;

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[5] Post-Merger Integration (PMI): Overview and Identification of Main Problems in People Management Context, Dissertation of the University of St. Gallen, School of Management, Economics, Law, Social Sciences and International Affairs to obtain the title of Doctor of Philosophy in Management, submitted by Nella Foley and approved on the application of Prof. Dr. Thomas Gutzwiller and Prof. Dr. Martin Hilb, Dissertation no. 4267, Difo-Druck GmbH, Bamberg 2014, page 27.

[6] Source: Lucks & Meckl (2002); Meckl (2006), p. 409. cited in page 14 of Post-Merger Integration (PMI): Overview and Identification of Main Problems in People Management Context Dissertation of the University of St. Gallen, School of Management, Economics, Law, Social Sciences and International Affairs to obtain the title of Doctor of Philosophy in Management, by Nella Foley, Dissertation no. 4267 Difo-Druck GmbH, Bamberg 2014, page 27.

3. Performing stage is characterized by established new organizational culture, beliefs and values, and completed sense-making process.

This means the following four basic stages: the singing of the Letter of Intent stage, followed by the signing stage of the share deal for example. To be noted the singing of a SPA does not necessarily mean that the integration is done per se. On the contrary, many efforts are done to reach the next stage of the Closing or Cut Over stage when the detailed plan for the PMI is elaborated along with the new internal policy of the new entity. From then on, it becomes a question of business talent and consciousness in order to transform the acquisition into a successful integration.

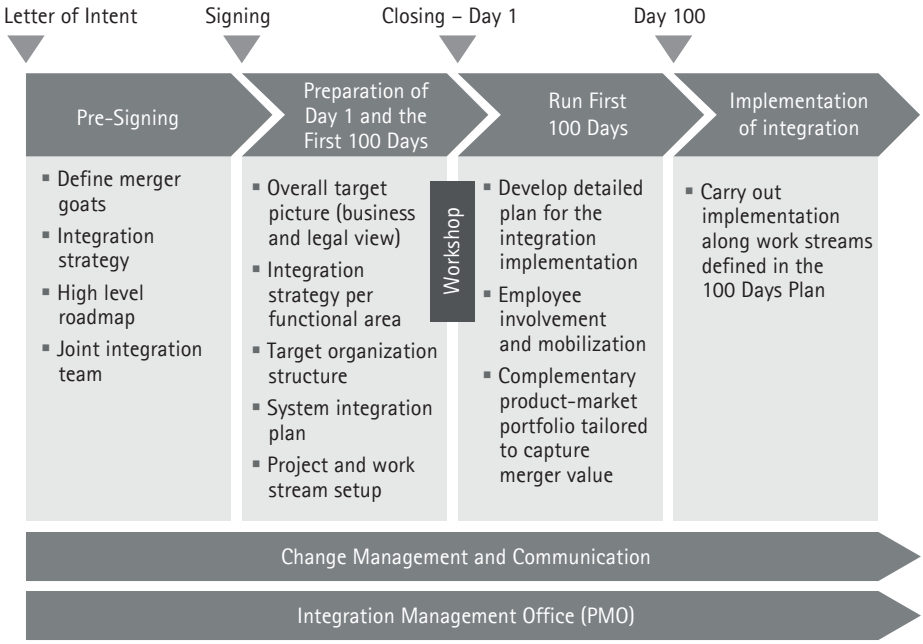

Fig. 2. Contractual phases of PMI[7]

[7] Post-merger integration of small digital companies into larger organizations, Capgemini Consulting, Figure 4, page 6, source: www.de.capgemini.com.

Surprisingly, a large number of companies still underestimate the importance of integration of acquired business in its own business. Frequently stakeholders do not give serious consideration to integration until well after a deal is announced or even closed.[8] In fact, it cannot be emphasized often enough that the PMI begins at the beginning of the entire transaction, more precisely, at the beginning of the due diligence exercise.

Although the reasons for PMI failure mainly include inappropriate pre-merger analysis and planning or poor choice of merger partner, there are also other conditions that might have an effect on the merger outcome.

5 EMPLOYMENT AND CORPORATE LEGAL ASPECTS THAT IGNORED COULD JEOPARDIZE THE PMI PROCESS

The consequences of labor and employment issues in respect of share deals, asset deals and mergers, spin-offs and split of companies are very different and should be reviewed at early stage. The purchaser is well advised to conduct thorough due diligence of labor and employment issues since staff costs may have a strong impact on the future profitability of the target. In particular, pension liabilities can be significant. Employee representatives may have significant information and consultation rights with regard to transactions. Furthermore, the seller and the purchaser should conduct clear and open communication with employee representatives in order to address concerns of the employees so as to make the transaction a success. Moreover, the seller and purchaser should come to a clear understanding of all obligations in the purchase agreement. All

[8] Carr, Elton, Rovit, & Vestring, 2004.

in all, the purchaser should review post-merger or transaction integration issues as early as possible.

5.1 BUSINESS TRANSFERS

Section 613a of the German Civil Code (BGB) governs employer's and employee's rights and duties in the case of a business transfer. Very strict notification requirements apply to employers in relation to all employees affected by a transfer of business (s. 613a, German Civil Code). Accordingly, either the transferor or the transferee of the business in Germany (or frequently both parties in a joint information) must inform each employee affected by the transfer of all of the following: the date or purported date of the transfer; the reasons for the transfer; the legal, economic, and 'social' consequences of the transfer for the employee; and about any measures envisioned which affect the employee.

5.2 INDIVIDUAL EFFECT

Due to its intended purpose sec. 613a BGB is a mandatory rule. The parties cannot preclude the legal consequences of sec. 613a BGB prior to the transfer of business. Corresponding agreements are null and void as well as circumventions, for example dismissals with the agreement of re-employment by the purchaser on less favorable working conditions. In fact, a mere oral notification is not sufficient. Notification must be in a written form in order to be valid. It in the way of fax or e-mail can suffice for these purposes if the employee has generally consented (usually in their employment contract or, implicitly, by having accepted a company's practice) to be notified about legally relevant issues in this form.

In addition, all affected employees have the right to object to the transfer of their employment. However, objections can be raised only in writing within a period of one month after the employees have been notified of the transfer of the business. An exception applies if the transferor or

transferee of the business fails to comply with the existing requirements as to the form and the contents of the notification. In this event, the notification will be deemed to be invalid and, thus, the employees affected have in principle an unlimited right to object to their employment being transferred to the transferee. If the employees do object to the transfer of their employment, the employment relationship with the transferor will remain in existence even if the whole enterprise is transferred. However, as a consequence, employees who object to the transfer of business are substantially at risk of being lawfully made redundant by the transferor following the effective transfer of business. Also, any dismissal based only on the grounds of the business transfer will be deemed invalid (s. 613a (4), Civil Code).

If a business or an identifiable part of a business is transferred from one entity to another, the employment relationships of all employees are attributable to the acquiring entity by operation of law. The acquiring entity takes over all rights and obligations of the employer under the employment relationship. Pursuant to applicable provisions of Article 613a BGB (German Civil Code), the future employer automatically succeeds to the rights and duties under the existing employment relationship if a business or part of a business is transferred to them. If the sole reason for dismissal is the transfer of business itself, then such dismissal is deemed invalid. The law says only this, but no less than this. Therefore, it is up to the courts to decide how to handle the many and varied cases occurring in practice.[9]

In the case of a share deal, the employee protection offered by Sec. 613 lit. (a) BGB is not required, because the mere change of the shareholder structure does not have any impact on the existing employee relationships in the first place.

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[9] http://www.roedl.com/services/success_in_germany/mergers_acquisitions_in_germany/business_acquisition_transfer_of_undertakings.html.

5.3 COLLECTIVE EFFECT

Employment contracts, works agreements and CBAs remain effective and unchanged. A change of shareholders does not give the employer or the employee extraordinary rights whatsoever, including the right to termination. Existing agreements remain effective without exception. Only in the case of senior management, it may be possible that employment contracts contain a change-of-control clause. Such a clause usually makes it possible to leave the company when the majority shareholder is replaced, against valuable consideration.

Nevertheless, following an acquisition of the share deal type, the purchaser may try and pierce the collective bargaining veil, by e.g. leaving the employers' association that has concluded the collective-bargaining agreement. But also, then, the binding effect of the CBA will not cease to apply forthwith. In fact, the leaving employer and the union will be bound to the provisions of the CBA until the CBA expires by way of termination through either the employers' association or the union (so-called "subsequent commitment" pursuant to Sec. 3(3) CA Act). Following the commitment phase, the so-called "subsequent effect" pursuant to Sec. 4(5) CA Act may apply. This means that the work conditions stipulated in the CBA will apply unchanged until a new agreement is reached. This is meant to bridge gaps. Provisions to prevent or put an end to the subsequent effect can be agreed either in the framework of a new CBA or through new employment contracts.

In any case, provisions in CBAs and works agreements are, by operation of law, directly applicable to each employment relationship that is transferred to the purchaser (Sec. 613 lit. (a) No. 1 second sentence BGB), and it is not possible to make changes to the detriment of the employee, not even through a mutually agreed contract amendment, within a period of twelve months following the transfer. The provision applies irrespective of whether the purchaser is bound by a collective agreement or not and provides protection of the employee's prior rights.

The final effect of the transfer of businesses on individual and collective labor rights. The final impact of sec. 613-1 BGB is that employment relationships existing at the time of the business transfer pass to the purchaser and continue. Legal agreements between the parties concerning the transfer of employment relationships are unnecessary and agreements to the contrary are ineffective.

5.3.1 AGREEMENTS RELATED TO THE TRANSFER OF AN UNDERTAKING

As mentioned before, the regulations in § 613a BGB are mandatory, its legal consequences can neither be excluded nor modified. With the occasion of the transfer of undertaking the following agreements can be concluded:

The workers can agree to the transition of their working conditions – acc. with § 613a, subsection 5, BGB – after the appropriate disclosure before expiry of the opposition period.

Between the purchaser of the operation and the employees an individual agreement can be made, so that an already regulated issue acc. with § 613a BGB shall continue to be regulated under the current scheme contact.

The purchaser may conclude a new contract with the employees taking into consideration that:

1. the collective regulations transformed in the employment relationship in accordance with § 613a, subsection 1, sentence 2 BGB may not, before the end of one year after the transition, be changed to the detriment of workers.
2. PER A CONTRARIO, the contractual agreements shall not lead to a circumvention from the employee protection provisions of § 613a BGB. From this point of view, following clauses are deemed questionable:

a. if the detrimental clauses differ from the previous employment contract for the employees and

b. if the new limited in time compared to the previously open-ended employment contracts while maintaining the same number of work places.

c. the employment relationship may be terminated by mutual agreement on the occasion of the transfer of operations.

5.4 DATA PROTECTION ASPECTS IN INTERNATIONAL BUSINESS TRANSFERS

Any company operating a business transfer should take into consideration that also a personal data of employees is implied. In the context of employment relationships, the balance of the collector's and the data subject's individual privacy rights remains the key element. In Germany, the transfer of employees' personal data to U.S. group companies for instance, has become increasingly problematic. The level of data protection in the United States in general is not considered adequate by the German data protection authorities. Therefore, U.S. entities must ensure an adequate level of data protection themselves. German authorities have already expressed the view that standard contractual clauses or binding corporate rules may no longer be sufficient to ensure an adequate level of data protection at the affected U.S. entity. As a rule, it must be obtained from all individuals concerned, in employment situations therefore, from all affected employees. In addition, "informed consent" under German legislation implies detailed explanations regarding the cross-border transfer and the treatment of the personal data in the United States which might mean un-noted regulatory access. The consent shall be granted in writing and voluntarily. The consent should not be included in the employment agreement. Obtaining a collective consent for all employees from the works council is not possible. Therefore, only employees' valid

consent declarations may currently ensure a reasonable degree of legal certainty.[10]

For now, most of the U.S. Germany-based companies have set up alternative legal arrangements to shift data to the United States, such as "standard contractual clauses," standard templates drawn up by the EU executive to allow cross-border data transfers to be made under EU privacy laws. The Privacy Shield was adopted by the European Commission on 12 July 2016. Companies are able to sign up to it with the U.S. Department of Commerce who will then verify that their privacy policies comply with the high data protection standards required by the Privacy Shield.

In response to the above mentioned possible legal issues, a way to diminish the risk of personal data accidents in the workplace is to implement strict security policies within the company, from board level right through to temporary staff and contractors. Basically, larger companies with an international approach or a German subsidiary would need to conclude "internal" and "external" agreements. Internal would be for instance, the contracts of employment and staff handbooks which ought to make clear the responsibilities of the employee, the conditions for collecting his or her consent and that everyone is accountable for their own contribution towards maintaining a safe cyber environment. Furthermore, a disciplinary policy should make express provision for treating certain acts (such as the use of internet for personal purposes) as gross misconduct and appropriate action must be taken against anyone breaching company standards.

A recent survey of 100 German firms found that those which adopted policies of enhancing worker skills, security, flexibility and initiative gave a greater return to shareholders than their competitors in the same industry.[11] For this purpose, in the process of internationalization, multinational companies are confronted with the challenge of harmonizing corporate

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[10] http://www.klgates.com/transfer-of-employees-personal-data-from-germany-to-the-united-states-under-german-data-privacy-law-10-09-2015/.

[11] Cornell University ILR School, Corporate Codes of Conduct and Labor Standards, Jill Murray International Labor Organization.

culture throughout their subsidiaries by means of codes of conduct, a form of self-regulation by the company itself which cannot be enforced in legal proceedings.

However, if a code of conduct has become part of an individual labour contract, for example by explicit incorporation of its provisions into the contract, an employee could try to enforce the provisions of the code of conduct in legal proceedings. Whether such proceedings would be successful will depend on the applicable (national) law and the way in which the reference to the code of conduct in the employment contract was phrased. When the code of conduct is implemented by means of international frame agreements ("IFAs), agreements between multinational and one or more global unions, private international law rules will apply. And, since there is no specific legal framework for the legal enforcement of IFA's at the international or European level the question whether or not an IFA is legally enforceable will have to be determined on the basis of national law, i.e. the law applied by the court adhered. However, an IFA is a soft law means to create a social dialogue rather than a strict contractual obligation that can be enforced in court.[12]

The most important aspect are the technical policies on IT systems which need to be introduced, regularly reviewed and made comprehensible to employees and elaborated in accordance with security standards such as ISO/IEC 27001, which manages information security. [13]

In addition, the much expected GDPR increases the rights for individuals while strengthening the obligations for companies. The GDPR expressly authorizes individual Member States to implement more specific rules in respect of the processing of employee -related personal data. Member State law is foreseen include processing such data, in connection with freedom of expression and professional secrecy (where restrictions of

[12] IUSLabor 3/2005, Implementation of Ethic Codes in Germany: The Wal-Mart Case, Ingebjörg Darsow Rechtsanwältin, Frankfurt am Main.

[13] http://employment.law-ondemand.com/cyber-security-not-just-an-it-issue/.

supervisory authority audit rights are predictable)[14]. Also, this means the ability to implement rules to safeguard the data subject's "dignity, legitimate interests and fundamental rights" and the GDPR cites the transparency of processing, intragroup transfers and monitoring systems as areas where specific regard for these issues is required. The GDPR recitals give examples of processing that could be necessary for the legitimate interest of a data controller. They include the transmission of personal data within a group of undertakings for internal administrative purposes, including client and employee data (note international transfer requirements will still apply according with Recital 48). Between the grounds for processing sensitive data Art. 9(2)(b) provides those "Necessary for the carrying out of obligations under employment, social security or social protection law, or a collective agreement." Also, to be considered is the fact that GDPR will not only apply to employers processing the personal data of their employees, but also to HR service providers that process such data on behalf of the employer ("data processors"). Until implementation of GDPR such HR service providers only had a contractual obligation vis-à-vis the employer but are not directly accountable for complying with the data protection regulations.

To continue with, under GDPR a data subject's consent to processing of their personal data must be as easy to withdraw as to give. The consent must be given unambiguously: freely, specifically and on an informed basis. The Recitals add that consent is not freely given if the data subject had no genuine and free choice or is unable to withdraw or refuse consent without detriment. Moreover, should the consent be given through a declaration that also regulates other matters, the consent to the processing of data has to be clearly distinguishable from other matters to be valid.

In what relates to binding corporate rules ("BCRs") the GDPR expressly recognizes these for controllers and processors as a means of legitimizing intra-group international data transfers. The BCRs must be legally binding and apply to and be enforced by every member of the group of undertakings/enterprises engaged in a joint economic activity, includ-

[14] http://www.twobirds.com/~/media/pdfs/gdpr-pdfs/bird--bird--guide-to-the-general-data-protection-regulation.pdf?la=en.

ing their employees. They must expressly confer enforceable rights on data subjects. Correlatively, GDPR refers to the cross-border transfers of personal data, by stressing the importance for companies to have a good understanding of the different HR data flows within and outside of the group in view of implementing the required mechanisms to legitimize these cross-border data transfers.

Lastly, inspired by the US-model, GDPR introduces a general obligation to notify data breaches: when a company suffers a data breach, as a rule it must notify the data protection regulator within 72 hours and if the breach affects employment-related data, the employer must notify the affected employees without undue delay if the breach is likely to result in a high risk to his/her rights and freedoms.

As a leitmotif of this research it has been stated that M&A make special demands on employees. Although the location of the numbers is not clear, and the criteria for the success of an M & A differ, literature has stated[15] that approximately two out of three mergers fail. For approximately 60 percent of these failed “corporate marriages” the reasons in areas are the so-called “Soft Facts”. This occurs mostly in the actual integration phase. Neglected are mainly: the involvement of employees (employee representative), the implementation of intensive communication with all stakeholder groups and the corporate-cultural aspects.

The aim of this thesis is to strengthen the ability of employees and employers to develop successful legal and business strategies in M & A PMI processes. As a result, as seen above a list of leading questions arose, which lead to the necessity of elaboration of a practical “checklist”, as a conglomerate of overviews which corporate practitioners – primarily personnel managers, but also works councils – can consult in order to facilitate the handling of PMI processes. Further on, the organization of the management of an acquisition process is done through project groups. The organization of the management and coordination of the individual project groups in practice are reflected in three models.

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[15] Personalarbeit bei Mergers & Acquisitions Fachausschuss Engere Mitarbeiter der Arbeitsdirektoren Stahl Hans-Böckler-Stiftung, Düsseldorf, August 2004.

6 MANAGEMENT MODELS ENABLING SUCCESSFUL PMI

1. The Classical Management Model

   Here, the management manages the entire process with the assistance of external consultants. Experience has shown that after the conclusion of the purchase contract, senior managers often delegate attributions to middle management. This then leads to delays and the credibility of the workforce gets shaken.

2. The Team Model

   At the beginning of the process, a team is formed, which is responsible for the acquisition process. It should be represented all major departments: tax, financial, legal and personnel department and the departments of corporate planning. This way, continuity for the total process, credibility, and discharge of the Executive Board will be ensured. Companies that have merger teams should count on competent works councils in their ranks.

3. The Department Model

   Large companies for M & A processes rebuild usually their own M & A Department. In this case, works councils in the area are an appropriate counterparty, continuously increasing their own competence in this area.

7 THE ACTUAL DEVELOPMENT OF PMI

To begin with, the Works Council has the right to make the proposals for the protection and promotion of employees. Generally, the employer is obliged to take a position on such proposals. In companies with more than 100 employees must happen even in writing. Businesses aiming to

establish open and cooperative relations with their workforce, they should make a virtue out of this obligation.

As a next step, works councils and managers need to make clear the legal framework. They need to know their rights, tasks and options for action and their influence. This way, unnecessary delays can be avoided, along with uncertainties and conflicts. Precisely if the goal of mergers centers on the workforce work councils of the target should be in their quality of bearers of participation as soon as possible incorporated, because convinced works councils can generate confidence.

Another field of their action is in the area of protection of employees or jobs. This can be done by the formulation of alternative strategies to the merger, negotiation of interests and plan, set of selection guidelines and qualification measures. It can also have a significant impact on the transfer policy of the company, as well as on the information of the workforce. The final aim of the works councils is the protection of workers against adverse effects of first the merger. They can attract opportunities for competitive jobs, secure employment, professional development and training.

From a strategical point of view the tasks are the strategy of the future business, the communication strategy, the corporate mission statement and the corporate culture. The translation of this at an operational level is: restructuring of enterprises, unification of structure and process organization, adjustment of charging systems and HR specific measures.

8 CONCLUSIONS

Although M&A strategy is massively perceived as the skilled negotiations or the purchase price, in reality, the price is only the initial goal of the strategy. It all begins with the business logic. Usually the the reason behind a deal is: the consolidation of a sector and the entry into new business fields. Please find below a matrix describing the phases of the takeover process.

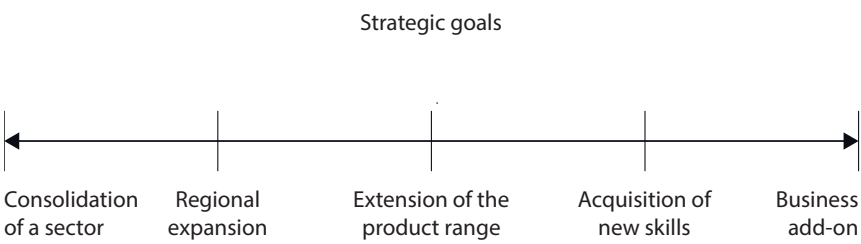

Fig. 3. Business logic[16]

Types	Home run	Time out	Adjourned game	Short shrift
Characteristics	Integration process begins immediately Open exchange of information from the start Initial decisions can be made before the closing	Joint integration planning Initial team building Preparation of guidelines, decisions only after the closing	One-sided integration planning Clear directions for Day Zero and the integration Stabilization of business is the top priority	Integration process must start at once Dynamic and strong leadership by the acquiring company
Attitude of management	Open, friendly		Defensive, destructive	
Sequence of transaction	Closing immediately follows the signing	Break between signing and closing		Closing immediately follows the signing

Fig. 4. Takeover process[17]

[16] The challenges of a PMI, Business logic, Organization and culture, Takeover process source: the 2008 Editorial Olyver Wyman, Post-merger integration A tailored approach to sustainable transaction success, by Thomas Kautzsch and Henning Thormählen, www.oliverwyman.com

[17] Idem 17.

The purpose shapes the type of the merger. Accordingly, in saturated markets, companies with similar business activities merge in order to generate economies of scale and to expand their market position. The objective of such mergers is to produce cost synergies in all company divisions. This endeavor usually means job cuts, unsettles the affected people from the very start, and triggers protests among employees and unions. For this reason, a successful integration must be carried out quickly and completely.

The approach is completely different during an expansion to new business fields. The goal here is to unlock additional sales and earnings potential. The company's organization remains basically intact. The focus of a successful PMI lies in adapting fundamental corporate governance functions and in developing optimal conditions for long-term sales and earnings growth.

As mentioned above, frequently, months pass between the takeover offer, the signing and the closing – as a result of antitrust or other institutions reviews and confirmations or, in many cases, of the doubtful or even hostile attitude of management. From a corporate and labor law perspective, this article aims at exploring options for action, and identifying the correct programs and decisions that could result in a successful integration. This period of forced waiting must be wisely used to prepare the day of the closing and to formulate a detailed plan. It includes the involvement in the management organization, and the fastest possible transfer of the project work into the areas of responsibility integration into the previously separated companies, high-performing employees retained at the company through the use of suitable incentives, permanent dialogue with the works councils, training sessions and many other measures must be employed over a longer period of time in order to form one company out of two.

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7 THE FIGHT AGAINST ECONOMIC CRIME WITH A VIEW TO CYBERCRIME:

EFFICIENCY OF INSTRUMENTS AND RESTRICTIONS BY LAW AND FUNDAMENTAL RIGHTS

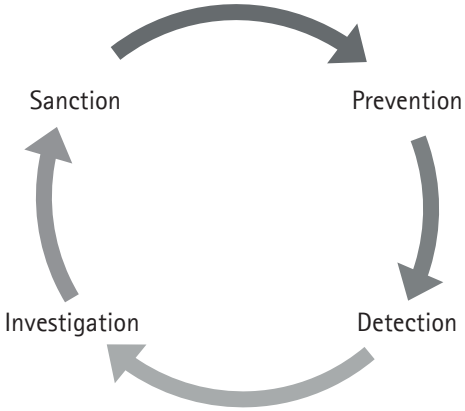
BERIL ARAL
GRADUATE LL.M.02

TABLE OF CONTENTS

1 ECONOMIC CRIME AS SUBJECT OF COMPLIANCE MANAGEMENT

Economic crime has always been subject for companies. Technological developments also result in new dimensions of economic crime and of cybercrime and are challenges for companies of all sizes and branches: Companies have to comply with regulations in order to prevent economic crime but they also have to react effectively against crime and committed breach of duties. Because of the high impact of this topic, economic crime should be seen in a broader sense and not only be regarded from the criminal point of view.

Firstly, the different elements of a compliance management system shouldn't be neglected, as the fight against economic crime is embedded in the idea of such a system. The 4-phase-model illustrates that the single elements are connected and cannot be regarded isolated[1]:



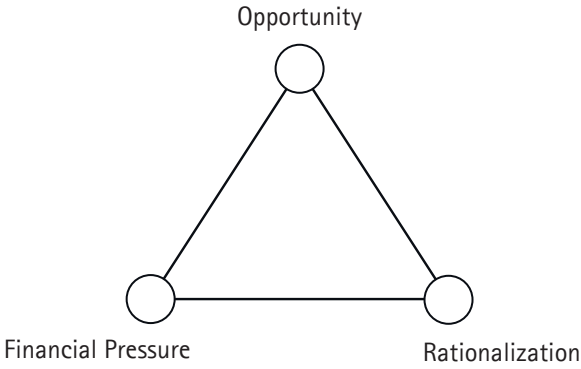
Preventive measures have to be carried out in order to avoid economic crime to occur. In case of cybercrime, preventive measures require special attention by establishing an IT-security. Organizations also have to take hints and red flags seriously so that detection of irregularities is pos-

[1] Bantleon, DStR 2006, p. 1719.

sible and investigation measures can be started. Committed crime also has to be sanctioned consequently in order to safeguard the credibility of the implemented compliance management system.

In every part of this phase-model organizations are confronted with challenging issues and legal requirements and limits which will be regarded in the following chapters.

The look at the issue from the fraudster´s perspective is also part of a broadened view and may help organizations to implement a compliance management system. The **Fraud Triangle** is a model that tries to explain fraud or economic crime from the fraudster´s point of view.



Fraud consists of three elements:

- the fraudster´s financial pressure as motivation,
- the existence of the opportunity to commit a crime and
- rationalization as the fraudster´s reaction to the committed crime.

Rationalization can have an external or an internal focus[2]. The fraudster can blame external factors, such as the company or someone else to be

[2] Dorminey/Fleming/Kranacher/Riley, Issues in Accounting Education 2012, p. 558; Rossouw, Business Ethics Quarterly, 2000, p.889, who defines "self-centered" and "other-centered" considerations.

the reason for the committed crime. In case of internal rationalization he compares his behavior to other´s or qualifies the consequences.

Insofar, the Fraud Triangle is an instrument to explain the inner motivation and to point out the circumstances that enable fraud. It has been developed further in literature by including ideology or the ego[3] to the motivation factor and by taking a closer look at certain circumstances in a company´s culture which enable fraud. Insofar the model developed to an indicator in fraud risk assessment.

For the organization it is important to keep an eye on these factors, as they support the company in the risk assessment and implementation of preventive measures.

Beneath traditional crime that has always been committed and nowadays is also carried out by digital means, cyber-dependent crime, which can only be committed with the help of a computer and which requires particular attention and technical defense by organizations, exists. The German Criminal Code (StGB) has been adjusted to the “Cybercrime Convention”[4] which dated 23th November 2001 and came into force in Germany in July 1st, 2009. According to the Federal Criminal Police Office (Bundeskriminalamt), it has to be distinguished between cybercrime in the narrow sense “including crime directed against the internet, data network, information technology and communications systems and their data.”, and cybercrime in a broader sense which is “crime committed by these means”.[5]

The registered criminal activity of cybercrime includes Computer fraud (sect. 263a StGB) 51 %; Data espionage (sect. 202a StGB)/Phishing (sect. 202b StGB) 21 %, Forgery of data intended to provide proof (sect. 269 StGB) 16 %, Data tampering (sect. 303a StGB)/Computer sabotage (sect. 303b StGB) 8 %, Fraud concerning access authorization to communication services 4 %.[6]

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3 Ibidem.

4 https://www.coe.int/de/web/conventions/full-list/-/conventions/rms/0900001680081561.

5 Bundeskriminalamt, Lagezahlen 2015 Cybercrime.

6 Ibidem.

The fact that cybercrime and digital investigation is of increasing relevance for companies is reflected by studies and surveys. Latest studies show that more than half of the companies in Germany are affected by Data Espionage or Sabotage, which causes annual damages of more than 55 billion Euros.[7] Also the reputational damage has to be taken into consideration, which could explain why only every third company reports the attack.[8]

2 GENERAL CONSIDERATIONS ON INTERNAL INVESTIGATIONS

The internal investigation of committed offences is also part of a compliance management system. A (former) employee´s complaint, investigation by authorities or a hint by an accountant that an infringement or criminal offence might have occurred can be a trigger for the company´s business management to start an internal investigation.

By ignoring such a hint, the management and compliance officer bear liability. Internal investigations are directly linked with the company´s compliance management system. The question how to react when suspicion occurs is – apart from the avoidance of liability- part of the compliance management system and completes it. A compliance management without application is ineffective. Internal investigation has the effect that:

- the infringement can be stopped
- the weak points of the compliance management system can be found
- It also has the preventive effect to demonstrate the sustainability of the compliance management.

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7 https://www.bitkom.org/Presse/Presseinformation/Spionage-Sabotage-Datendiebstahl-Deutscher-Wirtschaft-entsteht-jaehrlich-ein-Schaden-von-55-Milliarden-Euro.html.

8 Ibidem.

In literature different statements of a compliance function can be found:

- Compliance consists of following elements: organizing measures to prevent misconduct, monitoring and in case of suspicion, investigation has to be conducted.[9]
- Compliance has a protective and consulting function. It also serves for quality management and marketing. Investigation in that context has a monitoring and protective function.[10]

In both statements, internal investigations are mentioned as one part of a compliance management system which is also generally acknowledged.

In that context, also a **legal obligation to carry out internal investigations** has to be affirmed. For the Joint-stock company (AG) sect.76 para.1, sect. 93 para.1 clause 1 German Corporation Act (AktG) regulate that the executive board is responsible for leading the joint-stock company with the duty of care and diligence of a prudent businessman. It is not only part of this duty to comply with the law but also to implement a monitoring system to control the compliance with the law (Legalitätspflicht). Pursuant to sect. 130 para.1 Administrative Offences Act (OWiG) an owner of an operation or undertaking is obliged to adopt supervisory measures in order to prevent misconduct and sect. 9 OWiG puts the responsibility for this duty to the management´s board. One legal duty of the supervisory board is to monitor the internal investigation of the management board or to initiate an internal investigation when the management board is suspected of having committed a breach of duty.[11] In case of suspicion against a member of the management board, it is also the supervisory board´s duty first -as a surveillance authority- to control the management board´s investigation.

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9 Hartwig: in Moosmayer/Hartwig: Interne Untersuchungen, p.8.

10 Hauschka in: Hauschka Corporate Compliance, § 1 para.22.

11 Wagner CCZ 2009, 15; Potinecke/Block in Knierim/ Rübenstahl/Tsambikakis, Internal Investigations, chapter 2 paragraph 32.

Also for the Company with limited liability (GmbH) such an obligation to carry out internal investigations can be affirmed according to sect. 43 para.1 Limited Liability Companies Act (GmbHG); sect. 30, 130, 9 OWiG.

A general duty to conduct internal investigations could be derived from the mentioned provisions, especially sect. 130 OWiG. Because of the development of the case-law, the main parts of a compliance management system can be derived from this provision: the obligation to organize a preventive system in order to avoid misconduct, to control this system and at least to investigate in case of suspicion. In Literature such a general duty is not affirmed. It depends on the size of the company, its structure, its risks and experiences if such an obligation to implement a compliance management system can be affirmed.[12]

Also if one says that internal investigations are part of compliance management, because investigation is part of this function, it suggests itself that there is a duty to conduct internal investigations.

As it is the main duty of the executive board to implement a monitoring system in order to control the compliance with the law, it would be contradictory to this duty not to investigate in case of allegations.[13] In this context the decision of the Regional Court Munich[14] has to be mentioned, where the Court affirms the executive board´s duty for compliance.

The duty to conduct internal investigations has to be affirmed at least when suspicion facts are of considerable importance for the company.[15]

Concerning the question how to conduct the investigation, concrete legal requirements don't exist.

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12 Hauschka in: Hauschka, Corporate Compliance, §1 para.23; Potinecke/Block in Knierim/ Rübenstahl/ Tsambikakis, Internal Investigations, chapter 2 paragraph 21.

13 Potinecke/Block in Knierim/Rübenstahl/Tsambikakis, Internal Investigations, chapter 2 paragraph 9

14 LG München Urt.v. 10.12.2013 – 5 HKO 1387/10.

15 Wagner CCZ, 13; Potinecke/Block in Knierim/Rübenstahl/Tsambikakis, Internal Investigations, chapter 2 paragraph 10.

Several kinds of **investigation measures** can be mentioned:

- Interview with the suspected employee/s or witnesses
- Research of working documents and workplace
- Search of the employee´s mail account
- Electronic data analysis
- Video surveillance
- Observation by detective/s.

In case of digital investigations certain particularities because of the amount and characteristics of the data that has to be analyzed, have to be noted by the investigator. It requires much more technical skills and resources because of the amount of data that has to be analyzed. The amount of the data makes it necessary to avoid over-investigation by regarding different measures, such as considering a project management, the right timing of the investigation and by clearly defining the investigation goals.

Internal investigations can be conducted by a team from inside the organization or by an external team such as law firms. In case of digital investigation it may in some cases be necessary to engage an external team with technical skills. An external investigator can also have the advantage of more credibility and can save the internal personnel´s time because of its specialization on this topic.

Internal investigation shouldn't be carried out without losing sight of the relation to governmental investigation and legal issues that may occur. The Federal Constitutional Court (Bundesverfassungsgericht/BVerfG) had to decide the following case[16]: A law firm was commissioned by a company in the automotive industry to conduct an internal investigation because of suspected manipulation of emission values ("diesel affair"). Preliminary

[16] BVerfG Urt. v. 25. Juli 2017 – 2 BvR 1287/17, 2 BvR 1583/17, 2 BvR 1405/17, 2 BvR 1562/17; http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2017/bvg17-062.html.

instigations had been initiated by the public prosecution. During a searching of the law firm´s office documents from the internal investigation were seized by the prosecutor. The law firm´s interim measure for a constitutional complaint was successful: because of the attorney-client privilege the prosecutor has to deposit the seized documents and was not allowed to evaluate the documents by reason of an appeal.

3 ASPECTS OF EMPLOYMENT LAW

Studies about economic crime show: about half of the perpetrators come from inside the affected organization[17] and are junior staff members or in the middle management.[18] This also applies to cybercrime: 62 % of the companies that became victim of Espionage, Sabotage or Data Theft identified current or former employees as perpetrators.[19]

The aspect of employment law in the context of economic crime is important in different dimensions: What are the possible sanctions that an employer can apply in case of fraud? What are the preventive measures concerning human recourses management in order to avoid fraud? What are the legal limits that an employer has to note in case of investigation measures?

A company has -from the employer´s point of view- to consider what legal instruments within the frame of employment law it has against the employee in case of fraud or suspicion of fraud including the legal restrictions of these instruments. The employer, who is confronted with a fraud case, has to take the current jurisdiction into account.

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17 PwC, Wirtschaftskriminalität in der analogen und digitalen Wirtschaft, 2016, p. 39; KPMG, Tatort Deutschland, 2016, p.15

18 PwC Cybercrime, Survey 2011, p.22

19 https://www.bitkom.org/Presse/Presseinformation/Spionage-Sabotage-Datendiebstahl-Deutscher-Wirtschaft-entsteht-jaehrlich-ein-Schaden-von-55-Milliarden-Euro.html

Usually, the **termination of the employment relationship** in case of fraud or suspicion of fraud is the preferred sanction, compared to warning which would be considered as too weak.

The termination because of suspicion of having committed a serious breach of duty or crime is generally accepted by the jurisdiction of the German Federal Labor Court (Bundesarbeitsgericht/BAG) but it is bound on certain conditions[20] and results in several legal issues, beginning with the question in how far the case depends on criminal proceedings. But as the legal assessment concerning the employment relationship has to be regarded independently, the employer is not bound on the criminal proceeding.[21] In case of termination of the employment relationship because of suspicion, the employer has to consider that

- strong suspicion grounds on objective facts,
- clarified with all reasonable measures and
- is adequate to undermine the basis of trust.
- The hearing of the employee is formal precondition for the validity of a dismissal.

Special regard has to be taken to the question when the notice period of two weeks according to para.626 German Civil Code (BGB) in case of termination without notice begins, or in other words, how much knowledge and investigation of the facts is necessary to let the notice period begin. In cases of economic crime, especially with several involved participants, it can be difficult and require long time of investigation in order to determine every person´s level of participation.

Also the **background check** of an applicant during the hiring process as preventive measure has to comply with law and with the principles developed by jurisdiction. Concerning the question in how far the employer may investigate or ask the applicant during the hiring process, the current

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20 Pröpper in Knierim/Rübenstahl/Tsambikakis, Internal Investigations, p. 366

21 ErfK/Niemann para. 626 sect. 177

jurisdiction has to be observed and the applicant´s rights on data protection has to be considered.

Internal investigation, which is necessary to confirm an employer´s suspicion and clarify the facts, has to meet legal requirements concerning employment law and data protection law. Otherwise in case of violation of provisions or breach of the employer´s fundamental rights – especially the general right of privacy according to Art. 2 (1), 1 (1) German Basic Law (GG) – the investigated evidence could be excluded in the trial.[22]

4 ASPECTS OF DATA PROTECTION LAW

Independent from the subject and method of analyze, in every case the investigator of economic crime will have to notice the **data protection law** of the employee who is subject of the investigation.

4.1 GENERAL CONSIDERATIONS

In general, data protection law within the employment context deserves special consideration.

Employee´s personal data seem to play a particular role in connection with data protection law. At least, data protection law in employment relations may not be regarded separately from employment law. In that context it is a kind of employee protection right.[23]

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22 BAG Urt.v. 20.6.2013, 2 AZR 546/12; BAG Urt. v. 21.11.2013, 2 AZR 797/11.

23 Wächter, Datenschutz im Unternehmen, para. 185.

Over the last decades, there has been a political discussion in Germany to establish a special data protection law for employment relationships.[24] Finally, sect. 32 Federal Data Protection Act (BDSG) as a special provision for data protection law for employment relationships has been included into the Federal Data Protection Act in 2009.

The employment relationship, regarded in detail, makes clear why data protection law requires particular attention:

- The employer has a strong interest for the employee`s data:
  - The employer is obliged to collect the employee´s (master) data in order to carry out the employment relationship, e.g. for wage payments.
  - The employer is interested in collecting as much information about his staff as possible for strategic human resources management.
  - The employer is interested in monitoring the employee´s working performance.
  - The employer is interested or may be obliged in monitoring the employee´s behavior in case of suspicion of breach of contract or criminal behavior.
- There is a structural and economic imbalance between employer and employee:

The employer is interested in running his business according to Art. 12, 14 GG. This can come into conflict with the employee´s basic rights according to Art. 2 (1), 1 (1) GG – such as in case of monitoring the employee´s keyboard input on his workplace-PC via Software-Keylogger.[25] One legal consequence is that the evidence, that the employer has illegally obtained, is no valid reason for dismissal and has to be excluded in the process against the dismissal. This balance of basic rights has to be reflected by the relevant provisions, which is in that context sect. 32 BDSG.

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[24] Simitis in Simitis, sect. 32 para.1.

[25] BAG Urt. v. 27.07.2017 – 2 AZR 681/16.

4.2 INVESTIGATION MEASURES

Three relevant investigation measures will be regarded further in the following paragraphs.

4.2.1 INTERVIEW OF THE EMPLOYEE

The employee ´s duty to provide information and to take part in an interview has to be affirmed as part of the accessory obligation of the employment relationship. As the employment relationship is a kind of contractual obligation according to sect. 662 BGB, also sect. 666, 675 BGB is applicable which regulates the mandatary´s obligation to provide the required reports and information to the mandator.

As the interview contains data collection according to sect. 32 para.1 clause 1 BDSG the requirements of this provision have to be respected.

After having collected the data another question arises: In how far are investigation authorities allowed to refer to the information, especially when they result in self-incrimination of the employee?

By the Higher Labor Court Hamm[26] the following case had to be decided: The employer claimed a right for information against the employee who was suspected to having violated the prohibition of competition. Thereupon the employee (defendant) considered that because of the general right of privacy according to Art. 2 (1), Art. 1 (1) GG, he couldn´t be forced to make a statement that would result in self-incrimination. It means that court has no objections concerning the employee´s duty to provide information to the employer. According to the Higher Labor Court Hamm, the right to silence, which is part of the Federal Constitutional Court´s jurisdiction, doesn't exist, when a person has a legal or contractual obligation to make a statement. In this case the employee was legally and contractually obliged to refrain from competing against the employer. Also independent from the possible infringement, the employee has the duty

[26] LAG Hamm Urt.v. 03.03.2009 -14 Sa 1689/08.

to provide information to the employer about his work. Constitutional objections even don't exist in case of self-incrimination. But according to the Court the employee's statement may not be passed on the investigation authorities – a prohibition of exploitation exists according to decisions by the Federal Constitutional Court.[27]

A uniform case law doesn't exist concerning this subject. Because of this unclear legal situation, the employer should always consider the employee´s general right of privacy and possible consequences when he demands information from the employee.[28]

Also the works council´s participation rights have to be noted. As according to sect. 80 para.2 Works Council Act (BetrVG) the employer has to "supply comprehensive information to the works council in good time to enable it to discharge its duties under this Act; (…)".The works council´s right for information has to be affirmed. In case, the employer uses a staff questionnaire for the interview, it requires the approval of the works council (sect. 94 para. 1 BetrVG). A right to co-determination according to sect. 87 para. 1 No.1 BetrVG could be affirmed if the topic of the interview refers to the employee´s conduct which is not part of the work performance.[29]

4.2.2 SEARCH OF AN EMPLOYEE`S WORKPLACE

One important investigation measure is the search of the employee´s workplace or working papers. As the working papers are owned by the employer, he always has the right to inspection. Concerning the search of the employee´s workplace, the employer´s domiciliary right has to be noted which gives him generally the right to search as long as the employee´s privacy is not violated.[30]

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27 BVerfG Urt.v. 13.01.1981 – 1BvR 116/77.

28 Lützeler / Müller-Saroti, CCZ 2011,p. 24.

29 Krug / Skoupil, NJW 2017, p. 2374, 2377.

30 Mengel in Knierim/ Rübenstahl/Tsambikakis, Internal Investigations, chapter 13 para. 48.

By the Federal Labor Court [31] the following case had to be decided: The employee, who works in a discounter, was suspected to have stolen underwear from his workplace. After that the employer decided to search secretly the employee´s lockable wardrobe in the presence of a member of the works council. Having found some underwear, similar to the one which is sold in the discounter, the employer terminated the employment relationship. In the following dismissal protection the employee claimed that the employer didn't have the right to search his personal closet and to use the result as reason for the termination of the employment relationship. The Court agreed with the employee´s legal opinion. According to the Court there is good evidence that the search of the employee´s closet is data collection in the sense of sect.32 para.1 BDSG. The Court leaves this question unanswered but determines that the employer´s search didn't meet the requirements of the principle of proportionality. The search of the employee´s closet has to respect the requirements of this principle in any case – independent from whether sect. 32 para. 1 BDSG or Art.2 para.1 GG is applicable. The closet counts to the employee´s private sphere that may only be breached for compelling reasons. Although the employer had documented reasons for suspicion against the employee, he didn't choose the mildest measure to investigate. In this case it would have been necessary to open the closet in the employee´s presence, which would have been the milder measure instead of opening it secretly. The presence of the work council even reinforced the breach of privacy because of the presence of a third party. In consequence the employer could not rely on the termination of the employment relationship on this search`s result.

4.2.3 ANALYSIS OF THE EMPLOYEE´S MAIL ACCOUNT

The legality of the analysis of the employee´s mail account first depends on the question whether private use is prohibited or not. In case the employee is not allowed to use the employer´s email system for private purpose, the mails can be considered as business mails. In this case the

[31] BAG Urt. v. 20.06.2013 – 2 AZR 546/12.

data handling according to sect. 32 para. 1 BDSG usually doesn't cause problems.

When the employee is allowed to use the email system for private purpose, first the problem occurs whether the employer can be qualified as provider of telecommunication services with regard to the provisions of the Telecommunications Act (TKG).

The employer could be confronted with the risk of committing a crime by violating the employee´s postal and telecommunications secret according to sect. 206 German Criminal Code (StGB):

Punishability requires that commercial provision of telecommunications services is provided by the employer according to sect. 3 No. 10 TKG which is discussed in literature and jurisdiction. The problem occurs when private use of the mail account is permitted or tolerated and before the mail is transferred and saved on the workstation.[32] One argument against the application of sect. 3 No. 10 TKG is that the employer doesn't provide the service on a commercial basis (sect. 3 No. 6 TKG). This opinion is supported by jurisdiction of two Higher Labor Courts[33]. On the other hand, according to sect. 3 No.10 TKG, an intention to make profit isn't necessary.

The question is also whether the employee is "third party" as required by law. Regarded from the systematic point of view, this question and the application of sect. 3 No.10 TKG has to be denied. According to sect. 1 TKG the legislative propose of the law is, "*through technology-neutral regulation, to promote competition and efficient infrastructures in telecommunications and to guarantee appropriate and adequate services throughout the Federal Republic of Germany."* This purpose doesn't correspond to the permitted private use of the mail account within an employment relationship. Even if private use is permitted, the main focus of the use of technical devices is to serve the interests of the employer

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[32] Grimm in Überwachung im Arbeitsverhältnis: Von Befragung bis zur GPS-Ortung – wie viel Kontrolle ist erlaubt? Juris Die Monatszeitschrift 2016,p. 22.

[33] LAG Urt. v. Berlin-Brandenburg, 16.02.2011- 4 Sa 2132/10; LAG Niedersachsen Urt. v.31.05.2010 -12 Sa 875/09.

which is a different context to what the legislative purpose describes. The application of this law wouldn't correspond to an employer's duties, such as described in sect. 257 para. No.2, 3 Commercial Code (HGB) which provides a documentation obligation of business letters which includes electronic mails.[34]

The allowance of private use should always be connected with a labelling requirement or work agreement which regulates the private use and employer's access in case of investigation.[35]

Another relevant investigation is the work place video surveillance, which can infringe the employee´s general right of privacy.[36]

But not only in case of internal investigation, also within the regular employment relationship the imbalance of employee´s and employer´s interests becomes apparent, such as in the context of the freely given consent. According to sect. 4a BDSG, the data subject´s consent, which is one legal ground for admissible storage, modification or use of personal data according to sect. 14 para.2 no.2 BDSG, is only effective when it is freely given. This provision is based on Art. 2 (h) of the Directive 95/16/EC which defines that: *'the data subject's consent' shall mean any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."* In connection with the employment relationship the question may occur, whether the employee really has a choice not to give his consent to the data collection or transfer.

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34 Thüsing, Beschäftigtendatenschutz und Compliance, § 3 para. 89.

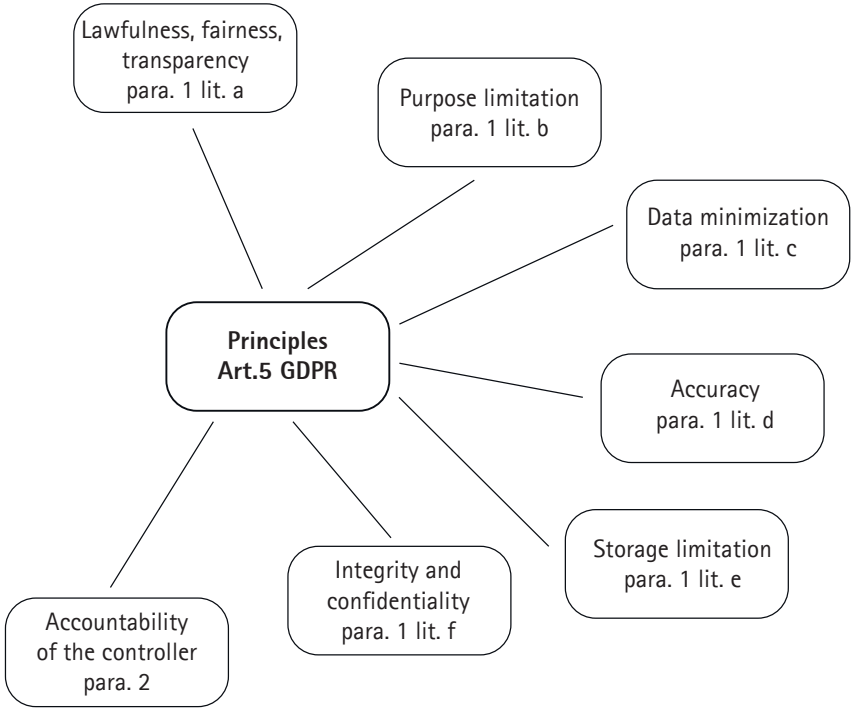
35 Grimm in Überwachung im Arbeitsverhältnis: Von Befragung bis zur GPS-Ortung – wie viel Kontrolle ist erlaubt? Juris Die Monatszeitschrift 2016, p. 22.

36 E.g. BAG Urt. v. 22.09.2016 – 2AZR 848/15.

4.3 GENERAL DATA PROTECTION REGULATION (GDPR)

In the context of data protection law and internal investigations, organizations have to prepare themselves for the General Data Protection Regulation (GDPR) that will be applicable directly in all Member States from 25 May 2018. The GDPR regulates several principles of processing of personal data and requires documentation and data protection impact assessment (Art.35). As data protection in the employment context includes an opening clause in Art. 88 GDPR, the amendment of the Federal Data Protection Act has been approved by the Federal Cabinet in 1st February 2017 and promulgated on 30 June 2017 (Federal Law Gazette I p. 2097).

The GDPR regulates several **principles of data processing** in Art. 5:



Most principles mentioned in Art. 5 and supplemented by other provisions in the GDPR and by the recitals, are already known from the Federal Data Protection Act. Also the principle of ban with permit reservation and principle of proportionality (Art. 6 para.1 (f), Rec. 47) have already been main principles in the Federal Data Protection Act.

The GDPR has a broad regulation of the data processor´s obligations which include technical and organizational measures and that can also be relevant in case of internal investigation:

- **Data protection impact assessment**

  Special regard has to be taken to the risk-based approach which also can be seen in the regulation of the data protection impact assessment, which every controller has to conduct (Art. 35 GDPR).

- **Information notices**

  As part of the principles "fair and transparent" processing of data, the GDPR regulates explicitly that the processor has to provide Information to the individuals about the processing of their data. Article 13 regulates which information the collector has to provide.

- **Higher requirements for documentation**

  According to Article 5 para. 2, the controller has to be able to demonstrate compliance with the principles mentioned in para. 1. Also Article 24 regulates such a duty as it provides that the controller has *"to be able to demonstrate that processing is performed in accordance with this Regulation"*. The processor also has to document the information he provides to the data subject according to Art. 13 and Rec. 58, 60.

- **Privacy by design/by default**

  Article 25, completed by Rec. 78, regulates that the controller has to implement appropriate technical and organizational measures ("technisch-organisatorische Maßnahmen") in order to meet the requirements of the Regulation. Such measures could be pseudonymisation or the integration of necessary safeguards. What measures

will be appropriate in each case depends on the risks for right and freedoms of natural persons posed by the relevant processing, which is also part of the risk-based approach.[37]

Concerning the employment relationship, an opening clause is regulated in Art. 88 GDPR as already mentioned, so that Member States may, "*by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context".*

The German Government has passed an amendment of the Federal Data Protection Act that will enter into force on 25 May 2018. Investigation measures will have to meet the requirements that are regulated in sect. 26 BDSG-E. According to this provision, the processing of the employee´s personal data has to be necessary such as already regulated in sect. 32 BDSG so that the same requirements have to be met.

In general, it will require high efforts to organizations to prepare themselves to the new legal provisions. Legal insecurities, especially because of the question whether the BDSG-E meets the requirements of the GDPR, could cause a challenge to companies.[38]

4.4 FURTHER PROVISIONS

When during or after an investigation data has to be transferred to the parent company in the US, the EU-US Privacy Shield, published by the European Commission in February 2016, gives a legal framework to companies. Organizations can certificate themselves[39] as they are bound on the framework.

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37 Baker&McKenzie, EU General Data Protection Game Plan Series-Part 3; http://globalcompliancenews.com/eu-general-data-protection-gdpr-game-plan-series-part3/

38 https://www.baden-wuerttemberg.datenschutz.de/wp-content/uploads/2013/02/PM_20170201_Expertengespraech_EUDSGVO.pdf#; Schulzki-Haddouti , Rolle rückwärts, c´t 2016, 38 referring to the first draft.

39 https://www.privacyshield.gov/list (last visit 07 July 2017).

Additionally the European Regulations concerning data protection have to be mentioned.

In the context of European Law , Art. 8 “Protection of personal data” Charter of Fundamental Rights of the European Union regulates that *“1. Everyone has the right to the protection of personal data concerning him or her.*

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.”

This provision is addressed *“to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.” (Art. 51)* This provision is part of EU primary law and has to be respected in case of implementation of European Directives or Regulation. This provision is not applicable for data handling which is outside the scope of this regulation.

Art. 8 Convention for the Protection of Human Rights and Fundamental Freedoms, as part of international treaties, regulates that “*Everyone has the right to respect for his private and family life, his home and his correspondence.”* It refers much more to the idea of protection of privacy than Art. 8 Charter of Fundamental Rights of the European Union, which refers much more to the right of data protection.[40] According to the decision of the Federal Constitutional Court, the provisions of the Convention have to be applied as basic law[41] and provisions must be interpreted in the light of Article 8 ECHR.

The GDPR also refers to the provisions in Rec. 1 as it regulates that:

“The protection of natural persons in relation to the processing of personal data is a fundamental right. Article 8(1) of the Charter of Fundamental Rights of the European Union (the ‘Charter’) and Article 16(1) of the

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40 Schneider in Wolff/Brink: Beckscher Online-Kommentar Datenschutzecht para. 20.

41 Schneider in Wolff/Brink: Beckscher Online-Kommentar Datenschutzecht para. 9.

Treaty on the Functioning of the European Union (TFEU) provide that everyone has the right to the protection of personal data concerning him or her."

5 ASPECTS OF PREVENTIVE MEASURES

With regard to **preventive measures** against economic crime and cybercrime, companies have to establish technical precautions and analyze security risks.

Preventive measures that are applied in German companies are the following[42]:

- Technical measures:
  - Password protection, firewall, virus scanner, back-ups (100 %)
  - Intrusion, detection (20 %)
  - Pentest (17 %)
- Organizational measures:
  - Regulation of technical access rights (99 %)
  - Regulation of access rights for entrance of rooms (81 %)
  - Safety certification (43 %)
  - Safety audits (24 %)
- Personnel measures:
  - Background-checks for sensitive positions (58 %)
  - Implementation of a security responsible (54 %)
  - Training of employees (53 %).

[42] Behörden Spiegel, August 2017, p.32.

Nationwide recommendations are given by the German Federal Office for Information Security which has published security-management standards that companies can apply, adapted to the company´s particularities and needs.

In the European level, the European Commission´s plans on a "Digital Single Market Strategy" include a "Regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC", published in January 2017. The Regulation has the aim to protect the confidentiality of electronic communications data, protected by Art. 7 of the Charter of Fundamental Rights of the European Union. It addresses to providers of electronic communications networks and services and regulates the conditions for the processing of electronic communications data. In how far the Regulation´s scope will be relevant for employers could be subject of discussion in literature if the employer is regarded as "service provider" according to the Regulation.

6 RELEVANCE OF COMPLIANCE CULTURE AND CONCLUSION

Beneath required compliance with regulations and establishment of technical preventive measures, the building up of a **Compliance Culture** is a crucial element for companies in order to avoid fraud and economic crime.

The idea of the Fraud Triangle helps to define the key factors that an organization should focus on for the implementation of preventive measures.

Opportunity	⟷	Identification and avoidance by defined processes
Motivation	⟷	Compliance Culture
Rationalization	⟷	Compliance Culture

The implementation of appropriate working processes, such as four-eye-principle, can avoid opportunities to commit a crime. The building-up of a Compliance Culture can be set against the factors motivation and rationalization.

But also the fact that detection of economic crime is possible because of hints from inside the company shouldn't be neglected. A company should focus on efforts to strengthen the employee´s awareness by trainings and open communication.

In order to establish a Compliance Culture, a company has to pay attention not to live in an "instrumental climate"[1] The identification of a company´s climate is an important factor of fraud assessment. First, there may be a gap of perception concerning organizational perception of management and employees. Second, even if an organization is formally well-prepared, having ethical concepts and policies, the climate may enable or encourage fraudsters to commit a crime.[2] Such a climate exists, if employee's personal benefits or the organization's interests are prioritized without regard to ethical considerations and which enables fraud and economic crime.

It is crucial for a company to "live" such a Compliance Culture, because only the existence of policies has no influence on the culture lived within a company: a gap between the "written" culture with rules, policies and with reality can exist and should be avoided.

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1 Murphy/Free, Behavioral Research in Accounting, 2016, p. 42.

2 Murphy/Free, Behavioral Research in Accounting, 2016, p. 42.

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8 TRANSNATIONAL DATA PROTECTION

THE IMPLICATION OF THE EUROPEAN GENERAL DATA PROTECTION REGULATION FOR TRANSNATIONAL BUSINESS MODELS AND THEIR DATA TRANSFER

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TABLE OF CONTENTS

Within the current business and administrative environments the topic of data protection is a crucial factor. The Snowden incident, the Safe Harbor Ruling of the European Court of Justice and ultimately the upcoming European General Data Protection Regulation, effective from May 2018 on, pose potential threat scenarios for institutions and businesses that require responsive actions on the respective management level. While the importance of data protections is now an omnipresent and commonly known issue, it is still a rather neglected topic. It often bears the stigma of nuisance and increased costs.

Nonetheless, businesses, institutions and governmental agencies have to adhere to data protection regulations, the demands of the digitalization and social pressure. Therefore, the abidance by Data Protection Law has incrementally gained a more essential role within company's and administration's structures. This is especially true for transnational contexts. Here, Data Protection Management encompasses privacy compliance and organizational privacy management as part of the information security and risk management. The objective and responsibility of Data Protection Management in the context of transnational data flows in the EU are based in the legal framework and impact the respective business models.

1 THE ECONOMIC RELEVANCE OF DATA PROTECTION

While the regulatory nature of Data Protection Law is self-evident, these regulations have a direct impact on organizational environments. As such they exhibit an economic relevance and form business cases. In light of modern technology development, especially the digitalization and hyper connectivity of modern society, these business cases encompass transnational as well as international data transfers.

1.1 DATA ECONOMY

The issue of personal identifiable data and its management seemingly developed into a key issue for modern society. As such, data protection legislation and management became a vital issue as well.

1.1.1 DIGITALIZATION AND HYPER-CONNECTIVITY

Due to the technical advancement, it is possible for individuals to create, access, transfer, and delete more and more amounts of data through various devices and platforms. The subsequent challenge arises, in part, through the introduction of hyper-connectivity. Hyper-connectivity is defined as the use of multiple means of communication (Wellmann, 2001). It is concerned with the accumulation and exchange of information via different media, encompassing but not limited to: email, instant messaging, phone, and Web 2.0 information services (Wellmann, 2001). This also encompasses traditional communication via face-to-face communication. In all instances, this often includes international data transfers via modern means of communication.

Hyper-connectivity introduced new ways of communication, extended its reach through mobile technologies and in recent years through the introduction of the Internet of Things (Wellmann, 2001). Now it is possibility to communicate from person to person, person to machine, and machine to machine, resulting in an immense network of communication that harbors huge data capacities.

1.1.2 BIG DATA AND DATA ANALYTICS

Thus, the digitalization created new capacities to accumulated and use data. These capacities for information are commonly called Big Data. The focus of Data Protection Management Systems (DPMS) in particular are one possible uses of Big Data. As such, the issue of Big Data and data analytics can be used both as a tool as well as being subject to the Data Protection Management.

The use of Big Data approaches, which use data analytics to extract valuable information from the accumulated data, is subject to complex algorithm development and application.

1.1.3 ECONOMICS OF CYBER CRIME AND THE COUNTER-MARKET OF SECURITY

The described tendencies allocate a high value to personal identifiable data. Subsequently, the accumulation and use of data are prone to misuse and even criminal actives. While crime is not considered something that is absent from the business world, it is also seldom realized as its own economy. Furthermore, it is – as a market – not necessarily associated with digitalization.

A criminal act is considered to be any behavior that deviates from societal norms, crosses the boundaries of ethical and lawful behavior, and is sanctioned by a governmental authority. As such, criminal behavior is often associated with the aspect of punishment, fines, and imprisonment. Any association to economics and business is often limited to crime happening in a certain business environment.

However, crime in itself can be considered a market and thus bound to economic principles. Within the “crime market” any individual player is motivated by the rational maximization of utility (Eide et alteri, 2006). It is a simple cost-benefit principle (Li et alteri, 2006). This model transfers the rational choice assumptions to criminal activity. A criminal will commit a criminal act “if the expected utility is positive, and he will not if it is negative” (Eide et alteri, 2006).

A modern example of this economically efficient behavior can be found in the market of cybercrime. Cybercrime is a growing industry and byproduct of the digitalization. Internet based crime evolved into a lucrative market (Li et alteri, 2006). It is often argued that cybercrime originated from political activism (Li et alteri, 2006). While this might be true, the indications of an existing market for crime are evident through media coverage as well as the study of Segura & Lahuerta (2010). Thus, even if the origin

of cybercrime was political activism, it is now a global market governed by rational choice.

Criminal behavior follows similar principles and provisions as the legal market. As a result, it was necessary to create models and approaches encountering criminal behavior. These models can disrupt the economic efficiency of criminal "products" like botnets and render them virtually inefficient. Furthermore, they make a “counter-market” for data protection and cyber security necessary. Thus, while the digitalization leads to the emergent market for cybercrime, it subsequently led to the need for a market to prevent cyber criminality – encompassing data protection.

1.1.4 COMPLIANCE WITH LEGAL STANDARDS AS A UNIQUE SELLING POINT

It is evident that the technological development of the digitalization, hyper-connectivity as well as subsequent tools put institutions and businesses under pressure to develop new business models. These business models naturally are concerned with transnational data transfer and personal (identifiable) information as modern organizations act within a globalized society and market.

Data protection is a crucial part of (legal) compliance. Compliance is like Bird & Park put it “a core concern for corporate governance” (Bird & Park, 2017). The compliance with normative and regulatory mandates focuses and binds resources in business environments. While this compliance might increase spending, create barriers for implementation or in product/service design and development, data protection and compliance also offer a unique opportunity for organizations to incorporate security as a feature. This is supported by the Art. 25 GDPR. The GDPR offers potential for including data protection consideration deep within the business case itself. The obligation is thus also a unique selling point.

2 DATA PROTECTION TRADITIONS – PROTECTING AND SECURING DATA

In order to build upon the evident need for (transnational) solutions in data protection and cyber-security, it is necessary to identify the legal structures, environments and processes of data protection.

2.1 ORIGIN OF DATA PROTECTION BASED IN INTERNATIONAL PUBLIC LAW

The origin of data protection in its various appearances dates back more than a century. It was as early as 1890, that Warren and Brandeis already contextualized the advancing technological changes with the Right to Privacy or as they called it the right “to be let alone” (Warren/Brandeis, 1890:2).

The Right to Privacy is widely considered one of the cornerstones of democratic societies due to the safeguarding function regarding fundamental principles like honor and personal dignity. It encompasses all aspects of personal and family life as well as personal, religious, sexual, political and social preferences or beliefs. Furthermore, it protects personnel communication and data. Therefore, data protection is a fundamental part of the Right to Privacy.

On the level of International Public Law, this protection is codified in Art. 12 of the United Nations Declaration of Human Rights of 1948. Additionally, the Right to Privacy is reflected in Article 17 of the International Covenant on Social and Political Rights as well as Article 16 of the United Nations Convention on the Rights of the Child. In a latest attempt to further the Right to Privacy the General Assembly passed a resolution for “The right to privacy in the digital age” (Human Rights Council, 2014).

Within this resolution, the Member States reaffirm the right of privacy and deem it necessary of protection.

2.2 APPROACHES TO DATA PROTECTION

While the Right to Privacy is already based in International Public Law, there are various approaches to data protection on the transnational and national level. In this regard, various models and approaches were developed. The transformation of these methods into national legislation occurs in a variety of combinations – seldom a legislator solely relies on only one protective approach and often the approaches differ from each other. The design, chosen by the individual legislator, is influenced by the perception and interpretation of privacy and data protection. There are four approaches to data protection.

There is the protection through comprehensive laws: Within this approach, laws are used to create a comprehensive legislative framework for collecting, processing, and using personnel data. Official institutions are bestowed with the purpose of enforcing the compliance with the set framework. It is considered as a more proactive approach (Charlesworth, 2000; Linxweiler, 2012).

The protection through comprehensive laws is fundamentally different from the protection through sectoral laws. While the first is to be considered a proactive one, protection through sectoral laws is more of a reactive approach. It deals with specialized or problematic singular aspects of privacy and data protection through individual legislative acts (Charlesworth, 2000; Linxweiler, 2012).

Another very prominent approach is the protection through industrial self-regulation. It is considered the most flexible and opportunistic approach. The reason for that is the self-imposition of rules by members of the economic system (Charlesworth, 2000; Linxweiler, 2012).

Finally, privacy-enhancing technologies are considered an approach for themselves. They encompass cryptographic encoding, digital currencies as well as similar technologies (Long/Pang Quek, 2002; Linxweiler, 2012).

2.3 CLASH OF LEGISLATIONS AND NEED FOR HARMONIZATION

It is evident that these approaches fundamentally differ from each other. However, it is possible for a national legislator to harmonize different approaches within a singular framework. The resulting national legislation naturally is influenced by its own perception of data protection and privacy as well as the influence of technology and business in the legislative process.

In general, organizations might both benefit and are pressured by the individual approaches. An international or transnational data transfer will be addressed by very different legislative regimes. As a result, the harmonization of data protection standards seems a logical necessity. Nonetheless, such a harmonization is far from a reality in the international legal environment. Therefore, the current differences in the data protection regimes strongly impact international data transfers and connected business models.

Subsequently, any individual, business or organization seeking to transfer data across boarders has to determine

- legal grounds for data processing;
- legal grounds for data transfer and
- the applicable law.

3 LEGAL GROUNDS FOR PROCESSING AND TRANSFER IN THE EUROPEAN UNION

Within the European Union, the issue of harmonization of data protection is already addressed. The typology of different approaches allows for a comprehensive analysis of the legal framework of the European Union regarding data protection and transnational data flows.

3.1 INFLUENCES ON EUROPEAN DATA PROTECTION LAW

It becomes evident that the EU framework for Data Protection heavily relies upon the construct provided by the aforementioned United Nation Declaration on Human Rights (UDHR).The Art. 12 UDHR constitutes the "right to protection of an individual's private sphere against intrusion from others" (Council of Europe, 2014). As previously indicated, this Right to Privacy is a fundamental influence for the construction of data protection laws. Building upon this foundation, the EU comprised the following legal framework.

The first pillar of the data protection framework within the European Union is Article 8 of the European Convention on Human Rights (ECHR). It is concerned with the "right to protection of personal data" and offers protection regarding the right to respect for private and family life, home and correspondence, and conditions for restricting the rights granted under Article 8 ECHR.

Another instrument of Data Protection that not originated within the EU legal framework but was subsequently included, is the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Council of Europe, CETS No. 108, 1981). Commonly called

Convention 108, it was adopted by the Council of Europe in 1981. While being based upon Article 8 of the ECHR, Convention 108 focuses on the "protection of individuals with regard to the automatic processing of personal data" (Convention 108). Its material scope encompasses "all data processing carried out by both the private and public sector, such as data processing by the judiciary and law enforcement authorities" (Council of Europe, 2014). Thus, it focuses on the protection of automated data collection, processing, transferal and storage.

The Convention 108 introduced common principles of Data Protection, the definition of sensitive data, the right to self-information, and the principle of free flow of data. In accordance with the convention personal data is only allowed to be collected, processed and stored for a specific legitimate purpose. For the duration of the purpose and within its scope the data is allowed to be collected, processed and even transferred. Additionally, the Convention introduced the prospect of adequate, relevant, proportional and accurate data collection.

Furthermore, the Convention identified data "on a person's race, politics, health, religion, sexual life or criminal record" as "sensitive data" (Convention 108; Council of Europe, 2014). These kinds of data set are only allowed to be collected and processed in the presence of legitimate purpose and sufficient safeguards. The Convention 108 implemented the right to self-information. In accordance with this right, any individual objected to his/her personal data being processed, has the right to be informed on the extend, the duration and the accuracy of the data in question.

Finally, the Convention also introduces the principle of free flow of data "between State Parties to the convention" (Council of Europe, 2014).

These provisions were amended in 2001. The Additional Protocol to Convention 108 is concerned with third countries. These third countries are defined as not being party to the Convention. It also obliges the Member States to establishment national data protection supervisory authorities.

The provisions of the ECHR and the Convention 108 subsequently have an impact on the regulation of data protection and transnational data flows. Both sources of law provide the foundation for subsequent legislation and have to be considered in a transnational and national legislation of their member states.

3.1.1 EUROPEAN UNION DATA PROTECTION LAW

While the aforementioned provisions are not originally based in the law of the European Union, the following provisions are. As a basic principle, European Union Law is to be considered its own legal order. As such it is not part of National Law but rather autonomous from it. Therefore, it cannot be considered contradictory to any national constitution or be set aside by any national body (cf. Article 267 (3) TFEU).

In an effort to implement the issue of Human Rights further into the European Union Law, the Charter of Fundamental Rights of the European Union was implemented (Council of Europe, 2014). Based in the competency to issue EU primary law in accordance with Article 16 of the TFEU the Charter of fundamental Rights of the EU encompasses data protection. Article 7 (“private and family life”) and Article 8 (“right to data protection”) of the Charter directly address matters of privacy and data protection. The Member States of the EU are obliged to implement these articles into national law in accordance with Article 51 of the Charter.

Additionally, the Directive 2002/58/EC on the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications or ePrivacy Directive) focuses on electronic communication. The European Commission currently endeavors to replace the ePrivacy Directive with a regulation. The current proposal aims for the imposition of privacy regulatory obligations for corporation conducting business in the EU via the Internet.

As another pillar of data protection law, the Directive 2000/31/EC imposes legislation for information society services in the Internal Market of the EU. The focus is on electronic commerce and the so called mere conduit.

It aims to empower the free movement of services through cross-border online services. Thus, it provides rules for the responsibilities and liabilities of intermediaries.

In anticipation of the analysis of the GDPR in the following analysis, the interdependency of the E-Commerce Directive and the GDPR has to be illuminated. While the E-Commerce Directive explicitly states in Art. 1 (5)(b) that it does not apply to "questions relating to information society services covered by Directive 95/46 […]" (Data Protection Directive), the GDPR specifies in Art. 2 (4) that it "shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive". Thus, it is indicated that the GDPR shall applied in cases concerning the liability of controllers (Van Alsenoy, 2016).

3.1.2 DATA PROTECTION FRAMEWORK INFLUENCES THE CONSTRUCTION AND DEVELOPMENT OF THE EUROPEAN DATA PROTECTION LEGISLATION

The analysis of the aforementioned provision proves to show that even without the Directive 95/46 or the GDPR there are various regulations regarding data protection in place. The Principles of European Law and the Charter of Fundamental Rights are primary legal sources that have a radiant effect on legislation. The construction, development, implementation and application of European and national law must adhere to and has to be interpreted in the light of these principles and provisions. Additionally, the ePrivacy Directive, the E-Commerce directive and Database Directive constitute their own data protection implications. These directives stipulate provisions with regard to controller and processor liability, duty of care, burden of proof, and defenses (Van Alsenoy, 2016). This furthermore implies that the aforementioned provisions do not only offer data protection mechanisms on their own, but also influence the data protection legislation, i.e. the Directive 95/46 and the GDPR. These influences subsequently impact businesses in their practical application of and adherence to these provisions.

The European Data Protection Framework does comprehensively offer a very clear and encompassing set of rights to the individual and ways to enforce these. It is especially evident at the level of the Principles of the European Union and the Charter of Fundamental Rights of the European Union. This complexity in legal hierarchy does, however, not impact business models negatively as these fundamental regulatory provisions are reflected in subsequent legislation and radiates into European as well as national law.

On the other hand, the different/various directives are impacting business cases directly and shape their scope of requirements. The legal compliance with these provisions is a fundamental aspect of the requirements engineering. Again, the fundamental rights have to be considered as they are impacting the application and interpretation of the directives. Therefore, the framework of data protection regulations has significant influence on the development of business models and especially the application to data flows in the European Marketplace. However, these implications are only directed towards data flows and subsequently Data Protection Management in the European Union. Transnational applicability is not constituted through this framework.

3.1.3 GENERAL DATA PROTECTION REGULATION

The transnational implication is, however, evident in the General Data Protection Regulation (GDPR) that after a two-year transition period came into effect in May 2018.

3.1.3.1 MATERIAL SCOPE

Unlike the Directive 95/46, the material scope of the GDPR is more encompassing than the immediate Internal Market. The GDPR is even applicable when the controller and/or the processor are not established in the EU, as long as the data subject is an EU citizen (Art. 3(2) GDPR). Essentially, it stipulates the applicability of the GDPR, whenever personal data is processed in connection to the offering of goods or services in

the EU or the behavior of data subjects in the EU is monitored (Malcom, 2017:143).

The focus of the GDPR is the lawful processing of personal data, Art. 4, 6-9 GDPR. It is only allowed to process data if a data subject gave his/her consent, a legal obligation is enforced upon the processor or it is permitted by law ("Verbot mit Erlaubnisvorbehalt"). This furthermore implies that an objection to processing by the data subject negates the processing of personal identifiable data, Art. 21 GDPR.

Based upon this principle, it is only allowed to process data for a predefined purpose and only for the duration of this purpose. The purpose of collection, the manner of processing and the duration of storage must be documented. The data must be protected through technical and organizational measures ("TOM"). The GDPR stipulates even higher standards for the processing and safeguard of sensitive personal data and personality profiles.

Additionally, the rights of individuals must be secured. This encompasses especially the right to rectification (Art. 16 GDPR), the right to erasure (Art. 17 GDPR), the right to restriction of processing (Art. 18 GDPR), and the rules on data portability (Art. 20 GDPR) and profiling (Art. 22 GDPR).

Offering goods or services

The lawful processing that is associated commonly with transnational data flows is processing related to the offering of goods or services. The GDPR itself does not define the terms "goods" or "services". Similar to the E-Commerce directive the Directive 2011/83/EU on Consumer Rights (Consumer Directive) impacts and influences the GDPR. Art. 2 (3) Consumer Directive defines goods as "any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity". The offering of goods and services has to encompass the processing of personal data. However, the GDPR does not discriminate any typologies or categories of goods or services. Therefore,

the GDPR encompasses all goods and services notwithstanding the fact that they are offered on a regular basis or occasionally (Jay, 2017:75).

Targeting

The offering of goods and services often makes it necessary to target a certain group. Product markets in general can be differentiated into different buyer or consumer groups. The process of this differentiation in groups and sub-groups is called segmentation (Clow & Baack, 2015:94f.). Thus, there is a differentiation between different consumer demand functions (Dickson & Ginter, 1987). The created segments are characterized by their consumer's responsiveness to particular strategies in product positioning. Within their endeavor to provide goods and services, corporations often address or target these segments through advertising campaigns, marketing, websites or direct communication. As a result, "business activity needs to be intended to have effects within the territory of the state which is asserting jurisdiction" (Taka, 2017) to fall under the GDPR.

Profiling

Besides targeting activities, profiling is a very common activity in the modern business world. Especially in the field of social media, the economic efficiency is based on the ability to profile. A fundamental endeavor for social media provider is ultimately to make the individual economically accessible. The individual is defined as the target market (Clow & Baack, 2015:94f.). This reduction of the target group / target group goes hand in hand with the need to individualized services. The individual's own interests have to be addressed or even influenced in favor of a product or a solution (Clow & Baack, 2015:94g).

In the implementation of such marketing strategies different methods are used. The most prominent method seems to be social profiling. Social profiling aims to build a personality profile based on data collected about a person's traits, actions, effects and preferences. Although the goal always remains the same, there are different approaches in the implemen-

tation of social profiling. In many cases, however, specially created software solutions or analysis tools are used, e.g. cookies or data analytics solutions on websites (Linxweiler, 2016).

On a next level, the personality profiles created in this way will be used. The so-called social engineering leads to a conscious influence. The best example of this are individualized banner ads or offer emails. This can be the purchase of certain products or the further disclosure of information (Linxweiler, 2016).

In addition, however, it is also possible to pursue criminal purposes with this data collection. For example, social hacking can use a social engineering approach to enable penetration into computer systems or the seizure of confidential data. This approach – although not a procedural model for companies – is of entrepreneurial relevance. Corporate management needs to be aware of the fact that their employees may become vulnerable to everyday social media use, potentially exposing themselves to potential social hacking attacks. An open communication culture as well as training and awareness can counteract industrial espionage and secret dissemination (Linxweiler, 2016).

This kind of endeavors are addressed in the GDPR und the term profiling. Art. 4(4) GDPR defines profiling as “any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements.”

Monitoring

Different from profiling activities, monitoring is not explicitly defined in the GDPR. However, the GDPR encompasses all manors of processing of personal data as long as the data subjects are either a EU citizen or resides physically in the EU. Therefore, the GDPR also encompasses activities by a controller or processor that are concerned with the monitoring of the behavior of data subjects. While there is no definition of monitoring,

the term is used in Art. 35(3)(c) GDPR as well as Art. 37(1)(b) GDPR. Art. 35 (3) (c) GDPR is concerned with systematic monitoring. Art. 37 (1) (b) GDPR is concerned with regular and systematic monitoring.

3.1.3.2 TERRITORIAL SCOPE OF THE GDPR

The territorial scope of the GDPR goes beyond the Data Protection Directive. In Art. 3(1) GDPR the applicability is linked "to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not", Art. 3(1) GDPR. Thus, any endeavor of an organization that encompasses the processing of personal data of an EU citizen falls automatically under the jurisdiction of the EU (Wybitul, 2016).

Additionally, Recital 19 of the GDPR defines the term "establishment" in accordance with the CJEU rulings (CJEU Case C-230/14 Weltimmo v NAIH; CJEU Case C-131/12 Google Spain and Google) as "the effective and real exercise of activity through stable arrangements". Due to this clear definition, the controller or processor can easily be associated with an established business and subsequently his/her activities can be protected accordingly (Wybitul, 2016). Different from the Data Protection Directive the GDPR extends its reach outside of the EU: "regardless of whether the processing takes place in the Union", Art. 3(1). As a result, the location of the processing can be considered irrelevant for the application of the provision. The GDPR would be applicable to processing of employee personal data in third countries as well. This results in the unification of a "legal regime on processing data" (Barkan, 2016:337). In addition, Arts. 3(2), (3) GDPR even regulates the case that a controller does not have an establishment in the EU. When offering goods and services in the EU coincides with the processing of personal data the controller has to comply with the GPD, Art. 3(2) GDPR. This extends to likewise to the employee data.

Modern information technology or services of the information society might cause problems regarding the identification of an establishment in

a third country – i.e. it is questionable if a website could be considered an establishment (Bygrave, 2000). However, Art. 3(2) GDPR does not require a defined establishment but simply that the controller or the processor is not established in the Union. Similar, the GDPR in accordance with Art. 3(2)(b) encompasses also the monitoring of the behavior of data subjects in the EU. Again, this provision addresses the extended application of the GDPR to organizations established in third countries.

3.2 TRANSNATIONAL APPLICABILITY AND COMPREHENSIVE FRAMEWORK OF REQUIREMENTS

It is evident from the presented legislative framework that the European Union founded its data protection tradition within a supranational system and thus a system of harmonization (Charlesworth, 2010). The main focus of EU-Policy is the uniformity of data protection frameworks throughout Europe; to the extent that barriers between Member States and inequalities resulting from these barriers are diminished. This provides businesses, corporation and especially multinational organizations with comprehensive and detailed guidelines to adapt to the data protection regimes. It is a consequence of the principle of free movement of goods, capital, services and people within the internal market. This free movement necessarily encompasses the free flow of data within modern society. The harmonization of Data Protection Standards leads to a level of predictability and comparability. However, it also sets a rigid and inflexible standard that has to be upheld.

The goal of the European Data Protection Framework is a common standing in data protection legislation that encompasses the essential regulations and regulatory positions of every Member State (Long/Pang Quek, 2002:333). Within this system, the European Community is obliged to protect the individual – or more precisely the EU-citizen and those, who are physically present in the European Union – against economic players (Charlesworth, 2000). As a result, business and especially multinational

organizations face high entrance barriers to the European Market. Additionally, due to the reach of the GDPR, the effects of this approach "radiate" throughout the inner workings of the organization.

To achieve this goal, the EU makes use of comprehensive laws within a legislative framework with the new General Data Protection Regulation at its core. This leads to a strongly proactive approach to privacy and data protection. For international and multinational organizations, this approach provides comprehensive guidelines, but also the necessity to adapt. Additionally, it is evident that the introduction of the GDPR extended the reach and impact of European Data Protection Law both in the material as well as territorial scope. The GDPR, as the Data Protection Directive before, is based in the fundamental principles and primary sources of European Law.

However, the GDPR evidently strengths the focus on fundamental principles by focusing on the protection of the natural person and the right for privacy. The transition from "equipment used in the EU" in the Data Protection Directive to the application of European Data Protection Law to any processing of personal data of persons residing on the EU in accordance with Artt. 3 (1), 3 (2) GDPR fosters fundamental principles based in the European Charta of Human Rights and the Charta of Fundamental Rights of the European Union.

Moreover, the GDPR establishes a better correlation and cooperation with other instruments of European Law. For instance, the close link and explicit reference to legal consequences in the E-Commerce directive ensures a comprehensive data protection framework and helps to minimize legal uncertainty (Van Alsenoy, 2016).

The transition from the Data Protection Directive to the General Data Protection Directive allowed for the inclusion of various definitions and adaptations that the Directive was lacking. As such, terms like profiling were defined and included in the GDPR. Furthermore, the provisions now address the technological advancement and constant development in the modern business environments through provisions like Art. 25 GDPR concerning privacy by design or default.

In general, the GDPR offers comprehensive protection for data subject and especially the data subject in his/her role as consumer. At the same time, these provisions increase the obligations and responsibilities of corporations and especially multinational organizations. The processing as well as the transfer of data in accordance with the GDPR is characterized by increased obligations in documentation, adaptation of processes and responsibilities regarding consumer protection. The transnational transfer of data is comprehensively regulated and forces business models to incorporate legal compliance already in processes, products and solutions.

4 APPLICABLE LAW AND CONFLICT-OF-LAW FOR DATA PROTECTION ISSUES

It is evident that the mentioned business models encompass aspects of Public International Law and Private International Law. In general, Classic Public International Law dictates that jurisdiction is determined by State Sovereignty.

This general principle ensures the independence and equality among interacting and interconnected sovereign nations. Private International Law builds upon these principles to ensure a unified approach to international contracting. The issues of jurisdiction are clearly settled within respective regulations. Focusing on the European Union, the Regulation (EU) No 1215/2012 of the European Parliament and of the Counsel of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters dictates jurisdiction in commercial matters. The scope of competences (“purpose”) issued by the regulation extends to the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in cross-border disputes. Thus, it covers civil as well as commercial court proceedings, authentic instruments, and court settlements initiated, produced or concluded from

10 January 2015 onwards. Therefore, the material scope encompasses Data Protection issues as well. The local scope is focused within the EU (excluding Denmark).

The interests of citizens of the EU Member States are protected with respect to their right to a fair and impartial trial. They have the ability to determine the court for the proceedings – due to the possibility of a choice of court agreement or the before mentioned differentiation in jurisdiction. Thus, a consumer can now always open proceedings against a trader in his/her home country. The enforceability of foreign judgments within a national state creates legal security. It protects the individual's rights to a judge, a fair trial and the rights adjudicated in judgment. Furthermore, the recognition and enforcement of foreign judgments secures international trade as a company can be held accountable within different jurisdictions. Essentially, the Regulation is the embodiment of the legal aspects of globalized trade.

4.1 GENERAL DATA PROTECTION REGULATION AND ROME I AND II REGULATIONS

Compared with the Data Protection Directive, the GDPR extends its reach outside of the EU: "regardless of whether the processing takes place in the Union", Art. 3(1). As a result, the location of the processing can be considered irrelevant for the conflict-of-law. The provisions of the GDPR would be applicable to processing of personal data in third countries. This would negate the dilemma the CJEU was faced in the Case C-131/12 Google Spain and Google. This results in the unification of a "legal regime on processing data" (Barkan, 2016:337). This unification directly impacts the contractual provision of Rome I Regulation. The principle of private autonomy is reflected in Rome I Regulation through the possibility to contractually chose the legal order for a contract as a whole or for parts of the contract, Art. 3(1) Rome I Regulation (Rauscher, 2012:289). However, the GDPR will harmonize the Data Protection approaches. That is why the necessity to choose between different Member State laws would cease.

Furthermore, the GDPR could oppose the application of Rome I due to the safeguarding of the public interest. Similar to the Data Protection Directive, the GDPR will focus on the protection of EU Citizens and the internal market. As a result, the GDPR could be considered an overriding mandatory provision. Again, Art. 114 TFEU that is concerned with legislation in civil/commercial matters of the internal market would support this approach. As the GDPR – due to its safeguarding of public interests – is to be considered as based in Art. 114 TFEU, it has to be considered an overriding mandatory provision.

Even so the GDPR could be considered an overriding mandatory provision and even so it harmonizes the conflict of law throughout the Member States, contractual parties are able to agree on the application of a law of a Member State regarding an issue that is not covered by the GDPR. Another alternative could be that the Member States makes use of the right to diverge from the GDPR. In these cases, only the Rome I Regulation would be applicable to solve the conflict-of law issue. As the GDPR operates on a global perspective due to the extension of its applicability to third countries, the monitoring of the behavior of data subjects in the EU in accordance with Art. 3(2)(b) is stipulated. Again, this provision addresses the extended application of the GDPR to organizations established in third countries. The conflict-of-law provisions also encompass – again similar to the Data Protection Directive – in Art. 3(3) the application of the law of the EU Member Stat or public international law.

4.2 GENERAL DATA PROTECTION REGULATION AND BRUSSELS I

Similar to the Rome I Regulation the Brussels I Regulation encompasses the concept of “directing activities”. Art. 15(1)(c) Brussels I Regulation and Art. 17(1)(c) Brussels I Regulation have to be focused in particular. These provisions stipulate the jurisdiction over consumer contracts. Jurisdiction is established if a commercial activity is directed the consumer’s domicile, which has to be located in a Member State (ibid).

While the GDPR does not use the term “directing activities” the aspect of “offering goods or services” is very similar. This is further demonstrated in the CJEU case law. In the joined cases Pammer (C-585/08) and Hotel Alpenhof (C-144/09) the issue of “directing activities” was addressed in the context of targeting. The court ruling was concerned with the interpretation of Art. 15(1)(c) Brussels I Regulation: “[…] it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader’s overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer’s domicile, in the sense that it was minded to conclude a contract with them.” In addition, the court clarified territorial scope of the Brussels I Regulation and the concept of “directing activities” as “the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States.”

This international nature under the Brussels I Regulations closely relates to the issue of transnational data flows through offering goods and services in accordance with Art. 3 (2) GDPR. Especially, in the context of consumer contracts and targeting conducted by electronic means, i.e. via websites or E-Mail campaigns, the targeting activity/directing activity is an influential factor for the applicability of both the Brussels I Regulation or the GDPR (Stone, 2014). The activities have to be directed towards the place of domicile of the consumer in a certain Member State.

In a follow-up ruling the CJEU ruled in the cases Mühlleitner (C-190/11) and Emrek (C-218/12) focused again on Art. 15(1)(c) Brussels I Regula-

tion. Here, the Court stipulated that Art. 15(1)(c) is not limited to distance contracts. Furthermore, these ruling indicated that commercial activities have to be directed to the Member State of the consumer's domicile for the applicability of Art. 15(1)(c) Brussels I Regulation. Again, the implications of the rulings can be applied to data protection and the application of Art. 3 (2) GDPR.

4.3 THE MARKET PLACE PRINCIPLE OPENS THE WORLD-WIDE APPLICABILITY OF EUROPEAN DATA PROTECTION

Overall, the GDPR introduces the applicability of European Data Protection "regardless of whether the processing takes place in the Union", Art. 3(1) GDPR. The applicability is furthermore linked "to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union", Art. 3(1) GDPR. Thus, any endeavor of an organization that encompasses the processing of personal data of an EU citizen falls automatically under the jurisdiction of the EU (Wybitul, 2016), while the location of the processing can be considered irrelevant for the conflict-of-law.

As a result, the GDPR will harmonize the Data Protection approaches. Subsequently, the necessity to choose between different Member State laws would cease. The provisions of the GDPR would be applicable to processing of personal data in third countries. This would negate the dilemma the CJEU faced in the Case C-131/12 Google Spain and Google. This results in the unification of a "legal regime on processing data" (Barkan, 2016:337). Similar to the implications of the the joined cases Pammer (C-585/08) and Hotel Alpenhof (C-144/09) as well as the the cases Mühlleitner (C-190/11) and Emrek (C-218/12) regarding the Brussels I Regulation and the "directing activities" applicability in data protection legislation is not limited by the processing activity but extended to any service or product concerned with personal data of EU citizen or individuals physically present in the European Union.

The subsequent impact for transnational data flows and business models reliant on such data flows is significant. Modern business models are often globalized and supported by hyper connectivity and digitalization. As a result, they are directed at individuals with EU citizenship or residing in the EU as well as the rest of the world. This market place principle extends the influence of the GDPR outside the territory of the European Union. Subsequently, a need for the regulation of international transfers of data is necessary.

4.4 INTERNATIONAL TRANSFER OF CUSTOMER DATA AND EMPLOYEE DATA

This regulatory necessity is evident in the international transfer of customer and employee data. In Art. 3(1) GDPR the applicability is linked "to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not", Art. 3(1) GDPR. Thus, any endeavor of businesses and especially multinational organization that encompasses the processing of personal identifiable data of EU citizens and individuals physically present in the EU falls under the jurisdiction of the EU.

Also, Recital 19 of the GDPR defines the term "establishment" in accordance with the CJEU rulings (CJEU Case C-230/14 Weltimmo v NAIH; CJEU Case C-131/12 Google Spain and Google) as "the effective and real exercise of activity through stable arrangements".

In contrast to the Data Protection Directive, as mentioned before, the GDPR extends its reach outside of the EU: "regardless of whether the processing takes place in the Union", Art. 3(1). As a result, the location of the processing can be considered irrelevant for the conflict-of-law. The provisions of the GDPR would be applicable to processing of personal data in third countries. This would negate the dilemma the CJEU was faced in the Case C-131/12 Google Spain and Google. This results in the unification of a "legal regime on processing data" (Barkan, 2016:337). In

addition, Arts. 3(2), (3) GDPR even regulates the case that a controller does not have an establishment in the EU. When offering goods and services in the EU coincides with the processing of personal data the controller has to comply with the GPD, Art. 3(2) GDPR. Similar, the GDPR in accordance with Art. 3(2)(b) encompasses also the monitoring of the behavior of data subjects in the EU. Again, this provision addresses the extended application of the GDPR to organizations established in third countries. (ibid). The conflict-of-law provisions also encompass – again similar to the Data Protection Directive – in Art. 3(3) the application of the law of the respective EU Member Stat or public international law.

Thus, the GDPR offers different solutions for international data transfer in the context of products and services offered in the EU. The adequacy decisions of the European Commission offer the legal certainty in this context. Businesses can focus their service area or distribution channels of countries that are listed with an adequate data protection level or that are parties to an accepted treaty concerning the data protection level.

Other third countries can be used as destinations for data transfers by utilizing Contractual Clauses and/or Binding Corporate rules. However, both of the latter solutions are accompanied by increased scrutiny by the Data Protection Authorities and pose significant requirements to implement a sufficient data protection level. While the Contractual Clauses are very stringent and inflexible contractual solutions, they offer a manageable approach to international data transfers. However, Binding Corporate Rules seem to impose a high regulatory and organizational effort on the business, corporation or multinational organization.

5 CONCLUSION

The modern business environment and fast-paced technological advancement lead to business models that are reliant on cross-border, transnational and international data flows. These data more often than

not encompass personal data. Whole business cases center around the transnational transfer of personal data.

Ultimately, the GDPR impacts modern business models reliant on data flow through a comprehensive framework of legislations and documentary obligations. The framework is based upon fundamental principles and primary sources of European Law and is supplemented by corresponding directives. The GDPR is a significant step in the harmonization of the European Data Protection Framework and potentially will be a guiding example in the international marketplace. For businesses, the GDPR implicates the adaptation of business models, implementation of documentary and transparency processes and introduction of a Data Protection Management Systems.

The transition from the Data Protection Directive to the General Data Protection Directive allowed for the inclusion of various definitions and adaptations that the Directive was lacking. As such, terms like profiling were defined and included in the GDPR. Furthermore, the provisions now address the technological advancement and constant development in the modern business environments through provisions like Art. 25 GDPR concerning privacy by design or default.

In general, the GDPR offers comprehensive protection for data subject and especially the data subject in his/her role as consumer. At the same time, these provisions increase the obligations and responsibilities of corporations and especially multinational organizations. The processing as well as the transfer of data in accordance with the GDPR is characterized by increased obligations in documentation, adaptation of processes and responsibilities regarding consumer protection. The transnational transfer of data is comprehensively regulated and forces business models to incorporate legal compliance already in processes, products and solutions.

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III SPECIAL FIELDS OF LAW

9 COMPETITION LAW IN DEVELOPMENT: A COMPARATIVE ANALYSIS AND EVALUATION EU – SWITZERLAND

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND DEFINITIONS

AG	Aktiengesellschaft (public limited company)
BGE	Bundesgerichtsentscheid (Federal Supreme Court Decision)
BV	Bundesverfassung (Federal Constitution)
BVGer	Bundesverwaltungsgericht (Federal Administrative Court)
CA	Agreement between Switzerland and the European Union concerning the cooperation on the application of their competition laws of May 17, 2013
CASO	Ordinance on Sanctions imposed for Unlawful Restraints of Competition of 12 March 2004, Cartel Sanctions Ordinance
CFI	Court of First Instance
CH	Switzerland
CHF	Swiss franc
Comco	Swiss Competition Commission
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
Ed.	Edition
EEA	European Economic Area
et seq.	et sequentes (and the following)
EU	European Union

EUR	Euro
EGC	General Court of the European Union
IP	Intellectual Property
KG	Kartellgesetz (Cartel Act, CartA)
lit.	litera (letter)
Ltd	Limited liability company
MCO	Ordinance on the Control of Concentrations of Undertakings of 17 June 1996, Merger Control Ordinance
No.	number
OECD	Organisation for Economic Co-operation and Development
p.	page
para.	Paragraph
sec	section
SIEC	Significant Impediment to Efficient Competition
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
v.	versus (against)
WEKO	Schweizerische Wettbewerbskommission (Comco)

1 INTRODUCTION

Competition policy and therefore also competition law plays a key role in promoting consumer welfare and market opening. Lack of competition is one of the main reasons for the high prices of many products and services on the market. Strengthening competition is essential for an effective internal market.[1] This essay deals with the competition laws of the European Union and Switzerland and also with the practice of its competent courts and antitrust authorities. Against this background it is examined, what is common and which are the differences between the two jurisdictions. In addition, it contains assessments on controversial legal points.

2 DEVELOPMENT OF ANTITRUST LAW

European antitrust law developed in the hands of the Community treaties (European Coal and Steel Community 1951, Treaties of the European Community: Rome 1986, Maastricht 1992, Amsterdam 1997, Nice 2001) and since 2009, with the replacement of the EC by the EU, on the basis of the Treaty of the Functioning of the European Union.

Whereas in Switzerland an Antitrust act was installed for the first time only in 1962, which was later revised in 1985, 1996 and 2004. The last law revision included direct sanctions on undertakings and leniency rules, but the ongoing principle that cartels or agreements are not prohibited as such, but only their harmful effects on competition. A further revision failed in 2014. The legislative proposal of 2011[2] was finally on 17 September 2014 the second time refused by the Swiss parliament. The revision

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1 Organisation for Economic Co-operation and Development, Competition Law and Policy in Switzerland, Policy Brief 2006, p. 1.

2 Federal Council Dispatch of 16 November 2011.

would have included a strengthening of the Competition Commission and the Federal Administrative Court as Competition Authority resp. Competition Court, then a partial cartel prohibition[3] combined with the regulation of justified behaviours in competition on the level of a corresponding ordinance. Futhermore the consideration of the SIEC (Significant Impediment to Efficient Competition) test as a further control mechanism on fusions of undertakings and also a melioration in the regime of the mitigation of sanctions based on effective compliance programs against antitrust infringements.

Not considered in the bill for the parliament was the refused part of the initiative *Schweiger* concerning direct sanctions against natural persons[4] with arguments as this would imply the prolongation of the cartel investigations and produce difficulties in material and procedural law questions as the proof of willful infringement of the natural person, its witness immunity and the installation of additional criminal law procedure rules.

As regards the exemption from sanctions for leniency (key witness rule), it has been criticized that this does not correspond to the Swiss legal tradition.[5] A majority saw no need for a revision, since the last revision of the law has been realised only a decade before and as well for different crucial points such as the partial cartel prohibition, the so called *Lex Nivea*[6] and the relative market power (considerable hindrance to effective com-

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3 Zäch, Roger, Für eine «Lex Nivea» gegen die Hochpreisinsel Schweiz, in: NZZ, 21.2.2012; Art. 5 para 1 revCartA wouldn't include anymore the wording 'agreements which lead to the elimination of effective competition' and especially the less extensive 'presumption of agreements that eliminate effective competition' would have been omitted.

4 This should have include also administrative measures as the prohibition of professional activities in the undertakings which participated in the cartel agreement. Moreover, wage components such as bonuses, which the responsible employees obtained as a result of the cartel agreement, could have been recovered.

5 Bericht des Bundesrates vom 15. Februar 2012 zur Abschreibung der Motion Schweiger vom 20. Dezember 2007 (07.3856): Ausgewogeneres und wirksameres Sanktionssystem für das Schweizer Kartellrecht.

6 Art. 7a revCartA Inadmissible disability of purchasing abroad (1) Companies are acting inadmissible if they do not provide Swiss customers with goods or services abroad at the prices and terms and conditions valid in this country, provided that such goods or services [of comparable expression] are also offered in Switzerland.

petition)[7] instead of the rule of the dominant market position have been very controversial. The latter was also rejected for not having experience with this instrument, for example because of still pending cases before the Federal Supreme Court.[8] But there were also voices that said that one had missed an effective remedy against the high price island Switzerland wherefore new initiatives are pending.[9]

3 LEGAL BASIS OF COMPETITION LAW

3.1 EUROPEAN UNION

Article 101 of the *Treaty on the Functioning of the European Union* (TFEU) prohibits agreements between undertakings having the restriction of competition within the internal market as their object or effect and Article 102 TFEU prohibits the abusive exploitation of a dominant position within the internal market or in a substantial part of it. The other criterion for the application of Articles 101 and 102 TFEU is the effect on trade between the Member States.[10] These competition law rules correspond with the initial wording pursuant to the Articles 85 and 86 of the Treaty estab-

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7 Art. 7 and Art. 4 para. 2bis revCartA: Relatively market-oriented undertakings are those from that other undertakings like suppliers or buyers of a certain type of goods or commercial services are in such a way dependent that sufficient and reasonable possibilities to turnover to other undertakings do not exist; in Germany: § 19 et seq. GWB.

8 Kartellgesetz. Änderung (12.028), Verlauf der Debatte im Nationalrat, 29.09.2014, Votum NR Louis Schelbert.

9 Motion sozialdemokratische Fraktion. Kampf gegen die Hochpreisinsel Schweiz. Entschlackte Kartellgesetzrevision (14.3780).

10 Vogel Louis, European Competition Law, p. 39; European Commission, Overview Antitrust Law (http://ec.europa.eu/competition/antitrust/overview_en.html).

lishing the European Economic Community.[11] The EC Merger Regulation, the Council Regulation (EC) N 139/2004 of January 2004 on the control of concentrations between undertakings[12] applies to concentrations with a Community dimension between or amongst undertakings and identifies criteria to declare concentrations as incompatible with the common market in particular as a result of the creation of strengthening of a dominant position.[13] Furthermore, Art. 106 TFEU deals with the application of the competition rules to *public undertakings* and those given special or exclusive rights by Member States. In addition, Art. 37 TFEU requires Member States which have *State monopolies of a commercial character* to eliminate discrimination between parts of the Member States regarding the conditions under which goods are procured and marketed.[14]

3.2 SWITZERLAND

Competition and antitrust law is regulated in Switzerland in the Federal Act on Cartels and other Restraints of Competition (Cartel Act) of 6 October 1995.[15] The act is based on the Constitution[16] stating that the Swiss Confederation shall legislate against the damaging effects in economic or social terms of cartels and other restraints on competition. It shall take measures to prevent abuses in price maintenance by dominant undertakings and private and public law organisations.[17] The constitution

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11 The Treaty of Rome, officially the Treaty establishing the European Economic Community (TEEC), is an international agreement that went to the foundation of the European Economic Community (EEC) on 1 January 1958, signed on 25 March 1957 by Belgium, France, Italy, Luxembourg, the Netherlands and West Germany; Keller-Rappold Manuela, Die Voraussetzungen und Wirkungen der Selbstanzeige bei unzulässigen Wettbewerbsbeschränkungen in der Rechtsordnung der Schweiz und der EU, p. 27.

12 EC Merger Resolution [ECMR] (OJ l 024, 29.1.2004, p. 1).

13 Art. 2(3) of the EC Merger Resolution.

14 Jones/Sufrin, EC Competition Law, Text, Cases and Materials, 3rd Ed., Oxford/New York 2008, p. 113, cypher (iii).

15 SR 251.

16 Swiss Federal Constitution of 18 April 1999, Systematic Collection of Swiss Federal Law, SR 101.

17 Art. 96 para. 1 of the Federal Constitution of the Swiss Confederation of 18 April 1999.

guarantees free competition.[18] The Government must therefore in all its acts and actions comply with the principles of free trade and commerce. Private and governmental interference with such concept of free trade and commerce must remain an exception.[19] The Swiss law against competition restrictions through private persons, the competition or cartel law, essentially consists of three substantive provisions[20]: Unlawful agreements affecting competition[21], unlawful practices by dominant undertakings[22] and forming a dominant position through concentration[23]. The Cartel Act applies to practices that have an effect in Switzerland, even if they come from another country.[24] Details of the Swiss Anti-Trust legislation are set in ordinances: The Ordinance on Sanctions imposed for Unlawful Restraints of Competition (Cartel Act Sanctions Ordinance, CASO) of 12 March 2004[25] regulates the assessment criteria for the imposition of sanctions, the conditions and the procedure for obtaining complete or partial immunity from sanctions and the conditions and the procedure for notifications.[26] Another relevant regulation is the Ordinance on the Control of Concentrations of Undertakings (Merger Control Ordinance, MCO) of 17 June 1996.[27]

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18 Constitution, Art. 27, para. 1; Art. 96; Art. 97, para. 2 and Art. 122.

19 Frick, Thomas A./Birkhäuser, Nicolas, Niederer Kraft and Frey Zurich, New Developments in Swiss Competition Law and Foreign Undertakings, Comparative Law Yearbook of International Business, Vol 26 2004, p. 255.

20 Hauser, Silvan, A Selective Comparison of EC and Swiss Competition Law, with specific Consideration to Setting Fines in Antitrust Cases, Zurich 2011, p. 9.

21 Art. 4 sec 1, Art. 5 et seq. and Art. 8 CartA.

22 Art. 4 sec 2 and Art. 7 et seq. CartA.

23 Art. 4 sec 3 and Art. 9-11 CartA.

24 Art. 3 CartA.

25 Systematic Collection of Swiss Federal Law, SR 251.5.

26 Art. 49a para. 1, para. 2 and para. 3 let. a CartA.

27 Systematic Collection of Swiss Federal Law, SR, 251.4.

4 PURPOSE AND SCOPE OF THE ANTI-TRUST LEGISLATION

4.1 EUROPEAN UNION

Broadly speaking competition law ensures both freedom and fairness of competition. Most of its rules protect the market and are against restrictive agreements, abuse of a dominant position or mergers which eliminate or reduce competition between undertakings. Strictly speaking, competition law is not concerned with the fairness of competition as a principle. Inspired by the example of the American antitrust law, its only object is the fight against monopoly or market power, i.e. the capacity of an undertaking or a group of undertakings who possess a rather significant market share to provoke price increases by reducing supply, therefore inciting consumer for scarcity of goods to turn to the favoured products. Beyond the proper functioning of the market, competition law is devoid of any equitable aim. It does not seek any objective of distributive justice and it only looks to increase the overall economic surplus.[28]

4.2 SWITZERLAND

The goal of the Swiss Anti-Trust law is to ensure effective competition between market participants in order to prevent the harmful economic effects of cartels and other restraint of competition.[29] Therefore, the purpose of the Cartel Act can be found in the prevention of harmful economic

[28] Vogel, Louis, European Competition Law, p. 29.

[29] Weber-Stecher, Urs/Tschudin, Michael, Wenger & Vieli Ltd, Swiss-American Chamber of Commerce, Antitrust Regulations, December 2015, p. 1.

or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. The act applies to private or public undertakings that are parties to cartels or to other agreements affecting competition, which exercise market power or which participate in concentrations of undertakings. Undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organisational form.[30]

4.3 EFFECTS DOCTRINE

In the context of international cases in the European Union and in Switzerland the *effects doctrine* has been implemented. According to this doctrine, domestic competition laws are applicable to foreign firms, but also to domestic firms located outside the state's territory. While at European Union level the effects doctrine has been generated by the courts[31], in Switzerland it is anchored in the Cartel Act itself which states that the act applies to practices that have an effect in Switzerland, even if they originate in another country.[32] Economists want to see an increasingly efficient competition regime, which means a major economic approach and an "economization" of competition law.[33] Progressively however, the competition authorities have reached a new level by rejection any prohibition whereby each case is verified whether the behavior was actually creating anticompetitive consequences. Instead of reducing the significance of the behavior, they directly defined that behavior by reference to its *effects*.[34]

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30 Art. 2 et seq. CartA.

31 CFI of 25 March 1999, Case T-102/96, Gencor Ltd/Commission, ECR 1999, p. II-0753, paras. 89-92.

32 Art. 2 para. 2 CartA.

33 Case C-10/89 17 September 1990, Hag II. ECR 3711, LawLex092423.

34 Vogel,. Louis, European Competition Law, p. 29.

5 UNLAWFUL RESTRAINTS OF COMPETITION

To determine whether an agreement between undertakings is anticompetitive, the emphasis should be put on the content of that agreement and the objective aims pursued by it. An agreement may be deemed to have a restrictive object even if the restriction of competition is not its only objective and it pursues other legitimate aims. The anticompetitive object of an agreement is determined with regard to the objective circumstances and does not depend on the subjective intentions of the parties. Concerning the specific legal and economic context, it must simply be possible for a concerted practice to be anticompetitive. This can result in the prevention, restriction or distortion of competition in the relevant market.[35]

Hardcore restrictions refer to restrictions of competition by agreements or business practices, which are not compatible with the law and are seen as being particularly serious and normally do not produce any beneficial effects. They almost always infringe competition law. Under EU law, the most prominent examples on the horizontal level include agreements between competitors that fix prices, allocate markets or restrict the quantities of goods or services to be produced, bought or supplied.[36] Examples of hardcore restrictions in vertical relationships are resale price maintenances, prohibitions of parallel imports, prohibitions of passive sales or cross-supply prohibitions.

The substantive competition law of the European Union is prohibiting all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.[37] Whereas Swiss

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35 Vogel, Louis, European Competition Law, p. 85 et seq.

36 Glossary of Competition Terms (http://www.concurrences.com/Droit-de-la-concurrence/Glossaire-des-termes-de/Hard-core-restrictions?lang=en).

37 Art. 101(1) TFEU.

competition law names agreements as unlawful that significantly restrict competition in a market for specific goods or services which are not justified on grounds of economic efficiency and all agreements that eliminate effective competition.[38] Either legislation refers to arrangements affecting competition what comprehends the presumption of the elimination respectively distortion of effective competition.[39] However, it is also possible in both jurisdictions to justify those agreements as lawful by claiming grounds of economic efficiency.[40] Both legislations include similar and effective dispositions against competition restraining agreements on a horizontal (e.g. price-fixation, limitation on quantities of goods or services to be produced, purchased or supplied, market-sharing) and vertical level (e.g. resale price maintenance, parallel imports, passive sales). In Switzerland, in the recent years many decisions have been made in the field of vertical restraints on an international or trans-border dimension, because the country, considered as the aforementioned "island of high prices", causes structures of parallel imports and passive sales whose legality are assessed under antitrust law.

6 COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS

While competition law promotes the freedom of competition as a vehicle to advance welfare, innovation and efficient allocation of resources, Intellectual Property (IP) law advances these goals by selectively limiting competition through the conferral of protection to the holders of pat-

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38 Art. 5 para. 1 CartA.

39 Art. 5 para. 3 and 4 CartA, Art. 101(1) and (2) TFEU: in particular agreements which directly or indirectly fix prices, limit or control the quantities of goods or services, allocate or share markets or sources of supply and apply dissimilar conditions to equivalent transactions at different levels of the production and distribution chain.

40 Art. 6 CartA, Art. 101(3) TFEU.

ents, copyrights, trademarks, designs and related rights. These different mechanisms, although at times inconsistent, should not be viewed as conflicting, but as performing a complementary role. Intellectual property law grants the right, based on a set of criteria. Competition laws may be triggered at a later stage, when the exploitation of the right, in a given case, distorts or hinders competition.[41]

6.1 EUROPEAN UNION

Licensing concerns the grant by the holder of an intellectual property right (the licensor) of a right to a third party (the licensee) to use such IP. They allow the licensee to make use of the protected rights, while protecting the interests of the licensor. By their nature, these agreements may include limitations on the use of the licensed materials, either in time, application or territory. The case Tetra Pak I concerned the use of patented technology which was developed by Liquipak, following its acquisition by Tetra Pak, the market leader in the production and supply of liquid food packaging. The acquisition of Liquipak enabled Tetra Pak to acquire control over the technology which up until then was used by its rival Elopak. Elopak complained to the Commission on the basis that its dominant rival had obtained this exclusive licence.[42] The commission concluded[43] that in the circumstances of the present case, where Tetra Pak is a dominant company and the barriers to entry are particularly high, the effect of the exclusivity provision is not to encourage but rather to prevent the emergence of both inter- and intra-brand competition. Inter-brand competition is damaged because no other licences can be granted and the licensor cannot himself produce the product which makes parallel import impossible.[44]

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41 Ezrachi, Arie, EU Competition Law, An Analytical Guide to the Leading Cases, Oxford and Portland, Oregon 2014, p. 331.

42 Ezrachi, Arie, EU Competition Law, An Analytical Guide to the Leading Cases, Oxford and Portland, Oregon 2014, p. 336.

43 European Commission, [1988] OJ I.272/27.

44 Case T-51/89 Tetra Pak Rausing v Commission [1990] 4 CMLR 334.

6.2 SWITZERLAND

Article 3(2) of the Cartel Act states that the Act does not apply to effects on competition exclusively resulting from the legislation governing intellectual property. However, import restrictions based on intellectual property rights shall be assessed under the Cartel Act (although article 6 Cartel Act empowers the Comcom to pass general guidelines on agreements granting exclusive licences for intellectual property rights, the authority has not passed any general guidelines regarding the overlap of competition law and IP rights yet). The idea behind this exemption is that antitrust law and intellectual property rights are in a certain contradiction to each other. Whereas the laws on intellectual property rights on the one hand were enacted in order to reward and to protect innovation by, for example, granting the holder of a patent a temporal but almost absolute and exclusive right to exploit the intellectual innovation achieved, the antitrust law on the other hand tries to limit the power of dominant firms. Therefore, article 3(2) of the Cartel Act (agreements affecting competition) makes sure that privileges granted by the laws on intellectual property rights shall not be annulled by antitrust legislation. However, a refusal to license IP rights by a dominant company may be unlawful if the general criteria of article 7 of the Cartel Act are met. In *Dynamic Currency Conversion* the Comcom imposed a fine on the SIX group, an allegedly dominant credit and debit card acquirer and, at the same time, a manufacturer of card terminals, because it denied other cash terminal manufacturers access to the required interface information of the so-called Dynamic Currency Conversion (DCC) feature. The DCC feature allows customers to decide, at the terminal, if they wish to make their payment in Swiss francs or in their home currency. According to the Comcom, copyright laws in this specific case did not protect the interface information. Therefore, the obligation to give further specialized companies access to interface information was not considered as a case of a compulsory licence.[45]

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[45] Decision of the Competition Commission concerning Dynamic Currency Conversion of 29 November 2010, LPC/RPW 2011/1, p. 113.

7 ABUSE OF DOMINANT POSITION BY UNDERTAKINGS

According to Swiss law dominant undertakings act unlawfully if they hinder other undertakings from starting or continuing to compete, or disadvantage trading partners by abusing their position in the market.[46] Pursuant to the rules in the European Union, any abuse by one or more undertaking of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.[47] Each of these rules rules, in the European Union and as well in Switzerland, comprehends a non-exhaustive list of abuse in relation to unlawful behaviour. With some minor distinctions the two lists are almost the same.[48] Referring to arrangements affecting competition both jurisdiction contain a presumption of the elimination respectively distortion of effective competition.[49] It can be said that agreements affecting competition are prohibited in both Switzerland and in the European Union. However, it is also possible in these jurisdictions to justify those agreements as lawful by claiming grounds of economic efficiency.

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46 Art. 7 para. 1 CartA.

47 Art. 102 TFEU.

48 In particular discrimination respectively applying dissimilar conditions between trading partners, imposing unfair trading conditions, limitation of production, markets or technical development and any conclusion of contracts subject to acceptance by the other parties of supplementary obligations.

49 Art. 5 para. 3 and 4 CartA, Art. 101(1) and (2) TFEU.

8 CONCENTRATIONS OF UNDERTAKINGS

Mergers and acquisitions provide for a company's external growth, enabling it to obtain a range of benefits, such as economies of scope and scale, access to information, licenses, patents, and a greater customer base. These transactions often derive many benefits for the market in the form of low prices, high-quality products, a wide selection of goods and services, enhanced efficiency, innovation, and an increase in consumer welfare. On the other hand, some transactions may make a competition weaker by providing a vehicle to segment markets or to achieve significant market power. The subsequently may result in increased concentration, decreased economic efficiency, decreased innovation, higher prices, lower quality and decreased consumer welfare. Merger control has the aim to distinguish between harmful and pro-competitive transactions and either to block or modify the former.[50]

In Switzerland a concentration of undertakings can be prohibited if it creates or strengthens a dominant position liable to eliminate effective competition and does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.[51] The same applies in the European Union: A concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position shall be declared incompatible with the common market.[52] Moreover, the competition authorities have the competence to authorise concentrations to implement the relevant conditions and obligations.[53] The intention is to ensure that the undertakings concerned comply with the commitments that they have entered into

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50 Ezrachi, Ariel, EU Competition Law, An Analytical Guide to the Leading Cases, Oxford and Portland, Oregon 2014, p. 361.

51 Art. 10 para. 3 CartA.

52 Art. 2(3) EC Merger Regulation.

53 Art. 10 para. 2 CartA and Art. 6(2) EC Merger Regulation.

vis-à-vis the commission with a view to render the concentration compatible with the common market.[54]

9 SANCTIONS

9.1 EUROPEAN UNION

EU competition law in particular confers rights on individuals and a breach of those rights demands a specific remedy to be granted. According to the ECJ case law, the purpose of competition law penalties is just as much to suppress illegal activities and to prevent any reference.[55] According to Art. 23(2) of Regulation No 1/2003[56] the Commission may impose fines on undertakings and associations of undertakings not exceeding 10 % of its total turnover in the preceding business year. In fixing the amount of the fine, regard shall be held both to the gravity and to the duration of the infringement. In the case of breaches in the context of *concentrations* of undertakings, according to Art. 14(2) of the EC Merger Regulation the Commission may by decision impose fines not exceeding 10 % of the aggregate turnover of the undertaking concerned. In principle it should be noted that the Commission enjoys through its guidelines a wide margin of discretion in exercising its power to impose fines.[57] The Commission must have regard both to the gravity and to the duration of the infringement. As a basis for setting the fine the Commission refers to the *value of the sales of goods or services* to which the infringement relates. In order to ensure that fines have a sufficient deterrent effect, the Commission may *increase* the fine to be imposed on undertakings in order to exceed the amount of

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54 Art. 6(2) EC Merger Regulation.

55 ECJ of 15 July 1970 - Case 41/69 - Chemiefarma v Commission, ECR 1970, paras. 172-176.

56 Council Regulation (EC) No 1 of 16 December 2002 on the Implementation of the Rules on Competition laid down in Articles 82 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

57 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).

gains improperly made as a result of the infringement. In setting fines the Commission uses a two-step methodology, firstly by determining a basic amount depending on the reference of the value of sales and secondly, it may adjust that basic amount upwards (i.e. in *aggravating* circumstances) or downwards (i.e. in *mitigating* circumstances). In accordance with the guidelines of setting fines, the basic amount will be set at a level of up to 30 % of the value of the involved undertaking's sales of goods or service made during the last full business year of its participation in the infringement and to which the infringement directly or indirectly relates in the relevant geographic area within in the EEA (nature and combined market share of all the parties concerned, geographic scope, etc.). In order to deter undertakings from even enteringin particularly harmful cartels the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales. To take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement.[58] Aggravating circumstances are in particular where an undertaking continues or where it repeats the same or a similar infringement after an authority's finding, and a mitigating circumstance it is considered in particular where the undertaking concerned terminated the infringement as soon as the Commission intervened. On the other side, firms that re-offend could face a 100 % increase in their fine for each subsequent infringement.[59]

9.2 SWITZERLAND

The Cartel Act distinguishes between civil titles, administrative sanctions and criminal sanctions.[60] Criminal penalties have as their exclusive objective to enforce Swiss competition law and are directed against responsible

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58 Paras 2-3, 5, 9-13, 19, 21, 24-25, 27, 31 and 41 of the guidelines of setting fines.

59 Para 28 et seq. of the guidelines of setting fines.

60 Art. 12 et seqq. CartA referring civil procedure, Art. 49a et seqq. CartA referring administrative sanctions and Art. 54 CartA et seqq. referring criminal sanctions.

natural persons.[61] In contrast, the purpose of administrative sanctions is in particular to prevent and to deter undertakings from participating in unlawful agreements or from abusing a dominant position in the future. The underlying reasoning is that anti-competitive behavior must not be profitable and that sanctions must be imposed without prior warning in order to render the balance for undertakings involved in negative anti-competitive behaviour. Direct fines may be imposed for hardcore restrictions in horizontal agreements.[62] All agreements between competitors on prices, output, purchase and supply quantities or the portioning of territories or customer groups are sanctioned with direct fines. Secondly, direct fines may also be imposed for hardcore restrictions in vertical agreements which means that restrictions on fixed or minimum resale prices and restrictions in distribution agreements on the allocation of territories as far as sales by other distributors in such territories are prohibited. Whether hardcore restrictions in horizontal agreements, according to Art. 5 para. 1 Cartel Act, are subject to direct fines only if they eliminate effective competition or also if they merely restrict effective competition, is discussed in Switzerland. Thirdly, direct fines may be imposed for the abuse of a dominant position by undertakings. The amount of the fine must be determined based on the duration and on the extent of the anti-competitive behavior. The proceeds that an undertaking has made through anti-competitive behavior must be taken into consideration. The Comcom may also take into consideration subjective elements on the part of the infringer that may have a mitigating or enhancing effect on the amount of the fine.[63]

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61 Nagel, Sven, Schweizerisches Kartellprivatrecht im internationalen Vergleich, Zurich 2007, p. 222, para. 395. The Cartel Act empowers the concerning authorities to impose penalties for procedural but not substantive infringements.

62 Art. 49a para. 1 CartA; a number of agreements are presumed to constitute hardcore restrictions according to the Cartel Act, Article 5, Paragraph 3.

63 Frick, Thomas A./Birkhäuser, Nicolas, Niederer Kraft and Frey Zurich, New Developments in Swiss Competition Law and Foreign Undertakings, Comparative Law Yearbook of International Business, Vol 26 2004, p. 274 seq.

9.3 CALCULATION OF THE FINE

The basis for both the assessment and the calculation of sanctions is the same. The amount of the fine is based on the gravity and the duration of the infringement. In principle, turnover respectively value of the sales is considered as the bases of calculation. However, there is a difference regarding the upper level of the basic amount. Whereas Swiss competition law set a level of up to 10 % of the turnover during the preceding three years, EU competition law set a level of up to 30 % of the value of the sales during one business year. In this regard the Swiss approach provides more guarantee for a balanced base and therefore for more legal certainty and predictability. Viewed over a period of three years, according to the Swiss method the highest basic amount remains the same even if the annual turnover varies. In contrast, according to the EU method of determining the basic amount it could be much higher or lower depending on the value of sales in the third or the last year. Consider there is an undertaking in Switzerland and in the EU with same turnovers over three years. In case A there are turnovers for each of the undertaking of 70 in the first Year, 90 in the second year and 110 in the third year. The Swiss basic amount will be 27 (10 % of 70 + 90 + 110). The EU basic amount will be 33 (30 % of 110). In case B the turnovers are the opposite row: there are 110 in the first year, 90 in the second year and 70 in the third year. The Swiss basic amount will still be 27 (10 % of (110 + 90 + 70) whereas the EU basis amount will be 21 (30 % of 70).[64] Whereas in Switzerland leniency policies of undertakings are considered as mitigating circumstances in the procedure of setting fines, the European institutes refuse to take the existence of these policies into account as a mitigating factor.[65]

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64 Hauser, Silvan, A Selective Comparison of EC and Swiss Competition Law, with specific Consideration to Setting Fines in Antitrust Cases, Zurich 2011, p. 21, N. 148.

65 Hofstetter/Ludescher, Fines against Parent Companies in EU Antitrust Law, Setting Incentives for 'Best Practice Compliance', within World Competition 3, no 1 (2010), pp. 55-76, p. 61, cypher 2.3.1.

9.4 EFFECTIVENESS OF FINES QUESTIONED BOTH IN SWITZERLAND AND IN THE EU

On the level of the EU, current discussions about setting fines in antitrust cases reflect rising criticisms against the cartel fining policies of the Commission: A study concludes that the deficiencies in substantive and procedural law with respect to the current system of competition law enforcement in the European Union call for changes. It is noted that EU's cartel fining laws and policies are in a highly questionable state: basic principles of due process are being violated, corporate governance realities are being ignored, the fault principle is being disregarded and the limited liability of corporations, a bedrock of modern business law, is being sidelined. In addition, the EU's fining policy is criticized for focusing more on punishment and deterrence than on compliance why it is held that such high fines can only be defended where due process is fully respected.[66] In Switzerland, parliamentarian initiatives launched it should be anchored that criminal sanctions apply for natural persons in case of their active participation in cartel agreements with competitors and, moreover, the recommendation to reduce or revoke sanctions when there are practiced sufficient compliance policies.[67] At the EU level it is also criticized that the Commission may impose fines on undertakings or associations of undertakings independently if those act intentionally or negligently.[68] The high fines are motivated as follow: For the purpose to pursue a general policy designed to apply the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles, the Commission must ensure that its action has the necessary deterrent effect.[69] According to ECJ case law, the objective of the penalties is just as much

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66 Hauser, Silvan, A Selective Comparison of EC and Swiss Competition Law, with specific Consideration to Setting Fines in Antitrust Cases, Zurich 2011, p. 2 et seq.

67 Curia Vista, database, 07.3856 Motion Ausgewogenes und wirksames Sanktionssystem für das Schweizer Kartellrecht, submitted by Rolf Schweiger on 20 December 2007 and 08.443 Motion 'Existenzgefährdung infolge von Kartellbussen verhindern', submitted by Hans Kaufmann on 13 June 2008.

68 Now the concerning provisions are Art. 101 and Art. 103 TFEU.

69 Dansk Rorindustri A/S and others v Commission, paragraph 170; Joined cases 100/80 Musique Diffusion française and others v Commission [1983] ECR 1825, paragraph 106.

to suppress illegal activities and to prevent any reference.[70] Therefore, according to the Commission and Community court's understanding, the key function of fines imposed for cartel infringement is deterrence. The same applies in Switzerland.[71]

10 ANTITRUST COOPERATION AGREEMENT BETWEEN EU AND SWITZERLAND

The Agreement between Switzerland and the European Union concerning the cooperation on the application of their competition laws of May 17, 2013[72], allows the Swiss and the European competition authorities to discuss and to transmit confidential information. In the absence of the consent of the affected company the competition authority may, upon request, transmit for the use of evidence, information obtained by investigative process to the other competition authority under the following conditions:

1. both competition authorities must be investigating the same or related behaviour or transaction,

2. the request for such information must be in writing and must include a general description of the subject matter and nature of the investigation or the proceedings to which the request relates, and

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70 ECJ of 15 July 1970, Case 41/69, Chemiefarma v Commission, ECR 1970, 661, paras. 172-176.

71 Dispatch of the Federal Council to the federal legislation on the amendment of the Competition Act of 7 November 2001, p. 2023, 2036.

72 entered into force on 1 December 2014.

3. the competition authority receiving the request must determine, in consultation with the requesting competition authority, what information in its possession is relevant and may be transmitted.[73]

The Cooperation Agreement (CA) provides for general information duties to facilitate the coordination of transnational procedures. The competition authorities will notify each other on their enforcement activities if such activities could have an effect on important interests of the other party. This should avoid or lessen the risk of conflicts (negative comity). Furthermore, one competition authority may ask the other authority to initiate or expand enforcement activities if the other competition authority is better positioned (positive comity).[74] The Agreement does regulate the cooperation between the competition authorities of Switzerland and the EU and serves for a more effective enforcement of both competition legislations. It is based on the equality of the competition laws of the Parties, but does not compromise a harmonization of material law. The Parties continue to use their national laws. Pursuant to the Agreement, the competition authorities have in cases of international anticompetitive activities easier access to evidence. This in contrast to the past as an exchange and transmission of information concerning competition proceedings was only possible under the laborious waiver practice. In the same time, the procedural rights of the concerned undertaking according to the competition law, including the confidentiality and the restrictive use of information, finds no changes. According to the Agreement it is in the competence of each authority to answer a request of the other Party.[75] The new Cooperation Agreement enables the involved competition authorities to execute more effective investigations based namely on the through the provisions of the Agreement obtained elaborate information and documents. These advantages with clearly defined rules and conditions correspond with a public interest on efficient and fast investigations against anticompetitive

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[73] Hoffet, Franz/Dietrich, Marcel/Brei, Gerald, Homburger Ltd, Cooperation Agreement Switzerland - EU on Competition Law, Bulletin November 6, 2014, p. 2.

[74] Borer, Jürg/Mamane, David/Jost, Samuel, Schellenberg Wittmer, Bilateral Cooperation Agreement in Competition matters, Newsletter September 2013.

[75] Hoffet, Franz/Dietrich, Marcel/Brei, Gerald, Homburger Ltd, Cooperation Agreement Switzerland - EU on Competition Law, Bulletin November 6, 2014, p. 2.

activities which takes precedence before private interests of investigated undertakings. Noteworthy is also that the information exchange under the Agreement demands that both competition authorities must be investigating the same or related behaviour or transaction which rule generally excludes unilateral requests of one Party.

11 PROCEDURAL DEFICIENCIES OF APPEAL PROCEEDINGS

In both jurisdictions, there are two appellate courts. In Switzerland the principle of judicial investigation applies consistently and without restriction before the *Federal Administrative Court*. This Court has the competence to examine the law, to make judicial investigations and to examine the adequacy of the amount of the fine, which is why there is full cognition. It may be noted that in this regard a perfect remedy with free cognition of fact and law is available. The Federal Administrative Court shall determine the facts of its own motion.[76] The second and final court instance in Switzerland, the Federal Supreme Court, bases its judgment on the facts which the lower court has established[77] wherefore its cognition is limited on the assessment of judicial questions.

In principle, it is held that there is a fully developed, two-tier appeal system for competition law cases within the European Union as well.[78] The decision made by the Commission can first be challenged before the General Court (EGC, since 2009, previously the Court of First Instance CFI) in an action for annulment[79] followed by an appeal on appoint of law to the ECJ. As in Switzerland, EU law provides that the EGC reviews points of facts

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[76] Art. 44 Act of the Federal Administrative Court, SR 173.32.

[77] Art. 105 Act of the Federal Supreme Court of 17 June 2005 (BGG), SR 173.110.

[78] Stoffel, Walter A., Sinnvoller europäischer Ordnungsrahmen - Duplik aus Weko-Sicht, within: Neue Zürcher Zeitung (NZZ) Nr. 163 of 17.07.2009, p. 23, cypher 2.

[79] Art. 263 TFEU.

and law. Even if the legal requirements appear at first sight in accordance with the rule of law, in practice there are still significant differences.[80] In general, the EGC shall have unlimited jurisdiction to review decisions.[81] The Court may in particular cancel, reduce or increase the fine imposed. But neither the EGC nor the ECJ fully review the Commission's decisions on fines of their own motion, but only upon plea raised by the party.[82] Furthermore, the EGC can adopt the following measures of inquiry: a personal appearance of the parties, a request for information and production of documents, oral testimony, the commissioning of an expert's report and an inspection of the place or thing in question.[83] In addition, the EGC may order that certain facts are proved by witnesses.[84] Even if the EGC has all those competences, it hesitates, however, to make use of these measures and to carry out its own investigation into facts. Instead of that it bases its judgement on the facts found by the competition authority. It is further noted that the EGC cannot be required to call witnesses of its own motion.[85] The EGC normally only carries out plausibility check and compares the facts found by the competition authority in the decision with the files and the pleas raised by the applicants.[86] Furthermore, it is held that the Community courts have not established their own fining policy and follow the Commission's Fining Guidelines.[87] The EGC holds that fines constitute an instrument of the Commission's competition policy, it

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80 Hauser, Silvan, A Selective Comparison of EC and Swiss Competition Law, with specific Consideration to Setting Fines in Antitrust Cases, Zurich 2011, p. 72.

81 Art. 31 of the Regulation 1/2003.

82 Schwarze/Bechtold/Bosch, Deficiencies in European Community Competition Law, Stuttgart 2008, p. 58, cypher 3.1a).

83 Rules of Procedure of the Court of First Instance, OJ of 30 May 1991, L 136/1, Art. 65.

84 pursuant to Art. 68 (1) of the CFI Rules of Procedure.

85 ECJ of 17 December 1998 - Case C-185/95 P - Baustahlgewerbe v Commission, ECR 1998, 1-8417, para. 77.

86 Schwarze/Bechtold/Bosch, Deficiencies in European Community Competition Law, Stuttgart 2008, p. 58, cypher 3.1b).

87 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).

must be allowed a margin of discretion when fixing them.[88] Therefore, it is the competition authority which determines the fining policy and not the courts.[89]

According to Art. 6(1) of the European Convention on Human Rights (ECHR), in the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[90] Moreover, it should be noted that the Convention not only applies to individuals but likewise to legal persons.[91] Since the EGC only considers the pleas raised by the applicant but does not of its own motion examine the legality of the entire decision of the competition authority and doesn't either carry out its own investigation into the facts but only carries out a plausibility check of the facts found by the Commission, the proceedings before the Community court do not meet the requirements of the Human Rights Convention. Since neither the EGC nor the ECJ have established their own fining policy but grant the Commission a wide margin of discretion regarding the amount of the fine to be imposed, the Courts only control such decisions to a limited extent but do not make their own decision on the cases. This does not satisfy the standards set out in Art. 6(1) of the ECHR because the Commission is not a tribunal. Finally, since neither the proceedings before the Commission nor before the Community courts include compulsory the possibility of examining witnesses, the proceedings infringe Art. 6 (3) of the ECHR, according to which everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance

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88 CFI of 7 October 1999 - Case T-228/97 Irish Sugar v Commission, ECR 1999, 11-2969, para. 246; CFI of 9 July 2003- Case T-230/00 - Daesang Corporation and Sewon Europe v Commission, ECR 2003, II-2733, para. 37.

89 Hauser, Silvan, A Selective Comparison of EC and Swiss Competition Law, with specific Consideration to Setting Fines in Antitrust Cases, Zurich 2011, p. 73.

90 Art. 6 para. 3 (d) ECHR.

91 Schwarze/Bechtold/Bosch, Deficiencies in European Community Competition Law, Stuttgart 2008, p. 61 et seq, cypher 3.1.

and examination of witnesses on his behalf under the same conditions as witnesses against him.[92]

12 JOINT LIABILITY OF THE PARENT COMPANY

12.1 SWITZERLAND

The question to be answered is whether a parent company can be held responsible for an infringement of competition rules by one of its subsidiaries. These competition rules (fines)[93] are directed at legal forms designated as 'undertakings'. Among others, an undertaking must satisfy the criterion of economic autonomy, which is missing when subsidiaries are dependent on other group companies.[94] In competition law, any companies of a group are considered as a single undertaking, if the parent company effectively controls its subsidiaries. This also applies to the question of whether a parent company can be sanctioned for the competition law conduct of its subsidiaries.[95] In principle, this is only the case where the subsidiary does not determine the market behavior itself but follows the directives of the parent company. A further condition is that the control of the subsidiary is in fact being exercised.[96] In its decision *"Publigroupe SA"* the Federal Administrative Court stated that the law does not require

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92 Schwarze/Bechtold/Bosch, Deficiencies in European Community Competition Law, Stuttgart 2008, p. 62 et seq, cypher 3.2.

93 Art. 49a and Art. 51 Cartel Act.

94 Candreia, Phillip, Konzerne als marktbeherrschende Unternehmen nach Art. 7 KG, Zurich 2007, cypher 199 et seqq.

95 Reinert, Die Sanktionsregelung gemäss revidiertem Kartellgesetz, within: Das revidierte Kartellgesetz in der Praxis, Zurich 2006, p. 156, cypher 2.

96 B-2977/2007, Federal Administrative Court, Division II, of 27 April 2010, cypher 4.1.

attribution to a natural person, but to a company or its organs, in which there is a certain analogy to Art. 102 Criminal Code.[97] The Court further pointed out that the decision was directed against a company unit and imposed the antitrust sanction on *Publigroupe SA* as the parent company responsible. The group is considered to be a single economic entity, provided that the parent company is able to control its subsidiary effectively and actually exercises this option so that the group company is not able to act independently of the parent company.[98] The Swiss courts have made a distinction between the addressee of the decision in the formal and material sense. Addressees in the material sense are the legal persons whose rights or obligations are to regulate by the decision, while the addressees in the formal sense are the legal subjects, which receive the decision without being directly affected themselves. It is derived that the parent company is the decision addressee in the material sense, whereas the subsidiary is merely to be treated as addressee in the formal sense, which is why the sanction shall be imposed on the parent company. [99] It has been criticized that where the court finds that the subsidiary was involved in a cartel, but denies the existence of economic unity, it would, due to a missing connection, lead to a lack of sanction if only the parent company was sanctioned. On the other hand, if the Comcom had the right to claim the parent and the subsidiary company, the penalty would at least remain with the subsidiary. The core of the critics is why only the parent company should be the addressee of the decision in the material sense, even if the subsidiary is also to be prohibited to participate in the anti-cartel behavior. Moreover, in international cases, it must be legitimate to proceed against a group company in the inland and to refrain from proceedings against group companies abroad if this is too complicated or involves disproportionate difficulties in the process or the enforcement of any decisions. For all these reasons, the Comcom should

97 SR 311.0.

98 BGE 139 I 72.

99 BVGer, 27.4.2010 – Publigroupe, RPW 2010/2, 329 (336 et seq.).

be given flexibility in the choice of the sanctioning of addressees and, in so doing, follow European antitrust law.[100]

12.2 EUROPEAN UNION

In the Akzo-decision, the ECJ made it clear that the Commission is allowed to use a presumption for the actual exercise of a determining influence at 100 % subsidiaries, without the need for further elements. It is not necessary, in particular, for parental liability that the parent company was personally or directly involved in the infringement. If the parent company is part of an economic entity formed with other group companies, it is jointly and severally liable for competition law infringements regarding other legal persons forming part of that entity.[101] In the European Union the concept of an undertaking is in particular linked with the concept of the 'economic unit'. The prohibitions of cartels and that of the abuse of a dominant position are also aimed at undertakings. In order to establish the so called intra-group immunity and the exclusion of agreements between individual companies of the same group from the cartel prohibitions of Art. 101(1) of the TFEU, the ECJ defined an undertaking as follows: In competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if that economic unit consists of several persons, natural or legal.[102] Against this background and pursuant to the ECJ, the concept of 'economic unit' serves as a criterion for attributing the responsibility of one company to another.

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100 Heinemann, Andreas, in: Wettbewerbsrecht. Jüngste Entwicklungen in der Rechtsprechung. Konzernsachverhalte und Konzernbegriff aus kartellrechtlicher Sicht, Zurich 2015, p. 60 f.

101 ECJ, 10.9.2009, Akzo Nobel / Commission, Rs. C-97/08 P, N. 60 et seq., 77.

102 ECJ, 12 July 1984, Case 170/83, Hydrotherm Gerätebau GmbH/Compact [1984] ECR 2999, Margin No 11.

12.3 LEGAL CONSIDERATIONS ON THE CURRENT PRACTICE

The legal consequence of a Swiss competition law infringement is, in principle, the charge of the fallible undertaking for an amount of up to 10 % of the turnover that it achieved in Switzerland in the preceding three financial years. According to Art. 49a sec 1 Cartel Act, the undertaking's turnover is determined at the group level, while pursuant to Art. 5 sec 2 MCO intercompany turnovers are to be considered in the calculation of the total turnover.[103] The legal consequence of the EU provisions regarding the existence of an 'economic unit' is almost the same, namely that one company can be obliged to pay a fine for another company. In the context of corporate groups, this means that the parent company can be made jointly and severally liable for the fines imposed on subsidiaries. Treating the various companies as a single entity, therefore, means that this maximum amount is drastically increased. For these reasons, where an 'economic unit' has been established, it is not anymore the turnover of the individual company that matters, but the *turnover of the entire corporate group*.

In both jurisdictions there is a very broad understanding of the notion "undertaking". This understanding means that any part of a group of undertakings may be held jointly and severally liable. If a subsidiary of a group commits a cartel infringement, the fine could be several times the turnover of the legal entity that violated the law. Another problem of the joint liability is that the *principles* developed under the *corporate laws are not respected.* In Switzerland and in the EU there is the basic *principle* of corporate law that *shareholders* – which means in particular the parent company – *are not liable for the obligations of the corporation* in which they hold ownership. Furthermore, it is questionable if the current rules on parent companies are *adequate.* At least, in Switzerland the Comcom may consider *compliance policies* as mitigating circumstances. As in all other aspects of competition procedure, in imposing fines the Commission must abide by the general principles of Community law. This means

[103] RPW/DPC 2010/1, p. 176, B.4.4.1.

that the Commission must particularly heed the principles of proportionality and equal treatment in setting fines. According to the ECJ, in particular the upper *limit* on fines was seeking to prevent fines from being disproportionate in relation to the size of the undertaking.[104] Where there is a subsidiary which has infringed competition law and under the concept of the 'economic unit', the fine *will* be based on the parent company's turnover and the result will be - from the perspective of the infringer (subsidiary) - an extraordinarily high fine. If the parent company - for reasons of control and influence over its subsidiary - is involved in the liability of its subsidiary, it would consequently be necessary to take into account or at least to consider their comprehensive effort to implement a group-wide compliance *policy* as mitigating circumstances. Besides, there is the presumption that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without need to check whether the parent company has in fact exercised that power.[105] Even if this presumption may be rebutted in principle, it is up to the Commission to prove that the conditions for imposing a fine have been met and not to the undertaking to provide that its efforts are sufficient.[106]

13 LIABILITY OF NATURAL PERSONS

The fining policies whether in Switzerland or in the European Union pursue the purpose of deterring undertakings from breaching competition law. Therefore, sanctions in general can promote the detection of competition law infringements and increase the effectiveness of antitrust law. As

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104 Jones/Sufrin, EC Competition Law, Text, Cases and Materials, 3rd Ed., Oxford/New York, p. 1234, letter i.

105 CFI of 10 June 2005 – Joined Cases T-71, T-74, T-87 and T-91/03 - Tokai Carbon v. Commission, ECR 2005, II-10, para. 60.

106 Hofstetter/Ludescher, Fines against Parent Companies in EU Antitrust Law, Setting Incentives for 'Best Practice Compliance', within World Competition 3, no 1 (2010), pp. 55-76, p. 73, cypher 4.

long as sanctions are only imposed against legal persons, individual employees will have a low interest in displaying anti-competitive conduct.[107]

13.1 EUROPEAN UNION

The Commission may impose fines in general only against undertakings and associations for negligent or individual violations of Art. 101 and 102 TFEU.[108] However, sanctions can be exceptionally imposed on individuals if they are to qualify as an undertaking in the legal sense.[109] This illustrates that EU competition regime does not recognize the liability of individuals, only of undertakings, that is why individuals are not personally liable for infringement of competition laws. Therefore, it is the undertaking which bears the risk for the individual's conduct. The current system does not reflect whether an individual acted negligently or intentionally, and it does not consider whether the individual acted on behalf of the undertaking.[110] It is also to consider that, in principle, criminal law is still deemed to be within the national sovereignty and an explicit provision in the EU Treaty would therefore be required to bestow such powers on the European Community. Since only harmonization measures are allowed by the guidelines, the creation of criminal powers for the authorities of the European Union itself is excluded. However, in any case the implementation of criminal sanctions would require that Art. 23 of Regulation 1/2003 is amended, which rules so far provide actually only the liability of an undertaking.[111] The practice of high fines are also likely to be detrimental to the economy, but an adjustment in the sense of the American

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107 Hauser, Silvan, A Selective Comparison of EC and Swiss Competition Law, with specific Consideration to Setting Fines in Antitrust Cases, Zurich 2011, p. 54, 57.

108 Art. 23(2) of the Regulation 1/2003.

109 Baudenbacher, Carl, Strukturberichterstattung, Nr. 44/3, Evaluation Kartellgesetz, Institutionelles Setting Vertikale Abreden, Sanktionierung von Einzelpersonen, Zivilrechtliche Verfahren, Bern 2009, p. 128.

110 Schwarze/Bechtold/Bosch, Deficiencies in European Community Competition Law, Stuttgart 2008, p. 67.

111 Schwarze/Bechtold/Bosch, Deficiencies in European Community Competition Law, Stuttgart 2008, p. 69.

antitrust regulations, which include direct sanctions against individuals, may be illusory because of the continental European tradition which does not provide for such.

13.2 SWITZERLAND

Swiss competition law differs between administrative[112] and criminal sanctions.[113] While administrative sanctions are directed to undertakings, the criminal sanctions apply to anyone. Undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organizational form, which must in particular satisfy the criterion of economic autonomy.[114] The persons covered by the criminal provision are exclusively natural persons. This relates not just to those corporate bodies exercising official functions of managements, but also to those persons who manage the affairs of the entity in fact.[115] According to Art. 54 et seq. Cartel Act any person is fined up to CHF 100.000 who

i. willfully violates an amicable settlement, a final and non-appealable ruling of the competition authorities or a decision of an appellate body or

ii. willfully does not, or does not fully comply with a ruling of the competition authorities concerning the obligation to provide information, who implements a concentration that should have been notified without filing a notification, or who violates rulings relating to concentrations of undertakings.

In relation to these elements of an offense it should be noted that natural persons may only be sanctioned indirectly for illegal restriction of

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112 Art. 49a et seq. CartA.

113 Zurkinden/Trüeb, Das neue Kartellgesetz, Handkommentar, Bern/Zurich 2004, p. 164.

114 Candreia, Phillip, Konzerne als marktbeherrschende Unternehmen nach Art. 7 KG, Zurich 2007, cypher 147 with further information.

115 Zurkinden/Trüeb, Das neue Kartellgesetz, Handkommentar, Bern/Zurich 2004, p. 165.

competition as this punishable conduct is only indirectly linked to an unlawful restraint of competition.[116]

13.3 APPLICATION OF DIRECT SANCTIONS?

In contrast to Switzerland, EU competition law does not recognise the liability of individuals at all. However, like in Swiss competition law sanctions can exceptionally be imposed on individuals if they qualify as undertakings in the legal sense within the meaning of Art. 101 et seq. TFEU. In relation to the above statements it should be noted that EU competition law provides neither administrative nor criminal sanctions in case of direct infringements of substantive competition law provisions by corporate bodies exercising official functions of management or by those persons who manage the affairs of the entity in fact. In conclusion both jurisdictions do not provide any direct sanctions for natural persons. Generally it is held that the enforcement of competition law would be more effective if natural persons could be directly sanctioned. It is not just the belief that it would be an effective complement to corporate sanctions but also an advancement of the compliance activities of the companies. As to negative aspect, it is known that it will have an impact on the willingness of natural persons like managers to cooperate in the investigations committed by cartels. In any event, if individual sanctions are to be fully effective, it is necessary to apply the leniency policy and the bonus scheme respectively as well to natural persons.[117] In order to justify a policy which allows for the imposition of severe fines, it is held that it is necessary to have clear rules on the attribution of responsibility, which means that at first it must be determined which individual violated the competition rules, then whether the violation was committed negligently or intentionally and finally whether the infringement committed by the individual can

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116 Baudenbacher, Carl, Strukturberichterstattung, Nr. 44/3, Evaluation Kartellgesetz, Institutionelles Setting Vertikale Abreden, Sanktionierung von Einzelpersonen, Zivilrechtliche Verfahren, Bern 2009, p. 122.

117 Hauser, Silvan, A Selective Comparison of EC and Swiss Competition Law, with specific Consideration to Setting Fines in Antitrust Cases, Zurich 2011, p. 58.

be attributed to the undertaking.[118] The link towards direct fines against individual involved persons refers to U.S. competition law which contains direct sanctions against natural persons, including high fines and even imprisonment[119], which at the end could be difficult to imply for simply not being in the continental European legal tradition.

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[118] Schwarze/Bechtold/Bosch, Deficiencies in European Community Competition Law, Stuttgart 2008, p. 67.

[119] 15 U.S. Code § 1 et seq.

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10 ANTITRUST LAW AND SPORTS: MAJOR PROBLEMS AND SOLUTION PROPOSALS

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TABLE OF CONTENTS

Note: The following paper is a summary of my eponymous Master's thesis at the Steinbeis University Berlin. Developments after 30 June 2017, however, have not been considered

1 INTRODUCTION

What has antitrust law-protected free competition got to do with sports?

It had been a long-standing belief that because of the autonomy of associations, as enshrined in Article 11 of the European Convention on Human Rights ('ECHR') and also in various national legal systems, one would have to act in a legal vacuum while implementing sports activities.[1]

The increasing interest of people in sports, in which recent technical advances might exert a great influence, has commercialized sports over the last few decades.[2] In fact, sports can be the subject as well as the object in an economy.[3] This gives the true essence of sports. Furthermore, sporting events are increasingly aligned with and arranged in conjunction with economic interests over time. Hence, there has been a palpable shift of sports to legally determined sectors. Additionally, individual interests of parties concerned are reproduced. This results in calls for legal protection against unfavourable rules, discriminating decisions, and other alleged undesirable measures as regards sports. All in all, these aspects cause a general juridification of sports.

In contrast to sports, European antitrust law seeks, in principle**,** a rather decentralizing direction. The concentration of business power is the starting point for restricting competition, which European antitrust law tries to counteract. Therefore, antitrust law seems to be inconsistent with the pyramid structure common in the sports sector, with mostly international associations at the top.

Owing to these different alignments, at first glance, this paper deals in its first half with the question of the extent to which antitrust law is applicable

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1 Heermann (2005), p. 198.

2 Compare, for instance, the development of the marketing revenues of the Olympic Games. In 1960, the marketing revenues amounted to only US$ 1.2 million, but in 1980, these had already crossed US$ 85 million. In 2000, these were US$ 1.322 billion, and in 2012, the figure was US$ 2.569 billion. See Summerer (2016), p. 54 recital 7.

3 Zschaler (2009), p. 233.

to the sports sector, wherein it is not restricted to European antitrust law. It also briefly examines the legal situation in the United States ('the US'). In the second half, three major areas of conflict between antitrust law and the sports sector are examined.

2 INTERNATIONAL APPLICATION

To what extent is antitrust law applicable to the sports sector? To answer this question, you first must analyze which national or supranational antitrust law is applicable. This seems to be obvious in purely national cases, where all protagonists only act nationally, and the effects are strictly restricted to the national territory. However, this might be the case in only a few sports-related cases, as international competition is quite common.

In most countries – for example, in Germany,[4] Switzerland,[5] or the US[6] – the effects doctrine applies. Hereafter, national antitrust law is applicable to all issues with effects on the national markets, even when the action has been committed abroad. Also, the European Commission follows this doctrine,[7] whereby the European Court of Justice ('ECJ') has so far avoided an unambiguous determination of the effects principle, but fairly comes close by gearing up, for example, in the case of an international cartel that was formed within the European Union ('EU').[8]

Due to the increase in internationalisation of sports, the measures taken by sports associations, clubs, and athletes have an impact beyond national markets. For the parties involved, this means that numerous ju-

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4 See § 130 Section 2 of the German Act Against Restraints of Competition ('GWB').

5 See Article 2 Section 2 of the Swiss Antitrust Law ('Kartellgesetz').

6 See Article 1 and 2 Sherman Act as well as U.S. Court of Appeals for the Second Circuit, Decision of 12 March 1945, United States v. Aluminium Co of America, 148 F.2d 416.

7 Commission, announcement, ABl. 1972 Nr. C 111/13; Commission, Decision of 29 November 1974, ABl. Nr. L 343/9; Commission, Decision of 10 October 1983, ABl. Nr. L 317/1.

8 ECJ, Decision of 27 September 1988, 89/85, Slg. 1988, 5193.

risdictions are often applicable at the same time. For the people responsible, it thus seems necessary to check the compliance overall and not just in a single jurisdiction, which can be very complex in cases with global implications.[9]

3 APPLICABILITY OF ANTITRUST LAW TO SPORTS

When that assessment is completed, it seems necessary to evaluate the extent to which the scope of application of the relevant national antitrust laws can be implemented in the field of sports. Hereinafter, this paper takes a detailed look at the legal situation in the EU and the US.

3.1 EUROPEAN ANTITRUST LAW

With regard to European law, the question arises whether community law is even applicable on the sports sector and, if so, what are the characteristics of sports that are taken into account by a field exemption or by other means.

a. The applicability of the community law to sports

There is no question nowadays that the community law is, in principle, applicable to the sports sector. There were doubts initially about that, as the European Community was found to be a purely economic community. However, since 1974, it is a settled case law of the ECJ that the right of the European Union is applicable to the field of sports, insofar as also an economic activity is given.[10] In addition, with the Treaty of Lisbon entering

[9] So also, Böni (2015), p. 10 et seq.

[10] The ECJ initially decided this in its decision of 12 December 1974, 36–74, 'Walrave', Slg. 1974, 1405. The ECJ repeated this view for example in its decision of 14 July 1976, 13–76, "Dona", Slg. 1976, 1333;

into force on 1 December 2009, sports got explicitly noted in the European Primary Law.[11]

As regards the question whether something constitutes an economic activity, it seems that a wide scope of application is given, which is only restricted in cases concerning purely sporting issues.[12] With regard to the top-class sport, it must be assumed that given its economic dimension, it fully belongs to the economic life of the European Union.[13]

b. Field exemption for the sports sector

Since the beginning of the process of its commercialization, sports have increasingly come into the orbit of the European legal system and, hence, claims for a field exemption for the field of sports have been present from the beginning. However, in the case of *Meca–Medina,* the ECJ pointed out that insofar as a sportive activity would fall within the scope of application of the treaty, the conditions of its exertion would be governed by the treaty's individual provisions.[14] Hence, the decision of the ECJ is a convincing rejection of any considerations with regard to a field exemption in the fields of sport.[15]

c. Three-step test of the ECJ

However, this does not imply that the special characteristics of sports remain completely unconsidered. In the cases of *DLG*,[16] *Wouters*,[17] and

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and its decision of 15 December 1995, C-415/93, 'Bosman', Slg. 1995, I–4921.

11 See Article 165 TFEU. Remarkably, the ECJ did not mention this in the European Primary Law that was introduced, anchoring of the field of sports in its decision of 15 March 2010 (C-325/08, 'Bernard') at all. The Treaty of Lisbon introduced jurisdictional provisions of the European Union for the sports sector and has no appreciable effect on the question of the applicability of the right of the European Union to sports. For more details hereto, see Hail (2014), p. 193.

12 Hail (2014), p. 193 et seq.

13 So also, Hess (2006), p. 4; Hail (2014), p. 193 et seq.

14 ECJ, Decision of 18 July 2006, C-519/04 P – 'Meca–Medina', Slg. 2006, I-6991.

15 See also Hail (2014), p. 211.

16 ECJ, Decision of 15 December 1994, C-250/92 – 'DLG'.

17 ECJ, Decision of 19 February 2002, C-309/99 – 'Wouters', Slg. 2002, I-01577.

Meca–Medina,[18] the ECJ emphasized that in each sports-related case, an abstract assessment of the compatibility of the legal requirements of competition law cannot be performed, but rather a treatment should be meted out on a case-by-case basis and based on the effects on competition.

This case-by-case basis is currently performed by the ECJ in the following three steps: First of all, the ECJ determines the general context and the intended purpose. Subsequently, it determines whether a necessary link between the intended purpose and the restriction on competition is given. Finally, the ECJ analyses whether the restriction on competition is proportionate to the pursued objective.

Nevertheless, it is unclear at which point of the antitrust examination the ECJ's three-step test has to be implemented. In the decision of the case *Meca-Medina,* the ECJ did not initially examine whether the preconditions for an exemption under Article 101 Section 3 TFEU are given.[19] This was partly criticized by legal literature with the argument that first, the given legal possibilities should be exploited, before special case law is applied.[20]

d. Statement

The approach chosen by the ECJ to slip in the characteristics of sports into antitrust evaluation seems necessary. European antitrust law was created to protect competition from anticompetitive effects. To take a decision different from the normal legal consequence of a violation of the ban on cartels – the nullity of the questionable collusion – the possibility of individual exemption was created. Indeed, this possibility assumes that certain conditions, such as adequate consumer participation, for example, are kept. These requirements are not directed towards sporting circumstances. Anyway, the approach chosen by the ECJ seems squalid technically. It would seem more sensible to begin by examining whether the requirements of an exemption in accordance with Article 101 Section

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18 ECJ, Decision of 18 July 2006, C-519/04 P – 'Meca-Medina', Slg. 2006, I-6991.

19 ECJ, Decision of 18 July 2006, C-519/04 P – 'Meca-Medina', Slg. 2006, I-6991.

20 So also Mayer (2005), p. 113.

3 TFEU are fulfilled. Only if this is not the case should it be examined whether an exemption could nevertheless be justified on the basis of the specific characteristics of sports. However, in practice, this would mean additional effort for the competition authorities, which is why this effort is avoided.

3.2 US ANTITRUST LAW

In the US, sports are also not excluded from the application of antitrust law, but some exceptions have been developed by and by, whereof two are described below.[21]

a. Exemption of baseball

In 1922, the US Supreme Court decided that Major League Baseball is excluded from the application of antitrust law.[22] As afterwards, the legislature remained inactive, the Supreme Court confirmed this position in 1953, referring to the protection of legitimate expectation.[23] As the legislature furthermore remained inactive,[24] the Supreme Court repeated this decision in 1972.[25] The exemption for baseball is, however, not transferable on to other sporting disciplines, as the Supreme Court clarified it in several decisions between 1957 and 2002.[26]

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21 An additional exemption is, for example, the merger exemption for mergers between different football leagues. See 15 U.S.C. § 1291 Section 2; see also Gack (2011), p. 155 et seq.

22 U.S. Supreme Court, Decision of 29 May 1922, Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs, 259 U.S. 200.

23 U.S. Supreme Court, Decision of 9 November 1953, Toolson v. New York Yankees, Inc., 346 U.S. 356.

24 Indeed, since the decision of 1953, the US Congress had discussed at least 50 draft laws regarding the abolition of the exemption of Major League Baseball from antitrust law, but none of these got codified, so that the Supreme Court assumed that the legislature wanted to continue the exemption of Major League Baseball from antitrust Law.

25 U.S. Supreme Court, Decision of 19 June 1972, Flood v. Kuhn, 407 U.S. 258. Owing to the so-called Stare-Decisis Doctrine, the Supreme Court also felt itself bound to its earlier decisions. The Stare-Decisis Doctrine states that judges can only overthrow earlier precedence judgments when significant differences exist. For further details, see Kozel (2011), p. 411 et seq.

26 See U.S. Supreme Court, Decision of 25 February 1957, Radovich v. National Football League, 352 U.S. 445.

In response to the Supreme Court decisions, the US Congress adopted the Curt Flood Act in 1998,[27] which, however, restricted the exemption of Major League Baseball only partly. The aim of it was that baseball players should be protected by antitrust law, just like all athletes of other sports disciplines, while continuing to exclude all other disputes from the application of antitrust law.[28] Thus, the amendment has had no real impact as its scope is very limited.[29]

b. Sports Broadcasting Act

At the beginning of the 20th century, the National Football League ('NFL') started to sell all clubs' broadcasting rights as a package. This approach was regarded as a violation of antitrust law.[30] Owing to the pressure of the NFL, which declared the increased revenues to be indispensable for financing the league, Congress adopted the Sports Broadcasting Act in 1961.[31] Since then, it excludes agreements concerning professional teams of football, baseball, basketball, and hockey from the application of antitrust law.[32] Furthermore, the Sports Broadcasting Act states that at games in the home territory, the home team is allowed to sell its own rights in the local market.[33]

c. Statement

There is a similar picture in the US as well as in Europe as regards a non-existent field exemption of sports. The existing divergences from this principle in the US law are all politically motivated and no longer in keeping with the times. Exemptions for single sporting disciplines with regard to European standards cannot be brought into conformity with the principle

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27 See 15 U.S.C. Sec. 26 (b).

28 Gack (2011), p. 138 et seq.

29 See also Gack (2011), p. 138 et seq.

30 District Court, E. D. Pennsylvania, Decision of 12 November 1953, U.S. v. National Football League, 116 F. Supp. 319.

31 15 U.S.C. §§ 1291–1295.

32 See Section 1 of § 1291 of the Sports Broadcasting Act.

33 Gack (2011), p. 155 et seq, referring to Piraino 79 B.U.L.Rev. 889, 839.

of equality guaranteed by the constitution,[34] as there is no objective reason for such unequal treatment.

In the US, special considerations on how to deal with the specific characteristics of sports based on the model of the three-step test of the ECJ are not necessary. Owing to the rule of reason,[35] the US antitrust law has sufficient flexibility. Rather, it appears that the ECJ, with its three-step test, would implement the US rule of reason in the field of sports. The heart of the ECJ's three-step-test is the third step – the weighing of interests – which is comparable to the American Rule of Reason.

4 EUROPEAN ANTITRUST LAW

Having established that the European antitrust law is basically applicable, it seems necessary to evaluate the cases in which the inter-state clause is fulfilled, and whether the persons acting in the field of sports come within the personal scope of EU antitrust law.

4.1 INTER-STATE CLAUSE

a. In general

According to their wording, Articles 101 and 102 TFEU are only applicable to anti-competitive agreements or abusive behaviour that can affect the trade between member states. This so-called inter-state clause

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[34] See, for Germany, Article 3 Section 1 GG. In the constituents of the other member states, comparable rules exist. For example, in Austria, in Article 2, Basic Law on the General Rights of Citizens.

[35] The rule of reason is a US antitrust doctrine, which essentially weighs the potential positive and negative effects of a restrictive measure. If the advantages are superior, the measure in question should not be prohibited. So, there is no intrinsic prohibition as in the European law (Article 101 Section 1 TFEU).

defines the field of application of European antitrust law to comparable regulations in national antitrust laws of the member states.[36]

The ECJ rules that for *an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States*.[37]

b. The inter-state clause and sports

The fulfilment of the inter-state clause is a basic prerequisite for the applicability of European antitrust law to sports.

Regulations and measures established by international associations can generally influence the inter-state trade.[38] The basis for this assumption is that agreements and abusive practices by their very nature are capable of affecting the trade between member states when they cover several member states.[39] Regulations and measures of international associations affect various and – in most cases – even all member states, mostly due to their areas of responsibility, as the compliance by their members is guaranteed by a pyramid structure. For example, a Europe-wide doping suspension of an international sports association that excludes an athlete from participating in any sporting competition must be noted by all national European member associations.[40]

Besides, regulations and measures of national sports association regularly appear to impact the trade between member states. Even though the area of responsibility is mostly confined within a single member state,

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36 See Brinker (2012), Art 101 TFEU, recital 68.

37 Settled case law of the ECJ; See for example ECJ, Decision of 13 July 2006, C-295/04 and C-298/04, Slg. 2006, I-06619, recital 42.

38 See also, Tyrolt (2007), p. 194.

39 Tyrolt (2007), p. 194 et seq.

40 Hail (2014), p. 241 et seq.

it must be considered that these regulations and measures, due to their unique position in their home countries, refer to the whole territory of a member state. As horizontal agreements that refer to the whole territory of a member state are due to their implied potential impact being suitable already by their nature for closing off national markets and, therefore, for having an impact on the trade between Member States, also, regulations and measures of national associations have an interstate dimension.

4.2 PERSONAL SCOPE OF APPLICATION OF ARTICLE 101 AND ARTICLE 102 TFEU

European antitrust law addresses only acts and conducts of undertakings and of its associations.[41] A central prerequisite for the application of the antitrust regulations of Article 101 Section 1 and Article 102 TFEU is that the organizational unit in question is, in person, an undertaking or an association of undertakings to the antitrust law. Consequently, the applicability of European antitrust law to the field of sports is only affirmed in cases where the questionable units in the field of sports can be classified as an undertaking or association of such.[42]

a. Definition of 'undertaking' and of 'association of undertakings'

As undertaking in the sense of the European antitrust law, the ECJ considers in established jurisprudence *every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*.[43]

The previously mentioned term 'entity' must be determined out of the community law. The characteristic of an entity does not depend on any particular legal qualification.[44] Economic activity is essential for the qual-

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41 See the wording of Article 101, Section 1, and Article 102 TFEU.

42 This is also comparable to the legal situation in Germany. See §§ 1 and 19 GWB.

43 See, for example, ECJ, Decision of 1 July 2008, C 49/07, recital 21 et seq.

44 Weiß (2016), Art. 101 TFEU, recital 33.

ification of an entity as undertaking.[45] Thus, economic activity is defined as every remunerated performance of goods or services in the single market.[46]

An association of undertakings is defined as any random structured merger of undertakings, where the objective of the merger must in any case be to represent the interests of its members.[47]

b. The sports as addressee of European antitrust law

In the field of sports, three basic types of acting units can be determined, which are connected by a strong relationship: Athletes and clubs as well as associations an national and international level. Their actions and behaviours are only covered by European antitrust law, as the acting unit can be qualified as an undertaking or association of such. Therefore, to answer the question concerning the applicability of European antitrust law to sports, it is important to clarify the way in which athletes, clubs, and associations can be undertakings or associations of undertakings in terms of European antitrust law.

Athletes can be qualified as undertakings, as undoubtedly natural persons, too, can be qualified as undertakings in terms of antitrust law.[48] The precondition is only that they carry out an economic activity. The individual athlete becomes economically active by offering his/her person as a marketing object in the market and thereby allows organizers, sponsors, and advertisers to use his/her person as a projection surface for all varieties of products.[49] This performance regularly takes place in lieu of payment and is, in many cases, an important source of income. With regard to his/her performance, the individual athlete must be seen as an undertaking in terms of European antitrust law. Athletes who participate in

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45 Weiß (2016), Art. 101 TFEU, recital 35; Emmerich (2012), Article 101 TFEU, recital 15 et seq.

46 Emmerich (2012), Article 101 TFEU, recital 16.

47 Emmerich (2012), Article 101 TFEU, recital 16.

48 See for example ECJ, Decision of 28 February 1991, C-234/89, Slg. 1991, I-00935; ECJ, Decision of 19 February 2002, C-309/99, Slg. 2002, I-01577, recital 45 et seq.

49 Hail (2014), p. 226 et. seq.

team sports, however, must consider that they are regularly employed by the club and, so, must be seen to an extent as the workforce of the club that produces the sporting event.[50] In team sports like professional soccer in which the athlete is getting engaged by the clubs, the athletes must be classified as employees.[51] Conceptually, the dependent employment is the opposite pole of economic activity.[52] Because of this, the applicability of the European antitrust law departs from these performances.

Sport clubs also carry out different economic activities. These comprise, among other items, setting up a match team, participation in competitions, and the marketing of the club. Sport clubs can, therefore, be considered undertakings in terms of Article 101, Section 1 and Article 102 TFEU.

In principle, sport associations can be undertakings in terms of the European antitrust law.[53] The qualification of national and international sports associations is judged solely on the economic character of their activities. In Europe, national and international sports associations perform diverse performances that can be qualified as economic activities. These include, for instance, staging national and international competitions, commercial management of these sports events, and other comparable activities. The associations often state that they would market their goods and services without a view to making any profits and pass on resultant profits to non-commercial associations – this is totally irrelevant as an intention of making a profit is not part of the ECJ's undertaking definiton.[54]

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50 Gippini-Fournier/Mojzesowicz (2009), Article 81 Section 1 EG recital 35 et seq.

51 So also, Gippini-Fournier/Mojzesowicz (2009), Article 81 Section 1 EG recital 53.

52 Weiß (2016), Article 101 TFEU, recital 25.

53 Weiß (2016), Article 101 TFEU, recital 28.

54 ECJ, Decision of 1th July 2008, C-49/07 – 'MOTOE', Slg. 2008, I-4863, recital 27.

5 THE 50 + 1 REGULATION

After having explained in the first half of this paper under which conditions antitrust law is applicable to the sports sector, the second half of this paper focuses on three selected major problems between antitrust law and sports, whereby the first one is the so called 50 + 1 regulation.

Since January 1th 1999, the statute of the German Football Association ('Deutscher Fußballverband', 'DFB') allows football clubs of the first and second Bundesliga to extract the division for licensed players into a capital company.[55] The aim was to take into account the increasing professionalization and financial requirements of professional football, as, in this way the access to the capital market is granted, and, through this, the involvement of sponsors is enabled.[56]

Nonetheless, the statutes of DFB place special requirements on the transfer of divisions for licensed players from Bundesliga clubs to capital companies to ensure that the association behind the respective Bundesliga club always has a decisive influence on the capital company. In this, the focus is on the so-called 50 + 1 rule laid down in § 16c number 2 of the DFB statutes as well as in § 8 number 2 of the statute of the German Liga Association ('Deutsche Fußball Liga', 'DFL'). Hereinafter, a capital company can only receive a licence for the Bundesliga, if a club is a majority shareholder of it and has got an own football department, and, at the moment of application, is athletically qualified in a licensed league. The case of RB Leipzig in 2014–2015 is an example in which the league licence was not initially granted because of the contribution of the billionaire and founder of the club, Dietrich Mateschitz.[57] After the commitment was made to fill the bodies with mostly independent persons, the league licence was finally granted. With this, the threatened judicial review of the 50 + 1 rule was averted.

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55 See Burghardt (2013), p. 143; Stöber (2015), p. 962.

56 German Football Association, official communication number 3 of 31 March 1999.

57 See for example http://www.spiegel.de/sport/fussball/red-bull-leipzig-gegen-den-geist-der-50-1-regel-a-824548.html (last visited on 20 March 2018).

The antitrust admissibility of the 50 + 1 rule is being examined in this section after doubts have been repeatedly expressed by different sources.[58] To this, at first the objective of the 50 + 1 rule will be outlined in greater detail.

5.1 OBJECTIVE OF THE 50 + 1 RULE

For the restrictions on majority stakes in sports companies in general and for the 50 + 1 rule in particular, numerous reasons are given.[59]

The main purpose of the 50 + 1 rule is frequently mentioned to be the maintenance of the integrity of sports.[60] This includes ensuring that the sporting competition is implemented truthfully and especially in a trustworthy manner, and especially does not come to any anti-competitive agreements. In particular, any behaviours which restrict or even eliminate sporting competition, like team orders,[61] known from Formula One, should be prevented.[62]

As a further purpose, the evenness of competition is often mentioned.[63] External shareholders should be prevented from shifting the financial possibilities of the clubs to such an extent that a competition with open results can no longer be guaranteed.[64] Closely connected with this is the argument of the fairness of competition.[65] However, there will always be differences in the financial structure of the clubs. This seems to be 'equi-

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58 See for example Stopper (2009); Scherzinger (2012).

59 See for example Summerer (2008), p. 236.

60 Summerer (2008), p. 236; Stopper (2009), 418 et seq.; Hovemann/Wieschemann (2009), p. 190.

61 The so-called team order is a motorsport term for the practice of teams issuing instructions to drivers to deviate from the normal practice of racing against each other as they would against other teams' drivers.

62 So, also, Summerer (2008), p. 236.

63 So, for example, Stopper (2009), p. 419; Fleischer (1996), p. 476.

64 For further details see for example Stopper (2009), p. 419.

65 Summerer (2008), p. 236.

table' by the ethical principles of sport, as the money is earned within the sporting competition.[66]

The final important objective is to secure the financial stability of the clubs. Dependence of investors should be avoided. Such dependence may result in the event of non-payment of planned benefits in the insolvency of the club.[67]

5.2 ANTITRUST EVALUATION

Whether the 50+1 rule is compatible with European antitrust law is a regularly discussed question, which has been the subject of numerous publications.[68]

Indisputably, the applicability of European antitrust law is given, as the 50+1 regulation noticeably affects trade between Member States.[69] Owing to the regulation, investors from other EU member states are prohibited to purchase a holding in a German sports club or have a controlling influence over the sports club. In reverse, the regulation makes it more difficult for German football clubs to acquire investors from other EU states.[70]

Furthermore, a violation of Article 101 Section 1 TFEU is also obviously given. As the European Court of First Instance ('ECFI') decided in the case of *Piau* in 2005, professional football clubs are undertakings and associations of these clubs are associations of undertakings, as per European

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66 Hovemann/Wieschemann (2009), p. 190 et seq.

67 As an example, the current developments at the TSV 1860 München with its major investor Hasan Ismaik can be mentioned. See the reporting of the Bayerischer Rundfunk from 2 June 2017, available at http://www.br.de/themen/sport/inhalt/fussball/2-bundesliga/tsv-1860-muenchen/tsv-1860-muenchen-muss-in-die-regionalliga-100.html (last visited 20 March 2018).

68 See for example Esposito (2014); Scherzinger (2012).

69 See, for example, also Deutscher (2009), p. 99; Heermann (2003), p. 729; Klees (2008), p. 393; Quart (2010), p. 87; Summerer (2008), p. 238; Stöber (2015), p. 965.

70 So also, Scherzinger (2012), p. 174 et seq.

antitrust law.[71] Therefore, the German Football League Association is also an association of undertakings, as it happens to be an association of the clubs of first and second Bundesliga. The 50+1 regulation also a noticeably restricts competition. The acquisition of majority stakes in German football clubs is prevented by the rule and so German football clubs, other than professional clubs in England or Italy, for instance, can offer their investors only minority shareholdings. A restriction of competition is accordingly evident.[72]

Hence, per Article 101, Section 1 TFEU, a prohibition in principle of the 50+1 rule is given. An exemption to the 50+1 rule under Article 101, Section 3 TFEU also does not seem possible. Neither an efficiency gain nor any kind of consumer participation is recognizable in this respect. Furthermore, the 50+1 cannot be exempted due to the three-step test of the ECJ. Numerous less radical alternatives to the 50+1 rule exist. By imposing restrictions on its influence on the day-to-day business, certain fields could be withdrawn from the influence of an investor as the majority shareholder of a club.[73] This can prevent over-commercialization.[74]

Moreover, the results of the 50+1 seem very limited. The regulation especially is easy to circumvent. Even though under the 50+1 rule, no further participation would be admissible, significant dependencies could be created by sponsoring agreements, whereby actual determination rights would be created. Also, as the case of the *TSV 1860 München* demonstrates, minority shareholders can, at any time, threaten to turn off the money supplies to build up pressure to enforce their will.[75]

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71 ECFI, Decision of 26 January 2005, T-193/02, Slg. 2005, II-217, Recital 69 et seq.

72 So, for example, also Deutscher (2009), p. 99; Summerer (2008), p. 238.

73 Scherzinger (2012), p. 277.

74 This could be implemented by continuously allowing only the members of the club to elect the management of the club (See Scherzinger (2012), p. 276). It would also be conceivable to implement a catalogue of legal transactions requiring approval to ensure a sufficient right of co-determination for club members.

75 See the reporting of the Bayerischer Rundfunk from 2 June 2017, available at http://www.br.de/themen/sport/inhalt/fussball/2-bundesliga/tsv-1860-muenchen/tsv-1860-muenchen-muss-in-die-regionalliga-100.html (last visited 20 March 2018).

A look at what is happening in other European countries raises doubts on the necessity of the 50+1 rule. In England, in accordance with Premier League Rules, it is solely not allowed to hold another share on a football club when you already hold 10 % or more of the voting rights. A single majority share hold is permitted.[76] In Spain, a comparable legal situation is given. There is a special legal form, the sports stock company ('Sociedad Anónima Deportiva'; 'SAD'). The purchase or sale of 5 % or more of a capital share on such a SAD must be indicated to the highest sports council (‘*Consejo Superior de Deportes*’). The purchase of a share, which gives more than 25 % of the voting rights, needs the permission of the highest sports council. Furthermore, it is not allowed to hold more than one share at a time which provides 5 % or more of the voting rights.[77] In France a special legal form for sports companies exists. A controlling share at more than one sports capital company is forbidden.[78] In Italy, it is not allowed to hold capital shares at several sports companies granting a dominant influence.[79]

Regarding the fact that the 50+1 rule already contains an exception,[80] numerous less radical alternatives exist, as a look at other European countries shows, and the effect of the rule seems very limited; no exemption by the three-step test of the ECJ can be granted. Hence, need for action is given, as the 50+1 rule violates Article 101, Section 1 TFEU and is, therefore, forbidden. At this, it seems possible to fall back on a less incisive 25+1 rule.[81] It seems additionally possible and useful to further obligatorily limit the influence of the investors on the day-to-day business with tools already existing under company law. Hereby, one lesson could be drawn from the case of the TSV 1860 Munich – that it should not be

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76 See Premier League Rules, 2016/2017, A.1.150, G.6, I.5, I.6.

77 See Article 23 Section 2 Ley del Deporte.

78 See Article L122-7 Code du Sport.

79 See Article 16 Norme Organizzative Interne of the Federazione Italiana Guioco Calcio.

80 § 16c Clause 2 of the DFB statute and § 8 Clause 2 of the statute of the DFL allow an exemption of the 50+1 regulation in cases where a commercial enterprise has supported continuously and substantially the football sport of the sports club for more than 20 years.

81 So also Scherzinger (2012), p. 353.

that easy for investors and sponsors to use financial support as leverage to enforce their own interests over those of the club.

6 MARKETING OF BROADCASTING RIGHTS

Another major area of conflict between antitrust law and sports is the marketing of broadcasting rights of sports leagues. As already mentioned, it is only in the US that a field exemption in this area exists for certain sporting disciplines.[82]

The proceeds from the marketing of rights of sporting events are a substantial portion of the revenues of sports clubs.[83] The TV and internet broadcasting rights for such sports events within the framework of a league are mostly marketed centrally by the organizer of the league. However, this practice comes across with antitrust concerns.[84]

The examination of whether such marketing models are compatible with European antitrust law is made exemplary by the exploration of the central marketing system of the German football Bundesliga.

6.1 FCA DECISION FROM 11 APRIL 2016

Anyone who wanted to see all football matches of the first and second German Bundesliga so far only had to take up a subscription with the pay TV provider Sky. The German Federal Cartel Authority ('FCA') has now

82 See 3.1 b) and 3.2. b).

83 Bagger (2010), p. 19 et seq.

84 See for example, Dück/Terhorst (2017).

put an end to this by accepting a commitment with the DFL,[85] under which a part of the matches must be broadcast by at least a second provider (the so-called 'no single buyer rule'). Already, before this, the FCA had closed the last two proceedings concerning the examination of the central marketing system in the years 2008 and 2012 with such an 'agreement'.[86] A deeper investigation of the compatibility with antitrust law was unfortunately not carried out by the FCA, which has already been criticized by the Monopoly Commission ('Monopolkommission').[87] A comprehensive investigation, therefore, already seems necessary, as the FCA's decisions create the impression that the central marketing would always fulfil the conditions for the granting of an exemption without even having checked the single requirements for an exemption.[88] The following section shows that there are grounds for doubts at the admissibility of antitrust.

6.2 CENTRAL MARKETING: ADMISSIBILITY OF ANTITRUST LAW

a. The event organizer

As antitrust law only prohibits anticompetitive agreements between at least two different undertakings, it appears necessary to evaluate whether the DFL is also the sole event organizer of the individual matches of the Bundesliga.

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85 FCA, Decision of 11 April 2016, B 6 – 32/15, The FCA declared this commitment binding in accordance with § 32b GWB.

86 FCA, press release from 13 January 2012, available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/13_01_2012_DFL.html;jsessionid=EA175CD48C3270B97E-1FB4455D802F47.2_cid371?nn=3591568 (last visited 20 March 2018).

87 Monopoly Commission, XXI Hauptgutachten from 20 September 2016, Zentralvermarktung in der Fußball-Bundesliga, p. 111 et seq.

88 So also, Dück/Terhorst (2017), p. 51, referring to FCA, Decision of 11 April 2016, B-6-31/15, Recitals 79 and 136 et seq.

According to the definition of the FCA,[89] which has also been recognized by several decisions of the German Federal Supreme Court ('BGH'),[90] the organizer of an event is the one responsible for organizational and financial aspects as well as for preparing and executing the event and bearing the entrepreneurial risk.

Thus, it can surely be discussed which event is being marketed, the whole competition or the individual matches, as the Bundesliga consists of individual matches between the clubs of the league throughout the season. However, even if you qualify the whole competition as the relevant event, as done by the FCA,[91] the matches are still being organized at least jointly by the clubs and the association, so that only a categorization of both as co-organizers seems possible. Hence, there is no single entity and, thus, an agreement between at least two undertakings is given.

b. Restriction of competition

The German[92] and European[93] decision-making practice unanimously considered that a model of central marketing of medial rights of a sports league fulfils the elements of the ban on cartels of Article 101 Section 1 TFEU.[94] This was not assessed in a different way with regard to US antitrust law before the Sports Broadcasting Act came into force in 1961.[95]

c. Exception of the central marketing

The FCA considers, in consistent practice, that the central marketing of the broadcasting of Bundesliga matches and its marketing scheme fulfils

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89 BGH, Decision of 22 April 1958, I ZR 67/57, NJW 1958, 1486, 1487; BGH, Decision of 24 May 1963, Ib ZR 62/62, NJW 1963, 1742, 1743; BGH, Decision of 29 April 1970, I ZR 30/68, NJW 1970, 2060.

90 FCA, Decision of 2 September 1994, B6-747000-A-105/92, WuW/E BKartA 2682, 2690.

91 FCA, Decision of 11 April 2016, B6-31/15, recital 78 et seq.

92 See BGH, Decision of 11 December 1997, KVR 7/96, BGHZ 137, 297, 303 et seq.

93 See Commission, Decision of 23 July 2003, COMP/C.2/37.398, ABl. 2003 Nr. L 291/25, recital 103 et seq.; Commission, Decision of 19 January 2005, COMP/C.2/37.214, ABl. 2005 Nr. L 134/46, recital 20 et seq.

94 This is in line with the predominant view in legal literature. See, for example, Schroeder (2006), p. 3 et seq.; Schürnbrand (2005), p. 409; dissenting is for example Stopper (2009), p. 418 et seq.

95 District Court, E. D. Pennsylvania, Decision of 12 November 1953, U.S. v. National Football League, 116 F. Supp. 319.

the elements of Article 101 Section 1 TFEU and § 1 GWB, because the clubs of the Bundesliga submit to the regulations of central marketing and the marketing scheme is based on the coordination of central behaviour by the league association.[96]

From the ban on cartels of Article 101 Section 1 TFEU, only such agreements can be exempted that allow consumers a fair share of the resultant benefits and contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress; they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives and do not allow such undertakings the possibility of eliminating competition with respect of a substantial part of the products concerned.[97] These conditions for an exemption are not fulfilled in the present case. No gain in efficiency or appropriate consumer involvement is apparent.[98] Furthermore, less restrictive anticompetitive possibilities exist, as a parallel or individual marketing by the individual sports clubs seems possible.

d. Three-step test of the ECJ

Also, an exemption by the three-step test of the ECJ does not seem possible,[99] as measures less radical than the actual central marketing exist.

An individual marketing, at which each club markets the rights to host games on its own, would be such an alternative. In the absence of horizontal agreements between clubs, individual marketed games do not fall within the ban on cartels.[100] However, the FCA saw the individual marketing so far only from a distance, and justified this with a lack of experience as well as with possible organizational difficulties of the organization and

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96 FCA, Resolution of 11. April 2016, B6-32/15, Recital 79; FCA, Resolution of 12 January 2012, B6-114/10, recital 25.

97 See Article 101 Section 3 TFEU, § 2 Section 1 GWB.

98 For more details, see Dück/Terhorst (2017), p. 60.

99 For the requirements of an exemption by the three-step-test of the ECJ, see Section 3.1 c).

100 FCA, Decision of 11 April 2016, B6-32/15, recital, 108.

marketing of a league competition.[101] However, such an individual marketing model might cause other problems, as herewith more successful football clubs would financially benefit from such a change, under which the sporting competition would surely suffer, insofar as no financial compensation between all clubs of the Bundesliga would be implemented. It, therefore, seems questionable whether individual marketing is a real alternative.

But between the two extreme positions of central and single marketing, further forms of exploitation are conceivable. For example, it seems possible to arrange central marketing with a club-specific classification.[102] It would be positive that the currently existing limitation of club-specific products would lapse by the exclusive marketing of club-specific products.[103] Last but not the least, regional providers could themselves ensure the broadcasting rights of 'their' clubs and thereby dare market entry. Further on, this would encourage the decision-making independence of consumers who could book 'club packages', and hereby probably save costs. In order not to jeopardize the league-related product, it seems possible to extend the single club packages with the right for the coverage of the highlights.

Differentiation by dissemination channels (satellite, terrestrial transmission, IPTV, web TV, mobile TV)[104] can also be a possibility for tendering the marketing of Bundesliga rights.[105] A separation of the different broadcasting rights by distribution channels would provide the opportunity to

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101 FCA, Decision of 11 April 2016, B6-32/15, recital 148 et seq.

102 The FCA also recognizes this as a possible alternative. See FCA, Decision of 11 April 2016, B6-32/15, recital 66.

103 FCA, Decision of 11 April 2016, B6-32/15, recitals 148 and 158.

104 FCA, Decision of 11 April 2016, B6-32/15, recital 15.

105 Indeed, the FCA propagates a technologically neutral tendering and assessment of rights packages over all distribution channels. However, at the same time, it recognizes that it could give exceptions from technology neutrality. In addition, the OTT package already included the platform-exclusive realization of the dissemination channels web TV and mobile TV for matches in full length as pay TV offer. Today, thanks to the progress of technology, especially in the field of web-broadcasting, considerable potential for growth exists.

push ahead the already existing content creation.[106] The clubs could offer their own matches live online on their websites and also the highlights of the remaining matches, depending on the broadcasting rights. The prices for the single consumer could decrease, while the quality of the product would increase. Next to the qualitative gain of efficiency by such product improvement and cost savings by consumers, the possibility of reducing the market power of Sky would arise.[107]

Owing to these existing alternatives, no exemption by the three-step test of the ECJ seems possible without more ado, so that the existing marketing model violates antitrust law and is hence inadmissible.[108] The decision of the FCA from 11 April 2016 was rightly severely criticized. The FCA should have examined which alternatives really exist in practice, as also recommended by the German Monopoly Commission,[109] as several alternatives seems to exist. It remains to be hoped that next time the FCA will not be content with a superficial examination, as in the Decision from 11 April 2016.

7 ARBITRAL JURISDICTION

The last major problem discussed here refers to arbitral agreements. In the field of professional sports, such agreements are comprehensively widespread. By this, a broad exclusion of the jurisdiction of state courts is caused for disputes between the parties involved – namely, athletes, clubs, and organizations. The primary objective is to ensure a uniform

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106 See for example, the website of the FC Bayern München under https://fcbayern.com/fcbayerntv/ (last visited 20 March 2018) as well as the website of Borussia Dortmund under http://www.bvbtotal.com (last visited 20 March 2018).

107 See FCA, Decision of 11 April 2016, B6-32/15, Recital 113, according to which, because of the significantly lower market entry barriers in the internet, potential and serious bidders of the new media are increasingly more likely to come up.

108 See for example Dück/Terhorst (2017).

109 Monopoly Commission, XXI Hauptgutachten from 20 September 2016, Zentralvermarktung in der Fußball-Bundesliga.

sport jurisprudence, especially with regard to international competitions, to avoid conflicting decisions to safeguard equal opportunities for athletes.

At this, from a legal point of view, the monopoly position – which most sports associations hold – seems problematic. Professional athletes can only take part in competitions if they agree to arbitration clauses presented to them by the sporting associations as organizers of the sporting competitions.[110]

So far, the question relating to its consequences without any voluntariness for entering an arbitration clause was mainly discussed from a constitutional and civil law point of view.[111] In the case of Claudia Pechstein,[112] considerations of antitrust law were considered for the first time in Germany.

7.1 THE CASE OF CLAUDIA PECHSTEIN

The German speed skater, Claudia Pechstein, intended to participate in the world speed skating championships in Hamar (Norway) in 2009. The competition was organized by the International Skating Union ('ISU'). As a prerequisite for participation, Pechstein had to sign a competition notification pre-formulated by the ISU. This included an arbitration agreement conferring exclusive jurisdiction of the Court of Arbitration for Sport ('CAS') and the Swiss Federal Supreme Court ('BGeR'), with a complete exclusion of ordinary jurisdiction.

After a substance was found in the blood samples of Claudia Pechstein that was prohibited by international anti-doping rules – which, according to her, was based on an inherited lifeblood aberration – she got banned from participating in ISU competitions for two years. After her appeal and

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110 See Heermann (2015), p. 362.

111 Zimmermann (2016), p. 67.

112 BGH, Decision of 7 June 2016, KZR 6/15, BGHZ 30, 89; see also the judgment delivered by the Court of Appeal: OLG Munich, Decision of 15 January 2015, U 1110/14 Kart.

revision were rejected by the CAS and then by the BGeR, she filed a suit in Germany against the doping ban and claimed compensation.

a. The decision of the OLG Munich

After the seised Regional Court I of Munich had dismissed the action as inadmissible due to the arbitration agreement, the Court of Appeal, the Higher Regional Court of Munich ('OLG Munich'), took a different view, since it assumed that the arbitration agreement was invalid due to a violation of the antitrust abuse prohibition of § 19 Section 1 and Section 4 Nr. 2 GWB (old version). The ISU would be a monopolist in the relevant market of admission to speed skating world championships and, would, therefore, be the norm addressee.[113] The organization of sporting events would be an economic activity. But the demand for an arbitration agreement by the organizer of international sports competitions would not be an abuse of a dominant market position per se.[114] In particular, ensuring uniform responsibilities and procedures in similar cases would prevent divergent decisions. It would, therefore, be an appropriate reason to allocate disputes arising between athletes and associations to a uniform sports arbitration jurisdiction. However, in the present case, the demand for the approval of the arbitration agreement would be an abuse of a dominant market position, as the associations would have a decisive influence in choosing the persons that would come into question to be the arbitrator at the CAS.[115] A factual justification for this would not be given. The reason why an athlete would subdue itself to an arbitration agreement – in spite of the preponderance of the associations at the CAS – could only be seen in the monopoly position of the association.

b. The Decision of the BGH

The BGH decided otherwise,[116] whereby it agreed with the basic considerations of the OLG Munich. It also considered that by the single-place

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113 OLG Munich, Decision of 15 January 2015, U 1110/14 Kart, recital 76 et seq.

114 OLG Munich, Decision of 15 January 2015, U 1110/14 Kart, recital 88 et seq.

115 OLG Munich, Decision of 15 January 2015, U 1110/14 Kart, recital 94 et seq.

116 BGH, Decision of 7 June 2016, KZR 6/15.

principle, the organized international sports association would have a dominant market position, as regards the admission by the association-organized sport competitions.[117] Nontheless, it judged that it would not be an abuse of a dominant market position by a sports association when the association makes the admission to competitions dependent on the signing of an arbitration agreement in which the CAS is laid down as the court of arbitration in accordance with the anti-doping rules.[118] The rules of procedure of the CAS would contain sufficient guarantees to defend the rights of the athletes.[119] Furthermore, the CAS arbitration awards would be governed by the control of the BGeR.

The rules of procedure of the CAS would also not lack sufficient guarantee for the rights of the athletes, as the arbitrators are picked out by the parties to the proceedings from a closed list created by a committee by the majority consisting representatives of the International Olympic Committee, the National Olympic Committees, and the international sport associations.[120] In combating doping, sport associations and athletes would not hereby have mutually conflicting interests.[121]

7.2 STATEMENT

Arbitration agreements between sport associations and athletes are not void only because of the monopoly position of the associations. Anyway, it can lead to the invalidity of the arbitral agreement, when, next to the monopoly position, the independence and neutrality of the arbitration court are not ensured.

The argumentation of the OLG Munich that at hypothetical competition athletes would have only agreed to a structural neutral arbitration court

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117 BGH, Decision of 7 June 2016, KZR 6/15, so already in guiding principle b).

118 BGH, Decision of 7 June 2016, KZR 6/15, recital 25 et seq.

119 BGH, Decision of 7 June 2016, KZR 6/15, recital 31.

120 BGH, Decision of 7 June 2016, KZR 6/15, recital 30 et seq.

121 BGH, Decision of 7 June 2016, KZR 6/15, recital 36.

can be agreed on.[122] At the present regulation of the appointment of arbitration judges at the CAS, a factual justification of the arbitration clause does not seem possible on account of the structural preponderance of the associations at the CAS. Hence, the arbitration clause in the case of Claudia Pechstein was, contrary to the view of the BGH,[123] invalid.[124] The appointment of judges at the CAS accordingly requires urgent reforms to establish a balance between the interests of the associations and athletes. Due to the possibility for athletes to move on to the BGeR, also no sufficient guarantees for athletes to defend their rights are ensured, as no full examination of the case takes place.

This assessment is not affected by the § 11 AntiDopG, newly introduced in Germany in 2015. According to this new legislation, the conclusion of an arbitration agreement may be required as a condition for participation in sporting events if the arbitration agreements integrate sports associations and athletes into national and international sports organizations and if they facilitate, promote, or ensure participation in organised sports overall. Nonetheless, this regulation does not conclusively regulate the effectiveness of arbitration agreements and only has an explanatory function in accordance with the intention of the legislator. It is still possible to call for other Acts to produce ineffectiveness, as stated in § 134 BGB, in conjunction with antitrust regulations. It, therefore, cannot be assumed after this legislative amendment that arbitration agreements in the sports sector are consistently unobjectionable under antitrust law.

Claudia Pechstein has levelled a constitutional complaint against the decision taken by the BGH.[125] It remains to be hoped that the German Federal Constitutional Court takes a different assessment of case as the BGH, so that the CAS will be restructured, under duress, not to lose its actual existing practical relevance.

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122 OLG Munich, Decision of 15 January 2015, U 1110/14 Kart, recital 114.

123 BGH, Decision of 7 June 2016, KZR 6/15.

124 So, for example, also Zimmermann (2016), p. 80.

125 See the reporting of Pia Lorenz in her article on Legal Tribune Online of 30 June 2016, available at https://www.lto.de/recht/hintergruende/h/bgh-urteil-pechstein-cas-falsche-tatsachengrundlage/ (last visited 20 March 2018).

8 CONCLUSION

Sports and antitrust law are two fields that normally many people might not associate with each other. However, this paper demonstrates that there are numerous intersection points between these two fields. Owing to further continuance of the commercialization process of sports, it is wise to assume that these areas of conflict will increase even further.

According to the established case law of the ECJ,[126] European antitrust law is limitlessly applicable to the field of sports, as this is a part of the economic life. A different starting point exists in the US, where there are partial field exemptions. Nevertheless, these are mainly historically determined, and cannot serve as role models for the EU. Rather, the European approach could be a model example for the US, as its unjustified preference of certain sporting disciplines must be clearly rejected not least from a constitutional perspective.

The recognition of sporting characteristics within the examination of a violation of antitrust law is to be supported from its result, as no purely economic issue should be examined for which antitrust law was originally constructed. The ECJ, therefore, chooses an approach that is fundamentally correct. Indisputably, the special features of the sports sector must be considered by an antitrust evaluation on a case-by-case basis. The possibility of antitrust law relating to an exemption, in accordance with Article 101 Section 3 TFEU, cannot meet these demands, as the special features of the sports sector cannot be considered. However, it seems appropriate to initially examine the foreseen possibility of an exemption per Article 101 Section 3 TFEU by the legislature before using the approach of the ECJ. However, in practice, this would mean additional effort for the competition authorities, which is why this effort is avoided. As the case of the TV broadcasting rights in Germany illustrates, this often results in an insufficient examination of the content, which is why the additional expense appears necessary.

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[126] See for example: ECJ, Decision of 18 July 2006, C-519/04 – 'Meca-Medina'; ECJ, Decision of 19 February 2002, C-309/99 – 'Wouters'.

As regards the broadcasting rights, the FCA hastily 'winked through' a central marketing system without really considering existing possibilities that would be less restrictive of competition. Rather, the FCA implemented the no single buyer rule to the detriment of consumers, as it probably would not be possible to watch all games of the Bundesliga live on TV at one pay-tv provider. A consequence of the hasty decision of the FCA is that no enhanced competition is given, and it is likely that consumers must dig deeper into their pockets. At this, a rethink seems urgently necessary.

About the analysed 50+1 rule, it can be noted that it restricts investment opportunities in clubs of the first and second Bundesliga and does not harmonize with European antitrust law. Several less radical measures exist, as demonstrated by the legal situation in several other European Countries and in other sporting disciplines. Hence, a need to reform the German regulation is given, more so as investors already announced to take the regulation to court. A potential solution could be to allow majority shareholdings but restrict the influence of investors on the daily business and prevent direct and indirect extortion by, for example, long-term contracts.

Finally, the last big area is the imposition of arbitration agreements by associations. The BGH[127] rightly assumed that a hypothetical athlete only would agree on a structural neutral arbitration court and that, otherwise, the consent of the athlete is only given due to the dominant position of the association. However, the BGH then assumed that the CAS is such a neutral arbitration court, although – as in the previous instance – the OLG Munich had rightly ruled, the associations have a decisive influence in choosing the persons who would come into question to be arbitrators at the CAS. Therefore, contrary to the position of the BGH,[128] it is necessary to reform the CAS. A balance between the interests of the associations and the athletes must be installed at all levels.

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127 BGH, Decision of 7 June 2016, Az.: KZR 6/15.

128 BGH, Decision of 7 June 2016, Az.: KZR 6/15.

To finally come back to the question initially asked – what antitrust law-protected free competition has got to do with sports – it can be noted that sports regularly has an economic aspect and hence falls within the scope of application of antitrust law. Due to the increasing commercialization of sports, the involved parties, especially the representatives of the associations, must increasingly keep an eye on antitrust law, especially as competition authorities as well as athletes have already started doing so.

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11 THE POWER OF ACCOUNTING STANDARDS:

A COMPARISON OF THE IMPACT OF IFRS AND GERMAN GAAP ON LEASING IN GERMANY

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TABLE OF CONTENTS

1 INTRODUCTION

In the modern business world, market participants[1] expect companies to be transparent, accessible and measurable. An important instrument in this regard are the annual financial statements (financial statements). They contain information showing a company's key features, e.g. capital, assets, receivables or liquidity and measure a company's success historically and even can be used as a forecast for possible developments depending on the results of the financial statements. The basis for the financial statements is the generally accepted accounting standards (GAAP). As the business world became global, rules and principles of accounting are expected to be globally applicable as well. Therefore, the undertakings of supranational institutions as well as international organisations of creating a global accounting standard in the past couple of years are not surprising. However, creating a globally accepted accounting standard is easier said than done, as almost every country has its own historically grown concept of accepted local accounting standards. One of the main problems is to find an accounting standard which will be accepted by all countries and their governments.[2]

A prominent example concerning the influence of accounting standards is the Daimler-Benz AG's financial statements of 1993. The Daimler-Benz AG (Daimler-Benz) was the first German company listed at the New York Stock Exchange.[3] A requirement for being listed was that Daimler-Benz had to show its financial statements based on the United States Generally Accepted Accounting Principles (US GAAP). But as Daimler-Benz is situated in Germany, the company was also obliged to prepare financial statements based on the German Generally Accepted Accounting Standards (German GAAP) as the financial statements in Germany are the

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1 For instance investors, creditors, stakeholder or customers.

2 Because this would mean that national governments have to accept its own accounting standards as insufficient; and in addition must accept a foreign accounting concept, which is able to directly influence a national companies financial statements' outcome, influencing the key data of a company and its success in doing business.

3 Daimler-Benz AG, 'Daimler-Benz: Annual Report 1993', page 62.

basis for the determination of the tax liability.[4] The results were astounding. When Daimler-Benz published its financial statements, the German financial statements showed a net income of 615 billion DM[5], but the financial statements based on US GAAP resulted in a loss of a total of 1.839 billion DM.[6]

This noticeable deviation between two accounting systems showed literally what kind of impact an exchange of accounting standards might have. Nevertheless, in a global business world with market participants that are no longer bound by geographical borders, such divergences in outcomes were not acceptable. As companies' started preparing their financial statements worldwide according to US GAAP in order to be able to be listed at the New York Stock Exchange, one possible conclusion might have been to use US GAAP as the 'world standard of accounting'. However, the European Commission, national governments and multinational companies with headquarters outside of the United States of America realised that in accepting the US GAAP as the global accounting standard, the ultimate decision-making power would be solely with the United States. For the European Union this would result in a high dependence for European companies and for European institutions from the United States.[7] Since 1995, the European Union and the International Accounting Standard Board (IASB)[8], an international private organisation

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4 The tax statement and the financial statements are linked in a way that the profit of the year according to the financial statements (net earnings) is the basis for the calculation of the tax amount a company has to pay, so-called earnings before taxes (EBT). See for example sections 7(2), 8(1) Corporate Income Tax Act (Körperschaftsteuergesetz – KStG).

5 Daimler-Benz AG, 'Daimler-Benz: Annual Report 1993', page 67.

6 One of the reasons for this significant difference stems from the fact that until that day, Daimler-Benz only prepared and published financial statements in accordance with German GAAP and based on the German Commercial Code (see for example section 249 German Commercial Code). German GAAP and US GAAP use different valuation methods, different methods for the recognition of assets and liabilities and for depreciation and amortisation. Further, the application of the principle of prudence and the creation of hidden reserves contributes to creating substantial accounting differences with impact on the profit of the year. In addition, the recognition of revenue is subject to much stricter criteria in the US GAAP than in accordance to the German GAAP.

7 Schildbach, T., 'Der handelsrechtliche Jahresabschluss', page 85.

8 The IASB has no political or state foundation and depends for the legal validity and acceptance of the International Financial Accounting Standards, on the support of the national governments and/or

therefore started creating their own accounting standard, the so-called International Accounting Standards (IAS) and the subsequently created International Financial Accounting Standards (IFRS).[9] By working actively together, as a counterpart to the already existing US GAAP, the European Union and the IASB could ensure that they maintain their decision-making authority.

However, the influence of accounting standards is not only notable regarding the actual change of the financial statements' outcome (as seen in the case of Daimler-Benz), but is also able to affect a company's business model.

One business model business model that might be significantly affected by a change in accounting standards is offering leasing as a financial instrument. Leasing is attractive for a lessee because it allows for investments without impacting the lessee's capital, as the object's purchase price is paid by the lessor and the lessee only pays small portions in form of lease instalments. Through this, the lessee can use the company's liquidity for other investments or obligations and does not unnecessarily restrict the company's credit line.[10]

With the establishment of the new IFRS for leases (so-called IFRS 16) as of 2019, the rules of how lease transactions are accounted in the lessees' financial statements will change significantly. With the new IFRS 16, the lessee is obliged to account for every lease transaction in its financial statements, i.e. recognise the object under fixed assets in the balance sheet and show the amount of the contractual agreed-upon lease instalments less the future finance cost of the lease instalment as a liability. For the lessees, this means more efforts with regard to the accounting of lease transactions and a change of the financial statements' outcome.

supranational institutions (Black, J., 'Says who?': liquid authority and interpretive control in transnational regulatory regimes', page 296).

9 Schildbach, T., 'Der handelsrechtliche Jahresabschluss', page 85.

10 Furthermore, the recurrent lease instalments can be earned and paid while using the object, so-called 'pay as you earn' principle (Martinek, M., 'Handbuch des Leasingrechts', § 2, mn. 4). Because the lessor is the legal owner of the object, the lessee is able to return the object after the end of the contractual agreed-upon lease term, giving the lessee the flexibility to choose a different and/or newer object.

This might be able to endanger a lessors' business model as the attraction of leasing as a financial instrument for lessees using IFRS 16 might decline.

This paper analyses the consequences for lessees and lessors under IFRS 16, taking Germany as an example. It will give a brief overview over IFRS and the German GAAP. It will then compare the consequences in preparing financial statements under German GAAP and IFRS exemplary on lease transactions. The paper will end showing some options a lessor can offer to a lessee after the new IFRS 16 is in use.

2 GENERALLY ACCEPTED ACCOUNTING STANDARDS

In this chapter an overview over IFRS and the German GAAP will be given.

2.1 INTERNATIONAL FINANCIAL REPORTING STANDARDS

The term IFRS generally refers to the Conceptual Framework for Financial Reporting[11], the IFRS 1-17, the IAS 1-41 and the interpretations by the IFRS Interpretation Committee[12]. IFRS are developed and published by the IASB. The objective of IFRS is to increase the transparency of fi-

[11] The Conceptual Framework sets the objective of financial reporting, 'which is to provide financial information about the reporting entity that is useful to existing and potential investors, lenders and other creditors in making decisions about providing resources to the entity' and sets the definitions, recognitions and measurements for the financial statements (IFRS Foundation, 'The Conceptual Framework for Financial Reporting' (online), accessed on 29.07.2017).

[12] Currently there are 14 members in the IFRS Interpretation Committee, reviewing accounting issues and providing guidelines concerning those issues. There are 13 members in the IASB, which are responsible for approving those guidelines.

nancial statements, making them understandable for readers worldwide. According to the current chairman[13] of the IASB, the IFRS is the 'global language of financial reporting, spoken fluently in pretty much every financial centre in the world'[14].

As already mentioned in the introduction, the European Union recognised the need to adopt a generally accepted accounting standard within the European Union. In 2002, the European Union therefore adopted the IAS regulation[15], which requires since 2005 from all European companies listed on a regulated market to create consolidated financial statements based on the IFRS requirements. According to the IAS regulation, member states[16] furthermore were allowed to permit non-listed companies to use IFRS optionally.[17] The European Union's aim was to strengthen the capital markets by making cross-border and/or global transactions easier and to make companies competing within the European Union more comparable for investors and market participants.[18] With the adoption of the IAS regulation, the rules included in it are directly applicable and binding within the member states. However, by adopting the IAS regulation, the IASB and the IFRS Interpretation Committee were indirectly accepted in the European Union as decision-making authorities. This leads to the situation that, on the one hand, there is the IFRS Interpretation Committee and its interpretations on how IFRS should be applied globally and on the other hand the European Court of Justice (ECJ) as the final

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13 Hans Hoogervorst is appointed Chairman of the IASB since 01.06.2011.

14 Hoogervorst, H., 'Latest developments and future focus', page 1. 150 countries are already committed to IFRS and 126 of the 150 countries explicitly require the use of IFRS for listed companies and/or financial institutions. There are 150 countries committed to IFRS, 44 countries (or jurisdictions) in Europe, 37 in America, 13 in the Middle East, 23 in Africa and 33 in Asia-Oceania. However, only 126 require or permit IFRS for its listed companies or financial institution, i.e. 43 in Europe, 27 in America, 13 in the Middle East, 19 in Africa and 24 in Asia-Oceania (IFRS Foundation, 'Analysing the use of IFRS Standards' (online), accessed on 02.08.2017.

15 Regulation (EC) No. 1606/2002.

16 The IAS regulation applies to the member states of the European Union and the European Economic Area.

17 See article 5 of the IAS regulation.

18 See IAS regulation, (4).

legal decision-making authority in the European Union.[19] Even though, a globally accepted accounting standard needs one ultimate decision authority, within the European Union the IASB is de facto no longer the decision-making authority. The 'global language' therefore will be tested and measured by the ECJ, and if necessary, adjusted for the application within the European Union accordingly. For European companies this means a certain degree of security, as decisions made by the ECJ are detached from political ambitions by other European and international institutions.

Additionally, as each country has its own set of rules and/or principles regarding accounting, the European Union and the IASB had to make the decision regarding the so-called principles versus rules based approach.[20] By using a principles based approach, which is a particular feature of the accounting systems of common law countries[21], companies are able to work flexibly while preparing the financial statements, because principles are only acting as guidelines, i.e. as a frame, with interpretations of those guidelines from a supranational entity. In civil law countries[22], which use codified law, the accounting rules tend to be stricter and quantitatively more articulated. They are also set by statute of laws and highly influenced by jurisprudence and commentaries.[23] To offer some leeway and flexibility, those rules also stipulate some exceptions. However, companies must ensure that a transaction meets the requirements for such an exception; otherwise the transaction is not valid.

As there is a mix between common law and civil law countries in the European Union, the decision-making process regarding the principles versus rules based approach was also a political one. In the end, the IASB and the European Union choose the principles based approach.[24] As a consequence, and in view of the application of IFRS, civil law countries now

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19 See article 267 TFEU.

20 Merkt, H., 'Rechnungslegung nach HGB und IFRS', chapter 1, mn. 51.

21 E.g. Australia, the United Kingdom, the United States of America.

22 E.g. Germany, France, Japan, Austria.

23 Merkt, H., 'Rechnungslegung nach HGB und IFRS', chapter 1, mn. 51.

24 Forgeas, R., 'Is IFRS That Different From U.S. GAAP?' (online), accessed on 08.08.2017.

are faced with principles instead of rules and must transform principles into codified law.

2.2 GERMAN GENERALLY ACCEPTED ACCOUNTING STANDARDS

In Germany, a company can either choose to prepare its financial statements based on the standards stipulated in the German Commercial Code (HGB) or based on IFRS, unless the company is obliged to prepare financial statements in accordance with IFRS.[25] When using German GAAP, companies preparing its financial statements must ensure that the financial statements meet the requirements set out in the HGB. This means first and foremost a preparation under consideration of the financial statements' purpose. The purpose of the German GAAP is based on the principle of prudence[26], which is meant for the protection of the company's creditors.[27] According to the German GAAP, businesses are also obliged to keep a complete documentation of each transaction, so

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[25] In Germany, only capital market-oriented companies are obliged to use IFRS; other companies are free to choose to use German GAAP; see section 315a HGB, implemented with the IAS regulation.

[26] See section 252(1) number 4 HGB. The principle of prudence expects from a company that only profits are entered into the balance sheet if they were truly realised (Freidank, C.; Velte, P., 'Rechnungslegung und Rechnungspolitik', page 305).

[27] Historically, this was primary a consequence of the founders crash (so-called Gründerkrach) in Germany and Austria, which resulted in the crash of the Vienna Stock Exchange in 1873. In 1870, Germany decided that Stock Companies could be founded without specific requirements concerning the foundation procedures, minimum capital or accounting standards (Zank Wolfgang, 'Vom Taumel in die Krise', page 3). This resulted in an increase in new Stock Companies, a rise of market speculations and ended in the crash of the Vienna Stock Exchange in May 1873. More regulations were the consequence with the aim to increase the trust of the participants in the capital market and protect the creditors, i.e. banks that provided loans to companies and therefore were interested in a company's financial situation (Schildbach, T., 'Der handelsrechtliche Jahresabschluss', page 80). This is why the substance for liabilities towards creditors is (over) protected, e.g. a company is not allowed to distribute profits without taking into account the creditor's interests, which in Germany, where businesses traditionally are financed with bank loans, is of major importance.

that each transaction can be verified and proven at a later time.[28] Further requirements financial statements have to meet depend on the company's size[29], its legal form[30] or its capital market-orientation[31]. The larger a company and the less personal liability of stakeholders is expected, the stricter the requirements are for the preparation of financial statements.[32]

With the declaration 'companies in Germany need modern accounting standards'[33], the German legislator adopted the HGB in accordance with the European standards.[34] However, as mentioned in the chapter before, the German GAAP is based on rules rather than principles. With the introduction of the IFRS through European legislation, the principles approach has been implemented and introduced into the codified law of the HGB. The already existing national rules, jurisprudences and commentaries are now faced with the principles of IFRS and its interpretation by the IFRS Interpretation Committee.

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28 See section 257(1) HGB; financial statements must be kept for 10 years. Another difference is that in Germany the financial statements are linked to the tax statement and a companies' tax base as the tax balance sheet is prepared based on the commercial balance sheet. The purpose of the financial statements in Germany is therefore – besides the creditor's protection – also the disclosure of the taxable income for the tax authorities. On the contrary, IFRS foresee a strict separation of tax balance sheet and commercial balance sheet and are therefore no instrument for tax accounting purposes.

29 See section 267 HGB.

30 See also sections 150 et seq. and section 286 Stock Company Act (Aktiengesetz – AktG); sections 41 et seq. Limited Liability Companies Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG).

31 See sections 264d, 267(3) sentence 2 HGB. Capital market-oriented companies are always recognised as big sized companies and therefore must follow the stricter regulations regardless of size or legal form.

32 Merkt, H., 'Rechnungslegung nach HGB und IFRS', chapter 1, mn. 195. The reason behind this is that stakeholders – when personally liable – are less inclined to endanger the company's and the creditor's capital. Therefore, the requirements the financial statements must meet are less strict than for companies where a personal liability is not given, e.g. stock companies.

33 Deutscher Bundestag, 'Gesetzentwurf der Bundesregierung', page 1.

34 German Act on the Modernisation of Accounting Law; in force since 29.05.2009.

3 ACCOUNTING OF LEASE AGREEMENTS

After introducing IFRS and the German GAAP, this paper will continue in showing the difference between the accounting of lease agreements under German GAAP and under IFRS. The example of leasing was chosen, because from 2019 on, significant changes regarding the accounting of lease agreements will occur. They are so significant that leasing is in danger of losing its recognition as a financial instrument.[35]

This chapter will describe the accounting treatment of leases under the German GAAP, then it will explain the status quo of accounting lease agreements under IAS 17, the current accounting standard for lease agreements for companies obliged to prepare its financial statements according to IFRS. Finally, this chapter will introduce IFRS 16, which will replace the current IAS 17.

3.1 LEASE AGREEMENTS UNDER GERMAN GAAP

In Germany, there are no stipulations regarding the accounting of lease agreements[36] in the HGB. As a consequence, in order to decide where an object must be recognised in the balance sheet, the general accounting standards pursuant to sections 238 et seq. HGB apply. This means the decision depends on the legal or economic ownership of an object

[35] Almost one quarter of investments in Germany are realised through leasing. Leasing is a major financial instrument for small and medium-sized companies (BDL, 'major force in the marketplace' (online), accessed on 02.08.2017). In 2015, the overall investment volume was 342,20 billion euro, with 51,90 billion euro realised through leasing. In 2016, the overall investment volume was 350,80 billion euro, 55,10 billion realised through leasing (BDL, 'year-on-year data and structural data' (online), accessed 02.08.2017).

[36] In Germany leasing is not codified. But because the lessor allows the use of an object for the duration of a lease term, while the lessee pays recurrent lease instalments for the right to use the object, the resemblance to rent contracts in accordance to sections 535 et seq. German Code Civil (BGB) is acknowledged. Lease agreements are recognised as 'atypical rent contracts'.

(so-called substance over form principle).[37] The substance over form principle means that not the legal owner of an object has to recognise an object, but the economic owner, if the economic owner exercises effective control over an object in such a way that the legal owner is excluded from the use.[38] This principle was already accepted for the tax calculation in the tax return, but was not mentioned in the HGB.[39] This changed with the German Act on the Modernisation of Accounting Law in 2009, which now stipulates the accounting of objects used by an economic owner as well. In accordance to section 246(1) sentence 2 HGB the [legal] owner must contain all assets [in its financial statements], unless an asset is not assigned to the [legal] owner, but to the economic owner.[40] The economic owner is a person, who – without owning an object legally – can use the object in the same capacity as the legal owner. This is the case, if the right to recover an object by the legal owner is de facto economically worthless[41] and the legal owner has almost no control over the object, i.e. if the lessee can exclude the lessor from the use of the object for the duration of the useful life of the object.[42] Then, all risks and rewards are with the lessee, which is the reason a lessee has to recognise the object in its balance sheet.[43] In Germany, lease agreements are, therefore, as a rule drawn in such a way that the lessor is the legal owner as well as the

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37 Freidank, C.; Velte, P., 'Rechnungslegung und Rechnungslegungspolitik', page 587.

38 See section 39(2) number 1 German Fiscal Code.

39 The deviation occurred as both statements pursued different purposes. The tax statement serves as the base for the calculating of the tax amount a company has to pay. The financial statement's purpose, on the other hand, is deemed as an instrument to protect the creditors' interests and the management's task to maintain the company's capital. As the purposes are divergent, the approaches of recognition objects were different.

40 The legal ownership in the meaning of section 903 sentence 1 BGB allows the owner of an object to deal with the object at its own discretion and exclude others from controlling the object.

41 German Federal Court, 13.10.2016 – IV R 33/13, mn. 43.

42 Martinek, M., 'Handbuch des Leasingrechts', § 71, mn. 18.

43 Brösel, G.; Kasperzak, R., 'Internationale Rechnungslegung, Prüfung und Analyse', page 55.

acknowledged economic owner of an object.[44] However, all lease agreements should adhere to the rule that the duration of a lease agreement should be between 40 and 90 percent of the useful life of an object to ensure the recognition on the lessor's side.[45]

If the lessor is the legal and economic owner, this in return might lead to tax related benefits for the lessees.[46] For example, lease instalments influence the trade tax result as the lease instalments must be recognised by the lessee as operating expenses in its profit and loss accounts, which in turn minimises the operating profit. The operating profit as shown in the profit and loss accounts (with some specific adjustments for trade tax purposes) is the basis for calculating the trade tax liability.[47]

3.1.1 ACCOUNTING OF AMORTISATION LEASE AGREEMENTS

Under an amortisation lease agreement, the lessor will recognise an object if two cumulative conditions are met. Firstly, the purchase price of the

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[44] To prevent the recognition in the accounts of the lessee, the lease agreement must follow the specific guidelines of the German Federal Ministry of Finance (BMF). Those guidelines, so-called lease decrees, are accepted by the financial authorities without further ado. As lease agreements are not codified, the lease decrees are highly appreciated in Germany as they provide certainty for the user. Pursuant to the lease decrees, a lease agreement can be either classified as an amortisation or partial amortisation lease agreement and can either cover moveable or immoveable objects, see BMF, administrative order concerning income tax treatment of finance leases on immovable assets (21.03.1972); concerning income tax treatment of finance lease agreements on movable assets (19.04.1971); concerning income tax treatment of partial amortisation lease agreements on immovable assets (23.12.1991) and concerning the taxation of partial amortisation lease agreements for movable assets (22.12.1975).

[45] This so-called 40-90 rule applies for all variations of lease agreements. A lease agreement under 40 percent of the useful life of an object implies a purchase agreement paid in instalments. In this case, the object is already fully amortised in only a short amount of time. In such a situation the lessee will probably buy the object from the lessor as it is paid in full and still highly valuable. If more than 90 percent of the useful life of an object is reached, the object lost most of its worth and is most likely not valuable any longer for the lessor (Martinek, M., 'Handbuch des Leasingrechts', § 2, mn. 14). In both cases, the lessee must recognise the object and the lessor will show the object only off-balance as operating income.

[46] See section 5(1) German Income Tax Act (Einkommensteuergesetz – EStG) and sections 6 et seq. German Trade Tax Act (Gewerbesteuergesetz – GewStG).

[47] The payment of lease instalments is to be booked in the profit and loss accounts of the lessee. However, as they minimise the operating profit of a lessee, section 8(1)d GewStG obliges the lessee for purposes of determining its trade tax base to add back to its operating profit 20 percent of the lease instalments paid in the tax year (only applicable to the lease of movable objects).

object including earnings and interests must be fully amortised at the end of the contractual agreed-upon lease term and secondly, the lease term must be a non- terminable one.[48] The BMF further classified specific variations of amortisation lease agreements, e.g. lease agreements without a purchase option and without a renewal option[49], lease agreements with purchase option[50] and/or with a renewal option[51] or special lease agreements[52]. For each type of lease agreement, the BMF provided matching accounting rules ensuring the recognition of the object in the lessor's balance sheet.[53]

If the lessor is required to recognise the object according to the above mentioned rules, the object is to be activated in the year of acquisition in the balance sheet[54] as a fixed asset with its acquisition or manufacturing costs.[55] Correspondingly, the lessor also needs to book a receivable in the same amount against the lessee. During the lease term the lessor is then obliged to depreciate the object linear over the lifetime of the object

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48 See lease decree on movable assets from 19.04.1971, II, 1.

49 See lease decree on movable assets from 19.04.1971, II, 2a. The lessor recognises the object if the lease term is between 40 and 90 percent of the object's useful life (lease decree on movable assets from 19.04.1971, II, 1).

50 See lease decree on movable assets from 19.04.1971, II, 2b. The lessor recognises the object if the lease term is between 40 and 90 percent and the purchase price for the purchase option is higher than the book value of the object (lease decree on movable assets from 19.04.1971, III, 2a).

51 See lease decree on movable assets from 19.04.1971, II, 2c. The lessor recognises the object if the lease term is between 40 and 90 percent and the additional lease instalments paid after the end of the lease term are higher than the remaining book value of the object (lease decree on movable assets from 19.04.1971, III, 3a).

52 The object is specially made for the lessee or is so unusual that other lessees won't be interested in leasing the object. Therefore, the lessor must ensure that the object stays with the lessee as long as possible or that the lessee purchases the object at the end of the lease term (lease decree on movable assets from 19.04.1971, II, 2d).

53 The exception is special lease. With special lease agreements all risks and rewards are with the lessee. The lessor has no use for the object besides earning the lease instalments. If the lessee is lost as a contractual partner, the lessor cannot lease the object to another lessee. The BMF acknowledged therefore the necessity to stipulate the recognition of the object on the lessee's balance sheet (lease decree on movable assets from 19.04.1971, III, 4).

54 See section 247(1) HGB.

55 See section 253(1) HGB with the highest amount. The costs include the purchase price as well additional costs, e.g. transport or installation.

with the same amount each year.[56] The lessor is required to book the lease instalments as operating income in the profit and loss accounts that increase the profit of the company.

The lessee books the lease instalments off-balance in its profit and loss accounts as operating expenses for the duration of the lease term. Transactions cannot be recognised in the balance sheets if the profit or loss related to the transaction is not realised at the closing date of the balance sheet.[57] As the obligation to pay the lease instalments exists throughout the lease term, the profit for the lessor and the loss for the lessee is not yet realised. As a consequence, the lease instalments fulfil the function of so-called pending transactions as the obligation to pay lease instalments only stops with the end of the lease term.[58] This accounting treatment mirrors the intention of the German legislator to protect the creditors of a company as only realised profits and owned objects should be accounted for.

3.1.2 ACCOUNTING OF PARTIAL AMORTISATION LEASE AGREEMENTS

Within a partial amortisation lease agreement, the duration of the non-terminable lease term must comply with the 40–90 rule as well. However, the lessee and the lessor agree on reduced lease instalments during the lease term. At the end of the lease term, the object is therefore not fully paid yet and a lessee is obliged to pay an additional sum to reimburse the lessor accordingly.[59]

In the same manner as with the amortisation lease agreements, the BMF explicitly classified types of partial amortisation lease agreements, e.g.

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[56] See section 253(3) sentence 1 HGB.

[57] So-called realisation principle, see section 252(1) number 4 HGB.

[58] Or, if a lease agreement was not terminated, after the renewal period expires.

[59] See lease decree on movable assets for partial amortisation agreements from 22.12.1975, 1.

partial amortisation lease agreements with purchase obligation[60], with participation rights or with obligations concerning the revenues[61].

In addition to paying the amount needed to reach full amortisation, including interests and profits, the parties agree that the lessor will sell the object at the end of the lease term. The realised purchase price is then credited with 90 percent of the amount received from the selling against the final payment the lessee has to pay in order to fully amortise the object. When following the stipulations made by the BMF, the objects are accounted in the same way as with amortisation lease agreements, i.e. the lessor has to recognise the object in its balance sheet, whereas the lessee books the lease instalments and the final amount paid to the lessor through profit and loss.

3.2 LEASE AGREEMENTS UNDER IAS 17

If companies in Germany are obliged or permitted to use IFRS, they will use IAS 17 when accounting lease agreements. IAS 17.4 defines lease agreements as agreements whereby a lessor conveys an object to a lessee in return for a […] series of payments for the right to use an object for an agreed period of time. In accordance with IAS 17, two types of lease agreements are classified; finance lease agreements and operating lease agreements.[62] Depending on the classification, either the lessee (finance lease) or the lessor (operating lease) must account an object in the bal-

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60 See lease decree on movable assets for partial amortisation agreements from 22.12.1975, 2a. The lessee is obliged to purchase the object after the end of the lease term for a price stipulated with the conclusion of the lease agreement if the lessor says so. However, the lessee has no right to purchase the object if the lessor is not interested in selling, i.e. if the lessor can sell the object to a third party at a higher price.

61 See lease decree on movable assets for partial amortisation agreements from 22.12.1975, 2b. If, after selling the object to a third party, there is a loss, the lessee must reimburse the lessor and if there is a gain realised, the lessor will reimburse the lessee with at least 75 percent of the profit.

62 It also defines sale and leaseback transactions. However, sale and leaseback transactions will not be part of this paper.

ance sheet. IAS 17 therefore uses an 'all or nothing' approach regarding lease transactions.[63]

3.2.1 ACCOUNTING OF FINANCE LEASE AGREEMENTS

The main factor whether a finance lease agreement has been agreed-upon, and consequently whether the lessee must recognise an object, is the determination of the economic ownership of an object. Under a finance lease agreement all substantially risks and rewards incidental to the ownership of an object are transferred to the lessee (so-called risks and rewards approach), thus explaining the need to recognise an object in the lessee's balance sheet.[64]

The risks of an object are transferred substantially to a lessee if the lessee bears the risk regarding the usage of an object in a similar manner as the legal owner of an object, e.g. risk of idle capacity, risk of subsequent or latent unsuitability, lack of usefulness of the object or risk of loss and theft of the object. Rewards incurred by the use of an object, on the other hand, are for example the right to use an object at its own discretion, excluding the legal owner from the use of an object, earning profits by using the object or participation in the increase of the object's value.

For the decision concerning the classification, the provisions of the lease agreements are of relevance. In case of doubt, however, the actual substance of the transaction will decide over the classification.[65] If for example a case of special lease[66] is given, even though a legally correct operating lease agreement was concluded, the transaction will be classified as a finance lease and therefore entails the obligation for the lessee to

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63 Nemet, M.; Heyf, R., 'Bilanzierung von Leasingverhältnissen nach IFRS 16', page 66.

64 See IAS 17.8 and IAS 17.20.

65 Substance over form principle means that the wording and stipulations in a lease agreement are less relevant than the actual situation; see IAS 17.10.

66 See IAS 17.10(e).

recognise the object.[67] If an operating lease agreement stipulates that at the end of the lease term the ownership will be transferred to the lessee, IAS 17 furthermore presumes a finance lease agreement. In this case, the lessor cannot use the object at its own discretion, because of the planned transfer of ownership at the end of the lease term.[68] A similar presumption occurs if the lessee was offered a purchase option in the lease agreement and said purchase option comes with a bargain price.[69] The logical conclusion in this situation is that the lessee will certainly use the option to purchase the object; therefore, the object should be recognised in the lessee's balance sheet from the beginning of the contractual relationship. Another indicator for assuming a finance lease agreement is the fact of the lease term being as long as the economic life time of the object. At the end of the lease term the object has (almost) no value left.[70]

All those cases indicate a finance lease agreement, which in return require the recognition of an object in the balance sheet by the lessee.[71] In such cases, the object must be recognised in the balance sheet of the lessee under fixed assets on the one side and the yet-to-pay lease instalments excluding future finance costs as a liability on the other side.[72] The lease instalments already paid are booked against the initial liability and the finance element of a lease instalment is booked as operating expenses in the profit and loss accounts of the lessee.[73]

The lessor on the other hand must account part of the amount of the lease instalments as a repayment of the receivable in its balance sheet[74]

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67 The reason is that with special lease, the risks and rewards solely lie with the lessee, because the object was specifically made for the lessee, no other person can make use of this object sufficiently. The lessor must, as a consequence, ensure that the object stays with the lessee as long as possible.

68 See IAS 17.10(a).

69 Bargain means that the price is less than the actual value of the object; see IAS 17.10(b).

70 So-called economic life test; see IAS 17.10(c).

71 However, the decision depends from case to case.

72 See section 247 HGB.

73 See IAS 17.25.

74 See section 266(2), B.II(1) HGB.

and the finance elements of the received lease instalments are accounted for in the profit and loss accounts as operating income.

3.2.2 ACCOUNTING OF OPERATING LEASE AGREEMENTS

In accordance with IAS 17, operating lease 'is a lease other than a finance lease'[75]. Essentially, this means that the risks and rewards are with the lessor, thus the lessor is the legal as well as the economic owner of the object. The object is then recognised in the balance sheet of the lessor under fixed assets with depreciation booked through profit and loss. The total lease instalments are recognised as operating income in the profit and loss accounts.[76]

The lessee will account the lease instalments in its profit and loss accounts as operating expenses for the right to use the object.[77]

3.3 LEASE AGREEMENTS UNDER IFRS 16

The former Chairman of the IASB, Sir David Tweedie, said in 2008 '[o]ne of my great ambitions before I die is to fly in an aircraft that is on an airline's balance sheet'[78]. He was referring to the situation that lease transactions allow the use of an object for the duration of a lease term without recognising it on the balance sheet. In his opinion, an aircraft should be shown in the balance sheet accordingly, because it is an object of great value. With the new IFRS 16, issued on 13 January 2016[79], his wish came true. From January 2019, IFRS 16 will be in force, and will replace IAS 17.[80] However, within the European Union, IFRS 16 still

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75 See IAS 17.4.

76 See IAS 17.50.

77 See IAS 17.25.

78 Tweedie, D., 'The 2007 Ken Spencer Memorial Lecture', page 9.

79 IFRS, 'Fact Sheet – IFRS 16 Leases' (online), accessed on 08.08.2017.

80 The deadline is set for new and already concluded lease agreements.

needs to be endorsed by the European Commission.[81] The endorsement process is stipulated in the IAS regulation, allowing the transformation of accounting standards from the IASB, an international private organisation with no democratic legitimation whatsoever, into European law.[82]

In accordance with IFRS 16, a lease agreement is a 'contract, or part of a contract, that conveys the right to use an asset […] for a period of time in exchange for consideration'.[83] IFRS 16 stipulates that every lease transaction, regardless of legal or economic ownership and regardless of the differentiation between operating or finance lease, must be recognised in the balance sheet of the lessee. For companies already using IFRS, this changes the accounting method from a 'risks and rewards' approach to a 'right to use' approach. The right to use is such a powerful right for the lessee that the recognition in the balance sheet is the only logical conclusion: with the right to use, the lessor's discretion and control over the object is completely transferred to the lessee.[84] According to the IASB, it is irrelevant that the lessor generally includes certain restrictions regarding the object's use in its lease agreements as this is only meant as a restriction for the economic benefit of the object, but does not result in more control for the lessor.[85] The IASB reasons further that with the use of the object, control and decision-making power lies solely with the lessee.

The IASB additionally argued that operating lease, for instance, lacked the transparency expected by the reader and user of financial statements if the objects are not recognised.[86] Under IFRS 16 objects are accounted and the amount of fixed assets will increase.

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81 The European Commission submits the endorsement to the European Parliament and to the Council (Poole, V., 'IFRS in your pocket', page 18). After IFRS is endorsed, IFRS becomes European Law pursuit to article 267 TFEU.

82 In accordance to article 3(1) of the IAS regulation, the European Commission decides about the application of IFRS. Accounting standards are only accepted if they are understandable relevant, reliable and comparable, see article 3(2), second bullet of the IAS regulation.

83 See IFRS 16.BC19 and Appendix A, defined terms.

84 See IFRS 16.BC22(a).

85 See IFRS 16.BC22(b).

86 See IFRS 16.BC3(a).

As of now, a creditor or investor can expect that those objects are under the ownership of the lessee, which means that the company's business transactions are backed-up by a base of objects. This base could be used in cases of critical financial situations or in case of insolvency proceedings in favour of the creditor's claims. However, as the lessee is not the legal owner, those expectations cannot be fulfilled. In contrast to IAS 17 and the German GAAP, IFRS 16 additionally ignores the nature of lease transactions as pending transactions.[87] According to the IASB, with the conclusion of a lease agreement, the lease transaction is concluded and no longer pending. However, this does not consider that the lessee is still expected to pay the lease instalments. Making available the object is the primary obligation of the lessor; the lessee's obligation is to accept the object[88] and to pay the lease instalments throughout the lease term. The transaction therefore is not fully completed and a typical transaction to be recognised in the balance sheet de facto not given.[89] Nevertheless, the IASB only considers the making available of the object and its right to use as relevant factors.

3.3.1 ACCOUNTING OF LEASE TRANSACTIONS UNDER IFRS 16

Under IFRS 16, the changes for the lessor have been almost non-existent[90], however, the consequences for lessees are more comprehensive. As mentioned already, under IFRS 16, the lessee is obliged to recognise each lease transaction in its balance sheet, regardless of economic ownership or its classification in accordance with IAS 17. The object must be activated under fixed assets from the time the object was given to the

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87 See 3.1.1 at the end.

88 The transfer of the contractual agreed-upon object is the primary obligation for the lessor. Only after the transfer is the lessee obliged to pay the lease instalments.

89 A fully concluded transaction is for instance a purchase agreement. With purchasing the object, the object must be activated under fixed assets in the balance sheet and the paid purchase price reduces the amount of capital in the balance sheet.

90 See IFRS 16.BC63.

lessee (date of commencement)[91], because in accordance with IFRS 16, from the date of commencement till the return of the object to the lessor, the lessor has no longer any control over the object. The amount of lease instalments is recognised as liability in the balance sheet[92] and each paid lease instalment reduces the amount of liability.[93] The object should be depreciated with the declining method instead of the current linear method as customary under German GAAP and IAS 17. Under the declining method an object is depreciated at the beginning with a higher amount than at the end of the lease term.[94] Off-balance – in the profit and loss accounts – the lessee is obliged to show the lease instalments as operating expenses.

3.3.2 EXEMPTIONS UNDER IFRS 16

Under certain circumstances, the IFRS 16 stipulates exemptions[95] from accounting an object on the lessee's balance sheet. In case of an exemption, the lessee only recognises the lease instalments in the profit and loss accounts similar to an operating lease agreement under IAS 17.

Exempted from the mandatory recognition of an object as an asset in the balance sheet of the lessee are short-term lease agreements[96] and lease

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91 See IFRS 16.BC19; the date of the commencement is the date of making an object available for use (IFRS 16, Appendix A, defined terms).

92 See IFRS 16.BC25. A liability under IFRS means an obligation of the lessee arising from past events, which is expected to result in an outflow from the lessee's resources embodying economic benefits. The past event, i.e. the making available of the object for the use, incurs the lessee's obligation to pay the lease instalments and paying lease instalments result in an outflow of capital. The lease instalments must be therefore shown as liabilities in the amount the lease instalments are agreed-upon. The amount of liabilities includes possible rights and obligations from termination and renewal options as well as residual value guarantees. And even if the lease agreement ends earlier than the agreed-upon lease term, the lessee is then obliged to pay the still open lease instalments. The liability for the lessee is therefore a known factor from the day of the conclusion of the lease agreement.

93 See IFRS 16.BC36.

94 Adolph, P, 'Es ist vollbracht: Der neue Leasingstandard IFRS 16 ist da', page 486.

95 The scope of IFRS 16 also exempts leases to explore for minerals or oil, see IFRS 16.B3(a), for licences of intellectual property rights, see IFRS 16.B3(d) or for intangible assets, see IFRS 16.B3(e).

96 See IFRS 16.BC87 et seq. The IASB found that the benefits of activating an object in the balance sheet for a short-term lease agreement do not compensate the costs for the lessee.

agreements of low-value[97]. In accordance with IFRS 16.BC93, a short-term lease agreement is a lease that has a maximum possible term of 12 month. Low-value lease agreements cover easily exchangeable objects with a value less than US$5,000, e.g. tablets or notebooks.[98]

4 OPTIONS TO CIRCUMVENT THE ACCOUNTING IN A LESSEE'S BALANCE SHEET

With the imminent approach of IFRS 16, in the future, lessees using IFRS will be probably less inclined to use lease agreements as a financial instrument. To keep the interests of the lessees, a lessor will have to adapt its product portfolio accordingly. This chapter will mention possible alternatives to lease agreements, which a lessor could offer its lessees who are accounting for leases using IFRS 16 in order to avoid bringing the value of an object on to the lessee's balance sheet.

4.1 OFFERING SHORT-TERM LEASE AGREEMENTS

One possibility is the use of short-term lease agreements, i.e. lease agreements with a non-terminable lease term less than 12 month. The lease term is determined by including all options for renewal as well as situations, where a termination by the lessee is possible, but would be unreasonable.[99] Realistically however, a lease agreement with such a short term increases the efforts for the lessor enormously and is only beneficial if the lessor can simultaneously include the corresponding costs in the

97 See IFRS 16.BC98 et seq.

98 See IFRS 16.BC100.

99 See IFRS 16.18(a), (b).

lease instalments. For the lessee, on the other hand, a short-term lease does not mean less responsibility. Even though, the lessor would recognise the object, it is still the lessee's obligation to use the correct accounting strategy for the object. The accounting strategy is primarily based on the subjective evaluation of the lessee. Therefore, the lease agreements must be administered, analysed and rated accordingly and, if an ex-post assessment shows a mistake, the object must be booked correctly retrospectively. Considering this, the practical feasibility of offering short-term lease agreements is questionable.

4.2 OFFERING LOW-VALUE LEASE AGREEMENTS

While a lessee would normally integrate several objects in one lease agreement, another option would be to conclude several lease agreements for each specific object if the value is less than US$5,000. However, this is only permitted if each lease transaction includes an object that by itself will function properly, e.g. a telephone or a notebook, but not a server and its components.

The exemption of low-value lease agreements indicates that the IASB negated lease agreements as financial instruments, as with the rather low values that are exempted, lessees will no longer choose lease agreements if they could just purchase the object by themselves instead. With a purchase agreement the lessee would become the legal and economic owner of the object. This is obviously not the case with lease agreements, where the lessee must, in addition to the purchase price, also pay interests and earnings for the lessor. Under these circumstances, the benefit of concluding a low-value lease agreement seems rather insignificant. Considering that the amount of 5,000 was declared in US dollar, the lessee is in addition obliged to check the amount of each lease transaction with possible currency fluctuations concerning the US dollar, making an appropriate controlling system necessary.

4.3 OFFERING SERVICE AGREEMENTS

A lessor could also offer service agreements as they are still recognised as pending transaction under IFRS.[100] Within a service agreement, a lessee could still use an object without recognising the object in its balance sheet. This is the case as the offered service is the deciding factor, and not the object itself.[101] It is, however, relevant that the service agreement does not include the right to use an identified object.[102] A typical example is a car rental service, where the lessor offers a car for a specific time. The car is chosen by categories, e.g. luxury class, intermediate class or convertibles, but the lessor decides which car – within the chosen category – the lessee will use. It is important that for the object to be recognised on the lessor's balance sheet that the lessor regularly exchanges the object for another one. As usually the aim of lease agreements is not the legal ownership, but the use of an object, this could be a suitable option to offer to lessees. However, this means that a lessor is de facto forced to specialise in only object categories, e.g. cars, office furniture or server, and all in different types and number. Such concept requires a huge amount of capital necessary for purchasing objects, storage areas for the objects, manpower for managing and maintaining those objects and additional effort concerning the administrative process.

4.4 OFFERING RENT CONTRACTS

Finally, another option to adjust a lessor's portfolio following IFRS 16 could be the use of rent contracts. Rent contracts and lease agreement are similar in nature and therefore a possible solution for the lessor's product portfolio. In rent contracts, however, the lessor must bear the responsibility for the functionality of an object. According to section 535(1) BGB, the lessor is obliged to grant the lessee the use of the object in a condition suitable

100 See IFRS 15.

101 See IFRS 16.BC34.

102 See IFRS 16.B13.

for use and in the functionally and contractually agreed-upon condition and to maintain it in this condition for the duration of the rent term in return for the recurrent payment of rent instalments by the lessee. This contrasts, however, fundamentally with lease agreements.[103] In a lease transaction, the lessor's only obligation is the making-available of the object, but not the maintenance of the object throughout the lease term.[104] Nevertheless, a rent contract could certainly be a suitable option to offer a lessee. The legal nature of a rent contract does, however, not influence the necessity to recognise an object in the balance sheet. In accordance with IFRS 16.B9, a contract (regardless of the legal nature) is classified as a lease agreements 'if the contract conveys the right to control the use of an identified asset for a period of a time' in exchange for recurrent payment. Hence, the deciding factor is, whether the rent contract includes an identified object. If the rent contract contains the use of such a specific object, the lessee still is obliged to recognise the object in its balance sheet in accordance with IFRS 16.

5 CONCLUSION

This paper explained the accounting of lease transactions and its recognition of leased objects in the financial statements under German GAAP, IFRS 16 and its predecessor, the current IAS 17. It was shown that under IAS 17 and the German GAAP, as a rule, the lessor recognises an object in its balance sheet, but that with IFRS 16 the lessee will be the one

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[103] In Germany, only financial services institutions are allowed offering lease agreements. Those financial services institutions are supervised by the German Financial Supervisory Authority (BaFin) and need a special permission, see sections 32, 33 KWG. For rent contracts, such requirements are not stipulated. A change to rent contracts would be feasible.

[104] A typical stipulation in lease agreements therefore is that the lessor will transfer the risk inherent in the use of an object to the lessee and with this transfers the responsibility for the object's condition to the lessee. As this is not possible according to section 535(1) BGB, for the lessor a rent contract therefore means more responsibility and the necessity of ensuring enough manpower suitable for maintaining the rented objects, either its own personal or third parties commissioned with this task. This will increase the expenses for the lessor, which will be passed on to the lessee, minimising the appeal for the lessee further.

to account for it in its balance sheet. As a consequence, the change in accounting treatment will affect the financial statement's outcome negatively for the lessee. Lessees should therefore inform the company's stakeholders, investors and creditors about the expected changes in the financial statements' outcome, e.g. impact on EBIT, increase of the amount of fixed assets and the amount of liability.

It was also shown that under the new IFRS 16 regime, lessors are barely confronted with changes regarding the accounting treatment of lease transactions, but that nevertheless, the impact of IFRS 16 on the lessor's business still will be enormous. Primarily, lessors in Germany are required to adjust their business models by adapting their lease agreements, i.e. for lessees using IFRS 16 and lessees using the lease decrees by the BMF or introduce new contract types. The adaptions for lease agreements under IFRS 16 will include stipulations regarding the lease term, the value of the objects, of purchase arrangements and renewal options.[105] If lessors want to offer products that allow the recognition of objects off-balance, lessors must offer alternatives, i.e. service agreements. As primarily big and capital market-oriented companies use IFRS in Germany, the size of a lessee's company means that lessors must be able to provide a large range of various objects lessees can chose from; otherwise the agreements would be in danger of being classified as lease transactions.[106] Not every lessor will be able to handle such an endeavour.

Lessors can, still focus on small and medium-sized companies as Germany does not expect the use of IFRS for them. Small and medium-sized companies can therefore use the principles laid out in the lease decrees by the BMF regarding lease transactions and can, consequently, benefit from the off-balance situation as well as leasing advantages, e.g. tax related benefits and 'pay as you earn' principle. Hence, lessors are still able

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[105] This means more legal and administrative efforts on the one hand, but also requires advanced knowledge concerning the various contract types and accounting treatments by the employees working with the customers, on the other hand.

[106] Lessors adapting their product portfolios perhaps are able to keep big companies using IFRS as customers, nevertheless, with the loss of the beneficial factors regarding leasing, the demand will most likely abate. This will also have an impact on a lessor's risk management as big sized companies generally have excellent credit ratings and are less prone to breach their contractual obligations.

to offer lease agreements to lessees as a financial instrument. This is all the more important, as small and medium-sized companies have more and more difficulties in receiving loans from credit institutions to be able to access necessary capital.[107] One reason is that credit institutions are under stricter supervision and must meet stricter requirements regarding the credit institution's capital, and therefore are less willing in granting loans to small and medium-sized companies as they often lack the necessary securities.[108] As the capital requirements are based on European regulations and directives, not only German companies might have problems in accessing additional capital by credit institutions, but European companies as well. If credit institutions, however, are less inclined to support small and medium-sized companies in granting loans, those companies are even more dependent on other alternative financial instruments.

As IFRS is an international accounting standard and already 150 countries, lessors acting on a global level, furthermore, have to check in each country they are represented in, whether those countries use IFRS and subsequently whether those have chosen IFRS for all companies or – similar to Germany – only for certain types of companies.[109] More than likely, lessors must thoroughly adapt their lease agreements and/or their product portfolio in each country as well. Therefore, leasing under IFRS 16 will not only lose its appeal in Germany, but most likely in those countries as well. As a worst case scenario, leasing as a financing instrument fails to attract new lessees or fails to retain the remaining lessees and, if lessors are not able to offer alternative products, lessors might be forced to stop doing business in IFRS-countries.

As a conclusion of this paper: The aim of European Union and the IASB of creating more transparency, readability and competitiveness is undoubtedly reasonable, it seems however that – in case of IFRS 16 – both

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107 Zimmermann, V., 'Unternehmensbefragung 2017' (online), accessed 07.08.2017.

108 Capital requirements are for example initial capital, capital buffer, a certain quantity of liquidity, see sections 10 et seq. KWG.

109 In Slovakia and Chile for instance is the use of IFRS an obligation for all companies, regardless of size or capital-market orientation. Lessor doing business in such country will have to adapt the product portfolio accordingly (Deloitte, 'Info Anwendung der IFRS in einzelnen Rechtskreisen' (online), accessed 16.08.2017).

institutions have gone too far. It is not clear, whether the intention of negating leasing as a financial instrument was an anticipated consequence of IFRS 16 or whether this was unintentionally. Yet, it seems rather questionable that the European Union and the IASB did not consider the significance of IFRS 16 for the involved parties of lease transactions. More than likely, the goal of creating one 'world accounting standards' was far more appealing than the consequences IFRS 16 will have on the real market and its participants. It remains to be seen whether the goal will justify the means.

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12 TOWARDS HARMONIZATION AND UNIFICATION OF INTERNATIONAL INTELLECTUAL PROPERTY LAW

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TABLE OF CONTENTS

1 INTRODUCTION

At present, international intellectual property law faces several problems that are caused by globalization and the internationalization of trade and business activities. Companies are acting worldwide – trade takes place internationally, research and development are globalized[1]. Globalization leads to the internationalization of patent applications[2]. Researchers and innovators are active all over the world and innovations are international and global by nature[3]. Global markets require global patent protection[4].

Whereas intellectual property laws are stuck in the last century and have not kept up with the technological and commercial system that has become global and where ideas, technology, products and services move across the borders.[5] For example, the common intellectual property law principle of "territoriality" is in conflict with the de-territorialization of the economy[6]. In former times, national legislators concentrated on the right balance of their national patent system[7]. But nowadays this question has become more complicated because of global communication and the interdependence of economic, social and cultural relations[8]. On the international level, conflicts exist between the interest a sovereign nation has in providing national patent protection and the interest of the international community in unrestricted trade and technology transfer[9]. For this conflict the international patent law should provide a solution.

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1 Straus / Klunker IIC 2007, 907.

2 Koppel Patente 2011, page 16.

3 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 184.

4 See the presentation of the Director of the USTPO Kappos with which he aimed to highlight the significant changes made by America Invents Act and which set the stage for international subjective patent law harmonization, https://www.uspto.gov/learning-and-resources/ip-policy/harmonization, last checked February 24, 2017.

5 Kappos Patent Law Harmonization Landslide July / August 2011, page 16.

6 Straus / Klunker IIC 2007, 916.

7 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 177.

8 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 177.

9 Campbell Global Patent Law Harmonization Ind. Int´l & Comp. L. Rev Vol. 13:2, page 616.

Moreover, IP laws are different from country to country. Significant differences regarding substantive patent law currently result in high costs for IP protection which the applicants have to bear since local legal advice is needed. The international intellectual property area is fractured and a segmented potpourri of national patent systems that serves to hinder an efficient and economical solution of international patent issues[10]. So, the need for international protection is growing, but the international intellectual property protection system does not offer efficient protection.

Furthermore, in the last few years a transition in society takes place from an industrial to a knowledge society[11]. Intellectual property, such as patents or trademarks, incorporates high values for companies in the modern knowledge society. More and more applications are made and the IP offices have huge backlog since the number of intellectual property applications is increasing and granting procedures last very long.

In order to meet these challenges international IP laws should be harmonized or unified. The idea of unification and/or harmonization of intellectual property law arose as a possible solution for the current problems with the goal to advance intellectual property law on the next level. Harmonization means the process by which the dissimilar laws of different sovereign entities are changed with the aim that all those different laws rather reflect a common set of legal principles agreed to by those sovereign entities[12]. Unification means the creation of one internationally applicable, uniform law. Harmonization and unification result in different achievements: unification leads to one set of agreed rules[13], a truly unitary IP law, whereas harmonization leads to revised national laws, so that differences between the laws of the different sovereign entities become smaller[14].

This essay is deemed to provide an overview of international intellectual property law harmonization and unification using the example of patent

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10 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7, page 173.

11 Straus/Klunker IIC 2007, 908.

12 Blakely University of Pennsylvania Law Review Vol. 149, 2000, page 312.

13 Blakely University of Pennsylvania Law Review Vol. 149, 2000, page 312.

14 Blakely University of Pennsylvania Law Review Vol. 149, 2000, page 312.

law since the clearest and most significant harmonization tendencies may be shown in the field of patent law.

2 HISTORICAL OVERVIEW

Harmonization and unification already have a very long history of more than a century. In general, harmonization and unification activities can be divided into three different kinds of activities: firstly, conclusions of international agreements, secondly, the cooperation of patent offices to share their work and thereby improve their efficiency and thirdly, the establishment of a forum for discussions regarding harmonization.

2.1 FOUNDATION OF WIPO

On a worldwide level, harmonization started with Paris Convention ("International Union for the Protection of Industrial Property") and Berne Convention ("Berne Convention for the Protection of Literary and Artistic Work"). Both Conventions are governed by the principle of national treatment which stipulates that the same national treatment has to be granted to nationals of not-parties of the Conventions in case they are domiciled in a member country[15].

In 1893 BIRPI was founded by uniting the two secretariats of the Paris and the Berne Convention[16]. The name BIRPI is the acronym of the French language version of the name: United International Bureaux for the Protection of Intellectual Property[17]. BIRPI was WIPO's immediate predecessor[18].

The "Convention Establishing the World Intellectual Property Organization" (WIPO)[19] was signed at Stockholm in 1967 and entered into force

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15 WIPO Introduction to Intellectual Property 1997, page 361.

16 Pfanner IIC 1979, 2; WIPO Introduction to Intellectual Property 1997 page 27 section 3.2.

17 WIPO Introduction to Intellectual Property 1997 page 27 section 3.2.

18 http://www.wipo.int/about-wipo/en/history.html, last checked May 28, 2016.

19 Text see http://www.wipo.int/treaties/en/text.jsp?file_id=283854, last checked May 29, 2016.

in 1970[20]. As successor of BIRPI WIPO is an intergovernmental organization and a specialized agency of the United Nations system[21] with the goal besides others to harmonize[22] intellectual property law worldwide.

2.2 EUROPEAN PATENT CONVENTION (EPC)

An example for historical harmonization/unification on EU-level is the European Patent Convention (EPC). The EPC system is a regional patent system[23] which entered into force in 1977. Its goal was the unification of patent law and the creation of a European bundle patent that contains a sum of single patents[24]. General aim of EPC was to create a unified economic area regarding intellectual property[25]. Of course, the European patent system also had and has to face the challenge to adapt to the globalized economic activities of the companies[26] and react to the problems connected with it.

However, EPC is also criticized for several reasons. For example, it is a very expensive system because national recognition is needed and translations are required[27]. These requirements result in high translation costs, generally high costs for patents. Furthermore, the bureaucratic efforts needed are the weak points of this European patent system[28]. Additional-

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20 Niemann Verhältnis WIPO und WTO 2008 page 159; WIPO Introduction to Intellectual Property 1997 page 27 section 3.1; Pfanner IIC 1979, 2; Schäfers GRUR Int 1996, 763.

21 Pfanner IIC 1979, 1; WIPO Introduction to Intellectual Property 1997 preface by Director General Bogsch at page V; WIPO Introduction to Intellectual Property 1997 page 27 section 3.3 and 3.4; http://www.un.org/en/sections/about-un/funds-programmes-specialized-agencies-and-others/index.html, last checked June 4, 2016; Fezer Markenrecht 2009 A. b) recital 16.

22 Pfanner IIC 1979, 7 and 12.

23 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7, page 179.

24 Stoll Technologietransfer 1994, page 225; Campbell Global Patent Law Harmonization Ind. Int´l & Comp. L. Rev Vol. 13:2, page 625.

25 Koppel Patente 2011, page 32.

26 Koppel Patente 2011, page 40.

27 Koppel Patente 2011, page 33 and 40.

28 Arntz EuZW 2015, 546.

ly, the EPC system and the national patent systems cause inconsistence and unpredictability in patent protection because national courts apply different procedural rules and exercise different approaches in patent infringement actions[29]. As a result, the system is strongly fragmented at the moment[30]. Furthermore, a major weakness of the EPC patent system is that a European Patent Court[31] for a common interpretation and enforcement lacks.

2.3 PATENT COOPERATION TREATY (PCT)

Patent Cooperation Treaty (PCT) entered into force in 1978[32] and introduced the possibility of international patent applications[33]. The aim of PCT was to rationalize filing, searching, and preliminary examination of patent applications and dissemination of technical information contained in patents by regulating cooperation[34]. The general goal was to simplify the application system and render it more effective[35]. It was thus procedural harmonization[36] since PCT does not provide regulations for the grant of international patents[37]. Filing an international application with the PCT system is possible by any national or resident of a PCT member state at the national patent office which acts as PCT office[38]. The office where the first filing is made is called the "Receiving Office"[39]. In those PCT

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29 Campbell Global Patent Law Harmonization Ind. Int´l & Comp. L. Rev Vol. 13:2, page 625.

30 Koppel Patente 2011, page 40.

31 Campbell Global Patent Law Harmonization Ind. Int´l & Comp. L. Rev Vol. 13:2, page 626.

32 WIPO Introduction to Intellectual Property 1997, page 396.

33 Stoll Technologietransfer 1994 page 226; WIPO Introduction to Intellectual Property 1997, page 396.

34 WIPO Introduction to Intellectual Property 1997, page 396 and 612; Baechtold/Miyamoto Journal of IP Vol.10 May 2005, page 179; Campbell Global Patent Law Harmonization Ind. Int´l & Comp. L. Rev Vol. 13:2 page 609.

35 WIPO Introduction to Intellectual Property 1997, page 396.

36 Chun Patent Law Harmonization In The Age Of Globalization, Cornell Law School Paper 45, page 16.

37 WIPO Introduction to Intellectual Property 1997, page 396.

38 WIPO Introduction to Intellectual Property 1997, page 397.

39 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7, page 182.

member states the applicant has numerated in his application the international application has the effect from the international filing date of a national application[40]. The language in which the application has to be made depends on the requirements of the receiving office; usually it is the national language[41]. An international searching is conducted by an International Searching Authority that does high quality search of patent documents and related literature which is assured by searching standards[42]. The proceeding until the international search report is called the "international phase". After having an international search report the applicant can decide whether he sees a chance to obtain patents in the states he has numerated or not, which is called the "national phase"[43]. If the applicant sees a chance he can start the national patent application procedure, if not chance he can withdraw his application in these countries[44]. The invention is disclosed internationally by publication in the language of application in the PCT gazette in order to determine the scope of protection[45].

Advantages of the PCT system for patent offices are that work load is reduced and costs for publishing are saved[46]. The advantages for applicants are that applicants can file in their own countries with effect in foreign countries and have time to decide in which countries they really like to have protection; further they save money[47].

PCT marked an important step towards harmonization[48]. Although PCT especially ensures freedom of its member states to prescribe substantive

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40 WIPO Introduction to Intellectual Property 1997, page 398.

41 WIPO Introduction to Intellectual Property 1997, page 398.

42 WIPO Introduction to Intellectual Property 1997, page 398.

43 WIPO Introduction to Intellectual Property 1997, page 402.

44 WIPO Introduction to Intellectual Property 1997, page 400.

45 WIPO Introduction to Intellectual Property 1997, page 400.

46 WIPO Introduction to Intellectual Property 1997, page 403.

47 WIPO Introduction to Intellectual Property 1997, page 404.

48 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7 page 184.

conditions of patentability under their own applicable laws, it is one of the most successful treaties[49].

2.4 TRILATERAL

In 1983, the "Trilateral Cooperation" was set up between the European Patent Office (EPO), the Japan Patent Office (JPO), and the United States Patent and Trademark Office (USPTO). The "Trilateral Offices" or "Trilateral" mean the Heads of these offices[50], they already cooperate for more than 30 years and aim to improve the quality of examination processes, promote harmonization of practices among the offices and exploit the full potential of work sharing[51].

2.5 WIPO´S BASIC PROPOSAL

"Basic Proposal" is the title of the international patent law treaty proposed by WIPO in The Hague in 1991[52]. It is also called "Draft Patent Harmonization Treaty"[53]. The aim of this treaty was substantive international patent harmonization[54]. The Basic Proposal included 20 substantive articles; 12 of them were accompanied by draft rules which were called "the Regulations" and were also part of the Basic Proposal[55]. The Basic Proposal contained several regulations that were extremely interesting and attractive for applicants, e.g. an international grace period, protection of inventions within all fields of technology, patentability, definition of novelty,

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49 Baechtold/Miyamoto Journal of IP Vol.10 May 2005, page 179.

50 https://www.uspto.gov/learning-and-resources/ip-policy/harmonization, last checked January 5, 2017.

51 https://www.uspto.gov/learning-and-resources/ip-policy/harmonization, last checked January 5, 2017.

52 WIPO Introduction to Intellectual Property 1997, page 613.

53 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 179.

54 Barber IIC 2013, 2; Bardehle IIC 1998, 877; Straus / Klunker IIC 2007, 910.

55 WIPO Introduction to Intellectual Property 1997, page 613.

inventive step and enforcement of patent protection[56]. This first attempt of harmonization of WIPO was initiated and supported by applicants[57]. The Basic Proposal also contained rules regarding prior use, amendment and correction of the patent as well as changes in patents[58]. The draft treaty also provided definitions for some of the terms used in the Basic Proposal[59]. Discussions reached a deadlock in 1993 because two major problems could not be resolved: grace period and the "first to file" principle[60].

During and prior to negotiations it became clear that the international grace period regarding novelty would only be accepted in certain European countries (the Scandinavian Countries, the Netherlands, France, Italy) on the condition that the "first to file" principle would be accepted by US[61]. The mentioned European countries considered the grace period to be dangerous and practiced resistance[62]. Therefore, US expected certain concessions for abandoning the "first to invent" principle. A compromise between Europe and US could only be achieved by a balanced package deal[63]. This fragile balance of interests was, however, destroyed by the fact that US would not switch to "first to file" since US Congress did not agree[64]. In 1994, US declared that it would not switch from "first to invent" to "first to file"[65]. Maybe the Basic Proposal was too progressive at this time; anyway it ended in failure to the regret of the majority of the countries taking part in this conference[66]. Predominant national interests prevented the agreement on the harmonization of substantive patent law[67].

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56 Bardehle IIC 1998, 882.

57 Bardehle IIC 1998, 877.

58 WIPO Introduction to Intellectual Property 1997, page 613.

59 WIPO Introduction to Intellectual Property 1997, page 613.

60 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 179.

61 Bardehle IIC 1998, 877; Barber IIC 2013, 2.

62 Bardehle IIC 1998, 877.

63 Straus / Klunker IIC 2007, 910.

64 Straus / Klunker IIC 2007, 910; Barber IIC 2013, 2.

65 Campbell Global Patent Law Harmonization Ind. Int'l & Comp. L. Rev Vol. 13:2, page 611.

66 Bardehle IIC 1998, 878.

67 Straus / Klunker IIC 2007, 909.

2.6 US – PROTECTIONISM AND STICKING TO TRADITIONS

In US harmonization of IP laws was not focused – on the contrary, for centuries US adhered to traditions and practiced protectionism[68] by using numerous exceptions to the treaties and further by creating disadvantages for foreign applicants. Adherence to traditions resulted in patent laws very different to patent laws of other nations[69]. Those differences have been philosophical[70].

From time to time, the government of the US used patent treaties to gather benefits from foreign patent offices while not reciprocating those benefits to foreign inventors who want to file in the US[71]. The US further used numerous complex exceptions to treaties making US patent law either more difficult to understand or disadvantageous for foreign applicants[72]. For example Paris Convention prohibits discrimination in patent prosecution based on nationality but US patent law discriminated because certain rights depended on the place of invention[73]. A fundamental reform of the US patent system has been intended since many years but the political realization of those reforms was always blocked by lawyer lobby groups and unions[74].

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68 Barber IIC 2013, 2.

69 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7 page 203.

70 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7 page 173.

71 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7 page 177.

72 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7 page 177.

73 Seifert Will the United States Take the Plunge into Global Patent Law Harmonization? Marquette Intellectual Property Law Review 2002 Vol 6 Issue 1 Article 7 page 177.

74 Koppel Patente 2011, page 32.

3 CURRENT DEVELOPMENTS

In the last 20 years harmonization or unification activities increased significantly compared to the periods before.

3.1 PATENT LAW TREATY

After having failed with substantive harmonization of Basic Proposal, WIPO focused on "procedural harmonization" and adopted Patent Law Treaty (PLT)[75] in 2000 which entered into force in 2005. PLT aims to harmonize and streamline formal procedures with respect to national and regional patent applications and patents, making such procedures more user-friendly[76]. With the significant exception of filing date requirements PLT provides the maximum set of requirements the patent office of a Contracting Party may apply[77]. This means that a Contracting Party is free to provide for requirements that are more liberal from the viewpoint of applicants, but that the requirements under the PLT are mandatory regarding the maximum an office can require from applicants[78]. Filing procedure is easier for applicants because of the standardized Model International Forms that have to be accepted by the offices of all Contracting Parties and because of the facilitating of the implementation of electronic filing[79].

3.2 WIPO´S SPLT

After the conclusion of PLT several member states of WIPO expressed the wish to consider issues regarding harmonization of substantive re-

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75 Barber IIC 2013, 2.

76 http://www.wipo.int/treaties/en/ip/plt/, last checked January 5, 2017.

77 http://www.wipo.int/treaties/en/ip/plt/summary_plt.html, last checked January 5, 2017.

78 http://www.wipo.int/treaties/en/ip/plt/summary_plt.html, last checked March 18, 2017.

79 http://www.wipo.int/treaties/en/ip/plt/summary_plt.html, last checked March 18, 2017.

quirements of patent law again[80]. These member states identified the challenges of the costs of patent protection, limited resources, increasing workload and the quality of the patents[81]. This was the starting point of the draft Substantive Patent Law Treaty (SPLT)[82]. Despite the failing of the Basic Proposal, WIPO proposed a second SPLT containing regulations regarding for example "first to file" versus "first to invent" principle, definition of prior art, novelty, inventive step (non-obviousness), industrial applicability (usefulness), 18 month publication, the sufficiency of disclosure of the invention, the structure and interpretation of claims and a post-grant opposition system [83].

SPLT was discussed a lot and several requests for changes were addressed[84]. Agreement could be reached regarding several issues but also difficulties arose regarding certain subjects[85]. EPO, USPTO and JPO proposed to deal only with an initial package of priority items, such as definition of prior art, grace period, novelty and inventive step[86]. But they could not even come to an agreement whether to deal only with the priority issues at first or with all provisions of this draft[87]. Different views on patent law harmonization among the WIPO Member States, however, emerged as the SPLT negotiation moved forward, and the sensitivity of those issues was highlighted. Consequently, the negotiations were put on hold in 2006[88].

Reason for the lack of success was the inability to reconcile differing perspectives on the objectives of the patent system[89]. Another reason for the

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80 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 179.

81 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 183.

82 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 183.

83 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 181.

84 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 181.

85 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 181.

86 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 182.

87 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 182.

88 http://www.wipo.int/patent-law/en/patent_law_harmonization.htm, last checked January 5, 2017.

89 Kappos Patent Law Harmonization Landslide July / August 2011, page 17.

lack of success was the view that harmonization shall be a negotiated trade-off instead of an adaption of the world´s best practice[90]. Further the context in which the discussions were held also caused a delay or lack of agreement because discussions were held in times of prosperity and global economic optimism but the length and depth of recession changed this view[91].

3.3 IP 5

Since October 2008, the IP5 have been working together to harmonize the search and examination environment of each office and to standardize the information-sharing process[92]. IP5 is the name for a forum of the 5 largest intellectual property offices in the world aiming to improve the efficiency of the examination process for patents worldwide and to address the growing backlogs in applications worldwide[93]. The members of IP5 are: the European Patent Office (EPO), the Japan Patent Office (JPO), the Korean Intellectual Property Office (KIPO), the State Intellectual Property Office of the People's Republic of China (SIPO) and the United States Patent and Trademark Office (USPTO)[94]. These IP offices handle about 80 per cent of the world's patent applications and deal with 95 per cent of all work carried out under the Patent Cooperation Treaty (PCT)[95]. The heads of the IP5 offices meet annually. The vision of IP5 co-operation is a global co-operation defined as: *the elimination of unnecessary duplication of work among the offices, enhancement of patent examination efficiency and quality, and guaranty of the stability of patent right*[96]. The work of IP5 will improve the service for companies and inventors worldwide and

90 Kappos Patent Law Harmonization Landslide July/August 2011, page 18.

91 Kappos Patent Law Harmonization Landslide July/August 2011, page 18.

92 http://www.fiveipoffices.org/activities.html, last checked February 19, 2017.

93 http://www.fiveipoffices.org/about.html, last checked January 5, 2017.

94 http://www.fiveipoffices.org/about.html, last checked January 5, 2017.

95 http://www.fiveipoffices.org/about.html, last checked January 5, 2017.

96 http://www.fiveipoffices.org/about.html, last checked January 5, 2017.

facilitate access to the respective patent systems and to guaranty legal security[97]. IP5 involves the users of the patent systems, other IP offices, patent examiners and WIPO to further their co-operation. The IP5 Offices attempt to explore the harmonization of their practices and procedures.

3.4 EU PATENT PACKAGE: UNIFIED PATENT AND UNIFIED PATENT COURT

After several failed attempts to create a unified European patent system the patent package now bases on the 9th part of the European Patent Convention which regulates that a group of Member States is allowed to create a convention with the effect that for these states the European patents have a unified effect[98]. This construction is unique![99] The aim of the "EU Patent Package" is to provide one pan-European patent and one court for litigation of European patents[100]. The "EU Patent Package" contains two EU regulations and an international treaty between States to amend the European Patent Convention[101].

3.4.1 UNIFIED PATENT

The new European patent with unified effect ("Unified Patent") is linked to patents granted by the European Patent Office since the applicant can request unified effect across the 25 participating Member States[102]. Without further validation, the unified patent grants unified protection in every Member State that takes part. This makes a big difference to the

97 http://www.fiveipoffices.org/about.html, last checked January 5, 2017.

98 Luginbühl GRUR Int 2013, 307.

99 Luginbühl GRUR Int 2013, 307.

100 http://www.wipo.int/wipo_magazine/en/2014/03/article_0003.html, last checked July 6, 2016.

101 Eck GRUR Int 2014, 115.

102 Arntz EuZW 2015, 545; Luginbühl GRUR Int 2013, 307; http://www.wipo.int/export/sites/www/amc/en/docs/basel2015_gilbert2.pdf, last checked July 16, 2016.

European Patent which has to be validated in the respective Member State where it shall have effect[103].

In contrast to the European Patent, a unified patent does not have to be translated into the respective national language, but it is sufficient to submit it in one of the three official languages (English, French and German) and to translate it into the two other official languages[104]. This procedure means less costs and facilitates the access to patent protection[105]. It is not permitted to have a classic European Patent *and* a European Patent with unified effect[106]. The question whether it is permitted to have a European Patent with unified effect and also a national patent has to be answered on a national basis[107].

The unified patent regulates a unified claim for desistance but refers to national law regarding the scope of protection[108].

3.4.2 UNIFIED PATENT COURT

The Unified Patent Court (UPC) will be a highly specialized court with judges that have a large technical and legal competence regarding patents[109]. UPC will be part of the judicial system of all the Contracting Member States and will have exclusive competence regarding European patents and European patents with unitary effect[110]. The exclusive competence is however subject to exceptions during the transitional period. The UPC's rulings will have effect in the territory of those Contracting

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103 Arntz EuZW 2015, 545.

104 Arntz EuZW 2015, 545; Luginbühl GRUR Int 2013, 308.

105 Arntz EuZW 2015, 545.

106 Luginbühl GRUR Int 2013, 307.

107 Luginbühl GRUR Int 2013, 307.

108 Arntz EuZW 2015, 544 and 546.

109 https://www.unified-patent-court.org/faq/upc-and-its-judges, last checked August 14, 2016; Koppel Patente 2011, page 33.

110 https://www.epo.org/law-practice/unitary/unitary-patent.html, last checked July 6, 2016.

Member States having ratified the UPC Agreement at the proper time. UPC will not have any competence with regard to national patents.

The Unified Patent Court will have a Court of First Instance, a Court of Appeal and a Registry[111]. The Court of First Instance will have a central department as well as local and regional departments; the central department will be seated in Paris, with sections in London and Munich[112]. UPC will come into existence and start its operations immediately after the UPC Agreement enters into force. This unification and centralization of patent jurisdiction in Europe would strengthen the European market independently from the creation of a European property right[113].

3.5 TEGERNSEE EXPERT GROUP

The so-called "Tegernsee Expert Group" was created to work on harmonization of substantive patent law[114]. In July 2011, EPO President Benoît Battistelli invited Heads of Offices and experts from Denmark, France, Germany, Japan, UK, the US and the EPO for a meeting taking place at Tegernsee to consider the status quo concerning patent law harmonisation[115]. Object of the work was a detailed analysis of key issues concerning harmonization and to create a basis for policy discussions[116]. The Tegernsee Expert Group held several meetings in which the following key issues to the substantive patent law harmonization process have been defined: "first to file", grace period, prior user rights, scope of prior art,

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111 https://www.unified-patent-court.org/faq/upc-and-its-judges, last checked July 16, 2016.

112 https://www.unified-patent-court.org/faq/upc-and-its-judges, last checked July 16, 2016.

113 Koppel Patente 2011, page 34.

114 http://www.uspto.gov/patents-getting-started/international-protection/tegernsee-experts-group, last checked February 14, 2016.

115 https://www.epo.org/news-issues/issues/harmonisation_de.html, last checked January 3, 2017; https://www.uspto.gov/learning-and-resources/ip-policy/harmonization, last checked January 4, 2017.

116 Table of harmonization topics: http://documents.epo.org/projects/babylon/eponet.nsf/0/967678F7EA-9DAD85C1257C27004E1B41/$File/tegernsee_aggregate_matrix_document_en.pdf, last checked February 14, 2016.

definition of novelty and non-obviousness/inventive step, and 18 months publication[117]. The "Aggregate Matrix Document" was described consisting a comparison in matrix form of the legal provisions applicable in the jurisdictions involved to the key harmonization issues listed above[118]. Further it was decided to carry out fact-finding studies mainly of a technical nature on the issues of the grace period, 18 months publication, treatment of conflicting applications and prior user rights[119]. A comprehensive user consultation was conducted based on a questionnaire to be developed by the Tegernsee Expert Group as a basis for round tables or hearings in the involved jurisdictions[120]. In EPOs report on the Tegernsee Consultation of European Users EPO states that the sample of users who responded to the Tegernsee Joint Questionnaire was small and not representative but, of course, it showed an indication of trends[121]. To the knowledge of EPO it was the largest, most detailed survey on fundamental issues of substantive patent law harmonization ever[122]. Grace period turned out to be the most controversial issue. 72 % of users had faced pre-filing disclosures either in an academic publication or as an error of the inventor or an employee but only a very small majority of 51.8 % was in favor of a grace period in principle, whereas 46.4 were opposed to it[123]. Provided that grace period was harmonized multilaterally, a majority supported a 6 months grace period starting from priority or filing date[124].

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117 https://www.epo.org/news-issues/issues/harmonisation_de.html, last checked January 4, 2017.

118 https://www.epo.org/news-issues/issues/harmonisation_de.html, last checked January 3, 2017.

119 http://documents.epo.org/projects/babylon/eponet.nsf/0/22754FAD2C351F42C1257C27004E37DB/$File/tegernsee_II_meeting_statement_en.pdf, last checked January 4, 2017.

120 https://www.epo.org/news-issues/issues/harmonisation_de.html, last checked January 4, 2017.

121 See the executive summary page 2 http://documents.epo.org/projects/babylon/eponet.nsf/0/04276CC41AF2CF87C1257C05002F1D25/$File/tegernsee_consultation_report_en.pdf, last checked February 25, 2017.

122 See the executive summary page 2 http://documents.epo.org/projects/babylon/eponet.nsf/0/04276CC41AF2CF87C1257C05002F1D25/$File/tegernsee_consultation_report_en.pdf, last checked February 25, 2017.

123 See the executive summary page 2 http://documents.epo.org/projects/babylon/eponet.nsf/0/04276CC41AF2CF87C1257C05002F1D25/$File/tegernsee_consultation_report_en.pdf, last checked February 25, 2017.

124 See the executive summary page 3 http://documents.epo.org/projects/babylon/eponet.nsf/0/04276CC41AF2CF87C1257C05002F1D25/$File/tegernsee_consultation_report_en.pdf, last checked February 25, 2017.

As a result it turned out that a majority of European users supports the harmonization process and certain flexibility is available with regard to issues of the joint questionnaire[125]. In February 2015, the EPO hosted the "EPO Symposium on Harmonisation: Tegernsee and Beyond" in Munich and an international user´s association expressed regrets that the SPLT was not signed[126].

3.6 AMERICA INVENTS ACT

The situation of US patent law changed dramatically with the enactment of the America Invents Act (AIA) in 2012 and 2013. AIA went into effect on March 16, 2013 and is seen as an advance towards harmonization[127]: the "first to event" principle was abolished and the "first to file" principle introduced. Since most of the countries in the world follow the "first to file" principle, the United States of America was one of the last countries that still adhered to the "first to invent" system[128]. Following the "first to file" principle[129] means that the essential date for the question of novelty is the point of time of the application, whereas following the "first to invent" principle means that the essential date for novelty is the point of time of the invention. However, the strict "first to file" principle is undermined by several exceptions and certain features which lead to the creation of a kind of "hybrid system" now known as the "first inventor to file" system[130].

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125 See the executive summary page 5 http://documents.epo.org/projects/babylon/eponet.nsf/0/04276C-C41AF2CF87C1257C05002F1D25/$File/tegernsee_consultation_report_en.pdf, last checked February 25, 2017.

126 See page 5 of the report of discussions http://documents.epo.org/projects/babylon/eponet.nsf/0/7F-2D7024E0916B69C1257F1C004929AC/$File/Report_Tegernsee_Symposium_2015_en.pdf, last checked February 25, 2017.

127 Haaldodderi Krishnamurthy JIPITEC 5/2014, page 42, para 1.

128 Haaldodderi Krishnamurthy JIPITEC 5/2014, page 42, para 1; for impacts on inventors – individual or corporations see page 44 et seq.

129 Lunze 2007 page 26; Storz et alt. Biopatent Law 2014, page 42.

130 Haaldodderi Krishnamurthy JIPITEC 5/2014, page 42, para 1; Rehahn BLJ 2012, page 107.

The US Senate passed this act by an overwhelming vote of 95-5[131]. The Congress recognized that AIA will improve the United States´ patent system and promote harmonization[132]. AIA was the most extensive reform of US patent law in decades[133] - and it is the most significant change in patent law since 1836![134]

In addition to this, US also adopted several other key issues of the grand package, e.g. the abolishment of the "Hilmer Doctrine" (discriminating foreigners[135]) and the removing of the best mode as reason for invalidating a patent[136]. Under the *Hilmer* doctrine, applicants could use their foreign priority date to get behind prior art that surfaced between their foreign date and U.S. filing date[137]. However, their foreign filing date was not considered to be a prior art date that a patent examiner could use against others[138]. *Hilmer* has been eliminated by the AIA, so prior art will now include all kinds of foreign filing as of their foreign filing date, thus meaning that foreign patent applications and issued foreign patents will be stronger prior art against U.S. patents and pending applications[139]. In other

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131 Kappos Patent Law Harmonization Landslide July / August 2011, page 16.

132 See the presentation of the Director of the USTPO Kappos with which he aimed to highlight the significant changes made by America Invents Act and which set the stage for international subjective patent law harmonization, https://www.uspto.gov/learning-and-resources/ip-policy/harmonization, last checked February 24, 2017.

133 Barber IIC 2013, 2 writes: "... the scale of these reforms is the most extensive in more than 100 years...".

134 See the presentation of the Director of the USTPO Kappos with which he aimed to highlight the significant changes made by America Invents Act and which set the stage for international subjective patent law harmonization, https://www.uspto.gov/learning-and-resources/ip-policy/harmonization, last checked February 24, 2017.

135 Bardehle IIC 1998, 882.

136 Barber IIC 2013, 2.

137 http://www.ipwatchdog.com/2012/10/03/the-impact-of-the-america-invents-act-on-the-definition-of-prior-art/id=28453/, last checked January 8, 2017.

138 http://www.ipwatchdog.com/2012/10/03/the-impact-of-the-america-invents-act-on-the-definition-of-prior-art/id=28453/, last checked January 8, 2017.

139 http://www.ipwatchdog.com/2012/10/03/the-impact-of-the-america-invents-act-on-the-definition-of-prior-art/id=28453/, last checked January 8, 2017.

words, it will be much harder for a U.S. applicant to overcome earlier filed foreign patent applications[140].

4 ADVANTAGES, OBSTACLES AND CRITICISM

The following section shall discuss advantages and obstacles of harmonization and unification and point out criticism to it.

4.1 ADVANTAGES

Advantages of harmonization/unification are that international patent law would react to the challenges of globalization and the changes in society. A global, harmonized patent system will enable applicants to file the same content under the same procedures anywhere in the world and will reduce workload for applicants and patent offices and improve predictability of patentability[141]. Access to patent protection will be easier, especially for medium sized companies or companies of developing countries[142]. Territorial protection is not sufficient any more. Without any doubt, innovative companies move their goods and services in markets with strong and consistent intellectual property protection[143].

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140 http://www.ipwatchdog.com/2012/10/03/the-impact-of-the-america-invents-act-on-the-definition-of-prior-art/id=28453/, last checked January 8, 2017.

141 Page 1 of the main issues regarding patent harmonization presented on the website of the Japanese Patent Office https://www.jpo.go.jp/torikumi_e/kokusai_e/pdf/tegernsee/necessity.pdf, last checked January 5, 2017.

142 Straus/Klunker IIC 2007, 925.

143 Kappos Patent Law Harmonization Landslide July/August 2011, page 18.

Harmonization would lead to a reduction of patent costs by a possible exchange of results of the examining patent offices[144]. Moreover, the IP Offices would be able to work more efficiently; granting of IP rights would be more consistent and predictable. The quality of such IP rights would be higher and patent offices will have fewer backlogs. Therefore, the global patent system will be more efficient[145] and it will be easier to access intellectual property rights.

Harmonization/unification would ensure that the international protection system fulfills its function again by granting efficient international protection. Due to the lack of a grace period, innovators lose intellectual property rights in several key markets[146], especially in the US. A free market for intellectual property is only possible with harmonized substantive patent law principles.

4.2 OBSTACLES

A limitation of sovereignty is feared by states as a consequence of harmonization. Further, in developing countries, patent protection is often inadequate because of insufficient substantive laws or/and inadequate enforcement of patent laws[147]. In developing countries, Paris Convention may apply formally but this does not mean that its regulations are realized and enforced[148]. Weak intellectual patent protection results in very high costs for the development process[149].

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144 Bardehle IIC 1998, 879; Straus/Klunker IIC 2007, 919.

145 https://www.uspto.gov/about-us/news-updates/uspto-host-asia-pacific-patent-cooperation-forum, last checked January 8, 2017.

146 See the presentation of the Director of the USTPO Kappos with which he aimed to highlight the significant changes made by America Invents Act and which set the stage for international subjective patent law harmonization, https://www.uspto.gov/learning-and-resources/ip-policy/harmonization, last checked February 24, 2017.

147 Campbell Global Patent Law Harmonization Ind. Int´l & Comp. L. Rev Vol. 13:2, page 627.

148 Stoll Technologietransfer 1994, page 227.

149 Campbell Global Patent Law Harmonization Ind. Int´l & Comp. L. Rev Vol. 13:2, page 628.

Language may be the most practical and fundamental hurdle in discussing harmonization[150]. Since the conclusion of harmonization agreements often only were hindered by disagreements regarding language, countries with the same language could discuss harmonization with each other and groups or clusters could be built[151]. But since there exists the Google program "patent translate" that provides translations for patents in English in 13 further languages[152] the eternal lasting dispute regarding languages is probably not relevant any more.

Consensus between all the states involved is often hard work[153]. But it is not helpful if an agreement regarding international IP harmonization only defines minimum standards – it should better be best practice[154]. The majority of "EPOs Symposium on Harmonization: Tegernsee and Beyond" did not support the minimum standard approach because "true harmonization" (meaning unification) is needed, not only a commitment to minimum standards[155].

4.3 CRITICISM

Mr. Heath has reservations regarding the progress of harmonization and questions whether it is necessary as such[156]. According to his opinion the world´s major patent systems have been called in question[157]. *Mr. Heath* does not see "more patent law" as compelling consequence of

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150 Chun Patent Law Harmonization In The Age Of Globalization, Cornell Law School Paper 45, page 36.

151 Chun Patent Law Harmonization In The Age Of Globalization, Cornell Law School Paper 45, page 40.

152 Luginbühl GRUR Int 2013, 308.

153 Stoll Technologietransfer 1994, page 220.

154 See page 4 of the report of discussions http://documents.epo.org/projects/babylon/eponet.nsf/0/7F-2D7024E0916B69C1257F1C004929AC/$File/Report_Tegernsee_Symposium_2015_en.pdf, last checked February 25, 2017.

155 See page 5 of the report of discussions http://documents.epo.org/projects/babylon/eponet.nsf/0/7F-2D7024E0916B69C1257F1C004929AC/$File/Report_Tegernsee_Symposium_2015_en.pdf, last checked February 25, 2017.

156 Heath IIC 2008, 210.

157 Heath IIC 2008 210.

harmonization but rather a significant loss of freedom determining patent protection levels according to economic development[158].

5 SUMMARY AND CONCLUSION

From my point of view harmonization/unification is a meaningful and important topic both for users of the patent system and for the patent offices – so it is a worthy goal![159] Further, I think it is an auspicious solution for the problems international IP law faces and the chance to advance the international intellectual property law to the next level. I totally agree with *Mr. Kappos* saying: "we cannot longer afford to ignore new economic realities and the role the patent system plays in them"[160]. Patent law harmonization is crucial to economic efforts and we cannot afford to wait any longer to bring it about[161].

Mr. Baechtold and *Mrs. Miyamoto* agree with *Mr. Kappos* saying that it is not appropriate to argue whether international harmonization is good or bad in itself but to ask the question: what are the international challenges that need to be addressed collectively, what should be harmonized and how should it be done?[162] For more than a century Member States of WIPO found that in certain cases international harmonization through international instruments was the best way to solve particular problems of an international dimension[163].

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158 Heath IIC 2008, 211.

159 See page 26 of the report of discussions http://documents.epo.org/projects/babylon/eponet.nsf/0/7F2D7024E0916B69C1257F1C004929AC/$File/Report_Tegernsee_Symposium_2015_en.pdf, last checked February 25, 2017.

160 Kappos Patent Law Harmonization Landslide July / August 2011, page 18.

161 Kappos Patent Law Harmonization Landslide July / August 2011, page 18.

162 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 183.

163 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 183.

5.1 HARMONIZATION OR UNIFICATION

Often, it is discussed whether harmonization or unification should be the goal to achieve. I totally agree with *Mr. Blakely* saying "harmonization might be the stepping-stone towards the genesis of a unitary transnational IP system"[164]. From my point of view procedural and substantive harmonization is the precursor to unification[165]. For *Mr. Duffy* the crucial question is to what extent inter-jurisdictional diversity and competition should be sacrificed to achieve a global uniform patent law[166]. This question is also central because its answer determines the optimal amount of harmonization or unification that should be pursued in future[167]. Since I guess that the world is not yet prepared for one uniform IP system because interests of smaller countries and developing countries are not the same as the other countries´ and even in IP5 countries opinions regarding details are different. At the moment true unification is unlikely due to the varying political and legislative processes each nation would have to undertake to reach the targets of unification[168]. But we are quite close to it and it is not unlikely considering the step by step harmonization leading to unification. Let´s move forward boldly to adopt a unified international system[169]!

I think the IP5 nations and other like-minded nations should proceed to harmonize their IP laws and wait for the right moment when an agreement for unification can be reached. Of course, such harmonization as an intermediate step to unification should be open for other nations to join as soon as they have the same attitude. The crucial question that still has to be answered is: how could international patent protection be designed "developing country friendly"?[170] Since I do not know any answer yet,

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164 Blakely University of Pennsylvania Law Review Vol. 149, 2000, page 310.

165 Blakely University of Pennsylvania Law Review Vol. 149, 2000, page 347.

166 Duffy Harmony and Diversity Berkeley Technology Law Journal 2002 Vol 17 Issue 3 Article 3, page 688.

167 Duffy Harmony and Diversity Berkeley Technology Law Journal 2002 Vol 17 Issue 3 Article 3, page 688.

168 Blakely University of Pennsylvania Law Review Vol. 149, 2000, page 313.

169 Barber IIC 2013, 3.

170 Stoll Technologietransfer 1994, page 255.

maybe we should build clusters with countries sharing the same cultural and legal background and planning the respective progress towards harmonization for each cluster.

5.2 INTERNATIONAL AGREEMENT AND BEST PRACTICES

An international agreement on patent harmonization as an intermediate step to unification should be balanced and reflect an international common understanding that responds to several challenges and benefits of all member states[171]. This kind of harmonization aims to achieve the best policies and best practices to improve the global IP system for all stakeholders[172]. The aim should be to build the best IP system possible for all of its users[173]! WIPO initiated international patent harmonization with its Basic Proposal and laid the foundation of today´s model of a harmonized international patent law. Unfortunately, WIPO was ahead of its time. But the concept of the SPLT still prevails and should be revised to make it fit today´s requirements and in consequence be implemented. WIPO has to continue “fighting”!

5.3 INTRODUCING GRACE PERIODS IN EU

From an international perspective, grace periods are unworkable in practice if they are only recognized in some jurisdictions (e.g. in US and Japan) and not internationally since a disclosure by the applicant before filing will destroy novelty with regard to all countries that do not know a grace period[174]. US have now moved to a system similar to the interna-

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171 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 184.

172 Kappos Patent Law Harmonization Landslide July / August 2011, page 17.

173 Kappos Patent Law Harmonization Landslide July / August 2011, page 18.

174 Baechtold / Miyamoto Journal of IP Vol.10 May 2005, page 178.

tional harmonized system focused in WIPO´s Basic Proposal containing the "first to file" principle and a grace period. The same applies for Canada, South Korea and Japan[175]. Almost all of the world´s most important intellectual property countries acknowledge a grace period[176]. Even in Germany grace periods are already known for designs (section 6 Design Act) and utility models (section 3, para 1 sentence 3 Utility Model Act). The change from "first to invent" to "first to file" makes US ready to demand further processing from Europe and the rest of the world on other harmonization issues, e.g. an international grace period[177]. As *Barber* says: "Europe, the ball is in your court."[178] We are now at a historic crossroad regarding evolution of the global patent system[179]!

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175 Barber IIC 2013, 3.

176 Barber IIC 2013, 3.

177 Campbell Global Patent Law Harmonization Ind. Int´l & Comp. L. Rev Vol. 13:2, page 622.

178 Barber IIC 2013, 3.

179 Kappos Patent Law Harmonization Landslide July/August 2011, page 17.

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Beril Aral studied law at the University of Mainz and did her legal clerkship at the district court of Wiesbaden including stages at the Labor Court Wiesbaden and German University of Administrative Sciences in Speyer.

From 2006 to 2014 she acted as a lawyer - self-employed and employed- in Wiesbaden and Frankfurt, specialized in the field of employment law. After having worked as a Junior Compliance Officer in a consulting, she is currently employed in the public service working in the field of public procurement law.

PROF. DR. DR. H.C. WERNER G. FAIX

Born in 1951 in Gärtringen (Germany). Chair of Corporate Management & Leadership at Steinbeis University, SU , (since 1999). At SU[1] Dean of the Faculty Leadership & Management (since 2018). Founder and CEO of the School of International Business and Entrepreneurship GmbH, SIBE (starting 1993), the graduate school of the faculty leadership & management of the SU, with currently over 800 students in Experience Based Curricula Master Courses in Leadership and Law. CEO of SIBE Scientific Projects GmbH and of Saphir Holding GmbH, a company of the the Steinbeis Foundation. Editor-in-Chief of the scientific Springer Journal "Leadership, Education, Personality: An Interdisciplinary Journal" (since 2018).

Member of the European Academy of Sciences and Arts (since 2019) and Honorary Director of the International Maker Institute of the Chinese Academy of Sciences, SIAT, Shenzhen (2014). Study of Chemical Engineering at the University of Applied Sciences in Aalen (Dipl.-Ing. (FH) 1973). Study of Chemistry and Biochemistry at the University of Ulm (Dipl.-Chem, 1978) and Ph.D. (Dr. rer. nat. (1981)) in the field of high purity materials research / trace analysis in cooperation with the Max Planck Institute for metals research, Stuttgart and the Karlsruhe Nuclear Research Center. Research associate at the University of Ulm and radiation protection officer (1978–1982). From 1982 to 1995, at IBM Germany manager in various educational, personnel development, management development and consulting functions; ultimately director (procuration) of the IBM Education Company. Member of the municipal council of the city of Gärtringen (1982–1991). Lecturer at the University of Stuttgart (1988–1996), the Freie Universität Berlin (1990–1992) and Heidelberg University (1995–1996); from 1996 to 1999 Deputy Director of the MBA Center at the Danube University Krems (Austria). Honorary doctorate of the Universidade Vila Velha, Espirito Santo, BR, (2016). Vice-President for Education at Steinbeis University (2016–2018).

Extensive publications in the areas of trace analysis, semiconductor technology, technology management, business management, foreign trade, leadership education and entrepreneurship.

Memberships (via SIBE): Landesverband der Baden-Württembergischen Industrie, LVI, Wirtschaftsrat, Wissensfabrik, Lateinamerika-Verband der deutschen Wirtschaft, Deutsch-Chinesischer Wirtschaftsverband (Regional Chairman DCW-BW 2000–2006).

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[1] The Steinbeis University, SU is a scientific university with the right to award doctorates with currently 8,200 students.

DR. EVA FELDBAUM

Eva Feldbaum studied law at the University of Bayreuth with an additional qualification in economic science. During the legal clerkship in Regensburg she achieved a mediation certificate as further qualification.

From 2010 to 2013 Eva Feldbaum acted as a lawyer for a partnership of lawyers in Nuremberg. Since then, she is working for Steinbeis School of International Business and Entrepreneurship where she has become Director of the Steinbeis SIBE Law School in 2014 with the key areas International Law and Civil Law, negotiation and mediation. In the same year, Eva Feldbaum obtained her doctorate at the University of Regensburg with a thesis on the British Law and the European Convention of Human Rights.

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JENNY HÖRICKE, LL.M.

Since October 2017, Ms. Höricke is working as a Legal Counsel for a financial services institution in Dublin, Ireland. She is responsible, among other things, for the implementation of the company's financial products, such as lease or rent contracts, on an international level. She is also in charge of legal matters concerning products and sales activities.

After completing her legal clerkship, she began her career in 2014 in Germany as a Legal Counsel at the headquarters of her current company. In addition to her work as Legal Counsel, she has been Deputy Data Protection Officer since 2015 and was Deputy Compliance Officer Group from 2015 to 2017.

Ms. Höricke studied law at Saarland University in Saarbruecken and at Zhongnan University of Economics and Law in Wuhan, China. During her time at University, she specialised in ‘national and international contract and commercial law’. Alongside her work, she completed a Master of Laws (LL.M.) in the area of international business law in 2018.

ANGELA MIRIAM HUTTEMANN, LL.M.

Angela Huttemann is currently the CEO of the MNT Arnold GmbH and shareholder of MNT Group. She helps corporate and small business professionals maximize tax incentives and legal services. Before her time at MNT Arnold GmbH, Angela worked as a lawyer at the family owned tax and auditing company, R.P.Arnold Wirtschaftsprüfungsgesellschaft, as well as a foreign entity contract manager and legal consultant for medi Gmbh and Deloitte respectively. Angela now provides corporate contract law advisory and legal tax assistance through her company.

Angela's diverse background as an alumni of Johnannes-Gutenberg University in Mainz and legal trainee at the German Consulate in Rio de Janeiro, motivated her keen interest in international law and inspired her to obtain her Master's degree in International Business Law at Steinbeis University, Berlin.

Angela enjoys traveling (especially to places off the beaten path), sports, and a proper Rheingau glass of Riesling wine.

Angela and her company MNT Arnold Gmbh are available for legal and tax advisory as well as auditing consultations and can be reached at info@mnt.de .

ARCHIL JANIBEGASHVILI, LL.M.

Archil Janibegashvili is a program manager at Ministry of Justice, LEPL Center for Crime Prevention, his educational backround includes Bachelor of Laws from Tbilisi State University in Georgia, also he holds a degree in Master of Laws (LL.M.) from Steinbeis University in Germany and is a graduate of the Master of Laws from the Grigol Robakidze University.

PROF. DR. STEFANIE KISGEN

Prof. Dr. Stefanie Kisgen, Junior Professor for Leadership at the Steinbeis University Berlin. Managing Director of the School of International Business & Entrepreneurship GmbH (SIBE) of the Steinbeis University Berlin, which currently has circa 800 students in master's degree programs in the areas of Business & Law, as well as 4,500 graduates. Founder and Managing Director of SIBE's research institute, the SIBE Scientific Projects GmbH (SISP), which focuses on leadership, personality and innovation.

Diploma studies in Modern China Studies at the University of Cologne and Nanjing Normal University, China (Dipl.-reg.: 2004). Work-integrated MBA program at the SIBE of the Steinbeis University Berlin (MBA: 2007). Work-integrated doctoral studies at the Ludwig Maximilian University (LMU) Munich (Dr. phil.: 2017) with a dissertation entitled "The Future of Business Leadership Education in Tertiary Education for Graduates".

Her publications focus primarily on Chinese and international law, foreign trade, international management and leadership.

Her research focuses on leadership and business leadership education.

HANSPETER KÜMIN, LL.M.

Hanspeter Kümin, born in 1967, finished law school in 1994 at the University of Zurich, Switzerland. In 2000 he was admitted to the Bar and as notary in Switzerland (Canton of Schwyz). He worked between 1995 and 2000 in the legal department of a financial company and then of a major Swiss bank. From 2001 he worked as an associated attorney at law and since 2006 with his own law firm with focus on business law. In 2017 he achieved the Master of Business Law LL.M. at Steinbeis University Berlin.

JAN ALEXANDER LINXWEILER, LL.M.

Jan Alexander Linxweiler studied Political Science (Bachelor of Arts) at the University of Hanover from 2014 to 2015 and subsequently from 2015 to 2018 General Management and Business Administration (Master of Arts and MBA) at Steinbeis University Berlin and Post University. In addition, he studied law from 2016 to 2017 (Master of Laws) at the Steinbeis Hochschule Berlin.

Before 2018, Jan Alexander Linxweiler worked as a freelance consultant and editor in the areas of organizational development, data protection and IT law. From 2015 to 2017, Jan Alexander Linxweiler worked as a consultant for Cassini Consulting and was an advisor businesses as well as public institutions in regards to data protection, IT security and organizational development.

Currently, Jan Alexander Linxweiler is Senior Consultant at the PD – “Berater der öffentlichen Hand GmbH” since January 2018. He is responsible for projects regarding strategic modernization in the public sector. He focuses on strategy and risk management, organization development and modernization. Moreover, he is a trained business mediator (c-v-m) and data protection officer as well as data protection auditor (TÜV Rheinland).

ALINA MOISE-BALASA, LL.M.

Alina Moise-Balasa has been acting since 2011 as a Romanian Lawyer registered under the Bar of Bucharest, collaborating with several boutique law firms and providing consultancy in Commercial & M&A law, Contracts & IT law, Civil and litigation law, Labour law and International Human Resources Management as well as in EU law matters.

Starting 2017 she has embraced an in-house career, starting her journey as Senior Legal Advisor of the Romanian subsidiary of one of the biggest digital companies, Accenture, as a member of the Accenture's Global Ventures & Acquisitions, Ecosystems and Alliances Department. From this role she has been handling many French, German, US and UK acquisitions as a due diligence, procurement, general contracting and post-merger integration specialist. Her passion for working in multicultural teams, transnational law and international corporate politics have been fully valorised.

Although she has been practicing under the Romanian law, Alina has not given up on her passion for international business law. While obtaining her Romanian bachelor's degree under the University of Bucharest, Alina also became acquainted with the specifics of the French and European law and obtaining a Paris 1 Pantheon Sorbonne bachelor diploma specialization European studies. She has permanently mirrored her practical experience into business-oriented know-how, reason why she further obtained a diploma in International HR Management at Rome Business School and recently her Master's degree in International Business Law at Steinbeis University, Berlin.

Besides her permanent interest for being up to date professionally, Alina has never ignored the importance of maintaining a work-life balance. Because of that, as often as possible she enjoys photography, sports, travelling and spending quality time with family and friends.

JULIAN RÜBSAAMEN, LL.M.

Julian Rübsaamen studied law at the University of Konstanz with a focus on competition and intellectual property law. During his studies, he started working for a leading Swiss business consultancy with a focus on commercial and, in particular, antitrust law for overall more than five years, most recently as research assistant.

He completed his legal clerkship within the purview of the Higher Regional Court of Karlsruhe with, inter alia, stations at the Frankfurt office of a leading international law firm and a leading national boutique law firm, with a focus on corporate, M&A, and restructuring.

During his legal clerkship, he graduated with a master's degree in International Business Law from Steinbeis University (Berlin) where he, inter alia, evaluated the possibility of antitrust class actions within the European Union and wrote his master's thesis on the link between antitrust law and sports. A summary of his thesis is presented in this book.

Currently, he works for a leading national boutique law firm with a focus on corporate, M&A, and restructuring.

He has been involved in several publications in the field of commercial law. Most recently, he published an article on taking into account the acquisition of convertible bonds at the determination of fair considerations at public takeover bids (see WM 2017, 2007-2012).

DR. KATHRIN SETTER

Kathrin Setter studied law at the Eberhard Karls University in Tübingen. In 2012 she obtained her doctorate at the University of Tübingen with a doctoral dissertation on the right to grant pardon. After legal clerkship at the district court of Rottweil she started to work in the legal departments of different companies. From 2013 until 2015 Kathrin Setter worked in the legal department of the Mercedes-AMG GmbH. Afterwards she worked in the legal department of the Alfred Kärcher GmbH & Co. KG. Besides her work in the legal department of Alfred Kärcher GmbH & Co. KG Kathrin Setter participated in the new Master of Laws (LL.M.) online program “International Business Law” and completed her LL.M. program in 2017. Kathrin Setter´s master thesis of the LL.M. program deals with harmonization and unification of intellectual property law (in particular patent law) on German, European and US level and shows worldwide harmonization developments. The papers of her study project of the LL.M. program contain a legal comparison of German and US procedural and substantive patent law including both licensing and transfer of patents as well as employee inventions. Since October 2017 Kathrin Setter is working for Daimler and responsible for defending IP litigation cases, e.g. alleged patent, trademark or design infringements.

GIORGI USTIASHVILI, LL.M.

Giorgi Ustiashvili, born on 02.09.1980, is the Head of Legal Practice at the JSC 'Healthy Water' (Mineral Water Company in Tbilisi, Georgia) and he has been a member of the Bar Association of Georgia since 2006. Before starting his current job he was a senior lawyer at the company ‚Udabno' LLC in Georgia, he also provided legal consultations to Georgian and foreign legal entities. In 2018 he elected as an assistant of law faculty at the Sulkhan-Saba University (Tbilisi, Georgia).

Furthermore, Giorgi is also author of several legal articles; for example, the Case of the United Kingdom – ‚Attorney General V. Blake an Another', Journal of Legal Methods (ISSN 2449-2795), publication of the Prince David Institution of Law and Tbilisi State University, Law Faculty Directions of the Legal Methods, 2017, Tbilisi, Georgia; Economic Rights in Georgian Constitution: Economic Analyses of Law, 75 Anniversary of Prof. Avtandil Demetrashvili (ISBN 978-9941-27-741-2), publication of the Prince David Institution of Law, 2017, Tbilisi, Georgia; Legal Basis of Public-Private Partnership Law, 55 Anniversary of Prof. Lado Chanturia (ISBN 978-9941-26-429-0), publication of the Prince David Institution of Law, 2018, Tbilisi, Georgia. Giorgi his first law degree MA obtained in Tbilisi, Georgia, furthermore, his is a licensed lawyer, e.g. he passed in 2003 Bar examination in Civil Law, in 2004 Bar examination in Criminal Law, in 2005 Prosecutors' examination, in 2005 Judge examination in Civil and Administrative Law.

Giorgi also graduated from Steinbeis University, Berlin with a LL.M. qualification in International Business Law. He now is a PhD candidate at the law faculty of the University of Regensburg, Germany. Mr. Ustiashvili receives further qualification through his activity as a scientific researcher at the Prince David Institution of Law (Tbilisi, Georgia) in 2016 and as a visiting researcher at the Max Planck Institute for Comparative and International Private Law in 2018. With native Georgian, Giorgi is fluently in English and Russian and has basic knowledge in German.

JESSICA WENG, LL.M.

Jessica Weng is married and 31 years old. Moreover, she was born on 10 May 1987 in Munich, Germany. Currently, she lives in Neufahrn near Freising, a small city close to Munich.

After her legal studies at the Munich's university Ludwig-Maximilian-Universität, she passed triumphantly the first state exam in Munich in January 2010.

Mrs. Weng did her legal trainee ship at the Higher Regional Court of Munich and passed successfully the second state exam in Munich in November 2013.

Afterwards, she made a specialist lawyer training course in labour law as well as in commercial and corporate law for further three months.

In Mai 2014, Jessica Weng admitted as a lawyer and became a member of the Munich's Bar Association.

From May 2015 to August 2016 she successfully passed her Master Degree in International Business Law (LL.M.) at the Steinbeis Hochschule Berlin.

Currently, she works in the legal department of a big international marketing agency, namely Serviceplan Gruppe für innovative Kommunikation GmbH & Co. KG, whose headquarter is located in Munich. Her daily work is mainly in the business field of corporate and commercial law. In these areas her work consists of the foundation of companies especially companies with limited liability or limited partnerships, as well as the development and execution of restructuring measures of the whole Serviceplan group.