

Article

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Paradigms of Business Consulting Agreements

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Abstract: Business consulting represents one of the most important activities in the service economy, yet its contractual arrangements have rarely been analysed. Various scandals linked to professional consulting in recent times, such as the accounting scandal surrounding the German DAX-company, Wirecard, or the ‘Luanda Leaks’, give reason for a closer look at this activity, as well as the corresponding contractual agreements. Additionally, the regular functioning of consulting agreements is largely undiscussed. The aim of this contribution is (1) to highlight the essential problems of business consultancy contracts, namely the informational advantage of the consultant with regard to the quality of advice and price; structural conflicts of interest, especially in the case of business consultancy by auditors; the possibilities of abusing consultancy contracts for personal gain, as well as the liability of the consultant and the exemption of management from liability through the use of consultants; and (2) to propose solutions to these problems using the existing rules of due diligence and collateral duties, especially by applying general norms in the light of the economic function of management consultants as brokers for knowledge and know-how.

Résumé: Le conseil aux entreprises représente l’une des activités les plus importantes de l’économie des services, mais ses contrats n’ont guère été analysés. Divers scandales liés au conseil professionnel, tels que le scandale comptable entourant la société allemande Wirecard ou les ‘Luanda Leaks’, ont récemment donné lieu à un examen plus approfondi de cette activité et de ses accords contractuels. Cependant, le fonctionnement régulier des accords de conseil est également peu discuté. L’objectif de cette contribution est (1) de mettre en évidence les problèmes essentiels des contrats de conseil en gestion, à savoir l’avantage informationnel du consultant en ce qui concerne la qualité du conseil et le prix; les conflits d’intérêts structurels,

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notamment dans le cas du conseil en gestion par des auditeurs; les possibilités d'abuser des contrats de conseil à des fins personnelles ainsi que la responsabilité du consultant et l'exonération de responsabilité de la direction par le recours à des consultants; et (2) de proposer leur solution par le biais des règles existantes de diligence raisonnable et des obligations collatérales en appliquant des normes générales à la lumière de la fonction économique des consultants en gestion en tant que courtiers en information.

Zusammenfassung: Die Unternehmensberatung stellt eine der wichtigsten Tätigkeiten in der Dienstleistungswirtschaft dar, ihre Verträge sind jedoch kaum untersucht worden. Verschiedene Skandale im Zusammenhang mit der Unternehmensberatung in jüngster Zeit, wie zB der Bilanzskandal um das deutsche DAX-Unternehmen Wirecard oder die "Luanda Leaks", geben Anlass, diese Tätigkeit und ihre vertraglichen Vereinbarungen näher zu beleuchten. Aber auch die reguläre Funktionsweise von Beraterverträgen ist weitgehend undiskutiert. Ziel dieses Beitrags ist es, (1) auf die wesentlichen Probleme von Unternehmensberatungsverträgen hinzuweisen, nämlich den Informationsvorsprung des Beraters in Bezug auf Beratungsqualität und Preis; strukturelle Interessenkonflikte, insbesondere bei der Unternehmensberatung durch Wirtschaftsprüfer; die Möglichkeiten des Mißbrauchs von Beratungsverträgen zur persönlichen Bereicherung sowie die Haftung des Beraters und die Haftungsbefreiung des Managements durch den Einsatz von Beratern; und (2) deren Lösung durch die bestehenden Regeln der Sorgfalts- und Nebenpflichten unter Anwendung allgemeiner Normen im Lichte der wirtschaftlichen Funktion von Unternehmensberatern als Informationsvermittler vorzuschlagen.

Keywords: consulting, information intermediary, management liability, money laundering, auditing

1 Why Reflecting Business Consulting Agreements?

1.1 Status Quo and Guiding Ideas of Business Consulting

Business consulting is one of the most rapidly growing economic sectors in Europe;¹ there are more than 120,000 business consultants working in Germany alone. Yet, the

¹ The total turnover of companies specialising in strategy, process, IT and HR consulting has almost doubled in the last decade to around 36 billion euros, see Bundesverband Deutscher

jurisprudential² analysis of business consulting is rudimentary at best, in contrast to special types of financial consulting, or legal and tax consulting.³ This gap must be closed.

In the following, it will be shown that business consulting contracts, despite a great deal of actual heterogeneity, tend to centre around a single main contractual obligation: the consultant is expected to provide a methodologically and analytically sound recommendation for action for a specific business problem. For the legal evaluation of business consulting contracts it is central to consider the superior knowledge of business consultants vis-à-vis their client concerning their consulting performance. In this respect, business consultants are commissioned precisely as ‘suppliers of knowledge and know-how’. In view of this asymmetry in knowledge and know-how, consultants may well be obliged to deliver a tangible result. This seems even more plausible because, in contrast to other goods of trust such as legal, tax or even medical advice, quality assurance in business consulting is not based on public law: the customer’s need for protection justifies measuring the performance owed by business consultants against reasonable expectations as determined by an independent third party (Section 2).

Thus far, conflicts of interest in business consulting have been completely underestimated. It goes without saying that there is a general duty to disclose conflicts (Section 3.1). In addition, the information asymmetry between the parties

Unternehmensberater, *Honorare in der Unternehmensberatung 2019*, 6. In comparison: turnover in legal consulting in Germany was significantly lower in 2018, at around 29 billion euros. In an EU comparison, consulting expenditure in Germany is the highest in relation to GDP, cf J. O’Mahoney/A. Sturdy/A. Galazka, ‘Acquiring knowledge through management consultancy: A national culture perspective’ (2021) 27 *Journal of Management & Organization*, Table 1, available at https://research-information.bris.ac.uk/ws/portalfiles/portal/285753757/NATIONAL_CULTURE_AND_MCY_JMO_2021_accepted.pdf (last accessed on 6 February 2022); on the development of the management consulting industry, see also D. Lippold, *Die Unternehmensberatung* (Heidelberg: SpringerLink, 2018) 45 *et seq.*

2 The international public law discussion of the use of external advisors by the state is more advanced, on this the volume by C. Hurl/A. Vogelpohl, *Public Policy, Private Expertise* (London: Palgrave Macmillan, 2021); M. Ylönen/H. Kuusela, ‘Consultocracy and its discontents: A critical typology and a call for a research agenda’ (2019) 32 *Governance* 241–258; J. Martin, *Reorienting A Nation: Consultants and Australian Public Policy* (London: Routledge, 1998); C. McKenna, *The World’s Newest Profession* (Cambridge: Cambridge University Press, 2006) 80 *et seq.*; on the intensity of the use of external advice by the public sector cf A. Sturdy/I. Kirkpatrick/N. Reguera/A. Blanco-Oliver/G. Veronesi, ‘The management consultancy effect: Demand inflation and its consequences in the sourcing of external knowledge’, in (2020) *Public Administration* DOI: 10.1111/padm.12712.

3 See for instance K. Schmidt, *Handelsrecht* (Cologne: Carl Heymanns, 2014) § 36 II Rn 30; M. Martinek, *Moderne Vertragstypen*, vol 2 (Munich: CHBeck, 1992) 309 *et seq.*; more comprehensive, although also referring solely to literature from the 1990s: M. Martinek/S. Omlor, in J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch* (Cologne/Berlin/New York: Otto Schmidt and de Gruyter, new edition 2017) § 675, B76-B89; the case law to be found is similarly narrow, but cf in particular the references here under C.

involved must also be taken into account. Business consultants fulfil the economic function of information intermediaries. Knowledge insourcing by consultants is a functional and legal substitute for information exchange between competitors that would be scrutinized critically under antitrust law. What is more, mandating business consultants for the solution of a specific problem can involve lower costs than respective knowledge generation within the company. The economic interest in passing on good corporate expertise in the market must be considered, especially when applying and construing intellectual property rights (Section 3.2). In the case of business consulting by auditors, consulting engagements following complacency certificates must, to an extent, be regarded as null and void in order to comply with the European auditor regulation (Section 3.3). So far, the potential for abuse of consultancy agreements has been underestimated (Section 4). The role of corporate advisors as knowledge intermediaries must also be considered in liability issues, specifically regarding the question of whether or not management can invoke the business judgment rule after consulting advisors (Section 5.3).

1.2 Subject Matter and (Lack of) Regulation of Business Consulting

The profession of business consulting is often viewed with a certain feeling of unease,⁴ which is largely due to the lack of any state certification and, primarily, the elusiveness of the activity. A current market definition comprises the following: ‘Business consulting is a professional activity for the external and independent analysis and evaluation of problems of the client, the development of individual solutions as well as project-related support of the implementation, with the aim of creating values as well as promoting necessary changes at the client. It is based on a contractual basis between the client and the consulting company’.⁵ According to this, the scope of business consulting is conceivably broad. Consultants consider themselves as ‘knowledge workers’ who can bring in short term specialised know-how for solving business problems in organisations.⁶ Since particular emphasis is placed on the theoretical and analytical aspect of the

4 Lippold, n 1 above, 113; M. Heese, *Beratungspflichten* (Tübingen: Mohr Siebeck, 2015) 5 *et seq.*

5 Definition of management consultancy, <https://www.bdu.de/branche> (last accessed on 6 February 2022); cf also U. Quay, *Der Consulting-Vertrag im Internationalen Privatrecht* (Pieterlen/Bern: Peter Lang, 2000) 19 *et seq.*

6 A. De Lange/W. Smith/Y. Taminau, ‘Innovation in management consulting firms through informal knowledge sharing’ (2019) 13 *Journal of Knowledge Management* 42–55; G. Gable/T. Davenport, ‘The IT Consulting Process Through a Knowledge Management Lens’ (2004) *PACIS 2004 Proceedings* Paper 106; S. Grolik/D. Kalmring/D. Lehner/C. Frigerio, ‘Analysis of Interrelations Between Business Models and Knowledge Management Strategies in Consulting Firms’ (2003) *ECIS 2003 Proceedings* Paper 71.

performance, especially on the application of certain methods such as the ‘systemic approach’⁷ or the ‘McKinsey method’⁸, knowledge transfer by virtue of superior specialised knowledge or methodology needs to be added as core element of business consulting.

The range of activities of business consultants is quite heterogeneous, which is probably also the reason for the lack of professional regulation.⁹ Consultants do not have a uniform education; the profession is on the contrary interdisciplinary – in principle, anyone can be a consultant as formal market entry barriers do not exist.¹⁰ Business consultancies can be found in all shapes and sizes, from independent freelance consultants who also offer their services on digital consultancy platforms,¹¹ to regionally established medium-sized companies, to global players such as the strategy consultancies McKinsey and the Boston Consulting Group.

In terms of content, however, business consulting can be considered to exclude the areas of legal and tax consulting as well as auditing, which are subject to licensing by the respective chambers¹² under state supervision.¹³ Outside of these regulated

7 On this F. Simon, *Einführung in die systemische Organisationstheorie* (6th ed, Heidelberg: Carl Auer, 2018).

8 On the importance of methodological knowledge for the management consultancy in general M. Peterson, *Wissensmanagement in der strategischen Unternehmensberatung – Erfolgsfaktoren, Methoden und Konzepte* (Wiesbaden: Deutscher Universitätsverlag, 2001); cf also Lippold, n 1 above, 351–501 (ch 5).

9 Lippold, n 1 above, 112; speaking more globally of a ‘post-professional age’ H. Kritzer, ‘The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World’ (1999) 33 *Law & Society Review* 713.

10 Internationally, too, there is hardly any specific regulation of management consultancy, with the exception of Austria, cf on this C. Gross/A. Kieser, ‘Are consultants moving towards professionalization?’ (2006) 24 *Research in the Sociology of Organizations* 69–100.

11 Provider in Germany are, for example: COMATCH GmbH; Berater.de GmbH; provider operating across Europe are malt and fiverr.

12 In **Germany** admission to the bar has been transferred to the bar associations since 1998, cf R. Brüggemann, in D. Weyland, *Bundesrechtsanwaltsordnung* (Munich: Franz Vahlen, 2020) Vorb § 4 Rn 4; for the licensing of tax advisors, cf § 40 StBerG; § 15 WPO for auditors. In **France** lawyers have to pass state examination and to be admitted by a local bar, décret n°91–1197 du 27 novembre 1991 organisant la profession d’avocat, art 68, 154; tax advisors (conseiller fiscal) are not regulated, auditors (experts-comptables) have to be part of a chamber (‘ordre’), Ordonnance n°45–2138 du 19 septembre 1945 portant institution de l’ordre des experts-comptables et réglementant le titre et la profession d’expert-comptable, art 3. In the **UK** solicitors are admitted by the Solicitors Regulation Authority (SRA), Legal Services Act 2007, barristers are authorised by the Bar Standards Board (established by the Bar Council in accordance with the Legal Services Act 2007 independently to exercise and oversee the regulatory functions of the Bar Council); tax advisors are not regulated, auditors falls under the Companies Act 2006, sec 498.

13 In **Germany**: For lawyers cf §§ 113 *et seq* BRAO; for tax consultants cf §§ 89 *et seq* StBerG; for auditors cf §§ 61a *et seq* WPO; in **France**: for lawyers: Décret n°91–1197 du 27 novembre 1991

areas, consulting is provided on practically any business management problem,¹⁴ including for engineering and technical issues ('consulting engineering').¹⁵ One focus of consulting services is in the IT area, since the introduction and maintenance of software often represents a strategic challenge for companies.¹⁶ Restructuring is also a traditional field for consulting.¹⁷ At present, the issues of digitalisation and sustainability in particular are booming. Consulting on the organisational implementation of Corporate Social Responsibility (CSR) standards is also in great demand.¹⁸ In Germany, much attention is being paid to the current implementation of a supply chain law (*Lieferkettensorfgfaltspflichtengesetz*),¹⁹ which is inspired by the French Loi de vigilance of 2017. In the UK, the Modern Slavery Act of 2015 necessitates horizontal implementation in companies. This shows that regulatory requirements are a major driver of business consulting activities.

Thus, the development of business consulting is indeed essentially shaped by competition regulation, albeit in an indirect way.²⁰ For example, the rise of business consulting in the US started with banking regulation. The Glass-Steagall Act of 1933, best known for effectively separating investment and commercial banking,²¹ prohibited banks from advising their clients on business issues as well, which had previously been common mainly in the area of restructuring and under the concept

organisant la profession d'avocat, art 183, 184 (+ art 1.4 Règlement Intérieur National de la profession d'avocat (RIN)); for auditors: Ordonnance n°45–2138 du 19 septembre 1945 portant institution de l'ordre des experts-comptables et réglementant le titre et la profession d'expert-comptable, art 20. In the UK: for lawyers Legal Services Act 2007, sec 14.

14 See also Martinek/Omlor, n 3 above, § 675, B77. In addition to providing advice to the organisation as a whole or its departments, the focus is increasingly on individual coaching as management advice – here, of course, only advice with a direct connection to the company is to be considered.

15 On this differentiation Quay, n 5 above, 19 *et seq*; R. Steding, 'Moderne Vertragstypen in der Wirtschaft' (2000) 50 *Betrieb und Wirtschaft* 845, 847 *et seq*; S. Exner, *Der Unternehmensberatungsvertrag* (Cologne: O. Schmidt, 1992) 1 *et seq*; W. Reineke/J. Hennecke, *Die Unternehmensberatung* (Heidelberg: Sauer, 1992) 11; A. Schlüter, *Management- und Consulting-Verträge* (Berlin/New York: de Gruyter, 1987) 107; Martinek, n 3 above, 309 *et seq*; Martinek/Omlor, n 3 above, § 675, B76 *et seq*; in more detail R. Schaub, *Der Engineeringvertrag* (Zurich: Schulthess, 1979) 1 *et seq*.

16 Cf Lippold, n 1 above, 47 *et seq*; H. Redeker, *IT-Recht* (Munich: CHBeck, 2020) n 520 *et seq*.

17 Cf also BGH 13 July 1992 – II ZR 251/91, OLG Celle 23 October 2003 – 16 U 199/02.

18 Following from Directive 2014/95/EU of the European Parliament and of the Council with regard to the disclosure of non-financial and diversity information by certain large companies and groups.

19 Critical G. Wagner, 'Haftung für Menschenrechtsverletzungen in der Lieferkette' (2021) 38 *Zeitschrift für Wirtschaftsrecht (ZIP)* 1095, 1105 – 'Job creation measures'.

20 McKenna, n 2 above, 19.

21 In more detail S. Grundmann, in H. Staub, *Bankvertragsrecht* (Berlin/New York: de Gruyter, 2020) part 1, section 1 para 24.

of ‘universal banking’.²² At the same time, the Securities Act of 1933 stipulated that any type of financing needed to be preceded by due diligence, which was generally understood as an obligation to use business consultants.²³ In addition, the separation of the professional practice of lawyers, auditors, and engineers from business consulting was ordered,²⁴ and later also the separation of IT production and IT consulting.²⁵ This paved the way for the growth of business consultancies. Most of these measures were reversed in the 1990s, but since then only IBM in IT consulting has regained its profile as a business consultancy to a considerable extent, but neither banks nor insurers.

1.3 Business Consulting and Business Organisation

The last decades have seen a sweeping tertialisation of national economies.²⁶ Outsourcing, which follows the basic premise of ‘make or buy’, has been central to this trend.²⁷ It affects all areas of a company, and recently even activities of companies’ core businesses have been outsourced.²⁸ In contrast to the traditional concept of large companies with their economies of scale, smaller and more agile units now seem to have advantages (especially startups), despite being dependent on the insourcing of core competencies.²⁹ Not only are production and administrative departments of companies affected, but also management, which is particularly knowledge-intensive. Internal staff positions for management are replaced or supplemented by external service providers in order to save on fixed costs and to be able to react faster to a volatile market environment. The use of external personnel also

22 T. Veblen, *The Engineers and the Price System* (New York: A.M. Kelley, 1965) 65; A. Andersen, *Behind the Figures: Addresses and Articles by Arthur Andersen, 1913–1941* (St Charles: Arthur Andersen and Company, 1970) 23 *et seq.*

23 G. Armstrong, *An Engineer in Wall Street* (New York: self-published, 1962) 68 *et seq.*; T. McCraw, *Prophets of Regulation* (Cambridge (MA): Belknap, 1984) 170 *et seq.*; J. Blum, ‘The Federal Securities Act 1933–1936’ (1938) 46 *The Journal of Political Economy* 52–96.

24 Association of Consulting Management Engineers, Inc (ACME), *Numerical Data on the Present Dimensions, Growth, and other Trends in Management Consulting in the United States*, 1964, Table 2.

25 T. Watson/P. Petre, *Father, Son & Co.: My Life at IBM and Beyond* (London: Bentam, 1990) 268–270.

26 On the three-sector hypothesis cf W. Ebke, in K. Schmidt/W. Ebke (eds), *Münchener Kommentar zum Handelsgesetzbuch*, part 4 (see n 94: there vol 4) (4th ed, Munich: CHBeck, 2020) § 324, Rn 18; the share of the service sector in the value added of the German economy is approx 68 %, Statistisches Jahrbuch 2019, 336.

27 On this W. Powell, ‘Neither Market nor Hierarchy; Network Forms of Organization’ (1990) 12 *Research in Organizational Behavior* 295, 297.

28 V. Rieble, ‘Industrienähe Dienstleistungen zwischen freiem Werkvertrag und regulierter Arbeitnehmerüberlassung’ (2013) 44 *Zeitschrift für Arbeitsrecht* 137, 138.

29 On this S. Kühl, *Organisationen* (2nd ed, Wiesbaden: Springer VS, 2020) 40–43.

makes it possible to circumvent collective bargaining agreements, although it is a recognised organizational instrument.³⁰ This trend of comprehensive and consistent out-sourcing of innovation work ('in-house outsourcing') is seen particularly in the automotive sector,³¹ which has established a ratio of 80 % permanent employees to 20 % external consultants.³² This is where business consulting as intellectual subcontracting matters. The use of consultants leads to a hybrid situation between market and company – and ideally represents an efficient transaction form, since the costs for permanent insourcing are higher than those for merely selective insourcing.³³ Business consultants reduce information and innovation costs,³⁴ a finding that cannot be ignored for the legal evaluation below. This also raises the question of 'emptying the company', which will be examined in more detail here in connection with the liability of the management bodies when business consultants are used (E III 3 below).³⁵

1.4 No Legal Issues in Business Consulting?

The relative silence of the business law discourse surrounding business consulting leads to the question: Are there simply no legal problems in this legal relationship, to the extent that this is even a prime case of functioning 'law of the economy'³⁶ in which market forces have spontaneously arranged themselves into a 'Pareto-optimal

30 O. Deinert, 'Kernbelegschaften – Randbelegschaften – Fremdbelegschaften – Herausforderungen für das Arbeitsrecht durch Reduzierung von Stammbesellschaften' (2014) 67 *Recht der Arbeit* 65, 73; S. Greiner, 'Werkvertrag und Arbeitnehmerüberlassung – Abgrenzungsfragen und aktuelle Rechtspolitik' (2013) 30 *Neue Zeitschrift für Arbeitsrecht* 697, 698; Rieble, n 28 above, 141.

31 T. Klebe, (2013) *Neue Zeitschrift für Arbeitsrecht*, Editorial; Deinert, n 30 above, 65, 72, with further references.

32 This figure is based on interviews with the consultancies acitoflux and P3 in November 2021, Stuttgart.

33 According to O. Williamson ex-ante information, negotiation and contract costs as well as ex-post costs of enforcing and controlling the contract must be taken into account, O. Williamson, *The economic institutions of capitalism* (New York: Free Press, 1985); A. Alchian/H. Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 *The American Economic Review* 777, 793 *et seq.*

34 Williamson, *ibid.*

35 On the public law problem of 'consultocracy', see the volume by Hurl/Vogelpohl, n 2 above; Ylönen/Kuusela, n 2 above; Martin, n 2 above; McKenna, n 2 above, 80 *et seq.*; on the intensity of the use of external advice by the public sector cf Sturdy/Kirkpatrick/Reguera/Blanco-Oliver/Veronesi, n 2 above.

36 Early on H. Rühl, *Rechtsschöpfung durch die Wirtschaft* (Mannheim: Bensheimer, 1931) and H. Großmann-Doerth, *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht* (Tübingen: Mohr Siebeck, 1933); cf also H. Merkt, 'Funktionsbedingungen der Selbstregulierung im Unternehmensrecht', in C. Bumke/A. Röthel, *Autonomie im Recht* (Tübingen: Mohr Siebeck, 2017) 167, 169.

state’?³⁷ While several factors seem to suggest this, upon closer examination, they cannot eliminate the jurisprudential relevance of business consulting.

A special propensity for trust between the parties of management consulting contracts could prevent opportunistic behaviour and breach of law. Reputation mechanisms have long been recognised as an extra-legal ordering factor that also have an effect in the market for business consulting.³⁸ Especially in markets for credence goods, reputation is a central institution;³⁹ it is a sign of competence and can discipline consultants by preventing them from exploiting their information advantages. Admittedly, the market for business consulting is too heterogeneous to recognise a uniform effect of trust systems across the board. After all, large business consultancies could perceive themselves as too big to fail, while small and mobile consultants throughout Europe offer their services almost anonymously. In addition, there is little focus on a single client, which usually creates dependencies and contributes to discipline in traditional subcontracting relationships.⁴⁰

The self-regulation of the business consulting industry does not rule out legal problems. Even the *BDU*,⁴¹ the largest umbrella organisation in the industry in Germany, is far from uniting all business consultants and is not representative of all

37 On the pareto concept H.-B. Schäfer/C. Ott, *Ökonomische Analyse des Zivilrechts* (6th ed, Wiesbaden: Springer Gabler, 2020) 13 *et seq.*

38 For an empirical analysis, see K. Kaas/C. Schade, ‘Unternehmensberater im Wettbewerb: Eine empirische Untersuchung aus der Perspektive der Neuen Institutionenlehre’ (1995) 65 *Zeitschrift für Betriebswirtschaft* 1067, 1072; groundbreaking F. Hayek, *Individualism and Economic Order* (Chicago: Chicago University Press, 1948) 97; building on this B. Klein/K. Leffler, ‘The Role of Market Forces in Assuring Contractual Performance’ (1981) 89 *Political Economics* 615; D. Kreps/R. Wilson, ‘Sequential Equilibria’ (1982) 50 *Econometrica* 863; P. Milgrom/J. Roberts, ‘Predation, Reputation, and Entry Deterrence’ (1982) 27 *Journal of Economic Theory* 280; C. Shapiro, ‘Consumer information, product quality, and seller reputation’ (1982) 13 *The Bell Journal of Economics* 20; C. Shapiro, ‘Premiums for High Quality Products as Returns to Reputations’ (1983) 98, *The Quarterly Journal of Economics* 659; on reputation as a regulatory mechanism in corporate and capital markets law, L. Klöhn/K. Schmolke, ‘Unternehmensreputation (Corporate Reputation) – Ökonomische Erkenntnisse und ihre Bedeutung im Gesellschafts- und Kapitalmarktrecht’ (2015) 18 *Neue Zeitschrift für Gesellschaftsrecht* 689, 691 *et seq.*

39 See on this C I 1.

40 Dazu L. Bernstein, ‘Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts’ (2015) 7 *Journal of Legal Analysis* 561, 599; with the negative example of the conflicts over the supplier F. Bremenkamp, *Rechtliche Governance von Zulieferverträgen* (Tübingen: Mohr Siebeck, 2021) 20 *et seq.*

41 UK: Management Consultancies Association (MCA), F: Syntec Conseil, EU: European Federation of Management Consultancies Associations (FEACO); Overview over all European umbrella organisations https://de.wikipedia.org/wiki/Feaco_subsec_‘Mitglieder’.

industry participants.⁴² Therefore, the BDU's quite concise consulting standards, which can be enforced by an association court up to the point of exclusion from the association,⁴³ do not have a broad effect in the market. It is neither evident that membership in an industry association is as value-enhancing as a protected designation of origin,⁴⁴ nor does the ISO standard for business consulting pose as an effective market reference.⁴⁵ Rather, the larger consultancies establish their own codes of ethics in the spirit of good corporate citizenship – which, of course, are only ever tightened after ‘scandals’, as McKinsey's involvement in the opioid crisis in the US shows.⁴⁶

Furthermore, indirect regulation of business consulting by public procurement law⁴⁷ is generally not evident, even though large companies use the classifications of business consulting services that follow from the public sector and the EU procurement regulations when awarding contracts, thus bringing about a standardisation of bids.⁴⁸ Admittedly, this has just as little effect in absolute breadth as industry standards, and does not ensure compliance by itself.

However, the widespread use of arbitration clauses,⁴⁹ which typically assign ‘all disputes of any kind between the parties arising from this contract or in connection with its performance to the exclusion of the state courts’ to arbitration, is likely to be

42 This can also be observed internationally, cf for example D. Collins/N. Butler, ‘Success and Failure in Professional Projects: The Nature, Contours and Limits of Consulting Professionalism’ (2019) 31 *British Journal of Management* 457–469.

43 Available under <https://www.bdu.de/der-bdu/unser-anspruch/> (last accessed on 6 February 2022); on the limited effect of industry standards cf also M. Kipping/D. Saint-Martin, ‘Between Regulation, Promotion and Consumption: Government and Management Consultancy in Britain’ (2005) 47 *Business History* 447–465.

44 Cf in general J. Lüttringhaus, ‘Kaufrechtliche Gewährleistungsansprüche bei “ethischen” Produkten und öffentlichen Aussagen zur Corporate Social Responsibility’ (2019) 219 *Archiv für die civilistische Praxis* 29 et seq.

45 ISO 20700 Guidelines for Management Consultancy Services; on the effect of the standards of private standards organisations cf H. Fleischer, ‘Aktienrechtliche Compliance-Pflichten im Praxistest: Das Siemens/Neubürger-Urteil des LG München I’ (2014) 17 *Neue Zeitschrift für Gesellschaftsrecht* 321, 326; in depth T. Schülke, ‘IDW-Standards und Unternehmensrecht’ (2014) 79 *Abhandlungen zum Deutschen und Europäischen Gesellschafts- und Kapitalmarktrecht* 283 et seq et passim.

46 Cf J. O'Mahoney, ‘Advisory Anxieties: Ethical Individualisation in the UK Consulting Industry’ (2011) 104 *Journal of Business Ethics* 1, 101–113; on the opioid crisis cf below Section 5.2.

47 Further on the links between state aid and public procurement law A. Guarrata/C. Wagner, ‘Das Verhältnis von Vergabe- und Beihilferecht’ (2018) 19 *Neue Zeitschrift für Bau- und Vergaberecht* 443; comprehensive on the primary law dimension of public procurement law M. Dausen/M. Ludwigs/I. Seidel/M. Probst, *Handbuch des EU-Wirtschaftsrechts* (57th ed, Munich: CHBeck, 2021) H IV, n 19–49.

48 J. O'Mahoney/S. Heusinkveld/C. Wright, ‘Commodifying the commodifiers: The impact of procurement on management knowledge’ (2013) 50 *Journal of Management Studies* 204–235.

49 Particularly (to be) found in the BDU's model contract (of the Federal Association of German Management Consultants).

significant.⁵⁰ Arbitration tribunals do not decide in public, which makes it more difficult to become aware of typical problems and to improve the legal framework.⁵¹ This lack of publicity of proceedings, however, in no way implies a lack of conflict in business consulting. In view of the complexity of their activities, as emphasised by business consultants, and the astronomical consulting fees,⁵² the lack of corporate law involvement in business consulting must be surprising. A closer look at business consulting contracts reveals fundamental problems, concerning in particular asymmetries of information (B), conflicts of interest (C), abuse by the parties (D), and liability issues (E) which will all be addressed in turn.

2 Asymmetries of Information

The information asymmetries characterising the business consulting relationship can be counterbalanced by the general law of obligations, as well as by a consistent application of the values of the Services Directive.⁵³

2.1 Information Deficits of the Client

Business consulting is a credence good *par excellence*,⁵⁴ because there are information problems regarding the service itself and its value. Business consulting

50 On the situation of interests BGH 20 March 1980 – III ZR 151/79; as well as OLG München 7 July 2014 – 34 SchH 18/13, *SchiedsVZ* 2014, 262, 264. Cf for example the model of J. Risse, ‘Schiedsvereinbarung’, in M. Hoffmann-Becking/A. Gebele, *Beck’sches Formularbuch Bürgerliches, Handels- und Wirtschaftsrecht* (Munich: CHBeck, 2019) XII, 1; on the legitimacy of arbitration agreements G. Wagner, *Prozeßverträge: Privatautonomie im Verfahrensrecht* (Tübingen: Mohr Siebeck, 1998) 48 *et seq.*

51 Cf on this C. Duve/M. Keller, ‘Privatisierung der Justiz – bleibt die Rechtsfortbildung auf der Strecke? – Ein Beitrag zur Auflösung des Spannungsverhältnisses von Privatautonomie und Rechtsfortbildung in der Schiedsgerichtsbarkeit’ (2005) 3 *Zeitschrift für Schiedsverfahren* 169, 178; there is, of course, no automatic protection of confidentiality, cf J. Risse/M. Oehm, ‘Vertraulichkeit und Nicht-Öffentlichkeit in Schiedsverfahren – Rechtsvergleichende und verfassungsrechtliche Überlegungen’ (2015) 114 *Zeitschrift für Vergleichende Rechtswissenschaft* 407, 412 *et seq.*

52 433 million euros for external consultants, <https://www.faz.net/aktuell/zunahme-um-46-prozent-regierungsausgaben-fuer-externe-berater-2020-stark-gestiegen-17240528.html> (last accessed 6 February 2022); Public sector problem: Federal government spent more than one billion euros on consultancy, <https://www.sueddeutsche.de/politik/transparenz-grosse-koalition-beratungskosten-1.5418692> (last accessed 6 February 2022).

53 Directive 2006/123/EC.

54 Fundamental for the concept M. Darby/E. Karni, ‘Free Competition and the Optimal Amount of Fraud’ (1973) 17 *Journal of Law and Economics* 67–88; cf also K. Kaas, ‘Kontraktgütermarketing als

contracts pose classic agency problems,⁵⁵ which have so far only been partially overcome in legal practice: the client in principle has poorer knowledge, especially with regard to the qualification of the consultant, which is neither ensured by a professional licensing regime nor by supervision by a trade association. The lack of abstract quality assurance is aggravated during the actual performance of the service: during the execution of the contract, the customer cannot evaluate the value and quality of the services.⁵⁶ This applies in principle unless an individual case is based on a consultant's special reputation, or the customer has already prior experience with the contracted consultant. Thus, institutions of contract governance⁵⁷ become necessary which can contain the dangers for the customer as principal resulting from the information deficit.

2.2 Remuneration

'Good advice is expensive' – but *when* is advice *too* expensive?⁵⁸ It is particularly difficult to determine the value of consulting services, as they are intangible goods. Recently, 'rip-offs' with high consulting fees have become widespread in Germany, especially in crisis industries and regions, and particularly in the eastern German states.⁵⁹ Similar patterns can be observed across Europe.

Expert opinions and comparisons with average fees for similar services in the respective industry can help to close the information gap regarding adequate consulting remuneration. Special characteristics of the business consultant (such as outstanding qualifications, representative business premises, or a research

Kooperation zwischen Prinzipalen und Agenten' (1992) 44 *Zeitschrift für betriebswirtschaftliche Forschung* 884–901; C. Schade/E. Schott, 'Kontraktgüter im Marketing, Marketing' (1993) 15 *Zeitschrift für Forschung und Praxis* 15–25; specific to management consultancy C. Schade, *Marketing für Unternehmensberatung. Ein institutionenökonomischer Ansatz* (2nd ed, Wiesbaden: Deutscher Universitätsverlag, 2000) 26; Lippold, n 1 above, 38 *et seq.*

55 On the application of the principal-agent theory to management consultancy contracts cf Lippold, n 1 above, 38 *et seq.*

56 Cf for example R. Stock-Homburg, *Personalmanagement* (Wiesbaden: Springer Gabler, 2013) 479.

57 See the volume S. Grundmann/F. Möslin/K. Riesenhuber (eds), *Contract Governance* (Oxford: Oxford University Press, 2015).

58 On problems regarding the control of consultancy services D. Voigt, 'Schlechterfüllung bei Unternehmensberatung – über die (Un)möglichkeit richterlicher Qualitätskontrolle' (2004) 42 *Deutsches Steuerrecht* 2216.

59 Cf for example, critically exaggerated, N. Glass, *Die große Abzocke* (Frankfurt am Main: Campus, 2006) 19 *et seq.*; more neutral Voigt, n 58 above, 2214; J. Staute, *Der Consulting Report* (Munich: Heyne, 1996) 190; C. Niedereichholz, *Unternehmensberatung Band 1: Beratungsmarketing und Auftragsakquisition* (5th ed, Munich: Oldenbourg, 2010) 14.

department) can then shift this average value of the consultancy service upwards in favour of the consultant.

However, the problem of comparability for specific individual customer needs and projects remains. The burden of substantiation for ‘what is customary’ lies with the business consultant, in accordance with the idea provided for in of Article 22 Para 3 a) of the Services Directive, which stipulates an obligation for the service provider to provide evidence of the basis of their price calculation upon request by the client.⁶⁰ There is a direct bridge leading from the duty to provide evidence on the basis of the price calculation straight to specifying the customary nature of the price, as the purpose of this provision is precisely to enable the customer to match the provider’s superior knowledge. In addition, an implicit duty of the business consultant to provide information on the usual level of remuneration with reference to comparative industry values seems compelling. In bigger projects, a precise duty to document billable periods and personnel expenses can also plausibly be identified as an implicit duty.⁶¹ It is advisable in any case to include so-called ‘fee caps’ in the consulting contract, the substantial exceeding of which (by approx 10 %) requires the client’s consent to continue the consulting activity.⁶²

2.3 Quality of Service

‘Good advice is expensive’ – but *what is good* advice? The question of the quality of the service is relevant for the rights and defences of the customer. Quality deficits can affect both the service provision itself and the person providing the service.

The quality of consulting services would be very difficult to measure because of its great heterogeneity, if one were to believe the industry’s self-assessment.⁶³ However, it should be noted that in larger companies the purchasing of services is quite professionalised, and tenders are held which require consultants to provide

⁶⁰ Cf on this T. Held/M. Sonntag/B. Burger, in W. Gloy/M. Loschelder/R. Danckwerts, *Handbuch des Wettbewerbsrechts* (5th ed, Munich: CHBeck, 2019) § 75 Preisangabenverordnung, n 24.

⁶¹ General legal principle, manifested in § 630f BGB; the protective purpose of which also extends to the ex ante control of settlements, cf T. Gutmann, in J. von Staudinger/T. Gutmann, *Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – Buch 2: Recht der Schuldverhältnisse: §§ 630a-630h* (Cologne/Berlin/New York: Otto Schmidt and de Gruyter, New Edition 2021) § 630f, n 90. Especially in connection with consultancy services, however, still opposed OLG Köln 1 December 2000 – 19 U 21/00, *Neue Juristische Wochenschrift-RechtsprechungsReport* 2001, 843, 844.

⁶² See on this C. Moes, *Vertragsgestaltung* (Munich: CHBeck, 2020) § 11.

⁶³ Eg Voigt, n 58 above, 2214; Lippold, n 1 above, 115 *et seq.*

factual information under standardised tender categories.⁶⁴ Such procedures are clearly based on tendering procedures under public procurement law.

Where the establishment of standardised purchasing is not possible, legal guidelines are required, as are found in European legal systems. The EU Services Directive requires the service provider in Article 22 Para 3 lit b) and d) to inform the recipient of the services about the professional and ethical rules applicable to the provider; a requirement that only serves a purpose if the provider has an obligation to perform in this respect. As a generalizable legal concept, what a consultant owes is a proper, technically-correct activity that meets the contractual purposes; the degree of professional skills and qualifications required corresponds to the normative expectations of a customer. Of course, the consulting service must also be legal.⁶⁵

The standards for conduct, methods, and professionalism formulated by industry associations are decisive for the more detailed specification of the generally applicable performance standards. The main German Consulting Association, for example, has established ‘professional principles’;⁶⁶ according principles.⁶⁷ According to Section 2 of these principles, the consultant must both have and exercise the ‘necessary care and competence’. Further specification of the methods and formats of business consulting would be desirable.⁶⁸ The Services Directive even calls directly on the EU Member States to, in turn, call on industry associations to ‘legislate for themselves’.⁶⁹ However, it is generally accepted that such industry standards should

⁶⁴ A. Werr/F. Perner, ‘Purchasing Management Consulting Services: From Management Autonomy to Purchasing Involvement’ (2007) 13 *Journal of Purchasing and Supply Management* 98–112.

⁶⁵ For liability towards third parties see below Section 5.2.

⁶⁶ Accessible under <https://www.bdu.de/mediathek/publikationen/branchenstandards/> (last accessed on 6 February 2022); for MCA (UK) Twelve Principles of Consulting Excellence, accessible under <https://www.mca.org.uk/value-of-consulting/consulting-excellence> (last accessed on 19 December 2022); for syntec conseil (F): Charte de déontologie Syntec Conseil visant les intervention de conseil auprès du secteur public, accessible under <https://syntec-conseil.fr/wp-content/uploads/2022/09/Charte-deontologie-secteur-public-Syntec-Conseil.pdf> (last accessed: 19 December 2022).

⁶⁷ Accessible under <https://www.bdu.de/mediathek/publikationen/branchenstandards/> (last accessed on 6 February 2022); for MCA (UK) Twelve Principles of Consulting Excellence, accessible under <https://www.mca.org.uk/value-of-consulting/consulting-excellence> (last accessed on 19 December 2022); for syntec conseil (F): Charte de déontologie Syntec Conseil visant les intervention de conseil auprès du secteur public, accessible under <https://syntec-conseil.fr/wp-content/uploads/2022/09/Charte-deontologie-secteur-public-Syntec-Conseil.pdf> (last accessed: 19 December 2022).

⁶⁸ On the ‘charlatanism problem’ in person-oriented counselling see for example S. Kühl, ‘Das Scharlatanerieproblem – Zwischen Professionsbildung und Professionalisierung’, in J. Surzykiewicz/B. Birgmeier/M. Hofmann/S. Rieger, *Supervision und Coaching in der VUCA-Welt* (Berlin: Springer, 2021) 95 *et seq.*

⁶⁹ Art 26 of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

only be understood as minimum standards, and they are always supplemented by activity-specific obligations of due diligence.⁷⁰

The consultant is also subject to appropriate transparency obligations with regard to the quality of his or her services. For example, if a consultant employs their own people to carry out the order, they must account for their qualifications; if their own qualifications are lacking in areas where competence is normally expected, they must provide information about this.⁷¹ This proposition can be derived from the Services Directive regarding the main characteristics of the service, Article 22 Para 1 j). The broadly-applied threat of punishment for billing fraud must also not be neglected in this context.⁷²

In other respects, the burden of proof for quality deficits lies with the customer in accordance with general principles, particularly regarding errors in instruction and clarification.⁷³ With regard to the internal circumstances of the consultant, the principles on the secondary burden of proof come into consideration only in exceptional cases.⁷⁴

2.4 Remedy of the Customer's Information Deficit Through Warranty Rights

A customer's lack of information can be compensated for by the inclusion of warranties. While some legal orders, such as France, can classify business consulting as a service agreement with adequate protection against quality deficits,⁷⁵ the solution is more complicated in jurisdictions like Germany, for example, which keep an outdated distinction between contractual agreements aimed at a success or at simple activity.⁷⁶ Prioritising the customer's interests seems to be necessary simply because the customer wants to benefit from the superior knowledge of the business consultant. The customer, however, cannot know the precise scope of the consultant's knowledge resulting in a tilted balance of information - in other words, in a market

⁷⁰ Cf for the area of IT security for example G. Spindler, *Verantwortlichkeit von IT-Herstellern, Nutzern und Intermediären*, Study for the BSI 2007, 66 *et seq*; G. Wagner, 'Produkthaftung für Autonome Systeme' (2017) 217 *Archiv für die civilistische Praxis* 707, 730.

⁷¹ Cf on this also BGH 3 April 1990 – XI ZR 206/88, n 18 *et seq*.

⁷² See on this for Germany N. Bosch, 'Abrechnungsbetrug bei fehlender vertraglich vereinbarter Qualifikation' (2015) 37 *JURA* 422.

⁷³ BGH 2 April 1987 – IX ZR 68/86, *Neue Juristische Wochenschrift-RechtsprechungsReport* 1987, 869.

⁷⁴ Lately for example BGH 25 May 2020 – VI ZR 252/19, *Neue Juristische Wochenschrift* 2020, 1962.

⁷⁵ Cf art 1165, 1166 CCiv.

⁷⁶ In detail on this topic M. Denga, 'Unternehmensberatungsverträge' *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)* 186 (2022) 543, 522 *et seq*.

failure.⁷⁷ In this situation, the activation of the law of warranties offers an adequate answer to the agency problems resulting from information asymmetry,⁷⁸ which is only aggravated by the lack of statutory regulation concerning access to the profession and practice of business consulting. In cases where the consultant's service is of lesser quality than the objective average, the law of warranties would permit price reduction and, in extreme cases, would even enable the termination of a contract and its rescission.⁷⁹ For example, where a business strategy for the topics of sustainability and digitalization is owed by the consultant, and the consultant is not familiar with the inherent requirements of either of these dynamic and highly-regulated fields, the advice can objectively only have insufficient quality and the customer is entitled to reduce the remuneration accordingly, or indeed entirely, if the advised business strategy was of no use at all. The question of whether, and which, warranties are available for services is not harmonized in Europe and requires specific analysis under national law. However, it should be possible to argue for such rights even in jurisdictions that do not cover service agreements explicitly, such as in Germany, and now also in France.⁸⁰

It is an international tendency, on the one hand, to consider the concrete need for protection also in the B2B sector,⁸¹ while on the other hand, to rely decisively on the superior corrective capabilities of one of the parties.⁸²

77 On the legitimacy of regulation in the case of disruption of market mechanisms, especially contractual parity E. Mestmäcker, 'Über die normative Kraft privatrechtlicher Verträge' (1964) 19 *Juristenzeitung* 441, 443; C.-W. Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (Berlin/New York: de Gruyter, 1997) 90; C.-W. Canaris, 'Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner "Materialisierung"' (2000) 200 *Archiv für die civilistische Praxis* 273, 292 *et seq*; W. Roth, 'Kartell- und Wettbewerbsrecht', in K. Riesenhuber (ed), *Privatrechtsgesellschaft* (Tübingen: Mohr Siebeck, 2007) 175 *et seq*; on regulation by dispositive law A. Hellgardt, *Regulierung und Privatrecht* (Tübingen: Mohr Siebeck, 2016) 84 *et seq*; F. Möslin, *Dispositives Recht* (Tübingen: Mohr Siebeck, 2011) 31 *et seq*.

78 On the qualification of management consultancy as an agency problem K. Jeschke, *Marketingmanagement der Beratungsunternehmung* (Heidelberg: Springer Link, 2004) 146; on the specific asymmetries of information Stock-Homburg, n 56 above, 479; in detail below Section 3.3.

79 In France and Germany only under the condition of renewed or unacceptability of renewed consulting, art 1223 *et seq* CCiv; sec 634 BGB.

80 See previous footnote 78 and in detail for the problem in Germany, Denga, n 75 above, 543, 558 *et seq*.

81 For example, through the Commercial Agents Directive 86/653/EEC, cf CJEU C-381/98 – *Ingmar*, ECLI:EU:C:2000:605; typified weaker protection is, however, not unquestionable, on this with the example of consumer protection L. Kaplow/S. Shavell, 'Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income' (2000) 29 *Journal of Legal Studies* 821–835; critically also G. Wagner, 'Zwingendes Vertragsrecht' (2018) 26 *Zeitschrift für Europäisches Privatrecht* 821, 831 *et seq*.

82 I. Ayres/A. Gertner, 'Majoritarian versus Minoritarian Defaults' (1999) 51 *Stanford Law Review* 1591; see also H. Fleischer, 'Die Euro-GmbH im "Wettbewerb der Rechtsordnungen"' (2004) 168

This solution fits in with the global tendency of service agreements to take strong account of the social and economic situation of the contracting parties, which is illustrated by the example of the employment relationship. In the case of business consulting contracts, however, the need for protection is quite different from employment relationships: since business consultants face their clients with superior knowledge and skills – they can assess their performance and the risk of success much better than their clients. The element of ‘exercising power over people’ under private law⁸³ which characterises employment law, is typically absent in business consulting by confident and well-trained consultants. If claims for remuneration of business consultants are made curtailable based on warranty law, then, unlike in labour law, social peace is not at stake.

3 Conflicts of Interest

Conflicts of interest are a major problem of business consulting. As an external party, the consultant is immersed in the internal affairs of a company without being solely bound to the one company. Rather, the consultant is free to offer their services and loyalty elsewhere in the market, while at the same time giving advice on essential company problems. Being bound by various legal relationships simultaneously or over time, almost inevitably leads to conflicts of interest.

3.1 Covert Sales Representation

Covert sales representation⁸⁴ is a widespread phenomenon, albeit a historical one, especially in IT consulting. For example, IBM’s practice of advising potential customers on its own product range prompted US authorities to take action and ultimately led to the cessation of IBM’s consulting activities for an extended period.⁸⁵ Even today, hidden commissions from IT providers to consultants are common; in this case, the consultant has a duty of disclosure. The duty to safeguard interests

Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 673, 693–695; L. Kähler, *Begriff und Rechtfertigung abdingbaren Rechts* (Tübingen: Mohr Siebeck, 2012) 149–155; Möslin, n 76 above, 324; H. Unberath/J. Cziupka, ‘Dispositives Recht welchen Inhalts?’ (2009) 209 *Archiv für die civilistische Praxis* 37, 63–69.

⁸³ K. Tillmanns, *Strukturfragen des Dienstvertrags* (Tübingen: Mohr Siebeck, 2007) 460 *et seq.*

⁸⁴ For the activity profile under German law cf A. Ströbl, in I. Drescher/H. Fleischer/K. Schmidt (eds), *Münchener Kommentar zum Handelsgesetzbuch*, part/vol 1 (5th ed, Munich: CHBeck, 2021) § 84, n 8 *et seq.*

⁸⁵ McKenna, n 2 above, 20 *et seq.*

and independence are general rules of contract law,⁸⁶ and in Germany, consulting industry principles also prohibit third-party commissions without the client's consent. At EU level, the same follows from Section 22 Subsection 3 c) of the Services Directive, which requires service providers to disclose 'information about their multidisciplinary activities and partnerships directly related to the service in question and about the measures they have taken to avoid conflicts of interest'.⁸⁷

3.2 Consulting for Competitors

3.2.1 Business Consultants as Information Intermediaries

Business consultants offer their services selectively and only for a limited period of time, while at the same time precisely engaging with the core of the company or its key departments, which has its own specific know-how. By working for different market participants, business consultants can gain knowledge about the latest 'best practice' in business ('interorganisational knowledge'),⁸⁸ but also about specific strategic decisions of their clients and subsequently pass these on to other clients. In economic terms, business consulting increases the efficiency of the overall economy by reducing information costs compared to knowledge generation within the company itself.⁸⁹ In contrast to cartels, business consulting also represents a legal method of information transfer in the market, and, in the US for example, it is perceived as a direct response to antitrust risks, since it spreads the technique of good management evenly.⁹⁰ Against the background of confidential assignments, however, the activity of business consultants is not without problems.

3.2.2 Confidentiality and Non-Competition Clauses

In practice, contractual confidentiality clauses bind the consultant, usually flanked by a Non-Disclosure Agreement (NDA). In such an arrangement, the consultant is typically obligated to maintain confidentiality about information provided by the

⁸⁶ See for instance art 3 para 1 Council Directive 86/653/EEC; for Germany C. Kumpan, *Der Interessenkonflikt im deutschen Privatrecht* (Tübingen: Mohr Siebeck, 2014) 87 *et seq.*

⁸⁷ In more specific investment law, under the MiFiD II Directive, banks and other financial service providers providing independent investment advice are prohibited from accepting inducements from third parties for doing so; this prohibition also covers distribution commissions from issuers.

⁸⁸ McKenna, n 2 above, 20.

⁸⁹ Comprehensive on this McKenna, n 2 above, 8–25; cf also Lippold, n 1 above.

⁹⁰ McKenna, n 2 above, 20, 43 *et seq.* A 'concerted practice' subject to art 101 TFEU does not exist because the behaviour of competitors in the use of management consultants is not 'concerted'.

client that is designated as confidential for the duration of the assignment and a certain period thereafter (usually four years), unless this information is obvious or generally known. Disclosure by the consultant may be permitted to employees or service providers if they are also bound by a duty of confidentiality; furthermore, use in legal proceedings (to enforce or defend against claims arising from the contractual relationship) is provided for. The consultant also agrees not to use the information from the consulting activity itself directly, but only ‘generally’.

These contractual requirements must be read in light of the EU Trade Secrets Directive, which has been in force since 2016 and protects business information to a very large extent if there is an ‘obligation to limit the use’ of trade secrets.⁹¹ However, apart from clear cases of industrial espionage, there remain considerable grey areas resulting from the role of business consultants as information intermediaries, as ultimately desired by the markets. In individual cases, the legitimacy of passing on information from past consultancy services to a new client may be doubtful such as in cases of identifying and defining critical markets, products in demand, and product or organisational methods. Recommendations often only gain weight by referring to a successful implementation at a specific company – or, as is often the case, by warning against the consequences of a certain behaviour at a competitor.

In view of the efficiency gains introduced by business consultants, however, their activities must not be made unduly difficult – in particular, the basic premise of market facilitation through information circulation must be accounted for in the interpretation and application of all intellectual property protection rules. This must be the guiding principle in weighing decisions of intellectual property protection rights and barriers,⁹² which are certainly complex in individual cases. The concept of a trade secrets according to Section 2 Subsection 1 of the Trade Secrets Directive is very far-reaching and, moreover, is objective.⁹³ Importantly, it therefore also affects business consultants. Consultants cannot violate the ‘*prohibition of acquisition*’ of Section 4 Subsection 2 of the Trade Secrets Directive themselves when helping to develop concepts, but instead must fear violations of the ‘*prohibition of use*’ of Section 4 Subsection 3 of the Trade Secrets Directive. For the avoidance of doubt, business consultants should contractually ensure their authorisation to continue using

⁹¹ Sec 4 subsec 3 c) of the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

⁹² In particular, implied licences may also be assumed, cf I. Obergfell/R. Hauck, in I. Obergfell/R. Hauck (eds), *Lizenzvertragsrecht* (2nd ed, Berlin/New York: de Gruyter, 2020) 84 *et seq.*

⁹³ Dazu M. Namysłowska, in W. Heermann/P. Schlingloff, *Münchener Kommentar zum Lauterkeitsrecht* (3rd ed, Munich: CHBeck, 2021) Geheimnisschutz-RL Art 2, n 4 *et seq.*

structural knowledge.⁹⁴ Conversely, in order to do justice to the role of business consultants as information intermediaries, an effective *prohibition of use* should only be assumed if this is expressly regulated in the contract – and also does not appear unreasonable in view of the level of remuneration and significance for the client.⁹⁵ Risk management measures on the part of the business consultant, for example, in the form of “Chinese walls” as known from the banking sector, should also be considered as a milder means of governance.

Due to the role of business consultants as information intermediaries, prohibitions on competition are also critical and, if implemented in a blanket manner, violate the legitimate interests of the consultants. If consultants are prohibited from further exploiting knowledge at the relevant point in the market, this is tantamount to a ban on practicing their profession.⁹⁶

3.3 Business Consulting by Auditors

3.3.1 Non-Audit Services by Auditors

The role of auditors in economic life and in the financial system cannot be overestimated,⁹⁷ especially since the ‘Big Four’ auditing firms (*Deloitte, EY, PwC and KPMG*) have increasingly been providing business consulting services since around 2010, which is considerably more lucrative than pure auditing.⁹⁸ Particularly in the

⁹⁴ Too restrictive is, for example, the form recommendation of C. Hoefs, ‘Beratervertrag’, in A. Gebele/K.-S. Scholz, *Beck’sches Formularbuch Bürgerliches, Handels- und Wirtschaftsrecht* (Munich: CHBeck, 2022) III, E, 29, § 6 sec 1.

⁹⁵ German scholarship, however, allows for a very wide scope of implicit prohibitions, see for instance M. Hiéramente, in M. Fuhrott/M. Hiéramente, *Beck’scher Onlinekommentar Geschäftsgeheimnisgesetz* (13th ed, Munich: CHBeck, 2021) § 4, n 63.1; undifferentiated also C. Alexander, in H. Köhler/J. Bornkamm/J. Feddersen (eds), *Gesetz gegen den unlauteren Wettbewerb: UWG* (41st ed, Munich: CHBeck, 2022) § 4 GeschGehG, n 46 *et seq.*

⁹⁶ Whether fundamental rights values also have an effect cannot be examined in depth here. In Germany, this would correspond to the materialising tendency of private law, especially via general clauses such as sec 242 or 307 subsec 2 of the German Civil Code (BGB), cf Canaris (2000), n 76 above, 273.

⁹⁷ Cf for Germany W. Ebke, in I. Drescher/H. Fleischer/K. Schmidt (eds), *Münchener Kommentar zum Handelsgesetzbuch*, vol 4 (4th ed, Munich: CHBeck, 2020) Vorb zu §§ 316–324a, n 10, with additional references; the investigative report by R. Brooks is very critical, *Bean Counters* (London: Atlantic Books, 2019).

⁹⁸ Consultancy firms: Strategic moves, 9 November 2013, <https://www.economist.com/business/2013/11/09/strategic-moves> (last accessed 10 February 2022); A. Sturdy, in Hurl/Vogelpohl, n 2 above, 3; see also C. Uhlmann, ‘Interessenskonflikte bei Wirtschaftsprüfern und Ratingagenturen – Zugleich ein Beitrag zur Gateskeeper-liability de lege lata und ferenda’ (2021) 185 *Zeitschrift für das gesamte*

banking sector, the fees for so-called ‘non-audit services’ clearly outweigh the fees for audit services.⁹⁹ The danger of conflicts of interest is obvious and was recently brought to the public’s attention in the course of the *Wirecard* scandal, where allegations were made that an auditor gave too favourable an opinion in order to improve the order climate for his legal and business consulting divisions.¹⁰⁰

The problem of conflicts of interest and, specifically, the provision of non-audit services, has long been on the agenda of the European legislator,¹⁰¹ at least since the collapse of the US energy trader *Enron* due to favourable audit opinions by *Anderson Consulting*.¹⁰² The professional legal framework for certified public accountants is characterised in essential aspects by European law requirements. Since 2014, the Auditors Directive¹⁰³ (A-Directive) and the Regulation on the Statutory Audit of Public Interest Entities¹⁰⁴ (A-Regulation) have regulated not only the qualification of auditors (Section 3 *et seq* A-Directive) but also their independence and impartiality, especially regarding ancillary business (Section 22 A-Directive). Particular emphasis is placed on the mandatory rotation of the auditor (Section 17 A-Regulation).¹⁰⁵ According to Section 25 A-Directive, audit fees ‘may not be influenced by the provision of additional services to the audited entity’ and may not be subject to any

Handels- und Wirtschaftsrecht 669, 689; of course, something similar can also be observed among tax advisors; C. Schäfer, ‘Unternehmensberatung durch Steuerberater’ (1997) 35 *Deutsches Steuerrecht* 794; Y. Taminiau/S. Heusinkveld/L. Cramer, ‘Colonization contests: How both accounting and law firms gain legitimacy in the market for forensic accounting’ (2019) 6 *Journal of Professions and Organization* 1–23.

99 J. Schmitt, ‘Wenn der Wirtschaftsprüfer zu viel berät’, 28 August 2017, <https://www.finance-magazin.de/banking-berater/wirtschaftspruefer/wenn-der-wirtschaftspruefer-zu-viel-beraet-35047/> (last accessed on 6 February 2022).

100 The facts of the case have not yet been conclusively clarified by the courts. However, see the report of the Bundestag’s Committee of Inquiry on the matter Report 19/30900, 1572 *et seq*; according to research by the Tagesschau, Wirecard mandated in particular with advisory mandates in Asia, ‘The dubious role of EY Law’, 14 December 2021, <https://www.tagesschau.de/investigativ/ey-wirecard-103.html> (last accessed on 6 February 2022).

101 On this Uhlmann, n 97 above, 669, 676 *et seq*; see also the overview of the Institut der Wirtschaftsprüfer (IDW), *Inhalte und Zweifelsfragen der EU-Verordnung und der Abschlussprüferrichtlinie* (6th ed, 2022).

102 Cf S. Holland/G. Schwarz, ‘Enron, WorldCom ... und die Corporate-Governance Diskussion’ (2002) 22 *Zeitschrift für Wirtschaftsrecht* 1661.

103 Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts.

104 Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC.

105 Cf C. Ebenroth/K. Boujong/H.-J. Böcking/M. Gros/D. Rabenhorst, in C. Ebenroth/K. Boujong/D. Joost/L. Strohn, *Handelsgesetzbuch*, vol 1 (4th ed, Munich: CHBeck/Vahlen, 2020) § 318 HGB n 9a.

conditions.¹⁰⁶ For the audit of public interest entities, which in addition to banks and insurance companies also include listed companies, the A-Regulation also takes up the independence of fees from performance in Section 4, but goes further in that it imposes a strict cap on income from non-audit services¹⁰⁷ and catalogues absolutely prohibited non-audit services in Section 5.¹⁰⁸ It is noteworthy that Section 5 Subsection 1 A-Regulation takes an overall view of the auditor's network, which suggests a certain parallelism with the concept of the economic unit under antitrust law.¹⁰⁹ However, the ECJ has not yet clarified whether the prohibited non-audit services also include business consulting (or any of its aspects). Notably, Section 5 Subsection 1 para 2 b) A-Regulation prohibits non-audit services which involve participation in the management or decision-making of the audited company; this may also be understood to cover preparatory and accompanying measures, as well as the 'optimisation of business processes' in a broad sense.¹¹⁰

3.3.2 Courtesy Audits

The linking of the audit opinion to subsequent business consulting contracts is therefore critical. The relevant question here is whether the validity of the business consulting contract can be affected in the case of such linking, even if the consulting service is of value, i.e. provided at standard market conditions and therefore does not constitute fraud.

Section 30 Subsection 1 A-Directive gives the Member States room for manoeuvre in the sanctioning of violations. They must provide for effective investigations and sanctions to uncover, correct, and prevent inadequate performance of audits. Section 30 Subsection 2 A-Directive speaks directly of deterrence beyond liability law. When implementing these sanction requirements, the Member States must follow the principle of *effet utile*, and are therefore required to leave any national law conflicting with the requirements of the A-Regulation either

106 Implemented in sec 55 subsec 1 sentence 3 WP-VO; in addition F. Goltz, in G. Ziegler/H.-F. Gelhausen (eds), *WPO Kommentar* (3rd ed, Düsseldorf: IDW, 2018) § 55, n 20 *et seq.*

107 To 70 % of the average of the fees paid over the last three consecutive financial years for the statutory audit(s) of the audited entity and, where applicable, its parent undertaking, the entities it controls and the consolidated accounts of the group of undertakings concerned, art 4 (2) A-Regulation.

108 Cf on this C. Zwirner/C. Boecker, 'Gesetz zur Stärkung der Finanzmarktintegrität (FISG) verabschiedet – Ausgewählte Konsequenzen für Abschlussprüfung, Bilanzkontrolle und *Corporate Governance*' (2021) 16 *Zeitschrift für internationale Rechnungslegung* 309, 309 *et seq.* Cf also the overview by IDW, *IDW Positionspapier zu Nichtprüfungsleistungen des Abschlussprüfers* (6th ed, 2021).

109 See also M. Denga, *Zurechnung* (Tübingen: Mohr Siebeck, 2022) ch 3 C III.

110 See Ebke, n 26 above, § 319a, n 50. Disagreeing IDW, n 107 above, 3.5.

aside or to interpret such national law in conformity with secondary law.¹¹¹ The provisions of the A-Regulation are directly effective meaning that national law must be applied and interpreted in line with the A-Regulation in order to avoid any conflict with its regulatory content. Thus, the national provisions of the general law of obligations and the national law of (unjust) enrichment must be applied in compliance with European law.

In this context, a nullity of consultancy agreements depending on positive auditing can be considered. Although the consulting service may not be critical as such, the circumstances of concluding the contract may be. The decisive factor is the relationship between the conclusion of the consulting contract and the audit. If both contracts are concluded at the same time, a lot speaks in favour of establishing the invalidity of the consultancy contract through infringement of law.¹¹²

If the contracts are concluded asynchronously, with a certain time delay and without an obvious connection, the assessment is more difficult, as in most cases there is no clear indication of bribery. This is because the creation of a ‘mood’ or ‘atmosphere’ for follow-up transactions cannot be equated with the conclusion of such transactions. However, the importance of the independence and impartiality requirements for capital market information, as well as the capital markets for the entire economic system which are protected by the A-Directive and A-Regulation, supports interpreting national rules on illegal contracts¹¹³ broadly in conformity with Union law, so that follow-up mandates are regarded as part of the legal transaction and are likewise void as a whole.

Yet further problems arise if the business consulting contract is concluded with a legal entity other than the one with which the audit engagement is concluded. In this case, however, the *effet utile* and the systematics of the A-Regulation and A-Directive, which expressly also take into account transactions with ‘members of a network’ (Section 5 Subsection 1 A-Regulation; Section 22 Subsection 2 A-Directive), suggest an overall consideration of economically-linked companies in accordance with the principles of antitrust law.¹¹⁴

If it is thus established that business consultancy contracts can be null and void as a consequence of acts of courtesy, the consequential question of compensation for enrichment arises, which becomes particularly important when a new management

111 K. Riesenhuber, in K. Riesenhuber (ed), *Europäische Methodenlehre* (4th ed, New York/Berlin: de Gruyter, 2021) § 10 n 45; see also on this Deng, n 108 above, ch 4 C.

112 Eg in German law under sec 134 BGB in conjunction with sec 55 subsec 1 sentence 3 WPO, possibly also sec 5 subsec 1 para 2 b) A-Regulation.

113 On this topic H. Beale/B. Fauvarque-Cosson/J. Rutgers/S. Vogenauer, *Contract Law* (3rd ed, London: Hart, 2019) ch 17.

114 CJEU, C-97/08 P (2009) – *Akzo Nobel*, ECLI:EU:C:2009:563; comprehensive on the levelling of the principle of separation by European law, Deng, n 106 above, ch 3 C III.

is appointed in the audited and advised company, which pays attention to compliance and wants to reclaim the consultancy fees in the interest of the company, the shareholders, and its creditors.

3.4 Interim Summary

Three categories of conflicts of interests are predominant in business consulting, and while it is a matter of course that transparency is owed with regards to sales representations within the scope of the consulting mandate, consulting for competitors is a more complex matter. Simultaneous counselling is not admissible unless there are solid “Chinese walls” in the consultant’s organisation, shielding any leakage of *specific* business knowledge. However, such shields do not apply to *general* business and market knowledge, the proliferation of which is the major reason for the existence of business consultants. Consequently, the provisions of intellectual property and trade secret law must be construed in a way that takes account of this consideration. Finally, conflicts of interests arise where consulting is offered by an entity affiliated to an auditor; here, with the crucial rationale of capital market stability in mind, a strict approach is required.

4 Abuse of Consultancy Agreements

Business consultancy can easily be abused as a means of money laundering or private enrichment. Both illegal activities often go together and are difficult to distinguish. As collusive action, they are distinct from a one-sided exploitation of the informational asymmetry (see Sections 2.2 and 2.3).

4.1 Money Laundering and Embezzlement

The United Nations Office on Drugs and Crime estimates the annual amount of money laundered¹¹⁵ worldwide to be 2–5 % of annual global GDP – approximately \$800 billion to \$2 trillion in current US-Dollars. The actual value could be many times

¹¹⁵ Sec 3 of the 6th European money laundering Directive ((EU) 2018/1673) defines money laundering as the conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person’s action (subsec 1 a)); the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property

higher.¹¹⁶ The process of money laundering is typically divided in three stages: *placement*, *layering*, and *integration*.¹¹⁷ During the *placement* stage, the illegal funds are introduced to the financial system. In the second stage, the *layering* stage, the funds' trail is disguised to hinder pursuit. In the final stage of *integration* the launderers spend or invest the seemingly-legitimate proceeds and make them available for themselves. The specific ways in which money laundering takes place are varied, ranging from the establishment of front companies to the exploitation of business contacts with genuine (and sometimes quite reputable) consulting firms. Consulting agreements are particularly interesting for the last two stages of money laundering, as high consulting fees are not uncommon. Even though the criteria laid out here under Sections 2.2 and 2.3 may be helpful, there is no easy way to verify the content of the service provided by the consultant.¹¹⁸ The spectrum of business areas and associated decisions and questions is vast, which in turn leads to an equally large potential and scope of consultancy. This makes it difficult to prove with certainty whether the consultancy service shown in the accounts has been rendered or whether it is really valuable. It is also hard to determine whether the services are billed in collusion with those responsible in management.

A telling example of abuse of business consulting agreements is the involvement of several smaller consulting firms as well as the Big Four in the *Luanda Leaks* scandal.¹¹⁹ Isabel dos Santos, the daughter of a former Angolan president, used her father's position and influence to acquire a lucrative network of investments and companies to embezzle millions of dollars of Angolan taxpayers' money; consulting agreements turned out to be the main tool of value transmission between entities.

Another scenario for abuse of business consulting contracts involves the awarding of (mostly superfluous) contracts to relatives, friends, or close business partners and public officials. Company funds are thereby distributed to others for one's own benefit, representing either fraud or embezzlement.¹²⁰ The aim can be to promote private connections, one's own business networks, or political contacts. Prominent examples of this can also be seen in the *Luanda Leaks*, but also in recent

is derived from criminal activity (subsec 1b)); the acquisition, possession or use of property, knowing at the time of receipt, that such property was derived from criminal activity (subsec 1c)).

116 Accessible under: <https://www.unodc.org/unodc/en/money-laundering/overview.html>.

117 See the EU's anti-money laundering policy available under: https://www.eca.europa.eu/lists/ecadocuments/ap20_05/ap_anti-money-laundering_en.pdf.

118 Already F. Teichmann/M. Camprubi, 'Money laundering through consulting firms' (2019) 5 *Compliance Elliance Journal* 60–72, 66 *et seq.*

119 See under <https://www.icij.org/investigations/luanda-leaks/banking-documents-reveal-consulting-giants-cash-windfall-under-angolan-billionaire-isabel-dos-santos/>.

120 On the typology of embezzlement, as withholding of assets by a trustee J. Lehman/S. Phelps, *West's Encyclopedia of American Law*, vol 4 (2nd ed, Detroit: Thomson/Gale) 223; on fraud.

developments regarding public broadcasting in Germany.¹²¹ Here, too, the above-mentioned peculiarities of the business consultancy contract, the demanding objective verifiability of consultancy services, and the low level of institutional control play a decisive role, as they make it very difficult to detect irregularities in scope and execution of the contract.

4.2 Consulting Governance

The possibilities and widespread occurrence of abuse through consulting agreements calls for institutional counter-measures.

On the part of businesses, it is necessary to have effective control mechanisms already in the preliminary stages, which, at best, exclude the awarding of abusive contracts from the outset and ensure transparency. For this purpose, management and its representatives should be bound to procedures when awarding contracts to critical parties and should also be required to keep records on the consulting. Further, management and its representatives should be required to demand comprehensive documentation and a final report on each consulting project. If one exists, a compliance officer should have oversight in matters of consulting.

The Shareholder Rights Directive¹²² addresses part of this for listed companies in the novel Article 9c, which subjects transactions with related parties¹²³ ('RPT') to the approval of the supervisory board and triggers a disclosure obligation for the company under capital market law.¹²⁴ The premise that shareholders, board members, or other persons, whether in the majority or minority, can purposefully harm the company and its shareholders if they use their influence on the company to gain advantages for their own benefit or for the benefit other persons from their own sphere of interest, is teleologically decisive for the regime. Materially, the RPT regulation does not represent a novelty to national laws, especially due to the principles on the abuse of power of representation, for instance because in Germany the company group law ('*Konzernrecht*') addresses the dangers resulting from

¹²¹ According to research by journalists, the director of the public broadcaster of Berlin-Brandenburg (RBB) and chairperson of the federal public broadcaster ARD, Patricia Schlesinger, and the head of the RBB board of directors, Wolf-Dieter Wolf, are said to have worked together to provide family members and business partners with lucrative consulting contracts: <https://www.businessinsider.de/wirtschaft/berater-affaere-beim-rbb-interne-dokumente-und-aussagen-des-chefaufsehers-erschuettern-die-glaubwuerdigkeit-der-ard-vorsitzenden-patricia-schlesinger-a/>.

¹²² Directive 2007/36/EC as amended by directive (EU) 2017/828.

¹²³ The concept of related parties is very broad and has the same meaning as in the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, namely IAS 24.

¹²⁴ Cf C. Grigoleit, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2019, 412, 418.

structural dependencies. However, in some respects, the RPT regulation is a useful addition, specifically because it is not bound to control thresholds, but also covers, for example, the use of board positions for harmful transactions. Furthermore, the RPT regulation also applies between companies affiliated below the control threshold, as long as one company has ‘significant influence’ on another, which is essentially the case from a shareholding of 20 %; in addition, only either the controlling or the controlled company must be listed on the stock exchange. Consulting agreements between the listed company and a party ‘related’ to the company or its organs are therefore subject to prior approval. It seems plausible for any company, regardless of its listing, to adopt an equivalent regime in its statutes. Of course, as can be seen in the mentioned examples, any governance instruments potentially have their limits, especially if the persons entrusted with the supervision are themselves involved in the abuse.

For consulting firms relying on reputation and integration in the legal order, it seems strategically important to introduce RPT-regimes and to effectively monitor compliance with regards to money laundering and embezzlement.

5 Liability

Finally, the liability of consultants to customers, but also the effect of their consulting services on advised managing directors, is a crucial aspect in practice.

5.1 Liability to the Client

The question of liability of the consultant towards the client becomes acute when following a consultant’s advice leads to damages in the company. The breach of duty can consist in a qualitative deficit of the service, of the service provider, or in a breach of the general duty of consideration. As has been demonstrated above (Sections 2.2 and 2.3), and contrary to the assertion of many consultants, it is possible to determine objective criteria for the services of management consultants. The starting point is industry standards: questionable details of the services customary in the industry, which may be very technically specific, must be determined by an expert opinion.

Professional consulting errors can often not be judged on the basis of a single episode alone; rather, a comprehensive overall consideration and weighing of the advantages and disadvantages of the recommendation against those of another

possible recommendation must be carried out.¹²⁵ Thus, for example, the choice of a corporate form and the detailed structuring of the corporate relationship is not solely determined by tax considerations, but rather also by the contingent liabilities, the manner of participation of the shareholders, their reputation, and their creditworthiness with business partners.¹²⁶ There are, of course, also clear-cut cases of mis-counselling, especially in the area of restructuring, when, for example, the statutory obligation to file for insolvency pursuant to Section 15a of the German Insolvency Code (InsO) is not observed under the assignment to examine the financial situation of a company.¹²⁷

General principles of national law apply to liability limitations in a business consultant's general terms and conditions.¹²⁸ The exclusion of liability for the success of proper advice in the general terms and conditions is merely declaratory in nature,¹²⁹ as proper advice does not constitute a breach of the duty of care. The risk of acting upon proper advice lies with the customer, as in the case of other subcontracted services.

Even if the violation of the duty of care is partly responsible for the damage, this is not necessarily to be borne completely by the consultant, because as shown above, a consultant supplies knowledge and know-how, and the customer decides whether to act upon the consultant's performance – if the deficiencies of the advice are obvious, the customer is partly to blame and should therefore bear part of the damage. The customer has at least a duty to cursorily check the work; although they may not be obliged to check all the work in view of the consultant's superior knowledge and the added value that can justifiably be expected from their input, they may not, on the other hand, trust blindly either and is required to carry out a plausibility review.¹³⁰

125 BGH 2 April 1987 – IX ZR 68/86, *Neue Juristische Wochenschrift-RechtsprechungsReport* 1987, 869, 871.

126 On the choice of the 'right' corporate form cf C. Windbichler, *Gesellschaftsrecht* (24th ed, Munich: CHBeck, 2017) § 4.

127 See on this BGH 14 June 2012 – IX ZR 145/11, n 27 *et seq*; sec 102 StaRUG does not state the management consultants explicitly, but a mandate-specific audit obligation can be agreed upon.

128 Eg in Germany only relief for damages caused by slight negligence and not affecting life, limb, health or material contractual obligations or within the scope of mandatory statutory liability provisions is permissible, cf S. Grundmann, in F. Säcker/R. Rixecker/H. Oetker/B. Limperg, *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 2 (8th ed, Munich: CHBeck, 2019) § 276, n 183 *et seq*; Moes, n 62 above, 323.

129 Cf for example the form from C. Eschwey, in R. Walz (ed), *Beck'sches Formularbuch Zivil-, Wirtschafts- und Unternehmensrecht, D-E* (5th ed, Munich: CHBeck, 2022) 8. Beratervertrag – Consulting Agreement § 5 Abs 2 HS 2.

130 On the plausibility control obligation BGH 14 June 2012 – IX ZR 145/11, n 29 *et seq*.

5.2 Liability to Third Parties

The opioid crisis in the US has recently shed light on the third-party liability of strategy consultants, specifically in the case of McKinsey having to answer for advising a pharmaceutical company to aggressively market its painkillers without regard to the known addictive potential and errors in the pharmaceutical approval process.¹³¹ Whether contractual liability to third parties is admissible depends largely on national law. Under German law, for instance, contractual liability vis-à-vis third parties can only be considered according to the principles of contracts with protective effect in favour of third parties (§ 311 (3) BGB). The prototypical case of § 311 (3) sentence 2 BGB is the liability of a trustee, which is justified by the fact that a person, because of their expertise or reliability in the context of contract negotiations, claims a special degree of trust for themselves on the side of one of the parties and thus offers the other party an additional personal guarantee for the conclusion and fulfilment of the contract.¹³²

For example, a management consultant who takes over the management of a company in need of reorganisation and refers to his previous reorganisation successes in contract negotiations conducted as the company's representative with third parties is liable as a trustee.¹³³ In the normal course of business, the assumption of such a special, central position in contract negotiations and beyond the provision of advice is, of course, likely to be the exception. If, however, within the scope of the advisory activity, expert opinions are also prepared which are recognisably intended to be the basis for investment decisions of third parties, especially in application of the EU Prospectus Regulation, liability under § 311 (3) sentence 2 BGB is also relevant.¹³⁴

5.3 Management Liability and Consultancy

Closely related to business consultancy agreements is the question of the management's release from liability through the use of external consultants. In this respect,

131 McKinsey has reached a nearly €500m settlement with the attorneys general of 49 states to drop the case, *New York Times*, 5 November 2021, <https://www.nytimes.com/2021/02/03/business/mckinsey-opioids-settlement.html?referringSource=articleShare> (last accessed on 6 February 2022).

132 BGHZ 14, 313, 318; BGHZ 56, 81, 85 *et seq*; BGHZ 70, 337, 341; BGH *Neue Juristische Wochenschrift* 1985, 2584; BGH *Neue Juristische Wochenschrift* 1989, 293; BGH *Neue Juristische Wochenschrift* 1997, 1233; BGH *Neue Juristische Wochenschrift-RechtsprechungsReport* 2006, 993, 994.

133 BGH *Neue Juristische Wochenschrift* 1990, 1907.

134 BGH *Neue Juristische Wochenschrift* 2014, 2345; on this J. Ellenberger/H. Bunte/S. Grundmann/M. Denga, *Bankrechtshandbuch* (6th ed, 2022 (forth coming) Rn 99.

some specific features of the business consultancy agreement itself must be taken into account.

5.3.1 Duty to Consult Expert Advise

The central motive for the use of consultants is not only the innovation which they bring into the company as external consultants, but also the safeguarding of decisions of the management on the background of their liability risks. In order to fulfil their due diligence obligations,¹³⁵ the management board and supervisory board must constantly consider complex strategies, continuously review the business model, and keep a global eye on the business environment.¹³⁶ As it is not possible to map this in depth alongside day-to-day business, obtaining external advice by consultants has been established as generally accepted practice.¹³⁷ Where the management itself does not have the necessary competence, it is even obliged to call in expert third parties. In the area of German insolvency law continuation forecasts, there is extensive case law on this.¹³⁸

5.3.2 Advisors as an Information Authority

The involvement of consultants does not, of course, release management from its duty to cooperate and its ultimate responsibility. As already shown above, consultants merely provide knowledge and know-how resulting in a tailored recommendation for action. The implementation of the recommendation is still the

¹³⁵ Eg sec 93 subsec 1 and sec 116 subsec 1 of the German Stock Corporation Act (AktG).

¹³⁶ In connection with CSR, for example C. Walden, 'Corporate Social Responsibility: Rechte, Pflichten und Haftung von Vorstand und Aufsichtsrat' (2020) 23 *Neue Zeitschrift für Gesellschaftsrecht* 50; K. Andrejewski, 'Editorial' (2019) *Audit Committee Quarterly* 1/2019: *Klima und Kapital* 2 et seq.

¹³⁷ F. Monteiro/J. Birkinshaw, 'The external knowledge sourcing process in multinational corporations' (2017) 38 *Strategic Management Journal* 342–362.

¹³⁸ BGH 14 May 2007 – II ZR 48/06 = *Deutsches Steuerrecht* 2007, 1174 n 16 with further reference to: OLG Düsseldorf 31 March 1999 – 12 U 176/97, *Neue Zeitschrift für Gesellschaftsrecht* 1999, 944, 946; G. Wiesner, in M. Hoffmann-Becking, *Münchener Handbuch des Gesellschaftsrechts*, IV (4th ed, Munich: CHBeck, 2015) § 26 n 16 with further references; cf also BGH 24 May 2005 – IX ZR 123/04, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* 2005, 547, BGHZ 163, 134, 240 et seq; BGH 27 March 2012 – II ZR 171/10, *Neue Zeitschrift für Gesellschaftsrecht* 2012, 672, n 15; summarising also G. Krieger, 'Wie viele Rechtsberater braucht ein Geschäftsleiter?' (2012) 41 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 496, 499; W. Goette, 'Zur Frage, welche Anforderungen an die Geschäftsleitung und ihre Berater bei der Fertigung einer Fortführungsprognose zu stellen sind (Teil II)' (2016) 54 *Deutsches Steuerrecht* 1752, 1758 et seq; H. Grigoleit/L. Tomasic, in H. Grigoleit, *Aktien-gesetz* (2nd ed, Munich: CHBeck, 2020) § 93, n 58.

responsibility of management itself within the spheres of responsibility of the company set up by management.

Thus, management must also exercise due diligence in dealing with the advice itself. The framework of the Business Judgement Rule can be used here: it regulates the scope of liability of the decision-making bodies vis-à-vis the company for entrepreneurial decisions. The Business Judgement Rule is intended to exclude hindsight bias in the subsequent assessment of entrepreneurial decisions and thus bring the liability risk for the decision-makers to an acceptable level. Entrepreneurial risk should thus remain possible and the superior expertise of the decision-making body in the specific corporate situation should be appreciated.¹³⁹ The standard of care of a prudent and conscientious manager is the starting point under the Business Judgement Rule. As soon as an entrepreneurial decision is made, the specific scope of application of the Business Judgement Rule is opened. Entrepreneurial decisions are not in breach of due diligence if the executive body could reasonably assume that it was acting in the best interests of the company pursuant to appropriate information. What is required is a sufficient basis of such information. In the specific decision-making situation, all available sources of information of a factual and legal nature must be exhausted and the advantages and disadvantages of the existing options for action must be carefully assessed. Further, the recognisable risks must be adequately taken into account.¹⁴⁰ In this context, the use of algorithms is also being discussed, whereby the final decision-making authority should remain with the corporate body.¹⁴¹ In practice, however, management consultants are by far the most important source of information.

139 J. Armour/L. Enriques/H. Hansmann/R. Kraakman, 'The Basic Governance Structure', in R. Kraakman et al., *Anatomy of Corporate Law* (Oxford: Oxford University Press, 2016) 69 *et seq*; cf also P. Kindler, 'Unternehmerisches Ermessen und Pflichtenbindung' (1998) 162 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 101; on backward-looking errors in general U. Falk, 'Rückschaufehler und Fahrlässigkeit – Zivilrechtliche Perspektive' (2019) 10 *Rechtswissenschaft* 204.

140 Established case law, cf BGH 14 July 2008 – II ZR 202/07, *Neue Zeitschrift für Gesellschaftsrecht* 2008, 751, 752; BGH 18 June 2013 – II ZR 86/11, BGHZ 197, 304.

141 Cf on this L. Strohn, 'Zur Zuständigkeit der Hauptversammlung bei Zusammenschlussvorhaben unter Gleichen' (2018) 182 *Zeitschrift für Handels- und Wirtschaftsrecht* 371; F. Möslin, 'Digitalisierung im Gesellschaftsrecht: Unternehmensleitung durch Algorithmen und künstliche Intelligenz?' (2018) 28 *Zeitschrift für Wirtschaftsrecht* 204, 206, with further references, and R. Weber/A. Kiefner/S. Jobst, 'Künstliche Intelligenz und Unternehmensführung' (2018) 21 *Neue Zeitschrift für Gesellschaftsrecht* 1131, 1136; D. Zetzsche, 'Corporate Technologies – Zur Digitalisierung im Aktienrecht' (2019) 64 *Die Aktiengesellschaft* 1, 9 *et seq*; U. Noack, 'Organisationspflichten und -strukturen kraft Digitalisierung' (2019) 183 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 105.

5.3.3 Dealing with Consultants as Information Intermediaries

The involvement of vicarious agents must not lead to exemption from liability, as the management body is called upon to pass on its own duties of care to consultants when commissioning them and to concretise them accordingly in the contract. The governing body invoking the advice must also ensure the selection and supervision of the consultants; if the governing body delegates these duties, it must ensure their remote effect in the delegation. It is of central importance to ensure that the advisor is not just sufficiently qualified to deal with the issue in question, but also that he or she is independent.¹⁴² These aspects must also be included in the consulting agreement. In addition, the management has a duty to cooperate in providing a sufficient basis of information for the work of the management consultants themselves.¹⁴³ The advisor's advice must be reviewed in principle, whereby the intensity of the review must correspond to the importance of the advice for the company. Overall, it must be possible to delegate the evaluation of information and the management of complexities to persons different from the management body in order to keep the organisation at all controllable; whether the information comes from internal or external sources cannot play a role here. A comprehensive review is therefore not required per se, but instead a plausibility check is necessary, which includes assessing the internal consistency of the recommendation and the appropriate use of the company information made available, and which only has to be extended to include a second opinion if there are indications of quality deficits.¹⁴⁴ Obvious 'clearance certificates' and 'favourable opinions' without factual substance are therefore not suitable for creating a liability effect in favour of the management body.

6 Conclusions

Business consulting contracts have hardly been analysed yet; they do, however, merit great attention due to the importance of consulting in the service and knowledge economy. Despite the apparent harmony in legal life, various aspects of market failure can be identified within business consulting contracts. This article points out that, in order to find adequate solutions, business consulting must be understood and interpreted from the role of consultants as information providers and suppliers of knowledge and know-how. In addition, the economic classification

¹⁴² Eg BGH 20 September 2011 – II ZR 234/09, *Neue Zeitschrift für Gesellschaftsrecht* 2011, 1271 – *ISION*.

¹⁴³ Eg BGH 20 September 2011 – II ZR 234/09 *Zeitschrift für Wirtschaftsrecht (ZIP)* 2011, 2097; Grigoleit/Tomasic, n 138 above, § 93 Rn 62.

¹⁴⁴ Cf also Grigoleit/Tomasic, n 138 above, n 63–65; as well as Heese, n 4 above, 267 *et seq.*

of such consultancy as a good of trust is essential. The rules on business consulting contracts still require considerable clarification in the national laws of obligations, however, some general principles can be derived from European secondary law.

First, this contribution has highlighted information deficits on the part of the client that already exist with regard to the value of the service and its quality. Here, according to current law, in particular the European Services Directive, information and transparency obligations, and also documentation obligations, of the advisors can be established. The client's perspective is decisive for the minimum requirements for service quality.

Second, conflicts of interest are an issue in business consultancy. Consultants are obliged to be objective and independent, therefore they have a duty to disclose conflicts of interest. A core function of business consultancy is the dissemination of innovation in the market, which can otherwise only be achieved through illegal cartels or expensive internalisation. Therefore, providing advice to competitors is unavoidable; the protective provisions of intellectual property and of the Trade Secrets Directive are to be interpreted in this context. Prohibitions on the further utilisation of a project's results can only bind the consultant if appropriate remuneration has been agreed upon, and if the remuneration corresponds to the overriding interest of the client, but not across the board and without an explicit non-disclosure agreement. Corporate advisory services as an ancillary service of auditing must be viewed critically because of their public function and the need to protect the capital market. The European regulation of auditors suggests that advisory engagements obtained by means of courtesy attestations are null and void and the fees can be capped.

Third, abuse of business consulting agreements for money laundering and embezzlement is an important issue for compliance officers in businesses as well as in consulting firms. The widespread use of consulting agreements to transfer illegally-acquired funds or to promote related parties must be avoided through strict internal procedures leaning on the Shareholder Rights Directive's RPT-regime. The imposition of transparency through comprehensive documentation is also key.

Fourth and finally, the adviser is liable for damages resulting from errors in his recommendations. Because it can be problematic to determine whether the recommendations were made in breach of the duty of care, an overall assessment is required, including consideration of the client's contributory negligence. The consultant's liability is determined by national law and may be based on claiming special trust. The standards of the Business Judgement Rule should be applied for the discharge of liability of the management due to the use of advisers – they must be carefully selected, qualified, and independent; their work must be subjected to a plausibility check.