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The economic analysis of lies in business-to-business contract negotiations¹

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Abstract

Lying is a widespread phenomenon in business-to-business (B2B) contract negotiations that national legal systems regulate substantially differently. Aim of this research is therefore to determine where the legal order should draw the line between legal and illegal lies in consideration of economic and moral arguments as well as differences in legal culture. This paper specifically addresses one subpart of this question: the economic effects of deception in bilateral business-to-business contract negotiations. So far, this topic has been intensively considered primarily with regard to various complex, specific issues. However, this paper will for the first time deliver an overall analysis within this topic field. In this respect, the analysis will base upon the following different economic approaches and lines of reasoning:

- *Transaction costs,*
- *welfare economics with special attention on the impact on BATNA (best alternative to a negotiated agreement) and ZOPA (zone of possible agreement),*
- *business practices (as an indicator),*
- *the truth signal and trust,*
- *spillover effects,*
- *the right to lie in order to protect the right to remain silent - prohibition of lies as basis for the prevention of knowledge shifts and*
- *the structural favouring of the weaker party.*

An international study on lies in contract negotiations conducted by the author and Peter Krebs (University of Siegen) with almost 1500 participants from 13 countries (including China, Russia, the USA and Germany – surveyed groups: judges, lawyers, professional negotiators and students) helps to apply the economic results to different types of lies. The study shows that, with regard to moral beliefs and, the sense of unlawfulness (feeling how the law should be), individuals differentiate between what a negotiator has actually lied about (e.g. the price, performance, offers of other providers, availability of products). The paper demonstrates that the economic effects also vary, depending on what exactly a negotiator lies about. It will be shown that there are constellations where lies result in clear economic disadvantages. Conversely, however, this paper also evinces that there may be constellations which (almost) do not produce any negative economic effects or even lead to a slightly positive overall result. With regard to the legal design, both, the economic results as well as the aforementioned international study suggest that not all lies should not be treated equally. The analysis also emphasises the importance of the enforceability of a possible legal prohibition of lies. For economic reasons alone, a prohibition only appears sensible if enforcement is feasible at all. The discussion of transaction costs, the truth signal, the loss of trust and spillover effects also demonstrates the negative economic consequences which arise if a legal order only bans causal deceptions – as most legal orders do. Moreover, the concept of the cheapest cost avoider supports the legal rule of "intent beats negligence".

¹ I would like to thank *Peter Krebs* (University of Siegen) for his insightful and inspiring comments and *Melissa Dowse* (University of Siegen) for her help writing this paper in English.

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I. Introduction

Lying is a widespread phenomenon in business-to-business (B2B) contract negotiations. However, how often and over which aspects professional negotiators deceive in business negotiations has so far only been researched rudimentarily.² Studies on lies in everyday life reveal that “bluffing” is a relatively common practice.³ Yet, these are usually "small, harmless lies" in a social context (e.g. "The dress suits you very well." / "The food is delicious."). Experiments with students, also give clues as to the entrepreneurial practice and substantiate that in negotiation simulations students lie relatively frequently, in fact also regarding concrete negotiation-related aspects.⁴ These results are to be seen in connection with further findings on deceptions: According to an international study conducted by the author (hereinafter referred to as the "Siegen Study") with almost 1500 participants from 13 countries (including China, Russia, the

² Providing an overview on the respective state of discussion *Barry/Rehel*, Lies, Damn Lies, and Negotiation: An Interdisciplinary Analysis of the Nature and Consequences of Deception at the Bargaining Table, in: *Ayoko/Jehn/Ashkanasy* (eds.), Handbook of Research in Conflict Management, 2014, p. 343 et seqq.

³ *DePaulo et al.*, Lying in Everyday Life, *Journal of Personality and Social Psychology* 70 (1996), 979, 979 et seqq.

⁴ *Aquino/Becker*, Lying in negotiations: How individual and situational factors influence the use of neutralization strategies, *Journal of Organizational Behaviour* 26 (2005), 661, 670, with the study also focusing on lying about certain aspects; *Murnighan/Babcock/Thompson/Pullutla*: The Information Dilemma in Negotiations: Effects of Experience, Incentives, and Integrative Potential, *The International Journal of Conflict Management* 10 (1999), 313, 332. *Schweitzer/Croson*, Curtailing Deception: The Impact of Direct Questions on Lies and Omissions, *International Journal of Conflict Management* 10 (1999), 225, 225 et seqq. (the results of the first of two studies are based on self-assessments of the participants). *Crott/Scholz/Michels*, The Effect of Experience on Information Exchange and Cheating in an Asymmetrical Bargaining Situation in: *Brandstätter/Stocker-Kreichgauer* (eds.), *Group Decision Making*, 1982, p. 356. Similar results were also obtained in the course of a research colloquium at the University of Siegen, where negotiation simulations were undertaken.

USA and Germany), certain deceptive tactics in contract negotiations were not regarded as immoral by the surveyed groups (judges, lawyers, professional negotiators and students).⁵ As regards even more deceptive tactics, the results of the Siegen Study suggest that legal order should not sanction lying. That in this context, professional negotiators generally adopt a particularly generous attitude,⁶ is a further indication for the widespread practice of lies in business negotiations. This is in line with research results which reveal that people particularly resort to bluffing when they can justify the deception to themselves.⁷ The author's confidential conversations with professional negotiators, as well as relevant negotiation books confirm the presumption that deception in B2B negotiations is a widely used practice. The leading negotiation literature does not only elaborate many misleading tactics, but frequently views misleading tactics as a common practice and an indispensable skill of a good negotiator.⁸ Taken together, it can be concluded that certain deceptions are customary practice in business negotiations. This result is also evident, in so far as negotiations yield countless possibilities for bluffs, many of which promise considerable advantages with a relatively low risk of being detected. Hence, negotiators have to choose between truth and deception in each individual instance.

This paper examines the economic effects of deception in bilateral business contract negotiations.⁹ The subject is by no means novel. However, for the first time central legal economic approaches such as transaction costs, allocation efficiency etc. will be viewed in their entirety,¹⁰ and examined for their effects on lies in B2B contract negotiations. With regard to the application of economic effects to lies in contract negotiations, the above-mentioned own international study on lies in business negotiations (Siegen Study) suggests a distinction in terms of the respective object of deception (here referred to as "constellations"). The Siegen Study presents

⁵ The author conducted the "Siegen Study" in collaboration with Peter Krebs (University of Siegen). First results can be found in the article: *Jung*, Bluffing in business-to-business contract negotiations - The relation between moral philosophy, moral intuition, sense of unlawfulness and the law in the US and Germany, *Southern California Law Review* (2019) (forthcoming). A detailed analysis of the data will follow shortly. At the moment, the study is expanded and will cover even more scenarios.

⁶ The majority of German professional negotiators, for instance, consider seven of the (previously) nine examined scenarios to be morally acceptable, while the majority of German students rate only four of the (previously) nine scenarios as morally acceptable. The majority of German professional negotiators are in favour of legal consequences (the right of rescission in the specific case) in only one case (with 49% in favour of legal consequences in a second case). Among German students, the majority favours legal consequences in two cases (and 46.5% in a third case). Further results of the study will be discussed in greater detail as part of the individual constellations (see at VI.). Some initial results were also published in the following article: *Jung*, Bluffing in business-to-business contract negotiations - The relation between moral philosophy, moral intuition, sense of unlawfulness and the law in the US and Germany, *Southern California Law Review* (2019) (forthcoming). At the moment, the study is expanded and will cover even more relevant scenarios.

⁷ *Shalvi et al.*, Justified ethicality: Observing desired counterfactuals modifies ethical perceptions and behavior, *Organizational Behavior and Human Decision Processes* 115 (2011), 181, 181 et seqq.

⁸ See e.g. *Shell*, When Is It Legal to Lie in Negotiations, *Sloan Management Review* 32 (1991), 93, 93 ("Commercial negotiations seem to require a talent for deception."); *Guth*, *The Contract Negotiation Handbook*, 2008, p. iii. („In the context of negotiations, bluffing is a generally accepted business practice where pretense is used to imply that one's position is stronger, cleverer or more determined etc., than one's position really is."); *Lakhani*, The truth about lying as a negotiation tactic: Where business, ethics, and law collide ... or do they?, *ADR Bulletin* 9 (2007), 133, 138 ("However, reality presents another story, where deception is sometimes permissible, sometimes necessary, and sometimes expected.").

⁹ Negotiations between businesses and consumers are not discussed in this paper.

¹⁰ Previous studies have been devoted to individual constellations, large case groups or dealt with individual economic effects.

that, in view of their sense of morality¹¹ and sense of unlawfulness (feeling as to what the law should be like),¹² people clearly differentiate between the subject matter that a negotiator has lied about (e.g. price, performance, offers from other providers, availability of products).¹³ As for the sense of unlawfulness, the preliminary results of the study even indicate that, considering most deceptions, stable majorities in favour or against legal consequences are found across all groups and country boundaries.¹⁴ This article takes up this differentiation on the basis of the individual constellations (i.e. objects of lies) and examines whether in this respect differences also arise concerning the legal economic analysis.

The aim of this article is to explore whether and, if so, which conclusions the economic analysis of this phenomenon implies for legislators. The baseline for the economic analysis¹⁵ is a legal situation in which lies are not forbidden, i.e. not legally sanctioned. Factually, there is indeed no such legal system in the world. However, for a prohibition liberally oriented legal systems presuppose a justification, which is why a situation with no prohibition is considered an adequate starting point to examine the reasonableness of legal prohibitions. The alternative to this approach would be the status quo baseline.¹⁶ Yet, this would hardly be amenable in view of the substantial divergences between national legal systems. Hence, this paper adopts “no legal consequences” as the baseline scenario. The analysis will focus on the economic effects that a prohibition of certain deceptions in contract negotiations would have. Thus, the analysis intends to provide indications as to whether a prohibition is generally reasonable or only economically viable for certain constellations of lies. Non-economic arguments that may justify a ban (e.g. moral aspects) are not addressed in this paper. The absence of an economic justification for a prohibition to sanction deceptions in certain constellations is thus not (yet) a recommendation to waive such a prohibition altogether.

The analysis follows a uniform understanding of "lie". Accordingly, a lie is given when an intentionally false statement is made which does not correspond with the actual situation and in which the deceiver also deliberately intended to deceive the opposite party.¹⁷ For this reason,

¹¹ On the importance of moral intuition *Nyberg*, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life*, 1993, p. 203.

¹² The term “sense of justice” is a synonym, but could also be understood in a broader sense. At least German literature distinguishes different forms of the sense of justice (“Rechtsgefühl”). Cf. e.g. *Riezler*, *Das Rechtsgefühl. Rechtspsychologische Betrachtungen*, 1946, p. 7 et seqq. and *Kaufmann*, *Rechtsgefühl, Verrechtlichung und Wandel des Rechts* in: *Lampe* (eds.), *Jahrbuch für Rechtssoziologie und Rechtstheorie*, 1985, pp. 185-199 (especially fn. 4). The Siegen Study investigates people’s sense of how the law should be, on this occasion more specifically people’s belief regarding the question whether legal consequences should be ordered or not. This then reveals their “sense of unlawfulness” since there are only legal consequences for unlawful behavior.

¹³ Further results of the study will be discussed in greater detail as part of the individual constellations (see at VI.).

¹⁴ If, for example, a seller deceives about the subject matter of the contract, all groups (judges, lawyers, professional negotiators, student judges, lawyers, professional negotiators, students) of all countries (USA, Germany, China, Russia, England, Ireland, Austria, Spain, Argentina, Italy, Poland, Ukraine and Turkey) agree that the deceived party should be able to challenge the contract. According to the sense of unlawfulness of all participants, the legal system should provide for legal consequences in such cases. More details are provided in the context of the individual constellations (see at VI.).

¹⁵ On this see at IV.1..

¹⁶ With regard to legislative impact assessments, in general the status quo is adopted as the "baseline scenario" (no policy change scenario), see e.g. European Commission, *Guideline on impact assessment*, 2009, p. 24 et seq.

¹⁷ Giving a corresponding definition *Bok*, *Lying – Moral Choice in Public and Private Life*, 1999, p. 13 et seq. *Nyberg*, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life*, 1993, p. 50, defines lies as follows: “To sum up, then, we can say that lying means making a statement (not too vague) you want somebody to believe,

this paper only considers intentional lies. Negligent deceptions are not included.¹⁸ The terms "lie", "deception", "misrepresentation" and "bluff" shall also be used synonymously.¹⁹ Since this article examines the effects of deception on business negotiations, it will only consider cases where the lie caused an error on the part of the person who was deceived and where this error was one of the reasons for concluding the contract or the specific content, i.e. where causality is given.

II. State of discussion on the economic assessment of lies in B2B contract negotiations

The general negotiation literature extensively explores lies in contract negotiations. In this respect, countless (at least 38) different tactics and techniques that are based on deceptions of the negotiating partner are debated.²⁰ In this context, in many cases deceptive tactics are regarded as an accepted and/or necessary business practice or important skill required of a successful negotiator.²¹ Yet, the relevant literature focuses on tactical and strategic aspects of lies and not on economic effects. Another research field are the circumstances under which people deceive and the conditions under which they speak the truth.²² Beyond that, there are numerous publications on ethical and legal aspects of deceptions.²³ While this extensive stock of literature does

even though you don't (completely) believe it yourself, when the other person has a right to expect you mean what you say".

¹⁸ There are more incentives to deceive if, even in the event of disclosure, the other side cannot clearly recognize whether the liar has deceived intentionally or negligently. *Cramton/Dees*, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, *Business Ethics Quarterly* 4 (1993), 359, 373.

¹⁹ In contrast, moral philosophy often differentiates: The lie is generally understood more narrowly than the deception. The term "bluff" is often used in literature to indicate a less serious misrepresentation in relation to lies and deceptions.

²⁰ *Krebs/Jung*, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 471 et seqq. (topic list: Irreführungen). In the following, the 38 tactics and techniques are listed: Distracting maneuver, all I've got, ambiguous authority, argumentative exaggerations, bait and switch, better offer, biased choice, big pot, bluff, bogey, brer rabbit, budget limit, cheap talk, deliberate error, disinformation, faking, false deadline, foggy recall, funny money, information overload, empty promise, last chance, ambiguous formulation, missing person maneuver, padding, phony facts, posturing, pseudo misunderstandings, red herring, apparent connectedness, scrambled eggs, similar-to-me tactic, snow job, tactic of the small quantity, trivializing, presenting a false legal view, limiting options, interjection.

²¹ See references in footnote 8.

²² Studies for example suggest that the use of tactics based on deception depends on how respondents evaluate these tactics ethically. Cf. *Lewicki/Robinson*, Ethical and unethical bargaining tactics: An empirical study, *Journal of Business Ethics* 17 (1998), 665, 669. *Banas/Parks*, Lambs among Lions? The Impact of Ethical Ideology on Negotiation Behaviors and Outcomes, *International Negotiation* 7 (2002), 235, 251 et seq. (concerning *false promises*, misrepresentation and misuse of information). There are e.g. also differences according to gender, nationality, ethnic origin, level of education, religious beliefs, work experience and personal attitudes to negotiation. Cf. among others *Lewicki/Robinson*, Ethical and unethical bargaining tactics: An empirical study, *Journal of Business Ethics* 17 (1998), 655, 679 (on nationality); *Maier/Lavrakas*, Lying Behavior and Evaluation of Lies, *Perceptual and Motor Skills* 42 (1976), 575, XXX (educational level and religious attitude).

²³ Often also the relationship between morality and law is discussed. See *Alexander/Sherwin*, Deception in Morality and Law, *Law and Philosophy* 22 (2003), 393, 393 et seqq. Also generally on the topic of morality/ethics and law in contract negotiations *Allhoff*, Business Bluffing Reconsidered, *Journal of Business Ethics* 45 (2003) 283, 283 et seqq.; *Adler*, Negotiating with Liars, *MIT Sloan Management Review* 48 (2007), 69, 69 et seqq.; *Carson/Wokutch/Murmann*, Bluffing in labor negotiations: Legal and ethical issues, *Journal of Business Ethics* 1 (1982), 13, 13 et seqq.; *Guernsey*, Truthfulness in Negotiation, *University of Richmond Law Review* 17 (1982), 99, 99 et seqq. (on professional model rules); *Lawrance*, Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates, *Ohio State Journal on Dispute Resolution* 29 (2014), 35, 35 et seqq.; *Dahl*, Ethics on the Table: Stretching the Truth in Negotiations, *The Review of Litigation* 173 (1988-1989), 173, 173 et seqq.; *Geoffrey*, The Use of Lies in Negotiation, *Ohio State Law Journal* 48 (1987), 1, 1 et seqq. On ethics and law according to Cicero *Backhaus* in: *FS Laufs*, *Ethik und*

not address the economic implications of lies, it allows to gain a comprehensive understanding on how, when, and why deception occurs in negotiations and which regulations are applicable.

Lies are also examined from an economic angle, in particular as to whether certain lies should be admissible or not.²⁴ In this context, occasionally the term “optimal dishonesty” appears.²⁵ A larger part of this literature is initially concerned with the distinction between duties of disclosure and the right to remain silent. The contributions often do not address deceptions directly. However, the statements given there provide a basis for the discussion as to whether lies are necessary in order to protect the right to remain silent.²⁶ The discussion is very differentiated, and is above all most interesting because it concerns the advantages of lies, which are otherwise rarely discussed. Additional possible advantages are then occasionally addressed with regard to anti-abuse lies, paternalistic lies and truth-revealing lies.²⁷ In this respect, however, the debate circles around very special constellations and can only be transferred to B2B contract negotiations to a limited extent.

Otherwise, in most cases the negative aspects of lies are discussed. In this context, in particular the transaction cost theory, cheapest cost avoider etc. are applied.²⁸ Furthermore, the (negative) effects of lies on the truth signal and trust are discussed.²⁹ However, as of yet, the effects of lies on the BATNA (best alternative to a negotiated agreement)³⁰ and the ZOPA (zone of possible agreement)³¹ have received little to no attention, though these serve as key indicators of bar-

Recht in Cicero, de officiis 3.12.50 ff., p. 3 et seqq.; from a moral/ethical perspective Carr, Is Business Bluffing Ethical?, Harvard Business Review (1968), 143, 143 et seqq.; Carson, Second Thoughts About Bluffing, Business Ethics Quarterly 3 (1993), 317, 317 et seqq.; Cramton/Dees, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, Business Ethics Quarterly 4 (1993), 359, 359 et seqq. (with a short section on legal institutions); Dees/Cramton, Shrewd Bargaining on the Moral Frontier: Toward a Theory of Morality In Practice, Business Ethics Quarterly 1 (1991), 135, 135 et seqq. (law as „moral baseline“).

²⁴ Levmore, A theory of deception, Texas Law Review 85 (2007), 1359, 1366: “it is the fact that deception is sometimes acceptable and sometimes not that makes the subject interesting.”

²⁵ Cf. among others Levmore, Securities and Secrets: Insider Trading and the Law of Contracts, Virginia Law Review 68 (1982), 117, 137; *id.*, A Theory of Deception, Texas Law Review 85 (2007), 1359, 1369; Fleischer, Informationsasymmetrie im Vertragsrecht, 2001, p. 261 et seqq. (rejecting this idea). The present paper does not aim at determining the economic optimum of lies in contract negotiations. Hence, the term is not adopted hereinafter.

²⁶ For example, taken up by Porat/Yadlin, A Welfarist Perspective on Lies, Indiana Law Journal 91 (2016), 617; 625 et seqq.; Levmore, Securities and Secrets: Insider Trading and the Law of Contracts, Virginia Law Review 68 (1982), 117, 134 et seqq. (especially ab p. 137); Fleischer, Informationsasymmetrie im Vertragsrecht, 2001, p. 261 et seqq.

²⁷ Fundamentally on this Porat/Yadlin, A Welfarist Perspective on Lies, Indiana Law Journal 91 (2016), 617, 631 et seqq.

²⁸ Cf. e.g. Posner, Economic Analysis of Law, 2014, p. 122.

²⁹ So e.g. Porat/Yadlin, A Welfarist Perspective on Lies, Indiana Law Journal 91 (2016), 617, 624 (in general for instance from p. 631 onwards applied concretely).

³⁰ The own BATNA is consulted to determine whether the concrete, negotiated contract is relatively reasonable in comparison to other options for action. The importance of negotiation alternatives was already fundamentally emphasized in 1950 by Nash, The Bargaining Problem, Econometrica 18 (1950), 155, 155 et seqq. The term “BATNA” and the significance of negotiation alternatives were mainly developed by Fisher/Ury (Fisher/Ury, Getting to Yes, 1981; new edition with the participation of Bruce Patton). On this see also Jung/Krebs, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 78 et seqq. (keyword: BATNA).

³¹ ZOPA stands for bargaining range. Within this zone, the contract is economically reasonable for both sides. In 1982 Howard Raiffa coined ZOPA as a basic term in negotiations. Raiffa, The Art and Science of Negotiation, 1982. Also on the ZOPA Jung/Krebs, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 427 et seq. (keyword: ZOPA).

gaining power and the rationally possible area of agreement. That is why this article will elaborate on this matter in greater detail (see at III.). Thoughts on welfare economics,³² especially with regard to allocation efficiency, are discussed.³³ On the whole, it can be asserted that legal economic approaches are examined very differentiated. The contributions usually focus on one approach (or fewer approaches) and analyse them in depth.

This article intends to comprehensively address the legal-economic considerations. Hence, he already discussed approaches will be supplemented by reflections on the BATNA (best alternative to a negotiated agreement) and the ZOPA (zone of possible agreement). Besides, based on evolutionary biological findings, it will be explored whether lies contribute to strengthening the economically weaker party and if this result is economically desirable (see at III.).

III. Legal economic approaches

The following considerations are generally oriented on the homo oeconomicus, because business contract negotiations (B2B) are generally characterised a high degree of rationality. National legislators likewise generally expect rationality of the parties to a B2B negotiation. For example, in Europe even for the offence of misleading in fair trading law the notion of an fictitious, economically reasonable average consumer, applies.³⁴ Therefore, the classical economic approaches basing on the homo oeconomicus are applicable. This article will not examine shifts caused by psychological findings or behavioural economics.

The legal-economic approaches with which constellations are analysed are presented concisely hereafter. This is achieved by presenting a concise overview of the argumentation structure without delving deeper into potential differentiations. Some of these approaches take an abstract view towards lies. Thus, they indicate whether lies result in negative or positive effects in general. Wherever practicable, insights on an economically expedient formulation of possible legal consequences will be drawn from these approaches.

Transaction costs: In view of negotiations, lies possibly substantially increase transaction costs.³⁵ To this extent, a distinction must be drawn between the following types of transaction costs:

- i. Transaction costs associated with the "invention" and telling of the lie (deceiver), e.g. the costs of the manipulation of documents;
- ii. Transaction costs associated to the fear of being lied to by the other negotiator (potentially deceived). In this respect, costs arise from preventive measures and the investigation of possible deceptions.

³² Even taking this aspect up in the title *Porat/Yadlin*, A Welfarist Perspective on Lies, *Indiana Law Journal* 91 (2016), 617, 617 et seqq.

³³ See only *Kronman*, Mistake, Disclosure, Information, and the Law of Contracts, *Journal of Legal Studies* 1 (1978), 1, 11 et seq. (with regard to information duties). Taking this up *Levmore*, Securities and Secrets: Insider Trading and the Law of Contracts, *Virginia Law Review* 68 (1982), 117, 135.

³⁴ Cf. recital 18 Directive 2005/29/EG („average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors“).

³⁵ Fundamentally on transaction costs: *Williamson*, The Economic Institutions of Capitalism, 1985, especially p. 15 et seqq.; *id.*, Transaction Costs Economics, in: *Schmalensee/Willig* (eds.), *Handbook of Industrial Organization* 1, 1989, p. 135–182.

- iii. Transaction costs associated with the detection of deception (both parties). If a lie is actually exposed, legal costs (e.g. court costs, lawyers' fees, costs of securing evidence) may be incurred.

It should be borne in mind that a proportion of transaction costs is not only incurred in the event of actual deception, but already where one party fears being misled (see (ii)). Although this article presumes that lies become causal, a glance at the transaction cost theory demonstrates that transaction costs are incurred even if the deception has not been successful (i.e. the deception does not become causal, see i.). In theory, it could therefore also be pondered to provide for legal consequences even in the event that misleading information does not become causal. Such regulations would consequently be sanctioning and would serve as a means of deterrence.³⁶ But, at any rate, a closer look at the transaction costs affirms that deceptions that have become causal and have been uncovered result in particularly high transaction costs.

Cheapest-cost avoider: The concept deals with the question which involved party can avoid certain costs more easily. Where deliberate deception occurs, the potential liar is the cheapest cost avoider as regards the truth of the information. The liar can most easily avoid the error of the deceiver. This even applies if the deceiver were able to detect the deception under certain circumstances.³⁷ Hence, the concept of the cheapest cost avoider appears pertinent for a possible legal design. For the concept suggests that, in the case of deliberate deception, it is irrelevant whether the deceived person “fell for” the deception in a negligent (or grossly negligent) manner. This indicates the basic idea that “intent beats negligence”. This article exclusively analyses deliberate deception. However, at this juncture, no statement is reached as to how the legislator is supposed to handle negligent misrepresentations. Another entirely different question is also whether the liar is also the cheapest cost avoider with respect to the preparation of the information,³⁸ which is likewise not to be answered hereafter.

Welfare economics in the sense of allocation efficiency: With regard to allocation efficiency, correct information is essential for markets. In general, markets serve to distribute goods in such a way as to achieve an efficient welfare outcome. To achieve a high level of allocation efficiency, markets require the best available information in the fastest time possible. This is the only way to guarantee that the markets can receive, process and react to the signals that contain this information.³⁹

At the individual level, rational negotiators orient their negotiations to their personal BATNA (best alternative to a negotiated agreement) when making a decision for or against a specific contract.⁴⁰ In purely rational negotiations, the relationship between the BATNAs of the two negotiating partners is decisive as to whether there is a zone of possible agreement (ZOPA)⁴¹

³⁶ On the deterrent nature of rules with regard to deception: *Levmore*, A Theory of Deception, Texas Law Review 85 (2007), 1359, 1364 et seqq.

³⁷ Cf. *Posner*, Economic Analysis of Law, 2014, p. 122.

³⁸ With regard to information obligations, however, such costs must also be taken into account. See *Kronman*, Journal of Legal Studies 1 (1978), 1, 16.

³⁹ *Kronman*, Mistake, Disclosure, Information, and the Law of Contracts, Journal of Legal Studies 1 (1978), 1, 11 et seq. Taking this up *Levmore*, Securities and Secrets: Insider Trading and the Law of Contracts, Virginia Law Review 68 (1982), 117, 135.

⁴⁰ See evidence in footnote 30.

⁴¹ See evidence in footnote 31.

for the concrete negotiation. If the BATNAs of both sides do not overlap, there is no zone of possible agreement (NOPA), and the parties should - from a rational point of view - not conclude the negotiated agreement. However, if the BATNAs of both sides overlap, there is a settlement zone (ZOPA). In this respect, the ZOPA presents the possible rational agreement zone within which there is no preferable alternative to concluding a contract for both parties. This implies that each conclusion of a contract within ZOPA is economically reasonable for both parties in relation to their BATNA (see figure).⁴²

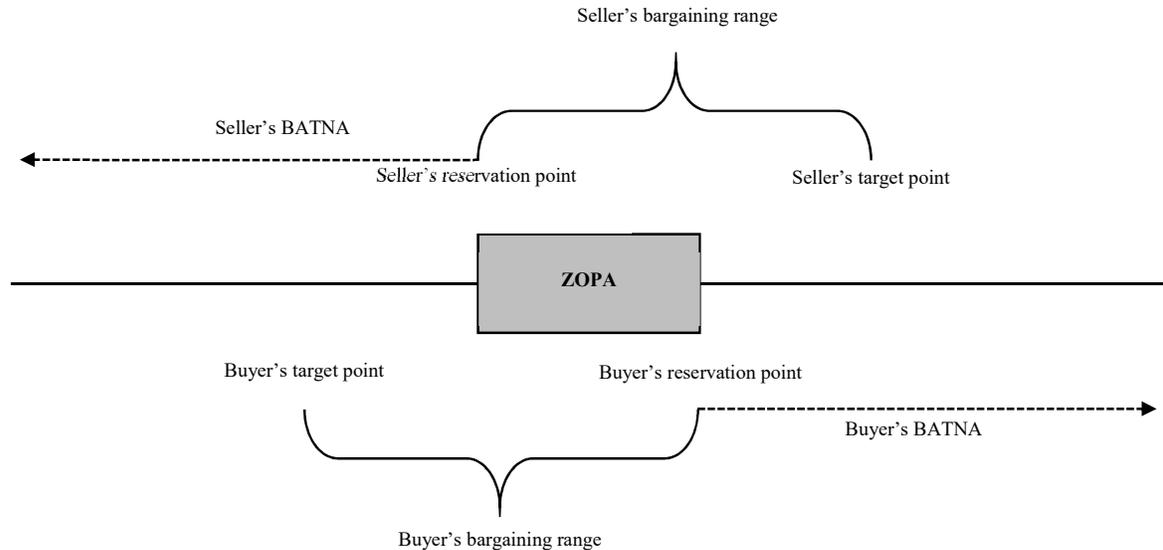


Fig. 1: *BATNA and ZOPA*⁴³

Deceptions can affect BATNA and ZOPA in different ways:

- One option is that certain deceptions have no effect on the BATNAs of both parties and thus also leave ZOPA/NOPA unaltered. They rather affect questions of distribution within the ZOPA, if there is one.⁴⁴ In these cases, the deception aims at a better distribution for the own side at a given BATNA. Such questions thus can have distributive implications. Yet, a contract is concluded that remains economically sensible for both parties.
- Besides there are deceptions, which can have influence the BATNA and therewith also ZOPA/NOPA in various ways. In this respect, it is decisive, for example, whether the deception is aimed at the own or the other parties' BATNA. This in turn can cause a wide variety of false assumptions concerning the ZOPA/NOPA. Bluffs, for example, can mislead the parties into assuming that the ZOPA is smaller or larger than it truly is.

⁴² *Wheeler*, *Negotiation Analysis: An Introduction*, Harvard Business School Background (2000), 1, 3 (“Any price between those two figures obviously leaves both parties better off than they would be if they fail to make a deal.”).

⁴³ Source: *Jung/Krebs*, *Die Vertragsverhandlung – taktische, strategische und rechtliche Elemente*, 2016, p. 80 (Figure 5 reproduced).

⁴⁴ If there is no ZOPA (i.e. if there is a NOPA), presuming rational negotiations, such deceptions have no influence on the negotiation outcome.

The explanations on BATNA and ZOPA may provide indications on legal consequences that are economically sensible: Deceptions that result in an agreement outside the ZOPA or an agreement in the absence of the ZOPA result in substantial welfare economic losses. In these instances, the legislator could envisage granting a rescission right which would render the contract null and void *ex tunc*.⁴⁵ Conversely, lies which only influence the distribution of the negotiation profit, i.e. lead to an agreement within ZOPA, should not necessarily entitle the parties to rescind the contract. In spite of the lie, these contracts are economically sensible for both parties. In this respect, for the legal system the question could arise as to whether it should interfere with the transfer of wealth to the deceiver. In this respect, claims for damages could be considered. Prerequisite for this would be that a damage, in this case a specific transfer of assets to the deceiver, is provable.

Truth signal and trust: Deception can cause a decline in the confidence in the liar and other market participants on account of the diluted truth signal.⁴⁶ Loss of trust can, in turn, entail higher transaction costs (e.g. use of resources for trust building measures and the verification of information). A lack of trust can even lead to the consequence that economically sensible contracts are not concluded. However, as with transaction costs, such negative effects do not only occur when deceptions become causal for the conclusion of the contract, but also in the event of unsuccessful bluffs. Thus, a loss of trust can also occur if the deception is exposed prior to the contract conclusion (and is therefore not causal).

Spillover effect: Closely linked to the dilution of the truth signal is also the spillover effect. For if a negotiator lies in a negotiation, often a spillover effect is feared. A spillover effect means in this context that other negotiators might be induced to also lie.⁴⁷ In this respect, a distinction can also be drawn between the different positions of the deceiver. If, for example, the provider of a service lies, this deception can prompt the deceived buyer to deceive as well. In the context of a business relationship it could therefore be argued that a lie can increase the probability of a "counter lie", which again results in increased transaction costs.

Beyond that, a spillover effect on other market participants⁴⁸ also has to be considered, i.e. on persons outside the scope of the actual negotiation. If individual market participants are lying, this can result in others also bluffing,⁴⁹ at least if they realise that the liar is getting away with it unsanctioned or even profits from his/her deception. Just think about the following scenario: If the provider of a service successfully deceives and other providers discover this, they might

⁴⁵ On the non-enforcement of contracts in the event of welfare losses *Shavell*, *Foundations of Economic Analysis of Law*, 2004, p. 321.

⁴⁶ On the truth signal, see *Porat/Yadlin*, *A Welfarist Perspective on Lies*, *Indiana Law Journal* 91 (2016), 617, 631 et seqq.

⁴⁷ *Tietzel*, *Zur ökonomischen Theorie des Betrügens und des Fälschens*, in: *Jahrbücher für Nationalökonomie und Statistik* 204/1 (1988), 17, 31 (who does not name it that way, but discusses the phenomenon.); *Porat/Yadlin*, *A Welfarist Perspective on Lies*, *Indiana Law Journal* 91 (2016), 617, 663 discuss possible spillover effects with view to their theory.

⁴⁸ Giving an overview of the influence of unethical behaviour on other persons *Gino/Ayal/Ariely*, *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, *Psychological Science* 20 (2009), 393, 393 et seqq.

⁴⁹ Calling this argument *Tietzel*, *Zur ökonomischen Theorie des Betrügens und des Fälschens*, in: *Jahrbücher für Nationalökonomie und Statistik* 204/1 (1988), 17, 31.

be more inclined to also bluff to their clients, since for them the appeal of deception has increased as a result of the new cost-benefit evaluation. However, the spillover effect could in theory also affect other market participants (e.g. consumers): If the supplier carries out a supplier-specific deception, the customer cannot duplicate this exactly. However, he/she could infer that other deceptive practices might also be worthwhile.

However, in literature, up to now, it has not been intensively explored whether the spillover effect of deceptions is confined to lies of "the same kind", or whether deception about one particular aspect causes more frequent deceptions on other aspects.

As with transaction costs, the dilution of the truth signal and the loss of confidence not only occur where deceptions have become causal, but also in cases of unsuccessful deceptions which are discovered before the conclusion of the contract.

Lies protecting the right to remain silent: As already noted for the state of discussion, lies are primarily debated with regard to protecting the right to remain silent.⁵⁰ However, the focus of this widely differentiated debate is not the right to lie, but the economically justified rejection of obligations to inform and thus the establishment of a right to remain silent. In this discussion, the right to lie appears more as a consequence of the absence of an obligation to inform (right to remain silent), more specifically as a measure to effectively ensure the implementation of the right to remain silent. With regard to obligations to inform and the right to remain silent, a fundamental distinction is made between how information is obtained (casually acquired information/deliberately acquired information)⁵¹ and what information is involved (productive information/redistributive information or socially valuable information/private valuable information)⁵². This question will not be elaborated here (and will hence also not be applied to the individual constellations). The result of such an analysis would be, that negotiators are allowed to remain silent with regard to many aspects. This is also the rule in all legal systems. In contrast, both, obligations to inform and, where applicable, the right to lie, constitute exceptions.

The conclusions of the distinction between the obligation to provide information and the right to remain silent underlie the concept of the "right to lie". This concept protects the freedom to remain silent. The underlying idea is that there is information which a negotiator is not obliged to disclose. Following this argumentation, this protection cannot be achieved by a right to remain silent alone. It is argued that the right to remain silent is not sufficient to protect certain information in the case of skilful questioning by the other party. This is because silence or a refusal to reply often gives a hint on what the refused answer is.⁵³ Against the assumption that

⁵⁰ Cf. *Kronman*, Mistake, Disclosure, Information, and the Law of Contracts, *Journal of Legal Studies* 1 (1978), 1, 1 et seqq.; *Cooter/Ulen*, *Law and Economics*, 6th edition (2016), p. 357; *Shavell*, Acquisition and Disclosure of Information Prior to Sale, *The RAND Journal of Economics* 25 (1994), 20, 20 et seqq.; also *Shavell*, *Foundations of Economic Analysis of Law*, 2004, p. 334.

⁵¹ *Kronman*, Mistake, Disclosure, Information, and the Law of Contracts, *Journal of Legal Studies* 1 (1978), 1, 1 et seqq.

⁵² *Cooter/Ulen*, *Law and Economics*, 6th edition (2016), p. 357; *Shavell*, Acquisition and Disclosure of Information Prior to Sale, *The RAND Journal of Economics* 25 (1994), 20, 20 et seqq.; also *Shavell*, *Foundations of Economic Analysis of Law*, 2004, p. 334.

⁵³ See e.g. *Porat/Yadlin*, A Welfarist Perspective on Lies, *Indiana Law Journal* 91 (2016), 617, 627 et seq.; based on J.L. Mackie *Nyberg*, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life*, 1993, p. 179 elaborates that a question can be intrusive and that a lie might be necessary to defend one's privacy.

silence has no validity, it is thus reasoned that under certain circumstances silence has expressive value. In the literature, this question is discussed primarily with regard to oil deposits under a property: If, for example, the seller of a property asks the potential buyer whether he knows of any reasons why the property should be worth more than the price the potential buyer offers for it,⁵⁴ the seller would usually be suspicious if the potential buyer refused the statement instead of negating it. He would probably conclude from this that the potential buyer has grounds for believing that the value of the property is higher (literature examples concern possible oil or gold deposits).⁵⁵ Consequently, not only questions, but any kind of request for information can exert such pressure. The problem becomes more acute the more concrete information is requested. As a rule, it is still possible to evade wide, undetermined questions without arousing suspicion on the part of the other side. This is however, virtually impossible with precise questions, which is why a certain pressure to lie arises in order to protect the information. Simultaneously, this consideration demonstrates that according to this approach, a lie is only justified if there is an informational demand. Unprovoked deceptions are not initially justified by this line of argumentation. However, under certain circumstances a conclusion may also be drawn from a silence without any prior request for information.⁵⁶ Therefore, it could be considered whether the legislator should differentiate between "causeless" and "induced" lies. In individual cases, however, not only this differentiation would prove difficult, but there would also be the risk of the emergence of negotiation strategies that circumvent this differentiation (e.g. confirmations that all information given was disclosed at the request and demand of the other party). That is why this regulatory approach is rejected here.

Concerning the disclosure of valuable information, literature has already reached a high degree of differentiation. It is stated that not all information can be obtained in all situations and not entirely, if there is a right to remain silent.⁵⁷ That is to be agreed with. If the negotiator reacts to the question of oil deposits under the property to be sold with silence or a refusal of the answer, the provider can merely deduce that the questioned party probably has some information about a possible oil deposit. However, s/he can neither predict how likely an oil deposit is, nor how much recoverable oil there may be under the property, nor how extensive the production will be. Questions can therefore only partially provide information on more complex

⁵⁴ Formulating the corresponding question *Levmore*, *Securities and Secrets: Insider Trading and the Law of Contracts*, *Virginia Law Review* 68 (1982), 117, 139.

⁵⁵ Cf. *Porat/Yadlin*, *A Welfarist Perspective on Lies*, *Indiana Law Journal* 91 (2016), 617, 628. *Levmore*, *Securities and Secrets: Insider Trading and the Law of Contracts*, *Virginia Law Review* 68 (1982), 117, 137 („Silence, however, will protect the buyer only until the seller learns to ask questions that require the buyer either to reveal the information in question or to be affirmatively dishonest“). Differing opinion *Borden*, *Mistake and Disclosure in a Model of Two-Sided Informational Inputs*, *Missouri Law Review* 73 (2008), 667, 667 et seqq. who instead pleads for a “minimal truthful disclosure rule”.

⁵⁶ Example: If a supplier demands an excessive price and the potential buyer protests, but without indicating that there are other suppliers offering it at a lower price, the supplier could conclude that the buyer is not aware of these options and therefore does not know his/her BATNA well. Therefore, if the buyer wants to protect the information that s/he is not well informed about his/her BATNA, s/he could bluff and simply claim that other suppliers have better offers.

⁵⁷ *Borden*, *Mistake and Disclosure in a Model of Two-Sided Informational Inputs*, *Missouri Law Review* 73 (2008), 667, 689 et seqq. describes possible reactions of the provider (two-sided model) and especially situations where the provider does not acquire the full information. In this respect, the author differentiates between „deep“ and „shallow“ secrets.

aspects (sometimes anti-abuse lies are treated as a separate category⁵⁸). With regard to the incentive structure, it is argued here that while a right to lie provides stronger incentives to obtain certain information, a sole right to remain silent does not necessarily remove all incentives to generate certain information. This can be supported by the previously substantiated argument that questioning regularly only provides partial information.

As a whole, however, this suggests that even upon disclosure of partial information only, the request for information causes a shift in assets (as compared to a right to lie). The possibility of enquiring or requesting information gives the questioner the opportunity to generate a kind of “windfall profit”. As the questioner can obtain the information or part of the information and thereby an advantage by skilful questioning, for which s/he herself/himself, has not spent any effort on.⁵⁹ This raises the question of whether this shift in assets is economically sensible. This finding is generally valid, i.e. insofar no differentiation into constellations is required.

Lies that cause a Pareto-improvement: Considering lies, it could be argued that the impact of deception on both parties is decisive. If a lie leads to both parties achieving a better position, or at least one party achieving a better position and the other party not being put in a worse position in the process, one could speak of a lie causing a Pareto-improvement. With regard to the latter, so-called "paternalistic" lies⁶⁰ and "Pareto white lies"⁶¹ are debated. However, the scope of paternalistic lies in B2B negotiations is much narrower than in other areas and Pareto white lies are also rather the exception.

In this context, the hypothetical bargain theory and the theory of “implied consent” can also be invoked. This line of thought argues that the deceived party would hypothetically have given its consent to the lie *ex ante*.⁶² This then signals that the lie results in a welfare gain and is at least *ex ante* deemed Pareto efficient.⁶³ In this context it has in turn to be considered that deception can also form a kind of business practice⁶⁴ and that the parties have thus implicitly (*ex ante*) agreed on certain "rules of the game". In this respect, it is reasoned that over time, groups develop such business practices which are most successful for the parties involved.⁶⁵ Thus, if it

⁵⁸ Cf. *Porat/Yadlin*, A Welfarist Perspective on Lies, *Indiana Law Journal* 91 (2016), 617, 633 et seq. In such cases, the replying party wishes to protect himself/herself against discrimination through deception. A „right to lie“ is then justified by the fact that deception is the most effective way to protect oneself from discrimination.

⁵⁹ *Levmore*, Securities and Secrets: Insider Trading and the Law of Contracts, *Virginia Law Review* 68 (1982), 117, 142 (who therefore also compares the situation to expropriation).

⁶⁰ In detail on this form of lying and its economic effects *Porat/Yadlin*, A Welfarist Perspective on Lies, *Indiana Law Journal* 91 (2016), 617, 656 et seqq. On this form of lies *Bok*, *Lying – Moral Choice in Public and Private Life*, 1999, p. 203 et seqq.

⁶¹ *Erat/Gneezy*, White Lies, *Management Science* 58 (2012), 723, 724 use the term and explore how often participants use Pareto white lies.

⁶² *Levmore*, A Theory of Deception, *Texas Law Review* 85 (2007), 1359, 1366. *Coleman*, A Bargaining Theory Approach to Default and Disclosure Provisions in Contract Law, *Harvard Journal of Law & Public Policy* 12 (1989), 639, 648 explains with regard to default rules that the issue is not so much whether the parties actually agreed on this outcome, but rationality.

⁶³ *Levmore*, A Theory of Deception, *Texas Law Review* 85 (2007), 1359, 1366.

⁶⁴ With regard to the 2008 amendment to the German UWG (Unfair Competition Act), the legislator stated that the term "business practice"/"practices" is negatively connoted in Germany. Cf. BT-Drucks.16/10145, 20.8.2008, p. 20. Here, however, the term is used neutrally.

⁶⁵ *Epstein*, Customary Practices and the Law of Torts, in: *Newman* (eds.), *New Palgrave Dictionary of Economics and the Law*, 1998, p. 579.

can be established that certain deceptions are inherent in business practice, this could, according to the aforementioned hypothesis, indicate that the behaviour is efficient for the participants.

Structural favouring of the weaker party and diversity: Further, it can be questioned whether structurally, the weaker party (i.e. the side with less negotiating power) is more likely to deceive and also benefits more from lies than the stronger party (i.e. the side with more negotiating power). Even if there are, as of yet, no valid empirical results stating that structurally weaker parties are more likely to deceive and profit more from these lies, this hypothesis remains very plausible.⁶⁶ Therefore, the lawfulness of certain deceptions could be seen as a potential compensation for an imbalance. As a consequence, from a structural perspective more weaker players could remain in the market. This could contribute to a lower concentration of power and keep the market as a whole both more flexible and adaptable. The importance of adaptability is evident in crisis situations where a high degree of adaptability is required to overcome such crises. The latter hypothesis is supported by the theory of evolution. Therein it is assumed that deceptions both intra-species⁶⁷ and inter-species can serve the preservation of the species,⁶⁸ as deceptions allow a wider range of variation. This has a positive effect on the species, particularly in evolutionary crises, where intelligence⁶⁹ and adaptability become more valuable than mere strength.⁷⁰ Yet, this argumentation cannot justify all lies. If one were to follow the argumentation, a certain "room for deception" would be sufficient. For a narrower determination of this scope, i.e. which lies should be privileged, the argumentation provides no direct clues, which is why it cannot be applied concretely to the various constellations. It could, however, be reasonable to privilege lies concerning the own BATNA (better offer⁷¹ and cost price), i.e. those which do not concern the performance object. If there is an area of agreement (ZOPA), these kinds of lies only affect the possible redistribution within this zone. Moreover, corresponding deceptions are meant to affect the negotiating power, i.e. precisely the aspect where an imbalance is present.

Interim results: For the individual constellations (on this hereinafter), as a result, the following economic approaches are to be applied:

- Transaction costs

⁶⁶ On the fact that weaker primates have a stronger tendency to deceive *Byrne/Whiten*, Machiavellian intelligence: Social expertise and the evolution of intellect in monkeys, apes, and humans, 1988. On deceptions of weaker Kune Kune pigs soon Messerli Forschungsinstitut (<https://www.vetmeduni.ac.at/de/messerli/forschung/forschung-kognition/haustiere/clever-pig-lab/kune-kune-forschung/>).

⁶⁷ On intra-species deception *Jolly*, Primate communication, lies, and ideas, in: Lock/Peters (eds.), Handbook of human symbolic evolution, 1996, 167, 172 et seqq.; *Byrne/Whiten*, Cognitive Evolution in Primates: Evidence from Tactical Deception, Man, New Series, 27 (1992), 609 et seqq.. Generally on how animals and plants mid-lead *Stevens*, Cheats and Deceits, 2016, 1 et passim.

⁶⁸ *Searcy/Nowicki*, The evolution of animal communication: Reliability and deception in signalling systems, 2005, p. XXX (camouflage and mimicry). *Byrne/Whiten*, Cognitive Evolution in Primates: Evidence from Tactical Deception, Man, New Series, 27 (1992), 609, 624 link "selection pressure" and "Machiavellian intelligence, including deceptive aptitude".

⁶⁹ „the development of deception may be viewed as a cognitive milestone in any species" *Talwar/Crossman*, From Little White Lies to Filthy Liars: The Evolution of Honesty and Deception in Young Children, Advances in Child Development and Behavior (2011), 139, 144.

⁷⁰ *Sommer*, Lob der Lüge, 2016, p. 11 explains that intelligence has increased in the course of evolution precisely because humans have attempted to expose liars while simultaneously trying to lie better to others.

⁷¹ Cf. *Jung/Krebs*, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 89 (keyword: besseres Angebot).

- Welfare economics with special attention on the impact on BATNA and ZOPA
- Business practice (as an indicator)
- Truth signal and trust
- spillover effect
- (right to lie in order to protect the right to remain silent - Prohibition of lies as basis for the prevention of knowledge shifts)
- (structural favouring of the weaker party)

IV. Baseline scenario and comparison scenario

1. Baseline scenario

For the economic analysis of the constellations presented below (see at IV.), the baseline is a lack of legal sanctioning of lies in B2B contract negotiations to enable a comparative assessment of the economic persuasiveness of such a ban. Even without a ban, however, people would not lie all the time and not about everything. The probability of a person lying also precisely hinges on the cost-benefit ratio.⁷² In turn, this largely depends on the risk of disclosure⁷³ and possible negative consequences in the event of disclosure.⁷⁴ The risk of disclosure varies depending on the particular constellation.⁷⁵ The same applies to possible negative consequences.⁷⁶ To this extent, it above all depends on the reaction of the deceived person, as well as of persons who learn about the deception and of the market as a whole.⁷⁷ The deceived party even without any legal claims and rights has a wide repertoire of reaction possibilities at his/her disposal. This includes renegotiations, replacement of the deceiving negotiator, counter lies, alteration of the negotiation behaviour, compensation in follow-up transactions etc.⁷⁸ Especially in permanent business relationships and in interconnected economic communities, social sanctions of

⁷² On the fact that people tend to lie for their own benefit see also *Cramton/Dees*, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, *Business Ethics Quarterly* 4 (1993), 359, 376.

⁷³ On the influence of the possibility of detection see also *Cramton/Dees*, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, *Business Ethics Quarterly* 4 (1993), 359, 373. See also *Schweitzer*, Deception in Negotiations in: *Hoch/Kunreuther* (eds.), Wharton on making decisions, 2001, p. 191, who is also pointing out that the estimation of the probability might be biased.

⁷⁴ *Schweitzer*, Deception in Negotiations in: *Hoch/Kunreuther* (eds.), Wharton on making decisions, 2001, p. 192 (mentioning legal and reputation costs).

⁷⁵ *Tietzel*, Zur ökonomischen Theorie des Betrügens und des Fälschens, in: *Jahrbücher für Nationalökonomie und Statistik* 204/1 (1988), 17, 23 et seq. On information asymmetries and the higher incentives to deceive when they exist.

⁷⁶ See also *Schweitzer*, Deception in Negotiations in: *Hoch/Kunreuther* (eds.), Wharton on making decisions, 2001, p. 192 on one-off negotiations.

⁷⁷ *Tietzel*, Zur ökonomischen Theorie des Betrügens und des Fälschens, in: *Jahrbücher für Nationalökonomie und Statistik* 204/1 (1988), 17, 28 et seq. (“All aforementioned individual responses to fraud attempts have a behavioural regulating effect on all parties involved; they increase the cost of fraud to the fraudster, reduce indirect fraud costs to third parties and reduce search and information costs for potential victims of fraud.”; free translation of “Alle genannten individuellen Reaktionen auf Betrugsversuche wirken verhaltensregulierend auf alle Beteiligten; sie erhöhen die Kosten des Betrugs für den Betrüger, vermindern die indirekten Betrugskosten für Dritte und senken die Such- und Informationskosten für potentielle Betrugsopfer”).

⁷⁸ *Tietzel*, Zur ökonomischen Theorie des Betrügens und des Fälschens, in: *Jahrbücher für Nationalökonomie und Statistik* 204/1 (1988), 17, 28 et seq. identifies individual and collective response options (e.g. objection, outflow of customers, quality review by consumer protection organisations, exclusion from other jointly produced services).

this kind prove to be particularly severe. They are largely effective even in the event of a subsequent discovery. As a result, they are a deterrent to deception in that they shift the cost-benefit ratio to the detriment of lies.

Even where tactics prove promising and there is no prospect of disclosure and thus no threat of negative social consequences, there are people who would not lie or at least would not lie about numerous aspects. For studies reveal that potential liars also consider "costs" that can be described as "person-internal". Thus, the fact that people do not always deceive about everything is at any rate also due to the so-called "honesty norm"⁷⁹. People internalise certain norms, such as the honesty norm. In this case, lies often incur psychological "costs" (so-called "lying costs"),⁸⁰ which can for example be manifested in a more negative self-image.⁸¹ In the brain of liars in general among other things the amygdala is active.⁸² This provokes emotional stress and feelings like shame and guilt for deceptions.⁸³ These "lying costs" occur primarily where the deceiver cannot justify the lie to himself/herself.⁸⁴ In turn, this depends on the moral evaluation of the deception. Hence, lying costs particularly occur when a behaviour is deemed immoral. In view of the individual constellations, the findings of the Siegen Study are therefore also consulted to take the corresponding effects of lying costs into account.

2. Comparison scenario – enforcement of granted legal positions

The baseline scenario serves as a benchmark for the economic implications which a prohibition of certain deceptions would have in contract negotiations. This approach requires special attention on the expected enforcement of granted legal positions. To assess the effects of a ban, it is essential to ascertain to what extent it would be implemented in practice. Only if the prohibition is applied effectively, it will noticeably influence the cost-benefit ratio of deceptions and, due to the associated costs, reduce the extent of deceptions (and thus at least a portion of the negative economic consequences associated to lies). With respect to the enforcement of the obligation to tell the truth (i.e. a ban on lying), *Tietzel* states the following:

⁷⁹ Cf. e.g. *Pruckner/Sausgruber*, Honesty on the streets: a field study on newspaper purchasing, *Journal of the European Economic Association* 11 (2013), 661, 661 et seqq. on the "honesty norm" with regard to buying newspapers "where payments are not monitored".

⁸⁰ *Abeler/Becker/Falk*, Representative evidence on lying costs, *Journal of Public Economics* 113 (2014), 96, 96 et seqq.; cf. also *Schweitzer*, Deception in Negotiations in: *Hoch/Kunreuther* (eds.), Wharton on making decisions, 2001, p. 192.

⁸¹ *Mazar/Amir/Ariely*, The dishonesty of honest people: a theory of self-concept maintenance, *Journal of Marketing Research* 45 (2008), 633, 633 et seqq.

⁸² Besides the amygdala, the right anterior prefrontal cortex also plays an important role. *Abe et al.*, Deceiving Others: Distinct Neural Responses of the Prefrontal Cortex and Amygdala in Simple Fabrication and Deception with Social Interactions, *Journal of Cognitive Neuroscience* 19 (2007), 287, 287 et seqq. Constant lying causes the amygdala to be less active and therefore reduces the sense of guilt. XXX. The amygdala is also active in people who are lied to, i.e. victims of deception, cf. *Grèzes/Berthoz/Passingham*, Amygdala activation when one is the target of deceit: Did he lie to you or to someone else?, *NeuroImage* 30 (2006) 601, 601 et seqq.

⁸³ Calling negative feelings as the result of lies *Cramton/Dees*, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, *Business Ethics Quarterly* 4 (1993), 359, 375. See also *Schweitzer*, Deception in Negotiations in: *Hoch/Kunreuther* (eds.), Wharton on making decisions, 2001, p. 193.

⁸⁴ *Shalvi et al.*, Justified ethicality: Observing desired counterfactuals modifies ethical perceptions and behavior, *Organizational Behavior and Human Decision Processes* 115 (2011), 181, 181 et seqq.; see also *Schweitzer*, Deception in Negotiations in: *Hoch/Kunreuther* (eds.), Wharton on making decisions, 2001, p. 193.

*"Whatever one does: fraud is unlikely to be completely eradicated, nor would it be worth the effort; for since cost-benefit considerations also play a role here, the optimal containment of fraud will always be less than the maximum possible."*⁸⁵

First of all, it should be considered that the actual enforcement of a prohibition on lying depends on the concrete legal rule. At this point, the legal consequences of civil law known in most legal systems are taken into account, that is, the right to contest and to claim damages. Possible criminal sanctions are not considered. When rational behaviour of the deceiver (in the spirit of a *legal risk management*) is taken as a basis, the following tendency emerges: The more severe the sanctions, the less deception occurs in practice.

The deceived party can only enforce claims if it has the possibility to uncover the deception. The disclosure initially causes transaction costs (already discussed under III.). Whether the party will actually invest resources into the discovery of possible bluffs is likely to depend on the ratio of the costs for clarification as well as the further costs of the enforcement and the possible profits in case of a successful enforcement.⁸⁶ In any case, transaction costs arise that have to be sustained by either one or both sides and generally diminish welfare.

Discovery and evidence problems are the main difficulty in the enforcement of possible granted legal positions where contractual negotiations between companies involve lies.⁸⁷ Only for deceptions, which are recognised as such at all, the possibility of a judicial enforcement of corresponding legal positions is available. Lies concerning the subject matter of the contract and the contracting parties can regularly be proved and explained at more or less reasonable expenses. Particularly in view of deceptions outside the subject matter of the contract, however, this is often difficult for the belied party (on selected constellations see VI.). A litigation is therefore frequently linked to a high degree of uncertainty for the deceived party. This will in most cases deter the deceived party from pursuing possible claims and asserting his/her respective rights.

In this context, it should also be taken into account that there may also be errors in the process of the enforcement of such claims. This implies that lawyers may make a mistake in the submission of the facts or may argue falsely, and courts may erroneously assess certain situations and render judgments that do not actually comply with the law. The degree of such a risk primarily depends on the legal certainty of the relevant regulations. In this respect, it can be generally stated that highly differentiated rules are more susceptible to errors than standard solutions. Likewise, broad, interpretable formulations are more likely to result in legal uncertainty than clearly and unambiguously formulated provisions.⁸⁸ In this respect, one cannot necessarily

⁸⁵ *Tietzel*, Zur ökonomischen Theorie des Betrügens und des Fälschens, in: *Jahrbücher für Nationalökonomie und Statistik* 204/1 (1988), 17, 33. Free translation of: „Was immer man tut: Betrug wird wohl weder vollständig auszurotten sein, noch würde sich der Versuch dazu lohnen; denn da auch hier Kosten-Nutzen-Überlegungen eine Rolle spielen, wird die optimale Eindämmung von Betrug stets geringer sein als die maximal mögliche.“

⁸⁶ *Cramton/Dees*, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, *Business Ethics Quarterly* 4 (1993), 359, 374 in this respect point to the fact that possible reputation gains must also be considered. A juridical enforcement may not be worthwhile in individual cases, but it may deter possible negotiating partners from using such deceptive tactics.

⁸⁷ *Cramton/Dees*, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, *Business Ethics Quarterly* 4 (1993), 359, 378 identify the problem and conclude: “Unfortunately, the civil law is a rather blunt instrument for the enforcement of norms”.

⁸⁸ *Levmore*, Securities and Secrets: Insider Trading and the Law of Contracts, *Virginia Law Review* 68 (1982), 117, 141 points out that in the case of a regulation of "optimal dishonesty", the risk of errors would increase.

speak of "errors". Rather, such rules entail a scope of justifiability in which one cannot speak of "right" or "wrong". For the deceived side, however, uncertainty remains as to whether the court will decide in his/her favour (within its scope of justifiability). As a result, it depends, among other things, on the "error rate" of lawyers and courts or the uncertainty due to the scope of justifiability if claims are actually enforced.⁸⁹ In this regard, clear and secure legal provisions are economically preferable, since this effect is less pronounced for them.

Moreover, the assessment of lies in contract negotiations needs to reflect the fact that an effective enforcement of claims also strongly depends on the sense of unlawfulness. If the law and the sense of unlawfulness do not correspond, the claim/legal right will be enforced less frequently.⁹⁰ This is particularly well illustrated by the example of the German legal system. The deceived party is granted a right of rescission in almost all cases.⁹¹ However, the already mentioned own international study on moral and legal feeling ("Siegen Study") demonstrates that in many of these cases the questioned Germans do not favour legal consequences for deception.⁹² A glance at the case law reveals that there are generally no court rulings for such cases.⁹³ This could partly stem from the fact that deceived parties do not want to enforce their rights due to their sense of unlawfulness.⁹⁴ Therefore, the analysis of lies in contract negotiations will also have to address the sense of unlawfulness with respect to the concrete constellations of deception. In addition, the enforcement of a rescission or claims for damages is dependent on the alternatively available courses of action. If there are effective and cheaper alternatives, the involved parties will resort to these (as for instance renegotiations and social sanctions). That being said, it must also be noted that the very existence of a right/claim can affect the alternatively available courses of action (e.g. the course of renegotiations).

In addition, it should be borne in mind that in business relations the owners of the companies rarely negotiate themselves. Thus, there is virtually always a principal-agent situation with all its associated consequences.⁹⁵ In many situations, the deceived agent will probably not tend to disclose that s/he was deceived in a negotiation and in this way prevent the enforcement of

⁸⁹ On the effect of mistakes in general: *Levmore*, Securities and Secrets: Insider Trading and the Law of Contracts, *Virginia Law Review* 68 (1982), 117, 141.

⁹⁰ *Cramton/Dees*, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, *Business Ethics Quarterly* 4 (1993), 359, 378 ("the parties must be willing to spend the resources (time and money) to seek remedies").

⁹¹ This is already demonstrated by the abstract, comprehensive regulation of sec. 123 1st para., 1st alternative BGB (German Civil Code): „A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration“. (In German: „Wer zur Abgabe einer Willenserklärung durch arglistige Täuschung (...) bestimmt worden ist, kann die Erklärung anfechten.“). Advocating the strict maintenance of a lie prohibition see also *Fleischer*, Informationsasymmetrie im Vertragsrecht, 2001, p. 264.

⁹² The majority of German professional negotiators favour legal consequences (in this specific case a right of rescission) in only one of (so far) nine cases (with 49% in favour of legal consequences in another case). Among German students, a majority favours legal consequences in two out of (so far) nine cases (and in another case it is 46.5%). The surveyed judges and attorneys each support a right to rescind the contract in two cases.

⁹³ For example, only one case on a misrepresentation about a better alternative offer could be found. AG Berlin of 22.03.1933 171 C 130/33 (unfortunately only published incompletely in: *Deutsche Justiz: Rechtspflege und Rechtspolitik; amtl. Blatt d. deutschen Rechtspflege*, 823 et seq. (1933)).

⁹⁴ There are further explanations for the lack of jurisprudence concerning certain deceptions. Another reason is regularly the lack of evidence as well as the reluctance to settle disputes in court, especially in permanent business relationships.

⁹⁵ On the principal-agent-problem in contract negotiations e.g. *van Uden*, Die unternehmerische Verhandlungsvertretung als komplexe Prinzipal-Agenten-Problematik, *ZKM* 6 (2018), 216, 216 et seqq.

potential claims. Not only does the deceived agent regularly lack the incentive to expose deceptions. In fact, the opposite is true: S/he often even has reasons to conceal deceptions s/he is aware of from his/her superiors. In these cases, the agent regularly does not want to admit to his/her superior that s/he has been deceived by the opposing party (and therefore may have concluded a less favourable contract). When a negotiator allows himself/herself to be deceived, the agent runs the risk that his/her principal will regard this as a "mistake".

The fact if legal positions are also enforced in court in turn influences the market participants' behaviour. If they recognise that lies about certain aspects do not prompt a legal dispute, they will not adapt their behaviour to the legal situation but rather to the actual practice.⁹⁶ This means that they will align their behaviour with possible social sanctions and the degree to which they anticipate deceptions by the opposing party. For the individual case, this simply implies that the legal position will hardly influence the behaviour of the market participants in the absence of enforcement. This leads to the conclusion that many of the negative effects caused by lies even arise when the legal system regards all deceptions as unlawful like in Germany. This is because the resulting costs depend on the actual extent of the lies as well as on the parties' expectations. A broadened view also indicates that the lack of law enforcement can damage the reputation of the legal system. This in turn can result in a loss of the law's steering effect in other areas as well. In this respect one could also speak of a certain spillover effect (see at III. for the spillover effect).

In general, the discussion yields that it is only sensible for a legal system to declare lies unlawful for strictly economic reasons and to grant corresponding legal positions where enforcement is reasonably possible in the first place.

Irrespective of individual constellations (objects of lies, see at V.), the potential enforceability of claims with regard to opinions poses a particular difficulty. Opinions and views are generally not "wrong" or "right". Therefore, a statement of opinion in itself cannot constitute a lie. However, a person can very well be deceived as to whether he or she actually holds a certain opinion or view. Only, it is regularly impossible to prove which opinion a person actually holds, insofar as it is an inner fact and because it is also possible to change one's opinion over time. This complicates the possibility of proving an existing opinion at a specific point in time. The same applies to inner attitudes and intentions.⁹⁷ Due to these proof problems, it is very difficult for a legal system to effectively enforce a ban on such lies. From an economic point of view, a ban can therefore not effectively mitigate the negative effects associated with these lies. However, since economic arguments are only one of many regarding regulation, this does not imply that a legal system should not principally sanction such lies.

V. Constellations of lies

Economic approaches often treat lies as either a uniform phenomenon or they adopt a rough differentiation according to different "types" of lies (see e.g. the comparison of productive and

⁹⁶ If this is economically reflected, one could also speak of legal risk management.

⁹⁷ Regarding US-law the following quote is regularly cited: „The state of a man’s mind is as much a fact as the state of his digestion.” *Edgington v. Fitzmaurice*, L.R., 29 Ch. D. 459, 483 (1885).

distributive information, white lies, paternalistic lies etc.).⁹⁸ The latter approach of the deconstruction of lies will be systematically used hereafter. The proposed differentiation draws on the findings of the Siegen Study on lies in business negotiations.⁹⁹ The study demonstrates that, with regard to their moral intuition and, above all, their sense of unlawfulness (feeling how the law should be)¹⁰⁰, individuals differentiate between what a negotiator has actually lied about (e.g. the price, performance, offers of other providers, availability of products).¹⁰¹

The following compilation does not claim to be exhaustive, but attempts to cover possible misleading constellations extensively. On the one hand, the degree of differentiation follows the potential differences in justification which are deemed possible, even if different constellations can certainly show the same results. It is also possible that there are still different justifications within a constellation which would necessitate a more detailed differentiation. Furthermore, the constellations are chosen in a way that even non-lawyers and non-economists find the constellations to be meaningful as case groups, since in the event of legal standardisation, clearly comprehensible categories have a greater chance of being implemented normatively and thus also actually being enforced.

The following categorisation comprises several levels, since in addition to the subject matter, on which the focus is placed here, a distinction can also be made between the persons who are deceived. With regard to the latter, a distinction can be drawn between persons on the own side (negotiators, other company-internal persons, the actual contractual partner (i.e. the company)), on the other side (company-internal persons, the actual contractual partner) and third parties. In the following, however, this differentiation will only be considered if it seems necessary. It is likewise possible to distinguish between facts, opinions and intentions. This implies that statements regarding the individual aspects of content can either capture facts or represent opinions and intentions. Opinions and intentions have already been discussed in general.¹⁰² The following remarks will, therefore, solely refer to facts.

With regard to individual deceptions, it could pose difficulties to define the boundaries between different constellations. However, with regard to the economic analysis, this is of lesser relevance than for a possible legal implementation. At this point, the legal formulation is, however,

⁹⁸ *Tietzel*, Zur ökonomischen Theorie des Betrügens und des Fälschens, in: *Jahrbücher für Nationalökonomie und Statistik* 204/1 (1988), 17, 17 et seqq. (dealing with lies about the contract object in general); *Posner*, *Economic Analysis of Law*, 2014, p. 118 et seqq. (in general on fraud), *Porat/Yadlin*, A Welfarist Perspective on Lies, *Indiana Law Journal* 91 (2016), 617; 625 et seqq. (discuss anti-abuse lies, truth revealing lies and paternalistic lies). Referring to Kronman's differentiation (see above at III.) *Levmore*, Securities and Secrets: Insider Trading and the Law of Contracts, *Virginia Law Review* 68 (1982), 117, 137 et seqq.

⁹⁹ Some initial results were published in the following article: *Jung*, Bluffing in business-to-business contract negotiations - The relation between moral philosophy, moral intuition, sense of unlawfulness and the law in the US and Germany, *Southern California Law Review* (2019), (forthcoming). A detailed analysis of the data will follow shortly.

¹⁰⁰ See above footnote 12.

¹⁰¹ The results vary greatly depending on what the lie is about. For example, 36% of German professional negotiators consider a bluff about an alternative offer immoral and 14% advocate a right to rescind the contract. In contrast, 78% deem a lie about the subject matter of the contract immoral and 88% advocate a right to rescind the contract. A deception about personal preferences (football club) is considered immoral by 26%, yet, none of the surveyed German professional negotiators advocates a right of rescission.

¹⁰² See above at IV.2..

not (yet) to be discussed. Therefore, in the following, typical examples are chosen for each constellation without delving deeper into the issue of a clear differentiation.

Compilation:

- **Deceptions on the contractual object.** In this respect, a typical example are misrepresentations of the suppliers concerning their own product (features, services, risks, chances, suitability to other products, ethical justifiability etc.). However, under certain circumstances there may also be a deception on the part of the buyer about the product of the supplier (in literature the previously undiscovered oil deposit under a plot of land for sale is frequently cited in this context).
- **Deceptions over the price.** In this respect, a distinction must be drawn between lies on price in a narrow and in a broader sense. Lies over price components are to be counted among the lies over the price in the narrower sense. Incorrect statements about a "special price" or a "mates rate" or an RRP (recommended retail price) count as lies about the price in the broader sense. Practically relevant are also lies about cost prices, profit margins and purchase prices. Insofar, it is also decisive whether such lies are the basis for the calculation of the price or whether they were only used as an argument in the negotiations. In the first case, they are part of price formation and thus of the price in the narrow sense, elsewhere they are only a part of the price in the broader sense.
- **Deceptions over the BATNA.** Deceptions often refer to presenting the own negotiating position as stronger than it actually is. As the BATNA (best alternative to a negotiated agreement) decisively influences the negotiating power, it is often bluffed about. Thus, negotiators lie about how attractive the own alternatives are compared to the conclusion of the negotiated agreement. A buyer may, for example, mention a different, better offer to negotiate better conditions with respect to the negotiated object (in negotiation literature therefore known as the "better offer" tactic¹⁰³). Conversely, sellers can bring other potential buyers into play. At the same time, it is even conceivable that one party tries to deceive the other party about his/her own BATNA. The corresponding efforts can be directed towards the other party not recognising potential options for action or misjudging alternatives due to misinformation.¹⁰⁴
- **Social lies (*white lies*).** White lies serve as a "social lubricant" and are designed to enable a harmonious interaction - also in the business sphere (examples: "The office design is tasteful."; "You speak our language very well."; "I'm fine."; "The coffee almost tastes like home."; "The journey was pleasant.").¹⁰⁵
- **Deceptions on emotions.** This particularly concerns deceptions about sympathies and antipathies about circumstances outside the contract and the respective persons (e.g.

¹⁰³ On this *Jung/Krebs*, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 89 (keyword: besseres Angebot).

¹⁰⁴ According to the understanding given here, deceptions about the market situation constitute a separate category. See below.

¹⁰⁵ See on white lies in general e.g. *Bok*, Lying – Moral Choice in Public and Private Life, 1999, p. 57 et seq.; *Talwar/Crossman*, From Little White Lies to Filthy Liars: The Evolution of Honesty and Deception in Young Children, *Advances in Child Development and Behavior* (2011), 139, 150 on prosocial lies: "Such lies (...) could be considered the oil that greases the wheels of everyday social interactions".

favourite football club, favourite restaurant, political opinions) in order to create the impression of parallel emotions towards the other side (i.e. to use the similar-to-me effect¹⁰⁶). In addition, deception about emotions concerning persons who belong to the own negotiating team (negotiators, colleagues, the chief negotiator, participants in the later realisation) are possible. Very common are also bluffs on emotions during the negotiation (deception about the satisfaction with the opposing party's offer, irritation about the opposing party's negotiation style, etc.). Some, but not all lies about emotions can be classified as white lies (see above).

- **Deceptions about external circumstances and events.** This concerns aspects that do not relate to the contract. Included are factors such as the inflation rate in a country, (incorrect) statements on the base rate, etc. Furthermore, the negotiator can also deceive the other side about events s/he attended and experiences s/he had. Such bluffs can inter alia serve, to simulate an ostensible similarity to the counterparty (similar-to-me effect). However, such bluffs can also be employed as so-called storytelling¹⁰⁷ and can then contribute to creating a certain image (for example that of a risk taker by employing stories about extreme sports etc.).
- **Deceptions on personal characteristics concerning the negotiation.** This includes any deception of the negotiator about his or her negotiating abilities (e.g. play dumb¹⁰⁸, alleged knowledge, attentiveness towards the opposing party). In contrast, deceptions about the characteristics of persons on whom the successful performance of a contract relies upon usually include deceptions about the enforcement of the contract (for this see hereinafter).
- **Deceptions on the negotiation process.** This includes e.g. lies about internal approval reservations, the requirement of concluding an NDA prior to the commencement of negotiations, etc.
- **Deceptions about time aspects.** This encompasses e.g. lies about the availability of certain persons,¹⁰⁹ wrong deadlines,¹¹⁰ and departure times).
- **Deceptions about interests and preferences.** Negotiators lie a lot about the interests and preferences of their own side, i.e. of their own company (typical phrases: "It is our goal (...)", "It is particularly important for us that (...)", "We have no greater interest in this aspect (...)"). In negotiation literature such deceptions are discussed under the terms

¹⁰⁶ People have a tendency towards finding people more likeable who are similar to them. This similarity can be related to age, gender, origin, hobbies, political attitudes etc.. On the similar-to-me-effect in job interviews cf. *Sears/Rowe*, A personality-based similar-to-me effect in the employment interview: Conscientiousness, affect-versus competence-mediated interpretations, and the role of job relevance, *Canadian Journal of Behavioral Science* 35 (2003), 13, 13 et seq.

¹⁰⁷ On this *Jung/Krebs*, *Die Vertragsverhandlung – taktische, strategische und rechtliche Element*, 2016, p. 358 et seq. (keyword: Storytelling).

¹⁰⁸ On this *Jung/Krebs*, *Die Vertragsverhandlung – taktische, strategische und rechtliche Element*, 2016, p. 206 et seq. (keyword: Play dumb).

¹⁰⁹ On this from a tactical negotiation perspective *Jung/Krebs*, *Die Vertragsverhandlung – taktische, strategische und rechtliche Element*, 2016, p. 269 (keyword: Missing person maneuver).

¹¹⁰ On this from a tactical negotiation perspective *Jung/Krebs*, *Die Vertragsverhandlung – taktische, strategische und rechtliche Element*, 2016, p. 181 et seq. (keyword: False deadline).

"bogey" or "padding".¹¹¹ However, the negotiator can also deceive about his/her own interests and preferences.

- **Deceptions about substantive requirements and instructions.** Bluffs particular concern the substantive requirements and instructions of the own side (superiors, stakeholders, etc.). Among the typical bluffs are false statements on budget limitations.¹¹² But it can also be deceived about specifications from third parties (e.g. from customers on one of the two sides). In most cases, such bluffs refer to thematic positions (which do not necessarily have to correspond with the respective interests).¹¹³
- **Deceptions about achieved interim positions/agreements.** In terms of negotiating tactics, this is termed "foggy recall".¹¹⁴
- **Deceptions about the legal framework.** In this respect, it is primarily a matter of deceiving about the lawfulness or unlawfulness, the necessity of approval or legal consequences of particular actions, as well as lying about the probable outcome of court proceedings or the existence or non-existence of provisions.¹¹⁵
- **Deceptions concerning the implementation or fulfilment of the contract.** The focus here is on bluffs about the ability to fulfil in good time and otherwise as contractually agreed. Deception about the performance of the contract is also covered by the scope of warranty law. Such deception is the type of deception which legal systems intensively address.
- **Deceptions on availability.** In this respect, several variations can be distinguished. One typical case are lies over the availability of goods at the supplier ("immediately available", even though in reality it must be procured first or vice versa "last free hotel room", although the hotel is scarcely occupied (the latter is specified as the "tactic of small quantities"¹¹⁶). Moreover, the availability of the service on the market ("unique item", "rare collector's item") can be used for bluffing. In addition, there are deceptions about the availability of third-party services (e.g. with a view to possible financing via a third party, the availability of suitable adapters or support services in the customer's mother language, etc.).
- **Misleading information about the general market situation.** This category is closely linked to deceptions about the BATNA (see above). However, there is the special fea-

¹¹¹ On this see specifically *Jung/Krebs*, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 98 et seq. (keyword: Bogey), p. 297 et seq. (keyword: Padding).

¹¹² See *Jung/Krebs*, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 107 (keyword: Budgetbegrenzung).

¹¹³ The Harvard negotiation concept recommends focusing on interests over positions. Cf. *Fisher/Ury/Patton*, Getting to Yes, 2012, p. 42 et seqq.

¹¹⁴ See on this *Jung/Krebs*, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 191 et seq. (keyword: Foggy recall).

¹¹⁵ See *Jung/Krebs*, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 415 et seqq. (keyword: Vorbringen einer falschen Rechtsansicht).

¹¹⁶ See on this *Jung/Krebs*, Die Vertragsverhandlung – taktische, strategische und rechtliche Element, 2016, p. 365 (keyword: Taktik der kleinen Menge).

ture that there is no direct deception about the concrete BATNA, but rather a more general deception about the overall market situation and expected market development (i.e. the dynamics).

VI. Economic consequences of lies for selected constellations

In the following, economic consequences of lies are considered for three selected constellations. For each constellation, it will be sought whether in the absence of legal regulation (no rescission, no damage claims) such aspects would be lied about and if so, what economic consequences such lies would entail (baseline scenario). If deceptions yield no negative economic consequences, the economic analysis reveals that there is no need to regulate. If, however, possible negative effects are identified, the question arises whether and if so, to what extent, legal regulation can contribute to overcoming such negative consequences (comparison scenario). The explanation of the constellations has insofar illustrated that there are also different variants within a single constellation. For simplification reasons, the following section will solely consider the standard case and not the entire spectrum of a constellation.

1. Subject matter of the contract - lies of the supplier about the contract subject

How often suppliers would lie about the subject matter of the contract if there was no legal prohibition is only roughly estimable. In this respect, it particularly depends on the information asymmetry between supplier and buyer, which in turn depends on the nature of the contractual object.¹¹⁷ However, in the absence of legal consequences, a substantial amount of lies can be expected, since the prospective advantages of the lie can be significant. The fact that such lies are regarded as immoral across all countries and all groups¹¹⁸ according to the Siegen Study indicates resulting *lying costs* that would in turn have a certain (moral) regulatory effect, but would not prevent such deceptions. The same applies to social sanctions, which the deceiver would have to anticipate in the event of the discovery of the bluff. Since such lies are consistently regarded as immoral, sensitive social sanctions can be expected.¹¹⁹ The fact that there would nonetheless be corresponding lies can also be inferred from a glance at the case law of different legal systems. The mere fact that, despite the legal prohibition in practically all legal systems and the comparatively good possibilities to sanction those lies, most court rulings concern these types of lies suggests that there would be many more of such deceptions if there were no sanctions.

The provider's lies about his/her performance are usually aimed at improving the provider's position and tolerate that the other side is disadvantaged, which is also regularly the case (hence the term "*harmful lies*"). Therefore, such deceptions are generally not Pareto-improving. With regard to corresponding lies, there are also considerable transaction costs, both for the deceiver and the deceived side. For lies about the characteristics of the subject matter of the contract

¹¹⁷ Cf. Tietzel, Zur ökonomischen Theorie des Betrügens und des Fälschens, in: Jahrbücher für Nationalökonomie und Statistik 204/1 (1988), 17, 23 et seqq.

¹¹⁸ This is the result of the Siegen Study on lies in contract negotiations. See, for example, the following results for the assessment as immoral: German students (82.9%); German lawyers (87%), German judges (96%); German professional negotiators (78%); US lawyers (88%); US students (78.2%); Chinese lawyers (77%); Chinese judges (77%); Polish judges (89%).

¹¹⁹ These change the cost-benefit analysis of lies concerning the subject matter of the contract and result in fewer lies.

initially require a certain use of resources by the deceiver. In this respect, it should also be taken into account that with regard to practically all typical contract types, the contractual object or the service enters the sphere of the recipient after conclusion of the contract and fulfilment of the contract which enables the latter to verify compliance with the performance promise and the corresponding details given in the preceding negotiations. For this reason, the deceiver must devote a certain amount of effort in order to prevent the lie from being exposed too easily. Suitable for misrepresentation are especially such characteristics that involve a large information asymmetry and which are difficult to verify (life cycle costs, etc.).¹²⁰ To be credible, there might be a need to underpin those lies by certain documents or even studies. If that is the case, this in turn increases transaction costs.

The party to be deceived will dedicate resources to avoid, prevent, and detect such deception where it suspects certain lies or certain indications of deception are present. For then there is a substantial risk that the deceived party will conclude a contract based on deception which is outside the ZOPA and therewith worse than the available BATNA. The parallel generation of information on the subject matter of the contract (by suppliers and buyer) to prevent and detect deception is welfare-reducing. When the lie is exposed, expenses are easily incurred with regard to the possible (extrajudicial) reactions of the deceived party, such as renegotiations or commencing ADR (*alternative dispute resolution*).

Moreover, deceptions about the contractual object generally dilute the truth signal and entail a loss of trust if they are discovered. This applies both to the truth signal of the liar and to the dilution of the truth signal of other negotiators. It seems self-evident that the loss of trust is particularly pronounced in the case of deception about the object of the contract. This is suggested by the Siegen Study on moral beliefs and the sense of unlawfulness.¹²¹ First and foremost, the truth signal of the deceiver with all its implications will suffer from the lie about the contractual object. Practical experience also points out that especially deceptions about the product itself may also be exposed outside the company (“naming and shaming” – sometimes even in the media). This primarily damages the specific liar's reputation, but simultaneously dilutes the truth signal of all negotiators. This, in turn, incurs transaction costs for sincere negotiators, as they have to spend resources to prove their integrity. On top of this, a certain spillover effect must concurrently be included. This also depends on whether deceptions are publicised outside the context of the specific business relationship. In addition, it should be noted that the Siegen Study indicates that deceptions about the contractual object are regarded as severe lies.¹²² This means the spillover effect could be exceptionally high. Whilst the purchaser of an object (due to the usually existing information asymmetries) usually cannot lie about the object, s/he might consider himself/herself “entitled” upon an a-fortiori conclusion to deceive

¹²⁰ See on this *Tietzel*, Zur ökonomischen Theorie des Betrügens und des Fälschens, in: *Jahrbücher für Nationalökonomie und Statistik* 204/1 (1988), 17, 25. As an example of high transaction costs associated with the verification of statements the author cites the harmfulness to health of foods. Also *Cramton/Dees*, Promoting Honesty in Negotiation: An Exercise in Practical Ethics, *Business Ethics Quarterly* 4 (1993), 359, 373 on the higher attractiveness of lies in case of information asymmetries.

¹²¹ Regardless of the group and nationality surveyed, respondents agree that such deceptions by providers are immoral and should entail legal consequences. (See on the moral assessment fn. 118).

¹²² See on this footnote 118.

about all other possible aspects (legal situation, BATNA etc.). Conversely, other suppliers could also initiate deceptions when they note that one of their competitors is successful.

Overall, an economic analysis demonstrates that lies of the supplier concerning the contract object consistently result in substantial negative economic effects. This effect is not diminished significantly by the possibility that the weaker party may benefit to a greater extent from the lie.¹²³ As a result, a legal system that provides for legal consequences for such deceptions can expect significant positive economic effects. This is mainly due to the fact that deceptions of the provider about the contractual subject – as stated above – can be regularly exposed and at least the current situation can be proven. Only the promised status frequently raises difficulties to prove if oral statements are included. Due to the possible considerable negative consequences for the deceived party, even a legal enforcement oftentimes becomes worthwhile. Most legal systems also cover this case with legal certainty, with the result that there are no uncertainties that complicate legal enforcement. The Siegen Study on lies also shows that across all countries and groups, a clear majority favours legal consequences and would therefore probably enforce such claims in court.¹²⁴ Moreover, a glance at the case law of, for example, Germany and the USA shows that rights and claims from such violations are enforced.¹²⁵ Thus, legal consequences, which are also enforced, would unfold the desired steering effect. This would, in turn, reduce the aforementioned negative economic effects – albeit not to zero. Because even a "good" law will not have as a consequence that lies are no longer told at all or accordingly that the parties do not suspect any lies from their negotiation partner. As all legal systems generally require causality, particularly lies discovered before the conclusion of a contract continue to reduce the truth signal and might lead to spillover effects. In addition, transaction costs in particular cannot be eliminated fully, since the parties still expect certain deceptions and therefore have to invest a considerable amount of effort to prevent and detect them.

However, the results of the analysis show that a legal regulation prohibiting lies of the supplier about the contractual object has substantial positive economic effects.

2. Emotions

In business negotiations the most diverse emotions can be faked, i.e. the existence or non-existence or the extent of the particular emotion. In negotiations, anger, outrage, joy, enthusiasm or appreciation are regularly simulated in contrast to the actual emotions.¹²⁶ First and foremost, the negotiator's delusions about his or her own emotions can be considered. However, it is also

¹²³ See above at III..

¹²⁴ The answers refer to the example that used an exaggeration (in case of an invented fact the results would probably be even higher): German lawyers (90%); Chinese lawyers (73%); US lawyers (88%); English lawyers (77%); Polish judges (87%); Russian students (80%); Spanish students (84%).

¹²⁵ For Germany only see the following judgments (comprehensive listing as provided under: Wendtland in: BeckOK BGB, Stand: 01.11.2018, § 123 Rn. 9.1): concerning the age of an oriental carpet (BGH WM 1977, 260); concerning the mileage of a second-hand passenger car (BGH NJW 1960, 237; OLG Köln NJW-RR 1988, 1136); concerning untrue labelling such as "ready to drive" (BGH NJW 1993, 1854), "generally overhauled" (BGH NJW 1995, 955 (956)), "new" or "as good as new" (KG OLGZ 1972, 402), concerning the advertising of basement rooms as living space, although there is no corresponding building permit available (BGH NJW 2014, 3296). For the USA only see the following judgments: concerning untrue descriptions of a car such as "mechanically sound" (Weng v. Allison, 287 Ill. App. 3d 535); "an efficient, high-volume profit producer" (Crues v. KFC Corp., 729 F.2d 1145 (8th Cir. 1984);

¹²⁶ On the importance of emotions in contract negotiations e.g. *Fisher/Shapiro*, Beyond Reasons - Using Emotions as You Negotiate, 2005, especially p. 25 et seqq. (core concerns framework).

not unusual for a negotiator to lie about emotions of his/her superior ("My boss was dismayed by your offer."). According to the baseline scenario, the exact frequency of such deceptions cannot be determined. However, it appears obvious that such deceptions occur frequently, as the risk of disclosure is minimal (more on this in the following).

The special feature of this category of deceptions is that some of them can be classified as "white lies".¹²⁷ White lies should provide an advantage to the person who has been lied to or at least should not cause any harm to that person.¹²⁸ If white lies simultaneously provide an advantage for the liar, this leads to a Pareto improvement. In addition, white lies serve as a "social lubricant"¹²⁹. White lies facilitate a harmonious cooperation - also in the entrepreneurial field. During negotiations, for example, joy about an invitation to dinner or a gift may be faked. In this case, the pretence of joy serves to avoid offending the other side and to build and maintain a good rapport with the negotiating partner.¹³⁰ In this respect, it could be argued that many of these deceptions do not become (co-)causal for the conclusion of the contract, while only (co-)causal lies are the focus of this article. However, faking positive emotions precisely serves to create a pleasant atmosphere for negotiations. The aim is to alleviate the negotiation process. A good rapport between the negotiators can also be helpful, especially in the event of a dead end in the negotiation. Conversely, many negotiators make a concession at the content level to appease a seemingly angry negotiating partner (and rescue the business relationship).¹³¹ Therefore, there are many constellations where causality can be assumed.

In contrast to deceptions about the contract object, the transaction costs incurred by corresponding bluffs are presumably very low. The deceiver must practically not invest any resources in faking the respective emotions. Even if the other side anticipates such a deception, it will hardly invest any resources into the prevention of such deceptions. It is also not known that companies invest time and money to uncover and pursue emotional deceptions. Generally, it is only attempted to recognize such bluffs by attentive observation. Even if this procedure may cause certain transaction costs, these are negligible. In addition, rational negotiators put a certain amount of energy into ignoring emotions with regard to content-related questions. They try to take decisions about the contract object in a rational rather than an emotional manner, as advocated in particular by the Harvard negotiation concept.¹³² However, this applies irrespective of deceptions regarding emotions, which is why such deceptions do not increase the costs.

¹²⁷ On white lies see e.g. *Bok, Lying – Moral Choice in Public and Private Life*, 1999, p. 57 et seqq. On the overlap between the two categories, see already above under V..

¹²⁸ In literature, the term "white lies" is not used uniformly. Sometimes the term only includes trivial lies, other times all kinds of "well-intentioned lies". Cf. *Bok, Lying – Moral Choice in Public and Private Life*, 1999, p. 58, who only refers to trivial lies when using the term "white lies".

¹²⁹ *Bok, Lying – Moral Choice in Public and Private Life*, 1999, p. 59: "They preserve the equilibrium and often the humaneness of social relationships". *Talwar/Crossman, From Little White Lies to Filthy Liars: The Evolution of Honesty and Deception in Young Children, Advances in Child Development and Behavior* (2011), 139, 150 (on prosocial lies).

¹³⁰ On building rapport see also *Jung/Krebs, Die Vertragsverhandlung – taktische, strategische und rechtliche Element*, 2016, p. 365 (keyword: rapport).

¹³¹ The Harvard negotiation concept advises separating the factual from the relational level and therefore suggests that problems at the relational level should not be solved with concessions on the factual level. See *Fisher/Ury/Patton, Getting to Yes*, 2012, p. 19 et seqq.

¹³² See *Fisher/Ury/Patton, Getting to Yes*, 2012, p. 19 et seqq.

Deceptions about emotions usually do not affect the BATNA and thereby also not the ZOPA. On a regular basis such deceptions should thus only concern the distribution within ZOPA (provided there is a ZOPA¹³³). However, in extreme cases the excessive simulation of negative emotions can provoke a break off of negotiations and thereby prevent the conclusion of a socially desirable contract. This, however, is most likely the exception. This is because the emotions are faked and the deceiver can still take corrective measures. In addition, here a legal prohibition would be ineffective. Conversely, pretending (positive) emotions can enlarge the negotiating pie in individual cases. Above all, appreciation can induce the other side to present constructive proposals.¹³⁴

The risk that such deceptions are unmistakably detected is extremely low. Because in most cases, only the deceiver is able to indicate whether an emotion was real or merely faked. Insofar, these are internal facts which are regularly not accessible to proof. In cases of ill faked emotions, the other person will suspect, but will never be able to demonstrate the deception. Even the reference to the emotions of others (e.g. the superior) is usually hardly verifiable for the opponent. A study also hints at the fact that bluffs about emotions are considered less serious than deceptions about information.¹³⁵ From an economic perspective this implies that even the truth signal of the deceiver is hardly likely to be diluted because of the often lacking disclosure. It seems even less likely that such deceptions will be publicised on a large scale. Even where there is talk about faked emotions, and the truth signal should be weakened, honest negotiators will rarely devote considerable resources to emphasising the honesty of their emotions to dishonest negotiators. Most likely, honest negotiators will rely on authenticity and will trust their counterparts to distinguish true from false emotions. Even the spillover effect is not easily transferred to this situation, especially with regard to negative emotions. Because there might be a certain psychological barrier to also fake negative emotions like anger as a reaction. However, with regard to white lies there seems to be a certain spillover effect. In this respect, many people learn from a very young age onwards that white lies are a successful strategy and therefore utilize it.¹³⁶ Yet, as demonstrated in the above, this would create positive rather than negative effects regarding negotiations. Lies could also be legitimate when it comes to emotions to enforce the protection of such information.¹³⁷ Emotions are very personal and no one wants to be coerced into revealing their true feelings.¹³⁸

Therefore, where such lies are considered lawful, they have no, or at most very limited, negative economic effects. For this reason alone, a legal regulation appears unreasonable from an economic point of view. In addition, due to the aforementioned difficulties in gathering evidence, such a provision could not be enforced effectively. This applies irrespective of the fact that

¹³³ If there is no ZOPA, i.e. if there is a NOPA, the contract would not be concluded irrespective of the lie and hence, the lie would also not result in any redistribution.

¹³⁴ On the importance of appreciation in contract negotiations e.g. *Fisher/Shapiro*, *Beyond Reasons - Using Emotions as You Negotiate*, 2005, p. 25 et seqq.

¹³⁵ *Fulmer et al.*, *Lying and Smiling: Informational and Emotional Deception in Negotiation*, *Journal of Business Ethics* 88 (2009), 691, 691 et seqq. The Siegen Study also points in this direction (see football club).

¹³⁶ On the learning process of children regarding prosocial lies in detail *Talwar/Crossman*, *From Little White Lies to Filthy Liars: The Evolution of Honesty and Deception in Young Children*, *Advances in Child Development and Behavior* (2011), 139, 150 et seqq.

¹³⁷ See on the reasoning how lies may protect the right to remain silent above at III.

¹³⁸ On lies and privacy *Nyberg*, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life*, 1993, p. 128 et seqq.

rights and claims would probably not be enforced even in the absence of evidentiary difficulties, since it can be assumed that such deceptions are generally regarded as morally acceptable and hence no legal consequences are called for.¹³⁹

3. Legal situation

Lies about the legal situation for instance include deceptions about the lawfulness/unlawfulness, required permissions or the legal consequences of certain actions as well as lies about probable outcomes of court proceedings or the existence or non-existence of legal provisions.¹⁴⁰ Bluffs about the lawfulness/unlawfulness of certain acts or the existence or non-existence of rules usually involves a deception about facts. Here, only the practical case of a lie about the unlawfulness (i.e. the pretence of unlawfulness) of an act is to be examined. In the event of success, lying about the unlawfulness of an action causes a lawful action to not be carried out. Similar effects may be caused by deceptive statements about the existence of rules. If there is no law that prohibits such provisions, these deceptions will occur in any event. These deceptions can be particularly effective where information asymmetries occur. The complexity of today's legal systems contributes to such information discrepancies. Such deceptions regularly serve to block demands (e.g. concessions) from the other party. The liar is concerned with achieving a positive effect for him/herself (e.g. not having to perform a service that is not worthwhile), for which s/he accepts negative effects on the liar. Therefore, such deceptions are regularly not Pareto-improving.

With regard to BATNA and ZOPA, there is a risk that the deceived person will not continue to invest in his/her BATNA and, in the worst case, that a contract will even be concluded outside the ZOPA, as due to the deception, a legally tolerated option will not be implemented. For example, a machine manufacturer may refuse to accept a product customisation from the customer with reference to the applicable safety standards.¹⁴¹ If the buyer is misled, s/he will not inquire about this configuration from other machine manufacturers (as they would also have to comply with legal standards). Even if s/he has an alternative offer from another manufacturer with this configuration which is preferable to the negotiated contract, in the worst case s/he will refuse this offer as s/he suspects that the other supplier is not aware of the safety standards or even deliberately disregards them.¹⁴²

Owing to the possible considerable negative consequences for the deceived party, certain transaction costs will arise if there are concerns about the possibility of lies. The parties will invest time and resources to determine the legal position themselves to avoid being deceived. Also the

¹³⁹ The Siegen Study on lies in contract negotiations does not yet include a scenario on this. A supplementary study, which also covers this constellation, is currently being conducted. Preliminary results of the supplementary study seem to confirm the hypothesis.

¹⁴⁰ *Arthur Schopenhauer*, *Eristische Dialektik oder die Kunst, Recht zu behalten*, 7th ed. 2009, p. 50 addresses this tactic under the name *argumentum ad auditores* (strategem 28). See on this tactic among others, *Jung/Krebs*, *Die Vertragsverhandlung – taktische, strategische und rechtliche Element*, 2016, p. 415 et seqq. (keyword: Vorbringen einer falschen Rechtsansicht).

¹⁴¹ The Siegen Study includes a corresponding scenario (question 8). The questionnaire is available for download in its different languages under this link: <https://www.wiwi.uni-siegen.de/contractgovernance/survey/?lang=de>.

¹⁴² In this case, it is conceivable that the deceived person has let himself/herself be deceived grossly negligently. In this respect, s/he had indications which would have justified his/her own examination of the legal situation. However, the approach of the cheapest cost avoider suggests that intent should generally beat negligence.

deceiver him-/herself, possibly, spends certain resources to substantiate his/her lie. For example, s/he might bring an in-house lawyer to the negotiation or even hire a lawyer to present the lie convincingly.¹⁴³ Also the preparation of legal opinions is possible and e.g. with regard to M&A transactions quite common. If the deception is exposed, further transaction costs can be expected. These can be either attributed to renegotiations or to alternative dispute settlements.

Moreover, also in this case the truth signal is considerably diluted and trust decreases. This is demonstrated by the results of the Siegen Study, that covers this case.¹⁴⁴ There are considerable cultural differences in terms of the moral assessment and the sense of unlawfulness (sense of how the law should be).¹⁴⁵ Nevertheless, it is the only question apart from the lie about the contract object, in which in all groups from all countries (except China) a majority considers this behaviour immoral (in the event of a pretence of unlawfulness).¹⁴⁶ Not in all groups, but in many, a majority also favours legal consequences.¹⁴⁷ This highlights the importance that is attached to such deceptions, and the fact that such lies are likely to result in a significant loss of trust. Since this is a severe lie, there is a risk that tolerating such deceptions could also trigger a significant spillover effect (*argumentum a fortiori*). The legislator must also consider that particularly lies about the legal situation could weaken the confidence in the legal system as a whole. Therefore, the legal system already has a self-interest in avoiding such deceptions.

These lies are relatively easy to detect. That is because anyone can access information on the existing legal framework. Some problems may arise in proving that the deceiver has made a respective statement (lie). Particularly in the business field, however, there are often several participants present when oral statements are made, who can then also act as witnesses. Therefore, the problem of proofing misrepresentations does not generally prevent enforcement. However, a glance at the German case law reveals that so far there are scarcely any such cases. But, this is probably not due to the sense of justice. In most groups in most countries a majority favours legal consequences. This low number of cases is presumably mainly due to the fact that it is difficult to distinguish between a fact and an opinion in a particular case¹⁴⁸ and that the German legal system only stipulates legal consequences for facts. In this respect, the actual enforcement of legal positions will depend on the specific formulation of the law, but is ultimately definitely possible, at least for factual statements. The negative effects caused by these types of deceptions could thus be mitigated to some extent by corresponding regulation.

VII. Conclusions

¹⁴³ Transaction costs increase if it is assumed that the in-house counsel would otherwise not have participated in the negotiation.

¹⁴⁴ In all regarded countries and in all examined groups a majority regards such lies as immoral. Only in China does the majority of all groups consider such deceptions as morally acceptable.

¹⁴⁵ For example, 90% of German lawyers regard such deceptions as immoral and 81% advocate a right of rescission. In contrast, only 13% of Chinese lawyers consider this type of deception immoral and 17% advocate legal consequences.

¹⁴⁶ E.g. considering this lie to be immoral: German students (79,6%), German professional negotiators (62%), German lawyers (90%), German judges (85%), US lawyers (88%), US students (85,6%), Italian students (75%), Russian students (63%), Spanish students (73%), Polish judges (76%).

¹⁴⁷ A majority for a right to rescind the contract prevails, for example, among German students, German lawyers, German judges, US lawyers, US students, Polish judges as well as Italian, Spanish, Argentine and Russian students, Argentinean and Russian students.

¹⁴⁸ OLG Karlsruhe, judgments of 06.12.2005 - 17 U 169/05.

This paper explored the economic consequences of deception in a broad overview and discussed whether the economic analysis provides indications on how a legal system should handle lies in bilateral business contract negotiations. However, not only economic aspects but also moral, political, legal-cultural and primary legal aspects (e.g. legal certainty), which were not addressed at this point, influence the lawmaker.¹⁴⁹ In the following, the most important results of the economic analysis are summarised in the form of theses:

- The Siegen Study on lies in contract negotiations suggests with regard to the legal design that not all lies should not be treated the same, but that it is useful to distinguish between different constellations. The study shows that, with regard to their sense of morality and lawfulness (feeling how the law should be), people clearly differentiate between what a negotiator has lied about (e.g. price, performance, offers of other providers, availability of products). The economic analysis of three selected constellations confirms that the economic consequences also vary greatly depending on the considered object of the lie, with the result that different legal rules for different deceptions may appear justified under certain circumstances.
- The conducted economic analysis shows that there are constellations where lies result in clear economic disadvantages. A legal ban on such deceptions can effectively mitigate the negative economic consequences (albeit not to zero). As shown here, this category includes deceptions by the supplier about the object of the contract.
- Conversely, however, the study also shows that there can be constellations that (almost) do not produce any negative economic effects or even lead to a slightly positive overall result. In this respect, deceptions about emotions should be mentioned. Therefore, from an economic point of view, a legal regulation does not appear sensible.¹⁵⁰
- There are many nuances between these two poles. This paper examines the lie about the unlawfulness of an action. Also in this respect negative economic effects were found, which could be at least partly alleviated by a regulatory approach. In other cases, the result may be different.
- The article highlights the importance of enforcing a possible prohibition of lies. Concerning lies, the enforcement may fail primarily on account of the lack of demonstrability of deceptions as well as the sense of justice according to which in many cases respondents do not favour legal consequences. However, for economic reasons alone, a prohibition only appears sensible if enforcement is feasible at all. The general problems of enforceability are therefore discussed with regard to opinions and intentions.
- The discussion of transaction costs demonstrates that a regulation which only sanctions deceptions that have become causal is not capable of reducing some of the costs arising

¹⁴⁹ *Epstein*, Privacy, Property Rights, and Misrepresentations, *Georgia Law Review* 12 (1978), 455, 456 („The legal system has very deep and powerful societal roots, and the values that it protects and advances are responsive to many non-economic as well as economic values and concerns. (...) Liberty, freedom, and personal autonomy are ideals of the law, and they cannot be reduced to simple efficiency considerations, however important efficiency may be in its own right.”).

¹⁵⁰ *Sherwin*, Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud, *Loyola of Los Angeles Law Review* 36 (2003), 1017, 1023 argues that a “low-level fraud” should not result in markedly inefficient exchanges” and may even “help to overcome bargaining impasses”).

from deceptions. The same applies to the truth signal and the loss of trust and the spill-over effect. Therefore, in theory, it could also be considered to provide for legal consequences even for deceptions that have not become causal. Corresponding rules would thus have a primary sanctioning character and would serve as a means of deterrence.¹⁵¹ If a legislator rejects sanctions for deceptions that have not become causal (e.g. because this contradicts the general basic structure of the civil law jurisdiction or official intervention appears too costly), this must be considered when regulating lies that have become causal. This is because some of the negative effects will already emerge than and can therefore not be eliminated by possible legal consequences for causal lies. For this reason, it would be consistent to only regulate deceptions that cause further negative consequences.

- The concept of the cheapest cost avoider supports the legal rule of "intent beats negligence". Where deliberate deception is concerned, it should therefore not matter whether the deceived party "fell prey" to the deception negligently (or grossly negligently).
- Concerning the right to remain silent, an information request of the other party leads to a certain shift of assets in favour of the asking party, insofar as there is no right to lie. In this respect, it must be decided whether such an effect is desired or whether the legislator wishes to eliminate it. A right to lie could effectively prevent this transfer of assets.
- With regard to the right to remain silent and the right to lie, it is also apparent that this argumentation basically only applies to circumstances where pressure is exerted by a demand for information. Therefore, it could be considered whether the legislator should distinguish between "induced" and "uninduced" lies. However, in this article this distinction is rejected.
- This article for the first time specifically examined the impact of lies on the BATNA (best alternative to a negotiated agreement) and the ZOPA (zone of possible agreement). The considerations of the right to lie to protect the weaker party also complement the current state of discussion.

¹⁵¹ On the deterrent nature of rules regarding deception *Levmore*, A Theory of Deception, *Texas Law Review* 85 (2007), 1359, 1364 et seq.