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Acceptable Lies in Contract Negotiations

*Prof. Dr. iur. Stefanie Jung, M.A. (CoE) **

I. INTRODUCTION

It is well established that lying is a widespread phenomenon in business-to-business (“B2B”) contract negotiations.¹ Some of the most prominent lies may be those about the subject matter of the contract. However, negotiators also frequently lie about other aspects like offers from other potential buyers or sellers, the availability of their product, the legal situation regarding contractual aspects, as well as their emotions and preferences.

Most, if not all, legal systems regulate the aforementioned lies to some extent. Every legal system must draw the line between legal and illegal lies in consideration of the many factors of negotiations, such as economic and moral arguments, differences in legal culture, the *Rechtsgefühl* (sense of how the law should be), and purely legal arguments. Some legal systems, including German law, are particularly strict and forbid almost all kinds of lies.² Other legal systems are more lenient, like U.S. law, which leaves some room for interpretation.³ This article demonstrates that the economic analysis of the effects of lies in B2B contract negotiations justifies treating some lies as lawful.⁴ Non-economic arguments, like morality, that may justify

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1. See *infra* Part IV A discussing frequency of lies generally. See also *infra* Part VII for a discussion of specific types of lies.

2. For a discussion of applicable German law see Stefanie Jung, *Bluffing in Business-to-Business Contract Negotiations*, 92 S. CAL. L. REV. 973, 988-92 (2019). Section 123 of the German Civil Code requires an intentional deception and a causality. All lies that fulfill these requirements allow the deceived party to rescind the contract. There are only minor exceptions to this rule. See CHRISTIAN ARMBRÜSTER, 1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 123 marginal no. 1-105 (8th ed. 2018) (Munich Commentary on the Civil Code). See also HOLGER WENDTLAND, BECK’SCHER ONLINE KOMMENTAR ZUM BGB, § 123, para. 1-24 (55th ed. 2020) (Beck Commentary on the Civil Code).

3. For a comparison of German and U.S. law, see e.g., Jung, *supra* note 3.

4. This paper does not address deceptions in business-to-consumer (B2C) negotiations because many legal systems provide special rules for B2C cases to counterbalance the structural disadvantages of consumers. Also, negotiations in the framework of a legal process are not addressed in this article. This paper assumes the existence of negotiations and therefore does not discuss the economic effects of the negotiation process itself. Criticizing the negotiation process from a welfare point of view, see ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* 201-03 (4th ed. 1932) (arguing for limiting negotiations, but admitting the impossibility of an absolute prohibition). Most legal systems do not regulate lying in the private sphere, such as lying to ones’ spouse or neighbor. See Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529-73 (2011) (favoring criminal sanctions for “egregious lying causing serious harm”).

limitations on dishonesty, are not addressed in this article. Therefore, the absence of an economic justification for legal rules sanctioning certain deceptions should not be equated with a recommendation to waive a prohibition of those lies.

The analysis of the economic effects of lies is not novel. So far, these effects have been considered intensely, focusing primarily on various complex economic approaches.⁵ This article examines the central economic approaches in their entirety, including transaction cost and allocation efficiency,⁶ which paints a complete picture of the economic consequence of deception, crucial to finding an appropriate legal solution.

Existing economic analysis regularly discusses either lies as a uniform phenomenon or establishes a rough classification of different “types of lies.” For example, the comparison of productive and distributive information, white lies/paternalistic lies, and harmful lies.⁷ An ultimate conclusion of this article is that the economic analysis of deception in contract negotiations necessitates distinguishing even more precisely according to what the negotiator lies about. This means that there should be a distinction, for example, between lies about the price, performance, offers from other providers, and availability of products. An international study conducted by the author and Peter Krebs (hereinafter the “Siegen Study”)⁸ that received more than 3,000 responses from 13 different countries⁹ regarding people’s sense of morality¹⁰ and their *Rechtsgefühl* supports this idea of distinguishing more precisely according to the subject of the negotiators’ lie.¹¹

This article proceeds in seven parts. Section II provides an overview of the current discussion on the economic analysis of lies in B2B contract negotiations. Section III introduces the types of lies that lead to different economic effects. Section IV briefly considers the interrelationship of moral, legal, and economic effects, as well as the interdependencies of these aspects with the frequency of lies. Section V discusses the different economic approaches and lines of reasoning that can be

5. See *infra* Part II.

6. Previous studies have been devoted to individual types of lies or large case groups or have dealt with individual economic effects.

7. Cf. Manfred Tietzel, *Zur ökonomischen Theorie des Betrügens und des Fälschens*, 204 JAHRBÜCHER FÜR NATIONALÖKONOMIE UND STATISTIK, no. 1, 1988, at 17 (dealing with lies about the contract object in general); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 118-122 (9th ed. 2014) (discussing fraud generally); Ariel Porat & Omri Yadlin, *A Welfarist Perspective on Lies*, 91 Ind. L. J. 617 (2016). (discuss anti-abuse lies, truth revealing lies, and paternalistic lies). See also Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 137-142 (1982) referring to Kronman’s differentiation among types of lies.

8. Some of the basic results of this study have been reported in Jung, *supra* note 2, at 973-1003. There, the author focused on differences in evaluations of lies between Germans and Americans. Further results will be published in Stefanie Jung, *Das Rechtsgefühl im Vertragsrecht*, RECHTSWISSENSCHAFT, issue 4, 378, 378-419 and Jung & Krebs & Leszczyńska, Does it matter what people lie about? Work in progress (asking if it matters what negotiators lie about by presenting empirical evidence on people’s moral and legal beliefs).

9. USA, China, Russia, Germany, England, Austria, Switzerland, Spain, Argentina, Colombia, Italy, Poland, and Ukraine.

10. DAVID NYBERG, *THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE*, 203 (1993).

11. As neither of the English terms “sense of justice” or “sense of unlawfulness” are exact translations of the German term, I have opted to use “*Rechtsgefühl*” throughout this paper. German literature distinguishes different forms of the “*Rechtsgefühl*.” See, e.g., ERWIN RIEZLER, *DAS RECHTSGEFÜHL. RECHTSPSYCHOLOGISCHE BETRACHTUNGEN* 6-25 (1946); FRANZ-XAVER KAUFMANN, *Rechtsgefühl, Verrechtlichung und Wandel des Rechts*, in *JAHRBUCH FÜR RECHTSZOLOGIE UND RECHTSTHEORIE*, 185-99 (1985).

applied to the different types of lies in contract negotiations. Section VI explains a baseline scenario and comparison scenario for the economic analysis of the different types of lies, while Section VII explores the specific economic consequences for four selected types of lies. Section VIII contains the conclusions of this article.

To sum up the most important finding: There are lies which do not produce negative economic effects. In some instances, bluffs may even bring about a marginally positive outcome. At least from an economic point of view, such lies should not be prohibited. The analysis also demonstrates that there are circumstances where lies result in economic welfare losses. However, in some of those instances, the current law cannot mitigate the negative effects of lies effectively. Hence, the law should also not prohibit such intentional lies. The lawmaker should only intervene, if lies produce negative economic effects and the law is able to mitigate them. Overall, the result is that lawmakers should differentiate between harmful and harmless lies and in line with this between lawful and unlawful lies.

The analysis utilizes a uniform understanding of “lie.” Hereinafter, the term lie refers to an intentionally false statement which does not coincide with the facts. Moreover, the deceiver must also have intended to deceive the opposite party.¹² For this reason, this article only considers intentional lies and leaves out negligent deceptions. Furthermore, this article focuses on “active” lies—intentionally incorrect statements—and not on lies by omission or by misleading acts. The terms “lie,” “deception,” “misrepresentation,” and “bluff” will also be used synonymously.

II. STATE OF DISCUSSION ON THE ECONOMIC ASSESSMENT OF LIES IN B2B CONTRACT NEGOTIATIONS

The general negotiation literature extensively explores lies in contract negotiations and addresses numerous different deceptive tactics and techniques used by negotiating parties.¹³ Yet, the relevant literature focuses merely on tactical and strategic aspects of lies and does not explore their economic effects.¹⁴ Another area of

12. See generally SISSELA BOK, LYING – MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 13-14 (1999); Nyberg, *supra* note 10, 50 (“To sum up, then, we can say that lying means making a statement (not too vague) you want somebody to believe, even though you don’t (completely) believe it yourself, when the other person has a right to expect you mean what you say.”); PAUL EKMAN, TELLING LIES 28 (1992) (“In my definition of a lie or deceit, then, one person intends to mislead another, doing so deliberately, without prior notification of this purpose, and without having been explicitly asked to do so by the target.”).

13. Cf. STEFANIE JUNG & PETER KREBS, DIE VERTRAGSVERHANDLUNG – TAKTISCHE, STRATEGISCHE UND RECHTLICHE ELEMENTE 471–73 (2016) (topic list: Irreführungen) [hereinafter Jung & Krebs, *Die Vertragsverhandlung*]. In *Die Vertragsverhandlung*, Jung & Krebs list 38 different tactics and techniques: 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, and interjection. See also STEFANIE JUNG & PETER KREBS, THE ESSENTIALS OF CONTRACT NEGOTIATION (Melissa Dowse trans., 2019) (2019). [hereinafter Jung & Krebs, *Essentials of Contract Negotiation*].

14. On tactical and strategic aspects of bluffs in contract negotiations without discussing economic consequences see, e.g., Jung & Krebs, DIE VERTRAGSVERHANDLUNG 471–73 (2016) (topic list: Irreführungen with references to the different tactics); LEIGH THOMPSON, THE MIND AND HEART OF THE NEGOTIATOR, 195 (2014); JACK, NASHER, DEAL!, 42-4 (2013) (on lies about the BATNA); AMIRA GALIN, THE WORLD OF NEGOTIATION, 129 (2016).

research addresses the circumstances in which people tend to deceive and specifies situations in which they speak the truth.¹⁵ Beyond that, there are numerous publications on ethical and legal aspects of deceptions that frequently discuss the relationship between morality and law.¹⁶ Moreover, the *Rechtsgefühl* (sense of how the law should be) regarding lies in contract negotiations and the interdependence of this *Rechtsgefühl* and law have been stressed occasionally.¹⁷ While this extensive body of literature does not address the economic implications of lies, it provides insights into how, when, and why deception occurs in negotiations and the interdependencies of morality, *Rechtsgefühl*, and the law.

Lies are also examined from an economic perspective, though the literature is more limited in this area compared to other aspects of deceptions. The economic literature focuses on whether certain lies should be permissible or not.¹⁸ Authors who justify some kinds of lies also speak of “optimal dishonesty.”¹⁹ A larger part of this literature addresses the distinction between disclosure duties and the right to remain silent.²⁰ These contributions rarely address deception directly. However, the insights gained by their examination provide the basis for discussing whether lies are necessary for protecting the right to remain silent.²¹ This discussion concerns the advantages of lies, which are otherwise rarely examined. Possible positive

15. Studies, for example, suggest that the use of tactics based on deception depends on how respondents evaluate these tactics ethically. See, e.g., Roy J. Lewicki & Robert J. Robinson, *Ethical and Unethical Bargaining Tactics: An Empirical Study*, 17 J. BUS. ETHICS 665, 669 (1998); Joseph T. Banas & Judi McLean Parks, *Lambs Among Lions? The Impact of Ethical Ideology on Negotiation Behaviors and Outcomes*, 7 INT'L. NEGOT. 235, 251–52 (2002) (concerning false promises, misrepresentation, and misuse of information). Scholars have also found differences by gender, nationality, ethnic origin, level of education, religious beliefs, work experience and personal attitudes to negotiation. See, e.g., Lewicki & Robinson, *supra*, at 678 (nationality); Richard A. Maier & Paul J. Lavrakas, *Lying Behavior and Evaluation of Lies*, 42 PERCEPTUAL & MOTOR SKILLS 575, 576 (1976) (educational level and religious attitude); James S. Leming, *Cheating Behavior, Subject Variables, and Components of the Internal-External Scale under High and Low Risk Conditions*, 74 J. EDUC. RES. 83, 86–87 (1980) (discussing cheating instead of lying, and how sanctions have different effects on the cheating behavior of men and women).

16. See generally Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 LAW & PHIL. 393 (2003); Fritz Allhoff, *Business Bluffing Reconsidered*, 45 J. BUS. ETHICS 283 (2003); Robert S. Adler, *Negotiating with Liars*, 48 MIT SLOAN MGMT. REV. 69 (2007); Thomas L. Carson et al., *Bluffing in Labor Negotiations: Legal and Ethical Issues*, 1 J. BUS. ETHICS 13 (1982); James K. L. Lawrence, *Lying, Misrepresenting, Puffing and Bluffing: Legal, Ethical and Professional Standards for Negotiators and Mediation Advocates*, 29 OHIO ST. J. DISP. RESOL. 35 (2014); RALPH BACKHAUS, *Ethik und Recht in Cicero, de officiis 3.12.50 ff.*, in HUMANIORA MEDIZIN—RECHT—GESCHICHTE 3 (Kern et al. eds., 2006) (discussing ethics according to Cicero); Albert Z. Carr, *Is Business Bluffing Ethical?*, 46 HARV. BUS. REV. 143 (1968); Thomas Carson, *Second Thoughts About Bluffing*, 3 BUS. ETHICS Q. 317 (1993) (the last two providing a moral/ethical perspective).

17. Jung, *supra* note 3, at 973–94.

18. Saul Levmore, *A Theory of Deception and then of Common Law Categories*, 85 TEX. L. REV. 1359, 1366 (2007) (“[I]t is the fact that deception is sometimes acceptable and sometimes not that makes the subject interesting.”).

19. See, e.g., Levmore, *supra* note 7, at 137; Levmore, *supra* note 18, at 136. *But see* HOLGER FLEISCHER, *INFORMATIONASYMMETRIE IM VERTRAGSRECHT* 261–64 (2001) (rejecting this idea). The present paper does not aim to offer a determination of the economic optimum of lies in contract negotiations. Hence, the term is not adopted hereinafter.

20. This issue is not addressed in this paper. For an in-depth analysis of this issue see e.g. Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS*, 357 (2016); Steven Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 THE RAND J. OF ECON., 20 (1994), see also STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW*, 331–34 (2004).

21. See, e.g., Porat & Yadlin, *supra* note 7, at 625–31; Levmore, *supra* note 7, at 137–42; FLEISCHER, *supra* note 19, at 261–64.

effects are occasionally dealt with in the context of anti-abuse lies, paternalistic lies, and truth-revealing lies.²² However, the debate centers around very specific types of lies and so can only be transferred to B2B contract negotiations to a limited extent.

In most instances, the literature focuses on the negative economic effects of lies and applies the transaction cost theory and arguments of the cheapest cost avoider.²³ The literature also examines the negative effects of lies on the truth signal and trust.²⁴ However, the effects of lies on the Best Alternative to a Negotiated Agreement (“BATNA”)²⁵ and the Zone of Possible Agreement (“ZOPA”)²⁶ have received very little attention, though the BATNA and the ZOPA serve as key indicators of bargaining power and the possible area of agreement. In response to this gap in research, this article will discuss this matter in greater detail.²⁷

The literature also focuses on welfare economics,²⁸ and especially on allocation efficiency.²⁹ On the whole, the economic approaches are examined in detail. The relevant contributions usually focus on one approach, like lies protecting the right to remain silent, and analyze it in depth. However, this article deals comprehensively with the economic considerations to draw overall conclusions for an appropriate legal solution to the problem.

III. TYPES OF LIES

This section discusses various types of lies, and the types of lies addressed here will later be analyzed regarding their different economic effects. Economic approaches often treat lies as either a uniform phenomenon³⁰ or they adopt a rough

22. See e.g., Porat & Yadlin, *supra* note 8, at 633–61.

23. See, e.g., Posner, *supra* note 7, at 122. Both approaches will be discussed in detail. See *infra* Sections V. A, V. B.

24. See, e.g., Porat & Yadlin, *supra* note 7, at 631. The effects on the truth signal and trust will be discussed in detail. See *infra* Section V. C.

25. Parties consult their BATNA to determine whether the concrete, negotiated contract is relatively reasonable in comparison to other options for action. JUNG & KREBS, ESSENTIALS OF CONTRACT NEGOTIATIONS, *supra* note 13, at 41. The importance of negotiation alternatives was already fundamentally emphasized in 1950 by John F. Nash. John F. Nash, *The Bargaining Problem*, 18 *ECONOMETRICA* 155, 156 (1950). The term “BATNA” and the significance of negotiation alternatives were mainly developed by Roger Fisher & William Ury. ROGER FISHER & WILLIAM URY, GETTING TO YES 104 (1981); see also JUNG & KREBS, ESSENTIALS OF CONTRACT NEGOTIATIONS, *supra* note 13, at 40–41 (explaining that Roger Fisher and William Ury originated the term “BATNA”).

26. ZOPA stands for zone of possible agreement, i.e. the bargaining range. Within this zone, the contract is economically reasonable for both sides. Michael A. Wheeler, *Negotiation Analysis: An Introduction*, HBS NOTE # 9-801-156, 1, 3 (2000); JUNG & KREBS, ESSENTIALS OF CONTRACT NEGOTIATIONS, *supra* note 13, at 171. In 1982, Raiffa coined ZOPA as a basic term in negotiations. *Id.* at 56–58; see also JUNG & KREBS, ESSENTIALS OF CONTRACT NEGOTIATIONS, *supra* note 13, at 171 (explaining the definition of the term “ZOPA” and attributing its coinage to Howard Raiffa).

27. See *infra* Section V. C.

28. Porat & Yadlin even take up welfare economics in their title: *A Welfarist Perspective on Lies*. Porat & Yadlin, *supra* note 7, at 617.

29. See Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 *J. LEGAL STUD.* 1, 11–12 (1978) (explaining that the importance of quickly relaying information to the market for society’s general welfare); see also Levmore, *supra* note 7, at 134 (explaining that disclosure should be compelled when it would result in economic efficiencies).

30. Cf. Tietzel, *supra* note 7, at 17–34 (describing lies about the contract object in general); POSNER, *supra* note 7, at 118–22 (describing fraud generally).

differentiation according to different types of lies.³¹ Here, the latter approach of deconstructing lies will be used systematically and will be further developed. The proposed differentiation draws on the findings of the Siegen Study on lies in business negotiations.³² The Siegen Study demonstrated that, with regard to their moral intuition and, above all, their *Rechtsgefühl*, individuals differentiate on the subject matter of a negotiator's lies.³³

As this research ultimately aims to find a suitable legal solution, a clear and comprehensible distinction between different types of lies will have a greater chance of being implemented and enforced. Moreover, a meaningful typification of lies helps to categorize individual cases and increase legal certainty.³⁴ The following compilation of types of lies is not exhaustive but provides an overview. The degree of differentiation follows the potential differences in justification, even though different types of lies can certainly show the same results.³⁵ Furthermore, the types of lies are chosen in a way that even non-lawyers and non-economists can find the classifications to be meaningful. However, in individual cases, it could pose a difficulty to define the boundaries between different types of lies. For the economic analysis, this is less relevant than for legal implementation.³⁶ Therefore, in the following, typical examples are chosen for each type of lie without delving deeper into the issue of clear differentiation. Finally, this section will focus on facts, including inner facts. The challenges associated with opinions and intentions and related inner facts will be discussed in Section IV.³⁷

Lies about the subject matter of the contract. Typical examples are misrepresentations by suppliers concerning their products. However, under certain circumstances, there may also be deception on the part of the buyer about the supplier's product, such as the often-cited example of undiscovered oil under a piece of land that is for sale.

Lies about the price. A distinction must be drawn between lies on the price in a narrow and a broad sense. Lies about the price in a narrow sense include those lies about price components, while incorrect statements about a "special price" or a "mates' rate" or a Manufacturer Suggested Retail Price ("MSRP") count as lies about the price in a broad sense. Practically relevant are also lies about cost prices,

31. Literature distinguishes e.g. between productive and distributive information and white lies and harmful lies. See among others Porat & Yadlin, *supra* note 7, at 633–61 (describing different kinds of lies such as anti-abuse lies, truth revealing lies, and paternalistic lies); Levmore, *supra* note 7, at 137–42 (describing Kronman's differentiation).

32. See JUNG, *supra* note 3, at 977–83 (publishing some initial results, with detailed analysis of the data to follow).

33. The results vary greatly depending on what the lie is about. For example, 41% of German professional negotiators consider a bluff of a seller about an alternative offer immoral and 18% advocate a right to rescind the contract. In contrast, 76% deem a lie about the subject matter of the contract immoral and 80% advocate a right to rescind the contract. A deception about personal preferences (football club) is considered immoral by 31%, yet, only 6% of the surveyed German professional negotiators advocate a right of rescission. See e.g., Jung, *supra* note 3, at 982.

34. With regard to the other attempts to categorize lies (e.g. productive vs. unproductive lies and casually acquired information/deliberately acquired information), the problem of actually assigning specific misrepresentations to one of the categories was the main point of criticism. See Kronman, *supra* note 29, at 17; Andrew Kull, *Unilateral Mistake*, 70 WASH. U. L. Q. 57, 66 (1992); Levmore, *supra* note 7, at 141.

35. However, it is possible that there are still different justifications within a single type of lie, which necessitates a more detailed differentiation.

36. At this juncture, the legal formulation will not be addressed.

37. See *infra* Section IV.

profit margins, and purchase prices. Such lies might be the calculative basis of the price or merely used as an argument in the negotiations. In the first case, they are part of the price formation and accordingly of the price in a narrow sense, otherwise, they are only a part of the price in a broad sense.

Lies about the identity and characteristics of the negotiation partner. The negotiation partner can deceive about his or her identity. Moreover, this type of lie also involves deceptions about the characteristics, especially competencies, of their own company, e.g. about their compliance with ethical standards, a certain code of conduct, or their performance. This also includes the deceptions of the negotiator about the financial situation of his or her company.

Lies about the BATNA. As the BATNA significantly influences negotiating power, it is regularly the subject of bluffs. Negotiators sometimes lie about how attractive their alternatives are. A buyer may mention another, more attractive offer in order to negotiate better terms, and it may even be the case that one party tries to deceive the other party about their BATNA.³⁸

Deceptions about emotions. This concerns deceptions about sympathies and antipathies regarding aspects of the negotiation or circumstances outside of the contract, such as the party's favorite football club and political opinions. These lies are used to create the impression that the parties share similar emotions and thereby make use of the similar-to-me-effect.³⁹ These deceptions are also used in B2B negotiations to build a good relationship with the other party. In addition, deceptions about emotions concerning persons who belong to their own negotiating team are possible. Bluffs about emotions during negotiation are very common, for example, faked dissatisfaction with the opposing party's offer or irritation about the opposing party's negotiation style. Some, but not all lies about emotions can be classified as white lies. White lies serve as a "social lubricant" and are designed to enable a harmonious interaction, particularly in the business sphere.⁴⁰

Lies about external circumstances. These lies do not relate to the contract, and could include factors such as the inflation rate in a country and incorrect statements on the base rate.

Lies about the negotiation process. This includes lies which are about internal approval systems⁴¹ or the requirement to complete a nondisclosure agreement before the commencement of negotiations.

Lies about time-related aspects. This, for instance, encompasses lies about the availability of certain persons, sometimes called "missing person maneuver,"⁴² as well as wrong deadlines,⁴³ and departure times.

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

39. People have a tendency towards finding people more likeable who are similar to them. This similarity can be related to age, gender, origin, hobbies, and political attitudes. See Greg J. Sears & Patricia M. Rowe, *A Personality-Based Similar-to-Me Effect in the Employment Interview: Conscientiousness, Affect- Versus Competence-Mediated Interpretations, and the Role of Job Relevance*, 35 CAN. J. BEH. SCI. 13 (2003) (discussing the similar-to-me effect in job interviews).

40. See also Victoria Talwar & Angela Crossman, *From Little White Lies to Filthy Liars: The Evolution of Honesty and Deception in Young Children*, 40 ADV. IN CHILD DEVEL. & BEHAV. 139, 150 (2011) (noting that "[s]uch [prosocial] lies . . . could be considered the oil that greases the wheels of everyday social interactions").

41. In this context, one tactic is known as "ambiguous authority." See Jung & Krebs, DIE VERTRAGSVERHANDLUNG, *supra* note 13, at 206–07.

42. *Id.* at 269.

43. *Id.* at 90–91.

Lies about interests and preferences. Negotiators often bluff about the interests and preferences of their side regarding the current negotiations. In negotiation literature, such deceptions are discussed under the terms “bogey” or “padding.”⁴⁴ However, an agent acting as a negotiator can also deceive about their own interests and preferences regarding the current negotiations.

Lies about substantive requirements and instructions. Bluffs concerning the substantive requirements and instructions of their side may arise in principal-agent situations.⁴⁵ Typical bluffs include false statements on budget limitations (“all I’ve got”).⁴⁶ Misrepresentations about specifications from third parties are also possible.

Lies 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.⁴⁷

Lies concerning the implementation or fulfillment of the contract. The focus here is on bluffs about the ability to fulfill in good time and otherwise as contractually agreed. Deceptions about the performance of the contract are also covered by the scope of warranty law.

Lies about availability. Suppliers may lie about the availability of their products.⁴⁸ This also includes lies about the availability on the market like “unique item” or “rare collector’s item.” Finally, there are deceptions about the availability of third-party services, such as third party financing.

Lies about the general market situation. This category is closely linked to deceptions about the BATNA. However, this type of lie includes the special feature that there is no direct deception about the actual BATNA, but rather a more general deception about the overall market situation and expected market development (i.e. the dynamics).

IV. INTERDEPENDENCIES OF VARIOUS FACTORS

The economic analysis of the different types of lies is highly complex due to the interdependencies of four different factors: the moral, legal, and economic aspects as well as the different frequencies with which lies are used in practice. Frequency and economic interdependencies are the primary subject of this article and are discussed in detail below. Moral and legal interdependencies are not the primary subject of this article, but for a better understanding, these interdependencies will be briefly outlined in this Section and discussed where necessary. In brief, moral aspects include people’s moral beliefs, the moral concepts of philosophers, the *Rechtsgefühl*, and the *Judiz* (sense of how the law is).⁴⁹ Legal aspects include

44. *Id.* at 132–133.

45. On the principal-agent problem in contract negotiations, see Jan van Uden, *Die unternehmerische Verhandlungsvertretung als komplexe Prinzipal-Agenten-Problematik*, 6 ZEITSCHRIFT FÜR KONFLIKTMANAGEMENT 216-20 (2018).

46. See Jung & Krebs, *ESSENTIALS OF CONTRACT NEGOTIATION*, *supra* note 13, at 26, 53–54.

47. *Id.* at 137–38.

48. One common tactic is the so-called “tactic of small quantities, see *Id.* at 158–159.

49. RIEZLER, *supra* note 11, at 6-25 distinguishes three forms of the *Rechtsgefühl* (1. Sense of how the law should be; 2. Sense of how the law is; 3. Sense that only what corresponds to the law is to be done.). For the second category I use the German term “*Judiz*.”

the legal rules, the enforceability of rights and claims, the probability of detection and the possibility of evidence as well as alternative courses of action.

Each of the four aforementioned factors are influenced by other factors. The frequency of lies, for example, is not only influenced by economic aspects, morality, the *Rechtsgefühl*, and the law, but also by gender, nationality, ethnic origin, level of education, religious beliefs, work experience, and personal attitudes towards negotiation.⁵⁰ Still, it is valuable to analyze some of the main interdependencies between the four factors to take them into account for the economic analysis.

A. *Frequency of Lies*

In order to determine the overall economic effects of lies, it is crucial to know the frequency with which professional negotiators deceive in business negotiations. However, the frequency of lies in B2B contract negotiations has limited research.⁵¹ Studies regarding lies in everyday life reveal that “bluffing” is a relatively common practice,⁵² even though people claim to value honesty.⁵³ Yet, bluffs usually concern small, harmless lies, also known as little white lies. Such harmless lies in a social context can also be expected in B2B negotiations.

Simulations conducted with students allow conclusions to be drawn about actual business practices. The simulations showed that in such negotiations students lie relatively frequently, not only in the social context but also regarding substantive aspects of the negotiation.⁵⁴ These results must be viewed against the background of further findings on deceptions: according to the Siegen Study,⁵⁵ the use of certain deceptive tactics in contract negotiations is considered morally acceptable.⁵⁶ This suggests that people would also be willing to apply such tactics in contract

50. See, e.g., Lewicki & Robinson, *supra* note 15, at 676 (describing how frequency of using lying as a tactic varies by nationality); Maier & Lavrakas, *supra* note 15, at 576 (describing how frequency of lying can be determined by educational level and religious attitude); Leming, *supra* note 15, at 86 (describing how sanctions have different effects on the cheating behavior of men and women).

51. Bruce Barry & Erin Rehel, *Lies, Damn Lies, and Negotiation: An Interdisciplinary Analysis of the Nature and Consequences of Deception at the Bargaining Table*, HANDBOOK OF RESEARCH IN CONFLICT MANAGEMENT 343 (Ayoko et al. eds., 2014) (providing an overview on the respective state of discussion).

52. Bella M. DePaulo et al., *Lying in Everyday Life*, 70 J. PERS. & SOC. PSY. 979, 991 (1996); Candida Peterson, *Deception in Intimate Relationships*, 31/6 INT. J. PSY. 279, 288 (1996) (on deception in intimate relationships).

53. See Norman H. Anderson, *Likeableness Ratings of 555 Personality-Trait Words*, 9 J. PERS. & SOC. PSYCHOL. 272, 272-279 (1968) (finding people valued “honest” and “truthful” on number 2 respectively 5, while “phony” and “liar” were at the end of the list (554 and 555 respectively)).

54. Karl Aquino & Thomas E. Becker, *Lying in Negotiations: How Individual and Situational Factors Influence the Use of Neutralization Strategies*, 26 J. ORG. BEHAV. 661, 670 (2005) (also focusing on lying about certain aspects); J. Keith Murnighan et al., *The Information Dilemma in Negotiations: Effects of Experience, Incentives, and Integrative Potential*, 10 INT. J. CONF. MANA. 313, 332 (1999); Maurice E. Schweitzer & Rachel Croson, *Curtailing Deception: The Impact of Direct Questions on Lies and Omissions*, 10 INT. J. CONF. MANA. 225, 225 (1999); Helmut Crott et al., *The Effect of Experience on Information Exchange and Cheating in an Asymmetrical Bargaining Situation*, in GROUP DECISION MAKING 356 (Brandstätter & Stocker-Kreichgauer eds., 1982).

55. *Study on Bluffs in B2B Contract Negotiations*, UNIVERSITY OF SIEGEN (Jun. 18, 2019) <https://www.wiwi.uni-siegen.de/contractgovernance/survey/?lang=de>.

56. For preliminary results, see Jung, *supra* note 3, at 973-1001. Judges, lawyers, professional negotiators and students took part in the survey.

negotiations.⁵⁷ Put generally, people tend to comply less with rules if they do not believe that those rules are morally justified.⁵⁸ Therefore, moral beliefs seem to influence the frequency of lies.

Studies also reveal that potential liars consider person-internal “costs.” Misrepresentations often lead to person-internal “costs” in the form of psychological “costs,” so-called “lying costs.”⁵⁹ This is due to the so-called “honesty norm.”⁶⁰ If people violate the internalized honesty norm then lying costs arise, which can manifest as a negative self-image.⁶¹ In the brains of liars, the amygdala and the right anterior prefrontal cortex are generally active.⁶² This provokes emotional stress and feelings, such as shame and guilt.⁶³ These “lying costs” primarily occur where the deceiver cannot justify the lie to him or herself.⁶⁴ Whether the liar can justify the lie to him or herself depends on the moral evaluation of the deception, so lying costs occur when a behavior is deemed immoral. However, as already mentioned, the

57. Shaul Shalvi et al., *Justified Ethicality: Observing Desired Counterfactuals Modifies Ethical Perceptions and Behavior*, 115 ORGAN. BEHAV. HUM. DECIS. PROC. 181, 182 (2011) (stating that people resort to bluffing when they can justify the deception to themselves).

58. Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 L. & SOC. REV. 457, 462 (1983) (“Weak beliefs in the moral validity of rules make conformity less likely.”).

59. Johannes Abeler et al., *Representative Evidence on Lying Costs*, 113 J. PUB. ECO. 96, 96 (2014); see also Maurice E. Schweitzer, *Deception in Negotiations*, WHARTON ON MAKING DECISIONS 187, 192 (Hoch et al. eds., 2001).

60. See e.g., Gerald J. Pruckner & Rupert Sausgruber, *Honesty on the Streets: A Field Study on Newspaper Purchasing*, 11 J. EUR. ECO. ASSOC. 661 (2013) (examining the “honesty norm” with regard to buying newspapers “where payments are not monitored”).

61. Nina Mazar et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MKTG. RES. 633, 634 (2008).

62. See, e.g., Nobuhito Abe et al., *Deceiving Others: Distinct Neural Responses of the Prefrontal Cortex and Amygdala in Simple Fabrication and Deception with Social Interactions*, 19 J. COG. NEUROSCIENCE 287, 292 (2007). Also, other areas are activated when people lie, e.g. the anterior cingulate cortex. *Id.* at 293. See generally Nobuhito Abe, *The Neurobiology of Deception: Evidence From Neuroimaging and Loss-of-Function Studies*, 22 CURRENT OPINION NEUROLOGY 594 (2009); *How the Brain Shapes Deception: An Integrated Review of the Literature*, 17 THE NEUROSCIENTIST 560 (2011); Matthias Gamer, *Detecting of Deception and Concealed Information Using Neuroimaging Techniques*, in MEMORY DETECTION: THEORY AND APPLICATION OF THE CONCEALED INFORMATION TEST, 101-03 (Verschuere, Ben-Shakhar & Meijer eds., 2011 (giving an overview on the neurobiology of deception); see also Thomas Baumgartner et al., *Who Is Honest and Why: Baseline Activation in Anterior Insula Predicts Inter-Individual Differences in Deceptive Behavior*, 94 BIOLOGY PSYCHOL. 192, 195 (2013) (concluding that “a high level of baseline activation in the anterior insula might predispose individuals to be honest due to a hyperactive emotional system which would make a deceptive act too stressful and bothersome”). However, studies generally show that brain activity is higher when people lie as compared to when they tell the truth. This suggests that telling the truth is easier than lying. See Gamer, *supra* note 63, at 97. The amygdala is also active in people who are lied to, i.e. victims of deception. Cf. Julie Grèzes et al., *Amygdala Activation When One Is the Target of Deceit: Did He Lie to You or to Someone Else?*, 30 NEUROIMAGE 601, 601 (2006); Julie Grèzes et al., *Brain Mechanisms for Inferring Deceit in the Actions of Others*, 24 J. NEUROSCIENCE 5500, 5502 (2004). Another study found that the left temporoparietal junction shows greater activation when people detect anti-social lies. See Tokiko Harada et al., *Neural Correlates of the Judgment of Lying: A Functional Magnetic Resonance Imaging Study*, 63 NEUROSCIENCE RES. 24, 30 (2009).

63. Cramton & Dees, *Promoting Honesty in Negotiation: An Exercise in Practical Ethics*, 3 BUS. ETHICS QUARTERLY 375, 375 (1993) (mentioning all negative feelings as the result of lies). See also Schweitzer, *supra* note 59, at 193.

64. Shalvi, *supra* note 58, at 181-89; see also Maurice E. Schweitzer, *Deception in Negotiations*, WHARTON ON MAKING DECISIONS 193 (Hoch et al. eds., 2001).

Siegen Study demonstrates that the use of certain deceptive tactics in contract negotiations is regarded as morally acceptable.⁶⁵

The Siegen Study also shows that even if respondents regarded deceptive tactics as immoral, they did not favor legal consequences in all cases.⁶⁶ That professional negotiators generally adopt a particularly generous attitude regarding morality and the *Rechtsgefühl*⁶⁷ is a further indication of the widespread practice of lies in B2B negotiations and of a possible interdependency between the *Rechtsgefühl* and frequency of lies. Further, negotiation literature describes misleading tactics as an indispensable skill of good negotiators,⁶⁸ which confirms the presumption that deception in B2B negotiations is widely used. This result is also evident, insofar as negotiations yield countless possibilities for bluffs. Negotiators have to choose between truth and deception in each instance.⁶⁹ Moreover, many of those lies promise considerable advantages and are paired with a relatively low risk of being detected. Taken together, it can be concluded that certain deceptions are a customary practice in business negotiations.

B. Cost-benefit Ratio

Moreover, the frequency of lies depends on the cost-benefit ratio.⁷⁰ The cost-benefit ratio is largely defined by the risk of disclosure⁷¹ and the possible negative consequences of disclosure.⁷² The risk of disclosure varies depending on the type of lie, such as lies about the availability of a product, alternative offers, or the legal situation.⁷³ The possible negative consequences also vary regarding the different types of lies.⁷⁴ This depends on the reaction of the deceived person, as well as the

65. Jung, *supra* note 57.

66. *Id.* at 979, 983.

67. 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. *Id.* at 978. The majority of German professional negotiators favor legal consequences (the right of rescission in the specific case) in only one case (and with 46% favor of legal consequences in a second case). Among German students, the majority favors legal consequences in two cases (and 45% in a third case). *Id.* at 982. Further results of the study will be discussed in greater detail as part of the individual types of lies (see Section VII.). *See also Id.* at 977–983. At the moment, the study is expanding and will cover even more relevant scenarios.

68. *See, e.g.,* G. Richard Shell, *When Is It Legal to Lie in Negotiations*, 32 SLOAN MGM'T. REV. 93, 93 (1991) (“Commercial negotiations seem to require a talent for deception.”); James H. Michelman, *Deception in Commercial Negotiation*, 2 J. BUS. ETHICS 255, 255 (1983) (“[D]eception often seems to be an unavoidable characteristic of negotiation.”).

69. “[I] submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true positions.” James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 5 AM. B. FOUND. RES. J. 926, 927 (1980).

70. *See also* Cramton & Dees, *supra* note 63, at 376 (noting that people tend to use deception for their own benefit).

71. *See also* THE WHARTON SCHOOL, ET AL., WHARTON ON MAKING DECISIONS 191 (Hoch et al. eds., 2001). I wasn’t sure what the Schweitzer section looked like without actually seeing the source.

72. *See* THE WHARTON SCHOOL, *supra* note 72, at 192 (mentioning legal and reputation costs).

73. *Cf.* Tietzel, *supra* note 7, at 2326 (on information asymmetries and the higher incentives to deceive when they exist). On the types of lies, *see below* Section VII.

74. *See also* THE WHARTON SCHOOL, *supra* note 72, at 192 (Hoch et al. eds., 2001) (one-off negotiations).

reaction of individuals that are aware of the deception, and the market as a whole.⁷⁵ The deceived party, even without entitlement to pursue legal or contractual claims has a repertoire of recourses at his or her disposal. Avenues of recourse include renegotiation, replacement of the deceiving negotiator, counter-lies, altering negotiation behavior, compensation in follow-up transactions, ending the business relationship, or damaging the liar's reputation.⁷⁶ These alternative actions are effective, even in cases where the lie is only discovered after the contract is finalized.⁷⁷ As a result, these actions deter deceptions because they increase the costs for the deceiving party. Rational negotiators will weigh the costs and benefits of applying these alternative actions. Renegotiations, for example, increase transaction costs, while accusing the other side of using deceptive tactics risks fracturing long-term business relationships.⁷⁸ Difficulties associated with the detection and proof of deception are less crucial for alternative courses of action than legal sanctions because real "evidence" is often not required to apply social sanctions. In many cases, even the suspicion of a lie can justify the application of alternative courses of action.

In permanent business relationships and interconnected economic communities, social sanctions, such as including reputational damage,⁷⁹ are especially severe.⁸⁰ Whether social sanctions are put into action will depend on the moral assessment of the deception and the *Rechtsgefühl*, because parties can only choose to exercise social sanctions if someone violates a social norm.⁸¹ The development of those social norms is influenced by morality and the *Rechtsgefühl*.⁸² In short, if people believe that certain behavior is morally acceptable, they are less likely to pursue social sanctions.⁸³

75. Tietzel, *supra* note 7, at 28–29 (“All aforementioned individual responses to fraud attempts have a behavioral regulating effect on all parties involved; they increase the costs incurred by the fraud to the fraudster, reduce indirect fraud costs to third parties, and reduce search and information costs for potential victims of fraud.”) (translated from “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.”).

76. Tietzel, *supra* note 7, at 28–33 (identifying individual and collective response options, e.g.: objection, outflow of customers, quality review by consumer protection organizations, exclusion from other jointly produced services).

77. Amar Bhidé & Howard H. Stevenson, *Why Be Honest If Honesty Doesn't Pay*, 68 HARV. BUS. REV. 126 (1990) (claiming that many businesses do not retaliate when lied to).

78. See, e.g., Jung & Krebs, *supra* note 13, at 96 (on fraud dilemma).

79. For a classification of social sanctions, see Stuart Piddocke, *Social Sanctions*, 10 ANTHROPOLOGICA 261, 281 (1968).

80. See, e.g., William C. Johnson et al., *Corporate Fraud and the Value of Reputations in the Product Market*, 25 J. OF CORP. FIN. 16, 39 (2014) (on reputation damages in the product market).

81. Piddocke, *supra* note 79, at 267 (“The third method of reinforcing the normative order is that of social sanctions. This is the provision of rewards for compliance with the norms (positive social sanctions) and of punishments for deviance therefrom (negative social sanctions).”).

82. On the role of path dependencies with regard to social norms, see MICHAEL HECHTER & KARL-DIETER OPP, *SOCIAL NORMS* 406–10 (2001).

83. Tobias Gössling, *The Price of Morality - An Analysis of Personality, Moral Behaviour, and Social Rules in Economic Terms*, 45 J. OF BUS. ETH. 121, 124 (2003). However, it should be taken into account that the moral evaluation will also depend on the fact if the behavior is judged from a neutral perspective or if the person is the liar or the victim of the lie.

C. *Legal Claims and Rights*

If the legal system grants the deceived party certain rights, the legal situation will influence the frequency of lies. Like alternative courses of action, legal consequences will shift the cost-benefit ratio of misrepresentations. Notably, the effects of the legal system hinge on effective legal enforcement.⁸⁴ The higher the enforcement rate, the less attractive it will be to lie, which will lower the frequency of lies.⁸⁵

It is important to note that enforcement depends on the concrete legal rules. The most common legal consequences in private law are the right to rescind the contract or contractual damage claims for intentional, causal misrepresentations.⁸⁶ Assuming that the deceiver behaves rationally, the more severe the sanctions, the less deception occurs.

Additionally, the enforcement of rescission or claims for damages depends on the availability of alternative courses of action. If there are effective and cheaper alternatives, the deceived party will resort to an alternative, like renegotiations and social sanctions. Regarding the decision between the enforcement of legal rights and alternative courses of action, the parties' relationship is a deciding factor. In long-term B2B relations, the parties generally apply only alternative courses of action to avoid damaging the long-term relationship.

1. *Detection and Evidence*

The victim of deception can only enforce legal claims if he or she can uncover the deception. Oftentimes, the uncovering of the lie initially causes transaction costs.⁸⁷ Whether the party will invest resources to uncover deception depends on the cost-benefit ratio. The deceived party will consider the costs for clarification, as well as the additional costs of enforcing the legally granted rights or the costs of using alternative courses of action and the potential monetary recovery from successful enforcement.⁸⁸ The transaction costs that occur diminish welfare and the possible benefits of successful enforcement will often be limited. In cases of misrepresentations that lead to a different negotiation result within the ZOPA,⁸⁹ the deceived party is rarely interested in a rescission, because he or she has no better alternative to that deal. However, the deceived party might want to enforce damage claims, but it might be difficult for the deceived party to prove his or her concrete damages.

Detection and evidence gathering are the main barriers to enforcement of legal remedies where deception taints negotiations.⁹⁰ This is because judicial

84. Enforcement is understood in a wide sense in this paper. Therefore, enforcement is not only given when a party enforces a right in court, but also if the party simply claims the right from the other party referring to the legal situation and the other party complies.

85. Tietzel, *supra* note 7, at 30 (regarding criminal sanctions).

86. Possible criminal sanctions and tort law are not considered here. *See generally, supra* note 3, at 983-992 (giving an overview on U.S. and German law).

87. *See* more in detail below at V.A.

88. *See* Cramton & Dees, *supra* note 63, at 374 (explaining that reputational consequences 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).

89. *See* below Section V.C.

90. *See* Cramton & Dees, *supra* note 63, at 378 ("Unfortunately, the civil law is a rather blunt instrument for the enforcement of norms.").

enforcement of legal remedies is only possible where deception is uncovered. In this case, the deceived party must bear the difficulties associated with the burden of proof.⁹¹ Lies concerning the subject matter of the contract and lies about the contracting parties can be proven at a reasonable cost.⁹² Additionally, written misrepresentations are often easier to prove than oral misrepresentations. For example, it is easier and less expensive to introduce a written document during judicial proceedings than it is to examine witnesses. Therefore, when there is an oral misrepresentation, the parties possess a high degree of uncertainty regarding the outcome of litigation. Such uncertainty deters the deceived party from pursuing litigation, which lowers enforcement.

2. Enforceability of Rights and Claims

a. Opinions, Intentions, and Inner Attitudes

The enforceability of claims regarding false opinions is a particularly difficult challenge. Opinions are generally neither “wrong” nor “right,” and thus a statement of opinion itself cannot constitute a misrepresentation.⁹³ But a person can deceive a contractual counterpart as to whether he or she holds a certain opinion (“inner fact”).⁹⁴ However, it is difficult, if not impossible, to prove what opinion a person holds, as this is known only by the person⁹⁵ and because one’s opinions can change over time. This complicates the possibility of proving that an opinion was held at a specific point in time. The same applies to inner attitudes and intentions.⁹⁶ Due to these problems of proof, it is challenging for a legal system to effectively enforce a ban on such misrepresentations. Therefore, from an economic point of view, a ban is generally ineffective at mitigating the negative effects associated with lies about opinions, inner attitudes, and intentions. However, economic arguments are only one of the arguments that lawmakers take into account.

b. Principal-Agent-Problems

Additionally, owners of companies rarely negotiate themselves, so they often rely on agents to represent their interests, which might cause problems regarding enforcement.⁹⁷ In many situations, the deceived agent will avoid disclosing that he

91. See, e.g., CHRISTIAN ARMBRÜSTER, 1 MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH: ALLGEMEINER TEIL § 123 marginal no. 94-95 (8th ed. 2018) (Munich Commentary on the Civil Code on German law).

92. See on the subject matter more in detail below at VI.A.

93. See Jung, *supra* note 3, at 983-992 (addressing differing legal standards in Germany and the U.S.).

94. U.S. law regulates such lies. See Restatement (Second) of Contracts § 159(d) (1981).

95. Even if the deceiver tells his colleague that he lied about his opinion, the testimony of the colleague cannot prove the lie for sure, because the deceiver could have also lied to his colleague. Only the deceiver knows the truth and could potentially offer proof that he lied.

96. Regarding U.S. 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*, 29 Ch. 459, 483 (1885).

97. In negotiations, a principal-agent situation is given where a representative (agent) is commissioned by the principal to conduct negotiations and, if necessary, to also conclude these negotiations. In this respect, hidden characteristics, hidden actions, hidden knowledge, and hidden intentions are particularly challenging. See, e.g., Jung & Krebs, *supra* note 13, at 138-41; Jan van Uden, *Die unternehmerische Verhandlungsvertretung als komplexe Prinzipal-Agenten-Problematik*, 21(6) ZEITSCHRIFT FÜR

or she was deceived in the negotiation because deceived agents regularly lack the incentive to do so. Agents seldom want to admit to their superiors that they have been deceived and may have agreed to a less favorable contract, because their principal may regard this as a mistake and punish them. Thus, the behavior of the agent will often prevent the enforcement of potential legal claims and the application of alternative measures.

c. Errors in the Enforcement Process

It should also be considered that there may be errors in the enforcement process of such legal claims. Lawyers may make a mistake in the submission of the facts or may argue the law incorrectly, and courts may erroneously assess certain situations and render judgments that do not comply with the law. The degree of such a risk depends on the clarity of the relevant regulations. In this respect, complex rules are more susceptible to errors than standard rules. Likewise, broad, interpretable formulations are more likely to result in legal uncertainty than clear and unambiguous formulations.⁹⁸ In this respect, one cannot necessarily 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 or her favor. As a result, whether claims are enforced depends, among other things, on the “error rate” of lawyers and courts and the uncertainty related to the scope of justifiability.⁹⁹ In this regard, clear and secure legal provisions are economically preferable because they minimize this effect.

3. Enforcement and Rechtsgefühl

The *Rechtsgefühl* may be particularly influential to actual enforcement. If the law and the *Rechtsgefühl* do not correspond, the claim or legal right will be enforced less frequently.¹⁰⁰ The sense of what the law is, the so-called “*Judiz*,” will also play a significant role regarding the actual enforcement. The importance of the *Rechtsgefühl* and the *Judiz* is illustrated particularly well by the example of the German legal system. German law grants the deceived party a right to rescind in almost all cases.¹⁰¹ However, the aforementioned international Siegen Study demonstrated that in many of these cases, the surveyed Germans did not favor imposing legal consequences for deception.¹⁰² The Siegen Study also indicated that Germans

KONFLIKTMANAGEMENT 216, 216-20 (2018) (discussing the principal-agent-problem in contract negotiations).

98. Levmore, *supra* note 7, at 141 (pointing out that in legal systems that permit “optimal dishonesty,” the risk of errors would increase).

99. *See id.* (discussing that courts can err).

100. Cramton & Dees, *supra* note 63, at 371 (“[T]he parties must be willing to spend the resources (time and money) to seek remedies.”).

101. Bürgerliches Gesetzbuch [BGB] [CIVIL CODE], abstract § 123, para. 1, *translation* at <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html> (Ger.). (“A person who has been induced to make a declaration of intent by deceit...may avoid his declaration.”) (German: “Wer zur Abgabe einer Willenserklärung durch arglistige Täuschung...bestimmt worden ist, kann die Erklärung anfechten.”); *see also* Fleischer, *supra* note 19, at 264 (advocating the strict maintenance of a lie prohibition).

102. The majority of professional German negotiators favor legal consequences (in this specific case, a right of rescission) in only one of nine cases (with 45% in favor of legal consequences in another study). Among German students, the majority favors legal consequences in two out of nine cases (and

believed that the law did not cover all forms of lies,¹⁰³ and case law reveals that there are also almost no court rulings for such cases.¹⁰⁴ This could stem from the fact that, due to their *Rechtsgefühl*, the deceived parties do not want to enforce their rights.¹⁰⁵

Whether legal rights are enforced influences the behavior of market participants. If they recognize that certain lies do not prompt legal repercussions, they will not adapt their behavior to the legal rules, rather they will respond to the actual situation.¹⁰⁶ Thus, they will change their behavior according to the possible alternative courses of action like social sanctions and the degree to which they anticipate deceptions by the opposing party.¹⁰⁷ This implies that the illegality of a given behavior will have little influence on market participants' behavior in the absence of enforcement. The law declaring lies to be illegal will therefore not effectively reduce the frequency of false statements made in negotiations. Thus, many of the negative effects caused by lies arise even when the legal system regards all deceptions as unlawful, like the German legal system. To an extent, the lack of legal enforcement can also damage the reputation of the legal system as a whole,¹⁰⁸ which may result in a loss of the law's steering effect in other areas as well. To conclude, if the *Rechtsgefühl* contributes to a lack of enforcement, the law will not be able to effectively mitigate the costs of lies.

D. Interim Results

Overall, the analysis demonstrates a connection between moral, legal, and economic aspects and the frequency of lies. The enforceability of legal rights as well as alternative courses of action is affected by the frequency of lies as well as moral beliefs and the *Rechtsgefühl*. It must also be noted that the very existence of a claim can affect the available courses of action, such as renegotiation. Interdependencies also exist between morality and the *Rechtsgefühl*, and the frequency of lies. While the interdependence between the *Rechtsgefühl* and the *Judiz* is complex, there is a

in another study it is 46.5%). The surveyed judges and attorneys each support a right to rescind the contract in two cases. Siegen Study, *Study on Bluffs in B2B Contract Negotiations*, University of Siegen, questionnaire available at <https://www.wiwi.uni-siegen.de/contractgovernance/survey/?lang=de>.

103. An additional survey to the Siegen Study also examines the *Judiz* (sense how the law is). Only in 2 out of 9 cases the German students believe that the law actually grants the deceived party a right to rescind. This is only the case for lies about the subject matter of the contract and lies about the legal situation.

104. For example, only one case on a misrepresentation about a better alternative offer could be found. Amtsgericht Berlin [AG] [District Court], Mar. 22, 1933, 171 C 130/33 (published incompletely DEUTSCHE JUSTIZ: RECHTSPFLEGE UND RECHTSPOLITIK; AMTL. BLATT D. DEUTSCHEN RECHTSPFLEGE, 823–24 (1933)).

105. 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. See also *infra* Section III. C. 1.

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

107. See also Tietzel, *supra* note 7, at 30-31 explaining how social sanctions can help to uphold moral rules.

108. Geiger, *VORSTUDIEN ZU EINER SOZIOLOGIE DES RECHTS*, 390 (1964) (“Die Sanktionstätigkeit der Instanz Δ kann dann einfach nicht mit dieser Kriminalitätsfrequenz Schritt halten und verspielt ihr Ansehen durch Ineffektivität.”).

clear distinction between morality and the *Rechtsgefühl*.¹⁰⁹ Thus, the term *Rechtsgefühl* is endowed with an independent meaning.

V. ECONOMIC APPROACHES

This section is oriented on the *homo economicus*¹¹⁰ because B2B contract negotiations are generally characterized by a high degree of rationality. National legislators usually expect rationality from the parties to B2B negotiations.¹¹¹ Therefore, rationality can be considered a baseline requirement of B2B negotiations and the classical economic approaches based on homo economics are applicable.¹¹²

The following overview presents the economic approaches that will be used to analyze the different types of lies. The analysis refers to one-off negotiations, but significant differences in long-term business relationships are addressed as well. Some of these economic approaches take an abstract view towards lies indicating whether lies generally result in negative or positive effects. However, they seemingly do not lead to different results when applied to different types of lies. Where practicable, insights are provided on an economically expedient formulation of possible legal consequences from these approaches.

A. Transaction Costs

Given B2B contract negotiations, lies can substantially increase transaction costs.¹¹³ However, a distinction must be drawn between different types of transaction costs. First, some transaction costs are associated with the “invention” and telling of the lie. These costs are borne by the deceiver and include the time and money spent manipulating documents used in furtherance of the deception, as well as the time and effort spent on instructing and preparing agents to tell such lies.

Second, there are transaction costs associated with the fear of lies. These costs are primarily borne by the potentially deceived party. These costs arise from preventive measures such as informing oneself beforehand and investing in good relationships,¹¹⁴ as well as from investigations, such as verifying offered information.

109. The Siegen Study investigates the relationship of morality and the *Rechtsgefühl*. Siegen Study, questionnaire available at https://www.wiwi.uni-siegen.de/contractgovernance/survey/?lang=de;_see_also Jung, *supra* note 3, at 983; Stefanie Jung, *Das Rechtsgefühl im Vertragsrecht*, RECHTSWISSENSCHAFT, issue 4, 378, 414. An additional survey also examines the Judiz. The distinction between morality and the *Rechtsgefühl* becomes very clear with regard to bluffs about product availability: 81% of American lawyers consider such a lie to be immoral, but only 14% favor ordering legal consequences.

110. The “economic man” is characterized by being rational and self-interested and acting in a way to maximize his or her utility.

111. For example, in Europe, even for the offence of deception in fair trading law, the notion of a fictitious, economically reasonable average consumer, applies; Cf. Council Directive 2005/29/EC, Recital 18, 2005 O.J. (L 149) 25 (EC) (“[A]verage consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors.”).

112. This article will not examine shifts caused by psychological findings or behavioral economics. These disciplines will only be invoked where the lie aims at such an effect.

113. See generally OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 15-42 (1985); *Transaction Costs Economics*, HANDBOOK OF INDUSTRIAL ORGANIZATION, 135 (Schmalensee & Willig eds., 1989) (illustrating fundamental principles on transaction costs).

114. Hence, the fear of being lied to with the associated transaction costs might be reduced by a long-term relationship. However, even if the parties have a very good relationship, the fear of some (less severe) lies might persist. One study found a corresponding relation between the parties’ relationship

Parties may attempt to mitigate the cost of lies by drafting special contract terms that address their fear of potential lies.

Third, transaction costs associated with the detection of deception may arise. Some of these costs may occur only for the deceived party, like the costs of securing evidence, while other costs arise for both parties. If a lie is exposed, legal costs like attorney fees may be incurred. Depending on the legal system these costs may have to be borne by both parties. Costs may also arise with social sanctions, including the time and effort spent enforcing those sanctions. In the case of a contract rescission, parties will have to renegotiate or more likely negotiate with other partners.

Fourth, transaction costs arise from the time and effort spent on the negotiation process. Hence, prolonging the negotiation process also increases transaction costs. However, it is not clear whether lies result in longer or shorter negotiations. Lies with distributional effects within the ZOPA¹¹⁵ might allow parties to arrive at compromises more easily, and therefore within a shorter time frame. However, the corresponding possible positive economic effects seem relatively small, because the time gained would probably be marginal compared to the total amount of time spent on contract negotiations.

Moreover, some of these transaction costs occur not only in the event of actual deception but also where one party fears being misled.¹¹⁶ Hence, these costs partially depend on the expectation of the potentially deceived party. Therefore, transaction costs may arise even where the deception has not been successful.¹¹⁷ Thus, a law regulating only causal deceptions cannot mitigate all possible negative economic effects resulting from lies. For this reason, it is worth considering establishing legal consequences, even for non-causal misleading information. Such rules could have distinct effects, different from rules regulating causal misrepresentations. They could be designed to compensate for damages and they could serve as a means of deterrence.¹¹⁸

To conclude, a closer look at the transaction costs confirms that deceptions, which are causal to the conclusion of a contract and have been uncovered, may result in particularly high transaction costs. However, many legal systems might not compensate for all damages of causal lies, such as the costs associated with developing strong relationships and informing oneself better.¹¹⁹ In case of rescission, many legal systems would not compensate the deceived party for the lost time or effort invested in the negotiation, which reduces the incentives for deceived parties to enforce the law.¹²⁰

and deceptions (the better the relationship the fewer deceptions), although the results were only based on self-declarations and not on observed behavior. Schweitzer & Croson, *supra* note 54, at 233. However, other studies based on laboratory experiments have not always shown a clear connection between fewer deceptions and friendship respectively rapport. See Sandy Jap et al., *The Dark Side of Rapport: Agent Misbehavior Face-to-Face and Online*, 57 MGMT. SCI. 1610-1622 (2011); Per van der Wijst & Emiel Kraemer, *Friendship, Deception, and Punishment in Negotiations*, Presentation at the 22ND ANN. INT'L A. CONFLICT MGMT CONF. (June 15-18, 2009).

115. Lies may influence the distribution of the negotiation pie, meaning that the parties still find an agreement within the ZOPA, but one party may receive a bigger slice of the negotiation pie due to the lie.

116. *Supra* note 2.

117. When this may be the case see 2 and 3. Cf. GERRIT HÖLZLE, VERSTRICKUNG DURCH DESINFORMATION, 11 (2012) (on information and search costs).

118. Levmore, *supra* note 18, at 1364–66 (describing deterrent nature of rules on deception).

119. *Supra* note 2.

120. *Supra* note 3.

B. *Cheapest-cost Avoider*

Where a party intentionally lies, the liar is the cheapest-cost avoider regarding the dissemination of the truth, because he or she knows the real facts. Cheapest-cost avoider refers to a concept where the party that can best minimize costs bears the economic risk.¹²¹ By simply telling the truth or remaining silent, the liar can easily avoid the error of the deceived party. This argument applies even if the deceived party were able to detect the deception at a low cost.¹²² Therefore, the concept of the cheapest-cost avoider appears pertinent for a possible legal design. The basic idea of “intent beats negligence” could be applied in the context of deceptions,¹²³ meaning that the law should grant deceived parties the right to rescind contracts or claim damages even if they were negligent. Another entirely different issue is whether the liar is also the cheapest-cost avoider regarding gathering information,¹²⁴ although it is not addressed here.

C. *Welfare Economics in the Sense of Allocation Efficiency*

Regarding allocation efficiency, correct information is essential for markets. In general, competitive markets serve to distribute goods and services in such a way as to achieve an efficient welfare outcome.¹²⁵ To realize a high level of allocation efficiency, markets require the best available information in the fastest time possible so that they can process the information and react to it.¹²⁶ Lies perpetuate the circulation of false information. As a result, market participants receive incorrect information and in turn make suboptimal decisions.

At the individual level, rational negotiators orient their negotiations around their BATNA when making a decision for or against a specific contract.¹²⁷ In rational negotiations, the relationship between the BATNAs of the two negotiating

121. It is assumed here, that there would be some costs associated with finding out the truth for the party being lied to. Under certain circumstances those costs, however, can be very low (e.g. if it is possible to easily find the information online or get reliable information by asking someone).

122. Posner, *supra* note 7, at 122.

123. Section 123 of the German Civil Code (BGB) applies the concept of “intent beats negligence”. *Cf.*, e.g., Andreas Feuerborn, in 1 NOMOS KOMMENTAR BGB, 2021, Vol. 1, § 123 no. 38; Armbrüster, *supra* note 91, at § 123 no. 23. In contrast, the U.S. concept of “misrepresentation” requires “justified reliance”. Circumstances in which a justified reliance is rejected include, for example, lies of minor importance to the contract or false statements that are not expected to be taken seriously. Obvious misrepresentations should regularly not be trusted either. In this respect, the common business practices also play a role. Hence, the deceived party is responsible to a certain extent. The deceived party is assigned personal responsibility; s/he cannot therefore rely on every statement. The principle of “intent beats negligence” known in German law therefore does not apply fully in the U.S. *See Restatement (Second) of Contracts* p. 447 (Am. Law Inst. 1981); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.14 (2004); Fleming James Jr. & Oscar S. Gray, *Misrepresentation – Part II*, 37 MD. L. REV. 488, 488 (1978); Alexander & Sherwin, *supra* note 16, at 411. For obvious misrepresentations, *see* Estate of McKenney, 953 A.2d 336, 343 (D.C. Cir. 2008); Porreco v. Porreco, 811 A.2d 566, 571 (Pa., 2002) (“Whether reliance on an alleged misrepresentation is justified depends on whether the recipient knew or should have known that the information supplied was false”) (citing Scaife Co. v. Rockwell-Standard Corp., 446 Pa. 280, 285 A.2d 451 (1971) (citing Emery v. Third National Bank, 308 Pa. 308 Pa. 504, 162 A. 281 (1932))).

124. With regard to information obligations (which are not discussed in this paper), such costs must also be taken into account. *See* Kronman, *supra* note 29, at 16.

125. MICHAEL L. MARLOW, PUBLIC FINANCE, 61 (1995).

126. Kronman, *supra* note 29, at 11-12; Levmore, *supra* note 7, at 135.

127. *Cf.* Fisher & Ury, *supra* note 25, at 102, 112; Jung & Krebs, *supra* note 13, at 41.

partners is determinative as to whether there is a ZOPA for the specific negotiation.¹²⁸ If the parties' BATNAs do not overlap, there is no ZOPA. For such situations, the term NOPA is used, which stands for "no possible agreement."¹²⁹ In the case of a NOPA, the parties should not conclude the negotiated agreement.¹³⁰ However, where both parties' BATNAs do overlap, there is a ZOPA and the parties should conclude the negotiated agreement. The ZOPA presents the possible rational agreement zone within which there is no preferable alternative to conclude the contract for either party. In other words, any conclusion of a contract within the ZOPA is economically reasonable for both parties concerning their BATNA (see figure 1).¹³¹

The following example will help illustrate the situation, it involves the purchase of a machine on a contract negotiated between A and B:

The best alternative of the potential buyer A is to buy the same machine for the same conditions from another seller C for \$10,000, A's BATNA. Hence, he or she will only agree with seller B on a price below \$10,000. Seller B, in turn, has an offer with the same terms from another potential buyer D for \$8,000, B's BATNA. Consequently, B will only enter into the contract with A, if A offers more than \$8,000. Therefore, there is a ZOPA between \$8,000 and \$10,000.¹³²

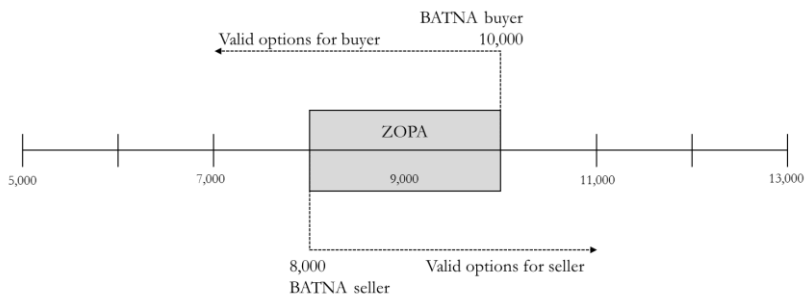


Fig. 1: BATNA and ZOPA.

Deceptions can affect BATNA and ZOPA/NOPA in different ways, or have no effect at all. Where a ZOPA is given, deceptions that do not affect the BATNA and the ZOPA usually have a distributional effect within the ZOPA.¹³³ In these cases, the deception aims at a more favorable distribution of the negotiation value for the

128. Jung & Krebs, *supra* note 13, at 171.

129. Michael A. Wheeler, *First, Let's Kill All the Agents!*, NEGOTIATING ON BEHALF OF OTHERS: ADVICE TO LAWYERS, BUSINESS EXECUTIVES, SPORTS AGENTS, DIPLOMATS, POLITICIANS, AND EVERYBODY ELSE 235, 245 (Robert H. Mnookin et al. eds., 1999); Jung & Krebs, *supra* note 13, at 171.

130. Due to transaction costs produced by the negotiation process, the parties are usually advised to stop negotiating in case of a NOPA. Jung & Krebs, *supra* note 13, at 11.

131. Michael A. Wheeler, *Negotiation Analysis: An Introduction*, HBS NOTE # 9-801-156, 1, 3 (2000) ("Any price between those two figures obviously leaves both parties better off than they would be if they fail to make a deal.")

132. The example describes a situation where the only variable is the price. That makes the BATNA unidimensional. However, in real business-to-business transactions, all circumstances (e.g. quality, date of delivery, warranty rights) have to be compared and considered with regard to investigating one's own BATNA.

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

deceiver's side. Yet, a contract is concluded that remains economically sensible for both parties. Other deceptions can be aimed at the lying party's or the other party's BATNA. The lies about one's own or the other party's BATNA, can in turn cause a variety of false assumptions concerning the ZOPA/NOPA. For example, bluffs can mislead the parties into assuming that the ZOPA is smaller or larger than it truly is. Such lies can induce the negotiating parties to assume that, contrary to the actual circumstances, there is no ZOPA. It is also possible that certain lies deter deceived parties from further investing in the development of their BATNAs.

The explanations of BATNA and ZOPA may indicate potentially economically sensible legal consequences. Deceptions that lead to an agreement outside the ZOPA or an agreement in the absence of the ZOPA create situations in which one contracting party had a better alternative to the concluded contract. This result leads to welfare economic losses, meaning that the lie creates suboptimal economic results. In these instances, the lawmaker could envision granting not only a right to claim contractual damages but also a rescission right.¹³⁴

If lies only influence the distribution of the negotiation pie,¹³⁵ meaning that they do not lead to an agreement outside the ZOPA, the contract is still economically sensible for both parties despite the lie. Then it remains the task of the legislature to resolve the question of whether the law should interfere with the transfer of wealth to the deceiver. In the case where lawmakers want to act, they could grant the deceived party a right to claim damages for the loss suffered.¹³⁶ Moreover, the lawmaker will have to decide whether the deceived party will also be allowed to rescind the contract even though the contract is economically sensible for both parties. While it does not seem to make economic sense to void an economically sensible contract, secondary effects, such as the deterrence effect of legal consequences, must be considered.

Naturally, the question arises whether a law should differentiate according to the actual effect¹³⁷ or according to the potential effects of certain types of lies.¹³⁸ Here, the latter solution is promoted, because the focus on potential effects would significantly increase the legal certainty, which is an essential prerequisite for effective enforcement.¹³⁹

D. *Truth Signal and Trust*

Lies can reduce the truth signal of the liar and also of other market participants.¹⁴⁰ In other words, other parties will believe the statements of the liar, and

134. See STEVEN SHAPELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 321 (2004) (describing the non-enforcement of contracts in the event of welfare losses).

135. The term "negotiation pie" describes the total value of the negotiation. Jung & Krebs, *supra* note 13, at 125.

136. To the author's knowledge, no legal system explicitly distinguishes according to the effects of misrepresentations on the BATNA and ZOPA. However, some legal systems might leave enough scope for interpretation to decide cases in this manner. U.S. law, for instance, leaves room for interpreting in broad concepts like "materiality." See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.24 (6th ed. 2009) ("Seemingly erratic approaches toward the issue[] of materiality . . . often mask appellate judges' covert imposition of control over the findings of fact in the court below.").

137. I.e. if the lie led in the specific case to an agreement outside the ZOPA.

138. For example, lies about the subject matter of the contract can potentially, though may not necessarily, lead to an agreement outside the ZOPA.

139. On enforcement and its interdependencies with other factors see *infra* Section IV. C.

140. See Porat & Yadlin, *supra* note 8, at 631-33.

other market participants, less and less. The decline of trust¹⁴¹ in other market participants means that the lie leads to negative externalities. The loss of trust can increase transaction costs by increasing the need for the liar and other market participants to expend resources to build trust. The lack of trust also induces the potentially deceived party to invest in attaining the relevant information on his or her own or verifying the given information.¹⁴² These negative effects also occur if the bluff is discovered during the negotiation. Moreover, by increasing transaction costs, lack of trust can lead to economically sensible contracts not being entered into. Hence, the question arises whether the legal system should determine possible legal consequences of deception even if that misleading information does not affect if or how the contract is concluded.

A variety of options are theoretically available to redress deception. For example, compensating the deceived party as well as market participants for losses caused by truth signal dilution. However, the compensation of other market participants does not seem to be feasible in practice, because the losses would be scattered and spread unevenly among market participants. Another possibility would be establishing a regulation with a sanctioning device, as a means of deterrence.¹⁴³ However, such legal consequences may not be necessary if the loss of trust and the dilution of the truth signal is limited or nonexistent, depending on the deceived party's perception of the lie regarding morality and their *Rechtsgefühl*. The aforementioned Siegen Study sheds light on this particular issue and demonstrates that the deceived party's perception of the lie varies according to the different types of lies. Moreover, it can be hypothesized that the dilution of the truth signal is generally limited to the "peers" of the deceiver. Where the selling party utters a lie, the truth signal of other sellers might be weakened, but the truth signal of other buyers is not necessarily weakened.

E. Spillover Effect

Closely linked to the dilution of the truth signal is the spillover effect.¹⁴⁴ The spillover effect refers to a situation where the lie of one negotiator induces other negotiators to also lie.¹⁴⁵ If the subsequent lies also cause negative economic effects and create additional spillover effects, the negative effects can multiply. If, for example, a service provider lies, the deceived buyer may deceive as well, if he or she finds out about the lie or suspects deception. Hence, in the context of a business relationship, a lie can increase the probability of a "counter lie" which would result in increased transaction costs.

Even though not immediately covered by the definition of spillover effect, the circumstance that the deceiver will lie more if his or her lie was effective has to be taken into account as well. It is possible that the deceiver might initially bluff about one aspect and, if successful, also start lying about other aspects as well. This might occur due to the perceived cost-benefit ratio, and the effect might be increased by

141. See GERRIT HÖLZLE, VERSTRICKUNG DURCH DESINFORMATION 73-142 (2012), for an overview on the economics of trust.

142. *Id.* at 77 (mentioning information costs and costs for verification); see also Levmore, *supra* note 8, at 138.

143. On the deterrent nature of rules with regard to deception, see Levmore, *supra* note 18, at 1364-66.

144. See Porat & Yadlin, *supra* note 7, at 663 (explaining the difference between the two concepts).

145. Tietzel, *supra* note 7, at 31; Porat & Yadlin, *supra* note 7, at 663.

the fact that lying becomes normalized. Accordingly, regular lies about one aspect might shift the moral assessment of lies in the direction of lower moral standards.

Spillover effects may also impact other market participants, creating additional negative externalities.¹⁴⁶ Hence, if individual market participants are lying, this can result in bluffing by others if they realize other liars have gotten away without penalty.¹⁴⁷ Consider the following scenario: If the provider of a service successfully deceives a client and other providers uncover this, they might be more inclined to deceive their clients as well. This owes to the more favorable cost-benefit ratio of lies, which increases the appeal of deception.¹⁴⁸

As with transaction costs, the dilution of the truth signal, and the loss of trust, spillover effects might occur in cases where deceptions are necessary for the conclusion of the contract as well as in cases of unsuccessful deceptions.¹⁴⁹ The legal system could also consider legal consequences in such cases. However, the spillover effect should be diminished in those cases, as unsuccessful bluffs should not affect the cost-benefit ratio of participants. Still, there might be a spillover effect because other market participants might believe that they are better liars. It also has to be noted that market participants who are negatively affected by lies, because of the spillover effect, are not compensated, as the law does not allow them to claim damages from the deceiver. As with the loss of trust, compensating other market participants may not be feasible because their losses will be widely dispersed. Finally, it would be nearly impossible to prove damages caused by a competitor.

F. *Lies Protecting the Right to Remain Silent*

Lies are commonly discussed in the context of protecting the right to remain silent.¹⁵⁰ In this discussion, the right to lie appears as the consequence of the absence of an information obligation, or as an effective measure to ensure the implementation of the right to remain silent. The underlying idea is that there is information that a negotiator is not obliged to disclose. Thus, the negotiator can protect this information and use it to his or her advantage. It is argued that this protection cannot be achieved by a right to remain silent alone, particularly in the case of skillful questioning by the other party.¹⁵¹ This is because silence or a refusal to reply often hints at what the refused answer would be.¹⁵²

146. See generally Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCH. SCI. 393 (2009) (overviewing the externalities of unethical behavior).

147. See Tietzel, *supra* note 7, at 31-32.

148. Cf. John P. Hill & Roy A. Kochendorfer, *Knowledge of Peer Success and Risk of Detection as Determinants of Cheating*, 1 DEVEL. PSYCH. 231 (1969) (describing the effect of the knowledge of peer performance on cheating).

149. This comprises deceptions that are discovered before the conclusion of the contract.

150. Cf. Kronman, *supra* note 29, at 30. See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 357 (6th ed. 2016); Steven Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 RAND J. ECON. 20 (1994); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, 334 (2004).

151. See Porat & Yadlin, *supra* note 7, at 627-28. Levmore, *supra* note 7, at 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").

152. See Porat & Yadlin, *supra* note 8, at 627-29; see also NYBERG, *supra* note 11, at 179 (elaborating that a question can be intrusive and that a lie might be necessary to defend one's privacy).

In literature, this problem is discussed primarily regarding oil deposits located under a property. This means that the discussion addresses value-increasing information. In this specific situation, there is an asymmetry of information, as the buyer has more information than the seller about the property. If the seller asks the potential buyer whether he or she is aware of any reason why the property is more valuable than what the potential buyer offers for it,¹⁵³ the seller would usually become suspicious if the potential buyer refused to make an explicit statement. The seller might conclude that the potential buyer has grounds to believe that the value of the property is higher.¹⁵⁴ This problem grows more acute the more information is requested. While it is possible to evade broadly phrased questions without arousing the suspicion of the counterparty, it is virtually impossible with precisely phrased questions. That is why the pressure to lie arises to protect the information.

According to this approach, a lie is only justified if it is provoked. Unprovoked deceptions are not initially justified by this line of argumentation. Therefore, legislatures could consider differentiating between “provoked” and “unprovoked” lies.¹⁵⁵ However, this differentiation is difficult due to the legal uncertainty because, in some circumstances, a conclusion may also be drawn from the silence of the counterparty, even without prior requests of information.¹⁵⁶ Finally, there is the risk that negotiation strategies that actively try to circumvent this differentiation between provoked and unprovoked lies will emerge.¹⁵⁷ That is why such a regulatory approach should be rejected.

Further, even if there is a right to remain silent, not all information can be obtained in all situations and despite the help of good questioning skills, information may remain unavailable.¹⁵⁸ If the negotiator refuses to answer the question of whether oil deposits are located under the property in question, the provider can merely deduce that the questioned party probably has some information about a possible oil deposit. However, the seller can neither predict how likely an oil deposit is, how much recoverable oil there may be, nor how extensive the production will be. In that case, asking further questions does not contribute to retrieving this specific information if the other party resolutely refuses to answer. Thus, questions can only provide partial information on more complex aspects. Regarding the incentive structure, a right to lie provides stronger incentives to obtain certain information, while a right to remain silent alone does not necessarily eliminate incentives to generate certain information. This can be affirmed by the previously

153. See Levmore, *supra* note 8, at 139 (formulating the following question).

154. Cf. Porat & Yadlin, *supra* note 7, at 628; Levmore, *supra* note 7, at 137. But see Michael J. Borden, *Mistake and Disclosure in a Model of Two-Sided Informational Inputs*, 73 MO. L. REV. 667 (2008) (pleading instead for a “minimal truthful disclosure rule”).

155. To the knowledge of the author, no legal system actually does explicitly differentiate between “unprovoked” and “induced” lies.

156. 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.

157. Such as confirmation that all information given was disclosed at the request and on demand of the other party.

158. Borden, *supra* note 154, at 689-91 (describing 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).

substantiated argument that questioning usually only leads to the acquisition of partial information.

In sum, this suggests that even upon disclosure of partial information, the request for information causes a shift in assets, while lying may prevent that. The ability to request information allows the questioner to generate a kind of “windfall profit” because the questioner can obtain at least part of the information and thereby secure an advantage with skillful questioning.¹⁵⁹ Hence, the lawmaker has to decide whether to prevent the aforementioned shifts of assets through questioning. A right to lie could effectively prevent this transfer of assets, so long as no differentiation into types of lies is required. However, the possibility of lying may create other negative economic consequences. This includes increased transaction costs, a diluted truth signal, and loss of trust. Moreover, the emergence of spillover effects cannot be excluded. Last but not least, in line with the above-presented arguments, the lawmaker would have to allow not only for “provoked” lies but also for “unprovoked” ones.

G. *Lies That Cause a Pareto-Improvement*

If a misrepresentation puts both parties in a better position, or at least one party is in a better position and the other party is not in a worse position, the lie is Pareto-improving.¹⁶⁰ The latter is often called a “paternalistic” lie¹⁶¹ or “Pareto white lie.”¹⁶² However, the scope of paternalistic lies or Pareto white lies in B2B negotiations is much narrower than in other areas. This is because deceptions in negotiations are generally aimed at improving the liar’s situation at the expense of the other party. If a win-win is possible, in most cases there is no need to use deceptive tactics. In this context, the hypothetical bargain theory and the theory of “implied consent” can be invoked. These theories argue that in some instances, the deceived party would have consented to the lie *ex ante*.¹⁶³ It should not matter if the party accepts the lie *ex post*, because the hypothetical consent *ex ante* already signals that the lie results in a welfare gain and is, at least *ex ante*, deemed Pareto efficient.¹⁶⁴ Implied consent might be assumed in cases where, *ex ante*, the party to be deceived stands a chance to profit from the lie.¹⁶⁵ The typical example is a restaurant critic who dines in a restaurant to write a review.¹⁶⁶ The critic might lie about his or her identity and the purpose of the restaurant visit to stay anonymous. However, most restaurants would agree to an undercover visit *ex ante*, because they hope to win

159. Levmore, *supra* note 7, at 142 (comparing the situation to expropriation).

160. The concept is named after Vilfredo Pareto. See ROBERT HALL & MARC LIEBERMAN, MICROECONOMICS: PRINCIPLES AND APPLICATIONS, 442-43 (2008) (introduction to Pareto improvements); see also Vijay K. Mathur, *How Well Do We Know Pareto Optimality?*, 22 J. ECON. EDUC., 172 (1991).

161. See Porat & Yadlin, *supra* note 7, at 656-61 (detailing this form of lying and its economic effects); Bok, *supra* note 12, at 203-19 (on this form of lies).

162. Sanjiv Erat & Uri Gneezy, *White Lies*, 58 MGMT. SCI. 723, 724 (2012) (using the term and exploring how often participants use Pareto white lies).

163. Levmore, *supra* note 18, at 1366; see also Jules L. Coleman, *A Bargaining Theory Approach to Default and Disclosure Provisions in Contract Law*, 12 HARV. J. L. & PUB. POL. 639, 648 (1989) (explaining, with regard to default rules, that the issue is not so much whether the parties actually agreed on this outcome, but rationality).

164. Levmore, *supra* note 18, at 1366.

165. *Id.*

166. *Id.*

from a positive review.¹⁶⁷ In B2B contract negotiations implied consent will be the exception rather than the rule, because there is rarely a chance that the deceived party might profit from the misrepresentation.

Deceptive negotiation tactics can also form a kind of business practice.¹⁶⁸ It could be argued that the parties have implicitly, *ex-ante* agreed on certain “rules of the game.” Consent to the “rules of the game” could be assumed, because both parties are allowed to use certain bluffs and therewith mutually benefit. It is argued that over time groups develop such business practices that are most successful for the parties involved.¹⁶⁹ Hence, if it can be proven that certain deceptions are inherent in business practice, this could indicate that the behavior is efficient for the participants. Although a business practice cannot prove that this behavior is efficient, it can serve as an indication.

H. Structural Favoring of the Weaker Party and Diversity

It has to be assessed if structurally weaker parties are more likely to deceive and profit more from lying than stronger parties. If this could be confirmed, the lawfulness of certain deceptions could compensate for structural imbalances in negotiations. It follows that weaker players could remain in the market if permitted to deceive. This could contribute to a lower concentration of power and allow the market as a whole to be both more flexible and adaptive. The importance of adaptability is evident in crisis situations because a high degree of adaptability helps to overcome difficult situations. The latter hypothesis is supported by the theory of evolution that assumes that deceptions both intra-species¹⁷⁰ and inter-species can serve to preserve the species,¹⁷¹ as deceptions enable a wider range of variation. This has a positive effect on the species, particularly in evolutionary crises, because intelligence¹⁷² and adaptability become more valuable than mere strength under those circumstances.¹⁷³ This cannot justify all lies but may support a certain scope

167. *Id.*

168. See *Act Against Unfair Competition*, https://www.gesetze-im-internet.de/englisch_uwg/index.html (last visited Mar. 3, 2021) (with regard to the 2008 amendment to the German Act Against Unfair Competition, the parliament draft stated that the term *geschäftliche Praxis* [business practice/practices] is negatively connotated in Germany); but see Bundestagsdrucksache 16/10145 (2008) at 20, <http://dip21.bundestag.de/dip21/btd/16/101/1610145.pdf> (example of *geschäftliche Praxis* used neutrally).

169. Richard A. Epstein, *Customary Practices and the Law of Torts*, in *NEW PALGRAVE DICTIONARY ECON. & L.*, 579 (Newman ed.) (1998).

170. Alison Jolly, *Primate Communication, Lies, and Ideas*, in *HANDBOOK OF HUMAN SYMBOLIC EVOLUTION* 167, 172 (Lock & Peters eds., 1996); Richard Byrne & Andrew Whiten, *Cognitive Evolution in Primates: Evidence from Tactical Deception*, 27 *MAN, NEW SERIES* 609 (1992) (both on intra species deception); see generally MARTIN STEVENS, *CHEATS AND DECEITS* (2016) (discussing how animals and plants mislead).

171. WILLIAM A. SEARCY & STEPHEN NOWICKI, *THE EVOLUTION OF ANIMAL COMMUNICATION: RELIABILITY AND DECEPTION IN SIGNALING SYSTEMS* 219-223 (2005) (“individual selection, rather than group selection, has been increasingly accepted as the primary engine of adaptation, making cooperation appear less likely, and intraspecific deception conversely seem more probable . . .” Thus, we believe that it is realistic to expect deception to be widespread in animal signaling systems.”).

172. Victoria Talwar & Angela Crossman, *From Little White Lies to Filthy Liars: The Evolution of Honesty and Deception in Young Children*, 40 *ADVANCES IN CHILD DEV. & BEHAV.* 139, 144 (2011) (“The development of deception may be viewed as a cognitive milestone in any species.”).

173. VOLKER SOMMER, *LOB DER LÜGE* 11 (2016) (explaining 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 themselves).

for deception. The argument provides no direct clues for how to determine that scope, which is why this argumentation cannot be transferred directly to the presented types of lies. On the one hand, it could be argued that false statements by the weaker party about aspects that do not immediately concern the subject matter of the contract and lead to an agreement within the ZOPA should be considered legal because they merely have distributional effects. On the other hand, a legal rule that leaves the weaker party with a certain scope of deception would result in high legal uncertainty. As this would lower the actual enforcement, this idea should be rejected.¹⁷⁴ Hence, the possibility for deception would have to be granted in general and could then structurally favor the weaker party.

I. SUMMARY

All of the aforementioned economic approaches and arguments seem to provide valuable insights for the question of a possible legal solution to the problem. Some of them provide more general insights into the phenomenon of lies in B2B contract negotiations. In other words, they seemingly do not lead to different results when applied to different types of lies. This is the case for concepts like the cheapest-cost avoider, the right to lie to protect the right to remain silent, and the structural favoring of the weaker party. In contrast, others have different consequences when applied to different types of lies. This is true for transaction costs, welfare economics with special attention on the impact on BATNA and ZOPA, business practices, truth signal, and trust as well as spillover effects.

VI. BASELINE SCENARIO AND COMPARISON SCENARIO

In the following section, two comparative scenarios will be outlined. In short, the baseline scenario represents a situation without legal consequences for lies, while the comparison scenario refers to a situation where the law orders legal consequences. When applying the economic approaches to the different types of lies, the potential and real effects may vary, so the “worst case scenarios,” the scenarios with the most far-reaching effects, will be examined.

A. *Baseline Scenario*

For the economic analysis of the types of lies presented below, the baseline scenario outlines a situation without legal sanctions for lies. Moreover, it also assumes that parties cannot contractually agree on sanctions and enforce those sanctions in court. The liar does not have to fear that the deceived party will rescind the contract or claim damages. But even without legal sanctions, people would not lie all the time and not about everything. As stated above,¹⁷⁵ the probability of a person lying hinges on the cost-benefit ratio.¹⁷⁶ The alternative courses of action, including renegotiations and social sanctions, that are at the disposal of the deceived party in

174. Moreover, there would be many regulatory problems like the correct determination of the relative strength of the parties.

175. See *infra* Section IV. B.

176. See Cramton & Dees, *supra* note 63, at 376 (explaining that people tend to lie for their own benefit).

the baseline scenario still have to be considered. The risk of disclosure¹⁷⁷ as well as the moral assessment of a particular lie also plays a role in the baseline scenario. Regarding the moral assessment, the findings of the Siegen Study are consulted. Finally, the relational solutions that market participants would seek to minimize the negative effects of lying are also considered.

In reality, there is no legal system as described in the baseline scenario. But some liberally oriented legal systems share similar justifications for legal prohibitions. This is the reason 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 to choose the status quo as the baseline scenario.¹⁷⁸ Yet, this would hardly be amenable because of the substantial divergences between national legal systems.¹⁷⁹ Hence, this article adopts “no legal consequences” as the baseline scenario. As this article does not discuss the relationship between legal rules and contractual arrangements that mirror legal rules, it is also assumed that no contractual arrangements are possible. If this were not the case, the discussion would boil down to the question of whether contractual stipulations can be, as effective as, or even more effective than legal rules.

B. Comparison Scenario

The comparison scenario is the benchmark for the economic implications that a prohibition of certain deceptions would have in contract negotiations. The right to rescind the contract and to claim damages for intentional,¹⁸⁰ causal misrepresentations, will be considered. Non-causal lies are assumed to not grant the deceived party any rights. Moreover, it will be assumed that the deceived party has to prove the relevant facts. Finally, apart from the deceived party, no other market participants are entitled to bring claims.

This approach requires paying special attention to the expected enforcement of granted legal positions. Assessing the effects of a legal prohibition of lies is essential to ascertain the extent to which it would be implemented in practice. If the

177. See Cramton & Dees, *supra* note 63, at 373 (explaining the influence of the possibility of detection); see also Maurice E. Schweitzer, *Deception in Negotiations*, WHARTON ON MAKING DECISIONS 187, 191 (Hoch et al. eds., 2001) (pointing out that the estimation of the probability might be biased).

178. 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, *Better Regulation Guidelines - Impact Assessment*, 24-25, (2009), <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines-impact-assessment.pdf>.

179. See Jung, *supra* note 3, at 992–1001 (articulating the differences between U.S. law and German law).

180. However, U.S. law also regulates so-called “innocent misrepresentations.” *Mortarino v. Consultant Eng. Servs., Inc.*, 467 S.E.2d 778, 782 (Va. 1996). In the case of “innocent misrepresentation,” however, rescission is partially rejected if the contract has already been fully executed. JOSEPH M. PERILLO, PERILLO ON CONTRACTS 293 (7th ed. 2014). See also SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 69:49 (4th ed. 2019); ARTHUR L. CORBIN ET AL., CORBIN ON CONTRACTS § 28:14 (2018); Farnsworth, *supra* note 123, § 4.15 (presenting differing opinion with regard to non-fraudulent misrepresentations). Section 123 of the German Civil Code only grants a right to rescind in case of a fraudulent (“arglistig”) misrepresentation. The term “arglistig” means “willfully” or “intentionally.” See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] June 13, 2007, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3057, 3059 (2007). See also Armbrüster, *supra* note 91, at § 123 no. 18; Jung, *supra* note 3, at 988. For damages claims based on *culpa in contrahendo* (c.i.c.), i.e. negligence in contracting, negligence suffices. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 280, para. 1, § 241, para. 2, § 311, para. 2, § 276.

prohibition is applied effectively, it will noticeably influence the cost-benefit ratio of deceptions and reduce the extent of deceptions. For the enforcement of the obligation to tell the truth, *Tietzel* states the following:

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.¹⁸¹

In this article, a broad definition of enforcement is used, which means that enforcement is not only assumed when a party asserts a claim in front of a court, but also if claims for damages or rescission are made to the other side directly.¹⁸² From an economic point of view, it is only sensible for a legal system to declare lies unlawful where enforcement is reasonably possible.

VII. ECONOMIC CONSEQUENCES FOR SELECTED TYPES OF LIES

In the following, the economic consequences of lies about the subject matter of the contract, the price, emotions, and one's BATNA are analyzed. For each of these four types of lies, the economic consequences of the baseline and comparison scenarios will be evaluated. If deception does not yield negative economic consequences, there is no need for regulation in the first place. Where negative effects are a result, the question arises whether and to what extent, legal regulation can help overcome such negative consequences. Laws are only economically justified if they help to mitigate negative consequences. The explanation of the types of lies illustrates that there are also different variations within a single type of lie. Moreover, the economic analysis could also vary depending on the degree of precision of the lie.¹⁸³

A. *Subject Matter of the Contract – Lies of the Supplier About the Contract Object*

The baseline scenario will demonstrate the negative economic effects of lies by the supplier concerning the contract object. The comparison scenario will show that legal rules prohibiting such lies would have substantial positive economic effects. This analysis is limited to lies by the supplier about the contract object, a buyer lying to the supplier is not considered.

181. *Tietzel*, *supra* note 7, at 33 (providing 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”).

182. In practice, however, it is often difficult to distinguish renegotiations (which belong to the baseline scenario) from the enforcement of damage claims and a right to rescind.

183. With regard to a better offer a negotiator might state, for example, “Other sellers offer a better price” or s/he might state “I have a better offer from another seller” or s/he might even say “I have a better offer from seller X for exactly the same good”.

1. *Baseline Scenario*

How often suppliers would lie about the subject matter of the contract if there was no legal prohibition can only be roughly estimated. It depends on the information asymmetry between the supplier and buyer, which depends on the nature of the subject matter.¹⁸⁴ However, in the absence of legal consequences, a substantial amount of lies can be expected, since the potential advantages of lying can be significant. This is particularly true for one-off negotiations. In contrast, within long-term relationships, the frequency of lies will be lower if there is a substantial risk of detection.

The fact that such lies are regarded as immoral across all countries and all groups¹⁸⁵ indicates that liars would suffer so-called “lying costs” that would have some moral regulatory effect. However, the lying costs could not prevent such deceptions altogether. The same applies to social sanctions, which would have to be anticipated if the bluff is uncovered. Since such lies are consistently regarded as immoral, sizeable social sanctions are to be expected.¹⁸⁶ Moreover, other possible courses of action of the deceived party, such as renegotiations have to be considered.

The supplier’s lies about their performance are usually aimed at improving their position and they accept that the other side is put at a disadvantage due to the lie, hence the term “harmful lies.” Therefore, such deceptions are generally not Pareto-improving. Moreover, considerable transaction costs arise, both for the deceiver and the deceived side, because lies about the characteristics of the contract object initially require a certain use of resources by the deceiver. It should also be considered that the contractual object is, oftentimes, possessed by the recipient after the supplier performs. The fact that the contract object is possessed by the recipient enables the recipient to verify compliance with the promised performance and the corresponding details, which were laid out during negotiations. Therefore, the deceiver must devote certain efforts to prevent the lie from being easily exposed. Characteristics of the contract object that lead to large information asymmetry are difficult to verify, which makes them particularly suitable for misrepresentation.¹⁸⁷ To be credible, there might be a need to bolster the lie with false documents, which would increase transaction costs.

The deceived party will dedicate resources to prevent and detect such deception, especially where deception is suspected. This can be explained by the substantial risk for the deceived party that they will conclude a contract outside the ZOPA. The deceived party’s efforts to prevent and detect deception are welfare-reducing. When the lie is exposed, expenses are easily incurred by both parties because of extrajudicial reactions by the deceived party, such as renegotiations or applying social sanctions.

Moreover, deceptions about the contractual object generally dilute the truth signal and entail a loss of trust whenever they are discovered. This applies both to

184. Cf. Tietzel, *supra* note 7, at 23–26.

185. *Supra* note 4, at 980.

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

187. See Tietzel, *supra* note 7, at 25 (As an example of high transaction costs associated with the verification of statements the author cites the harmfulness of some foods on health). See also Cramton & Dees, *supra* note 63, at 373 (on the higher attractiveness of lies in cases of information asymmetry).

the truth signal of the liar and the dilution of the truth signal of other negotiators. The loss of trust is particularly pronounced in the case of deception about the contract object.¹⁸⁸ Practical experience also points out that deceptions about the product itself may be exposed outside of the sphere of the companies involved “naming and shaming.” This damages the liar’s reputation, but simultaneously dilutes the truth signal of other negotiators, especially the peers of the liar. This creates transaction costs for sincere negotiators, as they have to spend resources to prove their integrity.¹⁸⁹ There can also be a spillover effect depending on whether the deception is publicized.

Additionally, it should be noted that the Siegen Study indicates that deception about the contractual object is regarded as a severe lie.¹⁹⁰ This implies that the spillover effect, especially in the form of counter-lies, could be exceptionally high. While the purchaser of an object usually cannot lie about the object, they might feel “entitled” to deceive in other, less severe ways. Besides, an increase in deception among competitors may be observed as they notice successful deceit has occurred.

This economic analysis demonstrates that the lies of the supplier concerning the contract object invariably result in substantial negative economic effects. This effect is not diminished significantly by the possibility that the weaker party may benefit from the lie more than the stronger party.¹⁹¹

2. *Comparison Scenario*

A legal system that provides for legal consequences for such deceptions can anticipate significantly positive economic effects. This occurs because there is at least the possibility that the supplier’s deceptions about the contractual subject can be exposed and proven *ex post*.¹⁹² Due to the potentially negative consequences for the deceived party, even legal enforcement can be worthwhile. The Siegen Study shows that a majority of respondents in all studied countries favor legal consequences and would therefore probably be inclined to enforce such claims in court.¹⁹³ The case law of Germany and the U.S. also demonstrates that claims stemming from such violations are regularly enforced.¹⁹⁴ Therefore, the law has a

188. *Supra* note 4, at 980.

189. On the economics of reputation, see JAN C. TEGTMEYER, DIE ÖKONOMIK DER REPUTATION (2005), <https://opus4.kobv.de/opus4-uni-passau/frontdoor/index/index/year/2005/docId/51>; see also GERRIT HÖLZLE, VERSTRICKUNG DURCH DESINFORMATION 137–40 (2012).

190. *Supra* note 4, at 980.

191. See *supra* Section V.H.

192. As for oral statements, the promised status is hard to prove, while the current status is easier to prove.

193. 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 (83%); U.S. lawyers (71%); English lawyers (77%); Polish judges (87%); Russian students (80%); Spanish students (85%).

194. For Germany only see the following judgments (listing as provided by: Holger Wendtland, BECKOK BGB (Beck online commentary on civil law), § 123 no. 9.1 (as of 01.02.2020): concerning the age of an oriental carpet BGH, Dec. 8, 1976, DER BETRIEB [DB] 671 (1977); concerning the mileage of a second-hand passenger car BGH, Oct. 29, 1959, NJW 237 (1960); Oberlandesgericht [OLG] [Higher regional court] Köln, Feb. 10, 1988, NJW-RECHTSPRECHUNGSREPORT [NJW-RR] 1136 (1988); concerning untrue labelling such as “ready to drive” BGH, Apr. 21, 1993, NJW 1854 (1993), “generally overhauled” BGH, Jan. 18, 1995, NJW, 955, 956 (1995), “new” or “as good as new” (Kammergericht [KG] OLGZ 1972, 402), concerning the advertising of basement rooms as living space, although there is no corresponding building permit available BGH, June 27, 2014, NJW 3296 (2014). For the U.S. only see *Weng v. Allison*, 287 Ill. App. 3d 535 (1977) (concerning untrue descriptions of a car such as

steering effect that may mitigate but not eliminate some of the negative economic effects. This is because even a “good” law cannot eliminate the possibility of lying. Therefore, the deceived party will still be required to prevent and detect lies, despite the legal provision.

As all legal systems generally require causality, they cannot prevent some of the negative economic effects associated with lies. Particularly lies which are discovered before the conclusion of a contract and, therefore, do not become causal, continue to reduce the truth signal, and the trust between the parties and might cause spillover effects. However, in many cases lies about the contract object are causal for the conclusion of the contract. Accordingly, the law would at least cover many cases of lies about the subject matter of the contract. Moreover, it has to be taken into account that laws regularly compensate the deceived party, while other injured market participants are not compensated. But the steering effect of the law reduces the overall number of lies and is in other injured market participants’ best interest.

Overall, this analysis shows that a legal regulation that prohibits lies by the supplier about the contractual object has substantially positive economic effects. For this reason, a legal regulation seems sensible from an economic point of view.

B. Price

The price and the subject matter of the contract are connected: one party undertakes an obligation to provide the other party with ownership of an object or to render a specific service. In exchange, the other party obligates itself to pay a certain consideration. While there are countless possibilities to deceive about goods or services, lies about pricing are limited.

Where the lie deceives about the actual price, this constitutes a deception about the price in the narrow sense. This includes deceptions in which a price component is withheld, such as delivery costs and lies about the price calculation mechanism. If a price calculation mechanism is determined in which the selling price is, for example, the cost price plus 10%, the seller can be deceived about the actual cost price. However, deceptions about price in the broad sense are more widespread. For example, a seller may state a price is a “special price” or a “mates’ rate” even though it is the common price. Especially in business negotiations, deceptions about production costs, profit margins, and cost prices are also relevant. These can be seen as price deceptions in the broad sense. This applies if these aspects do not become the calculation basis for the price, but are merely mentioned as an argument in the price negotiation. Thus, the differentiation may be difficult in individual cases.

1. Price in the Narrow Sense

a. Baseline Scenario

Deceptions about the price in the narrow sense are only possible to a limited extent. First, only one party can deceive about the price. The most common deceptions are those related to calculating the price. This is another “harmful lie” that

“mechanically sound”); *see also* *Crues v. KFC Corp.*, 729 F.2d 1145 (8th Cir. 1984) (“an efficient, high-volume profit producer”).

does not result in a Pareto improvement. In negotiations, the price is essential for a rational decision. That is why lies about the price also incur transaction costs. Although in certain cases the transaction costs for the liar may be low, the party who fears a lie will invest considerable resources into prevention. Lies about price components in the narrow sense can generally be clarified, since as a rule there are few information asymmetries, at least after the transaction has been completed. In the event of successful detection of deception, there would also be transaction costs for renegotiations and social sanctions.

Such deceptions can also result in an agreement outside ZOPA. Furthermore, it seems plausible that the liar's truth signal would be weakened significantly, as such lies may be deemed immoral.¹⁹⁵ A dilution of the truth signal of other market participants is also plausible. Certain spillover effects in the form of counter-lies are also to be expected. In these cases, the economic assessment is therefore just as unambiguous as it is regarding the subject matter of the contract.

b. Comparison Scenario

Not only can such deceptions be uncovered, but it also seems plausible that corresponding rights would at least occasionally be enforced. The assumption that enforcement would occur is also supported by U.S. case law.¹⁹⁶ This is consistent with the results of an additional survey undertaken in the Siegen Study, in which a majority of German students and a significant minority of international professional negotiators also advocate legal consequences.¹⁹⁷ A legal rule that makes such lies illegal would likely result in a substantial positive economic effect. For this reason, a legal regulation seems sensible from an economic point of view.

2. Price in the Broad Sense

a. Baseline Scenario

Regarding lies about the price in the broad sense, one cannot simply refer to the explanations given about the subject of the contract. If a price is falsely termed a special price or a friendship price, the potential buyer is still aware of the true price they have to pay for the product. This is not a lie that qualifies as Pareto-improving, because it has the psychological impact of encouraging the potential buyer to purchase.¹⁹⁸

This deception does not directly influence the BATNA and ZOPA. Thus, the lie does not induce an agreement outside the ZOPA if rational behavior is practiced.

195. At least this is indicated by the first results of an additional survey to the Siegen Study, in which a majority of German students (70.4%) a lie about a price calculation mechanism as immoral. Instead an international group of professional negotiators was divided. 45% rated the lie as immoral, 40% as moral and 15% refused to answer.

196. See *Voorhees v. Cragan*, 112 N.E. 826 (Ind. Ct. App. 1916); *Stewart v. Salisbury Realty & Ins. Co.*, 74 S.E. 736 (N.C. 1912); *Essenburg v. Russell* 78 N.W.2d 136 (Mich. 1956); RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1979).

197. In the additional survey to the Siegen Study, 61.1% of German students and 40% of international professional negotiators were in favor of legal consequences.

198. Angela Hoffmann & Kerstin Hackelbusch, *Sonderangebote und psychologische Preissetzung im deutschen Lebensmitteleinzelhandel*, 62 GJAE 173, 175 (2013).

This applies regardless of whether the offer is a “normal” price or a “special offer” or a “friendship price.” In theory, the term “special offer” should not affect the search for better alternatives. In practice, however, the presentation of a special price may entice some negotiators to invest less effort in exploring their BATNA. Especially for goods where the price margins are thin, the labeling as a special price may induce potential customers to stop seeking better offers.

Psychological effects can cause a shift in the distribution of the surplus because special prices give buyers the impression that they have made a particularly good deal. Special prices activate the reward system in the human brain,¹⁹⁹ increasing the likelihood of purchase. In addition, using a special price is also intended to provide secondary information that suggests some concession has already been made and no further concession can be expected thereby resulting in a shift within the ZOPA.

The transaction costs that result from such lies are negligible. The wrong labeling of the price does not require much effort. The opposing party for its part, will not invest much effort in the prevention and detection of such lies. Professional negotiators will avoid the well-known psychological effects. Since these occur regardless of whether the price is a special price or whether a lie has been made about it, professional negotiators will have to take up these expenses anyway. In this respect, the transaction costs do not increase due to the lie. If such a lie is detected, the deceived party may resort to social sanctions and renegotiations, which would incur the corresponding transaction costs. This is hinted at by the Siegen study, which shows that at least German students classified these lies as problematic from a moral point of view.²⁰⁰ In B2B relations, however, it can be anticipated that fewer professionals would classify such lies as problematic.²⁰¹ Yet, even then, renegotiations are probable, as the disclosure of the lie will in many cases raise the hope of still being able to influence the distribution to one’s advantage.

As previously discussed, especially in the business sector it can be assumed that the wrong labeling as a “friendship price” or “special price” is probably considered as a rather harmless lie.²⁰² If one follows this assumption, such bluffs will also often not be made public, which is why the truth signal in the market as a whole will probably only decrease marginally. Since only one party can deceive about the price, no direct spillover effect can occur. It is impossible to accurately estimate whether the person who is being lied to would subsequently be lying about other aspects. However, it can be assumed that only a limited spillover effect would be noticed. As a result, only marginally negative economic effects can be identified. This corresponds to a reduced need for legal regulation.

199. Christian Elger, *Mit Neuroökonomie aus der Krise*, in *GLANZLICHTER DER WISSENSCHAFT* 46–47 (2014); Bernd Weber & Carolin Neuhaus, *Preise im Kopf: Vom Teuro zur Schnäppchenjagd*, in *NEUROMARKETING: ERKENNTNISSE DER HIRNFORSCHUNG FÜR MARKENFÜHRUNG, WERBUNG UND VERKAUF* 35–46 (Häusel ed.) (2007) (on the psychological explanation of discount hunting).

200. In the additional survey to the Siegen Study, 50.7% of German students viewed such lies as immoral.

201. The Siegen Study shows that moral standards of professional negotiators are generally lower than the moral standards of students. First results of the additional survey confirm this hypothesis, as only 35% of the international professional negotiators view such lies as immoral.

202. *Infra* note 195.

b. Comparison Scenario

If a legal system, despite only slight economic disadvantages, decides to classify such deceptions about the price in a broad sense as unlawful, the question arises as to whether the corresponding regulation could further reduce the already marginal negative effects. It is important to keep in mind that the corresponding deceptions are not always easily detectable and verifiable, but at least there is a theoretical chance. Therefore, if a legal system grants legal positions, these could potentially also be enforced. A glance at German case law reveals that enforcement is possible, as cases of this kind can be found sporadically.²⁰³ However, in the United States, there is no case law regarding such deceptions in the business area.²⁰⁴ The Siegen Study showed that the *Rechtsgefühl* of German students disfavors granting a right to rescind.²⁰⁵ Thus, for professional negotiators, at least equally low support for a right to rescind can be expected,²⁰⁶ which suggests that corresponding law would rarely be enforced. Depending on the structure of the laws, difficulties in enforcement could also arise concerning the causality requirement, since the effect of such lies is at least partially attributable to psychological effects and cannot be explained with purely rational arguments.

Moreover, despite the deception, contracts are concluded within the ZOPA, which is why, if one favors legal consequences at all, damage claims seem to be particularly suitable for the deceived party. If a legal system were to grant a rescission, this could invalidate economically sensible contracts. To conclude, the negative effects of such deceptions are already limited to start with and legal rules would struggle to effectively mitigate those effects.

C. Emotions

Business negotiations bring the most diverse emotions to light. These emotions can be faked, as to their existence, non-existence, or the intensity of the particular emotion. In negotiations, parties regularly simulate anger, outrage, joy, enthusiasm, or appreciation.²⁰⁷ Similarly, it is not unusual for a negotiator to lie about the emotions of their superior.

1. Baseline Scenario

According to the baseline scenario, the frequency of deceptions about emotions cannot be determined. However, it appears that such deceptions occur frequently, as the risk of disclosure is minimal and at least some positive results can be

203. Amtsgericht Düsseldorf [AG] [Düsseldorf District Court], Sep. 10, 2008, 32 C 6293/08, BeckRS 5960, 2009. *Similarly*, OLG Hamm, June 12, 1992, NJW-RR 628 (1993). OLG Jena, Dec. 6, 2005, BECK-RECHTSPRECHUNG [BeckRS] 18097 (2011) on the other hand, denied the causality in a case concerning the calculation of the rent. *See also* OLG Frankfurt, May 12, 1982, DEUTSCHES AUTORECHT 294, 294-95 (1982).

204. Jung, *supra* note 3, at 986.

205. According to the first results of the additional Siegen Study, only 17.7% of German students favor legal consequences (regarding a lie about a “friendship price”).

206. According to the first results of the additional Siegen Study, only 20% of the international group of professional negotiators were in favor of legal consequences.

207. *See e.g.*, ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE et passim. (2005) (discussing the importance of emotions in contract negotiations).

expected. Faked anger and frustration about the offer may induce the deceived party to make more concessions. Further, a tough fight about the final offer combined with corresponding emotions is often supposed to signal to the other person that they got the best deal possible. If the negotiator shows their joy, the other side is generally less content with the negotiation outcome.²⁰⁸ However, it can further be assumed that positive emotions are faked even more regularly than negative ones. This is due to the possible reluctance towards faking negative emotions like anger. Faking positive emotions also seems to be widely accepted.²⁰⁹ Moreover, a broad spectrum of negotiation literature suggests that a good rapport with the other side is crucial for negotiation success.²¹⁰ Thus, negotiators might find it useful to fake positive emotions.

The special feature of this category of deceptions is that some of them can be classified as “white lies.”²¹¹ 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.²¹² If white lies simultaneously provide an advantage for the liar or at least do not cause any harm to their side, this leads to a Pareto improvement. In addition, white lies serve as a “social lubricant.”²¹³ During negotiations, joy about an invitation to a business dinner or a gift by the counterparty may be faked, and the pretense of joy serves to avoid offending the other side and building and maintaining a good rapport with the negotiating partner.²¹⁴ This shows that these positive effects generally occur with lies about positive emotions. Similar effects can also be established regarding the suppression of negative emotions. In both cases, the aim is to alleviate the negotiation process.²¹⁵ In contrast, faking negative emotions does not produce the same positive effects. Many negotiators make concessions on the subject matter of the contract, like price or delivery time, to appease a seemingly angry negotiating partner and rescue the business relationship.²¹⁶ The possible effects of emotions on contractual agreements demonstrate that many deceptions about emotions can become causal for the contract conclusion.

In contrast to deceptions about the contract object, the transaction costs incurred by corresponding bluffs are presumably very low, irrespective of whether the negotiator bluffs about positive or negative emotions. Even if the other side anticipates such a deception, it will hardly invest any resources into the prevention

208. Jung & Krebs, *supra* note 13, at 108.

209. Ingrid Smithey Fulmer et al., *Lying and Smiling: Informational and Emotional Deception in Negotiation*, 88 J. BUS. ETH. 691 (2009). The study shows that bluffs about emotions generally are considered less serious than deceptions about information. The additional survey to the Siegen Study also points in this direction (bluff about a negative emotion). Only a minority of the German students surveyed considered such a lie to be immoral, and even fewer students favored legal consequences.

210. See, e.g., Jung & Krebs, *supra* note 13, at 86.

211. See, e.g., Bok, *supra* note 12, at 57-72 (on white lies). On the overlap between the two categories, see Section III.

212. See, e.g., however, Bok, *supra* note 12, at 58 (using the term “white lies” to refer only to trivial lies).

213. See Bok, *supra* note 12, at 59 (“[White lies] preserve the equilibrium and often the humaneness of social relationships . . .”). See also Talwar & Crossman, *supra* note 172, at 150 (on prosocial lies).

214. See Jung & Krebs, DIE VERTRAGSVERHANDLUNG, *supra* note 13, at 365 (discussing rapport-building).

215. Faking positive emotions serves to create a pleasant atmosphere for the negotiations and in this way such lies become (co-)causal.

216. See Fisher & Ury, *supra* note 25, at 8-10 (“separate the people from the problem”). 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. *Id.* at 21-22.

of such deceptions. This means that companies do not invest time and money to uncover and pursue emotional deceptions. Generally, negotiators only attempt to recognize such bluffs through attentive observation of the negotiation partner. Even if this procedure may cause certain transaction costs, they are negligible. Rational negotiators put a certain amount of energy into ignoring emotions about content-related questions. They try to make decisions about the contract object in a rational rather than an emotional manner. However, this applies irrespective of whether the emotions are real or fake, which is why such deceptions do not increase these costs.

Deceptions about emotions usually do not affect the BATNA and the ZOPA. Regularly, such deceptions should only concern the distribution within ZOPA, provided there is one.²¹⁷ Yet, in extreme cases, the excessive feigning of negative emotions can provoke the termination of negotiations and thereby prevent the conclusion of a socially desirable contract. Conversely, pretending positive emotions can enlarge the negotiating pie in individual cases. Above all, appreciation can induce the other side to present constructive proposals.²¹⁸

There is little risk that such deceptions are detected, as only the deceiver knows with certainty whether an emotion was real or merely faked. In cases of poorly faked emotions, the other person may suspect but will never be able to demonstrate the deception.²¹⁹ Pareto-improving lies are perceived as less negative if the deceiver demonstrates that he or she acted out of altruistic rather than selfish motives.²²⁰

A study conducted by Fulmer and others also hinted at the fact that bluffs about emotions are generally considered less severe than deceptions about information.²²¹ From an economic perspective, this implies that the truth signal of the deceiver is unlikely to be significantly diluted due to the lack of disclosure. However, for social sanctions or alternative courses of action, it is not necessary to supply proof of the lie. In these cases, a strong suspicion may be sufficient. Yet, it seems highly unlikely that such deceptions will be publicized on a large scale because such lies are usually considered harmless.²²² Hence, even where faked emotions are suspected, the reputational loss should be minimal. This affirms the weak sanctioning character of making the lie public.

Moreover, even if the truth signal is weakened, honest negotiators will rarely devote considerable resources to emphasizing the honesty of their emotions towards dishonest negotiators. Most likely, honest negotiators will rely on the positive influence of their authenticity and will trust their counterparts to distinguish true from false emotions. Also the spillover effect is not easily transferred to this situation,

217. If there is no ZOPA, the contract would not be concluded irrespective of the lie and hence, the lie would also not result in any redistribution.

218. Fisher & Shapiro, *supra* note 207, at 25–51 (discussing generally the importance of appreciation in contract negotiations).

219. Imagine a situation where negotiator A fakes his joy about a dinner invitation. Even if he tells his colleague B that he lied about his feelings to the competitor, the testimony of B cannot prove the lie for sure, because A could have also lied to B. Only A knows the truth and could potentially offer proof that he lied. Even the reference to others' emotions is usually not verifiable.

220. Daniel Shapiro, *The Effects of Explanation on Negative Reactions to Deceit*, 36 *ADM. SCI. Q.* 614, 625 (1991).

221. Smithey Fulmer et al., *supra* note 210. The additional survey to the Siegen Study also points in this direction (bluff about a negative emotion). Only a minority of the German students surveyed considered such a lie to be immoral, and even fewer students favored legal consequences.

222. See *supra* note 209. This is true even for faked (positive) emotions that were faked for selfish rather than altruistic reasons.

especially about negative emotions, because there might be psychological barriers to also fake negative emotions like anger as a reaction.

However, positive emotions can have a significant spillover effect. Many people learn from a very young age that white lies are a successful strategy and therefore utilize them.²²³ White lies are closely related to deceptions about positive emotions. Hence, it is likely that people also learn early on, that faking positive emotions is a successful strategy. Yet, as demonstrated in the above, this would create positive rather than negative effects regarding negotiations. Emotions are very personal, and no one wants to be coerced into revealing their true feelings.²²⁴ On this account, lies could also be legitimate if they concern particularly sensitive emotions, as in these instances lying would serve to protect such personal information.²²⁵

To conclude, such lies have either none or very limited negative economic effects. For this reason alone, a legal regulation appears unreasonable from an economic point of view even without viewing the comparison scenario.

2. Comparison Scenario

A legal provision could not be enforced effectively. It would be extremely difficult to prove faked emotions and to prove causality and if necessary, concrete damages. This applies irrespective of the fact that 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 people's *Rechtsgefühl* suggests that there should not be legal consequences.²²⁶ Moreover, the only case that leads to significant negative consequences is the one in which the lie about emotions leads to the break-off of the negotiations. However, a right to rescind and contractual damages do not deal with this situation. Consequently, the negative effects of deception about emotions are relatively limited. Even if one assumes some negative consequences, these could not be effectively mitigated by legal rules.

D. Deceptions About One's Own BATNA

Deceptions often involve presenting one's own negotiating position as stronger than it is. Since the perceived BATNA decisively determines relative negotiating power, lies about this aspect can prove to be a successful negotiation tactic. Parties may lie about how good their alternatives are compared to the current negotiated agreement in what is called "better offer" or "intensified competition" tactics.²²⁷

1. Baseline Scenario

Since both BATNAs together determine the ZOPA or NOPA, these deceptions generally affect the perceived zone of agreement. Feigning a better BATNA, may

223. See Talwar & Crossman, *supra* note 172, at 150-53 (on the learning process of children regarding prosocial lies in detail).

224. Nyberg, *supra* note 10, at 128-36 (on lies and privacy).

225. See Section V.F. for a discussion of the reasoning how lies may protect the right to remain silent.

226. On the moral intuition, see *supra* note 208. Preliminary results regarding the *Rechtsgefühl* show 81.3% of German students and 100% of international professional negotiators are against legal rules.

227. Cf. Jung & Krebs, *supra* note 13, at 45-46.

allow the deceiver to capture greater surplus, may cause negotiations to fail even where there was a ZOPA, or may have no effect at all. If there is a ZOPA, the exaggeration of one's own BATNA can cause the existing ZOPA to appear narrower than it is. Under the assumption of rational negotiations, the economically sensible contract is usually concluded nevertheless. However, the deception can influence the distribution within the ZOPA.

If there is a ZOPA but the deceiver's own BATNA is excessively exaggerated, the parties may mistakenly assume that there is no ZOPA. If this is the case, there is a risk that the negotiations will be terminated, even if the parties act rationally. However, smart liars will leave a "withdrawal option" open in negotiations. If they realize that a reasonable conclusion of a contract within the ZOPA could fail due to their lie, they often try to relativize the deception, while simultaneously saving face, to reach an agreeable conclusion. Still, if the conclusion of the contract fails due to the bluff, both parties are worse off than without the deception. In this respect, the lie can cause a so-called "lose-lose" situation. From a macroeconomic point of view, such deceptions cause a decline in welfare-enhancing market transactions. However, since there is no conclusion of a contract, a rescission is out of the question as are contractual claims for damages.

Finally, if there was no ZOPA, the consequence of exaggerating one's BATNA is that the lack of a ZOPA becomes even more evident. From an economic point of view, such deceptions are not problematic because they have no significant impact on the negotiations. These deceptions can lower transaction costs under certain circumstances, as the negotiations may be terminated more quickly as a result of the lie. In many cases, these deceptions will not become causal to the outcome of the negotiations. Finally, as there is no conclusion of a contract, rescission and damage claims would not be appropriate legal measures.

Lying about one's own BATNA increases transaction costs on the side of the liar since they must convincingly present a better offer. The cost of this can vary. Non-specific oral statements require less effort than precise differentiated statements that may have to be substantiated. Yet, such deceptions incur transaction costs for the party that fears a lie. Because of the potential distributive impacts, the other party will take preventive measures and may also invest resources into clarification.

The moral evaluation of this type of lie varies widely.²²⁸ Some interviewed groups classified it as clearly immoral while other groups were split. Overall a noticeable dilution of the truth signal and a loss of trust can be expected. In some of the surveyed groups, a substantial minority favored legal consequences.²²⁹ Some spillover effects also seem plausible. If one side suspects a bluff about the BATNA, it may react with a counter lie about their BATNA. Furthermore, the deceived side might consider it legitimate to use less harmful bluffs. However, weaker parties

228. The results of the various groups surveyed in the U.S. and Germany for a lie about another offer are as follows: U.S. lawyers (76% immoral), U.S. students (71.2% immoral), German professional negotiators (41% immoral), German lawyers (48% immoral), German judges (75% immoral), German students (59.9% immoral). Even fewer people regard a lie about a better offer as immoral.

229. The results of the various groups surveyed in the U.S. and Germany favoring a rescission for a lie about another offer are as follows: U.S. lawyers (33%), U.S. students (43.3%), German professional negotiators (18%), German lawyers (16%), German judges (28%), German students (36.6%). With regard to lying about a better offer, even fewer people are in favor of legal rules.

could benefit from lies about the BATNA. Overall, it should be noted that misrepresenting a better BATNA can have certain negative consequences.

2. Comparison Scenario

Legal regulations can only partly alleviate negative economic consequences. For example, rescission and damage claims granted by contract law have no controlling effect if the entire conclusion of the contract fails on account of the lie.²³⁰ Consequently, only tortious claims and criminal sanctions could be effective. In many legal systems, however, the injured party would only be compensated for its negative interest²³¹ and often receives only partial compensation. Thus, the claiming party would not be in the same position as if the contract had been concluded. Some negative effects also arise if the lie is not causal to the conclusion of the contract. Because lies about one's BATNA do not result in the conclusion of a contract outside of the ZOPA, only compensation claims should be granted, if at all.

There are also difficulties related to both, the disclosure and the presentation of evidence, necessary for effective enforceability. This occurs because such information is only available to the deceiver and to the company that allegedly made the better offer. In theory, both the exposure of the lie and gathering the evidence is possible. However, the sense of lawfulness in most of the groups surveyed demonstrates that only a minority favored legal regulation.²³² This supports the view that the actual enforcement of such claims, even in the event of the disclosure of a lie, would often not proceed. There are few, if any, cases in either the United States or Germany, although this is assumed to be a very common tactic.²³³ The actual controlling effect of the law would therefore be limited. However, the mere existence of regulation would improve the negotiating position of the deceived party in any subsequent negotiations or renegotiations. In order to influence the cost-benefit ratio of this tactic significantly, legislatures would probably have to pose more severe sanctions, such as criminal sanctions. Overall, the misrepresentation of a better BATNA is a category for which an economic analysis does not provide unambiguous results.

230. Something different only applies if a legal system is familiar with the instrument *culpa in contrahendo* and thereby includes corresponding deceptions.

231. This means that the damaged party would be put in the position as if he or she had never heard of the lie.

232. The results of the various groups surveyed in the U.S. and Germany favoring a rescission for a lie about another offer are as follows: U.S. lawyers (33%), U.S. students (43.3%), German professional negotiators (18%), German lawyers (16%), German judges (28%), German students (36.6%). With regard to lying about a better offer, even fewer people are in favor of legal rules.

233. Studies on the actual use of this tactic are not available. However, it is an often-discussed tactic in the literature, which suggests a certain frequency of its usage. In the B2C area, for example, one case has become public in Germany: An online fashion store, Zalando SE, was sued in 2015 by the competition authorities based on a corresponding misrepresentation. Press Release, Peter Brammen, *Wettbewerbszentrale erhebt Klage gegen Zalando wegen irreführender Werbung*, Zentrale zur Bekämpfung unlauteren Wettbewerbs (Nov. 11, 2015), https://www.wettbewerbszentrale.de/de/home/_pressemitteilung/?id=268.

VIII. CONCLUSION

This article explored the economic consequences and the immense complexity of deceptions in business-to-business contract negotiations. The economic analysis provided arguments for the lawmaker on how to handle lies in negotiations. However, other considerations, including moral, political, cultural, and primary legal aspects also influence lawmakers.²³⁴

The Siegen Study suggested that lawmakers should not treat all lies equally. Therefore, this article suggests differentiating between various types of lies, such as lies about the subject matter of the contract, better offers, and emotions. Lawmakers should consider if and how the law can effectively mitigate the negative effects of different types of lies. Types of lies focusing on the subject or price of the contract result in clear economic disadvantages and the law can mitigate these effects effectively. Conversely, some lies produce few negative economic effects and it is even possible that some bluffs lead to marginally better outcomes. This is the case for lies about emotions and the price in a broad sense. From an economic point of view, lawmakers should not prohibit such lies. However, many lies lead to mixed results between the two poles. Concerning those cases, the economic analysis does not provide conclusive indications on how a legal system should handle such bluffs.

234. Richard A. Epstein, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 456 (1978) (“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.”).