

# CORPORATE COMMUNICATION IN TURBULENT TIMES

## **Law and Communication**

Change of paradigms - examples of cases affecting the reputation of an enterprise - diagnoses and therapies regarding risks and opportunities at the intersection of law and reputation as part of an integrated Corporate Reputation Management

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(detailed outline for a freely held presentation, only partially reflects the content of the presentation - with annexed lists of literature)

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## OVERVIEW

- Preliminary remarks
- design of line of arguments on Law and Reputation
- Changed circumstances due to change of paradigms
- Corporate Reputation - The reputation as immaterial core value and factor of success
- Actual case examples of Corporate Reputation and Law - retrospectively
- Observations concerning the cases
- Possible case examples as part of an "Integrated Risk Management Initiative" - prospectively
- Conjectures as regards the future possible cases
- Diagnoses of the changes in the "International Practice of law" and its significance for the risks and opportunities at the intersection of law and reputation
- Possible Therapies in handling the risks and opportunities at the intersection of law and reputation
- The management of chances and risks of the legal dimension of management as a care area of a new Corporate Reputation Management

## **The handling of opportunities and risks of the legal dimension of entrepreneurial activities as key area of new Corporate Reputation Management**

"Corporate Reputation Management is the communicative/legal dimension of a modern wholistic management which strives for Sustainability and Business Excellence. The Corporate Reputation Management brings about an early recognition of possible issues of the public opinion (Issue Management), helps to master these issues with preventive communication strategies (Perception Management) positively or at least to attain the effects of the issues in a timely manner (Exposure Management)."

"Reputation occurs with social acceptance, it reflects the added value to society and is the basis for business sustainability"

*Alex Krauer*

## **Change of Paradigms: The term of Reputation - Legal Dimensions?**

"Reputation is a critical corporate asset. It is built around intangibles such as trust, reliability, quality, consistency, credibility, relationships and transparency, and tangibles, such as investment in people, diversity and the environment. All of these can be affected either positively or negatively by the company's triple bottom line performance.

Reputation is especially important for those companies whose brand equity depends on it.

Reputation is also important for maintaining the company's "license to operate". Compliance with regulations and avoidance of legal sanctions are only one aspect of "license to operate". Increasingly, this also depends on building good relationship with host governments, communities and other stakeholders in the places where a company operates."

## The changed starting position due to change of paradigms

The world has changed, new dimensions ...

- The world of globalization
  - Death of time and distance
  - Loss of boundaries in the global village
- The world of politics
  - Personality of cult in media and politics
  - Politization company activities
- The world of mediatization
  - Struggle for attention as a new scarce resource
  - The need to reach public opinion at any price
- The world of lawyerization
  - omnipresence of lawyers and law suits
  - Size determines guilt, class actions are big business

## The changed starting position due to change of paradigms (seq.)

..... bring about unfamiliar problems

- Private matters become public property
  - No company affairs are any longer secret
  - Media matters intrude into private company spheres
- High exposure increases the risk of criticism
  - Public criticism becomes a status symbol
  - Behaviour in the face of criticism is decisive
- Big size creates "let's attack mentality"
  - "Deep pocket attitude" by lawyers
  - Target companies vs. reference firms
- Politics become important for company policy
  - Political problems cannot be solved by managerial economics
  - Company management faces new political realities

## **The changed starting position due to change of paradigms (seq.)**

..... which are often confronted with ingrained behaviours and attitudes

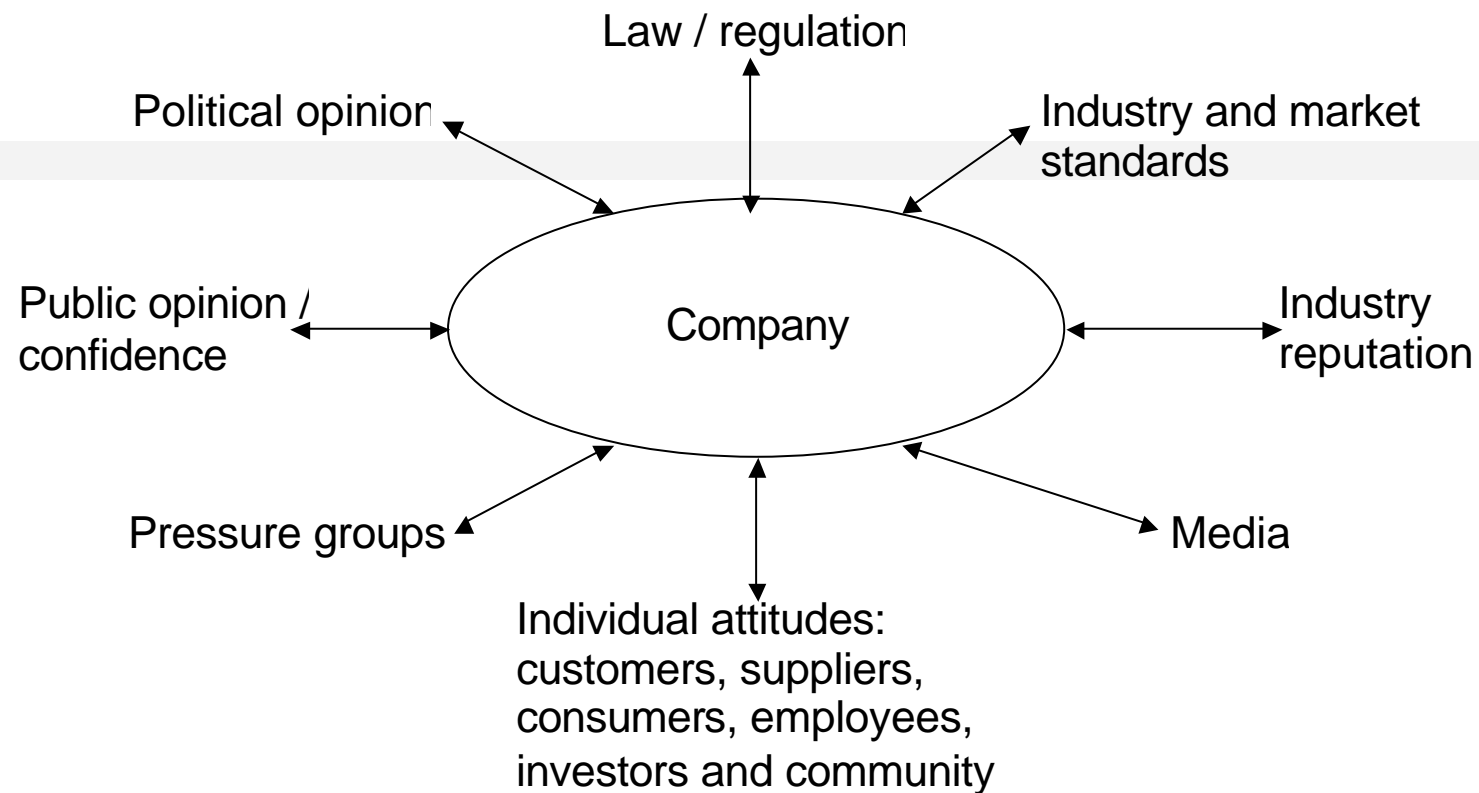
- Organizational structures from military times
  - Compartmentalized responsibilities
  - Hierarchical bureaucracy, slow decision making process
- Traditional thinking
  - Always done like this/never done like this
  - "No contraction behaviour" as a team concept
- Inward looking mentality
  - Tunnel vision, defensive attitude
  - Closing up under criticism
- Outdated methods of communication
  - Information cascading
  - Only communicate the positive to the outside world

## Change of paradigms: Higher Expectations in 8 Areas - Legal Dimensions?





## Change of paradigms - Licence to Operate - Legal Dimensions?



## **Elements of the role of Law and Lawyers in this change of paradigms - Case examples as a basis and a diagnoses and therapies**

- Case examples Switzerland and Europe - retrospectively
- Case examples United States - retrospectively
- Observations as to case examples - retrospectively
- Possible cases in the framework of an "Integrated Risk Management Initiative " which takes into account seven types of risks - prospectively
- Conjectures as to "possible future cases" - prospectively

## **Cases: Corporate Reputation and Law - Switzerland and Europe - retrospectively**

- Bayer, Baycol and Ciprobay during the planning of a new organizational and legal structure of the group
- Monsanto and Class Action coordinated with an environmental campaign during merger negotiations
- Glaxo and the announcement of the planning of a further merger after the loss of patent protection for the antibiotic Augmentin in a US court
- Roche and prices of HIV drugs in South Africa and Brazil; fines and punishment in antitrust proceedings in the United States and the EU and statements of the president of the board on industrial catastrophe of Seveso
- Astra Seneca and sexual Harrassment in the US
- SAS and unlawful conspiracy with regional airlines combined with an at first unadmitted consent of the top management

## **Cases examples: Corporate Reputation and Law - Switzerland and Europe - retrospectively (seq.)**

- Swiss Re and insurance coverage for Twin Towers after 9/11
- Credit Suisse Group regulatory investigations in various jurisdictions, conflicts of interest, Swissair, incidences at the annual shareholders' meeting
- UBS and the deference to law after change of strategy with regard to Swissair
- Vontobel and the firing of three members of top management
- VP Bank and the personal accusations against the president of the board
- Swissair grounding and the communication in the relevant press communiqué "chapter 11 requested" ("Nachlassstundung beantragt")
- Swiss and the advertising campaign "97 years of experience"
- ABB and Asbest, violation of antitrust laws, sensitive payment<sup>3</sup> and unduly high pensions for top managers
- Swisscom and the handling by media and administrative authorities of the former "Monopolist"

## **Cases examples: Corporate Reputation and Law - Switzerland and Europe - retrospectively (seq.)**

- Miracle after the statement of a major client as regards the performance of the license agreement
- Sulzer Medica and "dirty" ("verunreinigte") hip implants
- Andersen Switzerland AG and Andersen Legal and the perception of American law based liability risks
- FIFA and the abuse proneness of the legal form of the association
  
- from "Holderbank" to Holcim
- Philip Morris and Marlboro group structure and change of name
- Bertelsman and Napster
- Deutsche Bank - from a German to an American management structure and culture

## **Case examples: Corporate Reputation and Law - United States - retrospectively**

- discrimination, especially in the form of a class action by employees (Coca-Cola, Texaco, Morgan Stanley)
- product liability; especially when a product recall may be involved (Ford, Firestone, Coca-Cola, Perrier, Johnson & Johnson)
- price-fixing, other anti-competitive practices of fraud (Archer Daniels Midlands, HCA, Sotheby's)
- failed due diligence (Cendant)
- investigation by the SEC or other regulatory body (Lucent)
- a catastrophic event producing loss of human life or environmental disasters (Exxon, Union Carbide)

## Observations concerning the case examples - retrospectively

- in all cases the legal dimension is a major cause for the issues
- in all cases reputation of affected
- the extent of the effects on reputation of the legal dimension mainly depends on the management of the issue itself
- the majority of the case examples concern crisis
- in case of lack of integration of communication in the issue management the potential risks of reputation of the legal dimension of the issue increase and vice versa
- the legal sanctions have become stronger and the reputation damages connected therewith have increased.
- The majority of the case examples are caused and influenced by American law.
- the medialisation of law often hinders or prevents the realization of law.
- the medialization of law often accelerates the realization of law.
- In many of the case examples individuals in the organization and their reputation play a key role

## Observations concerning the case examples - retrospectively (seq.)

- the medialisation perverts the legal presumption of innocence in an early presumption of guilt in the media
- what often matters is the perception of potential legal risks and not the risks or the binding judgment at the end of a legal proceeding
- the importance of the legal dimension in connection with reputation in generally is underestimated.
- the controversy relating to reputation with a legal dimension is carried out in a different, in particular in an earlier point of time, and it seriously affects the preconditions of later applications and execution of law.
- Under reputation perspective legal issues of an enterprise often affect the whole industry.
- From the reputation perspective the legal issues of corporate reputation often have a dimension that affects government reputation.



## Observations concerning the case examples - retrospectively (seq.)

### Observations

- the implication of legal issues on reputation in general are dealt with in-house, whereby the integration of the chief legal officer in the management, in particular with other C-Level functions often is underdeveloped and in general is not used from a preventive perspective and usually is undertaken too late.
- the usual perception of the management of law affects the management of these issues negatively
- the knowledge as regards the manageability of the legal dimension is underdeveloped
- the acceptance of the function of law and of the lawyers in that context is suboptimal.
- the "opportunities" are much less taken care of than the "risks"
- the lawyer in general is not an accepted "messenger" for an integrative issue, crisis and reputation management on the strategic level, on which the legal dimension is adequately taken into consideration and is adequately integrated.

## **Possible constellation of cases: Corporate Reputation and Law in "Integrated Risk Management Initiatives" - prospective (conjectures on the implications of the legal dimensions based on an example of a actual Risk Management, described in Literature)**

"An integrated risk management initiative should first identify those risks that collectively define the unique risk portfolio of a particular business. The portfolio of risks must then be analyzed in the context of the seven interlocking risk dimensions common to businesses across industry sectors: Safety and Security Risk; Reputational Risk, Business Risk; Legal and Compliance Risk; Corporate Governance Risk, Political Risk; and, Future Risk. As a result, risk management has moved from the province of someone in Treasury managing and insurance portfolio, to the concern of Wall Street analysts, institutional investors and individual shareholders, whose determination of a company's market value will be based, in part, upon their perception of that company's success in identifying and managing risk. To address the concerns of these important constituencies, the Chief Legal Officer would bring the gravitas required for these audiences."

"To function as the CEOs strategic business partner, the Chief Legal Officer, collaborating with other C-level officers and the board of directors should analyze a risk event across the matrix of these interlocking dimensions of the risk universe."

## Possible constellation of cases in "Integrated Risk Management Initiatives " prospective

- **Safety and Security Risk**

- ⇒ Physical Safety. To what extent are employees on site or travelling on business, third-parties on site and families of expatriate employees, vulnerable to physical or health risks?
- ⇒ Data. To what extent are the computer-based information systems vulnerable to breach of integrity from hackers or destruction?

### *Implications of the legal dimension? Examples?*

- **"Business Risk"**

- ⇒ To what extent does the company have adequate financial resources to remain in business despite adverse economic conditions or an unforeseen catastrophe?

### *Implications of the legal dimension? Examples?*

## Possible constellation of cases in "Integrated Risk Management Initiatives " prospective (seq.)

- **"Political Risk"**
  - ⇒ To what extent does the Company engage in lobbying to prevent a potentially adverse governmental (federal, state, municipal or regulatory) decision or course of action that could hurt its ability to remain profitable and grow?
  - ⇒ To what extent does the Company monitor the potential political instability of foreign governments which could devalue the local assets and interests of the Company doing business in that region?

### *Implications of the legal dimension? Examples?*

- **"Legal Risk"**
  - ⇒ To what extent does the Company anticipate and minimize liability arising from litigation, criminal indictment, loss of intellectual property assets, contractual obligations, commercial disputes and compliance failures?

## **Possible constellation of cases in "Integrated Risk Management Initiatives " prospective (seq.)**

⇒ To what extent does the Company protect its intellectual property assets?

*Implications of the legal dimension? Examples?*

- **"Reputational Risk"**

⇒ To what extent does the brand or image of the Company suffer from the public perception of actions or omissions taken by the Company?

⇒ To what extent does doing business in a country known to deny basic human rights to its citizens tarnish the brand of the Company?

*Implications of the legal dimension? Examples?*

## Possible constellation of cases in "Integrated Risk Management Initiatives " prospective (seq.)

- **"Corporate Governance Risk"**
  - ⇒ To what extent are structures and processes in place to insure that the board, and especially the Audit and Corporate Governance Committees, are following best practices in exercising informed judgment to further the Company's business objectives without exposing the Company to unreasonable risks of liability?

### *Implications of the legal dimension? Examples?*

- **"Future Risk"**
  - ⇒ To what extent is the Company anticipating risks arising from changing technology, new business models, political upheavals in countries where business may be conducted, loss of intellectual property protection from exporting products to countries which fail to protect intellectual property, among others?

### *Implications of the legal dimension? Examples?*

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**Thoughts as regards to "possible future case constallations"  
(on the basis of referenced "Integrated Risk Management Initiative"  
taking into account seven types of risks)**

- the link to risk management is a limitation of the taking into account of the legal dimensions relevant for an enterprise; risk management is not taking into account many areas, in which law is of strategic importance for an enterprise,
- the link to risk management is primarily geared to "risk" and not to "opportunity"
- the link to risk management does also not cover all interdisciplinarity necessary for a comprehensive Issue, Crisis and Reputation Management
- even in the narrower circle of categories of risks taken into account the identification of the Legal Risks as one of the risk categories is imprecise and misleading.
- the analysis has shown the remaining six categories of risks Law and Lawyers all have an important and sometimes central function depending on the type of enterprise.
- The focus of Risk Management visibly is on prevention

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**Thoughts as regards to "possible future case constallations" (seq.)**

- the role of law as regards to a risk may lie in the structure and content of the national and international legal systems and in the structures effected by lawyers in enterprises in private economy
- the probability of materialization of a risk with legal dimension and its extent is materially affected by the specific handling of the risk
- the legal systems and legal structures relevant to enterprises are constantly changing; these developments often lack transparency and continuity even if legal security is an important value.
- prevention dealing with the legal dimension often is underdeveloped in enterprises.
- this often is caused by an inadequate perception of law and legal role models
- the successive development, which is paralleled in many legal system of law into a strategic dimension in enterprises is hardly examined and generally recognized incompletely and too late.



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**Diagnose of the changes in the International Practice of Law -  
Relevance for the intersection of Law and Reputation**

General Trends

- Globalization
- Legalization
- Informatization
- Interdisziplinarization
- Professionalization
- Market orientation
- Economization
- Specialization
- Proceduralization
- Institutionalization/Organization
- Emanzipation of Education and legal professions
- Tendency for americanization

Remarks:

- the list is developed from a perspective of the private practice
- it is incomplete in the area of Issue, Crises and Reputation Management
- even if there are tendencies for americanization the degree of maturity of the various trends varies
- private practice at times has been leader, corporate legal departments a follower
- the big 4 legal networks are suffering from the effects of September 11

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**Diagnose of the changes in the International Practice of Law -  
Relevance for the intersection of Law and Reputation (seq.)**

**The differences between Private and Corporate Practice Law?**

- they have moved up to private practice as regards to size and sophistication
- they operate closer to management in a more integrated and holistic manner
- they are part of an integrated management
- they are more sophisticated in dealing with Issue, Crisis and Reputation Management
- they have - based upon the cases - nevertheless have still deficits

The possibly most important deficits dealing with the intersection of law/communication/reputation in an integrated issue, crisis and reputation management are:

- the mental deficit in accepting the paradigm shifts
- underestimation of the challenges of a specific internationality
- underestimation of integrality and the interdisciplinarity of the issue management
- obvious deficit in the perception of law and lawyers
- organizational deficit
- educational and training deficits
- underestimation of the function of the role of prevention
- lacking acceptance of the "manageability" of the intersection between law and reputation

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**Possible therapy for changes in the dealing with the changes and risks of the intersection  
law/communication/Reputation**

1. Special measures for the improvement of the integration of law, communication and reputation in an integrated Reputation Management - from the perspective of a lawyer - among others in the following areas
  - acceptance of the change of paradigm "The world has changed, New Dimensions"
  - Positioning of law and lawyer and communication and risk management
  - the organization of the relationship of these actors amongst themselves and the interdisciplinarity connected therewith and the respective organizations
  - Integration of the management and the external consulting functions
  - development of an integrated methodology of the issue - perception - exposure and crisis management as part of an integral reputation management
  - placing this methodology on top management level in a mode of "business as usual" with an acceptance of the "feasibility", "doability" and "manageability" of the issue in general.

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**Possible therapy for changes in the dealing with the changes and risks of the intersection  
law/communication/Reputation (seq.)**

2. General measures to improve the knowledge on relationship between law, communication and reputation - from the perspective of a lawyer - among others in the following areas
  - Knowledge and Communication on "The World has changed, New Dimensions"
  - Knowledge and Communication on national legal systems
  - Knowledge and Communication on foreign law
  - Knowledge and Communication on professional role models in law
  - Knowledge and Communication on the basic functions of law
  - Knowledge and Communication on international business law reported on in international economic media
  - Knowledge and Communication in the education and training of an international lawyer
  - Knowledge and Communication on reputation and the significance of law for reputation

"Reputation occurs with social acceptance

## **The handling of chances and risks of the legal dimension of entrepreneurial activities as key area of a new type of Corporate Reputation Management**

"Corporate Reputation Management is the communicative/legal side of a modern, integrated management, which is heading in direction of sustainability or business excellence. With the help of corporate reputation management possible problem areas of the public opinion are recognized at an early stage (issue management), positively mastered by a preventive communication strategy (perception management) or at least timely contained (exposure management).

"Reputation occurs with social acceptance, it reflects the added value to society and is the basis for business sustainability"

*Alex Krauer*