

#### 1.1.2.4 Introduction of Means to Overcome this Gap

Insights gained from this analysis will then, coupled with valuation fundamentals discussed earlier, be used to introduce a systematic integrated valuation methodology in the following chapters four and five. This methodology serves as the author's contribution to the desired improvement of IP valuation quality (by mitigation of risks and information asymmetries) and thereby to increased tradability of such assets and reduction of cost of capital.

As the systematic integrated methodology is, in its essence, applicable to valuation of all intangible assets and intellectual property, it can, for instance, also be applied with respect to patents. The problems of lack of suitable valuation instruments, excess market intransparency and cost of capital exist regarding both patents, brands and other intangible assets.

Hence, not only the content-related but also the quantitative focus of this work lies on the fundamentals of IP valuation as well as on the methodology newly introduced in chapters four and five, especially its legal dimension. These issues will, for the most part, be illuminated and discussed on the basis of (trade marks and) brands.

### 1.2 Distinguishing Reporting from Forecasting Valuations

Ideally, instead of utilising different valuation tools for different valuation occasions, one is able to elaborate at least one category of valuation scenarios which all show a sufficient degree of commonality in order for them to be covered by one single valuation tool. This would be conducive to both clarity of valuation processes, usefulness of the respective method and comparability of valuation outcomes.<sup>21</sup>

In this connection, it is important to realise that valuation for accounting and taxation purposes is to a certain extent regulated by existing legal frameworks and statutes, both on national, supranational and international levels. For instance, IP valuation in the accounting field is internationally regulated by the standards IFRS 3 and IAS 38.<sup>22</sup> These sets of rules prescribe certain valuation techniques, such as the cost method for initial valuation of intangible

<sup>21</sup> Cf. 1.4.3.2.

<sup>22</sup> More on valuation for accounting and taxation purposes below at 2.3.5.

assets in an accounting setting,<sup>23</sup> to be utilised in many areas they apply to. Accounting and taxation rules are self-contained bodies leaving comparatively little room for methodical preferences of the appraiser and should therefore be treated as a group distinct from valuation scenarios which are not governed by binding legal bodies.<sup>24</sup>

What is more, the appraiser generally works with historic data and mostly serves the purpose of covering past events.<sup>25</sup> Due to this fact, valuations for the purpose of assessment of damages or the amount in dispute in legal proceedings should be - as they are also based on mainly historic data - added to accounting and taxation valuations in order to form one group. Based on its focus on past events, this category shall be called ‘reporting’ valuations in order to differentiate it from future-related valuations.

The latter include all those scenarios in which the appraiser is tasked with estimating future value. These are all future-oriented occasions in the broadest sense, i.e. strategic ones such as licensing and other prospective transactions, strategic and operative management and controlling, as well as finance and protection strategies.<sup>26</sup> Valuations carried out in this category are not regulated by binding laws. They shall, in contrast to reporting valuations, be named ‘forecasting’ valuations.

All forecasting valuation occasions have in common that future value has to be determined on the basis of presently available data. Hence, they by necessity constitute an estimate. This means that – contrary to mainly past-related valuation fields such as accounting and tax – the outcome cannot be expressed in one fixed sum. Rather, future-related valuation must result in a

23 Cf. IAS 38.24 in combination with IAS 38.65.

24 Furthermore, the purchase price of a brand is in most cases not identical to the value of the respective brand as laid down on the balance sheet. Cases may arise in which the balance sheet value is zero whereas the brand is sold for a considerable sum. Examples which show that brands have been sold for a multiple of the book value is the takeover of Rowntree by Nestlé for US\$ 4.5 bn. – the fivefold of the book value – and the acquisition of Kraft by Philip Morris for US\$ 12 bn. – four times the book value, cf. *Berger*, MarkenR 1999, 271, 271. Quod vide *Franzen*, DStR 1994, 1625, 1625. The examples just mentioned show that there must be a difference between the accounting value and the one arrived at in the course of a sale. The balance sheet cannot and does not make a valid statement about the strategic future-related value of the respective brand.

25 This shall not ignore that accounting is in part future-related. However, this is not the main focus. As *Barsky* and *Marchant* put it, “Accountants are paid to track the past, but managers are paid to build the future.”, cf. *Barsky/Marchant*, The Most Valuable Resource – Measuring and Managing Intellectual Capital.

26 Cf. 2.3.1, 2.3.2, 2.3.3 and 2.3.4.1.