

### 2.3.1.1 Marketing – Planning, Implementation and Control

As a central component of brand management, marketing shall briefly be highlighted in the following. Like all other brand management instruments, marketing means need to be constantly revisited, reviewed and evolved. A holistic brand valuation or rather evaluation methodology serves as an important resource of guidance in this context.

Marketing is not confined to market communication such as advertising. Rather, it is a fundamental and far-reaching task touching almost every section of a business. The way a marketing concept is established and implemented can vary conspicuously from marketing manager to marketing manager and from company to company. Marketing is a dynamic process during which priority setting can take a variety of forms. For these reasons, there are many definitions of marketing. A viable one defines marketing as ‘the planning and implementation process of the conception, pricing, advancement and dissemination of ideas, products and services in order to effectuate processes of interexchange for satisfaction of individual and organisational objectives’.<sup>245</sup>

The classic marketing instruments, the so-called ‘marketing mix’ or ‘four Ps’, serve to practically implement the respective marketing strategy. They comprise product, price, place and promotion.<sup>246</sup> These instruments need to be tailored to the respective goals and needs in the course of planning and implementation of each company’s brand and marketing strategies. The respective brand identity, as strategically planned, is implemented with the aid of these marketing instruments in the course of operative brand management.<sup>247</sup>

Product policy includes all activities on composition of the market output of the respective company, such as product configuration, additional output, styling, design and branding.<sup>248</sup> In the course of the pricing policy, the general pricing level (top price vs. medium or low price segment) and the pricing

245 Meckl, Übung: Funktionsbezogenes Internationales Management (IM) – SBWL IM III, slide 2.

246 Homburg/Krohmer, Grundlagen des Marketingmanagements. Einführung in Strategie, Instrumente, Umsetzung und Unternehmensführung, p. 158; Irmischer, Markenwertmanagement. Aufbau und Erhalt von Markenwissen und -vertrauen im Wettbewerb, pp. 216-266.

247 Burmann/Blinda/Nitschke, Konzeptionelle Grundlagen des identitätsbasierten Markenmanagements, pp. 34-42.

248 Baumgarth, Markenpolitik. Markenwirkungen – Markenführung – Markencontrolling, p. 196.

strategy over time are being defined.<sup>249</sup> ‘Place’ refers to distribution policy. Significant issues in this context are the constitution of the distribution system (such as selection of sales agents, licenced dealers, wholesale etc.), of the cooperation with distribution partners and of sales activities.<sup>250</sup> Lastly, the promotion policy of a business defines how information which is designed to influence the audience in favour of the branded goods or services is to be designed and communicated.<sup>251</sup> There are classical means of communication, such as advertising, public relation and sponsoring, and non-classical ones such as events, giveaways and mobile marketing.<sup>252</sup>

In the course of value-based management, more or less all disbursements within businesses are seen as investments and therefore scrutinised for profitability. Often, marketing managers lack an objective, quantitative and qualitative instrument to justify budget requests and decisions with respect to investments in a brand. In general, this tends to result in underinvestment. Yet even if the volume of investment in the brand is optimal, inefficient budget allocation decisions cannot be precluded without feedback through comprehensive brand valuation and evaluation, which give detailed information about the brand’s performance and significance.

Marketing information and planning are closely linked to marketing control (which is, for instance, carried out by portfolio analysis). The co-ordination of information, planning and control is known as controlling. It serves to provide information for, amongst others, strategic and operative planning, portfolio management, market segmentation and monitoring of results.<sup>253</sup> As such, it is of vital assistance for marketing management. Comprehensive brand (e)valuation, for instance as proposed in this work, can provide quantitative and qualitative information about the respective brand (such as brand strength or sales volumes) which is crucial throughout the controlling process.

249 *Böhler/Scigliano*, Marketing-Management, pp. 156-161.

250 *Homburg/Krohmer*, Grundlagen des Marketingmanagements. Einführung in Strategie, Instrumente, Umsetzung und Unternehmensführung, p. 266.

251 *Ibid.*, p. 222.

252 *Baumgarth*, Markenpolitik. Markenwirkungen – Markenführung – Markencontrolling, p. 194.

253 *Böhler/Scigliano*, Marketing-Management, p. 185.

### 2.3.1.2 Communication with the Financial, Investment and Press Communities

Knowing and communicating the value of their brands can help companies generate positive public relations (PR) in financial markets which can, in turn, assist in boosting the share price. Such communication is independent from balance sheets and can be carried out by means such as company brochures.

### 2.3.1.3 Assessment of Employee Bonuses

Leading employees are usually compensated by a fixed monthly sum plus a variable profit share (bonus). Such boni constitute both important performance incentives and means of employee retention. In order to determine boni for employees working in brand-focussed divisions, their share in brand-related profits needs to be calculated. This can be carried out by means of brand valuation.

## 2.3.2 Brand Transactions

Businesses are frequently re-organised through transactions in merger, acquisition (M&A) and liquidation cases. These include licencing deals with subgroups such as sale and licence back transactions. Failing to understand the value elements and implications in these activities can lead to undesirable outcomes such as acquisitions at prices which do not return expected benefits. Effective, comprehensive valuation can reveal important information which can be advantageously utilised in order to alter the transaction's nature and/or financial quid pro quo.

### 2.3.2.1 Brand Transfer (M&A, Outright Sale)

As previously stated, brands are assets of central value for many businesses and often the most important and valuable ones. Therefore, apart from production facilities and customer relationships, they constitute, as a 'third pillar',<sup>254</sup> an increasingly interesting target for potential acquirers. Hence, it is

254 *Sattler*, ZfB 1995, 663, 664.

assumed that it is often the brands which are bought or targeted by corporate acquisitions and mergers; other assets are said to be of minor matter.<sup>255</sup> Furthermore, knowing the value of their brands can enable companies to fend off hostile takeover bids.<sup>256</sup> The fact that interrelations between brands and changes thereof owing to a corporate merger or acquisition are central value determinants is another issue specific to M&A situations.<sup>257</sup>

In the course of corporate restructuring by means of brand-related M&A deals, which are often multinational, the range of IP-related tasks does not stop at but is crucial for the audit and due diligence stages, in which the range, proprietor(s) and quality of title of existing IP rights are documented and all other existing assets, resources and liabilities are comprehensively scrutinised. A due diligence, which should be carried out in preparation of any M&A transaction, helps assess and manage risk and enables the initiator to implement best practices. For example, brands often need to be split (territorially and/or with respect to goods or services classes) between retained and disposed of businesses or between seller and acquirer, managed in a way which secures brand value, reputation and product or service quality and which balances competition law requirements with commercial objectives and secures desired brand strategic options.

A comprehensive brand and IP evaluation tool can be particularly helpful in an M&A situation. Not only can it help to strengthen and focus the IP portfolio but also to manage and mitigate risks, show opportunities for utilisation of synergy effects, increase return on IP investment as well as awareness of IP importance within the acquiring company. This is not possible without capturing all characteristics of the respective brand in their entirety. For instance, high quality goods and services brands may find their value diminished if transferred to an organisation which does not sustain this potential.<sup>258</sup> The acquirer may not be aware of these issues prior to acquisition, and may expect the brand to continue providing the same pre-acquisition returns and benefits. Furthermore, a number of IP problems can be relatively

255 *Friedhoff*, Marken in der Übernahmeabwehr, p. 1. This is certainly true with respect to brand-focussed businesses and shall not belie the fact that patents may play a similarly important role, depending on the acquired company's asset portfolio and activities.

256 Cf. *supra* at 2.2.1 – *RHM* utilised brand valuation to ward off the takeover bid by *Goodman Fielder Wattie*.

257 *Meissner*, Science Factory 2004, 1, 2.

258 This is due to the general nontradable nature of intangible assets as explained above at 2.1.1.3.4.

easily remedied or managed if detected early in the lifecycle of an enterprise but are much more expensive to fix at a later stage.<sup>259</sup> Hence, comprehensive (e)valuation must be a necessary part of the transaction's due diligence.

Furthermore, the appraiser's expert opinion can be utilised for purposes of argumentation in the course of negotiations, be it for a deal limited to certain brands and associated assets or in the course of a sale of a complete business. Being well informed about the value of brands and other intangibles in the company by an independent third party can provide a stronger bargaining position in price negotiations. Value finding is the task of the valuator, yet pricing is a corporate decision.<sup>260</sup>

All this supposes that brands, including the IP right trade mark, are freely transferable. As of today, this applies to trade marks in all member states of the European Union. This has not always been so. In Germany, for example, the preceding rules to the present Trade Mark Act stipulated that every trade mark is accessory to the proprietor's business.<sup>261</sup> Hence, a due transfer of a trade mark was not complete until the corresponding business had been transferred in whole or at least in the respective part.<sup>262</sup>

The Community Trade Mark Directive<sup>263</sup> does not include rules or guidelines regarding transfer of trade mark rights.<sup>264</sup> However, the later Community Trade Mark Regulation<sup>265</sup> stipulates in Art. 17 (1) that a Community trade mark can be the object of a transfer, independently of an assignment of the associated business. According to Recital 10 of the same Regulation, a Community trade mark constitutes an "object of property which exists separately from the undertakings whose goods or services are designated by it". As a consequence, it is an asset which is capable of being transferred, charged as security and licenced.<sup>266</sup> Either of these activities can take place

259 *Limpert/Samiian*, Conducting an Intellectual Property Audit and IP Due Diligence, p. 3.

260 Similarly, for cases of business purchase, *Beisel/Klumpp*, Der Unternehmenskauf, p. 49.

261 Warenzeichengesetz, in force until 1992, esp. § 8 (1).

262 *Fezer*, Markenrecht, § 27 no. 7.

263 Fn. 108.

264 At the time of adoption of the Directive, the EU Member States were not able to reach agreement regarding a free transferability of trade marks, cf. *Deutscher Bundestag*, Gesetzentwurf der Bundesregierung - Entwurf eines Gesetzes über die Erstreckung von gewerblichen Schutzrechten (Erstreckungsgesetz - ErstrG), Bundestags-Drucksache 12/1399 of October 30, 1991, p. 69.

265 Fn. 108.

between separate companies or within one enterprise or group. They can be with or without foreign and tax implications.

As Recital 10 of the Community Trade Mark Regulation further states, the possibility to transfer a trade mark exists “subject to the overriding need to prevent the public being misled as a result of the transfer”. As a consequence, it can be demanded in some cases that the transferor of a trade mark keeps the possibility for quality control or confers with the mark certain goods or know-how (which would often be deemed to be part of the brand) in order to assure a certain level of quality of the branded goods or services.

### 2.3.2.2 Licencing

In the last two decades, trade mark and brand licencing has grown to a multibillion-euro business involving a wide range of industries, from fashion, the traditional licencing stronghold, to food and financial services.<sup>267</sup>

An IP licence is the right to use the respective intellectual property. It can be exclusive, i.e. granted to a single licensee only,<sup>268</sup> or non-exclusive. Exclusivity can refer to specific parameters only, e.g. as geographic, temporal or distribution exclusivity.<sup>269</sup> As the licensee compensates the licensor by payment of royalties in various forms (lump sum,<sup>270</sup> milestone payments, running royalties,<sup>271</sup> or a combination thereof), the value of the licence object, e.g. a brand, needs to be determined. Royalty rates are computed on the basis thereof.

266 The German Trade Mark Act has contained similar provisions since 1992, see § 27 (1) and § 29 (1) MarkenG (Gesetz über den Schutz von Marken und sonstigen Kennzeichen (Markengesetz – MarkenG) vom 25. Oktober 1994 (BGBl. I S. 3082 (1995, 156))). According to § 31 MarkenG, the right to a trade mark (i.e. the right to registration of the trade mark after application if all prerequisites are satisfied) can be used as credit collateral. For further reading, cf. *Klawitter/Hombrecher*, WM 2004, 1213, 1217.

267 *Progoﬀ/Palladino*, Tips for successful trade mark licensing, p. 1.

268 Two types of exclusive licence need to be distinguished: the exclusive licence in the strict sense, in the course of which not even the licensor but solely the licensee is allowed to use the respective IP and the licensor merely retains formal title to the respective IP right, and the so-called ‘sole licence’, by means of which the licensor retains his use rights and licences out to merely one licensee, cf. *Goddard*, Deal-making, Understanding the Contractual Terms and Conditions for Licensing “out”, p. 1.

269 More on the legal arrangement of licencing deals below at 5.13.1.

270 This is hardly found in brand licencing at all but in technology licencing, usually in cases where an exclusive licence is granted for the remaining term of a patent.

271 These are charged on a regular basis, for instance as actual percentage of sale revenue, a fixed monthly/quarterly payment or a sum per unit produced.