

## Networking as a Process of Private Ordering

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### ABSTRACT

This paper examines companies' networking as a process of private ordering. We use the term *networking* to describe the interactive, self-serving process of integrating business activities and resources. We also use the term *private ordering* to describe companies' processes of setting up rules and procedures to regulate inter-organizational networking activities.

Private ordering is manifested in private inter-organizational arrangements of quasi-legal processes that are built on selective aspects of customs and public legal order established by States. As a result, private ordering enables companies to develop flexible, yet reliable quasi-legal processes which regulate networking across several state-bound public orders and local business customs. Hence private ordering enhances predictability and reliability and efficiency of networking activities. Based on empirical research in the German food retail business conducted between 2011 and 2013, we identify a pattern of networking processes that rely heavily on the use of standardized, legal artefacts. These artefacts function as inter-organizational interfaces that facilitate recurrent interaction and enforcement of rules in networking through (1) law-like network constitutions, (2) out-of-court dispute resolution procedures, and (3) non-legal sanctions.

Our findings demonstrate that private ordering enhances companies' compliance with constantly changing regulations by reducing complexity and uncertainty. Equally, companies rely on private ordering to enhance the reliability and predictability of networking activities even beyond the confines of direct inter-organizational relationships. The present study adds to the existing body of IMP research highlighting the relevance of private ordering and the use of organizational artefacts.

**Keywords:** Networking, business networks, private ordering, artefacts.

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*“A glance at modern legal life shows that it is predominantly controlled not by state law but by the business document. ... The living law must be sought in...contracts of purchase...and business partnerships. In all of these contracts, there is, in addition to individual content which applies only to the particular transaction, a typical, ever recurring content. The typical content is basically the most important thing in the document.”* (Eugen Ehrlich, 1913, p.495)

### INTRODUCTION

This paper examines companies’ networking as a process of private ordering. We use the term *networking* to describe the interactive, self-serving process of integrating business activities and resources. We also use the term *private ordering* to describe companies’ processes of setting up rules and procedures to regulate inter-organizational networking activities.

Private ordering is manifested in private inter-organizational arrangements of quasi-legal processes that are built on selective aspects of customs and public legal order established by States. As a result, private ordering enables companies to develop flexible, yet reliable quasi-legal processes which regulate networking across several state-bound public orders and local business customs. In this way, private ordering enhances predictability and reliability and efficiency of networking activities.

In contrast to state-bound public orders and locally accepted business customs, private ordering regulates companies’ networking across geographic boundaries and often beyond the confines of direct inter-organizational relationships.

Our understanding of networking is that it is a self-serving process where companies simultaneously engage in inter-dependent *activities* with multiple *actors* in order to integrate dispersed *resources* (Ford et al. 2003). The resources necessary for any single company “to solve its problems are not available in a concentrated form and certainly not within the company itself” (Mouzas & Ford, 2006, p.1248). Rather, resources are distributed across multiple companies often located in distant markets. Therefore, companies need to *interact* with each other in order to secure access to relevant resources at most favourable terms. Interaction between actors, resources and activities forms the backbone of networking (Johansen & Håkansson, 1992; Ford et al. 2002), which happens increasingly across geographic borders. Consequently, networking results in a continuous process of “action, reaction and re-reaction, based on a company’s own ...and other’s *networking* and the outcomes of this” (Ford et al. 2002, p.21, emphasis added).

The multiplicity and complexity of networking interactions precludes the possibility of any one company controlling the networking processes. Neither can any company “predict the outcome of interaction or the direction of relationships” (Ford & Mouzas, 2010, p.960). Consequently, companies’ networking becomes a “process of [constantly] coping under uncertainty” (ibid, emphasis original). Where there is paucity of discussion, however, is that *networking is a process of private ordering*.

We argue that private ordering is an essential, yet under-researched mechanism for companies who must cope with complexity and uncertainty in networking. Both of these networking challenges are amplified in progressively globalized markets (Ford & Mouzas, 2010, 2013).

Consider the case of U.S. food-retail giant Wal-Mart: With over 100 000 suppliers, Wal-Mart purchases over 80 per cent of its stock in China and serves 245 million customers per week in 27 countries (Wal-Mart Annual Report, 2013; Statistic Brain, 2013). Wal-Mart's promise to combine a "seamless shopping experience" (Wal-Mart Annual Report, 2013, p. 4) with its "everyday low price...winning formula" (ibid, p. 7) powered by "everyday low cost focus", guarantees the company total annual sales of \$466 billion. This secures Walmart the rank of the 26<sup>th</sup> largest economy in the world, if it were a country (Business Insider, 2013). Exceeding in revenue Exxon Mobil (largest U.S. oil-company) and General Electric (largest U.S. manufacturer), Walmart is renowned for its pioneering role in innovating 'lean' supply networks: Technological advances, such as "Vendor Managed Inventory" (VMI) allow the company close to 100 percent order fulfilment on merchandise. Similarly, 'Retail Link' is a colossal Bentonville database, which links real-time sales data from all cash-points via satellite systems to analysts who forecast demand to *all* suppliers and distribution centres (Arkansas Business, 2012). The result is a complex, flexible and globally distributed network of companies "behaving almost like a single firm" (Arkansas Business, 2012). These 'tangible' networks, which materialize through technological innovations are recognized in business and research (Mouzas & Araujo, 2000; Lee, 2004) as vital tools for efficiently decreasing uncertainty and for enhancing the calculability and security in networking.

An aspect that seems to constantly escape attention is that the technological fabric interconnecting webs of business actors, resources and activities is only one manifestation of how companies' cope with complexity and uncertainty in networking. Technological advances undoubtedly facilitate networking through integrating, standardizing and tracking of inter-organizational activities and resources. However, technological capacity is limited in addressing any of the following networking problems: (a) Ensuring actors' accountability, and (b) compliance to best possible performance; (c) protection from moral hazard, and (d) protection of resources invested in networking, or (e) procedures to resolve disputes within particular business relationships.

The crux is thus, to *efficiently* address these networking problems, without compromising on the companies' need for *speed and reliability* in interactions, *protection* of resources and *flexibility* in face of rapidly changing market conditions. As "companies cannot just capitulate vis-à-vis this complexity" (Henneberg, Naudé & Mouzas, 2010, p. 355) and uncertainty, they actively invest in processes of setting up *rules and procedures* to regulate inter-organizational networking activities. That is, private ordering.

Private ordering is the process of companies' setting up private rules and procedures for regulating networking activities (Hayek, 1973; Eisenberg, 1978; Galanter, 1981; Birnhack, 2004; Sagy, 2011). The legitimacy of these rules does not originate from the State, referred to as the 'public order'. Legitimacy of private ordering emanates from the *voluntary consent* of all actors subordinate to these rules (Birnhack, 2004). Voluntary consent may manifest in signing a contract or silently accepting a company's General Terms and Conditions.

Academic interest in understanding the use of *rules* for coping with uncertainty emanates from IMP and extant research. This research elevates attention to the powerful processes and outcomes of negotiating and establishing *shared and commonly understood rules* for governing inter-organizational activities (Ehrlich, 1913; Hayek, 1973; Buchanan, 1975; Mouzas & Ford, 2006; Mouzas & Ford, 2009; Sagy, 2011; Mouzas & Blois, 2013).

Rules are not simply a plan of action, but “equipment for certain unknown contingencies” (Hayek, 1973, p.23) which bring “order into a complex of actions [no single actor can] know in detail in advance” (ibid, p.134). Rules become even more important in business networks of *interdependent* activities, because “successive decisions will be made by different groups of [actors] with reference to different parts of the whole” (ibid, p.135). Such complexity precludes certainty. Instead, companies need to eliminate “avoidable uncertainty – which cannot be attained by preventing unforeseen changes from spreading their effects, but only by *facilitating the [collective] adaptation to such changes*” (ibid, p.125, emphasis added).

Rules facilitate the *collective adaptation of multiple business actors* to changing conditions in two ways: First, rules specify commonly shared processes for preventing and resolving conflict, which facilitates ongoing cooperation. Second, rules eliminate uncertainty resulting from the “interference by others” (Hayek, 1973, p.38). Essentially, these functions of rules encapsulate the power and purpose of private ordering.

In contrast to the public ordering of business processes by the State, private ordering has the advantage of “better reflecting the needs of the relevant players, their difficulties and possible avenues of response” (Birnhack, 2004, p.3). For example, private ordering responds to the fundamental need of business actors to ensure reliability and continuity of business networking processes. This need is elevated in light of perturbations that may take the form of changes in legal regulations, changing consumer preferences or technological innovations or simply conflict within existing network relationships. To this end, private ordering provides the means for confidentially settling “disputes that have arisen out of past action, and the establishment of rules to govern future conduct” (Eisenberg, 1973, p.637). Both of the private ordering processes – settling dispute and governing future conduct – happen according to the actors’ *preferences*. Hence, private ordering depends on application and re-production “on the ground floor [of business networking practice and re-produced] through situated local practices” (Powell & Colyvas, 2008, p.281). There is a reciprocal relationship between established private ordering principles and their evolution through recurrent application in networking *practice*: Once the local practices become “habitualized ... patterns both harden and deepen as they are transmitted to others, particularly newcomers” (ibid, p.280).

In practice, private ordering manifests in companies’ setting up quasi-legal processes that replicate aspects of the public legal order established by the State. Therefore, private ordering “captures and uses the symbolic capital of state law” (Merry, 1988, p.881). The benefit of this dialectic relationship between the private and public order is that companies can use the public order “to induce compliance with a decision [made in the private ordering]” process (Galanter, 1981, p.25). The looming threat of the “costs, delay, aggravation and risk of being subjected to the official system becomes a resource of the [private order]” (ibid).

In the process of business networking, private ordering is an essential mechanism for orchestrating inter-dependent interactions between multiple, dispersed actors, activities and resources over time. Companies’ efforts of setting up commonly understood rules manifest in business networking practice on the inter-organizational and business network levels:

In *inter-organizational networking*, previous research illuminated how and why companies use contractual agreements, focusing in particular on ‘framework’ or ‘umbrella’ agreements (Mouzas & Ford, 2004; Mouzas, 2006; Mouzas & Ford, 2012). Less is known about the role of *unilaterally* imposed rules and principles governing business interactions by means of General Terms and Conditions (GTC) (Mouzas & Furnston, 2008).

On the *business network level*, previous research draws attention to the phenomenon of “business network constitutions” (Mouzas & Ford, 2009). However, our current understanding of business network constitutions still needs development of how companies manifest the achievement of and *share* ‘constitutions’, and how “explicit, formalized, legal, non-legal or illegal” (Mouzas & Ford, 2009, p.501) such constitutions are.

Considering that private ordering appears to be a fundamental mechanism for orchestrating dispersed business networking processes, it is surprising that this phenomenon seems to have escaped researchers’ attention to date. For this reason, the present study examines the nature and dynamics of private ordering to improve our understanding of “business networking as a process of *coping under uncertainty*” (Ford & Mouzas, 2010, p.960, emphasis original) and in this way, further contributes to “the relatively un-explored area of the *practice* of business networking” (Ford & Mouzas, 2013, p. 441, emphasis added).

Specifically, we aim to investigate the following research questions:

1. *Why does networking result in a process of private ordering?*
2. *How does private ordering affect business interactions?*

We substantiate our study with empirical research in the German food retail business, conducted between 2011 and 2013, which investigates how retailers actively employ standardized, legal artefacts for governing interaction with their suppliers in global food networks by means of private ordering. Specifically, we illustrate in our case study that private ordering of business-to-business interactions manifests empirically in three processes: (1) Codifying rules and procedures in law-like ‘network constitutions’; (2) engaging in out-of-court negotiations, which exploit the looming power of available court settlements; and (3) employing legal, non-legal and illegal sanctions in order to ensure compliance with ‘network constitutions’. Our findings suggest that private ordering processes are particularly strong in business networks where there is high power asymmetry between actors.

## **PRIVATE ORDERING IN DYADIC BUSINESS INTERACTIONS**

Academic interest in the phenomenon of private ordering focused on the study of two manifestations of private ordering processes: First, private ordering is manifested in *contractual agreements* governing *dyadic inter-organizational relationships* (Eisenberg, 1976; Edelman & Suchman, 1999; Mouzas, 2006; Talesh, 2009; Sagy, 2011). Second, private ordering is manifested in the *network constitution* which includes all conventions and rules that govern a specific *business network* (Mouzas & Ford, 2009).

Developing, codifying and sharing commonly understood rules and procedures as a means for coping with uncertainty, is at the heart of private ordering. Private ordering entails the processes of business actor’s “‘making law for themselves’ in the light of their ‘preferences’ and the ‘the [public order]’” (Galanter, 1981, p.23). Private ordering enhances the predictability and reliability of networking by *reducing the future into a set of collectively shared ‘modi operandi’*, as defined by the *preferences* of business actors. In this way, business actors cope with the impossibility of ‘controlling the future’: Since no single actor can pre-define every outcome or activity of networking, actors use *rules* for privately regulating various *responses* to predictable and unpredictable situations more efficiently. For example, such rules may predefine how business actors will resolve conflicts arising within a business relationship (Edelman & Suchman, 1999) or how they will interact in case of

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<sup>1</sup> In this quote and throughout the paper, ‘*public order*’ refers to legal regulations emanating from the state or supranational institutions, such as the European Union.

unforeseen contingencies arising from outside their immediate relationships (Talesh, 2009). Such unforeseen contingencies may result from trade embargoes, natural disasters, changes to legal regulations or shifts in consumer preferences and create disruptions to business networking processes of whole industries.

The guiding principle of private ordering is not to abandon ‘the public order’ and replace its statutes with own, privately negotiated rules. Rather, private orders are “semi-autonomous” in that they include own rules, customs and symbols, but are also “vulnerable to rules and decisions and other forces emanating from [the public order] by which it is surrounded” (Moore, 1973, p.720). On the other hand, actors can actively mobilize public order mechanisms or threaten to do so in their interactions with each other to enforce compliance with private ordering (Moore, 1973; Macaulay, 1986). There is therefore, a reciprocal relationship between the private and public order. As a result, private ordering relies on *combining* “externally imposed, but accepted laws or legal agreements” (Mouzas & Ford, 2009, p.497) with actors’ own, private rules. Such a combination of rules emanating from the public and private order has several important benefits:

First, companies may use private ordering to fill the gaps or ‘loopholes’ they identify in the public order. In some cases, “the law is silent” (Birnhack, 2004, p.8) in that it does not specifically regulate a certain field which creates dangerous ambiguity for networking. In such a situation, companies can rely on private ordering to address the ambiguity and complement the public order with their *own* rules. This allows companies to codify their own *preferences* (Nee, 1998) as *rules* regulating business networking beyond the confines of direct business relationships. The strength of such private rules results from the fact that they “can better represent and reflect the needs of the relevant players, their difficulties and possible avenues of response than legislation” (Birnhack, 2004, p.3). To illustrate this point, let us consider again the case of Wal-Mart: In the quest of lowering its total greenhouse-gas emissions, Wal-Mart identified that more than half of its emissions originated from unregulated fertilizer use throughout its supply networks in China, Central and South America. The vacuum in regulating fertilizer use essentially confronted Wal-Mart with an “area where there’s been no regulatory action” (Elizabeth Strucken, Managing Director of Wal-Mart Partnership with Environmental Defence Fund, 2014). As a result, Wal-Mart set up “a new standard in saying that they want fertilizer optimized [sic]. When Wal-Mart acts in a big way across multiple product categories, it is really ...becoming a de facto regulatory entity in a lot of ways” (Strucken, 2014).

Second, combining public and private rules facilitates global business networking processes that span several different legislative systems and local business customs. To this end, private rules may codify and standardize a set of ‘meta’-rules that apply regardless of the specific country where business networking takes place (van der Meulen, 2011). This becomes increasingly important in global business networks, where the number of constantly changing legal regulations creates uncertainty over accountability and liabilities resulting from business interactions and may impede speed of deal-making (Bunte et al. 2011). To exemplify, consider again Wal-Mart’s move to regulate fertilizer use across its supply network on several *continents*. Ensuring high-standards in fertilizer use across supply networks even in developing countries, Wal-Mart responds to the accountability and social responsibility pressure pronounced in its Western markets: Public orders in Western markets increasingly demand from companies to lower emissions below a certain amount, and consumers may exert pressure by boycotting products that do not meet certain environmental and social standards.

Third, *combining* rules from public and private ordering allows companies to add (perceived) legitimacy to their own 'private ordering'. This happens by framing private orders in similarly formal language as public orders (Hill, 2001; Eigen 2012) and by positioning private and public orders within the same business document.

Typically, academic interest in studying business documents codifying private ordering focuses on researching the negotiation and use of *contractual agreements* (Eisenberg, 1976; Suchman, 2003; Mouzas, 2006; Mouzas & Furmston, 2008; Mouzas & Blois, 2013). For instance, framework contracts provide a "framework for the involved parties... [appearing] as 'constitutional orders', which are orders...that regulate the ongoing negotiation between [two] actors and translate the consequences of fulfilling or breaching promises" (Mouzas, 2006, p.285, emphasis added). Thus, framework contracts provide 'mini-constitutions' governing the interaction between two companies for specified periods of time, according to the terms and conditions that have been agreed. Efficiency of framework contracts in regulating multiple, recurrent transactions results from companies' decoupling the 'framework' for future interactions from the actual details of individual transactions (Mouzas, 2006). The legitimacy of framework contracts emerges from the process of *negotiating the rules* and from explicitly and voluntarily *consenting to the rules*. This is symbolically manifested in mutually signing the contract.

A voluntary consent to contract terms is not a "non-hierarchical process of coordination" (Sagy, 2011, p.944) that results in interactions to serve both actors' "mutual advantage without the help of a state or other hierarchical coordination" (ibid). Rather, it is a process and product of "domination, and it serves the groups more dominant actors' interest" (ibid). This is confirmed in IMP related research on contracting in asymmetric business relationships (Mouzas & Ford, 2004; Mouzas, 2006): Typically, stronger parties in asymmetric relationships "have the ability to impose time-tested rules and principles on the other party" (Mouzas, 2006, p.298). In this way, the stronger party inscribes clauses "into their contracts which allow them to shape the structure of their relationships and most of all to institutionalise the asymmetry between [the two actors]" (Mouzas & Ford, 2004, p.36). Nevertheless, even in asymmetric business relationships, *contractual agreements* are per definition an *expression of explicit "joint consent"* (Mouzas & Ford, 2004, p.10) and consequently imply voluntary acceptance of the terms of interaction (Mouzas & Ford, 2006) demonstrated in the ritual of 'sealing of the deal' with joint signatures.

Although framework contracts are indispensable for reducing uncertainty in dyadic business interactions, this practice has limitations when multiplied across a number of interactions: First, contracts assume a degree of negotiation and hence require potential compromise of each actors' preferred terms. Second, actors need to consider the time and costs incurred in drafting contracts, which in effect are suitable for governing only *one* business interaction. As a result, companies need to strike a balance between *increasing efficiency* in governing multiple interactions and *retaining security and calculability* in these interactions. A common way to address this dilemma is manifested in companies' active use of General Terms and Conditions (GTC).

GTC are a type of contract that "one of the contracting parties has defined in advance with the intention to incorporate them into future transactions" (Mouzas, 2006, p.42). Typically, GTC are the result of a continuous "rationalisation and adaptation process to the evolving needs of commercial practice" (ibid). Hence, GTC provide an ancient and powerful tool for

(a) *unilaterally defining the terms and conditions* governing interactions and thus, inscribing most 'favourable conditions' for that business actor;

(2) *constantly and quickly adapting these terms and conditions* in response to the “evolving needs of commercial practice”; and

(3) *enhancing efficiency, predictability and reliability* by standardizing the framework for multiple business interactions *across geographic boundaries and legislatures*.

GTC facilitated the replication of similar business transactions since ancient times: The Roman classical jurist Marcus Labeo for example, reported of a storehouse landlord who nailed liability exemption terms on the storehouse entrance (Hellwege, 2010)<sup>2</sup>. Later, with the development of medieval markets and the inception of industrialization, GTC proliferated all industries such as banking, transportation, insurance and retail, with each industry codifying own ‘GTC’. This practice persists to date:

Consider the recent move by General Mills, who amended their GTC to the effect that consumers “give up their right to sue the company if they download coupons, “join” it in online communities like Facebook, enter a company-sponsored sweepstake or contest or interact with it in a variety of other ways” (New York Times, 2014). The new GTC state that the company has “new legal terms which require all disputes related to the purchase or use of any General Mills product or service to be resolved through binding arbitration” (General Mills GTC, April 14 2014). Similar to ancient uses of GTC, the U.S. fast food chain “Whataburger” hung a placard on its doors “warning customers that simply by entering the premises, they agreed to settle disputes through arbitration” (New York Times, 2014).

The parsimonious nature of unilaterally created and – at least in principle – globally applicable rules, secures GTC a vital role in business networking processes. In fact, GTC proliferate business networking in most industries and its terms become increasingly sophisticated. Yet, this type of contracts received scarce attention in research (Blois, 2006; Mouzas & Furmston, 2008) and legislation. Surprisingly, GTC became more regulated in most jurisdictions, including the U.S., the United Kingdom or Germany only in the 1960s and 70s and in Australia only in 2003. Moreover, these jurisdictions still regulate predominantly the use of GTC in business-consumer, *not* business-to-business interactions. Hence, in German law for example, it is sufficient for business actors to engage in a ‘silent concurrence of wills’ (‘stillschweigende Willensübereinstimmung’) (IHK Stuttgart, 2010) for GTC to become a valid contractual basis for business interactions<sup>3</sup>. Another implication of the GTC’s legal state is that it reserves business parties much freedom in the content and applicability of private ordering.

We suggest that the study of the use of GTC in business networking processes is important, because it provides insights into the *content and mechanisms* of private ordering on both levels of networking: Dyads and business networks. Hence, while the study of contractual agreements tells us about the ways companies use shared rules and procedures for governing idiosyncratic issues inherent to specific *dyadic* relationships, GTC may tell us about the rules and procedures governing networking on a higher-level of aggregation: Business networks. Consequently, we suggest that in order to understand – *why* networking results in a process of private ordering and *how* private ordering affects business interactions - we have to study the *content* and understand the *use* of GTC in business network interactions.

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<sup>2</sup> Documented use of GTC in medieval markets is similar to the ancient Roman use, yet more formalized terms started appearing: For example, in the 17<sup>th</sup> century, Scottish stall-keepers taking care of travellers’ horses developed placards stating “if there is a placard fixed on the door of a stable, or enclosure, declaring the stabler not liable for hazards, the persons interested are presumed to consent to the terms of it” (Hellwege, 2010, p.3)

<sup>3</sup> GTC are treated in both, common and civil law systems, as a type of “standard form contract” and hence are enforceable like any other contract.

## PRIVATE ORDERING IN BUSINESS NETWORKS

Business network constitutions describe “a higher-order of multiple conventions that are customary, expected and often self-enforcing ... that transcend any single organization or dyadic relationship” (Mouzas & Ford, 2009 p.495). Thus, network constitutions articulate a privately negotiated “framework for a continuing regulation of interaction among actors” (Mouzas & Ford, 2009, p.499). The explicitly stated rules and norms comprising network constitutions, *transcend* individual organizations or dyadic relationships (Mouzas & Ford, 2009; Sagy, 2011) and guide the orchestration of actors, activities and resources of business networks across geographic boundaries, over time.

The common myth of the *omnipotence of public ordering* by means of state law<sup>4</sup>, imagined as an “all-encompassing, uniform, exclusive and controlling...monolith” (Galanter, 1981, p.21) seems to have obscured the understanding and study of ‘network constitutions’ as a central mechanism for governing interactions in business networks. Private inter-organizational arrangements are “non-state forms of normative ordering are more difficult to see, because they blend more readily into the landscape” (Merry, 1988, p.873). This happens precisely “when they are most effective...when they appear not as rules at all, but simply as apt responses to an immediate reality, as part of the way ‘things are’” (Fuller, 1969, p.540).

Network constitutions as higher-order manifestations of private ordering, however, are not isolated from the public order (Yadlin, 2000). Rather, network constitutions are closely interdependent with the public order in two ways:

First, network constitutions are “vulnerable to rules and decisions and other forces emanating from the [public order] by which it is surrounded” (Moore, 1973, p.720) and frequently incorporate those ‘external’ rules into their own statutes. Simultaneously, rules emerging through recurrent practice and precedent in business networks may influence public law over time (Galanter, 1981; Sagy, 2011). Precedent becomes paramount as a *catalyst for creating or refining rules* and triggers a process of *replicated application* of these rules in similar cases throughout the network. This is because the principle of applying rules based on previous precedent cases provides for speed, fairness and legitimacy (Eisenberg, 1976). Moreover, actors “will not only employ precedents to shape their agreement, but will be aware of the precedential effect of any agreement they reach” (Eisenberg, 1976, p.672). Hence, a significant portion of network constitutions reflects the accumulated, refined knowledge and *practice* of business network actors in resolving recurrent networking problems as ‘precedent cases’ (Mouzas & Ford, 2009). In this way, the content of network constitutions is similar to Ehrlich’s (1913) understanding of the “living law”<sup>5</sup>, which is codified in companies’ legal documents-*in-use* and regulates the conduct of those who share the documents and recognize them as binding.

Second, network constitutions actively “draw on the symbol of the law, but operate in its shadows” (Merry, 1988, p.874). This happens, as business actors *institutionalize* the order codified in the *private rules* of business network constitutions by “mimicking symbols and structures of the *public* [order]” (Merry, 1988, p.877, emphasis added). Consequently,

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<sup>4</sup> An explanation why private ordering frequently escapes the researchers’ attention is our inherent tendency to see the development of the ‘big system’ of public order as an evolution from ‘informal’, dispersed “regulatory elements to a centralized, bureaucratic legal system” (Galanter, 1981, p.21).

business actors capture and exploit the “symbolic capital of [the public order]” (ibid, p.881) to legitimate and enforce private orders.

To illustrate, consider the example of Wal-Mart once again: In its private regulation of fertilizer use, Wal-Mart prohibits the use of 10 chemicals and includes this regulation in its supplier contracts. The “contract” is a public order instrument, which *protects* the “private regulation” – at least symbolically - with public order *legitimacy, enforcement, and dispute resolution mechanisms* in the form of court settlements. We say symbolically, because typically, business network constitutions provide for alternative and *actually* practiced means for attributing legitimacy to private rules, and for exercising enforcement and dispute resolution. These alternative means used for institutionalizing private ordering codified in network constitutions “often replicate aspects of the legal order” (Merry, 1988, p.877). The replication of the public legal order is however, distorted, in that the private order is likely to privilege the interests of more powerful actors. For example, the internal complaints and alternative dispute resolution mechanisms of private orders may advance conditions privileging more powerful actors in a business network (Edelman & Suchman, 1999; Sagy, 2011).

Power asymmetry is an important driver for the development and institutionalization of private ordering. Power asymmetry originates typically from one actor or group of actors holding the key to scarce resources. The more powerful actors are those who are “allocators of scarce resources, whether these resources are capital, labour, or the opportunity to make money. To all of those in a position to allocate these resources [there is a flow] of ‘benefits’” (Moore, 1973, p.743) usually in the form of money, such as lump sum payments or fees. In the case of food retailers, the power of retailers results from few actors holding the key to the resource of “end-consumer market access”, which translates into sales and revenue for retailers’ contracting partners. In return for granting access to consumer markets, retailers receive ‘slotting allowances’ or fees for preventing ‘de-listing’ of products (Mouzas & Ford, 2004; 2009).

Specifically, power asymmetry influences the content and institutionalization of private ordering processes for three reasons: First, power asymmetry provides power holders “with an incentive to create private orders that allow them to sustain norms that preserve the power structure they benefit from” (Sagy, 2011, p.926). Second, such private orders typically include incentives for less powerful actors to prevent dissenting, and include enforcement and sanctioning mechanisms for those cases, where incentives did not work. Third, power asymmetry allows to ‘lock-in’ actors into private ordering by suggesting de facto a monopoly over dispute resolution procedures (Sagy, 2011). The final aspect is well exemplified in the above mentioned case of General Mills: By unilaterally defining that all consumers must rely on private arbitration for dispute resolution with the company, it locks-in consumers by suggesting a monopoly over this procedure. Consumers are precluded from using public courts to sue the company. If consumers disagree with this rule, they are at least in principle excluded from the benefit of purchasing General Mill’s products.

So far, we shed light on the current understanding of the role and manifestations of private ordering in (a) dyadic business relationships and (b) business networks by drawing on previous research on this concept. In line with our research questions, we suggest in the following two important ways for extending our understanding of the under-researched phenomenon of private ordering in the context of business networking as a process of coping with uncertainty:

First, we enrich our knowledge of *why* networking results in a private ordering. To this end, we suggest that companies actively tackle the complexities and uncertainties inherent to

networking by investing in explicit and formalized private ordering processes. Hence, private ordering becomes a vital mechanism for regulating business networking even beyond the confines of dyadic business interactions. Second, we shed light on *how* private ordering affects business interactions, by studying the content and conceptualising the use of GTC of major food retailers in Germany.

## RESEARCH METHODS

We conducted multiple embedded case study research (Dubois & Gadde, 2002; Yin, 2003; Dubois & Araujo 2007) grounded in the critical realist paradigm (Sayer, 1992; Easton 2010; Tsoukas & Chia, 2011).

The phenomenon of private ordering is inextricably linked with the interactive practices of multiple, interdependent business actors embedded in the legal, political, market and industry-specific developments. We were motivated to explore why networking activities would result in a private ordering and then how private ordering would affect business interactions. Seeking to understand the “living law” presumably codified in legal ‘artefacts-in-use’ and striving to understand *how* business actors use such artefacts in business networking *processes*, motivated us to conduct multiple embedded case study research in the German food retail business, from 2011 to 2013. Exploiting the possibilities of case study research allowed us to triangulate multiple sources of data collection and draw our conclusions from rich, contextualized analysis (Easton, 2000; Piekkari, Plakoyiannaki & Welch, 2010). Therefore, we combine primary evidence from analysing forty in-depth interviews with multiple actors involved in the food retail business, including manufacturers and processors, advisory lawyers, strategic consultants and audit experts with evidence from four sets of current and *confidential General Terms and Conditions (GTC) and contracts* of the four major German food retailers.<sup>6</sup>

In the following, we briefly explain *why* the analysis of business documents and, specifically, legal artefacts is relevant for understanding business networking and how actively including such analyses in case study research can fruitfully enrich the body of knowledge on business network phenomena.

Although case study research actively demands the triangulation of different types of evidence (Yin, 2003; Easton, 2009; Ryan et al. 2010) most case studies in business research give precedence to interviews and technological artefacts (D’Adderio, 2011). This research focused on the use of inter-organizational computer technologies, human interaction with technology and effects of technology on changing organizational practices (Orlikowski, 2007; Mouzas & Araujo, 2000). Few notable exceptions explore the role of contracts (Suchman, 2003; Mouzas & Ford, 2006; Mouzas, 2006; D’Adderio, 2011; Mouzas & Blois, 2013) upon which we suggest to build further.

The paucity of research investigating the use of documents in business processes, and specifically the lack of attention given to legal artefacts as primary - or at least equally legitimate data sources as interviews - may be rooted in several reasons:

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<sup>6</sup> The evidence from forty in-depth interviews *informed our content analysis of the legal artefacts* and helped us to contextualize the clauses from the legal artefacts. Since our aim is to highlight the usefulness of legal artefact analysis for business network case study research, we decided to allocate more space to present detailed artefactual analysis in the hope of encouraging future research in this direction.

First, business research may lack broadly recognized cases of successfully using primary document analysis for important findings, with few exceptions mentioned above. Second, there is a lack of specified procedures and conceptual frameworks that aid in the selection of relevant documents, their analysis, interpretation and the reporting of findings. Third, it may be unclear to *researchers* how the study of certain documents can contribute to answering specific research questions. Hence during data collection, documents may ‘pass unnoticed’ as if being non-existent or irrelevant to the researcher. Fourth, to practitioners, documents may seem ‘mundane’ and insignificant, because many types of documents form parts of routinely performed processes and are not considered of ‘interest’ to research. Fifth, access to certain documents such as GTC, may prove difficult and in light of the above reasons, not ‘worth’ the efforts. Finally, particularly legal documents are oftentimes perceived as ‘insignificant’ to business *practice* because of their allegedly ‘solid’ or ‘too flexible’ nature, which would suggest that such artefacts have minimum relevance on phenomena of interest (D’Adderio, 2011).

Seminal works on the study of (legal) artefacts point to highly interesting uses of artefacts in research (Suchman, 2003; D’Adderio, 2008, 2011) which can fruitfully enrich the case study research on business network phenomena. Legal artefacts are generally defined as “formally documented arrangements for governing a voluntary exchange relationship” (Suchman, 2003, p.94). Legal artefacts are relevant to the study of business interactions and specifically, marketing and purchasing for several reasons: Legal artefacts include multiple terms of key concern to marketers such as product specifications (including rights over product content, design and brands); distribution agreements (including market boundaries, specifications to distributors regarding product presentation, additional services provision, returns and complaints management); pricing specifications (including deal promotions, advertising expenses, discount conditions) and not least specifications over (joint) strategies addressing risk and uncertainty.

As *utilitarian devices*, legal artefacts provide “intricate frameworks of procedures, commitments, rights and incentives – all in order to accomplish practical objectives in the governance of human transactions” (Suchman, 2003, p.99). Artefacts may act as “obligatory points of passage” (D’Adderio, 2011, p.198) such as when business actors have to accept GTC before even entering negotiations over future transactions with a retailer. However, artefacts are not neutral, rigid or ‘lifeless’ objects with fully prescriptive or merely descriptive capacities (D’Adderio, 2011). Rather, artefacts reflect the “objectives, motivations, values and dispositions of the agencies that use/produce them as well as the context from which they are abstracted. ...[Moreover artefacts] are *selective*, implying that the knowledge they contain has been *sifted, ordered, and classified* according to one or more rationales or ‘logics’ (D’Adderio, 2011, p.212, emphasis in original). As such, artefacts are “formal, explicit, synthetic, selective, partial” (D’Adderio, 2011, p.204) representations of objectified, inter-organizational processes (Öberg, Henneberg & Mouzas, 2007, 2012). Integrating artefacts into the study of business processes allows to illustrate the “combined influence of ...agents and material artefacts” (D’Adderio, 2011, p.199) on the course of a series of business interactions. This embedded view of artefacts is crucial, because an artefact’s inherent powers and liabilities (Sayer, 1992) are not visible in isolation, but rather are “relational..., emergent” (D’Adderio, 2011, p.201) and highly context contingent.

Artefacts have *utilitarian and symbolic* meaning, as they are “front loaded with the ... intentions, and rationales held by the agencies by which they have been created, adopted and adapted” (D’Adderio, 2011, p.207). In this regard, on the one hand, artefacts are (distorted) mirrors of agents’ knowledge, interests and power. On the other hand, artefacts are also the

tools through which knowledge and interests are constrained or advanced in networking *practice*.

In addition to the primary data set, we actively integrated secondary data from further confidential “documents-in-use” in the form of retailers’ ordering agreements, insurance policy agreements and supplier screening documents. To accurately contextualize our analysis, we also studied relevant governmental reports issued by the German and European Union (EU) governments on current legislation and industry trends, and documented 84 relevant media and industry reports on current company efforts documenting different manifestations of ‘private ordering’.

Triangulating material evidence from the analysis of confidential GTC and contracts, with verbal accounts was critical, since “material traces of behaviour give an important and different insight from that provided by any number of [accounts]” (Hodder, 1998, p.114). Moreover, particularly the study of legal artefacts has been crucial in gaining insight on business-to-business interactions, as such artefacts-in-use capture *inter-organizational* agreements on a ‘course of (inter-)actions’ *over time*, rather than representing a “material trace” or verbal account of only one party. The analysed GTC and contracts were current ‘artefacts-in-use’, frequently containing notes and annotations, and attached e-mail exchanges relating to aspects of these documents.

Throughout our study, we followed the iterative approach of “systematic combining” (Dubois & Gadde, 2002) which allows the simultaneous evolution of the “theoretical framework, empirical fieldwork and case analysis” (p.554). This approach also influenced our theoretical sampling of the four cases (Dubois & Araujo, 2007) which were selected to illustrate the operation of ‘private ordering’. Considering the pronounced consolidation in German food retail, resulting in effectively six retail chains, we chose to focus on four retail chains and their respective supplier networks. We concluded our data collection, once ongoing analysis confirmed significant overlaps in the interview accounts and content of the documents, resulting in saturated findings (Piekkari, Plakoyiannaki & Welch, 2010). The comparability of the cases was established by applying common research questions, derived from a common theoretical framework across the cases and analysing data from similar case networks, the same industry and country and time frame (Halinen & Törnroos, 2005).

The outcome of this case study research is reported in the form of thematic cross-case analysis. This form of case study reporting, is written up in a form that “exhibits the operation of some identified theoretical principle” (Dubois & Araujo, 2004, p.210) which in the context of this study is the principle of ‘private ordering’. We chose thematic cross case analysis, because this allows us *condensing evidence* from four cases, avoiding replication and presenting an *analytical synthesis* of the findings in a conceptual manner, yet still *preserve close relation* to the original empirical evidence (Miles & Huberman, 1994).

As most qualitative case studies of business networks, we dealt with “complex data sets involving high levels of detail of events, activities and perceptions over time” (Ryan et al, 2012, p.301) and have therefore employed two conceptual tools to synthesize our findings further: In answering our first research question, of why business network results in private ordering, we use a metaphor to synthesize our answer. Using the metaphor of “private quasi-legal systems” allows us to combine the need for a ‘rich description’ and ‘parsimony’ in case study research in an innovative way. Moreover, exploiting the power of the metaphor helps in “effectively uniting reason and imagination” (Miles & Huberman, 1994, p.250) in that it gives in to the ‘creative’ and ‘imaginative’ element of data analysis, yet ties the researchers back to pre-defined meaning and concepts associated with the ‘metaphor-in-use’. In answering the second research question, we illustrate the process of how private ordering

affects business interactions by extending the Actor-Resource-Activities-Model (Håkansson & Johanson, 1992).

## **EMPIRICAL STUDY**

### **CONTEXT AND SETTING**

In the following, we briefly illustrate the empirical context relevant to understanding the case findings by drawing on four key trends in the German food retail industry: (1) The consolidation of food retailers leading to growing power asymmetry in the industry; (2) the internationalization of food supply and retail; (3) the continuously changing regulations in the German and EU legislations; and (4) the proliferation of collective industry standards steered by German retailers.

The German food retail business is characterized by a growing consolidation among retailers which triggered a further consolidation trend among manufacturers, wholesalers and commodity traders (European Food and Drink, 2011; Brandeins, 2013). This trend is intensified, as retailers and manufacturers must respond to German consumers' exceptional sensitivity to price and quality (ACNielsen, 2013). Consequently, retailers and manufacturers turn to enhancing efficiency and cost savings through economies of scale, tighter supply network configurations and international expansion (Commerzbank Report, 2013).

Germany's six major retailers – the Aldi Group, Edeka Group, Rewe Group, Metro Group, Kaiser's Tengelmann and Schwarz Group – hold together a 90 percent market share (RP, January 2013). A high market share enhances the retailers' bargaining power vis-à-vis smaller suppliers, who constitute an important element of the German food industry, commonly known as small and medium sized enterprises (SMEs) forming the German 'Mittelstand'. These suppliers compete for fewer and more powerful buyers and hence to agree even to most unfavourable business conditions: The lack of alternative buyers and high switching costs foreclose the option of seeking more promising relationships. Hence, 87 percent of suppliers do not resort to take any actions over unfavourable business conditions, because 63 percent of suppliers fear revenge and 50 percent believe that no measures available to them (including legal measures) would be effective (European Commission Report on Unfair Trading Practices, 2013, p.8). In fact, the analysis of protection provisions the European legal system holds for 'repressed' business parties operating in the European food industry reveals that there are weak or no systems in place to remedy the situation (Bunte, van Galen, de Winter et al. 2011). The EU's recent attempts to remedy the situations materialized in the development of "Codes of Conduct" for fair trading practices, but most member states (including Germany) refrained from adopting it and hence compliance to this COC is voluntary for retailers and subject to general contract law.

The resulting power asymmetry between retailers and manufacturers materializes in many forms, ranging from retailers' demands for 'extra' listing fees, excessive transfer of liabilities or arbitrary contract termination, to coercion, intimidation and even illegal practices. Consider the number and variety of 'fees' suppliers are typically required to pay retailers for their products to enter *and stay* on the shelves: per-unit fees for new products, 'pay-to-stay-fees', buy-back of unsold products, upfront lump sum payments for new products, free product discounts, promotional allowances, volume discounts and other non-specified 'fees' (OECD Global Forum, 2009).

The pressure to produce, deliver and sell at ‘everyday lowest prices’ qualifies the German food retail as the business with one of the lowest margins, reaching at the most 2-3 percent (Netztrends, 2014). Therefore, most retailers and manufacturers turn to internationalization to benefit from food exports into more profitable markets and leverage over-production (Economist, 2014). In fact, the German retailer Lidl (belonging to the Schwarz Group) even generates the majority of its revenue from international sales (Lebensmittelzeitung (LZ), 2013).

the prime challenge particularly *food* retailers and manufacturers face in internationalizing is the need to comply with a myriad of constantly changing legal regulations (EU Food Safety Almanac, 2011): Despite the EU’s efforts in ‘harmonizing’ legal regulations, food law remains a double-regulated area, with national governments still holding considerable power to adapt, add and change national food law, which applies *in addition* to EU food law. Outside the EU, every market a retailer enters has own provisions for regulating permissible contents, ingredient declaration and packaging of food products, storage, transportation and presentation of products, waste management or consumer information and in-store advertising, to name just a few. Falling short of fulfilling any of these requirements may result in risking considerable sales due to reputational damages and fines. Hence, it is a vital interest of food retailers to navigate through this complex jungle of high-impact, yet often contradictory and ambiguous regulations by actively developing contract and GTC documents that reduce ambiguity, shield the retailer from liabilities and close legislative ‘loopholes’ in ways favourable to retailers.

Apart from each retailer’s active investment in designing these legal documents, the combined trends of internationalization and legal complexity sparked the rise of collective industry standards, steered by all six food retailers (GTZ, 2007; GFSI, 2012). The outcome of this collective effort is the “International Featured Standard” (IFS) which proliferates every German and increasingly, any European retailer’s supply network. The IFS comprises six different ‘statutes’, including among others the regulation of food transportation (IFS Logistics), food wholes sale (IFS Cash & Carry), manufacturing and processing (IFS Food), trade (IFS Broker) and packaging (IFS Pack). Each of these statutes is a book of detailed rules and procedures developed collectively by food retailers to govern the mentioned processes involved in food retail business. These statutes are continuously adapted and developed in response to changes in legal regulations and in response to industry incidents, such as the horsemeat scandal. The latter case illustrates how industry rules develop by way of settling ‘precedent cases’ (IFS, 2013).

## **CASE EVIDENCE**

Our case evidence comes from examining the content and use of GTCs and framework contracts in the focal business networks of four German food retails, Alpha, Lambda, Eta and Omega<sup>7</sup>. The retailers are major players on the German and European food retail markets, if ranked by business volume, market share and the number of national and international outlets:

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<sup>7</sup> The names of the retailers are disguised for confidentiality reasons, as we draw on actual content of confidential legal documents.

**Table 1.** Business Metrics of Analysed Retailers.

	<b>Annual Turnover</b> (from Food, Million EUR)	<b>Market Share</b> (in Germany)	<b>Nr. of stores in Germany</b>	<b>Nr. of stores internationally</b>	<b>Nr. of new stores in Germany</b> (in 2013)
<b>Alpha</b>	20 931	21%	4 305	4 017	68
<b>Lambda</b>	24 084	21.4%	3 832	6 213	35
<b>Eta</b>	44 567	26%	13 345	865	114
<b>Omega</b>	25 225	15.4%	18 101	2 267	122
<b>Total Market Share:</b>		<b>84 %</b>			

Alpha and Lambda are the strongest ‘hard discounters’ on the German market (LZ, 2013) whereas Eta and Omega are the two largest supermarket chain operators. Fierce competition between the retailers for consumer shares and high saturation of the German market in terms of the numbers of stores per square kilometre, drive the aggressive expansion of these retailers in European and non-European markets. German food retail business is subject to a highly regulated industry, with most regulations emanating from the new food law passed by the EU government in 2002 (European Regulation (EC) No. 178/2002) taking effect in as late as 2004 and in some cases only in 2007. EU law is comprehensive in covering a wide range of food sourcing, processing, manufacturing and retail processes, however, EU law remains very general and in fact, ambiguous, because each regulation has to match the market conditions and industry structured of 27 nation states.

In addition to the EU law, German food retailers are subjected to stricter, national regulations by the German government. Until recently,<sup>8</sup> the German food law relied on the principle of “*chain responsibility*” which did *not* differentiate responsibilities and liabilities between different stages of food processing, manufacturing and retailing. Hence, ‘chain responsibility’ implied that every company handling food was responsible and liable for the condition and quality of the products according to all legal requirements, regardless of whether non-conformities occurred or have been caused in previous tiers of the food supply chain (Simon, 2007). In other words, since ‘chain responsibility’ does not account for *when* non-conformities occurred and by *whom*, the later tiers of food production – most likely, *the retailers* – had to bear responsibility and liability for any faults that may have been caused outside their immediate sphere of action. This historical development is important, because it shaped the evolution of the retail chains’ GTC over time: In order to cope with the ‘unfair burden of chain responsibility’, the GTC were historically shaped in a way so as to redistribute or at least limit the impact of the ‘chain responsibility burden’. Today’s high power asymmetry in the food industry allows most retailers to uphold the historically grown “terms and conditions” by supplementing *legal* requirements with *non-legal* requirements and even *illegal* terms.

Apart from the legal ambiguity and complexity, the four retailers are increasingly exposed to negative public media coverage caused typically by real or alleged food safety incidents. The media coverage is often conflict-driven and opinion-laden, which is specific to the German press and non-governmental organizations (NGOs) who exploit media attention to advance

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<sup>8</sup> With the introduction of the EU Reg. (EC) No. 178/2002, the German principle of ‘chain responsibility’ has been *slightly* modified resembling more the principle of ‘tier responsibility’. ‘Chain responsibility’ implies that each business actor is liable for all product attributes, regardless of who was handling the product in previous supply tiers. In the food industry context, the chain-responsibility principle made retailers liable for *any* product deficiencies occurring earlier in the food chain. In contrast, the ‘tier responsibility’ principle limits company liability for product deficiencies to its respective stage of production.

their goals of “regulation by litigation”. This principle summarizes the mechanism by which most of the latest changes to public food law (on the EU and German levels) emerged. “Regulation by litigation” describes the process of publicly exposing practices of *individual* industry players (such as the retailers selling ‘horsemeat’) and subsequently adapting industry-wide regulations (such as legally requiring DNA-tests for horse-meat traces on mandatory bases). This principle, in addition to detrimental damages to sales, company and brand reputation, is a strong motivator for food companies (a) to invest in meticulously detailed requirements for product quality safety exceeding German legal requirements and (b) to avoid public litigation by any means, even if an industry player has high chances of ‘winning’ the case in strictly legal terms.

Instead, our research suggests that retailers invest in skilfully crafted GTC, which codify the statutes of the private order of a particular industry. Consequently, GTC provide the basis for *private ordering* of business interactions irrespective of national boundaries. Private ordering - as codified in GTC – goes beyond merely stating industry-specific rules for regulating networking over time. Instead, private ordering codifies a *wider set of practices* for *sanctioning* non-compliance to the private order and for *dispute resolution*. As a result, we suggest that private ordering manifests in companies’ setting up quasi-legal processes that replicate aspects of the public legal order established by the State. The scope of application of such private ordering depends on the ‘reach’ of one, or a group of more powerful business actors within an industry. Typically private ordering regulates business networking interactions within specific industry networks such as food retail, banking or automobile manufacturing, but is *not confined* by geographic boundaries.

In the following, we illustrate the practical manifestations of private ordering processes which are inscribed in GTC of the German food retail businesses. Specifically, we suggest that private ordering is expressed in three practices that mimic public legal orders and often *draw on the public order to induce compliance with the private order*:

The first practice manifests in the codification of business-network rules and procedures in GTC, which function as *law-like network constitutions*. The second practice manifests in the specification of *alternative, out-of-court dispute settlement procedures* that exploit the looming power of litigation. The third practice manifests in the specification of non-legal sanctions for punishing cases of non-compliance with the private order.

Consequently, we suggest to answer our first research question - *why networking results in a process of private ordering?* – in the following way: Networking processes result in private ordering because private ordering provides companies with an essential mechanism for coping with inherent challenges of networking. To recall: *Networking* entails inevitable, interdependent business processes for accessing and integrating dispersed resources, actors and activities. Networking is inherently a process characterized by uncertainty and complexity which precludes any one company to predict the outcome or fully control networking processes. Therefore, we suggest that companies strive to enhance the reliability and predictability of networking processes by relying on *private ordering*. Private ordering regulates and standardizes multiple networking processes, which results in enhanced predictability and reliability of business networking activities even beyond the confines of direct business relationships.

Private ordering is a reliable yet flexible mechanism which takes the form of standardized, explicit and formalized rules shared between multiple business actors. By suggesting that private ordering is ‘formalized’ we refer to the meaning of ‘formalized’ as having a *quasi-legal status*, and give less emphasis to the attribute ‘definite’ or ‘stable’. That is because, our findings strongly suggest private ordering is *essentially* very dynamic, adaptable and

continuously evolving. Private ordering facilitates the *simultaneous adaptation* of multiple, interdependent network actors and activities to constantly changing demands and uncertainties emanating from ‘outside’ or from ‘within’ the business network. Uncertainties emanating from outside the business network may materialize in the form of changing legal, market and political conditions; whereas uncertainties from within the network may materialize in the form of sourcing products from new markets or coping with the proliferation of food (ingredients) and packaging fraud. These uncertainties create repercussions in business practices that rapidly translate into adaptations of currently valid GTC. Consider the case of recent adaptations to the ‘private order’ in response to the horsemeat scandal: Whereas changes to the public order in response to the horsemeat scandal are still discussed by the German government, the private order rapidly reflected adaptations in light of this ‘precedent’ case of food fraud. One month after the incident, the collective industry body representing all food retailers (IFS) decided to unilaterally change the terms, which automatically effects change in all retailers’ GTC containing a reference to the IFS standard. Specifically, the IFS adapted its existing regulations for checking food authenticity with the additional requirement of mandatory DNA tests (Communication of the IFS to all members, March 14<sup>th</sup>, 2013).

Hence, we can confirm the findings from previous research (Eisenberg, 1973; Mouzas & Ford, 2009) which state that private ordering evolves by principle of resolving ‘precedent cases’. Moreover, we extend the work on networking as private ordering by suggesting that companies use *standardized legal artefacts* to specify explicit, quasi-legal rules and procedures for orchestrating multiple networking interactions beyond the confines of direct business relationships. As such, private ordering consists of highly adaptable, yet standardized means for coping with the complexity and uncertainty inherent to business networking.

We turn now to illustrating the three private ordering practices codified in GTC:

### **Law-like network constitutions**

Law-like network constitutions manifest in practice in standardized GTC, which comprise complex combinations of rules. These rules emanate from (a) *the public order* (constituted by European, German and extant market laws) and from (b) *the private order*. The private order is in itself a blend of collectively shared industry rules and retailer-specific rules. The retailer-specific rules vary slightly between retailers, but show strong patterns of similarity nevertheless. In Table 2 we demonstrate that private ordering relies on a framework of rules which specifies the scope of application and general principles of the private order.

Whereas the public ordering is limited by respective geographic boundaries, private ordering is bound only by the ‘limits’ of the business network or industry. Complying with the private order in terms of collective industry regulations (see Table 2) typically *guarantees automatic compliance* with all state-specific food regulations. The codification of the private order in GTC points to a crucial mechanism of how companies exploit the inter-relationship between the private and public order: GTC are recognized by the public order by investing this type of artefact with legal legitimacy and enforceability. In that way, GTC specify and enforce a *private order by instrumentalizing a public order mechanism*.

**Table 2. Scope of Application and General Principles of Private Ordering.**

<b>Illustrative examples from GTC</b>	
<b>Public Ordering:</b>	
German and European Union laws	<b>The German and EU food laws are limited in their application to the states adopting these laws.</b> Business with companies outside this geographic scope of 27 nation states (in case of EU) law, must familiarize themselves and comply with respective national laws.
<b>Private Ordering:</b>	
<b>Collective Industry Rules:</b>	<b>IFS and BSCI are globally recognized standards</b> , benchmarked by the “Global Food Safety Initiative” (GFSI, a global retailer consortium including <i>all</i> international food retailers) against all other food standards (including the U.S. Standards).  Compliance with IFS and BSCI typically <i>automatically guarantees compliance</i> with all state-specific food regulations (due to the high-standards set).
<b>Retailer’s proprietary terms (codified in GTC)</b>	<b>GTC are subject to contract law and as private agreements may span national boundaries which gives GTC the capacity to invest private agreements with legal legitimacy and enforceability.</b>  (1) <b>Scope of Application:</b> GTC are applicable to all further contracts between the retailer and the CP. <b>The CP guarantees that any sub-contractor or any other party he conducts business with conforms to the GTC</b> (agreed with the retailer). The retailer’s GTC supersede any CP’s GTC. No term of the CP are accepted, unless the retailer decided otherwise in writing. The CP may not pass on performance of agreed duties to a 3rd party, unless retailer’s written agreement has been obtained. All changes must be agreed by the retailer in writing. <b>Confidentiality: Any information, including the terms and conditions of the agreement must be kept confidential and not disclosed under any circumstances to third parties.</b> The CP must ensure compliance to confidentiality of his employees. In addition, the CP must (a) implement certain data erasing software, (b) return any documentation of the business relationship with the retailer and (c) destroy any data storage media upon termination of the contract.  (2) <b>Property Rights:</b> The retailer reserves property rights over any documents, calculations and pictures. No 3rd party may see or access these materials without the retailer’s written consent. The CP frees the retailer of any claims for damages, product liability, claims of material defects and compensation for personal suffering from 3rd parties, when the cause of the claims lies with the CP.  (3) <b>Severability:</b> Invalidation of one or more clauses does not affect the validity of the agreement as a whole. (Typically this allows the retailer to continuously and unilaterally change the terms or their application without risking ‘collapsing’ the order. Changes occur in response to industry events such as the horsemeat scandal or in response to changing public orders).  (4) <b>Venue of Jurisdiction/Applicable Court:</b> Retailer specifies his preferred court and reserves the right to sue the CP at his local court. The GTC specify the law to which the contract is subject, excluding the international provisions of the EU or the United Nations Convention on Contracts for the Sale of Goods (CISG).  (5) <b>Termination:</b> The retailer reserves the right to terminate contracts immediately.

In addition to specifying the general framework and scope of private ordering, the GTC also capture industry-specific regulations pertinent to food manufacturing and retail processes (Table 3). As is evident from the illustrative examples of the analysed GTC, private ordering comprises legal (public order), non-legal and even illegal (private order) terms. With regard to the industry specific public order, our research suggests that the private order conforms to industry specific regulations (such as EU traceability requirements or ingredient declaration). However, the private order regulations take precedence as ‘*de facto mandatory law*’ and are stricter than any public orders. Consequently, in revoking the metaphor of “private quasi-legal systems”, private ordering mimics the statutes of the public order, but contains additional and different terms and conditions:

**Table 3. Manifestations of Industry Specific Private Ordering Regulations.**

Illustrative examples from GTC	
<b>Public Ordering:</b> (Legal requirements):	
<b>German and European Union laws</b>	<p><b>EU:</b></p> <ul style="list-style-type: none"> <li>- Compliance to European Food Law, codified in EG (Reg.) No. 178/2002</li> <li>- Compliance to Rapid Alert System for Food and Feed (RASFF) requirements (database sharing product and company data among all EU states in case of food safety or health risk)</li> </ul> <p><b>Germany:</b></p> <ul style="list-style-type: none"> <li>- Compliance to German Food Law codified in the Lebensmittel und Futtermittel Gesetzbuch (LFGB)</li> </ul>
<b>Private Ordering</b> (Non-legal requirements):	
<b>Collective Industry Rules</b>	<p>(1) <b>Compliance with retailer-developed industry standards</b> governing food processing, manufacturing, packaging, transport, trade and wholesale (IFS)</p> <p>(2) <b>Compliance with retailer-developed social, environmental and ethical standards</b> (Business Social Compliance Initiative (BSCI) or Global Social Compliance Programme (GSCP))</p> <p>Both collective industry regulations are stricter than German, EU and most other countries’ regulations in order to pre-empt further regulation by public authorities.</p>
<b>Retailer’s proprietary terms</b>	<p>(1) Product quality, composition, processing regulations</p> <p>(2) Transportation, packaging and delivery requirements</p> <p>(3) Mandatory product liability insurance</p> <p>(4) Crisis management regulation</p> <p>(5) Claims for damages</p> <p>(6) Regulation of CP’s media relations</p> <p>(7) Warranties</p> <p>(8) Force Majeure (the terms ensure the parties will co-operate in face of unexpected circumstance to the best of their knowledge and capability)</p>
<b>Illegal terms/ grey zone:</b>	<p>(1) <b>Information clause</b> which requires CP to contact the retailer in case of real or alleged food safety risk prior to contracting the authorities. The German law specifies the reverse order (informing authorities prior to business partners).</p> <p>(2) <b>Price Fixing:</b> retailers require the ‘most favourable conditions’ so that the CP guarantees not only exclusive distribution of certain products, but also agrees to fix a ‘best price’ which may last for years or result in de-listing.</p> <p>(3) <b>Open book accounting</b></p> <p>(4) <b>‘Special’ fees</b> (in addition to ‘common’ (advertising, shelf-space) fees, such as ‘rewards’ for retailers upon successful launch of a new product or in case of its “failure”. Note: ‘failure’ as defined by retailer.)</p> <p>(5) <b>Refusal to buy</b> (retailer may boycott a CP or limit purchases as to weaken CP’s competitive position, which may distort competition among CPs).</p> <p>(6) <b>Obligatory use of specified 3rd party contractors</b> (restricts CP’s freedom for strategic networking).</p> <p>(7) <b>Imposition of unfair risk bearing:</b> Retailers impose ‘chain responsibility’ principle upon CPs, which makes the CP liable to the retailer for any disruptions arising from: delivery, ingredients, packaging and labelling, even if not in the CP’s power to monitor.</p>

	(8) <b>Shift of due diligence:</b> Retailers may choose to ‘save costs’ by skipping due diligence procedures and require CPs to guarantee perfect products. In light of recent food scandals, this practice significantly diminished.
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The ‘illegal terms’ represent the epitome of power asymmetry in the business network we study and demonstrate that the more powerful party may go beyond merely extracting most favourable terms in *compliance* with the public order. Instead, more powerful actors may actively push the boundaries of the public order in developing additional private rules. These additional rules further *institutionalize* the power asymmetry (Mouzas & Ford, 2004) and, by consequence, *institutionalize the ‘private quasi-legal system’*. This is further illustrated in the following Table 4, where retailers ‘lock-in’ contracting partners into the ‘private quasi-legal system’ by precluding the choice over using public order litigation as means for dispute resolution.

### Alternative, out-of-court dispute settlement procedures

As a ‘private quasi-legal system’, private ordering also mimics the public order by relying on alternative, *de facto mandatory* dispute resolution procedures (Table 4). Private dispute resolution is more powerful than public litigation. This is because private dispute resolution provides confidential and efficient means for companies to resolve disputes, while preserving their ability to continue networking with one another. Private dispute resolution does not permit third parties, such as the media to observe the process and hence saves reputational damages to products and companies in question. Moreover, private dispute resolution is more efficient in terms of cost and time and frequently bears more promising outcomes through problem-tailored solutions. In contrast, litigation typically results in fines and/or the *annulment* of the contract. However, both parties generally need the contract not to be terminated (as this is what they can do by themselves) but the contract to be *continued on new terms*. Hence, our findings suggest that courts are not exclusive arenas for dispute resolution and that alternative means of dispute resolution are not necessarily any less ‘formal’ or ‘explicit’. Furthermore, settling cases through private negotiation or arbitration is not a self-contained activity, but radiates normative implications and threats relevant to networking with other actors.

**Table 4. Manifestations of Private Ordering Dispute Resolution Practices.**

Illustrative examples from GTC	
<b>Public Ordering:</b>	
<b>German and European Union laws</b>	German and European Laws offer in case of disputes, <b>public litigation procedures</b> at different levels (regional, national, European courts). However, the outcomes are either: (1) <b>annulment of contract</b> ; (2) <b>injunctions of fines</b> for one party as a form of compensation. Usually, in German of EU law (in contrast to U.S. court settlements) the compensation incurred by public ordering is less than the privately negotiated amounts. Moreover, reputational damages incurred by litigation are a major threat.
<b>Private Ordering:</b>	
<b>Collective Industry Rules</b>	<b>Industry Body Complaints Management Board</b> led by the <b>IFS</b> includes a “ <b>Sanction Committee</b> ” chaired by a Lawyer. The committee consists of 3 members (a retailer; an industry representative; i.e. a Nestle representative; and an IFS certification body representative) and assists in resolving disputes over any matter related to <i>de facto mandatory</i> IFS certifications.  The IFS published any company’s litigation history in an industry-wide shared company database, which is accessible by all ‘members’ including retailers and competitors.

<b>Retailer's proprietary dispute resolution procedure</b>	<p><b>The contract takes effect only if the CP agrees to resolve any disputes amicable through direct mutual negotiations.</b> Most GTC provide a two-step approach to dispute resolution (which are exclusive of litigation procedures):</p> <p>(1) <b>Negotiation:</b> In case of dispute, the parties agree to resolve the dispute using their best efforts, in good faith in direct negotiations within a period of 30 days.</p> <p>(2) <b>Arbitration:</b> If the parties fail to resolve the dispute through negotiation, any dispute – national or international – will be resolved in accordance with the “Rules of Arbitration of the International Chamber of Commerce (ICC), by one or more arbitrators who will all be appointed by the International Court of Arbitration of the ICC. The arbitration proceedings will take place in Geneva, Switzerland.</p>
<b>Illegal terms/ Grey zone:</b>	<p><b>‘Lock-in’</b> CPs into ‘private arbitration’ without a choice to prefer public litigation as a legitimate alternative to private arbitration. Since ‘private arbitration’ can be codified as the <i>exclusive</i> dispute resolution procedure, non-compliance with this condition results in ‘breach of contract’.</p>

### Non-legal sanctions

In close reference to the metaphor of ‘private quasi-legal systems’, private ordering of business interactions relies on legal, non-legal and illegal *sanctioning* procedures to ensure compliance with the statutes of private ordering. The basic and most powerful sanctioning mechanism inducing compliance is each actor’s desire to ‘stay in the game’ and profit from future business. Nevertheless, this self-enforcing motive is supplemented with efficient private ordering sanctions that exceed in their severity public order sanctions and hence, enforce compliance by the ‘looming’ mobilization of these sanctioning means.

**Table 5. Manifestations of Private Ordering Sanctioning Practices.**

<b>Illustrative examples from GTC</b>	
<b>Public Ordering:</b>	
<b>German and European Union laws</b>	<p><b>Sanctions for breaching the EU or German food law involve financial and non-financial means.</b></p> <p>The financial sanctions are deemed ‘ineffective’ due to relatively low lump-sum fines (instead of percentages of sales/revenue). The more effective sanctions involve publishing product and company names by authorities, which in effect, damage reputation and sales drastically.</p>
<b>Private Ordering:</b>	
<b>Collective Industry Rules</b>	<p>Sanctions for non-compliance with collective industry rules are more effective than public ordering sanctions and result in:</p> <p>(1) <b>Suspension from business</b> by refusing to ‘license’ the business with a certificate. This results in ‘breaching’ the GTC and terminates any future transactions.</p> <p>(2) <b>Publishing CP’s details of the incident in industry-wide database</b>, accessible by all business actors, including retailers and competitors.</p> <p>(3) <b>Publishing CP’s details concerning past and current litigation in industry-shared database.</b></p> <p>(4) <b>Payment of fines for the industry body to ‘waive’ the suspension</b> after required changes have been implemented.</p>
<b>Retailer’s proprietary sanctions</b>	<p>(1) <b>Immediate termination of contract: Forecloses any future sales, includes reputational damages.</b></p> <p>(2) <b>Severe fines</b> causing serious damage to CP’s business performance even causing insolvency (including a combination of high lump-sum payments per affected retail-<i>store</i> and percentage-payments of a company’s sales, value of the ‘contract’)</p>

Each of the practical manifestations of private ordering practices illustrated above, confirms that private ordering does not operate in a vacuum. Rather, private ordering comprises a combination of collectively shared rules and procedures emanating from the public order, industry specific bodies and individual actors. In practice, private ordering manifests in

companies' setting up quasi-legal processes that replicate aspects of the public legal order established by the State. As a result, private ordering enables companies to capitalize on the flexible, yet reliable nature of quasi-legal processes, which regulate networking across several state-bound public orders and local business customs. However, in contrast to the public order, the private order relies on a distorted balance emerging from the power asymmetry between those who *make* and those who *accept* the rules.

Consequently, in response to our first research question, we suggest that networking processes result in private ordering because private ordering provides companies with an essential mechanism for coping with inherent challenges of networking. Private ordering enhances the efficiency, predictability and reliability of networking *activities* and protects companies' *resources*.

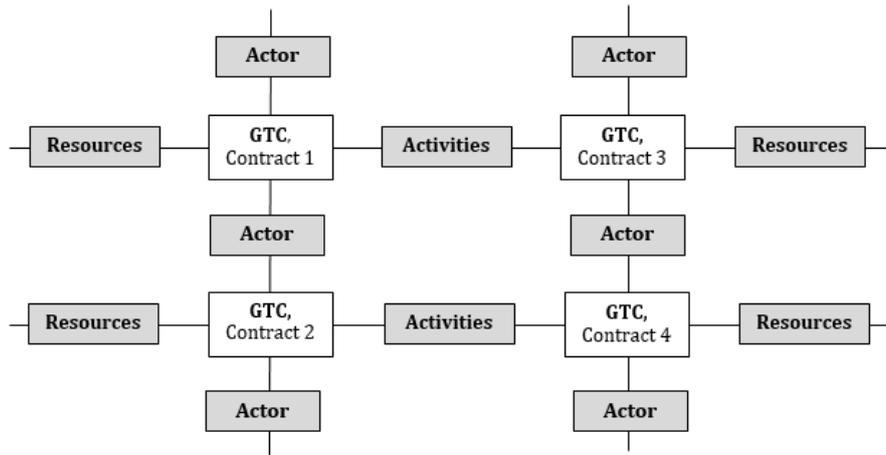
In the next step, we shed light on our second research question: *How does private ordering affect business interactions?*

We have illustrated above, how private ordering is codified in standardized GTC. Two of the most powerful conditions included in these documents (Table 1) are that (1) the stated terms and conditions are the *exclusive basis* for interacting; and that (2) any contracting party guarantees that *any of its own contracting parties adhere to the same terms and conditions*. This 'cascading effect' (Johnsen, Lamming & Harland, 2008, p.74) explains how private ordering penetrates networking interactions even beyond the immediate confines of the dyadic relationship where the GTC were first shared. GTC are organizational artefacts that become a *repository* of inter-organizational knowledge (Powell & Colyvas, 2008). As *standardized* artefacts the use of GTC becomes "routinized through repeated application and use [that] develops habitual, taken-for-granted character" (Powell & Colyvas, 2008, p.280). Hence, private ordering profoundly permeates business networking processes, yet remains unnoticed or 'taken-for-granted'. This is because private ordering is universal enough to apply across a specific business network, yet is re-produced and evolves through every day local practice.

Another characteristic of GTC as legal artefacts that may contribute to explaining how private ordering affects networking processes, lies in the nature of legal artefacts as 'scripts' that facilitate and govern the integration of multiple actors, resources and activities. In the context of the present study, GTC orchestrate networking between *multiple actors* (i.e. retailers, manufacturers, logistic partners, certification bodies), *multiple interdependent activities* (i.e. product manufacturing, transportation, packaging, advertising, retail, disposal) and *resources* (i.e. production capacity; financial resources in terms of 'fees' and 'payments' production capacity). As a result, legal artefacts function as "o-rings" and "scripts" as they help keeping the "performance on course, even in the face of substantial improvisation" (Suchman, 2003, p.114). Indeed, the greater the complexity of business networking processes and "the greater the number of players [involved], the greater the importance of having a cognitively tractable reference document that can link the individual parts into a coherent and meaningful whole" (Suchman, 2003, p.114).

We therefore illustrate how private ordering affects business networking by suggesting a way of conceptually integrating legal artefacts in the ARA-model (Håkansson & Johanson, 1992). GTC function as a crucial link in facilitating the orchestration of multiple and distributed business actors, activities and resources over time (Figure 1):

**Figure 1. Conceptual integration of legal artefacts into the ARA-model.**



The conceptual integration of GTC in the inter-dependent networks of actors, activities and resources shows how multiple network interactions are ‘standardized’ by means of reference to a common set of private rules. The extended ARA-model suggests that artefacts can provide the ‘glue’ for mediating and orchestrating several business interactions simultaneously. Moreover, the model illustrates how simple changes to multiple business interactions can be administered by changing the private ordering codification in one document. Changing the rules in one version of the GTC may result in adaptations in all those interactions, which rely on the same ‘script’.

We simplify here the role of artefacts significantly, in that we do not take into account the fact that there are likely deviations in actually *performing* interactions according to the terms and conditions stated in legal artefacts (D’Adderio, 2011). However, for reasons of scope, this question will be carried further in future research. At this stage, it is important to highlight the role of artefacts in business networking and the relevance of studying artefacts in generating new, important insights into the structure and processes of business networking.

## CONCLUSION AND IMPLICATIONS

This study has demonstrated that private ordering is a powerful process of setting up rules and procedures that regulates inter-organizational networking activities and has provided evidence that private ordering rules and procedures are codified in standardized legal artefacts such as GTC.

Specifically, building on previous IMP and extant research, we shed light on two questions:

- (a) *Why inter-organizational networking results in private ordering?*
- (b) *How private ordering affects business interactions?*

In addressing the first question, we have illustrated how private ordering provides companies with an essential mechanism for coping with inherent challenges of networking. Private ordering allows companies to enhance the efficiency, predictability and reliability of networking activities and to protect companies’ resources. In practice, private ordering manifests in companies’ setting up quasi-legal processes that replicate aspects of the public legal order established by the State. As a result, private ordering enables companies to develop flexible, yet reliable quasi-legal processes which regulate networking across several

state-bound public orders and local business customs. The study has demonstrated that private ordering comprises three quasi-legal processes: (1) The codification of law-like network constitutions in GTC, (2) reliance on alternative, out-of-court dispute resolution procedures, and (3) the specification of non-legal sanctions for punishing cases of non-compliance with the private order.

We have demonstrated how each of the private ordering processes is codified in the General Terms and Conditions (GTC) by drawing on empirical research conducted in the German food retail business from 2011-2013. This analysis has shown that networking as a process of private ordering does not exist in isolation from the public order, but relies on a complex blend of public, industry and company specific rules. Moreover, such rules can be of legal, non-legal and even illegal nature and continuously evolve in light of changes occurring outside or within the business network. In sum, networking results in private ordering, because private ordering is a highly adaptable, yet standardized and efficient means for companies coping with inevitable uncertainties inherent to business networking processes.

In addressing the second research question of how private ordering affects business interactions, we suggest the following: Private ordering profoundly permeates business networking within an industry, reaching even beyond the confines of companies' direct business relationships. Private ordering enhances the predictability, reliability and efficiency of business interactions, because it *standardizes* the networking processes of multiple interactions. This happens primarily because the private order is codified, shared and constantly adapted in parsimonious, standardized GTC. In contrast to contracts, GTC enable more powerful companies to *unilaterally codify private orders* including the principle that such order must be reproduced throughout the business network. Hence, the extent of power asymmetry in a business network affects in how far multiple actors must share and comply with the same frame of reference for interacting with one another. Compliance with the private order is institutionalized in each business interaction, because of the commonly shared rules and procedures for regulating dispute resolution and sanctioning for non-compliance. In that way, private ordering becomes a self-enforcing and self-perpetuating process regulating business networking.

In this way, we enrich our current understanding of the content and use of different legal artefacts in business network research by shedding light on the relevance of GTC as unilaterally drafted legal contracts. Whereas previous studies highlighted the role of framework contracts in efficiently governing dyadic business interactions over time and under uncertainty, we add to this, in positing that GTC have a major role in governing business networking beyond direct dyadic relationships. To illustrate this finding, we demonstrate how we can conceptually integrate legal artefacts in the Actor-Activities-Resource-Model (Håkansson & Johanson, 1992). In addition to our conceptual contribution, we demonstrate how methodologically, the analysis of relevant inter-organizational artefacts can enhance our understanding of business networking processes.

These analytical findings translate also into relevant implications for the practice of business networking in two major ways: First, this research draws manager's attention to the power of *influencing and negotiating rules* in order to affect change in business networking and outcomes in the short and long term. Second, we highlight the importance of *knowing the rules* in order enter, stay in and improve business interactions. Both ways – negotiating and knowing the rules – are fundamental ways for *influencing business outcomes through interaction* under inevitable conditions of uncertainty. This is because, by influencing the rules one does not specify certain actions, outcomes or commands, but rather a way of interaction.

Management research and practitioner literature commonly focus on the ultimate objective of influencing, or better, *maximizing business outcomes* in terms of profit, shareholder value, or more generally, performance (see for example Porter, 1998; Kontes, 2011). This focus is legitimate and stems from the origins of this literature in economics and classic strategic management. However, the goal of ‘profit maximization’ may detract attention from the *rules-system within which this goal is to be achieved* (Powell & Colyvas, 2008) and, more importantly, how actively influencing these rules, rather than taking them for granted, may significantly contribute to shaping the outcome.

To illustrate the point, consider again the case of Wal-Mart changing the state of regulating fertilizer use: Most companies – even major industry players – tend to focus on strategies to reduce a company’s emissions or waste by changing something about *the company’s* internal processes or products, such as renovating multiple sites to reduce heating, or charging consumers for using plastic bags. However, Wal-Mart shows an alternative, powerful way of using rules to achieve an even greater outcome in reduced emissions: The company changes the rules of fertilizer use in every single country it receives supplies from.

Our second implication for management suggests that *knowing the rules* of a certain business network is at least as critical as trying to influence these rules, because it can significantly (a) lower avoidable uncertainties and (b) enhance achievement of business outcomes. Studying the rules through the GTC is an efficient and insightful way of learning the ‘terms and conditions’ according to which one *will have to network*. Despite the simplicity of the advice and its impact on business networking and outcomes, few companies seem to follow it.

To exemplify, Wal-Mart actively advises prospective suppliers applying for business with Wal-Mart to *study its GTC, before pursuing* this objective further. What most prospective suppliers see first, is the ‘outcome’ of high-volume sales to Wal-Mart and benefits from affiliating with a renowned brand. However, as Taunya Painter (former senior corporate counsel for Wal-Mart) states, suppliers must first understand the rules, codified in GTC “to determine whether or not it even makes sense to try to become one of Wal-Mart’s suppliers. As a rule, Wal-Mart uses a non-negotiable GTC” (Bloomberg BusinessWeek, 2009). Understanding the rules of the food retail business network, enables potential suppliers to adapt to sometimes unexpected requirements or timely preclude an unmanageable business venture. For example, by studying the GTC of Wal-Mart, potential suppliers learn that even by managing to “convince Wal-Mart to sign a supplier agreement, it almost never obligates the retailer to buy anything” (Bloomberg BusinessWeek, 2009). Moreover, if Wal-Mart shall place orders at all, they will be paid only within 30 to 45 days, requiring suppliers to re-finance in that time on their own. Finally, low product sales will result in surplus inventory, a condition that breaches supplier’s obligation of ‘guaranteed sales’ according to Wal-Mart’s GTC. Hence, all surplus products result in the supplier’s liability for chargebacks. In sum, our research implicates that companies can learn much and consequently enhance their business performance by understanding the ways they can *exploit the mechanism of rules regulating business networking* – either through actively changing the rules, or through studying existent rules.

## **LIMITATIONS AND SUGGESTIONS FOR FUTURE RESEARCH**

The phenomenon of networking as a process of private ordering is a relevant and rich direction for business network research. Pursuing this stream of research further, promises interesting insights into the fundamental processes and structures of business networking. The scope of the present study allowed us to highlight some relevant corner stones of *why* networking results in private ordering and *how* private ordering affects business interactions,

within one empirical domain. However, there remain fruitful paths for further research that would benefit from both, conceptual and empirical contributions.

It is established that networking processes are dynamic and therefore, the private order regulating these processes must evolve. However, we do not know how private ordering rules are constantly re-shaped or re-confirmed by networking practice. We could gain much by *comparing legal artefacts-in-use* which carry codifications of private orders *over time*. In that way, we could track how major network ‘events’ materialize in changing or preserving codified rules and what such changes (or lack thereof) imply about the actors’ interests, power positions and concerns. Studying such change processes as materialized in inter-organizational artefacts could help us to generate greater understanding of causal mechanisms *explaining* business networking processes (Easton, 2010).

Moreover, it is very likely that legal artefacts represent only *one* type of empirical manifestations of private ordering. Hence, we should start examining more closely the powerful role *industry standards* play in governing business interactions. Specifically, it would be highly relevant to understand how and why do business actors become members of standard setting bodies? How do competing companies agree on *sharing* standards as de-facto mandatory rules? This stream of research could enrich our understanding of private ordering processes on the business network level.

However, studying the micro-dynamics of private ordering in dyadic interactions could also yield interesting insights. For example, how does private ordering change or perpetuate actual business *practice* in networking? How do companies adapt industry rules within individual dyadic interactions with idiosyncratic needs? What are the costs and benefits of such adaptations? How do companies network across different private orders?

Finally, future research could extend our understanding of private ordering mechanisms by shedding light on how private ordering processes materialize and differ in business networks characterized by *less* power asymmetry. Similarly, studying ‘private ordering’ in business networks embedded in different ‘geographical contexts’ could yield interesting insights into how cultural and political contexts shape the extent of, reliance on and change in private ordering for business actors. This could yield important insights for business practice, as we could learn about a greater range of possibilities to influence, use or cope with challenges of private ordering.

## REFERENCES

- ACNielsen (2013). Consumer Price Index. In: *HDE, Handelsverband Deutschland* (2013, July). *Der Handel als Wirtschaftsfaktor. Branchenreport Einzelhandel*, Berlin, Germany.
- Arkansas Business (2012, July 2<sup>nd</sup>). Wal-Mart use technology to become supply chain leader. *Arkansas Business Online Newspaper*. Retrieved on April 20<sup>th</sup> 2014, from: <http://www.arkansasbusiness.com/article/85508/wal-mart-used-technology-to-become-supply-chain-leader?page=all>.
- Birnhack, M. (2004). Principle of private ordering. *Document written for the working group on private ordering of the Israeli Internet Association (ISOC-IL)*, 1-9.

- Blois, K. (2006). The boundaries of the firm – a question of interpretation? *Industry and Innovation*, 13 (2), 135-150.
- Bloomberg BusinessWeek (2009, July 14<sup>th</sup>). *The profits and perils of supplying to Wal-Mart*. Retrieved on April 20<sup>th</sup> 2014 from: [http://www.businessweek.com/smallbiz/content/jul2009/sb20090714\\_270767.htm](http://www.businessweek.com/smallbiz/content/jul2009/sb20090714_270767.htm).
- Bloomberg News (2014, February 7<sup>th</sup>). *Big companies step up efforts to trim environmental risks in supply chains*. Retrieved on April 20<sup>th</sup> 2014 from: <http://www.bloomberg.com/news/2014-02-07/big-companies-step-up-efforts-to-trim-environmental-risks-in-supply-chains.html>.
- Brandens. (2013, April). *Wem gehört was? Ein Überblick über die beherrschenden Handelsunternehmen und ihre Töchter*. Retrieved on February 8th 2014 from: <http://www.brandens.de/archiv/2013/handel/wem-gehoert-was.html>.
- Buchanan, J. M. (1975). A contractarian paradigm for applying economic theory. *The American Economic Review*, 65 (2), 225-230.
- Bunte, F., van Galen, M., de Winter, M., Dobson, P., berges-Sennou, F., Monier-Dilhan, S., Juhasz, A., Moro, D., Sckokai, P., Soregaroli, C., van der Meulen, B., Szaikowska, A. (2011). The impact of private labels on the competitiveness of the European food supply chain. *Enterprise & Industry Magazine*, Luxemburg: Publications Office of the European Union, 1-201.
- Business Insider. (2013, October 17<sup>th</sup>). 14 Facts about Wal-Mart that will blow your mind. Retrieved on April 20<sup>th</sup> 2014, from: <http://www.businessinsider.com/facts-about-wal-mart-to-blow-your-mind-2013-10> .
- Commerzbank Report. (2013, June). *Branchen-Steckbrief Einzelhandel. Commerzbank AG, Group Risk Control & Portfolio Analysis, Industries Research, Frankfurt/Main, Germany*, 1-11.
- D'Adderio, L. (2008). 'The performativity of routines: Theorising the influence of artefacts and distributes agencies on routines dynamics', *AIM Research Working Paper Series*, 1-62.
- D'Adderio, L. (2011). Artifacts at the centre of routines: performing the material turn in routines theory. *Journal of Institutional Economics*, 7(2), 197-230.
- Dubois, A. & Araujo, L. (2004). Research methods in industrial marketing studies. In: Håkansson, H., Harrison, D. & Waluszewski, A. (Eds.). *Rethinking Marketing: Developing a new understanding of markets*. Wiley, Chichester, UK.
- Dubois, A., & Araujo, L. (2007). Case research in purchasing and supply management: opportunities and challenges. *Journal of Purchasing and Supply Management*, 13 (3), 170-181.
- Dubois, A., & Gadde, L.E. (2002). Systematic combining: an abductive approach to case research. *Journal of Business Research*, (55), 553– 560.
- Easton, G. (2000). Case research as a Methodology for Industrial Networks: A Realist Apologia. (205-219). In Ackroyd, A. & Fleetwood, S. (2000) (Eds.). *Realist Perspectives on Management and Organisations*. Routledge, London and New York.
- Easton, G. (2010). Critical realism in case study research. *Industrial Marketing Management*, (39), 118–128.

- Economist. (2014, January 18th). Shares in emerging economies. Retrieved on February 6<sup>th</sup> 2014 from: <http://www.economist.com/news/finance-and-economics/21594476-scarce?fsrc=scn/fb/wl/dc/scarcessharesemerginmarket>.
- Edelman, L.B. & Suchman, M.C. (1999). When the ‘haves’ hold court: Speculations on the organizational internationalization of law. *Law & Society Review*, 33 (4), 941-991.
- Ehrlich, E. (1913; 2002). *Fundamental Principles of the Sociology of Law*. Transaction Publishers New Brunswick, USA and London, UK.
- Eigen, Z. (2012). When and why individuals obey contracts: Experimental evidence of consent, compliance, promise, and performance. *Journal of Legal Studies*, (41), 67-93.
- Eisenberg, M.A. (1976). Private ordering through negotiation: Dispute-settlement and rulemaking. *Harvard Law Review*, 89 (4), 637-681.
- EU Food Safety Almanac (2011). *Bundesinstitut für Risikobewertung (BfR)*. 1-119.
- European Commission (2013, January 31st). *Green paper on unfair trading practices in the business-to-business food and non-food supply chain in Europe*. COM (2013) 37 final. Brussels. 1-22.
- European Food and Drink. (2011). *Data & Trends of the European Food and Drink Industry*. Food Drink Europe Presentation, Brussels, 1-24.
- Ford, D. & Mouzas, S. (2010). Networking under uncertainty: Concepts and research agenda. *Industrial Marketing Management*, (39), 956-962.
- Ford, D., Gadde, L.E., Håkansson, H. & Snehota, I. (2003, 3<sup>rd</sup> ed.). (Eds.). *Understanding business marketing and purchasing*. Thomson Learning, London, UK.
- Ford, D., Gadde, L.E., Hakansson, H., & Snehota, I. (2002). Managing networks. *Paper presented at the 18th IMP Conference in Perth, Australia*, 1-21.
- Ford, D. & Mouzas, S. (2013). The theory and practice of business networking. *Industrial Marketing Management*, (42). 433-442.
- Fuller, L. L. (1969). The Law’s precarious hold on life. *Georgia Law Review*, (3), 530-545.
- Galanter, M. (1981). Justice in many rooms: courts, private ordering and indigenous law. *Journal of Legal Pluralism*, 19, 1-47.
- GFSI. (2012). *Advancing global food safety through collaboration*. Conference Report from the Global Food Safety Conference 2012, February 15-17, 2011, in Orlando FL, USA.
- GTZ, Gesellschaft für Technische Zusammenarbeit. (2007). *Food quality and safety standards as required by EU law and the private industry*. Report published by GTZ’s Division 45: Agriculture, Fisheries, and Food. Deutsche Gesellschaft für Technische Zusammenarbeit GmbH, Eschborn, Germany. 1-162
- Håkansson, H. & Johanson, J. (1992). ‘A model of industrial networks’, in Axelsson, B. & Easton, G. (Eds.) (1992). *Industrial networks: A new view of reality*. Routledge. London and New York (28-36).
- Halinen, A. & Törnroos, J.A. (2005). Using case methods in the study of contemporary business networks. *Journal of Business Research*, (58), 1285-1297.
- Hayek, F.A. (1973). *Law, Legislation and Liberty*. Routledge & Kegan Pau, London and Henley, UK.

- Henneberg, S.C. Naudé, P. & Mouzas, S. (2010). Sense-making and management in business networks – some observations, considerations and a research agenda. *Industrial Marketing Management*, (39), 355-360.
- Hertz, S. & Mattson, G.S. (2004). Collective competition and the dynamics of market reconfiguration. *Scandinavian Journal of Management*, (20), 31-51.
- Hodder, I. (1998). The interpretation of documents and material culture (pp. 110-130). In Denzin, N.K. & Lincoln, Y.S. (Eds). *Collecting and interpreting qualitative materials*. SAGE Publications, London, Thousand Oaks.
- IHK Stuttgart (2010). *Allgemeine Geschäftsbedingungen*. Retrieved on April 20th, 2014, from:  
[http://www.stuttgart.ihk24.de/recht\\_und\\_steuern/Wirtschaftsrecht/Vertragsrecht/971548/Allgemeine\\_Geschaeftsbedingungen.html#11](http://www.stuttgart.ihk24.de/recht_und_steuern/Wirtschaftsrecht/Vertragsrecht/971548/Allgemeine_Geschaeftsbedingungen.html#11).
- International Featured Standards (IFS). (2013, March 14th). *Modifications in IFS Food: Standards for auditing quality and food safety of food products Version 6*. Retrieved on March 14th, 2013 from <http://www.ifs-certification.com/index.php/en/imprint-left-en/51-global-news/1849-news-2013-03-13-modifications>.
- Johnsen, T.E., Lamming, R.C. & Harland, C.M. (2008). Inter-organizational relationships, chains and networks. 61-89, in Cropper, S., Ebers, M., Huxham, C. & Ring, P.S. (Eds.) (2008). *The oxford handbook of inter-organizational relations*. Oxford University Press, Oxford, UK.
- Kontes, P. (2011). *The CEO, Strategy, and Shareholder Value: Making the Choices That Maximize Company Performance*. Wiley, UK.
- Lebensmittelzeitung (LZ). (2013). *Top 30 Lebensmittelhandel Deutschland*. Retrieved on February 8<sup>th</sup> 2014, from:  
[http://www.lebensmittelzeitung.net/business/datenfakten/rankings/pages/Top-30-Lebensmittelhandel-Deutschland-2013\\_371.html#rankingTable](http://www.lebensmittelzeitung.net/business/datenfakten/rankings/pages/Top-30-Lebensmittelhandel-Deutschland-2013_371.html#rankingTable).
- Lee, H. L. (2004). The triple-A supply chain. *Harvard Business Review*. October, 1-13.
- Macaulay, S. (1986). Private government (445-518). In Lipson, L. & Wheeler, S. (Eds.). *Law and social science*. Russell Sage Foundation.
- Merry, S.E. (1988). Legal Pluralism. *Law & Society Review*, 22(5), 869-896.
- Miles, M.B., & Huberman, A.M. (1994, 2<sup>nd</sup> ed.). *Qualitative data analysis*. Thousand Oaks London- New Delhi: Sage.
- Moore, S.F. (1973). Law and social change: The semi-autonomous social field as an appropriate subject of study. *Law & Society Review*, 7 (4), 719-746.
- Mouzas, S. & Blois, K. (2013). Contract research today: Where do we stand? *Industrial Marketing Management*, (42), 1057–1062.
- Mouzas, S. & Ford, D. (2004). Contracts in asymmetric relationships. *Conference Paper presented at the 22<sup>nd</sup> Annual IMP Conference in Milan, September 7-9, 2004*. 1-41.
- Mouzas, S. & Ford, D. (2006). Managing relationships in showery weather: The role of umbrella agreements. *Journal of Business Research*, (59), 1248-1256.
- Mouzas, S. & Ford, D. (2009). The constitution of networks. *Industrial Marketing Management*, (38), 495-503.

- Mouzas, S. & Furmston, M. (2008). From contract to umbrella agreement. *Cambridge Law Journal*, 67 (1), 37-50.
- Mouzas, S. (2006). Research report: Negotiating umbrella agreements. *Negotiation Journal*, July, 279-301.
- Mouzas, S. Araujo, L. (2000). Implementing programmatic initiatives in manufacturer-retailer networks. *Industrial Marketing Management*, (29), 293-303.
- Nee, V. (1998). Norms and networks in economic and organizational performance. *American Economic Review*, 88 (2), 85-89.
- Netztrends. (2014, January 26th). Lidl mit 68 Mrd. Euro Umsatz knapp vor Metro, Real, Kaufhof. Retrieved on February 8th, 2014, from: <http://www.netztrends.de/id/3070/Lidl-mit-68-Mrd-Euro-Umsatz-knapp-vor-Metro-Real-Kaufhof/>.
- New York Times (2014, April 16<sup>th</sup>). When ‘liking’ a brand online voids the right to sue. Retrieved on April 20<sup>th</sup> 2014 from: [http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html?\\_r=1](http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html?_r=1).
- Öberg, C. Henneberg, S. C. & Mouzas, S. (2007). Changing network pictures: Evidence from mergers and acquisitions. *Industrial Marketing Management*, (36), 926-940.
- Öberg, C. Henneberg, S. C. & Mouzas, S. (2012). Organizational inscriptions of network pictures: A meso-level analysis. *Industrial Marketing Management*, (41), 1270-1283.
- OECD Global Forum. (2009). *The impact of investment and concentration among food suppliers and retailers in various OECD countries*. Global Forum on international investment. Paper present by Gabor Konig, on 7-9 December 2009.1-16.
- Orlikowski, W. (2007). Sociomaterial practices: Exploring technology at work. *Organization Studies*, 28 (9), 1435-1448.
- Piekkari, R., Plakoyiannaki, E. & Welch, W. (2010). ‘Good’ case research in industrial marketing: Insights from research practice. *Industrial Marketing Management*, (39), 109–117.
- Porter, M. (1998). *Competitive advantage: Creating and sustaining superior performance*. Free Press, New York, USA.
- Powell, W. W. & Colyvas, J. A. (2008). Microfoundations of institutional theory. (pp. 276-299). In: Greenwood, R., Oliver, C., Sahlin, K. & Suddaby, R. (Eds.). *The SAGE handbook of organizational institutionalism*. (Chapter 10). London: SAGE Publications Ltd.
- Ryan, A.M., Tähtinen J., Vanharanta, M., & Mainela, T. (2012). Putting critical realism to work in the study of business relationship processes. *Industrial Marketing Management*, (41), 300-311.
- Sagy, T. (2011). What’s so private about private ordering? *Law & Society Review*, 45 (4), 923-954.
- Sayer, A. (1992, 2nd ed.). *Method in social science*. A realist approach. Routledge, London, UK.
- Simon. B.J. (2006). *Kooperative Risikoverwaltung im neuen Lebensmittelrecht: Eine Analyse des neuen Lebensmittel- und Hygienerechts am Beispiel der Fleischerzeugung*.

Lebensmittelrechtliche Abhandlungen, Band 8, Nomos Verlagsgesellschaft Baden-Baden, Germany.

- Statistic Brain (2013, November 12<sup>th</sup>). Wal-Mart Company Statistics. Retrieved on April 20<sup>th</sup> 2014 from: <http://www.statisticbrain.com/wal-mart-company-statistics/>.
- Sturcken, E. (2014, February 7<sup>th</sup>) quoted in Bloomberg News (2014, February 7<sup>th</sup>). Big companies step up efforts to trim environmental risks in supply chains. Retrieved on April 20<sup>th</sup> 2014 from: <http://www.bloomberg.com/news/2014-02-07/big-companies-step-up-efforts-to-trim-environmental-risks-in-supply-chains.html>.
- Suchman, M.C. (2003). The contract as social artifact. *Law & Society Review*, (37), 91–142.
- Talesh, S.A. (2009). The privatization of public legal rights: How manufacturers construct the meaning of consumer law. *Law and Society Review*, 43(3), 527-561.
- The Economic Times (2012, October 7<sup>th</sup>). The weight of Wal-Mart: A company with an annual revenue more than the GDPs 170 countries. Retrieved on April 20<sup>th</sup> 2014 from: [http://articles.economictimes.indiatimes.com/2012-10-07/news/34306325\\_1\\_retailer-largest-oil-walmart](http://articles.economictimes.indiatimes.com/2012-10-07/news/34306325_1_retailer-largest-oil-walmart).
- Tsoukas, H., & Chia, R. (2011). Introduction: Why philosophy matters to organization theory. *Research in the Sociology of Organizations*, (32), 1-21.
- Van der Meulen, B. (2011). The anatomy of private food law (ch.3, 75-111). In: Van der Meulen, B. (Ed.) (2011). *Private food law*. Wagenigen Academic Publishers, The Netherlands.
- Wal-Mart. (2013). *Annual Report*. Retrieved on April 20<sup>th</sup>, 2014 from <http://stock.walmart.com/annual-reports>. 1-64.
- Yadlin, O. (2000). A public choice approach to private ordering: Rent-seeking at the world's first futures exchange, 98, *Michigan Law Review*, 2620-2635.
- Yin, R.K. (2003). (3rd ed.). Case study research: Design and methods. Sage Publications, London.