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Is the organ of a legal person liable for violations of an obligation to cease and desist?

Thomas Musmann (Rospatt Osten Pross) · Friday, June 22nd, 2012

by Stefan Lieck

In the judgement dated 12/01/2012 (file no. I ZB 43/11), the Federal Supreme Court decided on the question as to whether an administrative fine is to be imposed on the managing director of a limited liability company [GmbH] if previously, both the GmbH as well as its managing director were ordered, upon pain of an administrative fine, to refrain from making a certain advertising statement, and the managing director then violates this obligation to cease and desist in the course of performing his business activities on behalf of this GmbH.

Since this question had previously been assessed differently by various higher courts, the Federal Supreme Court now decided that in such a case, exclusively the legal person is liable for the violation, but not its managing director. Consequently, only the GmbH was ordered to pay an administrative fine.

As a reason, the Federal Supreme Court firstly noted that a legal person itself is not capable to act; it only acts through its organs. To the extent that the organ, in performing its business activities, acts on behalf of the legal person, a culpable violation committed by the organ is attributed to the legal person pursuant to Sec. 31 German Civil Code [BGB]. In contrast to that, the Supreme Court held that there is no reason to assess additional fines against the organ, or to establish its liability as a joint and several debtor, on account of a culpable act of violation which is attributable to the legal person but was committed by its organ. Moreover, the Supreme Court held that an administrative fine, apart from being a civil-law means of coercion designed to prevent future acts of non-compliance, also has the repressive character of a sanction, similar to a penalty. It hardly agrees with this character that one and the same administrative fine is imposed on several persons due to an act of non-compliance committed by a natural person.

Nonetheless it may still be reasonable to assert claims both against the legal person and its organ. A separate liability of the organ is conceivable if the acts of the organ are not attributable to the legal person pursuant to Sec. 31 BGB, because the organ has e.g. committed the culpable violation on behalf of its own business existing beside the legal person, or on behalf of another legal person.

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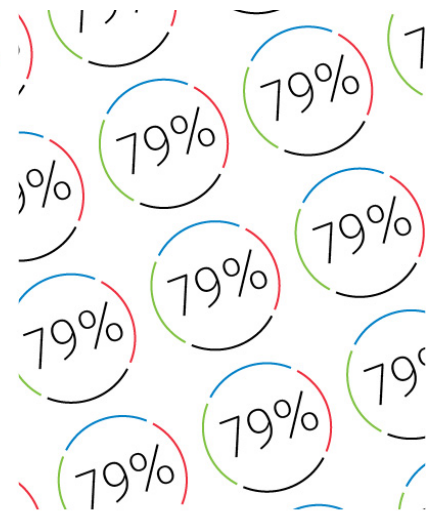
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