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## **The Federal Court of Justice's concept for piercing the corporate veil due to destruction of a German Limited Liability Company**

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The GmbHG (*German Limited Liability Company Act*) does not know any explicit regulation for the case of misuse of the legal form of the company. This unintended regulatory gap has been closed by the BGH (*Federal Court of Justice*) so far with the concept of piercing the corporate veil, which means disregarding the veil of incorporation that separates the personality of a corporation from the personalities of its members and thus extending the liability to the shareholders.

The latest concept of the BGH for piercing the corporate veil was disregarding the corporate entity because of a destruction of the company's existence by the shareholders.

The liability for destruction of existence was dogmatically reasoned as a teleological reduction of the liability privilege of section 13 (2) GmbHG, which according to the regulation's purpose should only come to bear if the assets binding anchored in the GmbHG is not misused by the shareholders. The theory of teleological reduction is based in turn on the theory of the purpose of the law according to which a legal rule is not applicable if its underlying – also tacit – prerequisites are not fulfilled.

In addition, piercing the corporate veil due to existence-destroying intervention was also dogmatically founded on an analogy of sections 105, 128 HGB (*Commercial Code*), because with-

out the liability privilege of section 13 (2) GmbHG a GmbH is comparable to an OHG (*general partnership*).

In terms of facts, the concept presupposed a perpetrator who as shareholder or partner-shareholder intervenes in the company assets. It should be possible that an act is committed by way of neglect in the form of tolerating the intervention by a co-shareholder.

Intervention should not merely be the direct withdrawal of assets, but any conduct that takes a sufficiently concrete assets position away from the company, that is to say also for example entering into risk transactions. Concrete assets positions should also be business chances or goodwill.

Consequence of the intervention had to be the insolvency of the company.

Piercing the corporate veil due to existence-destroying intervention should be subsidiary to a compensation entitlement of the GmbH against the shareholder from sections 30 and 31 GmbHG, that is to say the non-existence of this compensation entitlement was a prerequisite. But this was regularly only significant in cases of insolvency deepening, because the consequential damages arising from insolvency do not otherwise usually fall under sections 30 and 31 GmbHG.

According to court decisions, the legal consequence of an existence-destroying intervention was piercing the corporate veil and extending the liability on the shareholders.

Since in the dogmatic reasoning the liability was based on an analogy of section 128 HGB and this dictates unlimited liability in the legal consequence, liability for existence-destroying intervention should therefore also be unlimited.

The BGH in the "Trihotel" judgement (16.07.2007 – II ZR 3/04, *Neue Juristische Wochenschrift* 2007, volume 60, issue 37, pages 2689-2694) has since abandoned the independent concept of piercing the corporate veil due to existence-destroying intervention. It no longer sees room for an analogy to the OHG, but instead recurses to the private law blanket norm of section 826 BGB (*Civil Code*). But with this the idea of an intervention destroying existence has not become obsolete; it must much rather be examined if there is an intervention in the GmbH assets suitable to cause the insolvency of the company, an unethical infliction of damage and the perpetrator's intent which encompasses all the facts founding the unethical conduct and the damage infliction.

Legal consequence is no longer an external liability of the shareholder toward the company's creditor, but solely an internal liability toward the company. So if the creditor asserts the claim and not the insolvency administrator, he must first acquire a title against the company and then

have the claim of the company against the shareholders from section 826 BGB attached and transferred to him (sections 829, 835 ZPO – *Code of Civil Procedure*).

Due to the structuring as damage compensation obligation, the liability scope of section 826 BGB is less than in its concept of piercing the corporate veil. It only reaches as far as the inability of the company to satisfy its obligations to the creditors is also actually due to the conduct of the shareholder. Damages going beyond this – which can be founded in mismanagement or adverse economic framework conditions – need not be compensated by the shareholder.

Through section 830 (2) BGB the circle of responsible persons is expanded to instigators and accessories.

The entitlements from section 826 BGB and sections 30 and 31 GmbHG can exist beside each other if the intervention has caused or aggravated a deficit balance (concurring foundations of claims).

According to opinions here, due to the changed dogmatic foundation of the claim, the “Trihotel” judgment not only constitutes a turn away from piercing the corporate veil due to existence-destroying intervention as a foundation of claim *sui generis*, but also due to misuse of the company form and assets mingling or co-mingled areas. A clarifying decision may be expected.