

JUDGMENT OF THE FEDERAL COURT OF JUSTICE IN THE NAME OF THE PEOPLE

III ZR 139/20 Delivered on: 15 April 2021

Facts of the case

1 The plaintiff seeks damages from the defendant, a civil-law foundation, by way of a partial action for breach of an exploitation and marketing agreement.

2 The defendant was established in 1992 and, together with partners, develops treatment concepts for the condition known as 'stroke'. Its articles of association contain, inter alia, the following provisions

§ 2 Purpose and functions of the foundation

1 The foundation pursues exclusively and directly non-profit-making purposes within the meaning of the section 'tax-privileged purposes' of the German Tax Code (Abgabenordnung).

2. The purpose of the Foundation is to promote public health, science, research and education in the fields of prevention, early diagnosis, treatment and rehabilitation of vascular diseases, therapeutic options in the treatment of vascular diseases, as well as the improvement of reintegration measures and the promotion of education and training in these fields. In particular, the Foundation's work aims to optimise the holistic care of patients. The Foundation also supports charitable causes.

3. This purpose shall be achieved in particular by

a) Educating the public about the risk factors of vascular diseases, appropriate preventive measures and new treatment methods through extensive public relations work, as well as actively supporting the public and the health system in all forms of stroke prevention.

(b) Promotion of regional acute care, such as the establishment of stroke centres,

c) Translating scientific knowledge and innovative treatment options into practice

d) Initiating and co-designing new intersectoral stroke care structures involving all treatment centres

e) Supporting training and exchange of experience among physicians, therapists, nurses and other medical personnel,

f) Promote applied research and award a prize for research into stroke and other vascular diseases, particularly health services research,

(g) Promoting appropriate non-profit structures and initiatives to improve regional and supra-regional care, e.g. by supporting self-help groups.

h) Promotion of education, training and further education in this field, e.g. by organising seminars.

4. the promotion of the above purposes shall include the evaluation and dissemination of research results and projects.
5. Within the framework of the above-mentioned tasks, projects abroad may also be financed.
6. The Foundation shall be involved in the design and influence of all funded projects.
7. the Foundation shall employ an auxiliary to carry out its tasks, unless it carries them out itself.
8. the Foundation may transfer its funds to eligible public corporations or other tax-privileged corporations for the fulfilment of its purposes, insofar as it does not fulfil them directly - if necessary through an auxiliary person pursuant to § 57 para. 1 sentence 2 of the Tax Code.

#### § 10 Principle

- 1 The Board of Trustees represents the Foundation externally. It has the status of legal representative. Two members of the Board of Trustees are authorised to represent the Foundation jointly, with the exception of the Chairman of the Board of Trustees, who is authorised to represent the Foundation alone in accordance with § 15.
2. The power of representation of the Board is limited by the purpose of the Foundation. The power of representation may also be limited internally by the rules of procedure.

#### § 15 Management

- 1 The Chairman of the Board shall manage the affairs of the Foundation and shall act for the Foundation as a full-time member of the Board.
- 2 The Chairman of the Board is authorised to represent the Foundation alone. His power of representation is limited by the purpose of the Foundation. The power of representation may be restricted internally by the rules of procedure.
- 3 In 2011, the board of directors of the defendant decided to become a 'social entrepreneur' and to set up a management company for this purpose - the plaintiff - with the task of marketing products developed by the defendant for the prevention and treatment of stroke. The applicant company was established by a memorandum of association dated 19 June 2012 and registered in the commercial register on 16 July 2012; its founding partners were the defendant's then managing director, Mr P., and Mr H. and Mr M., who both worked as consultants for the defendant.
- 4 Even before the creation of the applicant, the transfer of the rights to use the defendant's products was to be governed by an 'exploitation and marketing agreement'. That agreement, under which 'C. GmbH i. Gr.' ('the Company') as the defendant's contracting party, was signed on 28 October 2011 by the defendant's then managing director and the plaintiff's founding shareholders on 14 November 2011. According to Article 2(2) of the agreement, the granting of the rights of use would become effective upon registration of the Company in the Commercial Register. An annex to the agreement stated that the company was to be founded by P., H. and M. as well as the lawyer S., who, however, did not participate as a direct partner but as a trustee.

5 After doubts had arisen as to the compatibility of the agreement with the requirements of tax law regarding the absence of a profit-making purpose (Art. 51 et seq. AO) and negotiations on a different form of the contractual relationship were inconclusive, the defendant informed the plaintiff on 5 March 2013 of the termination of the cooperation. By letter of 15 March 2013, the defendant stated that it was contesting the agreement and, in the alternative, terminating it for cause. By letter of 21 March 2013, the plaintiff declared the termination of the agreement without notice.

6 Finally, the claimant demanded payment of EUR 25 million (plus interest). Of this amount, EUR 12,000 is attributable to financial intermediation costs, EUR 14,488,000 to lost profits, EUR 5 million to a partial amount of the funds lost by the investors and a further EUR 5.5 million to a partial amount of the decrease in the value of the company. On appeal, the plaintiff clarified that its claim for damages was primarily based on the defendant's breach of the exploitation and marketing agreement and, in the alternative, if the agreement had not been validly concluded, on the defendant's refusal to adapt it.

7 The defendant denied that the agreement had been validly concluded. As the plaintiff was only established on 19 June 2012, it was not a party to the agreement. In addition, the plaintiff's acceptance of the contract had not been received (in time). Furthermore, the defendant's managing director had exceeded his power of representation, as the contract was incompatible with the non-profit character of the foundation. The defendant also claimed that the contract should be declared void and rescinded.

8 The Landgericht dismissed the action. On appeal by the plaintiff, the Oberlandesgericht (Higher Regional Court) set aside the first judgment and, in an interlocutory judgment, held that the appeal was well founded. When the Court of Appeal upheld the appeal, the defendant applied for the first-instance judgment to be reinstated.

#### Reasons for the judgment

9 The defendant's appeal is admissible. The Federal Court of Justice has jurisdiction to hear and determine the appellant's appeal pursuant to Art. 8 (2) EGGVG, since only federal law applies. The failure of the court of appeal to determine the court of appeal with jurisdiction, contrary to Article 7 (1) sentence 1 EGZPO in conjunction with Article 8 (1) EGGVG and Article 11 (1) BayAGGVG, should not be remedied (see Senate, Judgment of 18 February 2021 - III ZR 175/19, BeckRS 2021, 6631 para. 11 and order of 6 June 2019 - III ZB 98/18, NJW 2020, 691 para. 6). The appeal is also allowed on the merits. It leads to the judgment under appeal being set aside and the judgment of the Court of First Instance being reinstated.

10 The Court of Appeal gave extensive reasons for its decision:

11 On the merits, the plaintiff was entitled to claim damages in lieu of performance under Sections 280(1) and (3) and 281 of the German Civil Code.

12 The plaintiff had standing. All parties were aware that it did not exist at the time the contract was concluded. The condition precedent in the contract was fulfilled when the plaintiff was entered in the commercial register on 16 July 2012. The fact that the lawyer S., who had not yet become a (direct) partner of the defendant, was named in the annex to the contract as an additional founding partner did not prevent the condition precedent from being fulfilled.

13 The contract, which was undisputedly signed by the defendant on 28 October 2011 and the founding shareholders of the plaintiff on 14 November 2011, was concluded in accordance with Sections 145 et seq. of the German Civil Code (Bürgerliches Gesetzbuch - BGB). The fact that the defendant denies having received the plaintiff's declaration of acceptance is irrelevant. An e-mail from the defendant's then managing director to the plaintiff dated 25 January 2013, in which he requested that the original contract be destroyed, proves that the contract signed by both parties was available to the defendant and that it therefore also received the declaration of acceptance submitted on 14 November 2011.

14 The defendant was indeed represented by its managing director at the time of the conclusion of the contract. She acted within the scope of her power of representation. It is true that the agreement is not compatible with the non-profit provisions of Sections 51 et seq. of the German Fiscal Code (Abgabenordnung - AO) and thus contradicts the provision in Section 2 (1) of the Articles of Association, according to which the defendant exclusively and directly pursues profit-making purposes. However, the Chairman of the Board has not exceeded her power of representation, which is limited by the purpose of the foundation pursuant to § 10 (2) sentence 1 and § 15 (2) sentence 2 of the statutes. These provisions refer exclusively to the specific purpose of the foundation pursuant to § 2 para. 2 of the statutes, but not to the pursuit of charitable purposes pursuant to § 2 para. 2 of the statutes. 1. It is not sufficiently clear from the statutes that the status as a non-profit organisation is of such importance to the defendant that it constitutes an effective restriction of the power of representation of the board in relation to third parties. It cannot be assumed that the founder intended the legal uncertainty that would arise if the board's power of representation depended on the difficult assessment of the non-profit status in each individual case. In addition, a limitation of the power of representation in the articles is only effective if the scope of the limitation is clear and unambiguous from the provisions of the articles and can be determined without detailed legal examination. This is particularly necessary for the protection of legal transactions. Since the conclusion of the contract could be reconciled with the specific purpose of the foundation pursuant to § 2 para. 2 of the statutes, the defendant did not exceed its power of representation.

15 The contract is not null and void because of the defendant's objection. The plea of avoidance of fraudulent misrepresentation was not satisfied because the then chairman of the board of directors signed the contract without having a sufficient basis for assessing its compatibility with the principles of public utility. The mere impression that the contract had been examined from the point of view of non-profit law was not sufficient to prove fraudulent misrepresentation.

16 Nor did the defendant actually withdraw from the contract, since it had no right to do so under § 275 para. 4 and § 326 para. 5 BGB.

17 By its final and serious refusal to perform the contract, the defendant breached its contractual obligations. In any event, the applicant has suffered damage in the form of loss of profit.

18 These arguments do not stand up to legal scrutiny on a crucial point.

19 Contrary to the appellant's submissions, the Court of Appeal allowed the appeal in its entirety.

20 (a) However, leave to appeal on points of law may be limited to an independent part of the whole matter in dispute. The limitation of the leave to appeal may also result from the grounds of the appeal judgement in the case of - as here - unrestricted leave to appeal in the operative part (see e.g. Senate, Judgments of 18 October 2018 - III ZR 497/16, NJW 2019, 215 para. 11; of 27 June 2019 - III ZR 93/18, NVwZ 2019, 1696 para. 7 and of 13 August 2020 - III ZR 148/19, WM 2020, 1862 para. 13, each with further references). This may be the case if authorisation is granted only because of a specific legal issue. If the point of law for which the court of appeal granted leave to appeal relates to a separable part of the matter in dispute, the decision is generally to be interpreted as meaning that leave to appeal was granted only with regard to this part of the matter in dispute (e.g. Senate, judgments of 18 October 2018 loc. cit.; of 16 May 2019 - III ZR 176/18, WM 2019, 1203 para. 7 and of 13 August 2020 loc. cit.). By contrast, a limitation of the admission to individual legal issues or elements of the application is not permissible (e.g. Senate, judgments of 18 October 2018 loc. cit.; of 27 June 2019 loc. cit. and of 13 August 2020 loc. cit.).

21 (b) The Court of Appeal based its authorisation decision on questions of interpretation of the statutory provisions and the scope of the limitation of the foundation board's power of representation, which have not yet been clarified by the highest court. This does not imply an effective limitation of the right of appeal. The power of representation of the chairman of the foundation board is an element of the application that does not concern only a separable part of the subject matter of the dispute, but is relevant for the decision on the entire subject matter of the dispute.

22 2. The Court of Appeal's finding that there was an actual contractual relationship between the parties to the proceedings must be challenged.

23 a) Admittedly, the Superior Court of Justice was right to hold that - if the contract had actually been concluded - the appellant would have become a party to the contract upon registration in the Commercial Register and would therefore have had the right to bring an action.

24 aa) Under § 11 para. 1 GmbHG, the GmbH as such only comes into existence with its registration in the commercial register. In the period between the formation and conclusion of the notarial deed and the entry in the commercial register, a preliminary company exists which is already largely subject to the law of the GmbH and which, with the entry in the commercial register, is automatically absorbed into the GmbH thus legally created with all rights and obligations (see only BGH, judgement of 7 May 1984 - II ZR 276/83, BGHZ 91, 148, 151). However, before the formation deed is concluded, the group of persons preparing for the later activities of the GmbH forms an independent (pre-forming) company, which is a civil law partnership or, if business activities have already commenced, a general partnership. This pre-forming company is neither identical to the future GmbH nor to the pre-GmbH. As a result, neither the future GmbH nor the pre-GmbH will generally be parties to the contract if the founders have opted for a 'GmbH' or a 'GmbH in formation'. Gr. Rather, according to the principles of company law, the pre-formed company is entitled and obligated as the real legal entity (see e.g. BGH, judgements of 7 May 1984 loc. cit. p. 151 f; of 13 January 1992 - II ZR 63/91, GmbHR 1992, 164 and of 9 March 1998 - II ZR 366/96, NJW 1998, 1645). The rights and obligations of the predecessor company are not automatically transferred to the predecessor company when the GmbH is formed or registered in the commercial register, but must be transferred by way of a legal transaction if they are to be transferred to the GmbH (BGH,

judgements of 26 October 1981 - II. October 1981 - II ZR 31/81, NJW 1982, 932, 933; of 7 May 1984, loc. cit. p. 151 mwN; of 9 March 1998, loc. cit. and of 25 October 2000 - VIII ZR 306/99, NJW-RR 2001, 1042, 1043). However, the interpretation of a legal transaction concluded by the founders prior to the conclusion of the memorandum and articles of association may show that only the GmbH, which has not yet been formed and does not yet exist, has rights and obligations (see BGH, judgements of 20 June 1983 - II ZR 200/82, NJW 1983, 2822; of 7 May 1984 loc. cit. p. 153; of 13 January 1992 loc. cit. and of 7 February 1996 - IV ZR 335/94, WM 1996, 722, 723). In this case it must generally be assumed that the validity of the legal transaction is subject to the condition precedent of the formation of the GmbH (see OLG Zweibrücken, DNotZ 2012, 449, 451; Fastrich in Baumbach/Hueck, GmbHG, 22nd edition, § 11 para. 37; MüKoGmbHG/Merkt, 3rd edition, § 11 para. 106; Schmidt, GmbHR 1998, 613, 615; see also OLG Cologne, judgement of 28 October 2016 - 17 U 87/14, juris para. 45). Since the GmbH and the pre-GmbH have not yet come into existence and therefore do not yet have a representative body, such a legal transaction requires authorisation pursuant to § 177 BGB (OLG Stuttgart, OLGR 2001, 46, 48; Fastrich loc. cit.; Merkt loc. cit.; Schmidt loc. cit.; see also Staudinger/Schilken, BGB [2019], marginal § 177 no. 20 with further references).

25 bb) The Court of Appeal held that the contractual partner of the use and marketing agreement - concluded prior to the notarisation of the articles of association of the GmbH - was not the pre-founding company but the appellant (which did not yet exist at the time), subject to registration in the Commercial Register. The Commission drew this conclusion from the designation of "C. GmbH i. Gr." as the contracting party, the granting of rights of use subject to the condition precedent of entry in the Commercial Register and the fact that all parties were aware that the GmbH did not yet exist at the time. This interpretation cannot be challenged on appeal. It does not violate the laws of reasoning or the principles of experience, nor is it based on an incomplete assessment of the facts. The condition precedent would have been fulfilled with the registration of the appellant in the Commercial Register. The authorisation required under Section 177(1) of the German Civil Code would have been granted by the plaintiff at the latest - implicitly - with the filing of the action.

26 b) However, the defendant did not become a party to the contract because it was not actually represented by the then chairman of its board of directors. The conclusion of the contract was not compatible with the defendant's profit motive and therefore did not fall within the scope of the chairman's power of representation. This limitation of the power of representation does not result from the purpose of the foundation as such, but from the sufficiently clear and unambiguous provision to that effect in the defendant's articles of association.

27 aa) The power of representation of the foundation council is limited by § 26 para. 1 sentence 2 in conjunction with § 86 sentence 1 of the Civil Code (Bürgerliches Gesetzbuch - BGB) is broad and unlimited, unless it is restricted in accordance with § 26 para. 1 sentence 3 in conjunction with § 86 sentence 1 BGB. § 86 sentence 1 BGB is not limited by the Articles of Association. It is not subject to a general limitation based on the purpose of the foundation.

28 (1) However, the most recent case-law of the Federal Court of Justice assumes such a general restriction based on the purpose for both the association with legal capacity and the foundation. The power of representation of the executive board of an association with legal capacity, even if it is not limited by the articles pursuant to § 26 Paragraph 1 Sentence 3 BGB (or § 26 Paragraph 2 Sentence 2 BGB in the version valid until 29 September 2009 - identical in

content and almost identical in wording), is limited by the nature of the purpose of the association. The board cannot bind the association if the transaction concluded is clearly outside the scope of the association's purpose (BGH, judgement of 30 March 1953 - IV ZR 176/52, GRUR 1953, 446). The same should apply to legal declarations of obligation by the trustees of a foundation which go beyond the limits of the foundation's statutes (BGH, judgement of 16 January 1957 - IV ZR 221/56, LM No. 1 to § 85 BGB, not published in NJW 1957, 708). This case law was based on a decision of the Reichsgericht (German Federal Court of Justice), according to which a legal person under public law cannot be legally bound by a legal transaction which goes beyond its intended purpose, at least not if the other party to the transaction should have recognised the improper purpose by exercising due commercial care (RGZ 145, 311, 314; see also BGH, Judgment of 28 February 1956 - I ZR 84/54, BGHZ 20, 119, 123). In a later decision, the II. Civil Senate of the Federal Court of Justice, which is responsible for the law of associations, left open the question of the invalidity of legal acts of the executive board which go beyond the purpose of the association (BGH, judgement of 28 April 1980 - II ZR 193/79, Neue Juristische Wochenschrift 1980, 2799, 2800).

29 (2) In the literature on foundation and association law, this case law is evaluated differently.

30 (a) Part of the literature adheres to the older case law and generally limits the power of representation in accordance with the purpose of the foundation or association (on foundation law: Ebersbach, Handbuch des deutschen Stiftungsrechts, 1972, p. 108; Luth, Die Vertretungsbefugnis des Vorstandes in rechtsfähigen Stiftungen des Privatrechts, 2005, pp. 80 ff, 113; Palandt/Ellenberger, BGB, 80th edition, § 86 para. 1; Stengel, Stiftung und Personengesellschaft, 1993, p. 123 f; probably also Jakob/Picht in BeckOGK/BGB § 86 Para. 20 [as of 1 February 2021]; on association law: Heidel/Lochner in Heidel/Hüßtege/Mansel/Noack, BGB, 4th edition, § 26 para. 4; John, Die organisierte Rechtsperson, 1977, p. 118; Schöpflin, Der nicht rechtsfähige Verein, 2003, p. 251; *ibid.* in BeckOK/BGB § 26 para. 12 [until 1 February 2021]). It is argued that the foundation bodies are only fully subject to the limitation of the purpose of the assets if it is legally impossible for the foundation council to act otherwise. Otherwise, the full protection of the foundation against unauthorised acts of the organs is not guaranteed (Stengel, *loc. cit.*, p. 124). Furthermore, a parallel is drawn to voluntary representation (Luth, *loc. cit.*, p. 96 ff.) and it is emphasised that the founder's will is better protected if the purpose limits the binding power of representation of the executive board (Luth, *loc. cit.*, p. 96 ff.). With regard to the law of associations, it is argued that the limitation of the power of representation on the basis of the purpose is simpler than the application of the principles on the abuse of the power of representation and more appropriate because it emphasises the special significance of the purpose of the association; this also corresponds to the intention of the legislator (Schöpflin, Der nicht rechtsfähige Verein, *loc. cit.*). Other authors are of the opinion that it follows from the special nature of the purpose of the association that the executive board may not bind the association if a transaction is recognisably completely unrelated to the purpose of the association, so that it is irrelevant whether it is a dogmatic restriction of the power of representation or an obvious abuse of it (Otto in Stöber/Otto, Handbuch zum Vereinsrecht, 11th edition, para. 448). 448; similarly Waldner/Wörle-Himmel in Sauter/Schweyer/Waldner, Der eingetragene Verein, 20th ed. 233).

31 (b) On the contrary, the vast majority of the literature rejects a general restriction of the power of representation of the executive board on the basis of the foundation's purpose. Such a restriction would endanger legal certainty, neglect the protection of legal transactions and correspond to the *ultra vires* doctrine of Anglo-American origin, according to which legal

persons are not capable of law and action outside their purpose and which is alien to German private law (see Backert in BeckOK/BGB § 86 para. 3 [from 1 February 2021]; Burgard, *Gestaltungsfreiheit im Stiftungsrecht*, 2006, p. 238; Dylla, *Die Weisungsfunktion des Stiftungszwecks*, 2015, p. 191; Erman/Wiese, BGB, 16th edition, § 86 para. 2; Geibel, ZJS 2009, 339, 340 s; Kohnke, *Die Pflichten des Stiftungsvorstands aus Bundes- und Landesrecht*, 2009, p. 227; MüKoBGB/Weitemeyer, 8th edition, § 86 para. 16; Schwarz van Berk/Fischer in *Münchener Handbuch des Gesellschaftsrechts*, Volume 5, 5th edition, § 99 para. 35 f; Schwintek, *Vorstandskontrolle in rechtsfähigen Stiftungen bürgerlichen Rechts*, 2001, p. 181 f; Staudinger/Hüttemann/Rawert, BGB [2017], § 86 para. 18; Stumpf in Stumpf/Suerbaum/Schulte/Pauli, *Stiftungsrecht*, 3rd edition, § 86 BGB para. 13; Godron in Richter, *Stiftungsrecht*, 2019, § 6 para. 31; Hof in von Campenhausen/Richter, *Stiftungsrechts-Handbuch*, 4th edition, § 8 para. 36; on the law of associations: MüKoBGB/Leuschner, 8th edition, § 26 para. 25; Soergel/Hadding, BGB, 13th edition, § 26 para. 20; Staudinger/Schwennicke, BGB [2019], § 26 para. 111 f). The rejected view is also incompatible with the statutory provision that the power of representation of the executive board is unlimited, subject to the restrictive provisions of the articles of association (see Kohnke, loc. cit.).

32 (3) The Senate shares the latter view. The interpretation of § 26 para. 1 sentence 3 in conjunction with § 86 sentence 1 of the Civil Code. § 86 sentence 1 BGB shows that the power of representation of the foundation council is unlimited, provided that the statutes do not contain any restrictive provisions in individual cases and are not generally limited by the purpose of the foundation. Previous case law to the contrary (BGH, judgement of 16 January 1957, loc. cit.; also for association law: judgement of 30 March 1953, loc. cit.) has been abandoned by the Senate, which is now solely responsible for foundation law.

33 a) The wording of § 26 para. 1 sentences 2 and 3 BGB contradicts a general restriction of the power of representation based on the purpose of the company. Pursuant to § 26 Para. 1 sentence 2 BGB, the board represents the association in and out of court; it has the status of a legal representative. According to § 26 Paragraph 1 Sentence 3 BGB, the scope of the power of representation can be limited by the articles with effect vis-à-vis third parties. This means that the power of representation is generally unlimited and its limitation is only a possibility, i.e. not mandatory. A general limitation of the power of representation by purpose could have been expressed in the wording of the provision if the legislator had intended it, but this was not done.

34 b) From a systematic point of view, the exceptional character of the limitation of the power of representation can be derived from § 26 para. 1 sentences 2 and 3 BGB, which argues in favour of a restrictive interpretation. With the exception of associations and foundations with a charitable purpose, the unlimited power of representation in the representation of legal persons is a general principle of law which is regulated by statute for commercial companies (§ 37 Paragraph 2 Sentence 1 GmbHG, § 82 Paragraph 1 AktG, § 27 Paragraph 1 Sentence 1 BGB). 1 AktG, § 27 Para. 2 Sentence 1 GenG, also § 126 Para. 2 HGB for commercial partnerships; see BGH, judgement of 20 September 2078. BGH, judgement of 20 September 1962 - II ZR 209/61, BGHZ 38, 26, 33) and, according to the jurisdiction of the Federal Court of Justice, also applies to the representation of local authorities (e.g. Senate, judgement of 17 April 1997 - III ZR 98/96, WM 1997, 2410, 2411 f; BGH, judgement of 18 November 2016 - V ZR 266/14, BGHZ 213, 30 marginal no. 7, 12; each with further references). It is consistent with this to assume a generally unlimited power of representation in § 26 para. 1 sentences 2 and 3 of the Civil Code,



which can only be restricted by statutory provisions in individual cases.

35 (c) The legislative history also argues against a general limitation of the power of representation of the executive board to the purpose of the association or foundation. The proposal to define more precisely the scope of the board's power of legal representation did not find a majority in the legislative process (Prot. I, p. 1031 = Mugdan I, p. 612). Even the proposal that the legal person should (only) be directly authorised and bound by the legal transactions carried out by the board of directors "within the scope of its constitutional powers" (Achilles' motion no. 13, 1; cf. Jakobs/Schubert, *Die Beratung des BGB*, AT I, 1985, p. 224) did not become law. Even the statement in the explanatory memorandum that the power of representation of the board of directors extends to all 'legal transactions and legal acts within the legal sphere of the company' (Motion I, p. 97 = Mugdan I, p. 405) does not indicate otherwise. This sentence is to be understood in the sense that the scope of the power of representation corresponds to the legal capacity of the company. The first draft of the Civil Code initially assumed that the legal capacity of the legal person was limited to its capacity to hold assets (§ 41 BGB-E I = Mugdan I, p. LIX; Mot. I, p. 78 = Mugdan I, p. 395). This restriction was not included in the final version of the law. Rather, legal persons were to have the same legal capacity as natural persons, unless there were natural obstacles (Prot RJA 23 = Jakobs/Schubert loc. cit. p. 237). It follows from this decision of the legislature that the legal capacity of legal persons under private law is broadly defined and, in contrast to the ultra vires doctrine of the Anglo-American legal system, is not limited in particular by their purpose (see, for example, MüKoBGB/Leuschner loc. cit. before § 21 para. 39 f; Schmidt, *Gesellschaftsrecht*, 4th edition, p. 214; *ibid.*, *Verbandszweck und Rechtsfähigkeit im Vereinsrecht*, 1984, p. 40 s; Mark in BeckOGK/BGB § 21 para. 26 s [as of 1 April 2002]; Soergel/Hadding loc. cit. before § 21 para. 22 s; Staudinger/Schwennicke loc. cit. introduction to §§ 21 ss para. 71 s).

36 d) Finally, the purpose associated with the board's power of representation cannot be reconciled with a general restriction based on the purpose of the association. The legal person needs representation in order to be able to act in legal transactions. If it has full legal capacity, the power of representation of its board must in principle also be unlimited. Its protection does not require a general restriction of the power of representation by the purpose, but can be achieved by clearly and unambiguously formulated statutory provisions on restrictions of representation and by the legal institution of abuse of the power of representation (see e.g. BGH, judgement of 29 October 2020 - IX ZR 212/19, *Neue Juristische Wochenschrift* 2021, 239 margin no. 9 with further references).

37 (bb) However, the power of representation of the chairman of the defendant's executive board was effectively limited to the charitable purpose of the foundation on the basis of the provisions of § 10 para. 2 sentence 1 and § 15 para. 2 sentence 2 of the statutes.

38 (1) For an effective restriction of the power of representation of the executive board within the meaning of § 26 para. 1 sentence 3 BGB, it is necessary that the provision in the articles clearly and unambiguously states that it is not only of internal relevance for the association, but (also) limits the power of representation of the executive board externally (see BGH, judgements of 28.12.2008, p. 1). BGH, judgements of 28 April 1980, loc. cit.; of 22 April 1996 - II ZR 65/95, *Neue Juristische Wochenschrift* 1996, 866 and of 29 July 2014 - II ZR 243/13, *Neue Juristische Wochenschrift* 202, 202 para. 15). These requirements also apply to the scope of the limitation of the power of representation, which must be clearly and unambiguously defined in the interests of the association's capacity to act and - above all - the protection of

legal transactions (see also BayObLG, NJW-RR 2000, 41; OLG Nürnberg, MDR 2015, 961; BAG, NZA 2007, 526, 527 para. 15; Palandt/Ellenberger *ibid.* § 26 para. 6).

39 (2) Applying this standard, the power of representation of the chairman of the defendant's executive board was effectively limited by § 10 para. 2 sentence 1 and § 15 para. 2 sentence 2 of the statutes to the purpose of the foundation, which includes the criterion of non-profit-making.

40 a) The statutes, which the Senate is free to review and interpret on appeal (settled case-law; see only the Senate judgement of 14 October 1993 - III ZR 157/91, *Neue Juristische Wochenschrift* 1994, pp. 184, 185 with further references), clearly state in § 10.2 sentence 1 and § 15.2 sentence 2 that not only the powers in the internal relationship but also the power of representation must be limited externally. This follows from the wording of the provisions and - conversely - from the possibility of a more extensive limitation in the internal relationship pursuant to Article 10 para. 2 sentence 2 and Article 15 para. 2 sentence 3 of the Articles of Association.

41 b) The limitation to the "purpose of the foundation" is also sufficiently clear and unambiguous in content and scope. It includes the description of the purpose in § 2 para. 2, taking into account the provisions on the realisation of the purpose in § 2 paras. 3 to 8 and including the status as a non-profit organisation under tax law, which is also described as a purpose in § 2 para. 1 of the Statutes.

42 aa) It is true that § 2 para. 2 of the Statutes begins with the words "The purpose of the foundation is ...". However, it cannot be concluded that this paragraph alone is decisive. Section 2 of the statutes as a whole is entitled 'Purpose and functions of the foundation' and all the paragraphs therein deal with the 'purpose' (or: 'of the purposes') of the defendant foundation. The distinction made by the Court of Appeal between a 'narrow' and a 'broad' purpose (which includes the criterion of charity) is not apparent. The appeal rightly points out that the limitation of the power of representation of the board to the "purpose of the foundation" - which is sufficiently recognisable for legal transactions - is intended in particular to protect the foundation from entering into legal transactions that are detrimental to its status as a charitable foundation and the consequent risk of losing its recognition as a charitable foundation. The fact that the status as a non-profit organisation under tax law is of particular importance with regard to the "purpose of the foundation" is not only evident from the underlined reference at the beginning of § 2 of the statutes, but also from the fact that the structure of this provision of the statutes is clearly adapted to the requirements of the German Tax Code (*Abgabenordnung* - AO): According to § 59 AO, tax relief requires that the statutes clearly state the purpose of the company, that this purpose meets the requirements of §§ 52 to 55 AO and that it is pursued exclusively and directly. In the case of charitable purposes, § 52 AO applies, which - similar to § 2 (1) and (2) of the articles of association - contains a general description of the pursuit of charitable purposes (§ 1) and then lists the individual areas and activities of the pursuit of charitable purposes (§ 2). According to § 60 para. 1 sentence 1 AO, the purposes of the articles and the manner in which they are to be realised must be defined so precisely that it is possible to check on the basis of the articles whether the statutory requirements for tax advantages, which are to be determined separately by the tax authorities in accordance with § 60a AO, are met. These requirements are to be considered in detail in § 2 paras. 2 to 8 of the articles (see also § 1 of the model articles in accordance with Annex 1 to § 60 AO).

43 (bb) It is true that in individual cases - as in the present case - it can be very difficult to assess whether an agreement fulfils the requirements for non-profit status under tax law. However, in view of the immense variety of possible constellations of legal transactions, it is generally not possible for charitable foundations to provide more precise rules. The non-profit rules are based on the fulfilment of certain tax-privileged purposes, which are defined in terms of content and not formally on the basis of certain legal transactions. Anyone wishing to enter into a contract with a foundation recognised as charitable must generally be aware that legal transactions detrimental to the charitable status will not be covered by the board's power of representation. The trust placed in the foundation and the protection of legal transactions therefore do not justify the rejection of the validity of a statutory restriction on the power of representation of the foundation council, because the question of whether a contract is compatible with the status of a charitable organisation may be difficult to answer in individual cases. The provisions of § 179 BGB offer adequate protection for cases in which a contract fails due to the lack of power of representation of the foundation council.

44 cc) As the two lower courts have explained in more detail, the disputed use and marketing agreement does not comply with the provisions of the law on charitable organisations in §§ 51 et seq. AO. This ruling cannot be legally challenged; the appeal on points of law does not challenge it either. The contract is therefore in breach of § 2 para. 1 of the statutes and thus also contrary to the "purpose of the foundation" pursuant to § 10 para. 2 sentence 1 and § 15 para. 2 sentence 2 of the statutes. Consequently, the then chairman of the defendant's board of directors did not have the necessary power of representation to conclude the contract and the defendant did not become a party to the contract. As the Regional Court correctly stated, there is neither sufficient evidence nor legal scope for an authorisation under § 177 BGB, since the granting of such an authorisation would again be outside the power of representation of the foundation's board of directors, which alone is authorised to do so.

45 c) Since the then chairman of the foundation's board of trustees does not have the power of representation required for the conclusion of a contract between the parties to the proceedings, it is no longer relevant whether the plaintiff accepted the defendant's contractual offer in good time pursuant to § 147.2 of the Civil Code, whether the defendant actually rescinded the contract because of fraudulent misrepresentation or because the basis for the contract had been lost, or whether the contract is null and void pursuant to § 138 of the Civil Code.

46 3. The Regional Court was right to dismiss the plaintiff's non-contractual or pre-contractual claims for damages against the defendant. The plaintiff has not raised any objection to this in its appeal.