[DE] Who is entitled to the “kickback discounts” received by a media agency?

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Silke Hans
Institute of European Media Law (EMR), Saarbrücken/Brussels

In its decision of 16 June 2016, on a final appeal on points of law in a dispute between Haribo and the media agency Mediaplus (Case III ZR 282/14), the Bundesgerichtshof (Federal Court of Justice - BGH) set aside the judgment of the Oberlandesgericht München (Munich Higher Regional Court - OLG München) of 23 August 2014 (Case 7 U 4376/13). OLG München had previously ruled that there was no obligation to disclose information and accordingly held that Mediaplus was entitled to the bulk advertising discounts and referred the case back to the appeals court for retrial and a new decision.

In a multistage action, Haribo demanded that Mediaplus disclose information and pass on any discounts, especially free advertising slots, granted by media providers between 2004 and 2008 to the media agency Mediaagentur MagnaGlobalMediaPlus (MGMP) on purchases of advertising time (so-called “kickback discounts”). Via the purchasing holding company MGMP, the media agencies Mediaplus and Interpublic pooled their purchasing volumes when concluding advertising purchase contracts with media. However, the only media agency contract was between Mediaplus and Haribo, and the latter had not signed a separate contract with MGMP.

Owing to the absence of a contractual relationship between MGMP and Haribo, the Munich Higher Regional Court ruled there was no obligation to disclose information about and pass on any kickback discounts that MGMP had obtained on behalf of Mediaplus with the Haribo budget. Since no contract had been concluded between Haribo and MGMP, there was no media agency contract from which the aforementioned obligation could be inferred.

The Federal Court criticised the Munich Higher Regional Court for failing to correctly assess MGMP’s legal position, stating that it had not sufficiently clarified whether MGMP had somehow acted as a “front” for Mediaplus in order to obtain better terms and conditions for the two media companies involved, Mediaplus and Interpublic, by pooling purchases, or whether MGMP had provided a separate service of its own. Only in the latter case, the Court said, would the agency on no account have to pass on the discounts. However, if MGMP had acted as a “front”, Haribo could be entitled to call for the discount to be passed on.

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The Federal Court emphasised that, despite its fundamental importance for the media agency business, its decision related to an individual case and did not establish a precedent.

Urteil des BGH vom 16. Juni 2016 (Az. III ZR 282/14)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2016&Seite=16&nr=75407&pos=480&anz=2031

Judgment of the BGH of 16 June 2016 (Case III ZR 282/14)

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