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# Personal Liability of Directors in Antitrust Cases

## With Focus on German Law

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## Abstract

This thesis examines the question to what extent managing directors are personally liable for antitrust violations. In this regard, the paper focuses on whether companies can take recourse for cartel fines from their managing directors and board members in cases where these fines are imposed on the companies. Since this question is particularly discussed in German case law and literature, the thesis concentrates on the existence of such recourse claims under German law. Firstly, the antitrust sanction systems at European and German level are presented. In particular, the addressees of fines are identified, since at European level no fines can be imposed on natural persons for antitrust violations. The previous German case law on recourse claims against managing directors for antitrust fines is then explained, especially the diverging judgements in 2023. The thesis goes on to analyze whether these recourse claims should be affirmed or whether the respective company law bases for recourse claims must be teleologically reduced. The paper affirms the existence of recourse claims in antitrust cases. In this context, the thesis particularly emphasizes the purposes of cartel fines and argues that these are not jeopardized by the affirmation of recourse claims, but that the achievement of these purposes is even strengthened. The thesis takes the view that recourse claims must, in principle, be affirmed in full, reduced solely according to the usual principles for calculating damages. The paper concludes with a description of the legal situation regarding recourse claims in antitrust cases outside Germany and compares these legal systems and case law with those in Germany.

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## List of Abbreviations

| Abbreviation | Definition |
|---|---|
| **AG** | Stock Corporation (German: Aktiengesellschaft) |
| **AktG** | Stock Corporation Act (German: Aktiengesetz) |
| **Art.** | Article |
| **BGB** | German Civil Code (German: Bürgerliches Gesetzbuch) |
| **BGH** | German Federal Court (German: Bundesgerichtshof) |
| **CJEU** | Court of Justice of the European Union |
| **D&O** | Directors' and Officers' Liability Insurance |
| **E.g.** | For example |
| **ff.** | And following |
| **GmbH** | Limited Liability Company (German: Gesellschaft mit beschränkter Haftung) |
| **GmbHG** | Act on Limited Liability Companies |
| **GWB** | Act against Restraints of Competition (German: Gesetz gegen Wettbewerbsbeschränkungen) |
| **Ibid** | In the same place |
| **I.e.** | That is |
| **LAG** | Regional Labor Court (German: Landesarbeitsgericht) |
| **LG** | Regional Court (German: Landgericht) |
| **OLG** | Higher Regional Court (German: Oberlandesgericht) |
| **OWiG** | Act on Regulatory Offences (German: Ordnungswidrigkeitengesetz) |
| **Para.** | Paragraph |
| **Reg. 1/2003** | Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty |
| **TEC** | Treaty establishing the European Community |
| **TFEU** | Treaty on the Functioning of the European Union |
| **VbVG** | Austrian Association Responsibility Act (German: Verbandsverantwortlichkeitsgesetz) |

# 1. Introduction

*"Commission fines Apple over €1.8 billion over abusive App store rules for music streaming providers."*[1] *Commission fines ethanol producer Lantmännen €47.7 million over ethanol benchmarks cartel."*[2] *"EU court fines Google €4.1 billion for anti-competitive actions."*[3]

The fines imposed by the European Commission for infringements of competition law are becoming increasingly substantial. While fines in the millions were relatively unusual in the 1970s,[4] there is rarely a decision today that does not involve fines in the million range. In 2009, the billion-euro threshold was exceeded,[5] and in 2018, Google was fined the highest amount to date.[6] Consequently, companies face the threat of such significant fines if they engage in anti-competitive behavior. And it is not only the European Commission that imposes these fines; national authorities also levy fines in the millions.[7]

However, there is a question of how justified it is to impose these high sanctions solely on the companies themselves and indirectly on their shareholders. The reality is that companies cannot act on their own and therefore cannot form cartels by themselves. They act through their executive bodies and representatives. Since corporations as limited liability companies (e.g. German GmbH) and stock corporations (e.g. German AG) far outweigh partnerships (where the shareholders manage the business themselves),[8] companies are mostly represented externally not by their shareholders but by appointed managing directors and board members. These individuals have the capacity to make arrangements and sign contracts on behalf of the company – often without prior approval from the shareholders. And it is nothing new that managing directors do not always act in the best interests of the shareholders and the company, but rather in their own interests – the so-called agency problem.[9] This agency problem does not stop at cartel cases. It is often these managers who meet with competitors, make price-fixing arrangements, or exchange sensitive information.

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[1] European Commission Press Release on fining Apple over €1.8 billion of 4.3.2024.
[2] European Commission Press Release on fining Lantmännen over €47.7 million of 7.12.2023.
[3] *Realfonzo*, The Brussels Time, 14.9.2022.
[4] *Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht, VO 1/2003 Art. 23 para. 106.
[5] Fine of €1.06 imposed on Intel, European Commission Press Release on fining Intel over €1.06 bn of 13.5.2009; but decision readopted on 22.9.2023 because of the renvoi judgement of the General Court, see *Arslan*, 'The European Commission Revisits Intel, The Saga Continues', Cleary Antitrust Watch, 22.9.2023.
[6] *Realfonzo*, The Brussels Time, 14.9.2022.
[7] E.g. German Federal Cartel Office, Annual Report 2022/2023.
[8] E.g. Germany: There are twice as many corporations as partnerships. – See German Federal Statistical Office (Destatis), 'Rechtliche Einheiten nach zusammengefassten Rechtsformen', 4.12.2023.
[9] *Gogineni/Linn/Yadav*, Journal of Financial and Quantitative Analysis, Vol. 57, No. 4, June 2022, p. 1237.

Despite this, the European Commission ultimately imposes fines on the company and thus its shareholders, even in cases where the shareholders had no knowledge of such conduct. Should the company bear all the disadvantages in these cases, while the management escapes any consequences? In order to answer this, it must first be answered what purpose European antitrust fines actually serve and how this can best be achieved. In this context, the question arises whether the company should actually be sanctioned by the fines or the individual who is ultimately responsible for forming the cartel. Another important consideration is who should primarily be deterred from cartel formation: the company itself or the individuals representing it.

Moreover, competition law is not the only area that needs to be considered. In company law, corporations are generally supposed to be liable as entities. Managing directors should usually not be personally liable. It can also be questioned to what extent it is justifiable for individuals to face such high sums. This would likely lead to financial ruin for many managers.

All these questions arise when a company seeks to recover imposed cartel fines from its management through internal recourse. Personal liability of the management for antitrust violations is not provided for at the European level and in some cases only limited at national level. Thus, recourse claims often represent the only way for fines to reach those who are responsible for the infringement.

The existence of a recourse claim for cartel fines is highly controversial - in case law and in the literature. However, it is significant for companies as well as for managing directors to know if these claims exist. This could influence their behavior enormously. The existence of the claims should finally be determined and should not depend on the court, which just happens to decide on the individual case.

In this thesis, the existence of these recourse claims is discussed in detail. As the topic is particularly controversial in German case law and literature, the focus will be on the existence of the claims under German law. The first section will lay out the foundations of both European and German antitrust sanction systems, examining which fines can be imposed and who the respective addressees of these fines are. Subsequently, German case law regarding companies' recourse claims against their management in cartel cases will be explained.

The third section of this thesis will assess whether such recourse claims should exist, especially whether they are compatible with European and German competition law or whether recourse provisions under company law should be teleologically reduced. Further, the thesis will discuss whether fines can be fully claimed from the management or if reductions in the amount should be considered. Finally, the legal situation in other European countries and existing case law on this topic will be examined.

## 2. Background

### 2.1 Antitrust Sanction Systems

Competition law infringements in the European Union are subject to several antitrust sanction regimes – on the one hand the European and on the other hand the respective national one. In the following, it will first be briefly described how the legal consequences of competition law infringements are regulated at European level – and as an example for national law and due to the focus of this thesis – under German competition law.

#### 2.1.1 EU: Art. 103 TFEU, Art. 23 of Regulation 1/2003

Art. 101 and 102 TFEU contain the main competition law rules at European level. Art. 101 TFEU prohibits all agreements between undertakings that may restrict competition between the Member States. Art. 102 TFEU prohibits the abuse of a dominant position by undertakings which would result in a restriction of competition among Member States.

The key provisions for the legal consequences of anti-competitive behavior under Art. 101 and 102 TFEU are Art. 103 TFEU and Art. 23 Reg. 1/2003. Art. 103(2)(a) TFEU empowers the Council of the EU to enact regulations or directives to secure compliance with the prohibitions in Art. 101(2) and 102 TFEU by adopting provisions on fines and periodic penalty payments. The Council exercised this right by adopting “Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty”.

The sanctions for infringements of EU competition law mainly reside in Art. 23(2)(a) Reg. 1/2003. According to this provision, the European Commission is entitled to impose fines on undertakings and associations of undertakings that intentionally or negligently infringed Art. 81 or 82 of the Treaty. At the time of its enactment, Regulation 1/2003 still referred to the former Art. 81 and 82 of the Treaty establishing the European Community (TEC). With the entry into force of the Treaty on the Functioning of the European Union (TFEU), Art. 81 and 82 TEC became the almost identical Art. 101 and 102 TFEU. Therefore, according to unanimous opinion and Art. 5(3) of the Treaty of Lisbon[10], Regulation 1/2003 now applies to violations against Art. 101 and 102 TFEU.[11]

The fines should be determined in accordance with Art. 23(3) Reg. 1/2003, taking into account the gravity and duration of the infringement. However, according to Art. 23(2) Reg. 1/2003, they may not exceed 10 % of the total turnover of the undertaking in the previous financial year. The calculation of the amount is further explained in more detail in the respective guidelines for setting these fines.[12]

It is important to note that both the prohibitions in Art. 101 and 102 TFEU and the threat of fines in Art. 23(2) Reg. 1/2003 are only addressed to undertakings and associations of undertakings.[13] "Undertaking" means that the addressee is not just a legal person, but an economic unit that can also consist of several legal persons.[14] However, more important is that the European Commission is not authorized to impose fines on natural persons, i.e. neither on individual shareholders nor on managers who are responsible for the actual breach. The behavior of these individuals is attributed to the respective company.[15] For the attribution, it is not required that the owners of the undertaking have knowledge of the infringement.[16]

Furthermore, Art. 23(5) Reg. 1/2003 expressly states that the fines are not of a criminal nature. Even if this statement is not constitutive, the prevailing opinion agrees with it.[17] Apart from that, no criminal sanctions for natural persons are provided for at European level in cases of competition law infringements.

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[10] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13.12.2007.

[11] CJEU 29.3.2011 – joined cases C-201/09 P and C-216/09 P, ECLI:EU:C:2011:190, paras. 55 ff., 62; *Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht, VO 1/2003 Art. 23 para. 56; *Meyer*, in: Frankfurter Kommentar zum Kartellrecht, VO 1/2003 Art. 23 para. 40.

[12] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003.

[13] *Feddersen*, in: Grabitz/Hilf, Das Recht der Europäischen Union, Art. 23 VO 1/2003 para. 2; *Kienapfel*, in: von der Groeben/Schwarze/Hatje, Europäischen Unionsrecht, VO (EG) 1/2003 Art. 23 para. 20.

[14] *Kienapfel*, in: von der Groeben/Schwarze/Hatje, Europäischen Unionsrecht, VO (EG) 1/2003 Art. 23 para. 20.

[15] *Nowak*, in: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht, VerfVO Art. 23 para. 17.

[16] CJEU 7.6.1983 – joined cases 100 to 103/80, ECLI:EU:C:1983:158, para. 97; *Kienapfel*, in: von der Groeben/Schwarze/Hatje, Europäischen Unionsrecht, VO (EG) 1/2003 Art. 23 para. 21.

[17] *Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht, VO 1/2003 Art. 23 para. 328; it is still controversial whether the fines are only administrative or administrative criminal law and therefore belong to criminal law in the broader sense (which is probably mostly affirmed), (see *Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht, VO 1/2003 Art. 23 para. 328) but this can be left open for the purpose of this thesis.

### 2.1.2 Germany: §§ 81 ff. GWB

Under German law, §§ 81 ff. of the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) apply to competition law violations.

In the first paragraph of § 81 GWB, all infringements of the aforementioned provisions of Art. 101 and 102 TFEU are classified as administrative offences. Thus, violations of EU competition rules also qualify as administrative offences under German law. These violations can be sanctioned with fines, allowing German authorities to enforce European competition law as well. Yet, this only applies until the European Commission initiates proceedings. Once proceedings have been initiated, the national authorities are no longer entitled to apply Art. 101 and 102 TFEU in an identical case according to Art. 11(6), 16(2) Reg. 1/2003 and the principle of prohibition of double jeopardy (*ne bis in idem*).[18]

§ 81(2) no. 1 GWB qualifies infringements of German competition rules as administrative offences. Like Art. 101 and 102 TFEU, § 1 GWB prohibits all agreements between companies that restrict competition (cartel prohibition), and §§ 19 ff. GWB prohibit the abuse of a dominant market position by companies.

In contrast to Art. 23 Reg. 1/2003, § 81 GWB initially sanctions only natural persons. Legal persons can only become subject to sanctions through the provisions of § 30(1) of the Act on Regulatory Offences (Ordnungswidrigkeitengesetz, OWiG) and § 81a GWB. According to § 30(1) OWiG, the actions of a natural person authorized to represent the legal entity can be attributed to the respective legal person. In this way, an individual legal person can be fined.[19] A fine can only be imposed on multiple legal persons - approximidated to the economic unit under Art. 23(2) Reg. 1/2003 – in conjunction with § 81a GWB. According to § 81a GWB, other legal persons that were part of the company at the time of the infringement and that had a significant influence on the company of the violation can also be sanctioned.[20] Therefore, a type of "corporate fine" can also be imposed under German law.[21]

It is also worth noting that, unlike the European Commission, German authorities can sanction individuals for violations of Art. 101 and 102 TFEU of the European competition law. While the scope of offenders under Art. 101 and 102 TFEU is limited to undertakings and associations

[18] *Ritter/Wirtz*, in: Immenga/Mestmäcker, Wettbewerbsrecht, VO 1/2003 Art. 11 para. 23.
[19] *Kubiciel*, in: Esser/Rübenstahl/Saliger/Tsambikakis, Wirtschaftsstrafrecht, § 81 GWB para. 19.
[20] *Achenbach*, in: Frankfurter Kommentar zum Kartellrecht, § 81a GWB para. 5.
[21] Ibid.

of undertakings, § 9(1) OWiG allows the sanctioning of natural persons, even though they do not fulfil the criterion "undertaking/association of undertakings". According to § 9(1) OWiG, it is sufficient if this criterion is fulfilled by the represented company. Natural persons with representative authority, as managing directors or board members, can therefore be sanctioned according to § 81(1) GWB in conjunction with Art. 101 and 102 TFEU and § 9(1) OWiG, even if they do not have the characteristic of "undertaking" required by Art. 101 and 102 TFEU.[22]

Another differentiation within the German sanctioning system exists regarding the amount. In principle, the upper limit for all relevant infringements of Art. 101, 102 TFEU and §§ 1, 19 GWB is one million euros according to § 81c(1) sentence 1 GWB. However, according to § 81c(2) GWB, fines up to 10 % of the total turnover achieved by the company in the previous financial year can be imposed on companies, similar to European cartel law. This means that while the limit remains at one million euros for natural persons, it can lead to a higher fine for companies.

The German sanction system has in common with the European system that it does not provide for criminal sanctions for violations of competition law.[23] Only administrative fines are imposed.

### 2.2 German Case Law on Recourse Claims against Directors

In particular in German case law and literature, the existence of a recourse claim by a company against their management in cartel cases is highly controversial.

So far, most of the case law has rejected recourse claims against managing directors in cases of cartel fines. In the recent years, there have already been three judgments that agreed with this opinion. Firstly, in 2015, the Regional Labor Court of Düsseldorf (LAG Düsseldorf) denied such a claim in connection with the so-called *Schienenkartell*, where the German Federal Cartel Office fined a steel trading company EUR 191 million.[24] The accused managing director has entered into illegal cartel agreements with other rail producers and traders for at least ten years, especially practicing a quota and price cartel.[25] Although the court generally recognized the

[22] *Achenbach*, in: Frankfurter Kommentar zum Kartellrecht, § 81 GWB para. 8; *Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht, § 81 GWB para. 28.
[23] *Meyer-Lindemann*, in: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht, § 81 GWB para. 218.
[24] LAG Düsseldorf 20.1.2015 – 16 Sa 459/14, BeckRS 2015, 65417.
[25] Ibid.

possibility of recourse, it denied it in the case of cartel fines – whether imposed by the Federal Cartel Office or the European Commission.[26 27]

The Regional Court of Saarbrücken (LG Saarbrücken) followed this line in a case in which the European Commission fined a company EUR 71 million because of infringements of Art. 101 TFEU in the form of regular meetings, fixing and coordination of prices as well as exchange of sensitive business information.[28] The recourse claim against the chairman of the board was rejected in this case as well.[29]

Finally, in July 2023, the Higher Regional Court of Düsseldorf (OLG Düsseldorf) supported this legal opinion and rejected the recourse claim against a former managing director and chairman of the board who had participated in a price cartel and whose company was consequently fined EUR 4.1 million.[30 31] In favor of the defendant, the company had taken out a Directors' and Officers' Liability (D&O) Insurance.[32] Despite the general recognition of the recourse claims under company law, the underlying provisions were teleologically reduced, so that no claim was granted.[33]

The arguments of the courts were essentially the following:

- Purpose and function of the cartel fine: 1. Sanctioning purpose: The cartel law infringement constitutes a separate breach of duty by the company due to insufficient control of its executive bodies. This breach of duty could not be sanctioned as intended by the regulations if the fines could ultimately be passed on the managers.[34] 2. Deterrent effect: Cartel fines are intended to be the main element of deterrence. Passing them on to managing directors would weaken this effect.[35] 3. Absorption of profits: Among other

[26] Ibid.
[27] On appeal, however, the German Federal Labor Court overturned the ruling and referred the case back to the LAG Düsseldorf (BAG 29.6.2017 – 8 AZR 189/15, NJW 2018, 184). The LAG Düsseldorf had wrongly assumed jurisdiction, as the case concerned a preliminary question of antitrust law, i.e. which assessments result from the provisions of antitrust law with regard to liability as a board representative for fines imposed by the Federal Cartel Office. The LAG Düsseldorf then referred the matter to the Chamber for Antitrust Matters at Dortmund Regional Court (Beck-aktuell, 'Schienenkartell-Prozess: LAG Düsseldorf verweist Schadensersatzklage gegen Ex-Geschäftsführer an Kartellgericht', 30.1.2018). But the legal dispute ended in a settlement. (*Schubert*, Deutscher AnwaltSpiegel, 27.9.2023.)
[28] LG Saarbrücken 15.9.2020 – 7 HK O 6/16, BeckRS 2020, 32440 paras. 15 f.
[29] Ibid para. 121.
[30] OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279.
[31] Beck-aktuell, 'Keine persönliche Haftung für Unternehmenskartellbußen', 27.7.2023.
[32] OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279.
[33] Ibid.
[34] OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279 (1287) para. 165; LAG Düsseldorf 20.1.2015 – 16 Sa 459/14, BeckRS 2015, 65417.
[35] LG Saarbrücken 15.9.2020 – 7 HK O 6/16, BeckRS 2020, 32440 paras. 122 f.

things, the fine should lead to the absorption of profits generated by the antitrust violation. The profits have accrued to the company, not to the management.[36]

- Nature of the corporate fine: The legislator has made a conscious decision with the regulations that the cartel fine should be imposed on the company. It is obvious that the company itself cannot commit the offence but requires a natural person to do so on behalf of the company.[37]
- Differentiation of fines: According to § 81c GWB, fines against natural persons should not exceed one million euros. Fines against companies, on the other hand, can be significantly higher. This provision would be pointless if individuals also had to pay higher fines in the end.[38]
- Turnover as a criterion for calculating fines: The amount of the fine depends significantly on the turnover associated with the infringement. The management has no influence on this.[39]
- D&O insurance: Both the sanctioning and deterrence effects would be undermined if the fines were fully covered by D&O insurers through claiming recourse against directors.[40]

Just before the decision of the OLG Düsseldorf, another court deviated from the previous case law for the first time. The decision was based on a fine notice issued by the Federal Cartel Office against a construction company that had entered into anti-competitive agreements. In June 2023, the Regional Court of Dortmund (LG Dortmund) expressed its preliminary legal opinion in an advisory decision that a claim for damages by the company against the managing director could be considered if the managing director had participated in a cartel law violation, whereupon a fine was imposed on the company.[41] Following the judgment of the OLG Düsseldorf in July 2023, the LG Dortmund even supplemented its statements and maintained its preliminary legal opinion in August 2023.[42] The LG Dortmund essentially put forward the following arguments:

[36] OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279 para. 165; LAG Düsseldorf 20.01.2015 – 16 Sa 459/14, BeckRS 2015, 65417.
[37] OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279 para. 161.
[38] Ibid para. 162.
[39] Ibid para. 163 ff.
[40] Ibid para. 165, 168 ff.
[41] LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562.
[42] LG Dortmund 14.8.2023 – 8 O 5/22, r+s 2023, 977.

- No violation of the purpose and function of cartel fines: The deterrent effect is already achieved by companies advancing payments of the cartel fines and having the insolvency risk of their executive bodies. Additionally, reputational loss contributes to deterrence. On the contrary, recourse is the only possible sanction remaining for the company.[43] Thus, without recourse, managing directors might not be sufficiently deterred but could even be encouraged to commit violations of cartel law.[44]
- No circumvention of administrative sanctions: Civil law and administrative offences law are independent of each other and cannot restrict one another.[45] Moreover, administrative sanctions for companies are not circumvented because companies generally cannot get full reimbursement of fines from managing directors or D&O insurances due to their high amounts.[46]
- No undermining of fine differentiation in § 81c GWB: A distinction must be made between administrative offences law and civil law here as well. § 81c GWB concerns only administrative offences law, not civil law recourse.[47] Furthermore, there should be no differentiation between fines imposed under German or European law as this would lead to arbitrary outcomes.[48]
- Fine assessment: The managing director indeed has the opportunity to reduce the fine, for example by establishing a compliance system or applying for leniency, thereby reducing the risk of recourse.[49]

[43] LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562.
[44] Ibid; LG Dortmund 14.8.2023 – 8 O 5/22, r+s 2023, 977 para. 6.
[45] LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562.
[46] LG Dortmund 14.8.2023 – 8 O 5/22, r+s 2023, 977 para. 13.
[47] LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562.
[48] LG Dortmund 14.8.2023 – 8 O 5/22, r+s 2023, 977 para. 5.
[49] Ibid para. 10.

# 3. Personal Liability of Directors under German Law

In the following, the arguments of the case law presented above are analyzed and discussed with regard to the extent to which managing directors and board members should be personally liable for cartel law violations, particularly in the form of recourse claims.

## 3.1 Direct Claim under § 81 GWB

As already mentioned, there is no direct liability of managing directors and board members at European level. This can only exist under German law pursuant to § 81 GWB and, as already explained, is limited to one million euros according to § 81c(1) sentence 1 GWB.

## 3.2 Recourse Claims

However, the question arises to what extent managing directors and board members are indirectly liable when the respective company takes recourse against them. In this regard, the bases of the claim will first be examined. Its is followed by an assessment of whether there are grounds for a teleological reduction of the relevant company law provisions and whether a reduction of the claim must be considered.

### 3.2.1 Legal Bases of the Claim

The relevant company law rules in German law are § 43 of the Act on Limited Liability Companies (GmbHG) and § 93 of the Stock Corporation Act (AktG). These provisions state the cases in which managing directors may be personally liable under German law.

§ 43(1) GmbHG and § 93(1) AktG firstly set out the standard that managing directors and board members must observe in their work. Accordingly, managing directors of a German limited liability company (GmbH) and board members of a German stock corporation (AG) must exercise the diligence of a "prudent businessperson" in company matters – a legal term that is not further defined. §§ 43(2) GmbHG, 93(2) AktG establish the obligation for managers to pay damages. Thus, managing directors and board members who breach their duties must compensate the company for any resulting damages.

In order to affirm a recourse claim by the company for cartel fines under §§ 43(2) GmbHG, 93(2) AktG – leaving aside a teleological reduction for now – the following conditions must be met: In addition to the status of a managing director or board member, the most important requirement is a causal breach of duty. In addition, the managing director must be at fault and the company must have suffered a damage.[50]

In this respect, it seems reasonable to agree with the courts that these conditions are likely to be met.

For the examination, it is assumed that the position of a managing director actually exists or existed.

Furthermore, it must be examined whether managing directors breach their duties when they meet with competitors on behalf of the company, enter into agreements with them, or share sensitive information. It is evident that this behavior constitutes a breach of duty. One of the most important duties of a managing director is the duty to act lawfully in their work – the duty of legality.[51] This includes compliance with all legal provisions affecting the company, especially those subject to fines,[52] including competition law obligations.[53] Cartel agreements are expressly prohibited under Art. 101 TFEU and § 1 GWB. Consequently, managing directors violate their duty of legality by concluding such agreements.[54] Under § 93(1) sentence 2 AktG, directors can generally justify their behavior by stating that they could reasonably assume that they are acting for the benefit of the company (*business judgement rule*). However, in cartel cases, they are unlikely to invoke this justification, as it must be evident for them that they are not acting for the benefit of the company. A breach of duty is thus given.

A breach of the duty of legality is not the only breach of duty that can lead to a recourse claim against managing directors in this context. Managing directors, especially in larger companies, cannot fulfill all their tasks alone, which is why they delegate many tasks to other employees of the company. At this point, in addition to their duty of legality, managing directors and board members are also obliged to take organizational measures to prevent employees from violating legal provisions on behalf of the company and thus causing the company to violate the law.[55] Consequently, when delegating tasks, the managing director is responsible for the careful selection and instruction of the respective employee, as well as for supervising his subordinate

[50] *Fleischer*, in: Münchener Kommentar GmbHG, § 43 para. 266.
[51] BGH 10.7.2012 – VI ZR 341/10, NJW 2012, 3439 (3441); *Fleischer*, in: Münchener Kommentar GmbHG, § 43 para. 21; *Beurskens*, in: Noack/Servatius/Haas, GmbH-Gesetz, § 43 para. 10; Koch, AktG, § 93 para. 10.
[52] *Ziemons*, in: Michalski, GmbH-Gesetz, § 43 para. 63.
[53] *Fleischer*, in: Münchener Kommentar zum GmbHG, § 43 para. 30.
[54] See also the judgements: LAG Düsseldorf 20.1.2015 – 16 Sa 459/14, BeckRS 2015, 65417; OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279 (1281); LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562.
[55] *Beurskens*, in: Noack/Servatius/Haas, GmbH-Gesetz, § 43 para. 11; Koch, Aktiengesetz, § 93 para. 17.

employees by setting up a compliance system.[56] Therefore, a lack of supervision by the managing director can also constitute a breach of duty within the scope of §§ 43(2) GmbHG, 93(2) AktG. However, it should be noted that it may be comparatively more difficult for the company to prove that the managing director has breached his supervisory duties compared to a breach of the duty of legality. Accordingly, it might be easier for the managing director to prove that this was not the case by demonstrating that a proper compliance system had been set up.[57]

The further requirement of fault should be unproblematically affirmed in these cases. Even slight negligence is sufficient.[58] This means that managing directors do not even have to be aware that their agreements violate competition law regulations. It is sufficient that they disregard the due diligence of a prudent businessman.[59] Managing directors are expected to inform themselves about when they are violating competition law and which communication with competitors is permissible. In most cases where particularly prices are set, this will likely be done consciously anyway. The managing director cannot rely on his inexperience.[60] He has a duty to acquire this knowledge or seek expert advice.[61]

In addition, the company usually suffers damage due to cartel fines, for which the breach of duty in the cartel formation is causal. Because of the damaging event of cartel formation and the resulting fines, the company's financial position is likely to be worse than before the cartel formation.[62] To ensure sufficient sanctioning and deterrent effects, fines are usually set higher than the profits generated by the cartel violation. The Commission can expressly increase fines so that they exceed the profits realized.[63] Thus, actual damage only exists to the extent that fines exceed profits. The rules on the absorption of profits also apply within §§ 43 (2) GmbHG, 93(2) AktG.[64] However, this is discussed in detail in section 3.2.3. If the violation was

[56] *Verse*, in: Scholz, GmbHG, § 43 paras. 141 ff.; *Beurskens*, in: Noack/Servatius/Haas, GmbH-Gesetz, § 43 paras. 11, 29.
[57] Although the burden of proof of the company for the existence of a breach of duty under §§ 43(2) GmbHG, 93(2) AktG is comparatively low as the greater burden of proof lies with the managing director - BGH 4.11.2002 – II ZR 224/00, NZG 2003, 81; *Ziemons*, in: Michalski, GmbH-Gesetz, § 43 para. 475.
[58] §§ 43(1) GmbHG, 276 BGB.
[59] *Spindler*, in: Münchener Kommentar AktG, § 93 para. 223.
[60] Altmeppen, GmbHG, § 43 para. 4.
[61] *Ziemons*, in: Michalski, GmbH-Gesetz, § 43 para. 412.
[62] Calculation of damages according to the difference hypothesis method pursuant to § 249(1) BGB. The financial situation of the company before the damaging event is compared with that after this event.
[63] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, para. 31.
[64] BGH 20.9.2011 – II ZR 234/09, NZG 2011, 1271 (1274); *Fleischer*, in: Münchener Kommentar GmbHG, § 43 para. 328.

committed by an employee, any successful recourse claims against the employee must be taken into account when calculating the damage for a claim against the managing director.

Therefore, a recourse claim for cartel fines exists in principle.

#### 3.2.2 Teleological Reduction?

In the following, it will be examined whether the view of the OLG Düsseldorf should be agreed with, that the provisions of §§ 43(2) GmbHG, 93(2) AktG must be teleologically reduced and, as a result, a recourse claim must be denied.

The legal concept of teleological reduction is applied by courts when the wording of a law covers a case which, according to the purpose and intent of the provision and in the overall context of the relevant regulations, should not reasonably be covered by this law.[65] It should also always be kept in mind that high requirements are placed on the admissibility of teleological reduction.[66] It is not sufficient if it is merely an undesirable regulation. The provision must generally be accepted as long as it does not violate fundamental legal principles.[67]

##### 3.2.2.1 Purpose of Cartel Fines

Firstly, the purpose and function of cartel fines under European and German law is analyzed to assess whether a recourse claim against managing directors thwarts this purpose and accordingly requires a teleological reduction of recourse provisions under company law.

The primary objectives of cartel fines are sanctioning and deterrence.[68] The latter is divided into specific deterrence – deterring the individual company from repeating infringements – and general deterrence – deterring other companies from infringing competition law.[69] These objectives serve the overarching purpose of ensuring compliance with Art. 101 and 102 TFEU and protecting competition from distortions.[70] Additionally, there is the goal of profit

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[65] *Rebler/Huppertz*, NZV 2023, 345 paras. 13 ff.
[66] Ibid para. 15.
[67] Staudinger/Honsell (2018), BGB, Einleitung BGB para. 150.
[68] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, para. 4; CJEU 7.6.2007 – C-76/06, ECLI:EU:C:2007:326, BeckRS 2007, 70387 paras. 22, 30; CJEU 17.6.2010 – C-413/08 P, ECLI:EU:C:2010:346, BeckRS 2010, 90751 para. 102; European Commission Note, 'Fines for breaking EU Competition Law', November 2011.
[69] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, para. 4.
[70] Reg. 1/2003, recitals 9, 11; already Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, recitals; *Nowak*, in: Loewenheim/Meessen/Riesenkampff/Kersting/Meyer-Lindemann, Kartellrecht, VerfVO Art. 23 para. 2.

absorption, which states that companies should not profit from unlawfully obtained advantages.[71] This is discussed in detail in section 3.2.3.

Similarly, fines imposed by the Federal Cartel Office under §§ 81 ff. GWB aim at sanctioning[72] and deterrent effects[73] and allow for absorption of profits.[74]

In the context of these purposes and the discussion about the admissibility of a recourse claim, the question arises as to who should ultimately be sanctioned and deterred by cartel fines – the acting individuals or the respective company.

According to the wording, both sanctioning and deterrence effects are intended to occur at company level. The guidelines for setting fines state that <u>undertakings</u> involved in an infringement are to be sanctioned and other <u>undertakings</u> are to be deterred from an infringement.[75] However, it cannot be concluded from this that the purpose of cartel fines would be thwarted in case of recourse claims. Reference is made to "undertakings" because European competition law only provides for fines against undertakings. Referring to individual persons here could potentially make the European legal system contradictory.

a. Deterrence Purpose

At first, it will be addressed whether sufficient deterrent effects can exist if the fines ultimately impact the managing directors through a recourse claim.

For this purpose, it must first be considered what the parties involved contribute to the violation of competition law and what they should be deterred from accordingly. Companies cannot enter into agreements themselves and thus cannot independently form cartels. At most, they can contribute indirectly to violations of competition law through inadequate supervision, e.g., insufficient compliance systems, or selection of management.[76] The managing director, on the other hand, ultimately commits the actual violation of competition law by entering into agreements with competitors or by sharing and exchanging sensitive information with them.

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[71] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, para. 31.
[72] Guidelines for the assessment of fines in cartel offence proceedings of the Federal Cartel Office as of 11.10.2021, section I para. 5.
[73] German Federal Parliamentary Paper (Bundestagsdrucksache) 15/5049, p. 50.
[74] Guidelines for the assessment of fines in cartel offence proceedings of the Federal Cartel Office as of 11.10.2021, Abschnitt I para. 5.
[75] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, para. 4.
[76] *Beurskens*, in: Noack/Servatius/Haas, GmbH-Gesetz, § 43 para. 65.

With this in mind, two scenarios will be considered – one with and one without a recourse claim. In both scenarios, it is assumed that the managing director committed a violation of competition law without the knowledge of the shareholders and that the European Commission has subsequently imposed fines on the company. In the first case, it is up to the company to bear all fines. Recovery of costs from the managing director is excluded. As a result, the managing director does not have to fear any serious personal consequences. The company, intending to avoid future fines, intensifies its compliance efforts. It might even proceed to dismiss the current managing director and seek to appoint a more suitable one. Nevertheless, there is a possibility that both the new and possibly still incumbent managing director will circumvent the improved compliance structures and violate competition law again. If the former managing director has been dismissed, he is free to continue his career in another company where he could commit similar violations.

In the second scenario, the company has the option to take recourse from the managing director. The financial burden of the fine now lies with the managing director himself and not with the company. It is very likely that this direct impact will deter the managing director from further violations of competition law, as he will probably not be in a position to shoulder further fines in the millions. Even if the company's compliance system remains deficient – perhaps because the company does not fear serious consequences – it is still very likely that no further violations will occur due to the sufficient deterrent effect on the acting person – the managing director.

This consideration makes clear that it is primarily the managing director and not the company that plays a decisive role in competition law violations. The deterrent effect should therefore also be aimed at the managing director.[77] This is difficult to achieve without the affirmation of recourse claims.

A company's options to induce and supervise its executives to comply with laws are limited.[78] Effective compliance programs are essential but cannot prevent breaches of the law if managing directors do not adhere to them.[79] In smaller limited liability companies (GmbHs), closer control through direct communication between shareholders and management may be conceivable (but probably also rare), yet in large corporations with numerous shareholders, complete supervision is unrealistic. Competition law violations can be triggered by simple

[77] See also *Ginsburg/Wright*, Competition Policy International, Vol. 6, No. 2, Autumn 2010, p. 18.
[78] *Argenton/van Damme*, TILEC Discussion Paper No. 2014-053, p. 2; *Geradin*, European Parliament ECON Working Group on Competition Policy, 8.11.2011, p. 6.
[79] *Caliskan*, Liverpool Law Review (2019) 40, 1 (16).

actions such as emails, phone calls,[80] or a single meeting[81] and often escape early detection by compliance systems. Possibly, the violation is detected in retrospect when its effects are reflected in the company's revenues, but by then it is already too late for the company to prevent the violation.[82]

An overall observation of the management would also run counter to the entire system of these corporate forms. The board of directors is fundamentally responsible for managing the company.[83] Corporations function precisely because they have a board that represents them externally and can act largely independently without having to obtain shareholder approvals for every measure. Excessive control would counteract this principle.

Even in the selection of managing directors, a company can do no more than review resumes and conduct personal interviews. Moreover, managers have often been employed by the company for many years before committing a legal violation, so that the violation cannot be attributed to a mistake in the company's selection process.[84]

Companies also have no further promising means to compel their managing directors to behave properly.[85] *Calkins* explains his view how companies can increase their compliance: *"[The company] can emphasize the quality of its people, by hiring honest employees, encouraging them to live healthy lives, and taking care of them in time of need. It can create good incentives, by tying compensation to long-term results, by refraining from exerting undue pressure, and by paying supra-competitive wages employees will not want to risk losing. It can teach and remind. It can monitor and audit."*[86] However, this is likely to be a utopian scenario. As already shown, it is incomprehensible how companies are supposed to ensure that the people they hire are honest. Moreover, it is correct that every company should pay its employees well and not exert excessive pressure. But this is probably not the case with managing directors of large corporations, or it would probably not deter them from such agreements. The salary of these directors is unlikely to be the problem here. In addition, companies still have the option to dismiss the managing director. Yet this alone is unlikely to prevent the managing director from

[80] No formal agreements are required in this respect (*Eilmansberger/Kruis*, in: Streinz, EUV/AEUV, Art. 101 AEUV para. 1).
[81] CJEU 4.6.2009 – C-8/08, ECLI:EU:C:2009:343.
[82] Cf. *Argenton/van Damme*, TILEC Discussion Paper No. 2014-053, p. 3.
[83] E.g. § 76 para. 1 AktG.
[84] *Reuter*, CCZ 2023, 289 (294).
[85] *Polinsky/Shavell*, International Review of Law and Economics (1993) 13, 239 (240).
[86] *Calkins*, Law and Contemporary Problems, Vol. 60, No. 3, p. 147.

engaging in anti-competitive behavior. There will be sufficient alternative opportunities for them to carry out their work.[87]

The incentive for the managing director is thus still likely to be higher than the damage or consequences that could affect him in case of detection.[88] Managing directors benefit when the company increases its revenues. Employment contracts for managing directors usually provide for additional variable renumeration if certain targets, as specific sales revenues, are achieved.[89] Moreover, even an intentionally acting managing director would not be liable and even favored by his unlawful actions.[90]

Therefore, even sufficient deterrence on the part of the company cannot prevent cartel formation.[91] Ultimately, it is the action of the executive body itself that is decisive. However, if the executive body – the managing director – is directly affected by consequences and must fear recourse claims, this would not only not thwart the deterrent effect of cartel fines but could even enhance it.[92]

Furthermore, it can be argued that while recourse claims may deter the managing director, companies might have less incentive to take their supervisory duties seriously and to establish appropriate compliance programs. In response to this, it can be said that this does not constitute a reason for a teleological reduction, as the actual purpose – deterring cartel formation – is better served by recourse claims than by solely burdening the company. The fact that this could result in a reduced deterrent effect on companies should be harmless if the overall purpose is achieved.

In addition, it has been argued in response that a potential loss of reputation or risk of insolvency could still provide incentives for the company for compliance with its obligations.[93] The company must settle fines with the European Commission and thus make advance payments. Consequently, it would still bear the risk of not being reimbursed in the event of the managing director's insolvency. This is indeed plausible. As already mentioned, fines are often set in

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[87] *Polinsky/Shavell*, International Review of Law and Economics (1993) 13, 239 (240).
[88] See also *Caliskan*, Liverpool Law Review (1997) 40:1-29, p. 18: The Deterrence Approach Theory: *"The cost of the punishment to the wrongdoer should be greater than the potential benefit he/she would gain."*
[89] E.g. *Zander*, in: Beck'sches Fb Zivil-, Wirtschafts- und Unternehmensrecht, section E part 3 para. 9; *Wentrup*, in: Gebele/Scholz, Beck'sches Formularbuch Bürgerliches, Handels- und Wirtschaftsrecht, section IX part 48; cf. *Bayer/Scholz*, GmbHR 2015, 449 (452); *Bunte*, NJW 2018, 123 (126).
[90] *Eufinger*, BB 2024, 451 (455).
[91] *Reuter*, CCZ 2023, 289 (294).
[92] OECD Economics Department Working Papers No. 575, p. 16.
[93] LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562; *Bayer/Scholz*, GmbHR 2015, 449 (452).

millions or billions. With such high fines, it is conceivable that they cannot be easily borne by managing directors.

Moreover, companies could still fear reputational damage.[94] Violations of competition law and corresponding fines are immediately published by the European Commission in press releases and picked up by the press and all major law firm websites.[95] This could cast the company in a negative light, which could incentivize the company to behave lawfully. But it is doubtful whether these consequences provide sufficient deterrence for companies. It is already questionable whether there will be a lasting loss of reputation for the company. Most people will likely not even become aware of competition violations. And even if they do, such headlines are probably quickly forgotten. It is difficult to imagine that a company like Google would suffer a lasting loss of reputation from headlines about cartel fines.

However, these arguments are probably not decisive since cartel fines themselves are already unlikely to have a sufficiently deterrent effect to incentivize companies to comply with their supervisory duties. As already shown, even if a company complies with its supervisory duties, it cannot prevent violations of competition law. Moreover, good compliance systems are not even considered by the European Commission or the Federal Cartel Office when reducing fine amounts.[96]

To summarize, it can therefore be said that without recourse claims, the deterrent purpose is only achieved to a limited extent, and that those actually responsible are not deterred. In the case of a right of recourse, the deterrent purpose remains intact and, according to the view expressed here, can even be achieved more effectively.

b. Sanctioning Purpose

The same applies to the sanctioning purpose as to the purpose of deterrence. In this regard, the following quote should first be noted: *"Punishment is not justified by its future consequence of deterring harmful conduct, but rather on the ground that it is morally fitting that a person who*

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[94] *Pavlic*, Scientific Review Paper, Vol. 12, No 3, 2015, p. 188.
[95] Ibid.
[96] Guidelines on the method of setting fines imposed to Art. 23(2)(a) of Regulation No 1/2003, para. 29; Guidelines for the assessment of fines in cartel offence proceedings of the Federal Cartel Office as of 11.10.2021, para. 14; different in the US: here fines can be reduced, if an individual within high-level personnel participated in the infringement or if the infringement occurred even though the company had in place an effective compliance – see Guidelines Manual 2023 of the United States Sentencing Commission, § 8C2.5(a), (f); *Wils*, World Competition (2006), Vol. 29, No. 2, p. 23.

*does wrong should suffer in proportion to his wrongdoing."*[97] The individual committing the wrongdoing in the cases at hand is the managing director, not the company, which is why it is justified to sanction him. This argument is not to say that companies cannot be sanctioned in general because sanctions presuppose personal guilt. If a law provides for the sanctioning of a company, it means that the company can incur the sanction. In this respect, the view of the LAG Düsseldorf is to be agreed with.[98] However, the violation here has simply not been committed by the company but by the managing director, who ultimately will be sanctioned through the recourse claim. It would be disproportionate to deny a recourse claim for the company, as the fine would hit the wrong party then.[99] Thus, the sanctioning purpose is preserved and even strengthened.

Moreover, it is not agreed with the LAG Düsseldorf that the company should be sanctioned for its lack of organizational fault, which would not be possible by passing on the fine through a recourse claim.[100] Art. 23 (2)(a) Reg. 1/2003 explicitly states that fines are imposed when there is an infringement of Art. 81 or 82 of the Treaty (today Art. 101, 102 TFEU). These articles regulate actual competition law violations, as agreements with competitors that affect competition. None of these provisions refer to fines being imposed if a company does not adequately control its representatives and if there is an allegation of organizational fault.[101] The competition law violation should be sanctioned and as such is attributed to the company. This competition law violation is further sanctioned if a recourse claim is affirmed.

Thus, the affirmation of recourse claims preserves the purposes of cartel fines. These purposes do not give rise to a teleological reduction of §§ 43(2) GmbHG, 93(2) AktG.

c. Deterrence and Sanctioning Purpose in case of violation by other Employees

The question arises as to whether these deterrent and sanctioning purposes are also upheld if managing directors did not commit the cartel infringement themselves, but rather their subordinate employees. In this case, the managing director has "only" breached his duty of supervision.

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[97] *Wils*, World Competition (2006), Vol. 20, No. 2, p. 20; *Rawls*, Philosophical Review (1995), 3, p. 4 ff.
[98] LAG Düsseldorf 20.1.2015 – 16 Sa 459/14, BeckRS 2015, 65417.
[99] *Reuter*, CCZ 2023, 289 (294).
[100] LAG Düsseldorf 20.01.2015 – 16 Sa 459/14, BeckRS 2015, 65417.
[101] But opinion of LAG Düsseldorf 20.1.2015 – 16 Sa 459/14, BeckRS 2015, 65417.

However, here as well, the right of recourse remains the most effective way of deterring further infringements and sanctioning the person actually responsible.

A right of recourse against employees comparable to §§ 43(2) GmbHG, 93(2) AktG does not exist. Although there is also an employee liability, this can be very limited and is unlikely to lead to a recourse claim in full against the employee in the event of antitrust violations. The principles of internal damage compensation apply to recourse claims against employees. This involves weighing up the amount to which the employee should be liable. In particular, the degree of fault plays a role (in the case of slight negligence, a claim is often already denied), but also the amount of the salary in relation to the claim.[102] For claims in the millions, this might only result in a small recourse claim as there might be a large disproportion between the fine and the employee's salary. This is also justified. Managing directors have a different position in the company and more authority to act on behalf of the company. The salary and participation in sales increases usually also differ.

In addition to the employee, the managing director is the next person responsible for the infringement. He delegates the tasks to the employee and can and must supervise him. These duties are not the responsibility of the company. It is therefore more effective to encourage the managing director to fulfil his supervisory duties by ultimately imposing the fines on him.[103] The fines cannot have a lasting effect on the company. Even in the event of an infringement by the managing director, the company's obligations are limited to its supervisory and organizational duties. These are even lower in relation to the employee, as the managing director is usually the intermediary who fulfils these supervisory and organizational duties towards the employee.

It may seem contradictory to the opinion expressed above that there is only a minor deterrent effect on the company as it only has a duty of supervision and cannot finally prevent the infringement, but now the managing director also "only" has a duty of supervision. However, it must always be weighed up who is the closest to the infringement – here it is rather the managing director than the company. This means it is more effective to deter and sanction the managing director, as he has a better opportunity to prevent the infringement than the company in relation to the employee.

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[102] *Baumgärtner*, in: BeckOK BGB, Hau/Poseck, § 611a para. 97.
[103] See also *Ginsburg/Wright*, Competition Policy International, Vol. 6, No. 2, Autumn 2010, p. 18.

#### 3.2.2.2 The Role of D&O Insurances

In addition to the purposes of fines, other arguments are used to reject a right of recourse, which are presented below. Firstly, D&O insurances are often included in the argumentation.

Nowadays, companies often take out liability insurances to cover misconduct by their representatives.[104] These insurances are known as Directors' and Officers' insurance, or short as D&O insurance.[105] They are intended to indemnify the representative from claims by third parties or even the company itself due to misconduct in the performance of their duties for the company.[106] The contract is usually concluded between the company and the insurer for the benefit of the representative.[107] The conclusion of such insurances for managing directors is considered permissible.[108]

Concerns exist that taking out such insurance on behalf of the company could undermine the sanctioning and deterrence effects of cartel fines. It is argued that these effects would be nullified if the fines were ultimately borne by the D&O insurance through a recourse claim against the director.[109]

This is countered by the argument that cartel fines are often hardly insurable due to their amount, and they would probably not be covered by insurances because of the frequently intentional conduct of managing directors.[110]

This cannot be followed in its generality. It cannot be assumed that cartel fines always exceed the insured scope. Moreover, although intentional behavior of managing directors may indeed be prevalent, this cannot be generalized either.[111] Therefore, it must first be acknowledged that the assumption of cartel fines by D&O insurances reduces sanctioning and deterrence effects.

However, this should not lead to an exclusion of the recourse claim. The weakening of sanctioning and deterrence effects is inherently part of such liability insurances. There is generally a concern about collusive behavior between a company and its management.[112] This represents a general problem with these insurances and leads to concerns not only in cases

[104] *Fleischer*, in: Münchener Kommentar GmbHG, § 43 para. 467.
[105] *Fleischer*, in: Münchener Kommentar GmbHG, § 43 para. 467.
[106] *Terlau*, in: Römermann, Münchener Anwaltshandbuch GmbH-Recht, § 10 para. 289 ff.
[107] *Terlau*, in: Römermann, Münchener Anwaltshandbuch GmbH-Recht, § 10 para. 285.
[108] *Kraft/Hoffmann-Becking*, in: Münchener Handbuch des Gesellschaftsrechts Bd. 4, § 26 para. 61.
[109] OLG Düsseldorf 27.07.2023 – 6 U 1/22, NZG 2023, 1279 para. 168.
[110] LG Dortmund 14.8.2023 – 8 O 5/22, r+s 2023, 977 para. 13.
[111] See also *Beck*, NZKart 2023, 654 (658).
[112] *Spindler*, in: Münchener Kommentar AktG, § 93 para. 246; *Kästner*, AG 2000, 113 (115).

involving cartel fines. Therefore, it is up to legislators and courts to fundamentally restrict the conclusion of D&O insurances and the assumption of corresponding damages by them.[113] Then, D&O insurances would have to be declared generally inadmissible instead of denying a recourse claim for cartel fines based on this reason.

Moreover, sanctioning and deterrence purposes are not completely undermined by D&O insurances. In addition to the aforementioned amount and intent limits, a deductible agreed upon by the managing director/board member is common and even mandatory for stock corporations according to § 93(2) sentence 3 AktG.[114] Furthermore, frequent utilization of the insurance is likely to lead to corresponding premium increases. Additionally, an insurer will probably also refuse coverage if there is reason to believe that collusive behavior has occurred between a company and its managing director. In this respect, there is no guarantee for companies and managing directors that fines will be covered in all cases. Lastly, insurance policies are always structured differently. Liability claims due to competition restrictions can be excluded,[115] although this is probably rare in practice.[116] However, this could change if D&O insurances have to pay more frequently for cartel fines in the future. Moreover, premiums for including such claims in an insurance policy will likely increase accordingly.

Therefore, it can be concluded that the mere taking out of a D&O insurance does not automatically lead to a loss of sanctioning and deterrence effects and does not constitute a reason to deny recourse claims.

#### 3.2.2.3 Criteria for the Assessment of Fines

The fact that company-related criteria are occasionally considered when determining the amount of a fine does also not provide grounds to deny a recourse claim.[117]

It is correct that the basis for calculating the amount of the fine is the turnover associated with the infringement.[118] However, it is not agreed with the view that this implies that the managing

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[113] *Spindler*, in: Münchener Kommentar AktG, § 93 para. 246.
[114] See also General Terms and Conditions of Insurance for Directors' and Officers' Liability Insurance for Supervisory Board Members, Management Board Members and Managing Directors, A-6.5.
[115] General Terms and Conditions of Insurance for Directors' and Officers' Liability Insurance for Supervisory Board Members, Management Board Members and Managing Directors, A-7.9.
[116] *Dreher*, VersR 2015, 781 (786).
[117] "Assessment of the amount of fines only according to company-based criteria." – *Beck*, NZKart 2023, 654 (659).
[118] Guidelines on the method of setting fines imposed to Art. 23(2)(a) of Regulation No 1/2003 para. 13; Guidelines for the assessment of fines in cartel offence proceedings of the Federal Cartel Office as of 11.10.2021, para. 10; see also OLG Düsseldorf 27.7.2023 - 6 U 1/22, NZG 2023, 1279 (1287) para. 163.

director has no influence on the amount of the fine and that the guidelines thereby declare that the company should be the addressee of the fine.[119]

It is questionable why the managing director should not have an influence on the company's turnover. He is significantly responsible for it, especially for the amount which is generated through his own infringement. Of course, he cannot change this retrospectively, but neither can the company. Furthermore, other criteria in the fine assessment are more behavior-based, which suggests that the managing director is responsible for the amount of the final fine. Factors as the gravity and duration of the violation[120] – both criteria that a managing director can actively influence – are decisive in determining the amount of the fine. When assessing the gravity of an infringement, the nature and geographic scope of the infringement are also considered.[121] Everything associated with the infringement is also associated with the managing director. Conversely asked – how can a company or its shareholders influence the nature or duration of an infringement if they are not even aware of the violation? It is true that criteria as a company's market share[122] can no longer be influenced by a managing director. However, he certainly acts with knowledge of the size and market share of the company. Criteria as playing a leading role, instigating or terminating an infringement, or whether the infringement was committed negligently[123] are clearly behavior-based criteria.

Additionally, managing directors can issue a corporate statement within a leniency program to reduce fines.[124] This requires a "detailed description of the alleged cartel",[125] which can indeed only be submitted by a managing director if he was responsible for it.

#### 3.2.2.4 Particularities of German Antitrust Law

The exclusion of a recourse claim for fines under German antitrust law is repeatedly justified with the argument that the legislator has already consciously differentiated between fines for

[119] OLG Düsseldorf 27.7.2023 - 6 U 1/22, NZG 2023, 1279 (1287) paras. 163 ff.
[120] Guidelines on the method of setting fines imposed to Art. 23(2)(a) of Regulation No 1/2003 paras. 19, 22; Directive (EU) 2019/1 of the European Parliament and of the Council of 11.12.2018, para. 47.
[121] Directive (EU) 2019/1 of the European Parliament and of the Council of 11.12.2018, para. 47
[122] Guidelines on the method of setting fines imposed to Art. 23(2)(a) of Regulation No 1/2003, para. 22
[123] Ibid paras. 28, 29.
[124] Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8.12.2006, para. (9)(a); see also LG Dortmund 14.8.2023 – 8 O 5/22, r+s 2023, 977 para. 10.
[125] Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8.12.2006, para. (9)(a).

natural and legal persons in § 81c GWB, which provides for a fine of up to one million euros for natural persons. It is argued that this limit would be undermined by a recourse claim.[126]

However, it is not clear why this should exclude the application of recourse provisions under company law. On one hand, there are regulatory public fines. On the other hand, there is a civil liability for recourse which can independently exist.[127] Neither do the regulatory provisions stipulate that civil recourse is excluded, nor are there any indications in §§ 43(2) GmbHG, 93(2) AktG that they do not apply to public law fines. As long as the purposes pursued by the fines are maintained, which is the case as outlined above, merely this differentiation in fines does not provide grounds for a teleological reduction.

Furthermore, the differentiation in fines does not become ineffective by the affirmation of the recourse claim. It is not uncommon for managing directors and shareholders to commit antitrust violations together or at least for shareholders to be aware of them. In these cases, only a fine of up to one million euros can be imposed on the managing director; a recourse claim is excluded.

The LG Dortmund is to be agreed with that otherwise, it would also depend on chance whether a deterrence and sanctioning effect occurs with respect to the managing director.[128] If the Federal Cartel Office investigates and sanctions the violation, the effect would be affirmed; if the violation is pursued by the European Commission, the managing director would have nothing to fear. This could motivate managing directors to form cartels between Member States, which can hardly be intended by legislators.[129]

#### 3.2.2.5 Further Argumentation Approaches

Furthermore, additional arguments are presented for the various approaches.

As already indicated in connection with the differentiation of fines, it is discussed whether regulatory offence law and civil law can be applied independently alongside each other[130] or whether civil law undermines regulatory offence provisions and therefore must be restricted.[131]

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[126] OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279 (1287), para. 163; LAG Düsseldorf 20.1.2015 – 16 Sa 459/14, BeckRS 2015, 65417; *Ackermann*, NZKart 2018, 1 (2); *Bunte*, NJW 2018, 123 (126).
[127] Cf. LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562
[128] Cf. LG Dortmund 14.8.2023 – 8 O 5/22, r+s 2023, 977 para. 5.
[129] Ibid para. 6.
[130] LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562).
[131] LAG Düsseldorf 20.1.2015 – 16 Sa 459/14, BeckRS 2015, 65417; *Beck*, NZKart 2023, 654 (656).

In this regard, *Thomas*' view that it cannot be the legislator's intention for the two to coexist, as this would lead to a contradiction,[132] is questionable. It is argued that under antitrust fine regulations, the company should suffer a financial disadvantage as a result of the fine, but under company law, the company should not suffer a financial disadvantage due to the fine.[133] This statement is undifferentiated and incorrect. It is evident that the company should suffer a financial loss if it has violated antitrust laws. §§ 43(2) GmbHG, 93(2) AktG merely aim to compensate the company for damages caused by negligent or intentional breaches of duty by its managing directors and thus also to encourage managing directors to adhere to the law.[134] Therefore, the company should not suffer a financial loss insofar as it did not commit the violation itself, which is understandable. Moreover, the recourse claim ultimately only relates to the internal relationship between the company and its managing director. Initially, the financial loss always affects the company. The European Commission as well as the Federal Cartel Office can demand payment of the fines only from the company. It is therefore agreed with the view that regulatory law and civil law are applicable in parallel and do not contradict each other, even if recourse claims are affirmed.

In connection with this stands the argument of the OLG Düsseldorf that corporate fines necessarily require an underlying action by a natural person since they cannot act themselves. Consequently, the legislator must have had precisely this case in mind when imposing the fines on companies, that it is the managing director who commits the violation.[135] Otherwise, it would also be questionable why there are fines against companies at all, because the offence is never committed by them but by a natural person.[136] Here, one can only refer back to previous arguments. It is correct that violations within companies must always be committed by a natural person. However, no indication can be found that violations are always committed by managing directors. The recourse claim has certain requirements. If there is even minimal involvement of shareholders, no recourse claim exists. Therefore, companies primarily bear liability.

Further support for the affirmation of recourse claims under national law comes from the CJEU case law on apportionment among joint debtors in cartel fine cases. Even though this case is not comparable to the present one of recourse claims because fines were imposed on two companies - the parent company and the subsidiary - as joint debtors, an interesting statement

[132] *Thomas*, NZG 2015, 1409 (1412).
[133] Ibid.
[134] BGH 10.7.2018 – II ZR 24/17, NZG 2018, 1189 (1193) para. 44.
[135] OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279 para. 161.
[136] OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279 para. 162.

was made by the CJEU. The Court stated that the internal allocation of fines between joint debtors is a matter of national law and cannot be regulated by the Commission.[137] This could imply that it is permissible for national law to regulate the internal liability without contravening European antitrust law - which only prescribes against whom the Commission can impose fines externally.

Therefore, the other lines of argument also tend to speak in favor of affirming the right of recourse.

#### 3.2.2.6 Case-by-Case Assessment for the Affirmation of Recourse Claims

When considering whether the company law provisions should be teleologically reduced and therefore a right of recourse should be denied, one could also consider differentiating between individual cases. In this respect, there may be cases in which recourse claims are more appropriate than in other cases.

A right of recourse should for example always be affirmed if the managing director has intentionally committed the breach of antitrust law. Intent should not remain without sanction and suggests that the managing director is not deterred from committing further infringements without a sanction. Other cases could be that the managing director has committed repeated infringements (i.e. there has obviously been no deterrent effect on him) or the infringement has been committed over a long period of time. A right of recourse should also be affirmed when managing directors deliberately incite others to commit offences. A further indication could be that the managing director has personally benefited from the antitrust violation, e.g. by receiving a higher bonus. Yet this would probably only justify a recourse claim in the amount of the higher bonus, in particular for the purpose of profit absorption.

In other cases, it could be argued that it is less appropriate to affirm a recourse claim. This could be considered in the case of extremely high fines that are significantly disproportionate to the managing director's salary. Cases in which the managing director has already received a fine at national level could also be taken into account as this would already have a certain sanctioning and deterrent effect on him. The case of only a slightly negligent offence or, for example, a one-time telephone call or email exchange could also make a rejection of the right of recourse reasonable.

[137] CJEU 10.4.2014 – C 231/11 P, ECLI:EU:C:2014:256, BeckRS 2014, 80701 paras. 58, 62; *Kersting*, NZKart 2016, 147 (148).

According to the view expressed here, a case-by-case assessment is rejected. This would not solve the existing problem of disputes over recourse claims and would only lead to increased legal uncertainty. In this respect, it is the task of the legislator to amend the recourse provisions if there should be no right of recourse in such cases. As already explained above, the purposes of European and German antitrust law are not jeopardized if the claim is affirmed, which is why a teleological reduction is also rejected in individual cases.

In conclusion, there are no compelling arguments to deny companies their right of recourse against their managing directors; therefore, teleological reduction aimed at complete exclusion of the claim does not come into consideration.

#### 3.2.3 Amount of the Recourse Claim

The amount of the recourse claim is generally calculated according to the usual calculation of damages. The actual current financial position of the company is compared with a hypothetical financial position that the company would have had without the breach of duty by the managing director,[138] i.e. without the breach of antitrust law. Without this breach of duty, no fines would have been incurred, which means that the full amount of the fines represents a damage for the company.

Even if several managing directors were involved in the breach of duty, the company can demand compensation for the full amount from one managing director. In this respect, the managing directors are liable as joint and several debtors.[139] The managing director against whom a claim is made can then in turn take recourse against his co-managing directors within the framework of joint and several liability. The amount is based on the specific contributions to the breach of duty.

This forms the basis for the amount of the recourse claim. However, there are different approaches as to whether the amount of the recourse claim should be reduced. The various starting points for this will be briefly examined below.

First of all, it is often argued that the claim must be limited by the principle of profit absorption.[140] It is not uncommon for a company to have gained advantages from the antitrust

[138] *Fleischer*, in: Münchener Kommentar GmbHG, § 43 para. 316.
[139] *Ziemons*, in: Michalski, GmbH-Gesetz, § 43 para. 375.
[140] LG Dortmund 21.6.2023 – 8 O 5/22, BeckRS 2023, 14562; *Bayer/Scholz*, GmbHR 2015, 449 (455); *Kersting*, ZIP 2016, 1266 (1273); *Nietsch*, NJW 2024, 471 (476);

violation. This principle generally applies within the framework of §§ 43(2) GmbHG, 93(2) AktG.[141] In the context of profit absorption, these advantages accrued to the company are offset against the recourse claim and thus limit the claim.[142] The benefits are usually deducted directly from the claim without a declaration from the managing director.[143] Although the managing director bears the burden of proof for the existence and amount of benefits, the company may have a secondary burden of presentation.[144] This means that the company cannot simply deny the managing director's statements but must demonstrate that no benefits have accrued to it.[145]

The application of profit absorption is agreed upon. The guidelines expressly state that the absorption of profits is among other things a purpose of antitrust fines.[146] Thus, the affirmation of recourse claims in full would indeed violate European and German antitrust law. However, no further elaboration is required on this point since, as already mentioned, the principle of profit absorption applies anyway when calculating the amount of recourse claims under §§ 43(2) GmbHG, 93(2) AktG. Therefore, the application of this principle leaves no room for discussion. The amount of the reduction of the recourse claim is then, as already described, based on the managing director's submission as to the amount of benefits obtained through the cartel violation.

The only other approach that might still be considered viable here is applying contributory negligence principles under § 254 of the German Civil Code (BGB). Although applying § 254 BGB within §§ 43(2) GmbHG, 93(2) AktG is predominantly denied,[147] this could reduce claims proportionally to how much responsibility lies with the company itself - for example by neglecting its supervisory duties. Thus, the application of this principle could encourage companies to fulfill their obligations and strengthen deterrent effects on the company. With regard to the amount of the reduction, it is up to the managing director to demonstrate the extent to which the company has also breached its duties, and, in the event of a dispute, it would be up to the court to determine a quota of contributory negligence.

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[141] BGH 20.09.2011 – II ZR 234/09, NZG 2011, 1271 (1274); BGH 15.01.2013 – II ZR 90/11, NJW 2013, 1958 (1961); *Fleischer*, in: Münchener Kommentar GmbHG, § 43 para. 328.
[142] *Oetker*, in: Münchener Kommentar BGB, § 249 para. 228.
[143] Ibid para. 279.
[144] Ibid.
[145] Cf. *Stadler*, in: Musielak/Voit, Zivilprozessordnung, § 138 para. 10a.
[146] Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, para. 31.
[147] BGH 20.11.2014 – III ZR 509/13, NZG 2015, 38 (39); *Fleischer*, in: Münchener Kommentar GmbHG, § 43 para. 315; *Kleindieck*, in: Lutter/Hommelhoff, GmbH-Gesetz Kommentar, § 43 para. 47; other opinion: Altmeppen, GmbHG, § 43 para. 115; *Bayer/Scholz*, GmbHR 2016, 841 (846); *Nietsch*, NJW 2024, 471 (476).

In the context of § 254 BGB, § 254(2) BGB in particular must be applied. According to § 254(2) BGB, the injured party must be credited with its own fault in its claim for damages if it has failed to avert the damage – the so-called duty to minimize damages. This can especially arise in the case of antitrust violations. The European Commission offers the so-called leniency program to companies.[148] It gives companies involved in an antitrust violation the opportunity to obtain full immunity from fines. The condition is that they are the first company in the cartel to cooperate with the European Commission and provide it with sufficient evidence to investigate and uncover the cartel.[149] If the company refuses to take advantage of this opportunity, even though the managing director shows a willingness to cooperate with the authorities, the company is in breach of its duty to minimize damages. Under § 254(2) BGB, this must then lead to a significant reduction of the recourse claim. If it can be shown that the company would have had the chance to have the fine waived in full, this should even lead to the complete rejection of the recourse claim. Even if the application of § 254 BGB is predominantly rejected, this is often based on contributory negligence in general. No reference is made to the specific duty to minimize damages. This duty is sometimes even examined by courts in the context of § 43(2) GmbHG.[150] In addition, the leniency program is a key component of the European sanction system. The European Commission is dependent on the cooperation of the companies.[151] Furthermore, the program contributes to the purpose of the sanction system described above, namely it also has a deterrent effect on cartel formation and can create mistrust among cartel members.[152] Therefore, the duty to minimize damages must apply to recourse claims based on cartel fines according to the view expressed here as this can lead to an increase in leniency applications and thus also to an enhanced deterrent effect.

Furthermore, to limit the claim, it has been suggested to change the burden of proof within profit absorption to the disadvanatage of the companies,[153] apply the one million euro cap of § 81c GWB also in terms of recourse claims[154] or limit claims depending on individual cases measured by duty breaches and financial capacity of managing directors resulting from

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[148] Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8.12.2006.
[149] Ibid para. 8.
[150] LG Kiel 5.2.2016 – 14 HKO 134/12, BeckRS 2016, 7912; OLG München 21.3.2013 – 23 U 3344/12, NZI 2013, 542 (545).
[151] Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8.12.2006, recitals 3, 4.
[152] European Commission on Leniency, available at: https://competition-policy.ec.europa.eu/antitrust-and-cartels/leniency_en; OECD Competition Policy Roundtable Background Note, 'The Future of effective Leniency Programmes - Advancing Detection and Deterrence of Cartels, p. 6.
[153] *Kersting*, ZIP 2016, 1266 (1274).
[154] Labor Court Essen 19.12.2013 – 1 Ca 657/13, NZKart 2014, 193 (195); *Spindler*, in: Münchener Kommentar zum AktG, § 93 para. 211.

corporate duties of care and loyalty.[155] In this regard, it is argued in particular that recourse claims in the full amount are not reasonable, as these could destroy the livelihood of managing directors.[156]

All these approaches must be rejected. It is already unclear why there should still be a duty of care and loyalty towards a managing director who has not fulfilled his duties and has not behaved lawfully within his representation authority for the company.[157] A reversal of burden of proof would result in a new condition for a recourse claim, which lacks any legal basis.[158] Also, capping at one million euros according to § 81c GWB would seem arbitrary and does not have any legal foundation,[159] especially concerning European Commission cartel fines. Moreover, all approaches aim to protect managing directors; but there is no reason for this considering both cartel fine purposes and managing director behavior. The argument that high recourse claims could lead to the destruction of livelihoods does also not apply. This problem does not particularly refer to cartel fines. High recourse claims can also exist in other cases under §§ 43(2) GmbHG, 93(2) AktG. However, the legislator has decided to make liability unlimited. In this respect, it would be up to the legislator to limit liability. The purpose of cartel fines does not give rise to a teleological reduction as the purpose is not to prevent the destruction of managing directors' livelihoods, but to sanction and deter cartel offences.

#### 3.2.4 Conclusion

In conclusion, it can be stated that, in the case of antitrust fines imposed by either the European Commission or the Federal Cartel Office, a company can seek recourse from its responsible managing directors or board members under §§ 43(2) GmbHG, 93(2) AktG. There is no reason for a teleological reduction. A limitation of the claim is carried out in accordance with German damage law principles of profit absorption and – according to the view expressed here – contributory negligence, in particular the duty to minimize damages.

## 4. Legal Situation outside Germany

The following shows whether the question of recourse claims by companies against directors in cases of cartel fines also arose in other European legislations and whether the legal

[155] *Spindler*, in: Münchener Kommentar AktG, § 93 para. 211.
[156] Labor Court Essen 19.12.2013 – 1 Ca 657/13, NZKart 2014, 193 (195); *Lotze*, NZKart 2014, 162 (167).
[157] See also OLG Düsseldorf 27.7.2023 – 6 U 1/22, NZG 2023, 1279 para. 155.
[158] Ibid para. 154.
[159] Ibid para. 157.

consequences of cartel infringements for natural persons at national level are designed similarly to those in Germany.

## 4.1 Case Law outside Germany

Outside Germany, judgments on this topic have so far only occurred in the Netherlands and – before the Brexit – in the UK. In other jurisdictions, the issue does not seem to be discussed yet.

### 4.1.1 Dutch Case Law

At the end of 2022, the Dutch Court of Appeal Arnhem-Leeuwarden confirmed in second instance the opinion of the District Court Groningen that the managing director is obliged to compensate the cartel fines imposed on the company.[160] Trustees of insolvent companies asserted recourse claims against the former managing director of these companies. The companies had suffered damage because the European Commission had imposed fines for illegal cartel agreements in the North Sea shrimp trading. The managing director invoked, among other things, the case law of the LG Saarbrücken.[161] The court found that the managing director's behavior violated competition rules and that a managing director acting reasonably can be expected to comply with these regulations.[162] Regarding the objection based on the decision of the LG Saarbrücken, the court stated that the cases were not comparable because - unlike in the LG Saarbrücken's case – the present case concerned a company in insolvency. Thus, neither the cartel fine nor the recourse claim would have any further impacts on the company itself, so that the purpose and useful effect of Art. 101 TFEU would not be jeopardized. The recourse claim was solely in the interest of creditors.[163] The principles of profit absorption were also invoked by the managing director, but rejected for lack of evidence.[164] Furthermore, the court opened up a possibility for mitigation if full compensation would lead to unacceptable consequences for the managing director, which he did not sufficiently demonstrate here.[165]

[160] Court of Appeal Arnhem-Leeuwarden 6.12.2022 - 200.284.936/01, ECLI:NL:GHARL:2022:10497.
[161] Ibid para. 6.4.
[162] Ibid para. 6.17.
[163] Ibid para. 6.5.
[164] Ibid para. 6.12.
[165] Ibid paras. 7.12 ff.

### 4.1.2 British Case Law

In the British case, companies of the Safeway Group asserted claims for damages against former employees and managing directors of the group. The Office of Fair Trading had announced the imposition of fines for breaches of British competition law.[166] The High Court still assumed that the claimants had a realistic prospect of enforcing the claims for damages.[167] The defendants particularly relied on the so-called *ex turpi causa* maxim, according to which a claimant cannot generally demand compensation for damages that are consequences of his own criminal offence or his own unlawful actions.[168] However, the court could not recognize any misconduct on the part of the claimant and found that the claimant had to accept responsibility for the defendants' misconduct only by virtue of the law and general rules of representation.[169] Therefore, the *ex turpi causa* maxim was not applicable here. The Court of Appeal then rejected any claims for damages against the managing directors and employees.[170] It stated that the competition violation lay in the company's agreement.[171] Thus, the company itself was personally liable for the fines.[172] It would be incompatible with liability if they could claim recourse in the civil courts.[173] Moreover, the aim of competition law is to protect the public by imposing specific obligations on companies. This principle would be compromised if companies could shift liability to employees and D&O insurers. The obligation to provide effective preventive measures to achieve a deterrent effect is the responsibility of the companies themselves.[174]

### 4.1.3 Assessment of the Decisions

It is noticeable that the reasoning of the courts is significantly less nuanced than German case law. In the Dutch judgment, the general existence of a recourse claim is discussed much more broadly than a limitation of the claim e.g. in form of a teleological reduction, although the existence of the claim should be quite unproblematic as it is evident that there has been a breach of duty by the managing director. A discussion of the purpose and function of cartel fines in the light of European competition law is only briefly addressed in connection with the presentation

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[166] England and Wales High Court (Commercial Court) 15.1.2010 – [2010] EWHC 11 (Comm).
[167] Ibid para. 131.
[168] England and Wales Court of Appeal 21. December 2010 - [2011] 2 All ER 841, para. 16.
[169] England and Wales High Court (Commercial Court) 15.1.2010 – [2010] EWHC 11 (Comm), paras. 74, 76.
[170] England and Wales Court of Appeal 21. December 2010 - [2011] 2 All ER 841.
[171] Ibid paras. 36, 42.
[172] Ibid paras. 26, 29.
[173] Ibid para. 29.
[174] Ibid para. 42.

of the decision of the LG Saarbrücken. There is not even an attempt to formulate what the purpose of cartel fines is. The discussion merely refers to a possible impairment of the "useful" effect of Art. 101 TFEU. However, it would be interesting to have a deeper analysis of the purpose of cartel fines in relation to an insolvent company. It has already been explained above that neither the sanctioning nor deterrence purpose is thwarted, even if a solvent company claims recourse. This must apply even more to an insolvent company. Here, neither a sanctioning nor deterrence effect can occur against the company itself. The only sanctioning and deterrence effect can still be exerted against the managing director. However, it is not comprehensible why a limitation of the claim should be possible if the claim leads to "unacceptable" consequences for the managing director which was mentioned by the Dutch Court. This has already been denied under German law according to the view represented here. The Dutch court also provides no basis for such a limitation.

Regarding the British judgment, the approach of the court of first instance as to why the company should be liable when there is no misconduct on its part is indeed understandable. However, any reference to the purpose and function of cartel fines was neglected here as well. This discussion then took place in the second instance but was also too undifferentiated. It was overemphasized that the cartel fine is a "personal" fine for the company. The argument that companies are responsible for providing appropriate preventive measures is also problematic as the companies do not have suitable means to force their managing directors and employees to comply with legal requirements, as already pointed out above.

## 4.2 Legal Provisions on Personal Liability in other European Jurisdictions

The following will exemplify how the personal liability of natural persons and the possibilities for recourse against managing directors are structured in other legal systems compared to Germany.

### 4.2.1 Austria

In Austria, managing directors face a significantly lower risk of being held liable for cartel fines than in Germany. Firstly, national competition authorities cannot impose fines on managing directors or board members for violations of antitrust law. According to § 29(1) of the Cartel Act, fines can only be imposed on an entrepreneur or an association of companies. Pursuant to § 29(2) of the Cartel Act, the fine is expressly directed against infringements by companies.

However, according to § 29(3) of the Cartel Act, the fine must be imposed on entrepreneurs who operated the relevant company.

In principle, recourse claims against managing directors are conceivable. Possibilities for recourse against managing directors comparable to German law exist according to § 84(2) of the Austrian Stock Corporation Act as well as § 25(2) of the Austrian Limited Liability Companies Act. However, it is disputed whether this possibility of recourse for cartel fines is excluded under Austrian law. The Austrian legislator has enacted a legal provision that gives rise to discussion in this context. According to § 11 of the Association Responsibility Act (Verbandsverantwortlichkeitsgesetz, VbVG), recourse against decision-makers or employees for sanctions and legal consequences affecting the association is excluded under this federal law. § 11 VbVG expressly refers only to sanctions under "this federal law", i.e. the VbVG. In this respect, there is a discussion in the literature as to whether the exclusion according to § 11 VbVG should also apply analogously to antitrust law and thus to cartel fines.[175]

### 4.2.2 Ireland

In contrast, the legal situation is stricter in countries such as Ireland, where natural persons face criminal sanctions. According to Section 8 of the Competition Act 2002 (amended), managing directors can expect fines and imprisonment for up to 10 years. While until last September the maximum limit for fines was at 5 million euros, this has been significantly increased by the Competition Act 2022 (amended) and is now at 50 million euros.[176] Furthermore, Section 8(6) of the Competition Act 2002 (amended) states that managing directors who have only approved or consented to the company's infringements can be punished as if they had committed the infringement themselves. In addition, managing directors who have been convicted of a competition law violation are automatically disqualified under Section 839(1) of the Companies Act 2014.[177]

Recourse claims are considered according to Section 232(1)(b) in conjunction with Section 228(1)(a) or (c) of the Companies Act 2014.[178] According to these provisions, a director of a company has the duties to act in good faith and to exercise its powers only for lawful purposes.

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175 *Madari*, GesRZ 1/2021, pp. 18 ff.
176 McCann Fitzgerald LLP, 'The Competition and Consumer Protection Commission's new Administrative Leniency Policy is now active', 18.10.2023.
177 *McKenna*, 'Competition Law Risks and Priorities for Directors in Ireland', 2.9.2019.
178 Practical Law Corporate Ireland, 'Memorandum for Incoming Directors on Their Duties and Potential Liabilities (Ireland)'.

A breach of antitrust regulations could constitute a violation of these duties. Under Section 232(1)(b) of the Companies Act 2014, the director is obliged to compensate the company for any losses or damages resulting from these breaches of duty. According to Section 233, however, the court has the option to relieve the managing director from liability.[179] This gives the impression that recourse possibilities are not as extensive as in Germany, although it remains open how liability is actually adjudicated under Common Law principles. On the other hand, courts and competition authorities have broader options for taking direct action against managing directors.

### 4.2.3 France

French competition law, similar to Irish law, also provides for imprisonment and fines for natural persons who have played a decisive role in competition law infringements. According to Article L420-6 of the Code de Commerce, they can be punished with imprisonment of up to four years and fines of up to 75,000 euros by the criminal courts;[180] consequently, these are significantly lower penalties than in Irish law.

The basis for a recourse claim by a stock company against its management in cases of cartel fines could be find in Article L225-251 of the Code de Commerce.[181] According to this article, directors are liable to the company for breaches of legal provisions applicable to French joint-stock companies, among other things. This could potentially include violations of competition law.

### 4.2.4 Belgium

Belgian competition law provides comparatively low fines for natural persons. According to Art. IV.79 § 4 in conjunction with Art. IV.1 § 4 of the Code de droit économique, the range for these fines is from 100 to 10,000 euros.[182]

There could also be a basis for recourse claim in Belgian company law. Under Art. 2:56 of the Code des sociétés et des associations, directors are liable to legal entities for mistakes made in the performance of their duties.[183] This could potentially include violations of competition law

[179] Ibid.
[180] *Condomines/Galmice/Saez*, 'Cartels & Leniency Laws and Regulations France 2024', 2.11.2023
[181] *Kömpf*, 'Directors' Liability In French Corporations – What You Should Know Before Accepting A Position As CEO In France, Directly Or Through A Company', 3.12.2021.
[182] Belgian Competition Authority on Cartels, available at: https://www.belgiancompetition.be/en/cartels.
[183] *Hellinx*, International Company and Commercial Law Review 2018, 29(11), pp. 649 ff.

as well. However, it is notable that Art. 2:57 of the Code des sociétés et des associations provides a cap on the amount of the claim based on the average annual turnover of the company. Even if a claim for cartel fines is affirmed, companies would therefore likely not be able to demand full recourse of the fine.

#### 4.2.5 Conclusion

Compared to other European legal systems, German competition law seems to be in the middle ground regarding legal consequences for natural persons. Although no imprisonment is provided and fines do not have a criminal nature, the maximum limit for fines is set relatively high at one million euros.

With regard to recourse claims for cartel fines, it appears that claims against managing directors are more extensively structured compared to other jurisdictions, which is particularly evident given that there are only a few judgments and discussions about this in other European countries. Nevertheless, most legal systems are likely to have legal bases for recourse claims as well. Therefore, it cannot be ruled out that such proceedings may occur outside Germany and thus German case law could provide points of reference for discussions in other European countries.

## 5. Conclusion

Following the two decisions in 2023, the question of whether companies can assert recourse claims against their management in cases of competition law violations is likely to lead to increased discussions, particularly in Germany, but also in other European countries and possibly even at EU level.

According to the current legal situation, recourse claims under German law must be affirmed - for fines imposed by the European Commission or the German Federal Cartel Office. There are no reasons for a teleological reduction of the company law provisions in this respect.

However, the question of recourse claims may reignite debates on how a deterrent effect can best be achieved and whether legal changes are necessary. Clarifications, such as those created in Austria with § 11 VbVG, are possible – even if this appears to be only a supposed clarification that opens up further discussions. At company law level, restrictions on recourse claims, as have been implemented in Belgium, could be considered. The long-running debate in competition law about the introduction of criminal penalties is also likely to be revived.

In terms of the issue of recourse claims, it might also be useful to discuss whether it would make sense to change the European antitrust sanction system to provide for fines for natural persons, similar to many national legal systems. While this would not eliminate the problem of recourse claims but would require even more thorough examination, it would certainly increase the deterrent effect. In this way, there would also be a harmonization among Member States that a deterrent effect exists on all managing directors, regardless of which Member State they are from. This should be considered before contemplating criminal penalties.

In addition, the discussions on the topic are now likely to be accompanied by increased uncertainty – both for companies and for managing directors. On the one hand, managing directors can no longer feel secure that they will not be held liable for cartel fines imposed on the company due to the initial affirmation of a recourse claim by case law. On the other hand, divergent case law does not provide companies with certainty about passing on cartel fines in cases of their management's violations. However, companies may have experienced a glimmer of hope with the ruling of the LG Dortmund.

In practice, companies, managing directors and D&O insurers should consider the following due to the divergent decisions: Companies should develop their compliance systems as well as possible and fulfill their supervisory duties. Even if managing directors cannot be completely supervised, this may help discover inconsistencies. Managing directors, on the other hand, should familiarize themselves with competition law provisions. In case of any uncertainties, they should prudently seek expert advice or suggest a resolution of approval by the shareholders. Furthermore, they should agree with the respective company that it takes out an appropriate D&O insurance policy that covers an adequate amount and specifically includes cartel fines. D&O insurers should also prepare for companies and managing directors now having a great interest in including cartel fines in insurance agreements. Accordingly, D&O insurers should adjust their policies and premiums since taking over cartel fines poses a risk for insurers to carry high sums.

It remains to be seen how the Federal Court will decide on this topic. The appeal against the decision of the OLG Düsseldorf has already been submitted.[184] A referral to the European Court of Justice regarding the interpretation of European competition law provisions and whether they allow for recourse claims against managing directors at national level would also be desirable.

[184] DStR-Aktuell 2023, 189; Reference No. BGH: KZR 74/23.

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