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Management Liability for Companies' Antitrust Fines

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ABSTRACT

If an antitrust fine has been imposed on a company, the question of managerial recourse liability arises. We present court cases from the Netherlands, the UK, and Germany, in part denying managerial liability and claiming that it would undermine the fines' deterrent effect. We analyse whether managerial liability for companies' antitrust fines should be limited or banned to prevent, on the one hand, the company or its shareholders being under-deterred or, on the other hand, the company's management being over-deterred. Regarding the former, we argue that a ban on managerial liability – which would have to be accompanied by a ban on other types of financial sanctions – would take an indispensable governance instrument out of the hands of shareholders. This holds true despite the availability of D&O insurance. Regarding the latter, we identify risks of over-deterrence but also see mitigating mechanisms at work. We conclude that, while a restriction on managerial liability may be regarded as a reasonable measure, this should be viewed as lying within the discretion of company law legislation and jurisprudence but not as a mandatory implication of antitrust fining laws and policy.

Keywords: antitrust law, cartels, antitrust fines, deterrence, managerial liability, recourse liability, antitrust compliance, D&O insurance, EU law, principle of effectiveness

JEL classification: K21, K22, K42, L40

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I. Introduction

Where a company is fined for antitrust infringements, the question that arises is whether it can recover the fine or at least some of it from its directors and officers. These managers may be held responsible for infringing compliance duties, either by committing an antitrust infringement through their own dealings or by failing to take sufficient precautions to prevent infringements by other employees.

Courts in the UK and Germany have found that the success of such recourse actions[1] could be contrary to the policy of antitrust fining. The fine, so it has been argued, must ultimately burden shareholders. If they could pass the fine onto their managers, this would undermine the intended deterrent effect. The company would no longer have sufficient incentive to ensure the effective prevention of antitrust infringements.

Although courts have relied on various doctrinal considerations rooted in national law to reject claims for recourse against (former[2]) managers, the main instrumental argument that has been invoked is the effect of managerial liability on the deterrent objective of antitrust fines. This argument may be particularly relevant in the context of EU antitrust infringements: given the obligation of sincere cooperation, Member State law must not undermine the effective sanctioning of EU antitrust law violations – whether fines are imposed by the Commission or by national antitrust authorities. The effectiveness requirements of EU law may therefore be crucial when considering managerial liability under national law.

Against this background, this contribution focuses on whether the deterrent effect contemplated by antitrust fines indeed requires a ban or a limitation of managerial liability. It will be argued that neither is the case. While the availability of recourse claims against the management may weaken the deterrent effect of the fine on the company and its shareholders, a prohibition on recourse claims – as well as the prohibition on other internal sanctions or salary cuts that result in a flow of money from the managers to the company triggered by the fined antitrust infringement – would deprive the company of an essential tool for controlling the behaviour of its managers.

This also holds true if the availability of D&O insurance is included in the analysis. It is true that the deterrent effect of cartel fines may not work perfectly as a result of deficiencies in the design of D&O insurance and its regulatory framework. However, we do not find that these deficiencies are of such magnitude as to render the deterrent effect of management liability for antitrust fines impossible or to undermine it on a broad scale. Should this prove to be different, this should be a reason to regulate D&O insurance but not to call into question managers' recourse liability.

[1] We use the term 'recourse action' to denote any lawsuit filed against (former) directors and officers aimed at compensating the company for an antitrust fine payment, regardless of whether the lawsuit is brought by way of a shareholder derivative suit or filed by the (new) board of directors or by any other entity authorized to act on behalf of the company.

[2] In practice, liability actions are often brought after a change of management (as it can go hand in hand with a change of control, for example) or by a liquidator after the company has gone bankrupt.

Finally, although unlimited recourse liability may entail a risk of over-deterrence with respect to managers, these risks are not considered to be so significant as to make a limitation indispensable to the policy of antitrust fines.

We will present our findings in six steps. First, we highlight five cases in which management liability for antitrust fines has been litigated. While, in one Dutch case, a former director was held liable, the judgments in the UK and Germany provide us with a good illustration of how courts have justified the denial of recourse liability against directors and officers and how they have framed their arguments (section II). Second, we will show that the main purpose of antitrust fines is to prevent infringements and that the intended deterrent effect is based on the threat of a cash outflow from the company in the event of an infringement. Consequently, when defining the scope of management liability for antitrust fines, company law must in principle take into account the deterrence rationale of such fines. In the case of an infringement of EU antitrust law, this may result in the EU law principles having a regulatory impact on national company law (section III). In the main sections of this contribution, which consider management liability as an instrument of corporate law and governance, we examine whether, in order to ensure adequate deterrence as envisaged by the law on antitrust fines, management's liability should be barred or limited to prevent under-deterrence of the company. We will advocate that this is not the case (section IV) even if D&O insurance and its regulatory shortcomings are taken into account (section V). At the same time, from the point of view of the adequate deterrent effect of antitrust fines, there is no need to limit managerial liability in order to avoid over-deterrence of the management (section VI). We then briefly consider the parallel issue of managerial liability for antitrust damages owed by the company to cartel victims (section VII). Section VIII concludes.

II. Recourse Actions Before National Courts: the Netherlands vs the UK and Germany

Managerial liability cases are typically negotiated out of the public eye. For different reasons, the parties involved – the companies and their (former) managers, as well as the insurers – have an interest in reaching a discreet settlement. This is all the more true when it comes to recourse liability for antitrust fines. But the fact that these disputes are usually resolved through out-of-court settlements or arbitration proceedings does not mean that the legal framework was irrelevant. After all, the parties negotiate in the shadow of the law.

Below we present five cases[3] that came to light when they were litigated in court. While the court in the *Heiploeg* case found in favour of the plaintiffs, the recourse claims in the four other cases were dismissed. These latter judgments are particularly instructive for us

[3] It should also be noted that there are ongoing proceedings before the Regional Court of Dortmund, Germany, which also relate to the recourse liability arising from the imposition of antitrust fines. The court has made public two indicative orders ('*Hinweisbeschlüsse*') in which it explains why, in contrast to the decisions of the three German courts analysed below, it is of the opinion that the recourse liability of managers cannot be excluded. The court intends to stay the proceedings with regard to the recourse liability for the antitrust fines as it expects the Federal Court of Justice (Bundesgerichtshof) to clarify the legal situation in the course of an appeal against the judgment of the Düsseldorf Higher Regional Court in the *Stainless Steel Companies* case presented below in section II.5. See LG Dortmund 8 O 5/22 (Kart), order of 21.6.2023 and order of 14.8.2023, juris ('Construction Cartel').

because they contain considerations as to why managerial liability may be considered problematic in cases of antitrust fines.

1. The *Heiploeg* Case

The Dutch District Court of Noord-Nederland provides us with an example of a judgment confirming the liability of a former company director for an antitrust fine.[4] In 2013, the European Commission had fined four companies for their participation in the North Sea shrimps cartel.[5] The fine imposed on Heiploeg was the highest, amounting to approximately EUR 27 million. When the company went bankrupt in 2014, Heiploeg's trustees in bankruptcy claimed damages from various former managing and supervisory directors. While most of the directors settled with the trustees (apparently in consultation with their D&O insurers[6]), one did not and was subsequently sued in court.

The court found that the defendant director had been directly involved in the administration of the (fined) price fixing arrangements and had thus breached his managerial duties towards the company. As a result, the claim based on directors' liability under Article 2:9 of the Dutch Civil Code succeeded, and the former director was held personally liable for damages in excess of EUR 13 million. The court did not seem to be concerned about the fact that the company (or its shareholders) could, by way of such a recourse action based on managerial liability, in effect relieve itself of a substantial part of the fine. The court did not discuss whether this would undermine the effectiveness of the sanction, in particular its deterrent effect.

In discussing the requirement of 'relativity' ('*relativiteit*'),[7] the court referred to the ECJ's finding in *Courage* that the 'practical effect' of Article 101(1) TFEU 'would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.[8] In *Courage*, as is well known, the ECJ had clarified that an innkeeper's right to claim antitrust damages from a brewery must not be a priori denied on the grounds that he himself was a party to the supply contract in violation of Article 101 TFEU. The ECJ had thus forced a change in English law, from which the Court of Appeal of England and Wales had meant to derive an exclusion of the damages claim based on the 'unclean hands' defence and the presumption that Article 101 TFEU was not intended

[4] Rechtbank Noord-Nederland 23.9.2020, *Gerald Willem Breuker*, ECLI:NL:RBNNE:2020:3292. See Tialda Beetstra and Mariska Van De Sanden, 'The Dutch District Court of Noord-Nederland Holds a Former Director Personally Liable for the North Sea Shrimps Cartel *(Gerard Willem Breuker)*' (September 2020) Concurrences N°97360.

[5] *Shrimps* (Case AT.39633) [2014] OJ C 453/16.

[6] Rechtbank Noord-Nederland (n 4) para 2.34.

[7] Ibid paras 4.52–53. The requirement of 'relativity' is a principle of Dutch tort law laid down in Article 6:163 of the Burgerlijk Wetboek, the Dutch Civil Code. The provision aims at limiting tortious liability: 'there is no obligation to pay compensation if the violated norm does not aim to protect against the damage as suffered by the injured party'. According to the case law of the Dutch Supreme Court, 'when answering the question of whether the requirement of article 6:163 BW … is fulfilled it comes down to the purpose and purport of the violated norm, on the basis of which it must be ascertained to which persons, to which damage and to what manners in which the damage occurs the protection of the violated norm extends'. Hoge Raad der Nederlanden 20 September 2019 NJ 2020/233, ECLI:NL:HR:2019:1409, para 3.1.3. A corresponding provision has been adopted, for example, in Article 3:201 of the Principles of European Tort Law (PETL).

[8] Case C-453/99 *Courage v Crehan* ECLI:EU:C:2001:465, para 26.

to protect parties to an agreement in violation of antitrust law.[9] By referring to the *Courage* doctrine at this point, the Dutch court seemed to imply that recourse claims by the fined company against its (former) director must not be excluded from the outset on the grounds that the company was itself responsible for the antitrust infringement (in that the conduct of its director establishes the company's fault). This would represent a remarkable extension of the ECJ's statement in *Courage* into the realm of managerial liability and, indeed, would address concerns[10] that led the Court of Appeal of England and Wales (which, of course, is no longer bound by ECJ case law) to deny managerial liability in the *Safeway Stores* case analysed below. In any event, the Dutch District Court considered that, in the case of a fine for breach of EU antitrust law, general principles of EU law could have an impact on the scope of any resulting managerial liability. This is an aspect that will be discussed in more detail below.[11]

Finally, it is worth noting that the director's liability insurance company apparently stated that there was no cover because the claim had been filed late.[12] In addition, the insurance company reserved the right to refuse payment because the insurance policy excluded deliberate intent.[13]

2. The *Safeway Stores* Case

Under English law, the judgment in *Safeway Stores v Twigger* set a precedent for the denial of recourse liability for an antitrust penalty. In 2005, the UK's then antitrust authority, the Office of Fair Trading ('OFT'), had launched an antitrust investigation against Safeway because of its participation in the 'dairy retail price initiatives'. In its decision, the authority imposed a penalty of GBP 5,691,553 on the firm for illegal coordination pursuant to section 2(1) in Chapter I of the Competition Act 1998.[14]

Even before the penalty decision was adopted, Safeway had brought a civil liability action against 11 former employees including directors. While the High Court did not strike out the action,[15] the Court of Appeal held that, even if the defendants had been responsible for the illegal activities, the shareholders were not entitled to recover the penalty. The court argued that the cartel fine was grounded on the personal responsibility on the part of the company; it was not regarded as a case of vicarious liability. Directors and employees could not be held liable for breaches of the Competition Act 1998. Therefore, under the principle of *ex turpi causa non oritur actio*, Safeway was barred from bringing recourse claims based on breach of contract and/or fiduciary duties and/or negligence. The rationale of the principle, pursuant to which no compensation could be sought for damage resulting from one's own criminal act, was described as ensuring consistency between the criminal and the civil justice systems:

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[9] Ibid paras 11–12.

[10] But cf. Beetstra and Van De Sanden (n 4) 5 (suggesting that the judgment might have disregarded Heiploeg's responsibility for the antitrust violation as the action was brought by the trustees in bankruptcy and not by the company itself).

[11] See below section III.3.

[12] See Rechtbank Noord-Nederland (n 4) para 4.2.

[13] Beetstra and Van De Sanden (n 4) 5.

[14] Office of Fair Trading, 26 July 2011, CA98/03/2011, Case CE/3094/03, *Dairy retail price initiatives*, 373.

[15] *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm), [2010] 3 All ER 577 (Flaux J).

> It would be inconsistent for a claimant to be criminally and personally liable (or liable to pay penalties to a regulator such as the OFT) but for the same claimant to say to a civil court that he is not personally answerable for that conduct.[16]

In the principal judgment, delivered by Longmore LJ, the significance of this consideration is essentially explained by how competition law conceptualizes the 'undertaking' as the addressee of the antitrust laws and the ensuing liability of the company for the antitrust infringement, reaching the conclusion that '[t]he liability is a "personal" one and that is enough to make the acts of the company "personal" for the purpose of the application of the maxim [*ex turpi causa non oritur actio*]'.[17]

The concurring judgments given by Lloyd and Pill LJJ reinforced that the antitrust fine relates to the company's own, 'personal' responsibility, which was seen as being reflected in the fact that only the company could appeal against the imposition of the fine.[18] Remarkably for present purposes, Pill LJ added a consideration to indicate the functional logic behind the rhetoric of 'consistency' between criminal (or quasi-criminal) liability and civil liability:[19]

> The policy of the 1998 Act is to protect the public and to do so by imposing obligations on the undertaking specifically. The policy of the statute would be undermined if undertakings were able to pass on the liability to their employees, or the employees' D & O insurers. Only if the undertaking itself bears the responsibilities, and meets the consequences of their nonobservance, are the public protected. A deterrent effect is contemplated and the obligation to provide effective preventative measures is upon the undertaking itself … In the present case, the policy of the Act attributes liability to the undertaking and it is for the undertaking to organise its affairs in such a way as can prevent infringements.[20]

In other words, Pill LJ argued that the deterrence effect as intended by the antitrust fine would be undermined if the shareholders did not have to shoulder the burden of the fine but could shift it to the directors and other employees and ultimately possibly further to the D&O insurers. The reference to D&O insurance indicates that the court assumed that, if managerial liability were affirmed, it would be covered by the defendant's D&O insurance policies.[21]

Although the Supreme Court did not allow an appeal,[22] some observations in its subsequent judgment in *Jetivia v Bilta*[23] have raised expectations that the court might consider overruling *Safeway* if it were to rule on the matter in the future.[24] The case did not involve antitrust infringements but a carousel fraud that raised questions regarding the attribution of knowledge and state of mind of directors to the company and when this would bar action of the company against directors for breach of fiduciary duty. In their judgment, Lord Toulson and Lord Hodge disagreed with the principal reasoning in *Safeway Stores*. Pointing to

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[16] *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 [16] (Longmore LJ).
[17] Ibid [27] (Longmore LJ).
[18] Ibid [36] (Lloyd LJ), [43] (Pill LJ).
[19] Ibid [29] (Longmore LJ).
[20] Ibid [44], [46] (Pill LJ).
[21] Anna Morfey and Conall Patton, '*Safeway Stores Ltd v Twigger*: The Buck Stops Here' [2011] *Comp Law* 57, 63.
[22] Order dated 4 April 2011.
[23] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23.
[24] Aidan Robertson, 'Pulling the Twigger: Directors and Employees Back in the Firing Line for Damages after Jetivia in the Supreme Court?' (2015) 36 ECLR 325, 326.

criticism in the academic literature,[25] they argued that the company's personal responsibility for the antitrust infringement and its ensuing personal liability for the penalty could not in itself explain why the company should be barred from having recourse for the antitrust penalty against its directors. Such a limitation of recourse would instead require countervailing policy reasons.[26] Lord Toulson and Lord Hodge accepted that:

> there may be circumstances where the nature of a statutory code, and the need to ensure its effectiveness, may provide a policy reason for not permitting a company to pursue a claim of the kind brought in Safeway

but left undecided whether they found Pill LJ's reasoning convincing.[27] The five other Supreme Court justices in *Jetivia* were less outspoken with regard to *Safeway Stores*. Lord Mance expressed his sympathy with the position taken by Lords Toulson and Hodge, but declined to engage in any further discussion;[28] Lord Sumption, without further ado, treated *Safeway* as good law;[29] Lord Neuberger, with whom Lords Clarke and Carnwath agreed, saw no need to discuss the case, but stated that he 'would take a great deal of persuading that the Court of Appeal did not arrive at the correct conclusion in that case'.[30]

3. The *Villeroy & Boch* Case

In 2010, the European Commission fined Villeroy & Boch AG, the parent company of the Villeroy & Boch group, around EUR 70 million for price fixing; various subsidiaries were jointly and severally liable with the parent company for partial amounts of the fine.[31] Appeals brought against the decision were essentially unsuccessful.[32] Subsequently, the company took legal action against its former CEO before the Regional Court of Saarbrücken.[33] During his term of office, he was alleged to have violated preventive and supervisory duties. In particular, with regard to the Austrian subsidiary of the plaintiff, the defendant CEO was said not to have raised awareness of antitrust risks and not to have considered introducing compliance training.

For stock corporations under German law – such as the plaintiff in the *Villeroy & Boch* case – section 93(2) of the Stock Corporation Act[34] codifies directors' liability for breach of duties owed to the company. Based thereon, the plaintiff claimed that the former CEO was liable for damages of approximately EUR 2.3 million resulting from the fine imposed by the Commission and of approximately EUR 143,000 from legal advice in course of the antitrust proceedings. This relatively small proportion – in relation to the total fine and the total legal

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[25] Peter Watts, 'Illegality and Agency Law: Authorising Illegal Action' (2011) *Journal of Business Law* 213, 220.
[26] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23 [159]–[161] (Lord Toulson and Lord Hodge).
[27] Ibid [162].
[28] Ibid [52] (Lord Mance).
[29] Ibid [83] (Lord Sumption).
[30] Ibid [31] (Lord Neuberger).
[31] *Bathroom Fittings and Fixtures* (Case COMP/39092) [2010] OJ C 348/12.
[32] See Case C–656/13 P *Villeroy & Boch Austria GmbH v Commission* ECLI:EU:C:2017:54.
[33] LG Saarbrücken 15.9.2020, 7 HK O 6/16 *Vorstandsregress* Juris.
[34] Section 93(2), 1st sentence of the German Stock Corporation Act reads: 'Members of the management board acting in dereliction of their duties are liable as joint and several debtors to compensate the company for any damage resulting from their actions'. (Translation taken from <https://www.gesetze-im-internet.de/englisch_aktg/index.html>.)

fees[35] – resulted from the fact that the action only concerned the cartel violations committed by the Austrian subsidiary during the defendant's term of office.[36]

The Regional Court dismissed the case as it considered the recourse claim time-barred. By way of obiter dictum, the court nonetheless gave its opinion on whether, as a matter of principle, such a claim could be brought:

> The Commission is … committed to a policy of public enforcement of cartels. Fines imposed by it must have a sufficient deterrent effect. Within this framework, cartel fines constitute the essential element of the deterrent effect against undertakings.
>
> The possibility of recourse of cartel fines would mitigate this effect and thus affect the core of public cartel enforcement by the Commission and, thus, of Articles 101 and 105 TFEU. Even if company law that governs the liability of directors is national law, it must not contradict the so-called general principles of EU law; these are [the principles of] non-discrimination and the protection of effet utile … However, the effet utile in relation to Articles 101 and 105 TFEU would be violated by the possibility of recourse [actions] for fines, because the company fined under EU [antitrust] law could pass on part of the fine to board members … In addition, there would also be the risk of further passing on to D&O insurers.[37]

Thus, the court clearly indicated that it was prepared to consider the passing on of an antitrust fine by way of recourse actions to directors and, ultimately, to D&O insurers, as unacceptable and, indeed, in the case of breach of EU competition law, as a violation of the principle of effectiveness. On appeal, the Saarland Higher Regional Court upheld the dismissal of the action on the grounds of limitation. With regard to the possibility of a recourse as such, the court stopped short of describing the Regional Court's considerations as 'respectable' ('*beachtlich*').[38]

As reported in the media, the legal representatives of the D&O insurers followed the proceedings closely.[39] Indeed, an insurer to whom a third-party notice had been addressed by a defendant director, and who could then intervene in the litigation, would be bound by the court's findings (in particular as to a breach of duty by the director and any resulting loss) in any subsequent litigation. Whether and to what extent the insurers would have had to cover the directors' liability in this case is, however, idle speculation. After all, the above reference shows that the court saw the possibility that insurance cover would step in for the defendant's benefit and was therefore inclined to reject liability from the outset.

4. The *Thyssenkrupp* Case

The recourse actions in the *Thyssenkrupp* case attracted a lot of attention. After the Bundeskartellamt had imposed two fines totalling EUR 191 million[40] on ThyssenKrupp GfT

[35] In total, the lawyers' fees amounted to around EUR 3.2 million, LG Saarbrücken 15.9.2020, 7 HK O 6/16 *Vorstandsregress* Juris, para 32.

[36] See OLG Saarland 16.2.2022, 1 U 114/20, p. 9 (on file with the authors; not yet published in a database).

[37] LG Saarbrücken 15.9.2020, 7 HK O 6/16 *Vorstandsregress* Juris, paras 150–51.

[38] OLG Saarland 16.2.2022, 1 U 114/20, p. 28 (on file with the authors; not yet published in a database).

[39] Sonja Behrens, 'Gleiss-Mandantin Villeroy & Boch bleibt auf Kartellstrafen sitzen' (Juve, 20.11.2020) <https://www.juve.de/verfahren/ex-vorstand-haftet-nicht-gleiss-mandantin-villeroy-boch-bleibt-auf-kartellstrafen-sitzen/> accessed 27 September 2022.

[40] See the Bundeskartellamt's press reports of 5.7.2012 (EUR 103 million fine imposed on ThyssenKrupp) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/05_07_2012_Schienenkartell.html?nn=3591568> and of 23.7.2013 (EUR 88 million fine imposed on ThyssenKrupp),

Gleistechnik GmbH owing to its participation in the rail cartel,[41] the company sued its former managing director in the labour courts for payment of damages in the same amount under section 43(2) of the German Limited Liability Companies Act (GmbHG).[42]

The Düsseldorf Regional Labour Court dismissed the action at second instance, rejecting the possibility of recourse liability in general. The court based its decision on a number of considerations, the main one being the sanctioning effect of the antitrust fines. It was emphasized that any fine imposed on a company was based on an implicit finding that the company had not sufficiently monitored its managers. The purpose of the fine, according to the court, is to encourage the company to exercise adequate control.[43] The court then went on to say that precisely this kind of sanctioning effect is intended by antitrust fines – whether under EU or German law – and concluded:

> This sanctioning effect can only materialize if the company is prevented from passing on the fine … to the persons acting on its behalf … Only if the company has ultimately to carry the burden of the fine the objective of antitrust fining laws … will be met.[44]

The court seems to have considered this point so important that it repeated it later in different language:

> The fine must stay with the company and affect the owners of the company to have an impact on their future behaviour. The company owners select, hire, and appoint the directors and officers so that they also have to bear the financial responsibility for all consequences of their actions … The preventive effect on the company would disappear if the actual addressee of the rule [*scil.* the company] could exonerate itself easily at the expense of its directors and officers.[45]

We can also identify a consideration similar to the 'consistency' rationale put forward by the Court of Appeal in *Safeway*.[46] The Düsseldorf court maintained that, if the directors' liability under company law prevented the company and its owners from being held accountable, the civil justice system would effectively be 'correcting' a decision of the law of (antitrust) fines. However, this would mean that 'the legal system contradicts itself'.[47]

On appeal, however, the Federal Labour Court overturned the judgment on formal grounds, holding that the ordinary civil courts, not the labour courts, had jurisdiction to hear cases involving recourse claims for the compensation for antitrust fines.[48] As a result, the case was referred to the competent regional court, which ultimately did not have to rule on the case as

<https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_07_2013_Schienen.html?nn=3591568> accessed 5 October 2022.

[41] The Bundeskartellamt does not publish fining decisions but only press releases as cited above (n 40), from which, however, it is not clear whether the authority also found a violation of EU antitrust law (Article 101 TFEU). This is apparent, however, from judgments on follow-on damages actions. See BGH 13.4.2021, KZR 96/18 Juris, para 10.

[42] Section 43(1) and (2) of the German Limited Liability Companies Act reads: '(1) The directors are required to conduct the company's affairs with the due care of a prudent businessperson. (2) Directors who breach the duties incumbent upon them are jointly and severally liable to the company for any damage arising.' (Translation taken from <https://www.gesetze-im-internet.de/englisch_gmbhg/englisch_gmbhg.html#p0234>.)

[43] LAG Düsseldorf 20.1.2015, 16 Sa 459/14 Juris, para 165.

[44] Ibid para 166.

[45] Ibid para 167.

[46] See above n 16 and accompanying text.

[47] LAG Düsseldorf 20.1.2015, 16 Sa 459/14 Juris, para 161.

[48] BAG 29.6.2017, 8 AZR 189/15 Juris.

the parties reached an out-of-court settlement. According to media reports, the D&O insurer ultimately paid less than 10 per cent of the damages claimed by ThyssenKrupp.[49]

Even if the judgment of the Regional Labour Court did not stand, since it was overturned only on formal grounds, and given the depth of the court's reasoning, it is not surprising that it remained an important point of reference in the debate on recourse actions for antitrust fines.

5. The *Stainless Steel Companies* Case

The Düsseldorf Higher Regional Court rejected recourse liability in a case involving steel producers. An appeal to the German Federal Court of Justice (Bundesgerichtshof) is pending.[50] The case arose out of a fine imposed by the Bundeskartellamt on a company belonging to a group of companies (referred to in the judgment as the 'X-group') that specialized in the cold forming of stainless steel and other materials into profiles, strips, and other semi-finished products.[51] The competition authority had found that the former managing director of the company had contributed to the maintenance of a price cartel between steel producers. Although the company did not benefit from this cartel in the upstream market, the manager had apparently felt compelled to do so in order to secure supply.[52] The authority found a violation of Article 101 TFEU and section 1 of the German Competition Act, and imposed a fine on the managing director and the company. The latter then sought recourse against its (former) managing director for the amount of the antitrust fine that it had paid.[53]

The D&O insurer intervened on the side of the defendant manager. The insurer had initially refused to cover the claim on the grounds that recourse to fines for intentional, knowing antitrust infringements ('*wissentliche Pflichtverletzung*') was not insured. However, the Frankfurt Regional Court ordered the insurer to provide cover because it considered that the defendant had not acted knowingly within the meaning of the insurance terms and conditions. In this respect, the Frankfurt court had emphasized the complexity of the applicable antitrust law and had assumed that the manager had made a legal error and was entitled to assume that his actions were lawful.[54]

In essence, the Düsseldorf court agreed with the view expressed in the two German judgments analysed above that a company cannot demand reimbursement of an antitrust fine from its management, as this would undermine the sanctioning purpose of the fine.

[49] Christine Albert, 'D&O-Versicherer zahlen für Verstöße bei Thyssenkrupp – ein bisschen' (Juve, 14.2.2022) <https://www.juve.de/verfahren/do-versicherer-zahlen-fuer-verstoesse-bei-thyssenkrupp-ein-bisschen/> accessed 27 September 2022.

[50] The appeal's reference number is KZR 74/23.

[51] OLG Düsseldorf 27.7.2023, IV-6 U 1/22 (Kart) Juris para 2. The decision by the Bundeskartellamt was part of a series of decisions between 2018 and 2021 in which the authority imposed fines totalling around EUR 355 million on 10 special steel producers, two trade associations and 17 individuals responsible for coordinating price components and exchanging competitively sensitive information. See Bundeskartellamt, Case summary of 28.9.2021, B12-22/15 and B12-21/17.

[52] Ibid paras 8 and 103.

[53] In addition, a second company, which was also part of the 'X-group' and for which the defendant had worked as a member of the board of directors and later as its chairman, joined the proceedings as a plaintiff and claimed compensation for further costs incurred in connection with the cartel infringement. Ibid paras 2 and 35.

[54] LG Frankfurt 20.1.2023, 2-08 O 313/20 (on file with the authors; not published in a database).

Therefore, the liability of the directors to the company should not be applicable in this scenario.[55]

The court argued that the design of the antitrust fine against the company made it clear that its aim was to reduce the company's assets. The aim was to deprive the company of the benefits that it had unlawfully obtained as a result of its directors' breach of the law. This is to prevent antitrust infringements. If the company could pass the fine on to its managers, this mechanism would be undermined.[56] In fact, the sanctioning effect of the fine on the company would be completely nullified if the D&O insurer were ultimately to bear the damage to the company (and thus the fine).[57] Managers, on the other hand, would be sanctioned through other mechanisms, such as individual fines.[58]

It can be assumed that the court's reasoning was influenced by the specific circumstances of the case: the defendant manager had been fined EUR 126,000 by the Bundeskartellamt. The recourse action against him was for damages suffered by the company as a result of the antitrust fine proceedings, namely a fine of EUR 4.1 million imposed on the company and lawyers' fees of approximately EUR 1.04 million. The claims were therefore of an amount that a defendant who had worked as a business manager for many years could reasonably expect to be able to satisfy. In addition, the court had to assume that the D&O insurer would ultimately have to pay for these damages (probably in full[59]) on the basis of the previous judgment of the Frankfurt District Court.

Finally, the court relied on a special characteristic of German antitrust fine law.[60] The imposition of a fine on a company necessarily presupposes that there is an individual person who acted on behalf of the company can be identified as responsible for the antitrust violation. Thus, the court argued that if, according to the law on antitrust fines, a responsible natural person, typically a manager, can always be fined in parallel with the company, it would seem inconsistent to allow the fine imposed on the company to be redirected to the manager by way of recourse liability.[61]

6. Conclusion

While there is one judgment in the Netherlands in which a (former) director was held liable for an antitrust fine (*Heiploeg*), the courts in both the UK and Germany have so far rejected the availability of such recourse claims. However, in neither jurisdiction has the issue been settled by supreme court precedent. In the UK, the judgment in *Safeway* provides for a binding authority at Court of Appeal level, but, following *Jetivia*, an overruling by the Supreme

[55] OLG Düsseldorf (n 51) paras 159 and 185.
[56] Ibid para 202.
[57] Ibid para 204.
[58] Ibid para 203.
[59] The insurance policy contained a limit of liability that was, however, not specified in the judgment.
[60] The significance of this consideration is therefore doubtful, because from the point of view of a company and a director or officer it is ultimately a matter of chance whether, for example, an infringement of Article 101 TFEU will be fined by the European Commission or by the German competition authority. That this should actually be relevant to the question of whether or not there is a right of recourse does not seem to be very convincing. See LG Dortmund 8 O 5/22 (Kart) ('Construction Cartel'), order of 14.8.2023, sub 3, juris.
[61] OLG Düsseldorf 27.7.2023, IV-6 U 1/22 (Kart) Juris, paras 195–200.

Court seems conceivable. In Germany, we find statements in lower court judgments, which were either rendered as mere obiter dictum (*Villeroy & Boch*) or overturned, albeit on formal grounds (*Thyssenkrupp*) or against which an appeal is pending (*Stainless Steel Companies*).

In analysing these judgments, we can identify three considerations that are particularly noteworthy for present purposes.

First, the civil justice system must not decide on managerial liability in isolation from antitrust (fining) law. Managerial liability may have to be excluded if otherwise the rationality of the fine would be undermined.

Second, where the effectiveness of fines for breach of EU antitrust law is at issue, this is not only a question of consistency of values within the national legal system but may also become a question of EU law.

Third, the most crucial consideration underlying the denial of recourse claims is the assumption that allowing the company to pass on the antitrust fine to its directors and officers (and possibly further to the D&O insurers) would undermine the deterrent effect as intended by the fine. Thus, the argument goes, the company would no longer have sufficient incentive to ensure that antitrust infringements are avoided through the selection and monitoring of directors and officers.

III. The Deterrent Effect Intended by Antitrust Fines and the Principle of Effectiveness

In this section, we will show that three premises of the courts seeking to deny actions for recourse are valid. First, deterring antitrust infringements is the principal objective of antitrust fines. Second, the fines are meant to have a preventive effect by affecting the shareholders of the company that is held responsible for an infringement. Therefore, in deciding whether or not a company may take recourse against its (former) directors or officers (thus effectively relieving the shareholders), company law must also have regard to the deterrence rationale of antitrust fines. Third, where a fine is imposed by the Commission, or by a Member State competition authority or court for infringing Articles 101 or 102 TFEU, the adequate consideration of the latter is not a matter of national (company) law alone but, through the principle of effectiveness, governed by EU law.

1. Deterrence as the Guiding Objective of Antitrust Fines

It is the guiding objective of antitrust fining to deter infringements. Even in its early case law, the ECJ clarified that it is the object of the fines provided for in Article 15 of Regulation 17 to 'suppress illegal activities and to prevent any reference'.[62] This has been reaffirmed and specified in later jurisprudence, the court stipulating that:

> It is settled case-law … that the fines imposed for infringements of [now] Article [101 TFEU] … are designed to punish the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other operators from infringing the rules of Community competition law in future.[63]

[62] Case C-41/69 *Chemiefarma v Commission* ECLI:EU:C:1970:71, para 173.

[63] Case C–289/04 P *Showa Denko KK v Commission* ECLI:EU:C:2006:431, para 16. See also Case C-100 to 103/80 *Musique Diffusion Francaise v Commission* ECLI:EU:C:1983:158, paras 105–06. Prevention of

Here, as in other judgments,[64] the ECJ has made it explicit that the purpose of the fine must be both to specifically deter the addressed undertakings from further infringements and to have a general preventive effect, encouraging other market participants to be law-abiding. The design of the fines under Article 23 of Regulation 1/2003[65] as an instrument for ensuring antitrust compliance is laid down in the underlying legislative competence pursuant to Article 103(2)(a) TFEU. The Commission mirrors these requirements in its guidelines on fines, taking it upon itself to 'ensure … the necessary deterrent effect'.[66]

The disgorgement of gains improperly made from an antitrust infringement is not to be considered an objective of antitrust fines in its own right, understood in the sense of a pursuit of corrective justice.[67] This is illustrated by the Commission's fining guidelines, which provide for the option 'to increase the fine in order to exceed the amount of gains' attributable to the infringement[68] – yet do so under the heading 'specific increase for deterrence' and, thus, only as a means to ensuring the fines' deterrent purpose.[69] In any case, fining could at most be viewed as a very imperfect mechanism for rectifying the injustice inflicted by antitrust violations because the fines collected do not reach the parties aggrieved by antitrust violations. The conferring of claims for antitrust damages constitutes a more suitable instrument for the pursuit of corrective justice.[70]

Therefore, the disgorgement of gains attributable to the infringement must, as such, not be regarded as a guiding principle for antitrust fining. It is thus not a viable normative basis for drawing implications for actions for recourse, and for evaluating and possibly justifying the courts' reluctance to pass on (in part) antitrust fines to managers responsible for an infringement.[71] This insight does not preclude limiting managerial liability for antitrust fines on

antitrust infringements has been identified in the literature as the primary goal of fines under EU law. See Ralf Sauer and Manuel Kellerbauer, 'Infringement Decisions and Penalties' in Luis Ortiz Blanco (ed), *EC Competition Procedure* (4th edn, OUP 2021) para 11.31 ('the essential purpose of penalties is to deter and persuade') and Jörg Biermann, in Torsten Körber, Heike Schweitzer, and Daniel Zimmer (eds), Immenga/Mestmäcker, Wettbewerbsrecht Band 1 EU (6th edn, C.H. Beck 2019) Vor Art. 23 VO 1/2003 para 25 ('In the center of the Commission's and the ECJ's practice of imposing fines is negative general prevention').

[64] Case C-447/1 *Caffaro* ECLI:EU:C:2013:797, paras 36–37.

[65] 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 [2003] OJ L 1/1.

[66] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. [2006] OJ C 210/2, para 4. See also recital 29 to Regulation No 1/2003 (n 65).

[67] See Miguel de la Mano, Renato Nazzini, and Hans Zenger in Jonathan Faull and Ali Nikpay (eds), *Faull & Nikpay, The EU Law of Competition* (3rd edn, OUP 2014) para 4.36.

[68] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. [2006] OJ C 210/2, para 31.

[69] See Antoine Colombani, Jindrich Kloub, and Ewoud Sakkers in Jonathan Faull and Ali Nikpay (eds), *Faull & Nikpay, The EU Law of Competition* (3rd edn, OUP 2014) para 8.673.

[70] See below n 219 and accompanying text.

[71] If one were to see this differently, one would have to consider that typically a portion of the cartel-related profits will have been passed on to the employees of the fined company. This is obvious in the case of profit-based compensation (which is especially common among managers). Furthermore, studies suggest that – depending on the bargaining position of employees and the power of trade unions – parts of monopoly returns benefit employees through higher wages. See W. Kip Viscusi, John M. Vernon, and Joseph E. Harrington, *Economics of Regulation and Antitrust* (5th edn, MIT Press 2018) 80. Therefore, recognizing the disgorgement of cartel-induced profits from shareholders as an independent objective of antitrust fines would not justify an outright ban on recourse actions, but might even support their availability. A consistent implementation of this goal would indeed require a complex analysis of antitrust effects.

grounds of distributional justice, or simply ‘fairness’, which might be inherent to company law – as long as it does not undermine the deterrence rationale of fines.[72]

Via the ECN+ Directive, the EU legislature has laid down requirements regarding the preventive function of fines imposed under national law for violations of Articles 101 and 102 TFEU. National competition authorities must have the power to impose ‘effective, proportionate, and dissuasive fines’,[73] either directly in administrative proceedings or by applying for the imposition of such fines in judicial proceedings.[74] The requirement pursuant to which sanctions must be ‘dissuasive’ points directly to an intended preventive effect: ‘A penalty is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Community law.’[75] More specifically, to ensure a sufficient ‘deterrent effect of fines’[76] and, thus, ‘dissuasiveness’ in the aforementioned sense, the ECN+ Directive prescribes that Member States must set the possible maximum amount of the fine at a level ‘not less than 10 % of the total worldwide turnover of the undertaking … in the business year preceding the decision’.[77]

As far as UK law is concerned, it suffices to refer to Article 36(7A)(b) of the Competition Act 1998, which provides that the CMA ‘in fixing a penalty … must have regard to … the desirability of deterring both the undertaking on whom the penalty is imposed and others from’ infringements. Thus, the UK legislature has recognized specific and general deterrence as central objectives of the imposition of fines, as has the case law of the ECJ.

2. Intended Deterrence Mechanism: Burden Shareholders, Incentivizing Them to Abstain from and to Prevent Antitrust Infringements

While the deterrent effect of antitrust fines has been repeatedly and unequivocally confirmed by legislatures and courts, there is little clear guidance in the case law as to how the intended deterrent effect should unfold in the case of a fined company. As far as we can see, for example, the ECJ has never explicitly stated that it is the shareholders of a company at whom the effect of an antitrust fine is directed. Since it is the ‘undertaking’ within the meaning of Articles 101 and 102 TFEU that infringes EU antitrust law, the court has held that, in general, ‘personal liability for an infringement and the principle that the penalty must be specific to the offender and the offence’ relates only to the ‘undertaking per se’.[78]

Nevertheless, some more specific conclusions can be drawn from the ECJ’s jurisprudence on the application of the fine rules in the event of changes in the control structure. While it is

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[72] See also below n 205 and accompanying text.

[73] This requirement is based on a line of jurisprudence that goes back the ECJ’s *Greek Maize* judgment; see below n 96 and accompanying text.

[74] Article 13 and recital 40 of Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (‘ECN+ Directive’) [2019] OJ L 11/3.

[75] AG Kokott, Case C-387/02 *Berlusconi and Others* ECLI:EU:C:2004:624, para 89.

[76] Recital 49 to the ECN+ Directive (n 74).

[77] Article 14 of the ECN+ Directive (n 74).

[78] Case C-231/11 P *Commission v Siemens Österreich and Others et Siemens Transmission & Distribution and Others / Commission* ECLI:EU:C:2014:256, para 56. See also Case T-77/08 *Dow Chemical v Commission* ECLI:EU:T:2012:47, para 74 (‘Where such an economic entity infringes the rules of competition, it falls to that entity, in accordance with the principle of personal responsibility, to answer for that infringement. However, the infringement of European Union competition law must be imputed unequivocally to a legal person on whom fines may be imposed’).

beyond the scope of this paper to lay out in detail how the deterrence rationale unfolds in the ECJ's doctrine of 'economic continuity',[79] a reference to one basic rule will suffice for our purposes: those who controlled a company (natural or legal person) at the time of the infringement are liable for the infringement, regardless of whether the company was sold before the adoption of the decision imposing the fine.[80] Thus, for example, in the case of a wholly owned subsidiary that ceased its illegal activities before being sold, only the subsidiary and the original parent company will be held jointly liable, not the succeeding parent company.[81] Moreover, if the subsidiary that committed the infringement was transferred during the course of the infringement, the successive parent companies will be jointly and severally liable with the subsidiary. However, each parent company will be jointly and severally liable for only a part of the antitrust fine, which will be determined according to the gravity and the duration of the infringement for which it is individually responsible.[82]

In Germany, it was the introduction of section 81(3a) to (3e) of the Competition Act, i.e. of provisions essentially equivalent to the ECJ's single entity doctrine in the case of a group of companies and the doctrine of economic continuity, that gave the legislature reason to take a stand on the preventive effect of antitrust fines:

> Antitrust fines are intended to … ensure that the fine affects the assets used for specific economic purposes of the economic operators who benefit from the offense, so that antitrust [infringements] are ultimately not profitable and the undertakings are induced to comply [with antitrust laws].[83]

Thus, regardless of the corporate structure underlying the undertaking that has committed the antitrust infringement, the desired deterrent effect should be achieved by causing the fine to deprive those assets of the financial benefit derived from the infringement.

All of this leads to the conclusion that the antitrust fines are indeed intended to have a deterrent effect by making the shareholders of the company responsible for an infringement bear the fine. Of course, this only begs the question: how is this supposed to prevent antitrust violations? The answer is twofold: shareholders should have no incentive to encourage (possibly) profitable breaches of antitrust law and they should also use their influence to prevent infringements by those acting on behalf of the company, in particular by exercising due care in the selection of their directors and officers.[84] Given the second dimension of the intended deterrence mechanisms, the finding that it is the shareholders that should bear the antitrust fines should only be taken as a starting point for an analysis of

[79] An overview is provided in Ioannis Lianos, Valentine Korah, and Paolo Siciliani, *Competition Law* (OUP 2019) 357–64.

[80] Case C-279/98 P *Cascades v Commission* ECLI:EU:C:2000:626, para 78 ('It falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking').

[81] The liability, however, may pass to the acquirer if it absorbs the subsidiary which hence ceases to exist. Joined cases T-259–264 and 271/02 *Raiffeisen Zentralbank Österreich AG and Others v Commission* ECLI:EU:T:2006:396, para 326.

[82] Case C-247/11 P *Areva and Others v Commission* ECLI:EU:C:2014:257, paras 133, 139.

[83] Deutscher Bundestag, Drucksache 18/10207, 7 November 2016, Gesetzentwurf der Bundesregierung, Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 88.

[84] See below section IV.3.

whether the deterrence objective actually requires the exclusion or limitation of recourse actions against directors and officers: a question that we will address below.[85]

3. The Principle of Effectiveness and the Potential Leverage of EU Antitrust Law over Company Law

It is clear from the foregoing that company law must not determine autonomously – i.e. without regard to the deterrent rationale of antitrust fines – who ultimately has to shoulder the burden of the fines. In particular, if antitrust fines are imposed for a violation of EU antitrust law, it is also a matter of EU law to ensure that the intended deterrence mechanism is not undermined by an imprudent application of established doctrines of (national) company law.

Pursuant to the principle of sincere cooperation embodied in Article 4(3) TEU, the Member States must assist the Union 'in carrying out tasks that flow from the Treaties'. Member States must therefore refrain from any conduct that could undermine the effectiveness of measures taken by the EU institutions. The ECJ has elaborated and developed this general principle in various settings. For example, national time limits for bringing actions must not limit the effects of a judgment of the EU courts.[86] Member States must also refrain from entering into international treaties that could limit the scope and effectiveness of EU law.[87] Where EU law provides for individual rights, the ECJ has specified Member States' loyalty obligations through the doctrine of *Rewe* effectiveness,[88] which requires that applicable national rules must not be 'framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)'.[89] In addition, the national courts' obligation to ensure that adequate effect is given to EU law may even require the creation of new remedies, the most prominent example being the liability of Member States under *Francovich*.[90]

Against this background, it is clear that, if the opportunity for a company to recover (parts of) an antitrust fine imposed by the Commission from its (former) managers does indeed jeopardize the deterrent effect of the fine, the principle of loyal cooperation would oblige the Member States to intervene and, if necessary, to adapt established doctrines of national company law, for otherwise the Commission would not be able to fulfil its task of ensuring compliance with the antitrust rules. In line with this, the ECJ found that the effectiveness of an antitrust fining decision is significantly reduced if the company can deduct the fine from its taxable profits.[91] The Commission, acting as amicus curiae before the Belgian Constitutional Court, argued that national measures allowing tax deductibility of fines would undermine the

[85] See below sections IV and V.
[86] Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* ECLI:EU:C:2002:435, para 36.
[87] Case C-469/98 *Commission v Finland (Open Skies)* ECLI:EU:C:2002:627, para 112.
[88] This case law was first laid down in Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188, para 5, and Case C-199/82 *Amministrazione delle finanze dello Stato v San Giorgio* ECLI:EU:C:1983:318, para 14.
[89] Case C-505/14, *Klausner Holz Niedersachsen* ECLI:EU:C:2015:742, para 40.
[90] Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ECLI:EU:C:1991:428, para 36.
[91] Case C-429/07 *Inspecteur van de Belastingdienst v X BV* ECLI:EU:C:2009:359, para 39. The ECJ had to rule only on the legality of the amicus curiae submission, not on the substantive issue as such.

punitive and deterrent purpose of the fine and, thus, would go against the principle of sincere cooperation enshrined in Article 4(3) TEU.[92]

The duty of sincere cooperation under Article 4(3) TEU applies to all institutions of the Member State, including the courts. Indeed, as the ECJ has emphasized, 'it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of EU law'.[93] This obligation has its limits in general principles of law. The EU principle of effectiveness does not require courts to rule *contra legem*.[94]

Where the Member States enforce Articles 101 and 102 TFEU by imposing fines under national law,[95] they are likewise bound by the principle of sincere cooperation pursuant to Article 4(3) TEU. It should be noted that, starting with the *Greek Maize* case, the ECJ has given concrete expression to the principle as it applies to the enforcement of EU law by Member States through a specific strand of case law. Accordingly, Member States 'must ensure … that infringements of Community law are penalized under conditions, both procedural and substantive … which, in any event, make the penalty effective, proportionate and dissuasive'.[96] This latter triad of attributes has been taken up by the EU legislature and included in various measures of secondary law including, as mentioned above, in Article 13 and recital 40 of the ECN+ Directive.[97] It seems natural to merge the case law on 'effective, proportionate and dissuasive' sanctioning with other rules derived from the general requirement of sincere cooperation, thus creating a single standard under Article 4(3) TEU to ensure effective sanctioning of EU law.[98] This is in line with the fact that, in scenarios that do not concern the effectiveness of a sanction imposed by a national authority as such but rather procedural aspects of the enforcement of EU antitrust law by national authorities, the ECJ does not refer to the *Greek Maize* test but rather to the general case law on Article 4(3) mentioned above.[99]

In sum, we may conclude that, in cases of infringements of Articles 101 and 102 TFEU, it is (also) a matter of Union law, namely of effectiveness requirements based on Article 4(3) TEU. This is true regardless of whether these fines were imposed by the Commission or by a national competition authority or court. For the application of this standard, reference can be made to the general sanction-related case law on Article 4(3) TEU but also in particular to the case law on the so-called *Greek Maize* test.

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[92] Commission, Amicus Curiae Observations to the Constitutional Court (Belgium), *Tessenderlo Chemie v Belgische Staat*, sj.e(2012)227414, 8 March 2012, paras 25 and 29.

[93] Case C-505/14, *Klausner Holz Niedersachsen* ECLI:EU:C:2015:742, para 31.

[94] Ibid para 32.

[95] See Article 5 of Regulation 1/2003 (n 65).

[96] Case C-68/88 *Commission v Greece (Greek Maize)* ECLI:EU:C:1989:339, para 24.

[97] See above section III.1.

[98] Thus, Advocate General Kokott referred to the yardstick of *Rewe* effectiveness to specify the effectiveness requirement under the *Greek Maize* test. AG Kokott, Case C-387/02 *Berlusconi and Others* ECLI:EU:C:2004:624, para. 88. See on the interrelation between *Rewe* effectiveness and the *Greek Maize* test Michael Dougan, 'Who Exactly Benefits from the Treaties? The Murky Interaction between Union and National Competence over the Capacity to Enforce EU Law' (2010) 12 *Cambridge Yearbook of European Legal Studies* 73, 106–07; Folkert Wilman, *Private Enforcement of EU Law before National Courts – The EU Legislative Framework* (Edward Elgar 2015) 2.19; Christian Heinze, *Schadensersatz im Unionsprivatrecht* (Mohr Siebeck 2017) 42–44.

[99] Case C-439/08 *VEBIC* ECLI:EU:C:2010:739, para 57.

IV. Avoiding Under-Deterrence of the Company's Shareholders (1): Should Managerial Liability for Antitrust Fines Be Barred?

Company law cannot turn a blind eye to the impact that managerial liability may have on the deterrent effect of antitrust fines. In particular, when a fine is imposed for a breach of EU antitrust law, it follows from principles of EU law that possible repercussions must be analysed and taken into account. In this section, we will argue that, while these assumptions have been correctly made – for example, by the German courts as presented above – the conclusion drawn is not convincing: for the effectiveness of antitrust fines as a deterrent instrument, the availability of recourse actions is the preferred second-best solution. It is true that the prospect of being able to shift part of a potential antitrust fine onto management may weaken the optimal sanctioning effect on shareholders. However, as we will explain below, this seems to be outweighed by the fact that it leaves them with a crucial tool to address conflicts of interest in relation to their management.

1. Deterring Individuals vs Deterring Companies

Contemplating whether managerial liability must be precluded to preserve the effectiveness of antitrust fines, one must first appreciate that companies respond differently to financial sanctions than individuals do. If an individual is punished with a fine for an infringement of the law or is to be deterred from an infringement by the threat of a fine, the underlying preventive mechanism is straightforward. The (potential) infringer should include the possibility of a fine in her calculation of whether it is worthwhile breaking the law or not. If the amount of the fine is set correctly, considering potential profits from the infringement and the probability of detection[100] and punishment, it will deter deliberate breaches of the law.[101] Things are more difficult when – unlike in the case of hardcore cartels, for example – individuals cannot readily anticipate the dividing line between legal and illegal conduct. The

[100] Anything said regarding this is inherently speculative. For Spain, for example, the probability of detection of cartels was estimated at 11.5 per cent. Javier García-Verdugo, Carlos Merino Toncoso, and Ane M. Martin, 'Probability of Cartel Detection in Spain: An Assessment' (2020) 11 *JECLAP* 188. For the US, according to a survey of studies and opinions, the detection rate of cartels is predominantly estimated to be in the 10% to 25% range. See John M. Connor and Robert H. Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 *Cardozo Law Review* 427, 462–465, 486–490, tbl. 3. See also Peter L. Ormosi, 'A Tip of the Iceberg? The Probability of Catching Cartels' (2013) 29 *Journal of Applied Econometrics* 549, according to which less than 20% of all cartels are detected. See also the contribution by Florian Wagner-von Papp in this volume, a working paper version of which is available under the title 'The Interplay Between Corporate Law and Competition Sanctions or Remedies', Section II.B., available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4578598>.

[101] Note the dispute as to whether an optimal sanction should be calculated on the basis of the damage caused ((net) harm-based) or of the profit made by the cartel (gain-based). Ultimately, this only concerns the question of whether efficiency gains that might occur – e.g. due to savings in production costs – should also be disgorged from the infringer or whether incentives for an 'efficient breach' should be left. For the former position, see Wouter P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183, 191–93 and, for the latter position, William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 *University of Chicago Law Review* 652, 656, and Richard A. Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 394. It is submitted that the former position is indeed to be preferred, because, by setting the antitrust laws, a line is drawn between business practices that are socially desirable and those which are not. For making this choice, legislatures are democratically legitimized and can be held accountable. Sanctions should therefore be aimed at respecting this boundary line, not deliberately leaving open the door for an 'efficient breach'.

conditions[102] and the amount of the fine may then be used to control what effort the individual will make in order to identify this line as accurately as possible (through obtaining legal advice etc.), and how he or she will behave in the event of remaining legal uncertainty. The aim is that individuals are not deterred from activities that are, in fact, perfectly legal and socially desirable just because they are unclear about the legality of those activities.[103]

Where a fine, however, does not address an individual but a company, and if ownership and management do not coincide in one (or more) person(s), this mechanism is complicated by the fact that interests of the company's owners are not aligned with those of its managers who make decisions on their behalf, a situation that is commonly referred to as an 'agency problem'. If, as assumed above, in this scenario the fines are conceptually designed to address the company's shareholders, then the point is not only that shareholders themselves should be deterred from committing or encouraging antitrust infringements but that they should be incentivized to ensure that those who run the company's business do not commit and initiate antitrust violations[104] and, moreover, actively prevent infringements by (other) employees.

The relevance of this agency problem in the relationship between shareholders and (senior) managers is not called into question by the finding that managers involved in antitrust violations typically assume that they are indeed acting in the economic interest of their company and, consequently, of the shareholders.[105] This should come as no surprise, given that the probability of detection in hardcore cartels, for example, is speculative but certainly well below 100 per cent,[106] and the extent of the damage to the company – both short term and long term[107] – in the event of detection is difficult to predict. Therefore, regardless of whether or not management receives a signal from shareholders that (profitable) antitrust

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[102] The requirement of fault may be used by authorities and courts to avoid or cushion risks of over-deterrence. See, in the context of antitrust damages liability, Jens-Uwe Franck, 'Umbrella Pricing and Cartel Damages under EU Competition Law' (2015) 11 *European Competition Journal* 135, 144–45.

[103] See Connor and Lande (n 100) 431n16.

[104] Indeed, in various studies the point was made that senior management was directly involved in a significant proportion of detected infringements. See, e.g., Michelle Berzins and Francesco Sofo, 'The Inability of Compliance Strategies to Prevent Collusive Conduct' (2008) 8 *Corporate Governance* 669, 675; Andreas Stephen, 'Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels' (2010) 31 *The Company Lawyer* 231, 235–37; Joseph C. Gallo, Kenneth Dau-Schmidt, Joseph L. Craycraft, and Charles J. Parker, 'Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study' (2000) 17 *Review of Industrial Organization* 75, 104–07.

[105] This is the result of several studies on managers' motives in antitrust violations. See, e.g., Jeffrey Sonnenfeld, 'Executive Apologies for Price Fixing: Role Biased Perception of Causality' (1981) 24 *Academy of Management Journal* 192; Wayne E. Baker and Robert R. Faulkner, 'The Social Organization of Conspiracy: Illegal Networks in the Heavy Electrical Equipment Industry' (1993) 58 *American Sociological Review* 837; John M. Conley and William O'Barr, 'Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct' (1997) 60 *Law and Contemporary Problems* 5; see also Maurice Stucke, 'Am I a Price Fixer? A Behavioural Economics Analysis of Cartels' in Caron Beation-Wells and Ariel Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart 2011), 263, 267 and 275; Wouter P.J. Wils, 'EU Antitrust Fines and Managerial Liability – A Legal and Economic Analysis' (2023) *Wirtschaft und Wettbewerb* 583, 587.

[106] See above n 100.

[107] For example, a prolonged decline in share value due to investor distrust or being excluded from public procurement needs to be considered; see Luca Aguzzoni, Gregor Langus, and Massimo Motta, 'The Effect of EU Antitrust Investigations and Fines on a Firm's Valuation' (2013) 61 *Journal of Industrial Economics* 290; OECD, 'Director Disqualification and Bidder Exclusion in Competition Enforcement' (2022) OECD Competition Policy Roundtable Background Note 28–37 <http://www.oecd.org/daf/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement-2022.pdf> accessed 30 October 2023.

violations are acceptable, it stands to reason that management that initiates or tolerates antitrust violations will typically do so on the assumption of a positive expected value for the company – a profit from which it will also benefit itself. This assumption may be the result of a miscalculation based on an overly optimistic estimate of the (individual) risk of detection and/or the amount of potential damage to the company if detected. However, the assumption may also be flawed simply because, contrary to management's assumption, shareholders may not appreciate antitrust violations, even if they appear to be profitable ex ante: shareholders may have an intrinsic preference for compliance with the law. These two scenarios illustrate that agency problems can be real and serious even though, in the case of a profitable antitrust violation, shareholders and management alike benefit economically.

Furthermore, against the background of these two scenarios – the risks of miscalculation and the intrinsic preference for legality – the law should provide shareholders with the means to send a clear and strong signal to management that antitrust violations are unacceptable, even if they appear ex ante to be an action with a positive expected value. As we will explain in more detail below, this necessarily includes the availability of internal financial sanctions – including the option to recover antitrust fines.

2. Ensuring Managers' Antitrust Compliance: Selection, Remuneration, Monitoring, and Sanctioning

To ensure that managers comply with their duty to ensure that the company acts in accordance with the law,[108] the shareholders – or, depending on the organizational form of the company, a body elected by them, such as a supervisory board[109] – need to overcome the said agency problem: assuring that the managers respond to the shareholders' interest in preventing antitrust violations rather than initiating or tolerating such infringements – even if such illegal activities ex ante appear (correctly or not) to be profitable for the company and, consequently, also for the managers. Various mechanisms are available to achieve this.[110]

First, the criteria for selecting managers certainly play a role. Company law provides for certain general (statutory) requirements for taking a position as a director or comparable

[108] The existence of such a legal obligation will usually be obvious and well understood. On German company law, see BGH 10.7.2012, VI ZR 341/10 Juris, para 23, and more specifically regarding compliance with antitrust law see LAG Düsseldorf 20.1.2015, 16 Sa 459/14 Juris, para 149. See relating to UK company law Paul Davies, Sarah Worthington, and Christopher Hare, 'Director's Duties' in Gower, *Principles of Modern Company Law* (11th edn, Sweet & Maxwell 2021) para 10-024.

[109] See for examples of jurisdictions that provide for two-tier board structures John Armour, Luca Enriques, Henry Hansmann, and Reinier Kraakman, 'The Basic Governance Structure: The Interests of Shareholders as a Class' in Reinier Kraakman et al (eds), *The Anatomy of Corporate Law* (3rd edn, OUP 2017) 50–51. For a comparative overview of various jurisdictions in the EU see Carsten Gerner-Beuerle, Philipp Paech, and Edmund Philipp Schuster, 'Study on Directors' Duties and Liability' (LSE Enterprise, April 2013) 3–12 <https://eprints.lse.ac.uk/50438/1/__Libfile_repository_Content_Gerner-Beuerle%252C%20C_Study%20on%20directors%E2%80%99%20duties%20and%20liability> accessed 16 December 2022.

[110] As lucidly summarized by Stephen Calkins 'Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties' 60 (1997) *Law and Contemporary Problems* 127, 147 ('[A company] can emphasise 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. And it can threaten with whatever draconian consequences are in its power').

managerial positions.[111] Beyond this, however, there will typically be broad discretion in the selection process, in the exercise of which an attempt can be made to find criteria that vouch for compliance with the law. For instance, it has been suggested that increased female representation in management positions can have the benefit of making compliance with competition law more likely.[112] In addition, it is conceivable that antitrust compliance attitudes and skills may be tested as part of the process of vetting management candidates. In general, for a company genuinely interested in avoiding antitrust violations (and not just in not getting caught), the trick is to select managers who are intrinsically motivated[113] to ensure antitrust compliance and not to act opportunistically. It may also be prudent to dismiss an executive if involvement (or at least a strong suspicion) in an antitrust infringement from a previous employment comes to light after he or she has been hired.[114]

Second, the terms and conditions of employment may affect managers' incentives to abstain from and prevent antitrust infringements. Incentive-based remuneration should not lead to undue pressure. In any case, there is a risk that it could weaken the intrinsic motivation for (antitrust) compliance.[115] Moreover, it is well understood that certain compensation schemes and performance benchmarks may promote a willingness to engage in collusive behaviour (although not necessarily through illegal coordination).[116] Abandoning these schemes and avoiding overly ambitious profit targets reduces the likelihood of management initiating or tolerating antitrust infringements.

Third, managerial activities can be monitored. The more intensive this monitoring is, the lower the risk of managerial misconduct.[117] To effectively deter breaches of managerial obligations, any indications of misconduct should be followed up.[118]

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[111] Under German law, such statutory requirements are given pursuant to section 6(2) of the Act on Limited Liability Companies and section 76(3) of the Stock Corporation Act. See Gerhard Wagner and Fabian Klein, 'Directors' and Officers' Liability in Germany' in Simon Deakin, Helmut Koziol, and Olaf Riss (eds), *Directors & Officers (D&O) Liability* (De Gruyter 2018) 162–63.

[112] Justus Haucap, Christina Heldman, and Holger Rau, 'Gender and Collusion' (2021), OECD Gender Inclusive Competition Policy Project #5, p. 15 <https://www.oecd.org/daf/competition/gender-inclusive-competition-proj-5-gender-and-collusion.pdf> accessed 12 December 2022. Gender may play a role in cartel stabilization. As was reported in the media, the people who organized the rail cartel (which ultimately led to the *Thyssenkrupp* case presented above section II.4) regularly combined their meetings with visits to brothels. See Martin Murphy 'Die Rotlicht-Freunde' (Handelsblatt, 11.09.2012) p. 18. Regarding the importance of avoiding gender imbalance see Carolina Abate and Alexis Brunelle, 'Cartel Behaviour and Boys' Club Dynamics: French Cartel Practice Through a Gender Lens' (2022) 13 JECLAP 473.

[113] 'Intrinsic' motivations based on moral norms and ethical beliefs are part of what is known in the economics literature as 'low-powered' incentives – as opposed to so-called 'high powered' (i.e. monetary) incentives. See John Armour, Henry Hansmann, and Reinier Kraakman 'Agency Problems and Legal Strategies' in Reinier Kraakman et al (eds), *The Anatomy of Corporate Law* (3rd edn, OUP 2017) 35.

[114] A notable example is the Belgian Post Group (BPost). Recently, the company dismissed two CEOs in a row on suspicion of being involved in antitrust violations. See Jean-François Noulet, L. Van de Berg, and M. Gassée, 'Bpost a perdu son patron, l'autorité de la concurrence enquête à propos de la distribution des journaux : que se passe-t-il?' (RTBF, 12 December 2022) <https://www.rtbf.be/article/bpost-a-perdu-son-patron-lautorite-de-la-concurrence-enquete-a-propos-de-la-distribution-des-journaux-que-se-passe-t-il-11121769> accessed 6 July 2023.

[115] Armour, Hansmann, and Kraakman (n 113) 36.

[116] For an overview of the economic literature, see Florence Thépot, *The Interaction between Competition Law and Corporate Governance* (CUP 2018) 150–52.

[117] Note that, for example under the German Act on Limited Liability Companies, shareholders have no general duty to monitor the managing director. See Karsten Schmidt, in Scholz, *GmbHG* (12th edn, Dr. Otto Schmidt 2021), § 46 para 112.

[118] In the case of German stock corporations, for example, this obligation arises from section 111(1) of the German Stock Corporation Act.

Fourth and finally, it is essential that managers face dissuasive sanctions for breaching their antitrust compliance obligations. This is the focus of the following section.

3. Recourse Actions (and Other Internal Monetary Sanctions) as a Critical Mechanism to Ensure Management's Antitrust Compliance

The selection of managers, their terms of employment and remuneration and their supervision are important mechanisms for ensuring management's compliance with antitrust law. However, without the availability of internal sanctions, including the threat of recourse actions, an essential mechanism is missing to translate the incentives through antitrust fines against the company into appropriate corporate governance. If the courts take the tool of recourse actions out of the hands of companies, a crucial building block in the menu for ensuring management compliance will be missing.

Depending on the legal framework, managers may face a variety of sanctions from public enforcement and from third parties ('external sanctioning'[119]). National antitrust authorities may impose fines on individuals.[120] In some jurisdictions managers may face criminal prosecution.[121] Moreover, antitrust infringements may result in disqualification proceedings for directors. In the UK, this sanctioning tool is legally endorsed and generally applicable.[122] In most jurisdictions, however, it is only rudimentary.[123] Furthermore, parties aggrieved by an antitrust infringement may bring damages actions against directors and officers.[124] Finally,

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[119] We use the term 'external' sanction to characterize any sanctioning mechanism that is *not* initiated by the company's shareholders or an entity acting on behalf of the company, such as a supervisory board or its (new) directors.

[120] In Germany, a fine can be imposed for a single-handed violation of cartel law pursuant to section 81 of the German Competition Act in conjunction with section 9 of the German Act on Regulatory Offences. The same applies to violations of supervisory duties pursuant to section 130 of the Act on Regulatory Offences.

[121] See Sections 188–90A of the (UK) Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013. The usefulness and necessity of criminal sanctions for EU antitrust law was also discussed. See, e.g., Wouter P.J. Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117. In Germany, bid-rigging is a criminal offence under section 298 of the Criminal Code and may in part also be prosecuted as fraud under section 263 of the Criminal Code. For other cartel law violations, parts of the literature consider criminal liability for fraud under section 263 of the Criminal Code to be possible. See Thomas Lampert and Susanne Götting, 'Startschuss für eine Kriminalisierung des Kartellrechts?' (2002) *Wirtschaft und Wettbewerb* 1069. However, this latter issue has not been addressed in case law. See Florian Wagner-von Papp, 'What If All Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011) 157, 165.

[122] See Sections 9A–9E of the Company Director Disqualification Act 1986, added by the Enterprise Act 2002 to deal specifically with disqualification as a consequence of breach of competition law. See the CMA's first application for a competition disqualification order, which reached the courts in *CMA v Michael Martin* [2020] EWHC 3318 (Ch). Instead of filing an application with the court, the CMA may also accept a disqualification commitment from the person, which occurs more often in practice. See Peter Whelan, 'The Emerging Contribution of Director Disqualification in UK Competition Law' in Barry Rodger, Peter Whelan, and Barry MacCulloch (eds), *The UK Competition Regime: A Twenty-Year Perspective* (OUP 2021) 283, 290–300.

[123] See OECD, 'Director Disqualification and Bidder Exclusion in Competition Enforcement' (2022) *OECD Competition Policy Roundtable Background Note* 45–50 <http://www.oecd.org/daf/competition/director-disqualification-and-bidder-exclusion-in-competition-enforcement-2022.pdf> accessed 28 November 2022.

[124] In Germany, the availability and scope of such (direct) claims for damages against directors and officers have not yet been definitively settled by case law. The Düsseldorf Higher Regional Court found that a managing director of a GmbH (limited liability company) was liable for antitrust damages as he had induced other employees of the company to engage in conduct in violation of antitrust law. See OLG Düsseldorf 13.11.2013, VI-U (Kart) 11/13 *Badarmaturen* Juris paras 115–17. An appeal was not allowed

the discovery of antitrust violations alone might lead to a loss of a manager's reputation, resulting in a loss of future income.[125]

Against this background, a system of antitrust deterrence based on a 'division of labour' concept is conceivable: the antitrust fine against the company ensures that a violation of antitrust law is not worthwhile for the shareholders. External individual sanctions ensure that the management does not act against the interest of the shareholders.

However, given that there is no solid basis for a deterrent effect of private third-party actions, and that the finding of a negative reputational effect on managers caught as antitrust infringers also seems unclear, the best hope seems to lie in public individual sanctions. In particular, the Düsseldorf Higher Regional Court based its rejection of the right of recourse on the fact that, under German law, the imposition of a fine on a company presupposes that there is a natural person who can be identified as responsible for the antitrust infringement and who can therefore (potentially) be fined.[126]

Yet, when looking at the realities of public individual sanctions, this does not appear to be a safe bet either. It is striking that the EU Commission is prevented from imposing fines on individual managers who are responsible for a company's antitrust infringement.[127] Moreover, even in those Member States where fines (or even criminal sanctions) can be imposed on individual managers, there seems to be a reluctance to use these instruments, which is probably related to the typically high standards of proof, among other things. It can be observed that at most a few individuals have been sanctioned.

To illustrate this, for example in Germany, we looked at a sample of the last 30 fining decisions by the Bundeskartellamt. We used the case reports published on the Bundeskartellamt's website, which usually, but not always, give the number of companies fined as well as the number of fined individuals. In seven decisions the Bundeskartellamt announced that fines had been imposed on the companies and responsible individuals, but did not publish the precise number of fines imposed on individuals.[128] In the 23 remaining decisions, a total of 127 companies and 76 responsible persons were fined.[129] This

by the OLG Düsseldorf. The Bundesgerichtshof rejected an appeal against this decision. See BGH 23.9.2014, KZR 88/13, not published.

125 While this is partly assumed in the academic literature – see, e.g., Richard Posner, *Antitrust Law* (2nd edn, University of Chicago Press 2001) 271 – there seems to be no clear empirical evidence for this. In fact, there is anecdotal evidence that managers have been promoted despite engaging in activities that violate antitrust law. See Andreas Stephan, 'Cartels' in Ioannis Lianos and Damien Geradin (eds), *Handbook on European Competition Law* (Edward Elgar 2013) 217, 237. See also Catarina Marvão and Giancarlo Spagnolo in this volume.

126 See above n 61 and accompanying text.

127 For an elaboration of the historical roots of this regulatory decision Walter Mölls, 'Why Does Regulation (EC) No 1/2003 Provide for the Imposition of Penalties Only on Undertakings?: A Historical Perspective' (2022) 45 *World Competition* 195.

128 Bundeskartellamt, case report of 14.1.2021, B11-8/18; 5.8.2021, B11-31/19; B11-33/19; 21.10.2020, B10-22/15; 17.5.2019, B11-28/16; 26.2.2018, B9-44/14; 18.8.2017, B12-16/13; 15.4.2019, B11-13/13.

129 Bundeskartellamt, case report of 15.2.2023, B10-28/18 (number of fined companies: 4/number of fined individuals: 0); 25.5.2022, B10-21/17 (2/0); 10.2.2022, B11-22/17 (2/0); 17.12.2021, B10-23/20 (1/0); 28.9.2021, B12-22/15 and B 12-21/17 (10/17); 16.7.2021, B10-26/20 (1/0); 10.2.2021, B12-22/17 (3/2); 3.2.2021, B12-24/17 (5/10); 27.3.2020, B11-21/14 (11/0); 29.5.2020, B10-22/17 (5/5); 3.8.2020, B12-25/16 (3/3); 9.1.2020, B12-23/16 (3/0); 10.4.2019, B1-189/18, B1-11/15 (1/0); 20.9.2018, B7-185/17 (1/1) (in addition, a fined was imposed on the company's lawyer); 16.3.2018, B5-139/12 (10/1); 8.8.2017, B2-62/16 (2/0); 1.9.2017, B12-13/09 (22/33); 11.1.2017, B1-164/13; B1-167/13; B1-87/14; B1-47/15 (5/4);

corresponds to an average of 0.6 fined individuals per fined company. Even if one takes into account that in three of these cases[130] the Bundeskartellamt referred the proceedings to the respective public prosecutor's offices on suspicion of submission fraud, and that it is therefore possible that the individuals responsible were nevertheless punished,[131] it appears that – contrary to the assumption of the Düsseldorf Higher Regional Court – there is on the whole no effective threat of a fine against those individually responsible for an antitrust infringement.

Therefore, as far as we can tell, referring society and shareholders to external sanctions alone as a solution to deter managers would be to abandon them. Consequently, the availability of recourse actions against managers (or holding them financially liable in some other way) is an essential, and indeed indispensable, governance tool. Two further observations are significant in this context.

First, one might ask: if shareholders were barred from recourse actions, then surely they could threaten directors and officers with financial sanctions of some other kind, such as by way of contractual penalties, a clawback of bonuses or other kind of variable compensation,[132] or a reduction in future salary. Taking the perspective of those who see managerial liability as unduly weakening the effectiveness of fines against the company, it is hard to see why those financial sanctions should be treated differently; after all, a contractual penalty, a clawback of past incentive-based compensation, or a reduction in future salary as a result of an antitrust fine have the equivalent effect of a recourse action, since the financial burden of the fine imposed is ultimately not (fully) borne by the shareholders but is (partially) passed on to the directors and officers. In addition, it should be noted that the above contractual mechanisms certainly have the potential to pass on not just a small but a significant part of a fine to the managers. Moreover, it is difficult to see why it should make a difference at this point whether the pass-on effect is based on a managers' liability inherent in company law (which, depending on the jurisdiction and the type of company that is concerned, may be a mere default rule[133]) or on a contractual liability (contractual penalty,

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14.12.2016, B10-20/15 (11/0); 12.9.2016, B12-23/16 (3/0); 14.12.2016, B10-40/14 (7/0); 18.1.2016, B10-50/14 (5/0); 6.7.2015, B12-15/12 (10/0).

[130] Bundeskartellamt, case report of 25.5.2022, B10-21/17; 10.2.2022, B11-22/17; 27.3.2020, B11-21/14.

[131] In a fourth case, there have already been reports of the discontinuation of proceedings by the competent public prosecutor's office on grounds of discretion. Bundeskartellamt, case report of 15.2.2023, B10-28/18.

[132] Most listed corporations in Germany use clawback clauses related to compliance rules. See Christian Arnold, Ricarda Zeh, and Luca Hanke, 'Malus- und Clawback-Regelungen in Vergütungssystemen börsennotierter Gesellschaften' (2022) *Die Aktiengesellschaft* 843, 846–48. Under US securities law, companies may be required to adopt a 'clawback' policy, which might also apply if earning figures disclosed were inflated by anticompetitive conduct. James S. Venit and Andrew S. Foster, 'Competition Compliance: Fines and Complementary Incentives' in Philip Lowe and Mel Marquis (eds), *Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies* (Hart 2014) 63, 75.

[133] If and insofar as managerial liability is conceived as a mere default rule, it seems even harder to see why, in our context, it should be understood as legally distinct from contractual liability as set out in the manager's contract with the company. For a comparative overview over the leeway left by various company laws to modify the scope and standard of care, to exclude or limit liability, and to waive claims arising from managerial liability, see Simon Deakin and Olaf Riss, 'Directors' and Officers' Liability: Comparative Report' in Simon Deakin, Helmut Koziol, and Olaf Riss (eds), *Directors & Officers (D&O) Liability* (De Gruyter 2018) 910–15. It should be noted that, under German law, the liability of the members of the management board of a stock corporation ('*Aktiengesellschaft*') is mandatory, whereas the liability of the managing director ('*Geschäftsführer*') of a private limited company ('*Gesellschaft mit*

clawback clause, etc.) agreed between the company and the manager. Functionally, the resulting claims of the company are each aimed at preventing the management from breaching their duties towards the company. Therefore, we do not see any relevant economic or legal difference here.[134] Those who believe that recourse actions should generally be prevented in order to ensure the effectiveness of antitrust fines should, to implement this idea consistently, also insist on banning any other form of monetary sanction that involves a flow of money from the company's management to its shareholders triggered by the imposition of an antitrust fine.

Following this line of reasoning, the question arises: what sanctioning tools would be left to a company that was not allowed to threaten its management with financial sanctions? It seems to us that, if the employment has not already ended, the company's options are basically limited to terminating the manager's contract for misconduct and removing her from her post. Further, the company could look at damaging the person's reputation, for example by issuing a bad employment reference or otherwise signalling the person's failure to the market.

Given that, first, the exclusion of recourse actions in the case of antitrust fines imposed on the company would consequently also have to entail the exclusion of other monetary sanctions against the management and, second, that the remaining (non-monetary) sanctions have little or no deterrent potential, it should be clear that the prohibition of recourse actions is not appropriate for a good deterrent effect of antitrust fines against the company. Shareholders would be deprived of an essential and possibly their most effective (internal) governance instrument for responding adequately to the risk of an antitrust fine. All in all, therefore, a ban on management liability for antitrust fines would be counterproductive for the effective prevention of antitrust infringements.

Our analysis appears to coincide with the judgment in *Jetivia* of Lord Toulson and Lord Hodge, who disagreed with the Court of Appeal's reasoning in *Safeway*:

> Safeway's direct liability … under the Competition Act arose through the acts of its directors and employees as its agents, but should the company therefore be denied the right to hold its errant directors and employees to account? … Unless there are special circumstances, the innocent shareholders should not be made to suffer twice. The reasoning in Safeway, if taken to its logical conclusion, would also mean that the company could not lawfully dismiss the errant employees or directors; for to rely on their misconduct would be to rely on its own misconduct …[135]

While this statement is framed as a criticism of the scope of the principle of *ex turpi causa non oritur actio* as assumed by the Court of Appeal in *Safeway*, it is essentially based on the same reasoning that we have developed above: an innocent shareholder would 'be made to suffer twice' if, on the one hand, it had to bear the fine imposed on the company and, on the other hand, the denial of any recourse action deprived it of the most effective governance tool for deterring antitrust violations by directors and officers in the first place.

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beschränkter Haftung' or 'GmbH') is widely considered to be only a default rule. However, the parties' scope for limiting liability has not yet been defined and confirmed by case law. See Holger Fleischer in Holger Fleischer and Wulf Goette (eds), *Münchener Kommentar zum GmbHG* (4th edn, C.H. Beck 2023) § 43 GmbHG paras 368–86.

[134] Contra Wils (n 105) 589.

[135] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23 [160]–[161] (Lord Toulson and Lord Hodge).

4. Is the Weakening of Shareholder Deterrence the Predominant Effect?

If shareholders can expect that, in the event of a fine for an antitrust infringement, part of the fine will be passed on to management, the deterrent effect on shareholders will be reduced. Assuming that the fine just reaches the level for an optimal sanction, the availability of recourse claims may therefore lead to a suboptimal deterrent effect towards shareholders. It is then not entirely certain that antitrust violations will no longer be profitable for them.

a) Three effects of managerial recourse liability on the overall deterrence

The overall effect of the availability of managerial recourse liability on the prevention of antitrust infringements, therefore, presupposes a balancing of three distinct mechanisms: first, the prospect of an effective solution to the agency problem between shareholders and management (i.e. the actual function of managerial liability); second, a weakening of shareholder deterrence; and, third, the creation of an additional deterrence mechanism (distinct from the solution to the agency problem). Whether one considers the availability of recourse actions to be preferable or a violation of the principle of effective prevention of antitrust infringements therefore depends on how one views and balances the effects of these three mechanisms.

b) First effect: addressing the agency problem between shareholders and management

First, it is the conclusion of the above sections that the availability of recourse liability is indeed an essential prerequisite for addressing the agency problem mentioned above. The recourse liability of management for the damage caused to a company by antitrust infringements is the strongest and most visible signal that antitrust infringements are not wanted and will not be tolerated, even if, from the management's point of view, they should have a positive expected value for the company's value.

The effectiveness of this mechanism therefore depends on whether the threat of recourse liability from the perspective of managers is not just 'cheap talk': that managers have a serious expectation that the company will ultimately enforce liability against them. It seems plausible to us that, although there is no certainty in this regard, there is a high probability that a company will assert claims against (former) managers arising from an antitrust violation. This is partly due to the attention and public pressure from stakeholders but also from shareholders, in particular as the issue has also come under the scrutiny of activist shareholders.[136] Ultimately, this also depends on the company law framework, such as the availability and effectiveness of shareholder derivative actions and mechanisms to ensure that supervisory boards, where they exist, enforce the sanctioning of (former) management in the event of misconduct.

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136 See, e.g., Reuters, 'Carl Icahn Sues Illumina Board for Violating "Fiduciary Duties"' <https://www.reuters.com/business/healthcare-pharmaceuticals/activist-icahn-sues-illumina-board-over-grail-acquisition-ft-2023-10-17/> accessed 20 October 2023. Activist investor Carl Icahn is reportedly suing Illumina's board of directors after Illumina proceeded with the acquisitions of Grail in violation of a European Commission's 'standstill' order, for which the Commission fined the company EUR 432 million (*Illumina / Grail* (Case M.10483) [12.7.2023]). The Commission prohibited the takeover (*Illumina / Grail* (Case M.10188) [6.9.2022]) and ordered Illumina to unwind the acquisition (*Illumina / Grail* (Case M.10939) [12.10.2023]).

c) *Second effect: reducing the deterrent effect on shareholders*

Second, one has to ask: how significant is the weakening of the deterrent effect on the shareholders by the availability of managerial liability for antitrust fines? The availability of D&O insurance is discussed separately below.[137]

To assess this, it is necessary to take the perspective of the shareholders at the time they make decisions relevant to the likelihood of antitrust violations in the company: selection of managers and terms of remuneration, setting performance targets, sending signals that antitrust violations will be tolerated, etc. When shareholders weigh the opportunities and risks of a potential antitrust violation at this stage, given the risk of antitrust fines against the company, how much do they see this risk as mitigated by the prospect of management liability?

Of course, it is not the right of full recourse as such that is decisive but the real prospect of being able to hold one or more directors or other employees liable. First of all, it should be noted that the fact that a company is fined does not necessarily mean that it will be able to demonstrate and prove in a subsequent trial that the underlying cartel infringement was due to a breach of duty by one of its managers. Depending on the jurisdiction and the remedy underlying the recourse in the individual case, it must also be proven that the manager acted at least negligently.[138]

Moreover, it should be borne in mind that the fines imposed on the company are based on the turnover of the company (or even of the group to which it belongs). In most cases, therefore, shareholders will have to reckon with such high fines in the event of the discovery and prosecution of an antitrust infringement that it would be absurd to hope for a recourse against management that would lead to the recovery of more than a small fraction of the antitrust fine.[139]

The Düsseldorf Higher Regional Court refused to accept this latter consideration, arguing that the actual enforceability of the liability depends on the contingencies of the individual circumstances, in particular on 'the respective financial situation of the manager and the amount of the corporate fine'.[140] However, it is in fact no coincidence that the amount of the fines typically far exceeds the assets of a managing director, in particular due to the above-mentioned method of assessing the fines (especially in hardcore cartel cases, which are most at stake). Moreover, it is true that, in individual cases, the fines can be in a range so that they do not exceed a manager's assets. The task facing the courts here, however, is to establish an ex ante rule according to which managerial liability is (or is not) excluded because it significantly weakens (or does not weaken) the deterrent effect of the fine. Of course, although there may be outliers in individual cases, the court must look at the typical scenarios to assess this.

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[137] See below section V.
[138] Christian Kersting, 'Organhaftung für Kartellbußgelder' (2016) *Zeitschrift für Wirtschaftsrecht* (ZIP) 1266, 1268.
[139] LG Dortmund 8 O 5/22 (Kart), order of 21.6.2023, juris, para 7 ('Construction Cartel').
[140] OLG Düsseldorf 27.7.2023, IV-6 U 1/22 (Kart) Juris para 204.

Therefore, if one wants to assess – in particular also in the light of the effectiveness requirement under Union law – the extent to which the availability of legal remedies reduces the deterrent effect of a fine on the company, it is not the legally conceivable but the actually expected effects that must be taken into account. If courts argue otherwise 'to be on the safe side', they run the risk of unnecessarily restricting the availability of recourse claims as a tool to address agency problems in the fight against antitrust violations.

In sum, the availability of managerial recourse liability weakens the deterrent effect on shareholders. However, if we take into account the substantial uncertainties and limitations of potential managerial liability for antitrust fines, the overall reduction in the deterrent effect is likely to be non-negligible but severely limited.

d) Third effect: managerial liability as supporting deterrence mechanism in its own right

The availability of managerial recourse liability may weaken the deterrent effect on shareholders, but at the same time it creates a further deterrence mechanism that may compensate for the former effect: if managers face the prospect of having to pay for the damage caused to the company by antitrust violations, including fines, they will be reluctant to take these risks – even if shareholders do not clearly signal that profit maximization through antitrust violations is per se unacceptable. Thus, beyond addressing agency problems between shareholders and managements, managerial liability can play a useful complementary enforcement role by preventing the deterrent effect from fizzling out as the shareholders merely price the fine in as a cost factor.

e) Conclusion

The overall effect of the availability of managerial recourse liability for antitrust fines on the deterrence of antitrust infringements is the sum of three effects, the magnitude of which depends on various parameters that are difficult to determine: on the one hand, a weakening of the deterrent effect on shareholders and, on the other hand, a significant contribution to solving the agency problem of shareholders vis-à-vis management and the establishment of an independent deterrence mechanism against directors and officers.

In our view, however, there are good reasons to believe that the latter effects outweigh the former, so that the availability of managerial recourse liability for antitrust fines is a superior 'second best'. There are two key considerations here. First, if one accepts that the availability of managerial (recourse) liability is crucial for the company (i.e. the shareholders) to address its agency problems and, thus, to actually translate the deterrence directed at them into the prevention of antitrust violations, then it should be clear that, without the availability of recourse liability, the deterrent effect on shareholders may be stronger but ultimately (significantly) less effective in terms of the overall effect of preventing antitrust infringements by senior management or by other employees of the company (supervised by senior management). Second, directors' and officers' liability for antitrust fines provides an independent deterrence mechanism that can at least partially compensate for the fact that the deterrent effect on shareholders may fall to a suboptimal level. On balance, we see no reason to believe that the availability of directors' and officers' recourse liability for antitrust fines would undermine the effectiveness of antitrust fines against the company as a tool to deter antitrust violations. However, if it should turn out that our assumptions above are wrong and that the weakening of shareholder deterrence is indeed, owing to the availability of unlimited recourse liability, the dominant effect, then this should not justify excluding this liability altogether. Such a step would unnecessarily deprive the company (i.e. shareholders) of an essential tool for solving the agency problem. Rather, the possibility of recourse liability in such circumstances should be limited, by judicial intervention according to the principle of effectiveness of EU law or if necessary by legislative intervention. As explained below in the context of the discussion on possible over-deterrence of managers, the amount of profit-related remuneration paid during the period of the infringement can be a useful benchmark to determine the lower bound of an adequate deterrence mechanism against managers.[141]

5. Waiver of Recourse Liability in Connection with Leniency Applications

In the course of the preparation of leniency applications, it appears to be not uncommon for agreements to be reached between a company and its managers in which the company waives recourse claims, including those relating to antitrust fines that may be imposed on the company at a later stage.[142] In this situation, the company's overriding interest may be to ensure full cooperation with the competition authorities as quickly as possible. If the threat of (recourse) liability and/or individual sanctions discourages suspected managers from assisting the investigation, the prospect of indemnification against liability and other sanctions may serve as an incentive to cooperate.

The prospect of the company's waiver of (recourse) liability in this situation may actually have the effect of diminishing its (ex ante) governance effect vis-à-vis management. But this effect should not be overestimated. First, leniency applications are only possible in cartel cases.[143] In the case of illegal vertical coordination, in abuse cases or even in the case of 'gun-jumping' in merger control,[144] the company could also face high fines, for which it could seek recourse against the management.[145] Second, it is difficult for an individual manager to foresee ex ante whether the scenario of a leniency application will even arise and whether the company will necessarily depend on his full cooperation in that situation.

In addition, it should be noted that the waiver of recourse liability in the scenario outlined enhances the effectiveness of the leniency programme and thus serves the purpose of detecting and punishing cartels. In any event, the existence of a certain trade-off between recourse liability as a governance tool and the effectiveness of the leniency policy is not an argument for forgoing the availability of a recourse liability. After all, the company could not

[141] See below section VI.5.

[142] The legality of these waivers and indemnities may be questionable depending on the applicable corporate law. See, e.g., Franz Jürgen Säcker, 'Gesellschafts- und dienstvertragsrechtliche Fragen bei Inanspruchnahme der Kronzeugenregelung' (2009) *Wirtschaft und Wettbewerb* 362, 372.

[143] See Article 4a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (as amended).

[144] See, e.g., European Commission 12.7.2023, M.10483 (Art. 14 procedure), *Illumina/GRAIL*: The European Commission imposed a fine of EUR 432 million on Illumina for the implementation of an acquisition without prior clearance.

[145] It should be noted, however, that even in these cases, antitrust fines against the company can be significantly reduced if the company cooperates (fully) with the authorities, so that there may also be an incentive for the company to secure the cooperation of one of its managers by waiving recourse liability.

incentivize managers to cooperate by waiving fines if there were no liability for antitrust fines in the first place.

6. Conclusion

Contrary to what some courts have argued, ensuring effective deterrence through fines imposed on companies does not require the exclusion of managerial liability for antitrust fines. The availability of recourse actions against directors and officers (or the ability to hold them financially liable in some other way) is an essential and indeed indispensable governance mechanism. If it were denied to shareholders, they would be unable to respond adequately to the threat of antitrust fines. The intended deterrent effect would thus be undermined by a prohibition of management's recourse liability.

It is true that the deterrent effect on shareholders is (possibly) reduced below the optimal level by passing on (part of) the fine to management. However, there is good reason to believe that this effect is outweighed by the positive impact that the availability of managerial recourse liability has on the deterrence of antitrust infringements. First, it allows the agency problems within the company to be addressed more effectively, so that the reduced deterrence to shareholders may ultimately be more valuable in terms of preventing antitrust violations. Second, in addition to its use as a tool to overcome a company's agency problems, managerial liability can be conceived as one element of sanctioning those who are individually responsible for a company's antitrust infringement, thus effectively complementing sanctions directed at the company and compensating the weakening of shareholder deterrence that may occur as a result of the availability of management liability in the first place. In any case, the weakening of shareholder deterrence should only lead to a limitation, not to a complete exclusion of management liability.

V. Avoiding Under-Deterrence of the Company's Shareholders (2): Should D&O Insurance Be Restricted?

Managers' liability risks for their misconduct are nowadays widely hedged by D&O insurance taken out by the company. Although D&O insurance is formally structured as third-party insurance, in practice it may be equivalent to first-party insurance: the company pays the premiums to cover the damage (such as an antitrust fine) it suffers from the misconduct of its directors and officers.[146] This raises the question of whether managerial liability for antitrust infringements in combination with D&O insurance borne by the company has the effect of unacceptably weakening the deterrent effect intended by the antitrust fines. Indeed, it was not least the prospect that the antitrust fine might ultimately be borne by the managers' D&O insurance that led the Court of Appeal in *Safeway Stores*,[147] the Landgericht Saarbrücken in *Villeroy & Boch*,[148] and the Oberlandesgericht Düsseldorf in the *Stainless Steel Companies* case[149] to conclude that managerial liability for antitrust fines should be excluded.

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[146] Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 278–79.
[147] See *Safeway Stores* (n 15).
[148] See *Villeroy and Boch* (n 32).
[149] See *Stainless Steel Companies* (n 51).

1. Mechanisms to Cope with Moral Hazard and Apparent Deficiencies in D&O Insurance

Insurance protection has to cope with moral hazard: those who know that they might be liable for faults but do not have to bear the damages may have too little incentive to invest in avoiding liability and in keeping potential damages to a minimum. Therefore, to succeed economically, insurers must find and use mechanisms to incentivize the insured to invest in damage prevention: adjustment of insurance premiums according to the individual damage risks as revealed, for instance, in the event of a claim and the stipulation of deductibles and caps, as well as other limitations on insurance coverage.[150] Thus, as a matter of principle, the availability of insurance does not eliminate the deterrent effect of liability but rather cushions and channels it. In this sense, Graystone concluded an empirical study on deterrence and motor liability insurance by stating:

> The major conclusions of this work provide strong support for the hypothesis: Liability insurance does not remove the deterrence to accident-causing behavior provided for by the fault determinations of the tort system.[151]

However, with regard to managerial liability in Germany, for example, it has been critically observed that it appears to be common practice for companies to take out group D&O policies for all members of the managing board and the supervisory board. These policies, it is said, are not based on an individual risk assessment of the executives whose behaviour is insured. It would appear, therefore, that standard D&O insurance operates without the sophisticated risk assessment mechanisms known, for example, from motor vehicle liability insurance.[152] It is understood that the stipulation of a mandatory deductible under German stock corporation law is a regulatory response to that insufficient preservation of incentives to avoid harm. Section 93(2), 3rd sentence of the German Stock Corporation Act provides that:

> [w]here the company has taken out insurance to protect a member of the management board against risks arising from their professional activities for the company, the insurance policy is to provide for a deductible of at least 10 per cent of the damage, up to a minimum of 150 per cent of the annual fixed remuneration of the member of the management board.[153]

Yet this provision does not preclude managers from taking out (additional) personal insurance at their own expense, thereby effectively covering *any* liability risk. This appears to be common practice. While the company must not bear the premiums for such additional personal insurance, in practice it often does so indirectly through a supplement to managers' regular remuneration.[154]

It is conceivable that mechanisms such as risk-adjusted premiums and deductibles could be used in this personal insurance to promote preventive incentives. However, experts doubt that the volume of this type of insurance would be large enough to make individual risk

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[150] Gerhard Wagner, 'Tort Law and Liability Insurance' in Michael Faure (ed), *Tort Law and Economics* (Edward Elgar 2009) 377, 389–92.
[151] Richard W. Graystone, 'Deterrence in Automobile Liability Insurance – The Empirical Evidence' (1973) 40 *Insurance Counsel Journal* 117, 126.
[152] Wagner (n 146) 246–47, 272.
[153] Section 93(2) 3rd sentence of the German Stock Corporation Act. Translation taken from <https://www.gesetze-im-internet.de/englisch_aktg/index.html>.
[154] Wagner and Klein (n 111) 197–198, para 141.

classification profitable for the insurer, or that deductibles would be high enough to encourage managers to take adequate preventive action. Therefore, in order to ensure a sufficient level of prevention through liability, it has been proposed to prohibit the use of personal insurance to cover the mandatory deductible for D&O insurance.[155]

2. Do Deficiencies in D&O Insurance Lead to a Failure of Antitrust Fines' Deterrent Effect?

In the light of the criticisms of the design of D&O insurance policies that may be raised in this or similar form in other jurisdictions, the question may arise as to whether the availability of management liability for antitrust fines should be made conditional on regulatory intervention in D&O insurance to ensure that it does not undermine the deterrent effect of managerial liability.

So far, we have not seen sufficient evidence for this. Given the deficiencies in the design of D&O insurance and the regulatory framework applicable to it, there may be reasonable doubt that management liability is translated into incentives to avoid liability in the best possible way. However, from the point of view of the deterrent effect intended by antitrust fines, not every imperfection in the shareholders' control of management through liability should be taken to mean that the deterrent effect of the fines is to be regarded as having failed. Two considerations seem to us to be essential for the assumption that, despite all plausible criticisms of the status quo, it should not be interpreted as allowing an inappropriate relief of shareholders and a failure of the deterrent effect of antitrust fines.[156]

First, for all the valid criticism of the lack of individual risk classification in D&O insurance, one should be cautious about jumping to conclusions about the availability of managerial liability at all. Inaccurate risk assessment, especially in the case of group D&O insurance, will make D&O insurance more expensive, and there is no reason to believe that these costs will not be passed on to the companies that take out these policies. The shortcomings of D&O insurance may thus lead to suboptimal, inefficient incentives for individual managers – but not to inappropriate relief for shareholders. In other words, there may be a market failure in the design of D&O insurance that would justify regulatory intervention. However, it does not then follow that managerial liability for antitrust fines should be restricted. Owing to these deficiencies in the D&O insurance, the deterrence mechanism of antitrust fines may not play out perfectly, but it would be wrong to speak of a failure.

Second, although not required by law for D&O insurance where the insured persons (the managers) and the policyholder (the company) are not identical,[157] policies regularly exclude coverage for losses caused by a deliberate or knowing breach of the law by the insured managers.[158] Insurers are forced to make such an exclusion to reduce moral hazard to a

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[155] Wagner (n 146) 273 and 280.

[156] This is in line with LG Dortmund 8 O 5/22 (Kart) ('Construction Cartel'), order of 14.8.2023, sub 4.b), juris.

[157] In any case, this is the legal situation according to German insurance law, and apparently also in the UK. See Wagner and Klein (n 111) 205 para 173; and Morfey and Patton (n 21) 63.

[158] See A-7.1 AVB-D&O (General Conditions of Insurance for D&O Insurance provided by the German *Gesamtverband der Versicherer*, individual insurance contracts may differ; published, e.g. in Oliver Lange, *D&O-Versicherung und Managerhaftung* (2nd edn, C.H. Beck 2022) 2277). This commonly used term excludes coverage to a greater extent than the exclusion for intentionally caused damage as stipulated under section 103 of the German Insurance Contract Act. In the *Heiploeg* case (above section

manageable level. This means, however, that for participation in hardcore cartels and, thus, for a large proportion of the antitrust infringements fined, the question of an excessively restricted liability effect due to D&O insurance seem not to arise.[159] This was apparently the case in *Heiploeg*,[160] and in *Thyssenkrupp* one may speculate that an exclusion of coverage for deliberate infringements was a major reason why the company agreed to a settlement with the insurer that included reimbursement of only a small fraction of the antitrust fine.[161] However, the outcome in the *Stainless Steel Cartel* case appears to be indeed quite problematic from the point of view of the necessary deterrent effect, as the court denied a knowing violation of antitrust law and thus affirmed D&O coverage despite the apparent participation in meetings in which price-sensitive information was exchanged.[162]

It has been argued that the exclusion of coverage for knowing antitrust violations could easily be circumvented by the company choosing a manager who could only be accused of negligent breach of supervisory duty, so that the company could claim compensation from the D&O insurance taken out for her.[163] Apart from the fact that in such a situation the insurance company could in any case take recourse against the managers who knowingly violated the antitrust laws, we doubt that the exclusion for intentional violations could be systematically circumvented in this way, otherwise the insurance company could not reasonably cope with the moral hazard problem. Besides, regulatory limitation of D&O insurance, rather than exclusion of managerial recourse liability, would be the preferable regulatory response.

3. Conclusion

All in all, we see no convincing evidence that the availability of D&O insurance, despite its deficiencies, would render impossible or undermine on a broad scale the deterrent effect of managerial liability for antitrust fines. To exclude managerial liability for antitrust fines because the design of D&O insurance weakens its preventive effect would be to throw the baby out with the bathwater. Thus, depending on the prevailing practice of D&O insurance and the applicable regulatory framework under company and insurance law, there may be good reasons to limit the coverage of managers' liability by law. However, as far as we can tell from D&O practice and the regulatory status quo, we see no need to make managers' liability for antitrust fines dependent on such regulatory intervention.

II.1) it was reported that the insurance company considered not covering the former directors' liability for the antitrust fine because the insurance policy excluded 'deliberate intent'. Beetstra and Van De Sanden (n 4) 5.

159 For scenarios where relevant legal uncertainty may exist, see below section VI.2.

160 See above n 13.

161 See above n 49.

162 See above n 54 and accompanying text.

163 Florian Wagner-von Papp in this volume, a working paper version of which is available under 'The Interplay Between Corporate Law and Competition Sanctions or Remedies', section IV.B.1, text accompanying note 73, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4578598>; Stefan Thomas, 'Bußgeldregress, Übelszufügung und D&O-Versicherung' (2015) *Neue Zeitschrift für Gesellschaftsrecht* 1409, 1419.

VI. Avoiding Over-Deterrence of the Company's Management: Should Managerial Liability for Antitrust Fines Be Limited?

If a company that has been fined for an antitrust violation is allowed, as a governance instrument, to bring recourse actions against the managers who have breached their antitrust compliance duty, the question arises: should managers really be threatened with having to reimburse the company for the *entire* fine? Or should the amount of recourse be limited? To answer these questions, we first shed light on the actual risk of over-deterrence and mitigating factors, and then assess whether, against this background, principles of EU law compel a limitation of managerial liability. Lastly, we discuss possible mechanisms for implementing such a limitation.

1. Managerial Liability for Antitrust Fines and the Risk of Over-Deterrence

The management of a company acts in the economic interest of the shareholders. While directors and officers may share in the economic success of their companies through variable compensation components (which create incentives for loyal, profit-maximizing conduct), they may at best only partially internalize the benefits of their activities.[164] Rather, it is the nature of a company that its success or failure is reflected in its shareholders' wealth.

Against this background, it is clear that a fine set at a level that effectively dissuades an undertaking from infringing the antitrust rules may, if passed on in full to its management, easily exceed the level that would be necessary to deter it from doing so. For the plausibility of this insight, one need not even think of the fines amounting to several billions of euros that the Commission has occasionally imposed in cartel cases[165] and abuse proceedings.[166] It is safe to assume that the EUR 191 million for which ThyssenKrupp sued its former managing director to indemnify for an antitrust fine in the same amount[167] exceeded his assets several times over.

If the liability of managers for breach of antitrust compliance obligations may thus easily exceed the optimal level and, indeed, may threaten to destroy their economic existence, there is a risk of an excessive deterrent effect. However, these risks materialize only under certain conditions, and, in practice, they may also be limited by countervailing factors and effects. Before discussing these aspects in more detail,[168] one might ask: why are these (potential) risks of excessive liability even of relevance when evaluating and controlling the deterrent effect of antitrust fines?

The threat of excessive liability creates an incentive for managers to be unduly risk-averse. They may invest excessively in compliance measures,[169] avoid business activities simply

[164] Certainly, this is different if they are at the same time the company's only shareholders. However, in such a scenario the agency problems, which are the reason for the discussion about how recourse actions might affect the preventive effect of fines, do not arise in the first place.

[165] *Trucks* (Case AT.39824) [2017] OJ C 108/6; [2020] OJ C 216/9.

[166] *Google Search (Shopping)* (Case AT.39740) [2018] OJ C 9/11; *Google Android* (Case AT.40099) [2019] OJ C 402/11.

[167] See above n 42 and accompanying text.

[168] See below VI.3.

[169] Bruce H. Kobayashi, 'Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations' (2001) 69 *George Washington Law Review* 715, 735–37; Douglas H. Ginsburg and Joshua D. Wright, 'Antitrust Sanctions' (2010) 6 *Competition Policy*

because they are in the vicinity of antitrust law, or even avoid activities in business lines just because they have proven to be susceptible to antitrust infringements. On the fact of it, if the company fails to exploit its business potential in this way, this would appear to be a problem (only) for the shareholders: shouldn't they, in their own best interests, take steps to avoid these effects? Yet, for one thing, depending on the applicable company law, liability may be mandatory or, even if designed as a default rule, may prove 'sticky' because of information problems or transaction costs. Moreover, if one is prepared to derive from antitrust fines' deterrence objective restrictions on managerial liability to avoid under-deterrence, one should consequently also keep in mind the risks of over-deterrence.[170] After all, it is not only in the shareholders' interest but also in the general interest that companies do not forgo business activities that are, in fact, perfectly legal and may thus be regarded as socially desirable but from the firm's perspective might be viewed as legally unclear.[171] In other words, there is no trade-off between maximizing shareholder value and overall social welfare[172] when allowing companies to effectively and efficiently address their agency problems in order to prevent antitrust infringements. If there is indeed a substantial risk of over-deterrence (which will be discussed next), managers should not have to bear the full damage caused to a company by an antitrust fine.

2. Are Risks of Over-Deterrence Only Theoretical as Managers May Simply Ensure Legal Compliance?

Managers can avoid liability by acting lawfully towards their company. Therefore, at first glance at least, over-deterrence might seem only a theoretical problem.[173] On closer inspection, however, it becomes clear that only personal activities carried out with the knowledge of illegality can be safely reduced to zero. However, over-deterrence remains a real problem because, first, the line between what is and what is not legal under antitrust law is not always precisely predictable.[174] In *Google Shopping*, the Commission imposed a fine of EUR 2.4 billion[175] for conduct when its illegality, from an ex ante point of view, seemed to quite a few observers at least doubtful.[176] Second, it is also not precisely defined which antitrust compliance measures management is legally required to take in order to prevent infringements by a company's employees or by a subsidiary for whose infringements the

International Autumn 2010, 3, 8; Gregory J. Werden, Scott D. Hammond, and Belinda A. Barnett, 'Deterrence and Detecting of Cartels: Using All the Tools and Sanctions' (2011) 56 *The Antitrust Bulletin* 207, 210–11.

[170] On the principle of proportionality as an EU law basis for the protection against over-deterrence effects see below section VI.4.

[171] See Connor and Lande (n 100) 431n16.

[172] For an overview of the discussion of which normative objectives should guide company law see John Armour, Henry Hansmann, Reinier Kraakman, and Marianna Pargendler' 'What Is Corporate Law?' in Reinier Kraakman et al (eds), *The Anatomy of Corporate Law* (3rd edn, OUP 2017) 22–24.

[173] This was implicitly assumed, for example, in the context of cartelists' liability for umbrella damages by AG Kokott, Case C-557/12 *Kone and Others* ECLI:EU:C:2014:45, para 68. See Franck (n 102) 143–44.

[174] See e.g. Thomas (n 163) 1418 (referring inter alia to uncertainties as to the scope of Article 101(3) TFEU).

[175] *Google Search (Shopping)* (Case AT.39740) [2018] OJ C 9/11.

[176] See Christian Bergqvist, 'Google and the Search for a Theory of Harm' (2018) 39 *European Competition Law Review* 149. Against this background, it has been doubted whether the infringement was committed intentionally or negligently as required under Article 23(2) of Regulation 1/2003 (n 65). This argument was rejected by the General Court. See Case T-612/17 *Google Search (Shopping)* ECLI:EU:T:2021:763, paras 605–20.

parent company could be fined.[177] Thus, given the uncertainties regarding both the antitrust laws and the antitrust compliance efforts legally owed, managers cannot always simply choose to act legally; in these scenarios, an excessive threat of liability can result in socially undesirable overcaution on the part of management.

3. Mechanisms Hedging Against (Potential) Over-Deterrence

a) Discretionary powers in case of (ex ante) legal uncertainty and regarding compliance organization

The potential over-deterrence effect of management liability for antitrust fines discussed above can be mitigated by granting the directors and officers certain discretionary powers. However, as will be shown, the law appears to provide only for a rather uncertain and wide-meshed safety net against the risks of over-deterrence.

Dealing with uncertain antitrust standards. While company laws routinely limit judicial review of management's business decisions via the 'business judgment rule',[178] the adequate handling of uncertainties in the management's assessment of the legal situation appears less clear. German stock corporation law provides a good example of this. Board members have a strict duty to examine the legal situation, to obtain legal advice from qualified lawyers, and to check the plausibility of the advice given. If these duties have been observed, liability can be excluded for lack of negligence, even if the conduct is subsequently found to be in breach of antitrust law.[179] The real problem, however, is when the antitrust assessment remains uncertain ex ante, either because a particular scenario has not yet been adjudicated or because the actual or potential effects of conduct are not readily discernible. In individual cases, legal or economic advice may reduce uncertainty but it cannot ultimately eliminate it; it may only make it more apparent to board members.

One conceivable approach in the face of such a state of uncertainty would be to require board members to rigorously avoid taking legal risks (or to accept liability). With regard to the imposition of fines on the company, Advocate General Kokott appears to have suggested such a strict position:

> [An] undertaking … acts at its own risk if the legal opinion obtained by it shows that the legal situation is unclear. In that case, the undertaking is at least negligent in accepting that by its market behaviour it infringes the rules of European competition law.[180]

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177 Case C-97/08 P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536, paras 54–63. See also the contribution of Florian Wagner-von Papp in this volume, a working paper version of which is available under 'The Interplay Between Corporate Law and Competition Sanctions or Remedies', section V., available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4578598>.

178 See, for instance, section 93(1) of the German Stock Corporation Act. Before this 'business judgment rule' was included in the Stock Corporation Act, it had already been recognized in the case law of the German Federal Court of Justice. See BGH 21.4.1997, II ZR 175/95 *ARAG/Garmenbeck* BGHZ 135, 244, 253; Juris, para 22.

179 See BGH 20.9.2011, II ZR 234/09 *ISION* Juris, para 18.

180 AG Kokott, Case C-681/11 *Schenker & Co. and Others* ECLI:EU:C:2013:126 para 71. The court did not take up this point but contented itself with the statement that 'the fact that the undertaking concerned has characterized wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anti-competitive nature of that conduct'. Case C-681/11 *Schenker & Co. and Others*, ECLI:EU:C:2013:404, para 38.

While there is no legal precedent on the related liability of board directors under German stock corporation law, most academic writers reject such a strict approach. The question that arises, of course, is: what level of risk of illegal action should a board member be allowed to impose on her company? It seems to be widely accepted that, where uncertainty arises from a lack of precedent, it should be permissible to rely on any one of several equally plausible alternative interpretations of the law. However, it has also been argued that a legal risk could be regarded as permissible even where a particular practice is contrary to the precedents of the highest courts, provided that their authoritative power has been weakened, for example if the court has indicated by obiter dictum its willingness to reconsider its precedent, because of changes in the legal or factual environment, or because of well-founded and widespread criticism in the academic literature.[181] In addition, it was noted that consideration should also be given to possible disadvantages for the company if the legal position adopted by the director is subsequently found to be incorrect (e.g. the imposition of an antitrust fine).[182]

It is therefore quite possible that a company may be fined but have no recourse against its board members if it deliberately engages 'in a particular cause of action [that] is more likely to be permissible than not'.[183] In the absence of a clear legal precedent, however, this remains unresolved under German law, for example.

Duties to ensure antitrust compliance by employees and the 'business judgment rule'. Illegal conduct by employees – with the resulting adverse effects on the company, such as fines and damages to be paid, as well as a loss of reputation – is, from the company's perspective, a business risk whose handling by the company should be assessed by the courts on the basis of the 'business judgment rule'. So, while there seems to be a consensus among legal writers that the board members should have wide discretion in the measures they take to achieve this,[184] there is no clear precedent for this either.[185] The fact that an antitrust violation has occurred, possibly even a hardcore cartel initiated by employees, must not in itself justify the conclusion that the measures taken were inadequate. Given this obvious risk of hindsight bias, even the recognition of broad discretionary powers for board members can only be expected to provide partial protection against over-deterrence.

[181] Dirk A. Verse, 'Organhaftung bei unklarer Rechtslage – Raum für eine Legal Judgment Rule?' *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 2017, 174, 191; Hans Christoph Grigoleit and Lovro Tomasic in Hans Christoph Grigoleit (ed), *Aktiengesetz* (2nd edn, C.H. Beck 2020) § 93 para 22. See also Gerald Spindler in Wulf Goette and Mathias Habersack (eds), *Münchener Kommentar zum Aktiengesetz* (5th edn, C.H. Beck 2019) § 93 para 99.

[182] Holger Fleischer in Gerald Spindler and Eberhard Stilz (eds), *Kommentar zum Aktiengesetz* (4th edn, C.H. Beck 2019) § 93 para 31.

[183] Douglas W. Haws and Thomas J. Sherrard, 'Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases' (1976) 62 *Virginia Law Review* 1, 33–34 (defining an 'odds opinion' as reflecting 'an attorney's belief that a particular cause of action is more likely permissible than not, although there is no clear legal precedent directly on point'). See for an Austrian perspective Daniel Madari, 'Die Regressfähigkeit von Kartellgeldbußen' (2021) 50 *Der Gesellschafter* 14, 16–17.

[184] Holger Fleischer (n 182) § 93 para 56; Gerald Spindler (n 181) § 93 para 115.

[185] In Germany, as far as can be seen, there is only one (though well-known) judgment by a lower court that considered an inadequate compliance organization in a recourse action directed against a former board member. In this ruling, the court did not assess the conduct of the board member against the 'business judgment rule' but found that the defendant had acted negligently regarding the inadequacies of the compliance system. LG München I 10.12.2013, 5 HKO 1387/10 *Siemens/Neubürger* Juris, para 105.

b) D&O insurance

Given the availability and widespread use of D&O insurance, liability risks of directors and officers for misconduct to the detriment of the company are now largely hedged. Therefore, if there is a risk of an excessive deterrent effect on management due to the (full) passing on of the company's antitrust fine in the event of a negligent breach of duty by directors and officers, this is substantially mitigated by insurance coverage. However, the potential for over-deterrence may still exist, albeit to a limited extent, mainly due to three factors.

First, antitrust fines imposed on a company may well exceed the coverage limits of D&O insurance. It has been reported that in Germany, for example, coverage limits of between EUR 75 million and 300 million were common prior to 2010, depending on the size of the balance sheet total.[186] For the largest companies, it is probably safe to assume that managers are protected from personal liability in the high hundreds of millions.[187]

Second, despite D&O insurance, there may be a risk of over-deterrence if the policy provides for a deductible that exceeds the level of optimal deterrence. Whether this possibility is of any practical significance remains uncertain to us. At least in Germany, the opposite phenomenon can be observed: managers are practically not subject to any deductible. While German stock corporation law provides for a mandatory deductible, in practice this provision is usually empty because managers cover the insurance gap with personal insurance, which may even be (indirectly) financed by the company.[188]

Third, D&O insurance policies generally exclude coverage for damages caused by a deliberate or knowing infringement of the law on part of the insured managers.[189] In line with this policy, it was reported that in the *Heiploeg* case the insurer considered that the defendant director's liability was not covered because the policy excluded deliberate intent.[190] In the *Safeway Stores* case, however, coverage was apparently not thought to be precluded despite managers' direct involvement in an illegal exchange of pricing information,[191] and in the *Thyssenkrupp* case it was reported that the insurance company paid part of the claim despite the company's initial argument that the defendant manager had been directly involved in the cartel.[192]

It is true that, in theory, the exclusion of cover for deliberate or knowing infringements may not provoke over-deterrence because the insured can simply refrain from illegal behaviour. In practice, however, there is a grey area where it is not certain whether a court will, in hindsight, assume that the illegality had to be considered merely possible (not excluding coverage) or that there was in fact a knowing breach of the law. Furthermore, a D&O policy

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[186] Wagner (n 146) 235.

[187] See, e.g., LG Hannover 12.10.2022, 23 O 63/21, Juris, para 112 (according to terms agreed in 2015 and 2021, respectively, the Volkswagen AG's board of management in total was apparently insured for up to around EUR 500 million).

[188] See above n 153 and accompanying text.

[189] See above n 158.

[190] See above n 13 and accompanying text.

[191] See above n 21 and accompanying text.

[192] See above n 49 and accompanying text.

may exclude coverage even if a director or officer merely considered a breach of antitrust law to be possible but accepted the risk of illegal dealings.[193]

c) Conclusion

The discretion granted by the courts to the courts in the face of uncertainty as to the applicable antitrust standard and as to the measures that need to be taken to ensure compliance by the employees, as well as the availability of D&O insurance, provides protection against over-deterrence risks that may arise from liability for antitrust fines.[194] However, depending on how these mechanisms are developed, designed, and used in a given legal framework, risks of over-deterrence may remain in individual cases.

4. Does EU Antitrust Law Force a Limitation of Managerial Liability for Antitrust Fines to Avoid Over-Deterrence?

Whenever a fine is imposed for violation of EU antitrust law, whether by the Commission or by national authorities or courts, it must be compatible with the principle of proportionality. This is recognized in case practice,[195] explicitly stated in the ECN+ Directive,[196] and essentially a matter of course, because the imposition of a fine substantially interferes with the fundamental rights of the addressees. Therefore, if a company is fined by a national authority for an infringement of EU antitrust law,

> the Member States must ensure … that infringements … are penalised under conditions, both procedural and substantive, which are proportionate and dissuasive … [T]he principle of proportionality requires, first, that the penalty imposed should correspond to the gravity of the infringement and, second, that when setting the amount of the fine, account should be taken of the individual circumstances of the particular case.[197]

This, however, says little about whether EU law must make it its business if a fine for violation of EU antitrust law discloses an *indirect* effect of excessive deterrence on the management via recourse actions provided for under (national) company law. In any event, in its adjudication on fines as an enforcement instrument, the ECJ has made clear that the appropriateness of a sanction must be measured against the objective of the law to be enforced.[198] On this basis, in the context of antitrust enforcement, it would seem consistent if EU law kept an eye on the risks of indirectly excessive deterrence caused by national law insofar as those effects might ultimately undermine antitrust law's regulatory objective. Since EU law uses the general principle of effectiveness for examining whether national law hinders the adequate deterrence of EU law infringements,[199] it seems consequent to use the

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[193] Wagner (n 146) 250.
[194] See for further mitigating factors Andrea Lohse, '§ 50 Zivilrechtliche Sanktionen' in Gerhard Wiedemann (ed), *Handbuch des Kartellrechts* (5th edn, C. H. Beck 2024, forthcoming) paras 85 and 88.
[195] Case T-236/01 *Tokai Carbon v Commission* ECLI:EU:T:2004:118, para 244.
[196] Article 13 and recital 40 of the ECN+ Directive.
[197] Case C-385/21 *Zenith Media Communications* ECLI:EU:C:2022:866, paras 34–35.
[198] Case C-418/11 *Texdata Software* ECLI:EU:C:2013:588, para 52 ('measures provided for under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question: where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued').
[199] See for one the doctrine of so-called *Rewe* effectiveness, pursuant to which national law must not be 'framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)'. Case C-505/14 *Klausner Holz Niedersachen*

principle of proportionality to examine whether there is a risk of over-deterrence measured against the objective of the provisions to be enforced. If a fine for an infringement of EU antitrust law results in companies being unnecessarily[200] prevented from exploiting their economic potential because of the effects of excessive recourse liability under national law, this may be seen as frustrating the objective of antitrust law. In this scenario, such an indirect consequence cannot easily be regarded as merely remote or accidental. Given that a company's supervisory body or (new) management, which may be competent for recourse actions, is obliged to maximize the company's profits, it seems entirely predictable that a legal opportunity to pass on an antitrust fine to the (former) management by way of a damages action will be used in practice.

However, if this argument is accepted, there should be no doubt that the national legislatures enjoy a wide margin of regulatory discretion. Given the complexity of the interplay between the different legal frameworks (antitrust law and company law) that determine the practical effect of antitrust fines and given that the rules on management's recourse liability can have at most an indirect effect on the effectiveness of antitrust fines, judicial review of the national rules on recourse liability should be exercised with restraint. A breach of a general EU law principle should only be presumed where it can be clearly and manifestly be shown that the liability regime is likely to have an overly dissuasive effect on management that is unacceptable in the light of the objectives of EU antitrust law.

We have seen that, on the one hand, the recourse liability of managers for antitrust fines imposed on the company carries the risk of counterproductive over-deterrence. On the other hand, a limited judicial review of business decisions can effectively mitigate those risks. In addition, the availability of D&O insurance protects against the excessive impact of recourse liability to a large extent, although not always completely. In the light of the above and the wide margin of discretion left to national legislators, we do not see that a general principle of EU law should compel a general limitation of directors' liability for a fine imposed on a company for a breach of EU antitrust law.

5. How Could a Limitation on Managers' Personal Liability Be Implemented?

Even if, as we conclude, general principles of EU law do not compel a cap on the liability of managers for antitrust fines, such a cap provided for in national law may be a good mechanism to protect against an excessive deterrence. It could be implemented through either legislative or judicial intervention.

a) Legislative intervention: liability cap based on variable compensation

In outlining a statutory cap on managers' liability,[201] the challenge is to achieve a convergence of interests between shareholders and management, providing the latter with

ECLI:EU:C:2015:742, para. 40. See for another the requirements for effective sanctioning as developed following the *Greek Maize* case (above n 96), stating that Member States must provide for sanctions that ensure a 'genuinely dissuasive effect'. Case C-81/12 *Asociaţia Accept* ECLI:EU:C:2013:275, para 63. See also Advocate General Kokott Case C-387/02 *Berlusconi and Others* ECLI:EU:C:2004:624, para 89.

[200] Measured against the level of sanction that would be necessary for effective deterrence.

[201] For an overview of the discussion in Germany see Gregor Bachmann, 'Reform der Organhaftung?' in *Verhandlungen des 70. Deutschen Juristentages* (C.H. Beck 2014) E62–E66.

sufficient incentives to fulfil their obligations to the company (including ensuring compliance with the law) without inducing overly risk-averse behaviour. Ideally, managers should expect to receive an appropriate share of the profits and losses resulting from their decisions.

The question of what a sensible and robust (general) statutory upper limit for the liability of managers would have to look like in this context is beyond the scope of this paper. It should be noted, however, that it is in the logic of the above that the cap should be calculated in relation to the variable remuneration. Consequently, if a cap for liability for breach of compliance obligations and the resulting antitrust fines were considered, the recourse liability could be limited to the amount of the variable components of the compensation during the period of the antitrust infringement or (in order to prevent circumvention[202]), if higher, to 50 per cent of the average fixed salary during this period. In addition, in the case of cartels, the liability cap could be subject to a multiplier in recognition of the limited likelihood of detection.

b) Judicial intervention based on equity considerations

As an alternative to a statutory (fixed or variable) limit on managerial liability, the law may grant the court discretion to reduce the amount of damages recoverable. In the UK, section 1157 of the Companies Act 2006 allows the court to exonerate managers (in whole or in part) from liability for breach of duty if they acted 'honestly and reasonably and … ought fairly to be excused'. The introduction of such a provision allowing the judge to reduce the damages to be compensated was also suggested for Germany.[203]

It seems doubtful, however, that a reduction based on equity considerations is a sound approach to avoiding risks of excessive deterrent effects. When weighing their options ex ante, directors and officers cannot reliably consider such a reduction if, ex post, courts have discretion to reduce liability in individual cases (or not).[204] That the possibility of ex post reduction by courts cannot well calibrate the deterrent effect of liability should not be surprising. Its legitimacy derives from equity considerations, i.e. from notions of distributive justice. In view of managers' liability for antitrust fines, the concept is meant to address whether the distribution of the burden of the antitrust fine between company (shareholders) and managers is fair and equitable,[205] not whether managers' liability creates optimal incentives to avoid antitrust fines.

In the absence of statutory authorization, courts might be inclined to establish ad hoc limitations on managers' recourse liability.[206] A notable example is the first-instance decision of the labour court in the *Thyssenkrupp* case, which considered limiting the liability of the managing director for the company's antitrust fine to EUR 1 million. The court based this

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[202] See Wagner (n 146) 274–75.
[203] Gregor Bachmann (n 201) E32 and E123.
[204] Wagner (n 146) 277.
[205] Whether and in which scenarios a reduction of liability appears to be necessary for reasons of distributive justice is beyond the scope of this contribution. In Germany, some authors recognize a duty of care of the company towards its directors and officers, which would require a limitation of liability; others strictly reject this approach. For the former position, see, e.g., Walter Bayer, 'Legalitätspflicht der Unternehmensleitung, nützliche Gesetzesverstöße und Regress bei verhängten Sanktionen' in Georg Bitter and others (eds), *Festschrift für Karsten Schmidt* (Otto Schmidt 2009) 85, 97; for the latter position, see, e.g., Wagner (n 146) 276–77.
[206] This might also be the case if courts understand that the weakening of shareholder deterrence is the predominant effect, so that EU law requires a limitation of management liability; see section IV.4.

ceiling for managerial liability on section 81(4) of the German Competition Act, according to which a fine imposed on natural persons for antitrust infringements must not exceed EUR 1 million.[207] In the end, the court did not have to commit itself to this position, as it did not consider the requirements for managerial liability to be met. While the court in its judgment was obviously concerned with equity considerations, the liability ceiling can also be understood as a pragmatic, albeit crude, approach to avoiding risks of over-deterrence. Conceptually, this approach does not fit well, mainly because, in the context of antitrust fining, EUR 1 million does not serve as a cap but marks the upper limit of a fining range.[208] In other words, a fine of this amount would be imposed on an individual only for the most serious conceivable case of antitrust infringement. At any rate, it only applies in cases of intentional injury; in cases of negligence, the upper limit for an antitrust fine is EUR 500,000.[209] These maximum limits for individual cartel fines bear no relation to the factors that should determine a cap on managerial liability. It would be completely arbitrary to apply them to recourse liability for antitrust fines.

c) Equalization of benefits

Although not designed with the impetus to calibrate the deterrent effect of liability, under German law[210] the principle of equalization of benefits (*Vorteilsausgleichung*) may give courts leeway to reduce managers' liability for antitrust fines that have been imposed on the company. Under this doctrine, if a person who has suffered a recoverable damage also benefits from the event giving rise to the underlying liability, the liable party may deduct that benefit if two conditions are met: first, there must be a causal link between the event giving rise to the liability and the benefit; and, second, the equalization of the benefit must not be contrary to the purpose of the underlying liability for damages, i.e. it must not unduly burden the aggrieved party and or unduly benefit the liable party.[211] In principle, the onus is on the liable party to prove that the aggrieved party has received a benefit that can be set off, and the amount of that benefit.[212]

Thus, in the context of managerial liability for antitrust fines, the question arises as to whether a manager who is liable for the damage caused to the company by the antitrust infringement can claim that the company made additional profits as a result of the antitrust infringement, which can be deducted from the antitrust fine in accordance with the principle of equalization of benefits. In the *Thyssenkrupp* case, the Düsseldorf Regional Labour Court considered the principle to be applicable, but without committing itself to this position. In fact, the court emphasized that the issue is controversial in the academic literature, where it is

[207] ArbG Essen 19.12.2013, 1 Ca 657/13 Juris, para 140.
[208] See Walter Bayer and Philipp Scholz, 'Zulässigkeit und Grenzen des Kartellbußgeldregresses' *GmbH-Rundschau* 2015, 449, 454.
[209] Section 17(2) of the German Act on Regulatory offences (Gesetz über Ordnungswidrigkeiten).
[210] For a comparative overview of equivalent legal institutions in European legal systems, see Christian von Bar and Eric Clive (eds) *Principles, Definitions and Model Rules of European Private Law*, Vol. 4 (Oxford University Press 2009) 3750–59. The corresponding model provision under the Draft Common Frame of Reference is 'VI. – 6:103: Equalisation of benefits.'
[211] BGH 6.6.1997, V ZR 115/96 Juris, para 7.
[212] BGH 31.1.1991, IX ZR 124/90 Juris, para 9.

also argued that equalization should be rejected because it is seen as an undue discharge of the liable party, namely the liable manager.[213]

Indeed, if a company benefits from increased profits as a result of an antitrust infringement, this benefit is a direct consequence of the very event that gives rise to managerial liability. However, insofar as the managerial liability is necessary to address the agency problem inherent in a company and thus to enable the deterrent objective of an antitrust fine imposed on a company to be realized in the first place, i.e. to be translated into compliance efforts on the part of the management, this objective of managerial liability would be undermined by an equalization. On the other hand, insofar as the antitrust fine for which a manager is to be held liable exceeds the amount of the threat of liability necessary to discipline her effectively,[214] there is nothing in the objective of managerial liability to prevent the equalization of cartel profits accrued by the company. Therefore, depending on the fact that the liable manager can show sufficiently high benefits on part of the company, courts may in fact use the principle of equalization of benefits to allocate an antitrust fine imposed on the company between shareholders and management in such a way that the latter's compliance violations are sufficiently deterred but the former are not unduly relieved of the antitrust fine. However, this would probably only become relevant in practice if the courts were to grant the liable managers certain evidentiary relief, possibly even shifting the burden of proof to the company.[215] Otherwise, it will often not be possible for the defendant manager to prove and quantify the benefits linked to an antitrust infringement.

6. Conclusion

The prospect of unlimited managerial liability for antitrust fines carries the risk of undesirable over-deterrence. These risks are not merely theoretical, because, given the uncertainties surrounding both antitrust law itself and antitrust compliance obligations, managers may not simply choose whether or not to breach their legal obligations to the company. However, the law can help mitigate these risks by allowing managers to exercise discretion. In addition, the availability and indeed widespread use of D&O insurance provides comprehensive, albeit imperfect, protection against excessive liability risks. Thus, while the latter may remain a serious problem in individual cases, this is not expected to be the case across the board. Therefore, and given that the rules on managerial liability have at any rate only an indirect impact on the dissuasive effect of antitrust fines, the need for a liability cap cannot be derived from general principles of EU law requiring proportionate sanctioning. If, however, the national legislator decides to introduce such a limitation, it should, ideally, be based on the variable components of the managers' remuneration.

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[213] LAG Düsseldorf 20.1.2015, 16 Sa 459/14 Juris, para 169. However, the majority of observers, including the two authors cited by the court, consider the set-off of benefits to be permissible. See Holger Fleischer, 'Kartellrechtsverstöße und Vorstandsrecht' (2008) *Betriebs-Berater* 1070, 1073; Frank Sebastian Hack, *Vorstandsverantwortlichkeit bei Kartellrechtsverstößen* (Peter Lang 2012) 82–84; Walter Bayer and Philipp Scholz, 'Zulässigkeit und Grenzen des Kartellbußgeldregresses' *GmbH-Rundschau* 2015, 449, 454–55.

[214] See above section VI.5.a).

[215] See Kersting (n 138) 1274. Note that such a shift of the burden of proof was rejected by the Düsseldorf Higher Regional Court in the *Stainless Steel Companies* case. See OLG Düsseldorf 27.7.2023, IV-6 U 1/22 (Kart) Juris paras 153 and 188.

VII. Managerial Liability in the Follow-Up of Antitrust Damages Actions

If managerial misconduct leads to the company having to pay antitrust damages to aggrieved parties, the question as to whether the company may seek contribution from its (former) directors and officers arises in the same way as in the case of an antitrust fine.[216] Although this is not the subject of this article, the parallelism of the questions warrants a brief side glance.

Antitrust damages and fines share the objective of deterring competition law infringements. The deterrent rationale of damages actions for breach of the EU antitrust rules is based on the ECJ's effet utile interpretation of Articles 101 and 102 TFEU, as emphasized in its seminal *Courage* judgment[217] and constantly reaffirmed since then.[218] Thus, insofar as the objectives of antitrust fines and damages are congruent, the question of possible under-deterrence of the company or over-deterrence of its management by recourse liability may arise – but also be answered – in the same way.

However, given the widespread acceptance that damages actions also serve to 'compensate' victims of the antitrust violations, an instrumental distinction may be observed. Thus, in addition to deterring antitrust infringements, the ECJ has identified the pursuit of corrective justice as an objective in its own right.[219] The right to full compensation as enshrined in Articles 1(1) and 3 of the Antitrust Damages Directive[220] is often viewed as an endorsement of this objective.[221]

However, to the extent that it is the company that compensates aggrieved parties for inflicted damage – which is in fact the most common scenario in antitrust liability cases – issues of internal allocation between the company and its management are irrelevant. Only in the exceptional case that the company is insolvent at the time of an antitrust action for damages could managerial liability be relevant to the compensation of cartel victims. This can be illustrated by the *Heiploeg* case:[222] while this dispute concerned the liability of (former) managers for an antitrust fine, it is equally conceivable that Heiploeg's bankruptcy trustee could seek compensation from former managers to indemnify the company against an antitrust damages obligation it owes to victims. Admittedly, it is not clear that, in the event of the insolvency of an antitrust infringer, managerial recourse liability can and/or must play an

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216 Robertson (n 24) 326.

217 Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465, para 27.

218 Case C-882/19 *Sumal* ECLI:EU:C:2021:800, paras 35–37.

219 Case C-536/11 *Donau Chemie* ECLI:EU:C:2013:366, para 24. See Jens-Uwe Franck and Martin Peitz, 'Cartel Effects and Component Markers' Right to Damages' (2020) 43 *World Competition* 209, 209–10. The crucial question, though, remains how the notion of corrective justice can meaningfully be employed to define the (legitimate) limits of antitrust damages liability. Jens-Uwe Franck and Martin Peitz, 'Suppliers as Forgotten Cartel Victims' (2018) 15 *NYU Journal of Law & Business* 17, 46–49.

220 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1. See also recital 12 of the Antitrust Damages Directive.

221 It should be noted, however, that the principle of full compensation as enshrined in Articles 1(1) and 3 of the Antitrust Damages Directive (n 220) as such tells us little about which damages related to an antitrust infringement should (or should not) be compensated and which policy objectives should guide this decision. See Jens-Uwe Franck, 'Private Enforcement in Germany' in Ferdinand Wollenschläger et al (eds), *Private Enforcement of European Competition and State Aid Law* (Wolters Kluwer 2020) 77, 82–83.

222 See above section II.1.

essential role in compensating aggrieved parties: on the one hand, in the insolvency scenario, a successful recourse action by a bankruptcy trustee would arguably benefit all of the company's creditors, not just the antitrust damages creditors. On the other hand, where an antitrust infringement results from joint conduct, undertakings involved are jointly and severally liable for the inflicted harm.[223] Thus, in cartel cases, even in the event of the insolvency of one of the antitrust infringers, the full compensation of a cartel victim will only rarely depend on managerial recourse liability.

In the light of the above, we see no compelling reason why management's recourse liability for antitrust damages claims should be different from that for antitrust fines. In both cases, it should be designed to best address the agency problems faced by the company.

Those who see a need to effectively increase the chances of full compensation for victims of antitrust infringements through managerial liability should instead advocate direct personal liability for those who have participated in cartelization or otherwise facilitated an antitrust infringement.[224] To be sure, such direct antitrust liability of managers vis-à-vis third parties could risk having an overly dissuasive effect on management, depending in particular on the apportionment of damages between the company and the managers and on the risk of bankruptcy of the company, an aspect that we need not go into here.

VIII. Conclusion

This contribution has examined the impact that the protection of the deterrence objective of antitrust fines should have on managerial liability towards the company. We support the view that the civil justice system should not decide on the recourse liability of managers in isolation from the law on antitrust fines. It is therefore conceivable that, contrary to conventional principles of company law, the liability of directors and officers to the company might have to be excluded or limited if the policy of fining would otherwise be undermined. When the European Commission, a Member State competition authority, or a Member State court imposes a fine for an infringement of Article 101 or 102 TFEU, it is a matter not only of national (company) law but also of EU law, in view of the principle of effectiveness, to take due account of the rationale behind antitrust fines. National courts, in particular courts of last instance, which have to decide on the availability of recourse liability in these situations, must therefore consider a referral to the ECJ under Article 267 TFEU in order to clarify the requirements to be derived from the EU principle of effectiveness.

In the light of the above, there are three main findings. First, while we recognize that antitrust fines are intended to have a deterrent effect by affecting the shareholders of a company held responsible for an infringement and that this deterrent effect is (possibly) reduced below the optimal level by passing on (part of) the fine to management, it is not necessary to bar recourse actions against managers responsible for antitrust infringements in order to avoid under-deterrence of antitrust violations. Rather, managerial recourse liability must be maintained as an indispensable governance tool for solving the agency problems associated

[223] See Article 11(1) of the Antitrust Damages Directive (n 220).
[224] See above n 124 and accompanying text.

with the risk that management will be prepared to commit cartel violations or not invest adequately in antitrust compliance. Therefore, there are good reasons to believe that, even if shareholder deterrence is reduced, this reduced deterrence is more effective in terms of preventing antitrust violations. Moreover, the availability of managerial recourse liability functions as a deterrence mechanism in its own right, at least partly compensating for the weakened shareholder deterrence it brings. Otherwise, disagreement with key assumptions of ours should be grounds for limitation, not elimination, of recourse liability.

Our findings are in line, for example, with the view of Flaux J on the policy of antitrust penalties as endorsed in the first-instance judgment in the *Safeway Stores* case:

> The suggestion that undertakings will only be deterred from breaching the [Competition] Act [1998] if they are prevented from suing the individuals who caused the breach is completely illogical. I accept [counsel for the claimants'] submission that passing on the penalty to the very people who caused the unlawful acts would not be inconsistent with the 1998 Act.[225]

Second, this also holds true when considering the availability of D&O insurance. We recognize that, given the practice of group insurance, for example, and other shortcomings in the design of D&O insurance, managerial recourse liability is often not ideally translated into incentives to reduce the risk of antitrust violations. Nonetheless, given the deterrent purpose of antitrust fines, the availability of recourse liability against management, even in combination with imperfect (or at least imperfectly regulated) D&O insurance, is preferable to the exclusion of recourse liability. In any event, it should be a reason to limit or otherwise regulate D&O insurance but not to exclude recourse liability per se, if it is assumed that insurability would undermine the deterrent effect of antitrust fines on the company.

Third, we recognize that the risks of over-deterrence inherent in managerial recourse liability may be legally relevant, particularly in light of the general principles of sanctioning in EU law, and that the existence of such risks cannot be denied given the level of antitrust fines. On the other hand, we see mitigating mechanisms at work: the acceptance of managerial discretion under the business judgment rule and the availability of D&O insurance. While there may be scenarios in which significant risks of over-deterrence remain, these findings do not make it necessary to derive a mandatory limitation of managers' recourse liability from the deterrence objective of antitrust fines. Whether or not managers' liability is limited should rather be seen as a policy decision within the discretion of company law legislation and jurisprudence.

Against this background, EU (antitrust) law therefore does not impose any restrictions on the liability of managers for antitrust fines under (national) company law. To the extent that German courts, for example, have argued to the contrary, this is unconvincing.

Finally, it should be emphasized that this article, starting from the question of whether the deterrent rationale of antitrust fines requires a denial or limitation of directors' and officers' liability or D&O insurance, has only provided a partial analysis of how directors' and officers' liability for antitrust fines should be designed. In addition to the key findings of our analysis, we have noted that there may be good reasons in a particular jurisdiction to limit managerial

[225] *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm), [2010] 3 All ER 577, at para 130.

recourse liability – be it to avoid excessive deterrence of management or possibly to satisfy considerations of corrective justice. A useful benchmark for such a limitation may be the amount of profit-related compensation paid to management during the period of the infringement. In addition, depending on the prevailing practice of D&O insurance and the respective corporate and insurance law framework, there may be good reasons to legally limit the coverage of managerial liability by D&O insurance. Thus, while we do not believe that the deterrence rationale of antitrust fines necessarily requires a limitation on managerial recourse liability or D&O insurance, we do not purport to have conclusively settled how managerial liability should ideally be designed in any particular jurisdiction to achieve the deterrence objective associated with antitrust fines.