

## Managerial liability for competition law fines – prohibited or required?

Order for Reference by the German Federal Court of Justice in C-347/25 – *Zapp*

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Bilbao, 14 November 2025

- The case is about the liability of company organs, i.e. directors of the company, towards the company. “Company organs” will in this presentation also be called “managers”, hence the title “managerial liability”.
- The manager of the company took part in illegal price fixing agreements, infringing Art. 101 TFEU.
- A (punitive) fine of about 4 Mio. € was imposed on the undertaking (i.e. the company).
- The company (i.e. the undertaking) pays the fine and demands compensation from its manager for the harm it incurred due to the fine.

# Corporate Law Starting Point

- The manager of the company took part in illegal price fixing agreements, infringing Art. 101 TFEU. A (punitive) fine of about 4 Mio. € was imposed on the undertaking (i.e. the company). The company pays the fine and demands compensation from its manager for the harm it incurred due to the fine.
- The corporate law assessment is – at least under German law – straightforward:
  - Price fixing is a breach of the duty of legality
  - Culpability is presumed (and also not really a problem)
  - Harm/damage: amount of the fine
- Thus: “pure” corporate law gives the company a claim for compensation

# Concerns under German Law

- The fine was imposed on the company. Does this mean that the fine must remain with the company?
  - England & Wales Court of Appeals: Safeway Stores Ltd. v. Twigger: *ex turpi causa non oritur actio*
  - Austrian Act on the Liability of Legal Persons: no compensation
- The German Federal Court of Justice disagrees:
  - No specific provision as in Austria (→ moreover: court fails to see that Austrian provision does not apply to competition law fines).
  - Paying someone else's fine is not a criminal offence.
  - Case law: holding tax advisors liable for a fine imposed on their client is possible (→ moreover: court is too careful, there is an *argumentum a fortiori* as well)
- Thus: no general prohibition of managerial liability for fines

# No compensation for *competition law* fines?

## **Pro** prohibition of managerial liability for *competition law* fines

The court sees the danger that managerial liability would economically relieve the company from the financial burden imposed by the fine, which would conflict with the objectives of the law on competition law fines (para 34).

## **Contra** prohibition of managerial liability for *competition law* fines

The fine sets incentives for compliance for the managers, which the court considers particularly significant because the fine can also be imposed on the association alone and the European Commission is not even able to impose a fine on the managers personally (para 35).

## **Result:** no prohibition of managerial liability for *competition law* fines

Court does not see sufficient reason to restrict the generally applicable corporate law provisions on damages for competition law considerations.

## Also: effects of managerial liability are exaggerated

- Company benefits from the cartel; e.g. it profits from excessive prices charged to customers.
  - Fines take these benefits away, at least partially.
  - Organs (managers) can offset these advantages from the company's damages claim.
  - This is necessary so that illegal profits are not returned to the company by the organs who have to compensate the company in full for the fine.
- Managerial liability only in the amount that company's damages exceed its profits!
- Burden of proof (against prevailing opinion) on the company: the company has to prove that its damages exceed its profits by the amount claimed.

# EU Law

- Risk of relieving the company from the financial burden
  - Could impair the effectiveness of the fine (Federal Court of Justice);
  
- But:
  - Company remains primarily liable for the fine; it is unlikely that the company will be relieved of the financial burden in full
  - Exempting the organs from liability will create wrong incentives
  - Art. 20 I NIS-2-Directive demands managerial liability → managerial liability for fines is not a threat to the effectiveness of the fines imposed, but a necessary means of controlling the behaviour of the organs

Managerial liability for fines is necessary to control the behaviour of the managers (organs). At least, if there are no personal fines that can be imposed on the managers. The Federal Court of Justice says this indirectly:

- No personal fines for managers can be imposed by the EU Commission (para 42)
  - In this case, managerial liability for fines reinforces the preventive and deterrent effect of the fine by providing incentives for the organs (managers)
  - Correct: it is possible that EU law thus demands managerial liability – the Court should have made that even clearer
- Suggestion that the ECJ not demand different rules depending on whether personal fines against managers are possible (para 42)
  - This means, though, that the ECJ has to base its analysis on the EU legal situation where no personal fines against managers are possible – otherwise its analysis would be too optimistic
  - This argues in favour of managerial liability for fines

- Managerial liability for fines is necessary for controlling the behaviour of organs (managers) and setting the right incentives for them
  - At least, if no personal fines can be imposed on the managers
  - The ECJ has to proceed on this assumption, unless it wants to differentiate between cases where personal fines can be imposed or not
- But even if personal fines can be imposed on the managers:
  - Are these sufficiently high to set the correct incentives for managers and deter them from competition law infringements?
  - In the case of the Federal Court of Justice the fine imposed on the manager was only 126.000 € - regarding a hard-core cartel that lasted 12,5 years

- What about other heads of damages? E.g. managerial liability for ...
  - ... internal investigations,
  - ... legal costs,
  - ... damages paid to injured parties, e.g. customers who have paid inflated prices?
- Federal Court of Justice: other heads of damage not affected if managerial liability for fines is considered prohibited
- True as regards costs of internal investigation and legal costs
- But: logical consequence of denying managerial liability for fines is also denying managerial liability for damages paid to injured parties (next slide)

Logical consequence of denying managerial liability for fines is also denying managerial liability for damages paid to injured parties:

- If managerial liability for fines impairs *public* enforcement of competition law, then managerial liability for damages paid to injured parties impairs *private* enforcement of competition law.
- Personally, I do not agree.
  - Public enforcement is not impaired by managerial liability for fines, because this provides the right incentives for managers.
  - Private enforcement is not impaired by managerial liability for damages paid to injured parties, because injured parties are still compensated and managers can invoke the principle of offsetting advantages and disadvantages.
- But: who denies managerial liability for fines is not convinced by these arguments and has to also deny managerial liability for damages paid to injured parties
  - Thus: without managerial liability for fines no managerial liability for damages
  - Thus: it cannot be argued that managerial liability for damages paid to injured parties sets sufficient compliance incentives for the managers

- *Pro* prohibition of managerial liability: undertaking is (partially or in full) relieved of the financial burden imposed by the fine
- *Contra* prohibition of managerial liability: managers must have sufficient compliance incentives
- **Important: without managerial liability for fines, there is a risk of exempting the managers from liability entirely and losing all compliance incentives:**
  - No managerial liability for fines
  - No managerial liability for damages paid to injured parties as this can hardly be justified if managerial liability for fines is denied
  - No personal fine imposed on the managers by the EU Commission; personal fines in Germany far too low
- **Consequence: managerial liability for fines is not prohibited by EU law. Rather it is mandated by EU law (at least at the moment)!**



# Considerations regarding the decision of the ECJ

- In its reasoning, the Federal Court of Justice examines whether managerial liability impairs the effectiveness of the fine; however, this narrows the perspective
- The question referred asks whether Art. 101 TFEU prohibits managerial liability for fines; it does not ask whether the provisions on the imposition of fines (Art. 13 Directive 2019/1/EU, Art. 23 Regulation 1/2003) preclude managerial liability
- Correct: the question is about effective enforcement of competition law; this requires broadening our perspective
  - Are undertakings sufficiently deterred? Are organs (managers) sufficiently deterred?
  - Are illegal profits disgorged and are they not returned to the undertaking?
  - These aspects are missing, if one only focusses on the effectiveness of the fine

- ECJ demands an overall assessment of national law, cf. *ASG 2* (C-253/23)
  - If bundling claims via assignment of claims is impossible,
  - are there other possibilities of collective redress in Germany?
  
- Similar situation in case of managerial liability for fines:
  - If managerial liability for fines reduces the financial burden for the undertaking too far, are the effects mitigated in any other way (by offsetting advantages and disadvantages)?
  - If the lack of managerial liability for fines reduces the organs' compliance incentives too far, are there any other positive compliance incentives for the organs (personal fines)?
  - We need an overall assessment and need to consider all effects, including those that run counter to each other: managerial liability for fines reduces the impact of fines on shareholders, but creates compliance incentives for organs (managers)

- Overall assessment of national law
  - Can only be undertaken by national courts
  - In principle, the Federal Court of Justice does this
- But: the court's analysis is incomplete, it does not consider the offsetting of advantages and disadvantages and ignores the question of burden of proof
  - Wrong impression that undertaking can take full recourse against its managers
  - But organ can offset the undertaking's illegal cartel profit against the undertaking's liability claim → insures that the illegal profit is not returned to the undertaking
  - Burden of proof according to prevailing opinion with the organ. But, correct opinion: burden of proof is on the undertaking. It has to prove that its disadvantages resulting from the cartel are higher than its advantages and can claim the difference from the organ
  - Federal Court of Justice should have explained that in detail and should have decided on the allocation of the burden of proof in order to give a complete picture of German law → hopefully this can be remedied (cf. ASG 2, C-253/23)

- In principle: the ECJ
- But, according to the ECJ in *ASG 2* (C-253/23, para 82 et seq.): national court  
*„[...] it is for the referring court alone to determine whether the interpretation of national law excluding, in disputes relating to competition law, a group action for collection has the effect of making it impossible or excessively difficult to exercise the right to compensation which EU law confers [...]. However, that court must, to that end, take account of all the relevant factors relating to the detailed rules laid down by national law [...].“*
- Not convincing
  - But reluctance of ECJ is understandable; only national law can answer the question *where* national law is to be interpreted in conformity with EU law or disapplied
  - With regard to limitation law, ECJ developed minimum standards

- Answer scenario 1: Art. 101 TFEU does not preclude managerial liability for fines
- Answer scenario 2: Art. 101 TFEU precludes managerial liability for fines
  - Any rejection by the ECJ would not be a general rejection, but only a rejection in the specific context of the concrete overall assessment: not 'no to managerial liability for fines', but only 'not like this'.
  - This is because excluding managerial liability would be problematic in itself; the problem can also be solved elsewhere in German law, for example by mitigating the effects of managerial liability
  - The ball would be back in the court of national law: if 'not like that,' then perhaps like this? Perhaps if one takes the offsetting of advantages and disadvantages into account? New referral?

# Theses

1. The Federal Court of Justice recognises the possibility of managerial liability for fines paid by the company under German law; but it sees the danger of a conflict with Art. 101 TFEU
2. Liability for fines also has positive effects on the enforcement of competition lawng
  - Incentives for organs (managers): especially in case of no or insufficient personal fines
  - NIS-2-Directive requires managerial liability for fines!
3. Necessity of an overall assessment of national law
  - To be undertaken by national courts, compatibility with EU law to be decided by the ECJ (disagreeing, however, the ECJ!)
  - Any rejection by the ECJ would not be a general rejection, but only a rejection for the specific context of the concrete overall assessment.
4. In sum: managerial liability is possible under EU law, possibly even mandated (at least at the moment for Germany)

# Muchas gracias por su atención!

for further reading

Kersting, ZIP 2025, 1590 [in German] = [\(2025\) 46 E.C.L.R. 330](#) [in English]

## Managerial Liability for Competition Law Fines

### Case Note on the Order for Reference by the German Federal Court of Justice in C-347/25

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<sup>45</sup> Competition law; Directors' liabilities; EU law; Fines; Germany; Jurisprudence; References to European Court

#### I. Introduction

The question of whether undertakings<sup>1</sup> can take recourse against members of their company organs (also referred to in this article as "managers") for competition law fines imposed on the company ("managerial liability") has long been controversial in German law.<sup>2</sup> After an odyssey through various branches of the judiciary and instances in various proceedings,<sup>3</sup> the German Federal Court of Justice (Bundesgerichtshof, BGH) has now had the opportunity to decide the issue. However, there is still no final clarification. The Federal Court of Justice referred the question to the European Court of Justice as to whether "Article 101 TFEU precludes a provision in national law according to which a legal person against which a national competition authority has imposed a fine for an infringement of Article 101 TFEU committed by its management body can claim compensation from the management body for the damage it has suffered as a result."<sup>4</sup> The order for reference, which sets the

framework for the ECJ's response, in particular by setting out the national legal framework and by the arguments considered, will be analysed below. It will be shown that although the order correctly addresses key aspects, it still needs to be supplemented. In particular, those aspects that do not speak in favour of a ban on managerial liability for competition law fines under European law, but rather speak in favour of a requirement of such managerial liability under European law, are neglected. Finally, the need for an overall assessment of national law and its significance for the answer to the question referred will be discussed.

#### II. Starting point under company law

The Federal Court of Justice initially approaches the question of the recoverability of competition law fines from a corporate law perspective. It correctly emphasises the liability in principle of directors of a GmbH (German limited liability company) for breaches of the duty of legality, even if the infringement of the law may be advantageous for the company, in accordance with § 43(2) GmbHG (German Act on Limited Liability Companies). At this point, the court already emphasises the parallelism with the liability provisions for AGs (German public limited companies, cf. § 93(2) AktG, German Act on Public Limited Liability Companies), which it then always cites together with § 43 GmbHG in the following. This makes it clear that there are no differences between AGs and GmbHs under German law in this respect.<sup>5</sup>

The Federal Court of Justice then sets out the question of whether compensation for competition law fines imposed on the company is excluded for legal reasons (paras 13–14) and introduces its decision on this question with explanations on the admissibility of a judicial development of the law by way of teleological reduction (i.e. reducing the scope of the provision that is indicated by its wording on account of its *ratio legis*, para 16).<sup>6</sup> It is therefore already clear at this point that the wording of the liability provisions also provides for recourse in relation to competition law fines imposed on the undertaking. The court rightly finds no restrictions either in the wording of §§ 43 GmbHG and 93 AktG or in other provisions of German law (para. 18). Its reference to the fact that Germany lacks a provision such as § 11 of the

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<sup>2</sup> The case takes place at the interface of company and competition law. Therefore, both the term "company" and the term "undertaking" are used. While company law looks at the individual company as a legal entity, competition law looks at the undertaking which can span both the individual legal entity and the economic unit consisting of several legal entities. For reasons of clarification, the term "undertaking" is therefore often used below as a generic term, which is not always understood strictly in terms of competition law, but also in terms of company law.

<sup>3</sup> See the references in BGH, decision of 11 February 2025, KZJR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, Rz. 13 f. – Zugp. as well as Kersting/May (2024) 45 E.C.L.R. 328 footnote 3 [German version: Kersting/May, WuW 2024, 343], see as well Kersting, ZEP 2016, 1266 = FWW Jahrbuch 2016 (2019), 81. The ECJ's docket number is Zepg-C-347/25.

<sup>4</sup> The possibility of managerial liability for fines is affirmed by LG Darmstadt, decision of 7 June 2023, O 5/22 (Kart), NZKart 2023, 443 = *Rechtsprech. gr. Gesellschftsw. u. LG Darmstadt*, decision of 14 August 2023, O 5/23 (Kart), NZKart 2023, 468 = WuW 2023, 173 = *Rechtsprech. Theoret. der Privatwirtschaft*, judgment of 27 July 2023, VI 4 U 1/22 (Kart), NZKart 2023, 489, para 133 et seq. = WuW 2023, 265 = *Rechtsprech. LAG Düsseldorf*, judgment of 29 January 2025, 16 56 4/919-1, NZG 2025, 782 = *Recht E.C.* 2/466 = WuW 2025, 548 = *Rechtsprech. LG Sankt-Omer*, judgment of 15 September 2024, 1720 O 6/16, NZKart 2021, 64 = WuW 2021, 63 = *Rechtspr. im Sanftware*, see as well BAG, judgment of 29 June 2017, 8 AZR 189/15, NZKart 2018, 53 = *Schiedsmediat.*

<sup>5</sup> BGH, decision of 11 February 2025, KZJR 74/23, BeckRS 2025, 1286 = NZG 2025, 855 – Zugp.

<sup>6</sup> BGH, decision of 11 February 2025, KZJR 74/23, BeckRS 2025, 1286 = NZG 2025, 855 – Zugp. Cf. Kersting/May (2024) 45 E.C.L.R. 328, 328–329 [German version: Kersting/May, WuW 2024, 343, 344]; Kersting, ZEP 2024, 1266, 1266 = FWW Jahrbuch 2024 (2019), 81, 81–82, each with further references.

<sup>7</sup> This is questionable from a methodological point of view, cf. Kersting/May (2024) 45 E.C.L.R. 328, 328–331 [German version: Kersting/May, WuW 2024, 343, 345].