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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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Competition law; Directors' liabilities; EU law; Fines; Germany; Jurisprudence; References to European Court

I. Introduction

The question of whether undertakings[1] 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.[2] After an odyssey through various branches of the judiciary and instances in various proceedings,[3] 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."[4] 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 s.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. s.93(2) AktG, German Act on Public Limited Liability Companies), which it then always cites together with s.43 GmbHG in the following. This makes it clear that there are no differences between AGs and GmbHs under German law in this respect.[5]

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).[6] 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 ss.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 s.11 of the

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[1] 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 mean both the individual legal entity and the economic unit consisting of several legal entities. For reasons of simplification, 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.

[2] See the references in BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, Rn. 13 f.—*Zapp*; as well as Kersting/May (2024) 45 E.C.L.R. 528 footnote 1 [German version: Kersting/May, WuW 2024, 243]; see as well Kersting, ZIP 2016, 1266 = FIW Jahrbuch 2018 (2019), 81. The ECJ's docket number is *Zapp* (C-347/25).

[3] The possibility of managerial liability for fines is affirmed by LG Dortmund, decision of 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443–*Bußgeldregress gg. Geschäftsführer*; LG Dortmund, decision of 14 August 2023, 8 O 5/22 (Kart), NZKart 2023, 496 = WuW2023, 573–*Bußgeldregress*. Denying the possibility of managerial liability for fines: OLG Düsseldorf, judgement of 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489, paras 133 et seq. = WuW2023, 505–*Organhaftung*; LAG Düsseldorf, judgement of 20 January 2015, 16 Sa 459/14, NJOZ 2015, 782 = WuW/E DE-R 4668 = WuW 2015, 648–*Stahlhandel*; LG Saarbrücken, judgement of 15 September 2020, 7 HK O 6/16, NZKart 2021, 64 = WuW 2021, 62–*Regress im Sanitärkartell*. See as well BAG, judgement of 29 June 2017, 8 AZR 189/15, NZKart 2018, 57–*Schienenkartell*.

[4] BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855–*Zapp*.

[5] BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, para.9–*Zapp*. Cf. Kersting/May (2024) 45 E.C.L.R. 528, 528–529 [German version: Kersting/May, WuW 2024, 243, 244]; Kersting, ZIP 2016, 1266, 1266 = FIW Jahrbuch 2018 (2019), 81, 81-82; each with further references.

[6] This is questionable from a methodological point of view, cf. Kersting/May (2024) 45 E.C.L.R. 528, 530-531 [German version: Kersting/May, WuW 2024, 243, 245].

Austrian Verbandsverantwortlichkeitsgesetz (Austrian Act on the Liability of Legal Persons), which specifically excludes managerial liability (para.18), is also correct. However, it would have been helpful and would have strengthened the argument to point out that the Austrian provision actually does not apply to competition law fines in the first place.[7] Furthermore, the court rightly emphasises that managerial liability is in line with the meaning and purpose of the liability provisions and in this respect emphasises the compensation function and the behaviour-controlling incentives (para.18).

III. Prohibition of managerial liability for fines according to the law of corporate sanctions?

The Federal Court of Justice then raises the key question of whether the provisions of the German law on corporate sanctions (ss.30 Act on Regulatory Offences, OwiG; ss.81–86a German Competition Act, GWB) result in a restriction of liability for damages under civil law.[8]

1. General prohibition of liability for fines

After stating that no restriction can be inferred from the wording (para.22), the court first summarises the rules that generally apply in German law for civil liability for fines: civil law claims against advisors or consultants for reimbursement of a fine imposed on the client are not excluded (para.24) and compensating offenders for a fine imposed on them is not a criminal offence (para.25). All of this is correct. The Federal Court of Justice could also have referred to its case law on the passing on of fines imposed by associations.[9] Overall, a clear picture emerges: German law generally permits civil liability for fines. Contrary to the Higher Labour Court Düsseldorf, which in particular considered the case law on consultancy cases to be non-transferable to cases involving competition law fines,[10] the Federal Court of Justice recognises the parallels and declares the principles of this case law to be significant for managerial liability for competition law fines (para.26). However, it phrases this far too cautiously. These principles are not only relevant for the situation in question here, but they are even *a fortiori* applicable, precisely because of the existing differences. While the consultant's client could have decided differently, companies can only act through their organs; their organs' actions are their actions.[11]

2. Prohibition of liability for competition law fines

The Federal Court of Justice then discusses whether something different should nevertheless apply in the case of competition law fines and whether managerial liability should be excluded.[12] First, it summarises aspects that may speak against managerial liability for competition law fines: the differences between association sanctions pursuant to s.30 OWiG and personal fines pursuant to s.9 OWiG as well as the different maximum amounts of fines (para.28); the purpose of the association sanction to inflict a serious disadvantage on the association's assets (para,29), which should also compensate for an illegal economic advantage of the association (paras 30–31). It is noteworthy that the Federal Court of Justice also refers to the aspect of disgorgement of profits and recognises that a disgorgement effect can also exist and be intended if the competition authority imposes a purely punitive fine, because even then the calculation of the fine is based on the offence-related turnover and thus reflects the profit and damage potential (para.33). This is relevant for the question of offsetting advantages and disadvantages, which the court unfortunately does not address (infra V.2.b).[13] In summary, the court sees considerable reasons for managerial liability possibly economically relieving 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). In addition, it adds that the threat of personal fines for managers, their dismissal and their possible liability for other damages already had the effect of controlling behaviour by setting incentives for compliance (para.34).

However, the Federal Court of Justice immediately casts doubt on this again (paras 34–35). In the opinion of the court neither the repressive-punitive nor the preventive function of the association sanction would generally be called into question if managerial liability was permitted (para.35). Depending on the amount of the fine, the sum insured under a D&O insurance policy, the liability exclusions agreed therein and the financial capacity of the managers, an effective and deterrent amount could remain with the company depending on the facts of the individual case (para.35). The deterrent function of the fine is, according to the court, supported by its behaviour-controlling effect (setting incentives for compliance), 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). Next, the Federal Court of Justice recognises

[7] Brand, ÖZK 2024, 207, 208-209; Steiner, Geschäftsleiterhaftung im Wettbewerbsrecht, 2021, p.91; Strasser, VersR 2017, 65, 66, 69–70; differently, however, Madari, GesRZ 2021, 14, 20–21. Already Kersting, ZIP 2016, 1266, 1267 = FIW Jahrbuch 2018 (2019), 81, 82-83; Kersting/May (2024) 45 E.C.L.R. 528, 529 [German version: Kersting/May, WuW 2024, 243, 245].
[8] BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, paras 19–36–*Zapp*.
[9] i.e. football clubs being punished by their association for the illegal behaviour of their supporters can pass this fine on to their supporters: BGH, judgement of 22 September 2016, VII ZR 14/16, BGHZ 211, 375. Cf. Kersting, FIW Jahrbuch 2018 (2019), 81, 85 et seq.
[10] LAG Düsseldorf, judgement of 20 January 2015, 16 Sa 459/14, NJOZ 2015, 782 = WuW/E DE-R 4668 = WuW 2015, 648, 654–*Stahlhandel*.
[11] cf. Kersting, ZIP 2016, 1266, 1267 = FIW Jahrbuch 2018 (2019), 81, 83.
[12] BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, paras 27–36–*Zapp*.
[13] Cf. Kersting/May (2024) 45 E.C.L.R. 528, 534–535 [German version: Kersting/May, WuW 2024, 243, 313–314].

that effective control of the management by the shareholders is not possible in every case (para.35). Finally, it also points out that the legislator has not opposed the case law according to which fines can be reclaimed, although the issue has been widely discussed academically (para.36).

3. Result

The Federal Court of Justice thus comes to the conclusion that managers can be held liable under German law for competition law fines imposed on the company. Even if this is not expressly stated, it is clear from the overall context. The court considers a teleological reduction (i.e. reducing the scope of the provision that is indicated by its wording on account of its *ratio legis*) of the corporate law provisions on damages. However, it cannot affirm the prerequisite of such a teleological reduction "beyond doubt" (para.17); a restriction of the scope of application of civil law liability for damages "raises doubts" (para.19); it is "doubtful" whether there is an unintended loophole (para.27); an exclusion of recourse "nevertheless remains questionable" (para.34). All of these considerations and formulations make it clear that the Federal Court of Justice (rightly) does not see sufficient reason to restrict the generally applicable corporate law provisions on damages for competition law considerations. For German law, it must therefore remain the case that managers can be held liable for fines imposed on their company. Only with this understanding does the question referred make sense. For only if German law affirms recourse does the question arise at all as to whether European law prohibits it. If German law were to exclude managerial liability for competition law fines, the question would have had to be asked in reverse, i.e. whether European law requires managerial liability or precludes its exclusion (seeinfra V.1).

IV. European law analysis by the Federal Court of Justice

Through its tentative, cautious approach, which only hints at a decision on the issue of German law, the Federal Court of Justice has already made it clear that German law is open to interpretation and further development. It can therefore emphasise at the beginning of its comments on European law that a restrictive interpretation of national law is not excluded from the outset.[14] However, even if this were otherwise and German law allowed no room for interpretation, this question would have to be clarified. Because in this case, conflicting German law—i.e. the provisions on managerial liability—would have to remain unapplied insofar as they contradict European law.[15] The question to be clarified is therefore whether art.101 TFEU requires such a restrictive interpretation of national German law.

The fact that the Federal Cartel Office based its decision imposing a fine on the claimant on art.101(1) TFEU is reason enough to look at Union law in this specific case (para.37). However, the question is also relevant beyond this specific case. The Federal Court of Justice rightly points out that the legislator wanted to harmonise the national law on fines with EU law requirements and emphasises that, in order to avoid a split interpretation of national law, it is hardly necessary to differentiate between whether the fine was imposed due to an infringement of national or European competition law (para.38). This is convincing and coincides with the later statement of the Federal Court of Justice that, according to art.101(1) TFEU, it should not matter whether the fine proceedings are conducted by the European Commission or a national competition authority (para.42).

The Federal Court of Justice does not (of course) answer its own question. This is ultimately the task of the ECJ. However, it does indicate where its doubts under European law stem from. To this end, it begins with an explanation of European law principles (para.40). The court then names some aspects which, in its opinion, are relevant for the ECJ"s decision (para.41–44). This is probably intended to pre-mould the ECJ"s answer and ensure that these aspects are highlighted in the answer. Two things stand out. Even if the court cannot address all aspects discussed in academic writing,[16] some important aspects are missing, such as the question of offsetting advantages and disadvantages. On the other hand, the comments of the Federal Court of Justice initially give the impression that the court leans towards denying managerial liability for competition law fines. On closer inspection, however, its comments also point in the direction of an affirmation of managerial liability. This will be analysed in more detail below.

1. General principles

The Federal Court of Justice first states that European law lacks an explicit provision on managerial liability and that it is therefore unclear whether art.101 TFEU precludes a right of recourse (para.39). This is followed by some more fundamental comments on the imposition of fines by national competition authorities (para.40). Even if the detailed regulation of fines falls within the competence of the Member States, the sanctions must be effective, proportionate and dissuasive (para.40). The sanctions serve to penalise and deter (para.40).

2. Risk of relieving the company from the financial burden

The Federal Court of Justice first justifies its doubts about the admissibility of managerial liability for competition law fines under European law by stating that recourse

[14] BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, para.37–*Zapp*.
[15] Cf. only ECJ, judgement of 18 April 2024, C-605/21, ECLI:EU:C:2024:324, para.82–*Heureka*.
[16] See on the one hand (in favour of managerial liability) Kersting/May (2024) 45 E.C.L.R. 528, 534–543 [German version: Kersting/May, WuW 2024, 243, 313] and on the other hand Wils, WuW 2023, 583 [in English].

could allow the company to completely or partially relieve itself of the economic burden imposed by the fine (para.41). It bases its considerations on the condition that art.101 TFEU "affects the internal relationship between the company and its management organs, which is characterised by national company law" (para.41). This condition should, of course, be easily met. It cannot be assumed that the ECJ will recognise an exception to the *effet utile* of art.101 TFEU for the internal relationship between the company and its (management) organs under company law. Firstly, under European company law, the liability of organs is only provided for in secondary law for the European Company in art.51 SE-Regulation and is therefore subordinate to primary law. Secondly, there is also no need for this. This idea is, however, viable to counter attempts of wanting to derive a prohibition of managerial liability from the secondary law provisions of art.23 of Regulation 1/2003 and art.13 of Directive 2019/1/EU.[17]

The Federal Court of Justice then justifies its finding that a complete or partial economic relief of the company from the fine imposed on it is problematic by stating that "such a shift of the economic disadvantage imposed on the association by the sanction has similar relieving effects as the deductibility of a fine under tax law" (para.41). However, this statement is not convincing and should be called into question by both the Advocate General and the ECJ.

The fact that the possibility of managerial liability for competition law fines does not constitute a violation of the European principle of effectiveness has already been explained in detail elsewhere.[18] To summarise briefly, the purpose of the corporate fine is already achieved by the fact that the company is primarily liable to pay. Moreover, the internal allocation of the corporate fine within the company to the shareholders (and not its organs) would be counterproductive, as the shareholders do not always have sufficient influence over the organs acting for them (see also Federal Court of Justice, para.35). Furthermore, exempting the organs from responsibility for the competition law infringement would create false incentives.

It should also be added that European secondary law elsewhere prescribes managerial liability for precisely these reasons:[19] art.34 of NIS 2 Directive (2022/2555/EU) provides for the imposition of administrative fines on "essential and important entities" in the event of infringements of the obligation to take risk-management measures in the area of cybersecurity under art.21 of NIS 2 Directive. Article 20(1) NIS 2 Directive then requires "that the management bodies of essential and important entities approve the cybersecurity risk-management measures taken by those entities in order to comply with art.21, oversee its implementation and can be held liable for infringements by the entities of that Article". It thus becomes clear that European secondary law does not see managerial liability for fines as a threat to the effectiveness of the fines imposed, but correctly classifies it as a necessary means of controlling the behaviour of the organs.

The other arguments need not be repeated here. However, we will only address the tax law aspect emphasised by the Federal Court of Justice. In this respect, it should first be noted that the ECJ"s tax law decision[20] cited by the Federal Court of Justice does not contain any decision at all on the question of whether the tax deductibility of fines actually conflicts with the principle of effectiveness.[21] Secondly, it is decisive that the assumption of the court that managerial liability for fines has similar relieving effects as the tax deductibility of fines (para.41) is precisely not correct. The effects are not similar, but completely different: if an undertaking (or a company within the undertaking) can treat a fine as tax deductible, this reduces its tax burden and it is completely relieved of the fine in this respect. This is not the case with managerial liability for fines. The fine remains in full. It is not reduced. It is merely distributed differently within the undertaking. It no longer (fully) affects the shareholders, but also (partially) affects the organs that ultimately caused it. However, the latter does not reduce the effectiveness of the fine, but rather increases its effectiveness because it ensures the urgently required behavioural control of the organs.[22]

3. No personal fines for managers imposed by the Commission

In its next recital (para.42), the Federal Court of Justice points out to the ECJ that the different competences of the national competition authorities and the European Commission must be taken into account. While the national competition authorities could impose individual fines on the organs, this was not possible for the European Commission. The court thus cites an aspect that speaks in favour of the possibility of managerial liability for competition law fines. In proceedings that are conducted by the Commission and in which it is not possible to influence the managers (organs) by means of an individual, personal fine, "the company's claim for damages under civil law can in any case have an additional preventive and deterrent effect which contributes to compliance with the prohibitions of Articles 101, 102 TFEU by the managers acting on behalf of the company (para.35 above)" (para.42). This is an important

[17] These provisions provide for fining the undertaking, they contain no statement that *only* the undertaking should be burdened by the fine. As secondary law they need to be aligned with and cannot simply be considered to override other provisions of secondary law that provide for managerial liability (e.g. art.51 Regulation 2157/2001), see Kersting/May (2024) 45 E.C.L.R. 528, 536 [German version: Kersting/May, WuW 2024, 243, 313, 315].
[18] Kersting/May (2024) 45 E.C.L.R. 528, 536 et seq. [German version: Kersting/May, WuW 2024, 243, 315 et seq.]. Opposing this view: Wils, WuW 2023, 583.
[19] This was pointed out by *Lüttringhaus*, presentation given on 19 March 2025, GVNW Fachtagung Cyber und Financial Lines, Köln.
[20] EuGH, judgement of 11 June 2009, C-429/07, EU:C:2009:359, X BV, para.39.
[21] Cf. *Drüen/Kersting*, Steuerrechtliche Abzugsfähigkeit von Kartellgeldbußen des Bundeskartellamts, 2016, para.220; Kersting/May (2024) 45 E.C.L.R. 528, 540–541 [German version: Kersting/May, WuW 2024, 313, 319].
[22] Kersting/May (2024) 45 E.C.L.R. 528, 540–541 [German version: Kersting/May, WuW 2024, 313, 319].

and correct point. The issue here is not whether managerial liability undermines the sanctioning purpose of the fine. On the contrary, it is a question of whether the enforcement of competition law does not even require that managerial liability be used to influence the behaviour of the managers and incentivise compliance with competition law. This is all the more necessary the fewer further disadvantages the organs have to fear. If it is not possible to impose an individual, personal fine on them, managerial liability becomes much more important for the enforcement of competition law. It is regrettable that this aspect is not given much more space in the Federal Court of Justice's analysis. The question (to be answered in the affirmative) of whether art.101 TFEU in conjunction with the principle of effectiveness maybe even requires managerial liability for competition law fines should also have been explicitly posed (see below V.1.).[23]

It is positive, however, that the Federal Court of Justice once again emphasises the idea that managerial liability can also contribute to the enforcement of competition law by specifically stating that, "for reasons of legal uniformity and predictability", no different rules should be taken from art.101 TFEU for proceedings conducted by the European Commission on the one hand and by national competition authorities on the other (para.42). If the ECJ complies with this—absolutely plausible—suggestion to take a uniform rule from art.101 TFEU, it must base its analysis on the European legal situation according to which there are no individual fines.[24] Otherwise, its analysis of whether the enforcement of competition law is sufficiently effective would be too optimistic.[25] This would then argue strongly in favour of the possibility of managerial liability for competition law fines. But even if one were to assume the possibility of individual fines, the amount of the fines imposed personally on the managers would also have to be analysed. It should be noted here that the level of fines in Germany is by no means sufficient to exert a sufficient influence on the behaviour of managers. The maximum fine in Germany, which in practice could only be reached in the most serious cases anyway, is clearly inadequate at € 1 million in view of the amount of remuneration paid to managers.[26] In the case at hand the personal fine only amounted to €126.000.[27] It is apparent that there is a need for additional behavioural control through managerial liability, both in proceedings conducted by the European Commission and by the German Federal Cartel Office (or, possibly, other national competition authority).

4. No exclusion of prohibition on managerial liability

In the opinion of the Federal Court of Justice, a prohibition of managerial liability for competition law fines is not excluded because, according to the case law of the ECJ,[28] a fine imposed on an economic unit can be distributed within this unit by an autonomous decision (para.43). One could now consider whether the distribution of the economic burden of a fine between shareholders and managers should not also be possible according to this case law. However, the Federal Court of Justice rightly points out that the allocation of liability within the economic unit only concerns the allocation within the addressee of the prohibition, whereas in the case of managerial liability, the allocation is made to an estate outside the liable economic unit.

5. D&O Insurance

The Federal Court of Justice also discusses the possible relevance of the existence of a D&O insurance policy (para.44). In doing so, it addresses a topic that was the subject of intense debate beforehand. While some called for an exclusion of managerial liability so that the fine could not be shifted to the insurance company,[29] others (rightly) argued that insurance law problems should be resolved under insurance law and could not have any repercussions on company and competition law.[30] The Federal Court of Justice avoids an intensive discussion of this problem. It points out that no general conclusions could be drawn as the insurance company's duty to indemnify depended on a variety of circumstances and in this respect mentions the degree of fault and the respective specific insurance conditions. The court then simply states that the possible cases are varied. Therefore, no general statements could be made either as to "what measurable effects the existence of civil law recourse claims has on the willingness of the organ to decide on participation in leniency programmes and thus on the investigation of cartel infringements" (para.44). These statements should be expanded to the effect that the question of insurance cover as a whole should not play a

[23] See in detail Kersting/May (2024) 45 E.C.L.R. 528, 539 et seq. [German version: Kersting/May, WuW 2024, 313, 317 et seq.].
[24] Kersting/May (2024) 45 E.C.L.R. 528, 539 [German version: Kersting/May, WuW 2024, 313, 317–318].
[25] Fining natural persons by the national competition authority following Commission proceedings is only a theoretical option and must therefore be disregarded. It is also unclear to what extent this possibility exists in all Member States. Cf. Kersting/May (2024) 45 E.C.L.R. 528, 540 [German version: Kersting/May, WuW 2024, 313, 318].
[26] Kersting/May (2024) 45 E.C.L.R. 528, 539 [German version: Kersting/May, WuW 2024, 313, 318].
[27] LG Düsseldorf, judgement of 10 December 2021, 37 O 66/20 (Kart), juris .6.
[28] ECJ, judgement of 10 April 2014, C-231/11 P u.a., WuW/E EU-R 2970 para.62–*Siemens Österreich*; ECJ, judgement of 10 Apri 2014, C-247 P u.a., WuW/E EU-R 2996 paras 152, 157–*Areva*; cf. as well BGH, judgement of 18 November 2014, KZR 15/12, BGHZ 203, 193 paras 37, 54–*Calciumcarbid-Kartell II*; cf. Kersting, NZKart 2016, 147, 148.
[29] OLG Düsseldorf, judgement of 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489, para.165–*Organhaftung*; LG Saarbrücken, judgement of 15 September 2020, 7 HK O 6/16, NZKart 2021, 64 = WuW 2021, 62, para.123–*Regress im Sanitärkartell*. Cf. as well *Wagner-von Papp*, Managerial Liability, Managerial Duties, And Liability Within Corporate Groups: Optimal Competition Law Sanctions by Rearranging the Deckchairs Within the Undertaking?, in: Thépot/Tzanaki, Research Handbook on Competition and Corporate Law, 2024 (im Erscheinen), als Arbeitspapier sub nomine The Interplay Between Corporate Law and Competition Sanctions or Remedies abrufbar unter: *https://fmos.link/22008*, p. 1, 19–20.
[30] Detailed discussion by Kersting/May (2024) 45 E.C.L.R. 528, 535–536 [German version: Kersting/May, WuW 2024, 313, 314].

role in the decision on the admissibility of managerial liability. This leads back to the realisation that any insurance law problems must be solved in insurance law.[31]

6. No prohibition of managerial liability due to negative incentives for market behaviour

The consideration that too far-reaching a threat of liability towards the managers could lead to too far-reaching a deterrent effect and thus lead to risk-averse behaviour bears little relation to the specific issue of competition law. The Federal Court of Justice is therefore right not to attach any decisive importance to this consideration (para.44). In fact, this would be a general legal policy consideration that is not sufficiently closely related to the question of the effectiveness of competition law enforcement, but goes far beyond it.

7. Other claims for damages

Finally, the Federal Court of Justice emphasises that a prohibition of managerial liability derived from art.101 TFEU would only extend to managerial liability for competition law fines. Claims for compensation for other damages, for example with regard to the costs of establishing the facts of the case and for legal defence, would not affect the effectiveness of the fine imposed. There was therefore no basis from the outset for restricting claims for damages based on this (para.45). This is correct.

This should also be extended to damages resulting from the fact that the company is held liable under civil law by third parties for cartel damages.[32] However, the Federal Court of Justice did not actually state this (also see infra V.1., V.2.b), V.3.c)(3)). In this respect, there is one more thought to be added that has so far gone unnoticed: If one wants to consider managerial liability for fines inadmissible because it jeopardises the effectiveness of public competition law enforcement, one would have to justify why managerial liability for damages paid to injured parties should nevertheless be possible. According to the same logic, recourse for damages paid would jeopardise the deterrent effect of private enforcement. The company would no longer have to fear claims for damages from injured parties. One can rightly argue that this effect is only weak due to the offsetting of advantages and disadvantages (and the distribution of the burden of proof advocated here) and that the compensatory function remains intact (see infra V.2.b)). However, if one wanted to consider managerial liability for fines inadmissible, the parallel objections (offsetting of advantages and disadvantages, hardly ever complete passing on to the organs) in public competition law enforcement would certainly not have been considered convincing. It should therefore be noted that anyone who considers managerial liability for fines to be inadmissible is likely to have great difficulty justifying the admissibility of managerial liability for damages paid to injured parties.

V. Correct point of reference and necessity of an overall assessment

In its analysis of German law, the Federal Court of Justice primarily examines the extent to which the competition law provisions on the fining of associations (i.e. undertakings) require a restriction of the scope of application of managerial liability under company law.[33] It then remains largely true to this perspective when analysing the requirements of European law and raises the question of whether managerial liability calls into question the effectiveness of the fine imposed (paras 40–41). However, to the extent that the discussion only looks at the effectiveness of the sanctions, the competition law fine, the view is too narrow. The—broader—question referred already shows this. The question asks whether art.101 TFEU precludes managerial liability; it does not ask whether the provisions on the imposition of fines, such as art.13 of ECN-Plus Directive (2019/1/EU) or art.23 of Regulation 1/2003, preclude managerial liability. The broader question referred makes it clear that this is an overarching issue, an overarching point of reference. It is about the effective enforcement of the prohibition of cartels (art.101 TFEU) or, in possible other cases, the prohibition of abuse of a dominant position (art.102 TFEU). It is therefore a question of whether competition law is effectively enforced. When asking this question, one must take a broader view. As the ECJ has repeatedly stated—especially in the area of limitation periods and class actions—an overall assessment of national law is then required.[34] This requires a comprehensive examination of company law and the law on competition law fines: Are undertakings sufficiently deterred? Are managers sufficiently deterred? Are the unlawful cartel profits disgorged from the undertaking and do they not flow back to the undertaking? Is there a defence in damages law of offsetting advantages and disadvantages? How is the burden of proof distributed?

1. No prohibition of managerial liability, but a requirement

If one broadens the perspective accordingly, it becomes clear that managerial liability may also be required under European law. If, for example, managerial liability is ruled out completely and there is no possibility of an individual fine being imposed on the organs, or if these fines are inadequate in terms of their amount (only

[31] See fn.31.
[32] On the liability of the company organs towards third parties for competition law damages and the allocation of liability in the internal relationship between the joint and several debtors, see Kersting, ZIP 2025 (not yet published); see as well Kersting, WuW 2025, 309.
[33] BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, paras 19 et seq.–*Zapp*.
[34] ECJ, judgement of 28 March 2019, C-637/17, ECLI:EU:C:2019:263, para.45–*Cogeco*; ECJ, judgement of 21 January 2021, C-308/19, ECLI:EU:C:2021:47, WuW 2021, 227, para.49-50, 52–*Whiteland Import Export*; ECJ, judgement of 28 January 2025, C-253/23, ECLI:EU:C:2025:40, para.83–*ASG 2*.

126.000 € in the Federal Court of Justice's case!),[35] the incentives for the organs to comply with competition law are significantly reduced. They need not fear any or only a small personal fine. At the same time, there is also no risk of being held liable for the undertaking's fine. Conversely, performance-based remuneration systems may provide an incentive to increase profits through competition law infringements. It is a highly problematic situation under European law to exempt the directly acting organs from liability, while the shareholders are economically burdened but have little or no influence on the actions of the organs, the managers.[36]

How such a situation is to be remedied should be a matter for national law: it can set the right incentives for organs by means of managerial liability and thus deter from competition law infringements. It is also conceivable to provide for sufficiently high and dissuasive personal fines or to introduce criminal penalties for competition law infringements. However, if competition law infringements are not punishable under criminal law and personal fines are too low or (in the case of EU Commission proceedings) not available at all, managerial liability cannot be excluded for reasons of effectiveness.[37] The European secondary legislator has also recognised this itself for the area of the NIS 2 Directive (2022/2555/EU) and has not considered managerial liability a threat to the effectiveness of the fine imposed, but rather as a necessary means of controlling behaviour and setting the right incentives for compliance (see above IV.2.).

2. Making an overall assessment

a) Taking stock of national law

An overall assessment first requires as complete an inventory of national law as possible. Naturally, this can only be done by the national referring court.[38] The Federal Court of Justice does indeed take on this task. It first explains the corporate law starting point in German law (II. above) and then discusses the interplay between corporate law and the law on fines. In the context of its comments on European law (III. above), the court provides further information on German law and suggests possible effects on the interpretation of European law. This applies in particular to its comments on the significance of D&O insurances (above IV.5.). The court's references to the differences in the possibilities for imposing individual fines and the need for standardised treatment already go beyond the mere description of German law (above IV.3.). Its remarks on the deterrent effect of fines are also important for the stocktaking (III.2. above).

b) Missing element: principle of offsetting advantages and disadvantages and distribution of the burden of proof Even if it is hardly possible to provide a complete reproduction of all relevant provisions of German law, there is a relevant gap in the picture painted by the Federal Court of Justice that should definitely be closed in the further proceedings: The picture of German law remains incomplete if the consequences of allowing managerial liability are not fully illuminated. There is a risk of creating the false impression that, under German law, an undertaking can demand full compensation for a fine paid from its managers or organs. However, this ignores the fact that the managers or organs can counter the undertaking's claim for damages by way of offsetting any advantages that the undertaking has gained from the cartel. This ensures that the undertaking does not retain an illegal profit resulting from an infringement of competition law or that this profit flows back to it.[39] The undertaking can therefore only hold its managers liable to the extent that its damage exceeds its profit from the cartel. This is of fundamental importance for the assessment of the effective enforcement of European competition law by German law.

While it is true now that, according to prevailing opinion and general rules, the burden of proof for a realised cartel profit lies with the injuring party, i.e. the managers.[40] Therefore, if the managers could not provide this proof, the undertaking would receive full compensation and thus, under certain circumstances, a profit obtained in violation of competition law that was disgorged from it by the fine would be returned to it. According to an emerging view, however, this burden of proof is to be distributed differently from the outset and allocated to the undertaking. The undertaking must therefore prove that its disadvantages from the infringement exceed the advantages by the amount claimed.[41] Only if this proof can be provided, will a damages claim against the managers be successful.[42]

When considering German law as a whole, it should therefore be noted that there is only a risk of the fine being shifted from the undertaking to the organ to the extent that the fine exceeds the undertaking's illegal profit. This risk is further reduced by the fact that the burden of proof lies with the undertaking. The undertaking must prove that its profit from the competition law infringement was lower than the fine paid.

[35] LG Düsseldorf, judgement of 10 December 2021, 37 O 66/20 (Kart), juris para.16.
[36] Kersting/May (2024) 45 E.C.L.R. 528, 536-541 [German version: Kersting/May, WuW 2024, 313, 315 et seq.].
[37] See above fn.36.
[38] Kersting, [2025] G.C.L.R. 39, ##, ##, ## [German version: NZKart 2025, 116, 117, 119, 122].
[39] OLG Düsseldorf, judgement of 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489 para.126; Kersting, ZIP 2016, 1266, 1272 = FIW Jahrbuch 2018 (2019), 81, 96–97; both with further references.
[40] OLG Düsseldorf, judgement of 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489 para.127 with further references.
[41] Detailed analysis by Kersting, ZIP 2016, 1266, 1273 et seq. = FIW Jahrbuch 2018 (2019), 81, 100 et seq.; Kersting, ZIP 2025 (not yet published); *Monopolkommission*, XXV. Hauptgutachten 2024, para.345–346; Wagner-von Papp, WuW 2025, 1, 2. See as well Kersting/May (2024) 45 E.C.L.R. 528, 531 [German version: Kersting/May, WuW 2024, 243, 246]. Also: Federal Cartel Office, oral presentation to the Federal Court of Justice by Vice President Ost on 11 February 2025 in Karlsruhe in the case KZR 74/23, i.e. the case discussed in this article [referring managerial liability for damages paid by the undertaking to injured parties].
[42] The same is true if the fine is punitive only, cf. Kersting/May (2024) 45 E.C.L.R. 528, 540 [German version: Kersting/May, WuW 2024, 313, 318].

In the order for reference, the aspect of offsetting advantages and disadvantages is unfortunately only briefly hinted at in the summary of the opinion that affirms the possibility of managerial liability for competition law fines.[43] However, the Federal Court of Justice should have included these questions more extensively in its description of German law. At the very least, the prerequisites and effects of the offsetting of advantages and disadvantages should have been described. It would also have made sense for the court to comment on the allocation of the burden of proof and to resolve the dispute between the case law of the courts of lower instances, which insists on general rules without closer examination, and the voices in academic writing that want to allocate the burden of proof differently in view of the special features of competition law.[44] Only this would have created a picture of German law that would have allowed an overall assessment.

c) Holder of the decision-making competence

Only against the background of as complete a picture of national law as possible can the question be answered as to whether German law as a whole fulfils the requirements of the European principle of effectiveness. If necessary, a number of other aspects of German law must also be taken into account.

(1) Principle: ECJ In principle, only the European Court of Justice can have the authority to decide this question. This is because it is a question of European law whether German law is compatible with European law with regard to the effectiveness of (public) enforcement of European competition law. To this end, the requirements of the European provision, in this case art.101 TFEU, must be determined. Ultimately, only the ECJ can do this with binding authority.[45]

(2) Case ASG 2: national court? In the *ASG 2* case, however, the ECJ largely avoided precisely this task. There, as part of an overall assessment of German law, it was necessary to judge whether the denial of the possibility of bundling individual claims ("collection by group action" or "group action for collection", German: "Sammelklage-Inkasso") violated EU law. The referring court had analysed German law in detail and took the view that there were no other equivalent options for bundling actions for damages.[46] The ECJ would therefore have had to analyse whether the German law determined in this way complied with the European principle of effectiveness.

However, it then assigned this task to the national court:[47] "In that regard, it should be noted that 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 on persons harmed by an infringement of competition law and of depriving them of effective judicial protection."[48] The overall assessment is assigned to the national court: "However, that court must, to that end, take account of all the relevant factors relating to the detailed rules laid down by national law governing the exercise of the right to compensation for the harm resulting from such an infringement (see, by analogy, judgment of 28 March 2019, *Cogeco Communications*, C-637/17, EU:C:2019:263, paragraph 45)."[49]

This is not convincing in this form. The establishment of facts with regard to national law must be the responsibility of the national court. However, only the ECJ can assess the extent to which this finding complies with the requirements of European law.[50] Still, the judgement reveals a certain reticence on the part of the ECJ, which shies away from making its own overall assessment. In the opinion of the ECJ, the national court should, if at all possible, avoid coming to the conclusion that national law is not in line with European law.[51]

This is also understandable. After all, the finding that national law is not in line with European law requirements when viewed as a whole must be followed by the question of the legal consequences. The legal consequence is that national law must be interpreted in accordance with EU law and, if this is not possible, the national law must remain unapplied.[52] However, when making an overall assessment, there are a large number of possible points of reference that can be used to arrive at the compatibility of national law and European law. Yet, this can hardly be done by the ECJ, but must be done in national law. In national law, it must be decided how a collective enforcement of claims for damages can be ensured. This can be done by allowing the bundling of claims ("collection by group action") or by expanding other instruments of collective redress. This decision cannot be taken by the ECJ for national law.[53]

[43] BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, para.14–*Zapp*.
[44] See the references in fnn .40, 41.
[45] Cf. Kersting, [2025] G.C.L.R. 39, ##, ##, ## [German version: NZKart 2025, 116, 117, 119, 122].
[46] ECJ, judgement of 28 January 2025, C-253/23, ECLI:EU:C:2025:40, at [25]–[30]–*ASG 2*.
[47] Detailed analysis by Kersting, [2025] G.C.L.R. 39, ##, ##, ## [German version: NZKart 2025, 116, 117, 119, 122].
[48] ECJ, judgement of 28 January 2025, C-253/23, ECLI:EU:C:2025:40, at [82]–*ASG 2*.
[49] ECJ, judgement of 28 January 2025, C-253/23, ECLI:EU:C:2025:40, at [83]–*ASG2*.
[50] See the references in fn.45.
[51] Cf. Kersting, [2025] G.C.L.R. 39, ##, ## [German version: NZKart 2025, 116, 120–121].
[52] See e.g. ECJ, judgement of 22 June 2022, (C-267/20) ECLI:EU:C:2022:494, at [52], [77]–*Volvo*; EuGH, judgement of 18 April 2024, C-605/21, ECLI:EU:C:2024:324, at [82], [93]–*Heureka*.
[53] Cf. Kersting, [2025] G.C.L.R. 39, ## [German version: NZKart 2025, 116, 121].

(3) Result Against this background, it should be noted that the decision as to whether national law violates the requirements of EU law when viewed as a whole (overall assessment) is reserved for the ECJ. However, it is also clear that the ECJ exercises and has to exercise restraint here. The decisions on the law on limitation periods also make it clear that the ECJ itself does not make the—actually required—overall assessment, but merely formulates minimum requirements of European law, which must be complied with regardless of an overall assessment. In the *Volvo* and *Heureka* cases, for example, it becomes clear that the commencement of the limitation period always presupposes the cessation of the infringement and the knowledge of the injured party.[54] The question of whether a lack of such prerequisites for the commencement of the limitation period can be compensated for by other provisions of limitation law is not raised.

3. Significance for the ECJ's decision on managerial liability

What do these findings mean for the ECJ"s decision on the question referred for a preliminary ruling on managerial liability? Here too, the ECJ is called upon to decide whether German law fulfils the requirements of European competition law when viewed as a whole (overall assessment). The Federal Court of Justice had to provide the necessary factual basis for this in its order for reference. The element of offsetting advantages and disadvantages is an important aspect that is missing and will hopefully be addressed in detail in the proceedings before the ECJ. The *ASG 2* case shows that the ECJ is receptive to this.[55]

a) Similar starting position

If the ECJ is guided by its decision in the *ASG 2* case, it is to be expected that it will also exercise restraint with regard to managerial liability. The analysis of German law is similarly complex and requires the consideration of a large number of legal aspects. In particular, the ECJ is not in a position to decide what legal consequences a possible violation of European law could have. A finding that German law in its form established by the Federal Court of Justice violates European law does not in itself allow any conclusions to be drawn as to how this violation should be remedied. This is because a violation can only be determined, but not localised, in an overall assessment, which must also take into account the opposing effects of certain provisions (e.g. promoting compliance incentives for the organs through managerial liability for fines, but at the same time weakening compliance incentives for the undertaking or the shareholders) and assess their interaction. German law could compensate for any deficits at various starting points or find a completely different starting point. It would certainly be conceivable to declare managerial liability for competition law fines inadmissible. However, it might also be sufficient to refer to the applicability of the principles of offsetting advantages and disadvantages. If this is not sufficient, it could also be pointed out that the burden of proof should be placed on the undertaking. German law could then decide either to deem managerial liability inadmissible or to place the burden of proof on the claimant undertaking when it comes to the offsetting of advantages and disadvantages. This decision is not a matter for the ECJ, but for national law. Simply pointing to the principle of offsetting advantages and disadvantages (and not declaring managerial liability inadmissible) could also be regarded as required by European law in order to maintain managerial liability for competition law fines in the interest of an incentive effect for the managers.

b) Response scenarios

Against this background, two response scenarios can be considered. Firstly, the ECJ may be of the opinion that art.101 TFEU does not preclude managerial liability under German law. In this case, the answer to the question referred would be "no". It can be assumed that certain minimum requirements of European law for national law will then be worked out in the reasons (see infra V.3.c)).

On the other hand, the ECJ may be of the opinion that the possibility of managerial liability under German law is not compatible with art.101 TFEU. In this case, however, the answer to the question referred cannot simply be "yes". After all, when making the necessary overall assessment, it cannot simply be said that managerial liability is the problem. Perhaps the problem also lies in the lack of explicit clarification in German law that illegal cartel profits that have been disgorged via the fine may not be returned to the company via managerial liability.

In addition, the elimination of managerial liability for competition law fines would in turn raise questions about compatibility with the principle of effectiveness (see supra V.1., V.3.a)). It is also conceivable, for example, that the insurability of managerial liability is problematic. It is a balanced system whose elements also have opposing effects on the enforcement of art.101 TFEU. While managerial liability may reduce the effects of the fine on the undertaking itself, it also provides sufficient compliance incentives for the managers. A taking away of managerial liability would therefore possibly have to be compensated for at this point.

In this situation, the ECJ would therefore have to arrive at a more abstract and at the same time more differentiated answer. The answer would be more abstract because it does not give the referring court a clear yes or no answer, but only states the conditions under which incompatibility

[54] ECJ, judgement of 22 June 2022, (C-267/20) ECLI:EU:C:2022:494, at [56]–[57],–*Volvo*; ECJ, judgement of 18 April 2024, (C-605/21) ECLI:EU:C:2024:324, at [56]–[63], [64]–[71]–*Heureka*; see Kersting, WuW 2024, 455, 457 et seq.
[55] ECJ, judgement of 28 January 2025, C-253/23, ECLI:EU:C:2025:40, at [57]–[58], [91]–[93]–*ASG 2*; cf. Kersting, [2025] G.C.L.R. 39, ## [German version: NZKart 2025, 116, 120, 122].

with the principle of effectiveness can be assumed. This would then correspond to the approach of the ECJ in *ASG 2*. However, while the ECJ in *ASG 2* ultimately only emphasises the applicability of the principle of effectiveness in its answer and paraphrases it in relation to the specific case, the answer in the present case would have to be more differentiated. The ECJ would have to make it clear—at least in the reasoning of the judgement, but ideally also in the operative part—which criteria are to be taken into account and how they are to be weighted. The ECJ would have to succeed in describing in abstract form a level of enforcement that the Member States must achieve (see infra V.3.c)). How they achieve this would in turn have to be left to the Member States themselves.

However, as such a level of enforcement cannot be described in absolute figures, but can only be assessed in normative terms, several different but equivalent solutions are conceivable. It is therefore always a question of the individual case as to whether the respective national law reaches the required level. On the one hand, only the ECJ can answer this question; on the other hand, in *ASG 2*, it precisely wanted to avoid answering this question and passed the ball back to the referring court. In the *Zapp* case dealt with here, the ECJ can now clarify whether it intended to grant national law a certain prerogative of assessment. In any case, an affirmative answer, i.e. that art.101(1) precludes the managerial liability for competition law fines, would not declare it inadmissible in general, but only in this form, only in the context of the specific overall assessment.

c) Minimum requirements

The minimum requirements of European law will not be developed in detail at this point. However, some suggestions can be distilled from the order for reference and the above considerations:

(1) Effective public enforcement The starting point must be that public enforcement through fines remains effective. This means that fines on undertakings must be imposed and, by setting proper incentives, have a behaviour-controlling effect on undertakings. On the one hand, this will require that undertakings cannot assume that they will always receive full reimbursement of the fines.[56] On the other hand, however, it will also require that the organs, i.e. the managers, acting on behalf of the undertaking themselves have strong incentives to avoid competition law infringements.[57] The fact that fines (should) also have a deterrent effect must also be taken into consideration.[58] This deterrent effect must not be undermined by managerial liability. However, this can be achieved by applying the principle of offsetting advantages and disadvantages.

(2) Insurability The question of the insurability of the fines and the design of the insurance conditions within the framework of a D&O insurance policy is complicated, since the insurance company"s obligation to assume liability depends heavily—as the Federal Court of Justice rightly emphasised (see *supra* IV.5.)—on the circumstances of the individual case. If the ECJ nevertheless deals with this contrary to the suggestion of the Federal Court of Justice (para.44), there is much to suggest that this is done in the sense of an exclusion of insurability required by European law. This is because insurability removes or reduces the positive effects of managerial liability on managers" incentives. This shows that the problem would not be managerial liability, but its insurability. This would have to be included in the minimum requirements.

(3) Personal fines against managers With regard to the aspect of the possibility of imposing personal fines on managers, the Federal Court of Justice argues in favour of refraining from treating managerial liability differently depending on whether personal fines are a possibility or not (para.43, supra IV.3). If the ECJ follows this approach, it would have to base its analysis on the European legal situation, which does not provide for the imposition of personal fines on managers (see supra IV.3.).

(4) Damages claims by injured parties Finally, it can be assumed that the ECJ will largely ignore questions regarding the significance of third-party competition law damages claims for reasons of manageability of the analysis and at best only touch on them. In *ASG 2*, it also did not address whether an infringement of art.101 TFEU due to an impairment of private enforcement was precluded because public enforcement was not impaired. It can be inferred from this that each pillar of competition law enforcement, i.e. public and private enforcement, must satisfy the requirements of the principle of effectiveness in its own right.[59] The question of whether a claim for competition law damages brought directly against the managers by injured parties[60] or managerial liability for damages paid to injured parties will ensure sufficient behavioural control,[61] i.e. proper incentives for managers, is therefore likely to play only a marginal role. That is also correct. It can already be assumed that setting

[56] The absolute amount of the fine and the insurability and insurance conditions of D&O insurance policies may play a role here.
[57] The possibility and amount of personal fines against the managers may play a role here.
[58] See e.g. ECJ, judgement of 28 June 2005, (C-189/02) [u.a.], ECLI:EU:C:2005:408, para.292 et seq., WuW/E EU-R 913 = WuW 2005, 819–*Dansk Rørindustri*; EuG, judgement of 14 May 2014, T-406/09, ECLI:EU:T:2014:254, para.250, WuW/E EU-R 3125 = WuW 2015, 98–*Donau Chemie*; *Biermann*, in: Immenga/Mestmäcker, Wettbewerbsrecht, 7th edition (2024), Vorbemerkungen zu art.23 f. (VO 1/2003) para.27; *Otto*, Der Kartellgehilfe als Bußgeldadressat im Europäischen Kartellrecht, 2015, p.97–98.
[59] Kersting, [2025] G.C.L.R. 39, ## [German version: NZKart 2025, 116, 122].
[60] OLG Düsseldorf, judgement of 13 November 2013, VI-U (Kart) 11/13, NZKart 2014, 68 para.145 et seq.; see Otto, ZweR 2022, 125, 143 et seq.; see as well *Kersting*, in: Kersting/Meyer-Lindemann/Podszun, Kartellrecht, 5th edition 2025, § 33a para.43; Kersting, ZIP 2025 (not yet published); Kersting, WuW 2025, 309 [English version available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5247934*].
[61] Cf., however, BGH, decision of 11 February 2025, KZR 74/23, BeckRS 2025, 1286 = NZG 2025, 855, para.34–*Zapp*.

sufficient incentives for compliance should mean extending managerial liability to both fines and damages claims by injured parties. Managerial liability limited to claims for damages by injured parties alone would be insufficient. It is unclear whether and to what extent injured parties (can) assert their claims. Furthermore, according to the correct view, the principle of offsetting advantages and disadvantages must always be taken into account here too, which makes it more difficult to enforce managerial liability.[62] Finally, it should be pointed out once again that anyone who considers managerial liability for competition law fines to be inadmissible is likely to have great difficulty justifying the admissibility of managerial liability for competition law damages paid to injured parties (see *supra* IV.7.).

d) Cautious approach required

Overall, a cautious approach appears to be required. With regard to questions of limitation, the ECJ refrains from making an overall assessment and imposes robust minimum requirements on national law: the commencement of the limitation period presupposes knowledge and cessation of the infringement.[63] In comparison to the case of managerial liability for competition law fines examined here, it should be emphasised that the limitation period is an aspect that renders claims for damages completely unenforceable. However, recognising managerial liability would not call into question that the undertaking is burdened with the fine. Firstly, the undertaking remains the primary addressee of the fine and primarily liable to pay. Secondly, due to the amount of the fines and the objection of offsetting advantages and disadvantages, it cannot be assumed that full recourse will be achievable. This suggests that the ECJ should be even more cautious here.

The *ASG 2* decision can also be cited in this regard. There, the effectiveness of private enforcement was called into question due to a lack of sufficient procedural enforcement options under German law. Nevertheless, the ECJ came to a cautious and reserved answer, which ultimately returned the ball to the field of national law.[64] In the present case, however, there is no danger that the public enforcement of the cartel prohibition as a whole will be called into question. There is no threat of the fine becoming moot altogether. The fine is still primarily to be paid by the undertaking. The only question is whether the fine will be (partially) shifted within the undertaking to its managers. All the more reason for a cautious response from the ECJ.

VI. Transferability to the liability of supervisory board members

In its order for reference, the Federal Court of Justice only deals with the liability of management board members and directors. However, the same should apply to the liability of supervisory board members in both the AG and the GmbH;[65] the above considerations are transferable. It is true that, as a supervisory body, the supervisory board does not manage the company's business, so that it could be seen as having less need for compliance incentives. However, the supervisory board should be motivated to carefully monitor the management of the company. The threat of liability for a competition law fine provides corresponding incentives.

VII. Conclusion

1. The Federal Court of Justice recognises the possibility of managerial liability for fines paid by the company under German law. It rejects a prohibition of managerial liability derived from the German provisions on fines. This is to be agreed with.
2. However, in terms of European law, the Federal Court of Justice sees the risk that allowing managerial liability for competition law fines could conflict with art.101 (1) TFEU, as this would lead to economically relieving the undertaking of the imposed competition law fine. Conversely, however, the court also emphasises aspects that speak in favour of allowing managerial liability for competition law fines. These include, for example, the fact that the EU Commission cannot impose personal fines on the managers. The court"s indication that there should not be a split interpretation depending on the existence of the possibility of imposing personal fines also speaks in favour of allowing managerial liability.
3. The presentation of German law by the Federal Court of Justice is incomplete. There is no description of the (legal) consequences of allowing managerial liability. The principle of offsetting advantages and disadvantages and the corresponding distribution of the burden of proof should have been described. This would have made it clear that there would at best be partial economic relief for the undertaking from the fine imposed. It would

[62] The undertaking would have to prove that the harm it suffered is greater than the advantages it derived from the cartel; see the references in fn.41, 42.
[63] See the references in fn.54.
[64] ECJ, judgement of 28 January 2025, C-253/23, ECLI:EU:C:2025:40, para.94–*ASG 2*; see as well Kersting, [2025] G.C.L.R. 39, ## [German version: NZKart 2025, 116, 119–120, 122].
[65] Sections 116 sentence 1, 93 (2) sentences 1, 2 AktG provide for the liability of supervisory board members. They apply directly to the AG. Regarding the GmbH these provisions are declared applicable by Section 52 (1) GmbHG, Section 25 (1) sentence 1 no. 2 MitbestG (Co-determination Act), Section 1 (1) no 3 DrittelbG (One-third Participation Act).

also have made it clear that this would prevent illegal cartel profits from being returned to the undertaking.

4. Managerial liability for competition law fines also has positive effects on the enforcement of competition law. It creates effective incentives for managers. It appears highly problematic under European law and hardly sustainable to largely exempt the managers that control the actions of the company ("organs") from the legal consequences of a competition law infringement. The Federal Court of Justice only mentions this aspect in passing. It does not make it clear that, against this background, managerial liability for fines may also be required under European law. This applies in particular if—e.g. as at European level—a personal fine cannot be imposed on the managers or organs or if—e.g. as in Germany—the personal fines are (far) too low.

5. An overall assessment of German law is required. In the *ASG 2* case, the ECJ (wrongly) assigned this overall assessment to the national courts and itself only made cautious statements. A cautious response, which is limited to the elaboration of minimum requirements, also appears necessary in the present case.

6. The decision as to whether a balance found in national law fulfils the requirements of art.101 TFEU is, of course, the responsibility of the ECJ. However, due to the required overall assessment, the ECJ reasonably can only find an infringement, but not localise it. An established infringement may lie in the admissibility of managerial liability for competition law fines, but it does not have to. It can also be found in the insurability of the recourse claim or in a risk (which does not actually exist due to the principle of offsetting advantages and disadvantages) that illegal cartel profits will be returned to the undertaking. It is up to national law to find its own solutions to remedy an established infringement. A rejection of managerial liability for competition law fines by the ECJ would therefore not be a general rejection, but only a rejection for the specific context of the concrete overall assessment.

7. Anyone who considers managerial liability for competition law fines to be inadmissible is likely to have great difficulty justifying the admissibility of managerial liability for competition law damages paid to injured parties.

8. All in all, it should be noted that managerial liability for competition law fines is possible under company law, does not violate European competition law and may even be required under European competition law. The EU legislator has also recognised this in a different context in art.20(1) of NIS 2-Directive (2022/2555/EU). The considerations set out in this case note apply equally to management and supervisory organs.