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Managerial Liability for Fines—Company Law, Competition Law and Principle of Effectiveness

Professor Dr Christian Kersting

Dr Manuel May[*]

Competition law; Competition policy; Corporate liability; Directors' liabilities; EU law; Fines; Germany; Managers; Principle of effectiveness

I) Introduction

Section 30(1) no.1 OWiG (Act on Regulatory Offences) provides that, "where someone acting as an entity authorised to represent a legal person or as a member of such entity […] has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal person or the association of persons has been enriched […], a regulatory fine may be imposed […]." In short: the misconduct of (management) board members or directors leads to a fine against the company. As a result, this raises the question of whether the company can take recourse against its management. We will refer to this question as 'managerial liability for fines' meaning the liability of company organs authorised to represent the company. In the German system this means the liability of the members of the management board of a public limited liability company pursuant to s.93(2) sentence 1 AktG (German Stock Corporation Act) or the liability of the directors of a limited liability company pursuant to s.43 para.2 GmbHG (German Act on Limited Liability Companies). This question of managerial liability for fines—in particular as far as competition law infringements are concerned—is fiercely disputed both in literature and in between the courts.[1]

In particular, recent rulings by the OLG Düsseldorf (Higher Regional Court of Düsseldorf) and the LG Dortmund (District Court of Dortmund) brought new impetus for the discussion. The courts came to opposite results. While the LG Dortmund[2] affirms the managerial liability, the OLG Düsseldorf[3] denies it. Our article will address this question in three steps. In a first step, it is shown that managerial liability is required under corporate law. In a second step, it will be analysed whether a different result is mandated by the law on regulatory offences which requires fines to be imposed on companies. In accordance with the settled case-law of the Bundesgerichtshof (BGH, German Federal Court of Justice) this is not the case. Finally, in a third step, the question is raised as to whether special requirements of competition law preclude managerial liability for fines imposed on the company. In particular, the European law principle of effectiveness must be taken into account. It becomes evident that no convincing argument can be made against managerial liability; rather, there is much to suggest that board member or director liability is required under European law.

II) Corporate Law

In principle, it is clear that board members or directors of corporations are liable for breaches of duty (ss.93(2) sentence 1 AktG, 43(2) GmbHG). This applies in particular to breaches of the duty to act lawfully (duty of legality). Thus, under German law, the strict application of the law leads to the liability of the board members/directors, who violate the rules of criminal or administrative offences, for the fines imposed on the company, because by violating these rules, they also breach duties owed to the company. In contrast to e.g.

[*] Prof. Dr. Christian Kersting, LL.M. (Yale) is the holder of the Chair of Civil Law, German and International Business, Corporate, and Competition Law at Heinrich Heine University Düsseldorf (HHU). Dr. Manuel May, is a trainee lawyer in the district of the Higher Regional Court of Düsseldorf. This article is a translated, revised and updated version of C. Kersting and M. May, "Der Bußgeldregress gegenüber Organmitgliedern—Gesellschaftsrecht, Kartellrecht und Effektivitätsgrundsatz –", first published in two parts in Wirtschaft und Wettbewerb (WuW) published by Handelsblatt Fachmedien GmbH. It can be found at [2024] WuW 243 and [2024] WuW 313. The authors would like to thank Nadia Aglan, Mattes Hoffmann and Hanna Voßen for their support with the translation of the original text into English.

[1] *The possibility of managerial liability for fines is affirmed* by LG Dortmund, 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443; LG Dortmund, 14 August 2023, 8 O 5/22 (Kart), NZKart 2023, 496; *Backhaus/Brand*, jurisPR-HaGesR 6/2015 Note 3; *Binder/Kraayvanger*, BB 2015, 1219; *Bünnemann*, ZIP 2023, 2669; *Drescher*, Liber discipulorum Möschel, 2021, 91; *Fleischer*, BB 2008, 1070, 1072; *Fleischer*, DB 2014, 345; Fleischer, in: MüKoGmbHG, 4th edn (2023), s.43 para.320; *Hahn*, Das Schadensrecht der Geschäftsleiterhaftung, 2022, pp.124; *Hauger/Palzer*, ZGR 2015, 33; *Jansen*, Verhaltenssteuerung als Mittel zur kartellrechtlichen Regulierung, 2019, pp.164; *Kersting*, ZIP 2016, 1266= FIW Jahrbuch 2018 (2019), 81; *Nietsch*, ZHR 184 (2020), 60; *Reuter*, BB 2016, 1283; *Ruttmann*, Die Versicherbarkeit von Geldstrafen, Geldbußen, Strafschadensersatz und Regressansprüchen in der D&O-Versicherung, 2014, pp.130; *Schöne/Petersen*, AG 2012, 700, 703; *Suchy*, NZG 2015, 591; *Denying the possibility of managerial liability for fines* OLG Düsseldorf, 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489, para.133; LAG Düsseldorf, 20 January 2015–16 Sa 459/14, NJOZ 2015, 782; LG Saarbrücken, 15 September 2020, 7 HK O 6/16, NZKart 2021, 64; *Beck*, NZKart 2023, 654; *Baur/Holle*, ZIP 2018, 459; *Bunte*, NZG 2018, 123; *Dreher*, FS Konzen, 2006, p.85; *Dreher*, AG 2023, 845; *Friedl*, ZWeR 2023, 428; *ders./Titze*, ZWeR 2015, 318; *Heyers*, WuW 2022, 413; *Kling*, FS Bergmann 2018, 391; *Leclerc*, Der Kartellbußgeldregress, 2022; *Leclerc*, NZKart 2021, 220; *Ost*, FS Schroeder 2018, 589; *Wagner-von Papp*, The Interplay Between Corporate Law and Competition Sanctions or Remedies. *Thépot/Tzanaki*, Research Handbook on Competition and Corporate Law (Edward Elgar 2024); *Sattler*, BB 2023, 2451; *Thomas*, NZG 2015, 1409; *Verse*, FS Krieger, 2020, 1025; *Verse*, in: Scholz GmbHG, 13. Ed. 2022, s.43 para.304; *Wils*, WuW 2023, 583; *Leaving the question open Arnold*, VGR, Gesellschaftsrecht in der Diskussion 2018, 2019, Organhaftung für Unternehmensgeldbußen; *Bürkle/Beutelmann*, VersR 2024, 8; *Stagat*, GWR 2023, 291; *In favor of limiting managerial liability for fines Bayer/Scholz*, GmbHR 2015, 449; *Fabisch*, ZWeR 2013, 91; *Franck/Seyer*, Antitrust Fines and Managerial Liability, *https://ssrn.com/abstract=4458185*, 2023; *Hopt/Roth*, in: GroßkommAktG, 5th edn (2016) s.93, para.419; *Koch*, Gedächtnisschrift Winter, 2011, 327 (in special cases); *Lindner/Otting/Thelen*, GmbH-StB 2015, 167; *Lohse*, in: Wiedemann, Handbuch des Kartellrechts, 5th edn (appearing), s.50 para.94; *Rust*, ZWeR 2015, 299; *Spindler*, in: MüKoAktG, 6th edn (2023), s.93, para.211.

[2] LG Dortmund, 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443; LG Dortmund, 14 August 2023, 8 O 5/22 (Kart), NZKart 2023, 496.

[3] OLG Düsseldorf, 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489, para.133.

Austrian law, there is no specific exclusion of managerial liability for fines in German law.[4] So far, ongoing discussions in German academia have not been able to change this.[5] Therefore, it is generally recognised that, at least in principle, board members and directors are liable towards the company for fines imposed on the company as a result of a criminal or regulatory offence committed by them.[6]

Competition law fines regularly affect corporations with third-party board members or directors, i.e. board members or directors that are not necessarily also shareholders. Principal-agent-conflicts are particularly prevalent here.[7] In this context, managerial liability is an essential element in the corporate governance structure of such bodies corporate and serves to mitigate such principal-agent-conflicts.[8] Managerial liability aims at compensation and prevention.[9] On the one hand, it is intended to compensate the financial disadvantages suffered by the company.[10] On the other hand, the purpose of managerial liability is to control behaviour.[11] While the board members or directors take the decisions, the consequences primarily affect the company. This divergence between the person acting and the person bearing the consequences reduces the incentive for the person acting to act diligently and avoid harm for the company.[12] In addition, there are information asymmetries between shareholders and board members / directors.[13] In particular (but not only) when there is dispersed ownership, the cost of effective monitoring can be so high for the shareholders that they remain "rationally apathetic".[14] In these cases, there is therefore a particularly high risk of insufficient supervision of managers. This is counteracted by managerial liability. The risk of liability provides an incentive for company organs (board members and directors) to avoid breaches of duty and reduces the likelihood of such breaches of duty.[15]

Since the point of managerial liability is to allocate the risk of an agent's wrongdoing to the agent, so that the principal ultimately only bears the entrepreneurial risk, these considerations apply equally to the AG (stock corporation, public limited liability company) and to the GmbH (limited liability company). Although the information asymmetry and the rational apathy of the shareholders may be greater in the public limited liability company (AG) than in the (usually more personalistic) limited liability company (GmbH), this is at least partially compensated by the AG's supervisory board. In both cases it is also crucial that the agent's risk of liability avoids false incentives from the outset and that one does not merely rely on monitoring, which—in the absence of a risk of liability—would be a toothless tiger.

III) The Law of Corporate Sanctions

Even a general principle of corporate law, according to which fines are in principle recoverable from company organs, is called into question by the OLG Düsseldorf in its decision. The court considers it to be already questionable whether, in case of a fine imposed both on natural persons and on the company, the possibility of "re-directing, simply by applying the general rules of civil liability, the sanction imposed on the undertaking to the company organ who has breached his duty of legality" is truly compatible with the intentions which have led the legislator to introduce a corporate sanction.[16] Even though, in some areas, the authorities are not making use of the possibility of fining both the company organs and the company[17] and only fine the company, this raises the question of whether the general principle that company organs are liable for fines caused by their behaviour must be given up in its entirety. Even though no corresponding legal provision exists in German law and even though the BGH has so far always ruled contrarily and upheld this principle, the Austrian provision of s.11 of the VbVG (Austrian Corporate Liability Act), which excludes "recourse to decision-makers or employees" for "sanctions and legal consequences imposed on the association on the basis of this federal law",[18] would ultimately be transferred into German law—even though the Austrian provision does not seem to apply to competition law.[19] However, there is no reason for this:

[4] See *Kersting*, ZIP 2016, 1266, 1267= FIW Jahrbuch 2018 (2019), 81, 82.
[5] See *Kersting*, ZIP 2016, 1266, 1269= FIW Jahrbuch 2018 (2019), 81, 90.
[6] See *Spindler*, in: MüKoAktG, s.93 para.211 with further references.
[7] Just see *Fleischer*, WM 2003, 1045, 1048 with further references.
[8] *Arnold* (fn. 1), para.22; *Backhaus/Brand*, jurisPR-HaGesR 6/2015 Note 3; *Hopt/Roth*, in: GroßkommAktG s.93 (fn. 1), para.32; *Jansen* (fn. 1), pp.15; *Werner*, jM 2024, 6, 11.
[9] *Bünnemann*, ZIP 2023, 2669, 1671; *Döring*, Die Durchsetzung der Organhaftung durch Aktionäre, 2014, p.23; *Fleischer*, in: MüKoGmbHG (fn. 1), s.43, para.2; *Hopt/Roth*, in: GroßkommAktG (fn. 1), s.93, para.28; *Kutscher*, Organhaftung als Instrument der aktienrechtlichen Corporate Governance, 2017, p.31.
[10] *Döring* (fn. 9), p.23; *Fleischer*, in: MüKoGmbHG (fn. 1), s.43, para.2; *Hopt/Roth*, in: GroßkommAktG (fn.1), s.93, para.28; *Kutscher* (fn. 9), p.31; *Paal*, DStR 2005, 382, 383.
[11] *Arnold* (fn. 1), para.22; *Backhaus/Brand*, jurisPR-HaGesR 6/2015 Note 3; *Fleischer*, in: MüKoGmbHG (fn. 1), s.43, para.2; *Hopt/Roth*, in: GroßkommAktG (fn. 1), s.93, para.32; *Wagner*, ZHR 178 (2014), 227.
[12] *Hopt/Roth*, in: GroßkommAktG (fn. 1), s.93, para.28; *Paal*, DStR 2005, 382, 383.
[13] See *Hirte*, in: Hirte, Kapitalgesellschaftsrecht, 2023, para.1.29; *Oehlrich*, NZG 2019, 1049, 1050; *Spindler*, AG 2006, 677, 678; *Wagner*, ZHR 178 (2014), 227, 240.
[14] *Bachmann*, FS Roth 2011, 37, 42; *Langenbucher*, in: Hopt/Binder/Böcking, Handbuch Corporate Governance von Banken und Versicherungen, 2nd edn (2020), s.13(1); *Wagner*, ZHR 178 (2014), 227, 240.
[15] *Arnold* (fn. 1), para.22; *Hopt/Roth*, in: GroßkommAktG (fn. 1), s.93, para.32; *Kutscher* (fn. 9), p.31.
[16] OLG Düsseldorf, 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489, para.161.
[17] See for capital market law and for the period between 1 July 2012 and 30 June 2015 BaFin Journal 7/16, 18, 23: 85% of the proceedings were directed exclusively against legal persons.
[18] See in fn. 19.
[19] *Steiner*, Geschäftsleiterhaftung im Wettbewerbsrecht (2021), p.91; *Strasser*, VersR 2017, 65, 66, 69; contrary *Madari*, GesRZ 2021, 14 (20). See already *Kersting* ZIP 2016, 1266, 1267= FIW Jahrbuch 2018 (2019), 81, 82.

1. The Relationship between Corporate Sanctions and Managerial Liability

In principle, public sanction law and civil liability law are independent from each other.[20] Therefore, in cases in which questions relating to public sanction law and civil law play a role, the respective questions must be answered primarily on the basis of the relevant legal field. Thus, cases in which sanction law objectives are intended to also apply in the area of civil law are, in principle, expressly codified (see, for example, Sections 134, 138, 823(2) BGB (German Civil Code)).

The attribution of responsibility under sanction law, i.e. fining somebody, therefore does not allow for any conclusions as to who has to bear responsibility under civil law (i.e. ultimately bear the fine).[21] This is the subject of the more pertinent civil law. The BGH has decided accordingly in a number of different situations. This applies first of all to cases involving a breach of duty by a consultant. These are characterised by the breach of contractual obligations by the respective consultant, which ultimately leads to a public sanction imposed on their contractual partner, i.e. the person consulting them. It is settled case-law that such a breach of contractual obligations can, in principle, lead to damages claims, which, according to the BGH, encompass the loss suffered as a result of fines.[22] This even applies despite the fact that in the cases decided by the BGH the addressees of the fines are also responsible for the unlawful conduct and guilty of culpable behaviour. Thus, if the addressees of a fine are therefore allowed to demand compensation for the fine even though there is also culpable conduct of their own besides the conduct of the person liable, this must apply *a fortiori* if the conduct leading to the imposition of the fine consists entirely of the action of the person being held liable.[23] This is exactly the case when fines are imposed on a corporation. Such fines are based solely on the fact that the culpable and unlawful conduct of its organs, its managers, is attributed to the corporation. There is no independent culpable behaviour of the corporation as the corporation can only act through its organs. Further, the decision of the BGH on passing on (contractual) penalties imposed on football clubs for improper behaviour of their fans also speaks for the possibility for an association to hold its officers liable for fines or for a corporation to hold its organs liable. In this case the BGH had to answer the question whether individual spectators are liable towards the football clubs for penalties which were imposed on the clubs by the DFB (German Football Association) for the misconduct of these individual spectators. Here too, the BGH came to a clear conclusion: the association can generally hold the spectator liable for the fine with which it was sanctioned for the spectator's misconduct, because the spectator is the one who is ultimately responsible for the penalty imposed on the club.[24] It is the spectator's conduct that caused the imposition of the fine.[25] According to the court, the spectator also cannot rely on the fact that the amount of the club's penalty is based on the financial circumstances of the football club and not on the financial circumstances of a natural person. For the responsibility of the board members or directors for fines imposed on companies, things are similar. Ultimately, it is only their conduct that is decisive for the sanction, since the fine necessarily presupposes a culpable and unlawful act of a director or board member.

2. The Objectives of Corporate Sanctions

In its reasoning, the OLG Düsseldorf in particular refers to the purpose of corporate sanctions and argues that it opposes a pass-through of the sanction from the corporations to its organs. The court therefore argues that 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 provision imposing managerial liability is necessary.[26] This is unconvincing. Even if one agreed with the OLG Düsseldorf that the sanction must ultimately affect the corporation, the purpose of the corporate sanction in itself would not justify a teleological reduction of the provisions of managerial liability (i.e., in the court's case, of s.43(2) GmbHG). For, even if one accepted the understanding of the OLG Düsseldorf of the purpose of the corporate sanction as correct, a teleological reduction based solely on this would be inadmissible. In particular, the situation is not a classic case of a teleological reduction. Typically, a teleological reduction is used in order to reduce the scope of a provision whose wording is wider than is warranted by its purpose. It is therefore the objective or *ratio legis* of the same provision that requires its wording to be interpreted restrictively.[27] Here, however, the court bases the teleological reduction on the objective of a completely different provision. Yet, this would have required, at least, that the respective provisions' objectives be determined, compared and weighed against each other.[28] The OLG Düsseldorf, though, does not justify—or even attempt to explain—why the objectives of the corporate sanction

[20] BGH, 31.1.1957–ZR 41/56, BGHZ 23, 222, 224; BGH, 14.11.1996–IX ZR 215/95, NJW 1997, 518, 519; BGH, 15.4.2010–IX ZR 189/09, NJOZ 2011, 460, 460; *Eufinger*, GWR 2018, 198; *Fleischer*, BB 2008, 1070, 1073; *Kersting*, ZIP 2016, 1266, 1267= FIW Jahrbuch 2018 (2019), 81, 84; *Suchy*, NZG 2015, 591, 592. contrary partly relying on the principle of the unity of the legal order *Hahn* (fn.1), p.132; *Leclerc*, NZKart 2021, 220, 222.
[21] *Fleischer*, BB 2008, 1070, 1073; *Kersting*, ZIP 2016, 1266, 1267= FIW Jahrbuch 2018 (2019), 81, 84; *Lohse* (fn. 1), s.50, para.97; *Wagner-von Papp* (fn. 1), pp.1, 17.
[22] BGH, 31 January 1957–II ZR 41/56, BGHZ 23, 222, 224; BGH, 14 November 1996–IX ZR 215/95, NJW 1997, 519; BGH, 15 April 2010–IX ZR 189/09, NJOZ 2011, 460, 460. In addition, LG Dortmund, 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443, 444; *Kersting*, ZIP 2016, 1266, 1267= FIW Jahrbuch 2018 (2019), 81, 83.
[23] *Bayer/Scholz*, GmbHR 2015, 449, 451; *Bünnemann*, ZIP 2023, 2669, 2673; *Drescher*, Liber discipulorum Möschel, 2021, 91, 98; *Fleischer*, DB 2014, 345, 346; *Jansen* (fn. 1), pp.211; *Kersting*, ZIP 2016, 1266, 1267= FIW Jahrbuch 2018 (2019), 81, 83; agreeing, LG Dortmund, 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443, 444.
[24] BGH, 22 September 2016–VII ZR 14/16, BGHZ 211, 375, para.21.
[25] BGH, 22 September 2016–VII ZR 14/16, BGHZ 211, 375, para.21.
[26] OLG Düsseldorf, 27.7.2023–VI-6 U 1/22 (Kart), NZKart 2023, 489, para.158.
[27] See BVerfG, 19.8.2011–BvR 2473/10 and Others, BeckRS 2011, 54837, para.21; *Danwerth*, ZfPW 2017, 230, 233; *Reimer*, Methodenlehre, 2. Ed. 2020, para.614. This also recognises *Leclerc*, NZKart 2021, 220, 222, who, however, incorrectly assumes that the purpose of organ liability is against a recourse to fines.
[28] See *Larenz*, Methodenlehre der Rechtswissenschaft, 2. Ed. 1992, p.280; see also *Jansen* (fn.1), p.200, 203.

should outweigh the objectives of managerial liability (protection of the principal from the agent).[29] Rather, it does not deal with the objectives of managerial liability at all.

Ultimately, however, as we will show now, this does not matter either, because already the objectives of the corporate sanction do not warrant a restriction of managerial liability.

a) Repressive Purposes of Corporate Sanctions

Corporate sanctions serve repressive and preventive purposes.[30] The repressive purpose consists of two components. On the one hand, the sanction is intended to deprive the association of financial gains obtained unlawfully (see immediately infra III)2.a)aa)).[31] On the other hand, the sanction serves the purpose of retribution (see infra III)2.a)bb)). Neither of the two components can be used to derive an argument for an exclusion of managerial liability for corporate fines.

aa) The Purpose of Disgorgement of Profits The main purpose of the corporate sanction is widely seen as the disgorgement of profits unlawfully obtained by the company.[32] The fact that the legislator was particularly concerned with disgorgement is also reflected in the wording of s.30(1) of the Act on Regulatory Offences. According to this provision, it is possible to impose a fine on a legal person because of the unlawful act of a person authorised to represent this legal person, if the unlawful act also entails a breach of the obligations of the legal person or if the legal person has been enriched by the offence.[33] By this means, the law wants to avoid a divergence between the beneficiary of the infringement and the addressee of the fine in order to avoid setting wrong incentives.[34] The mere fining of the person acting itself would normally not suffice, because the profits gained from the offence generally accrue primarily to the legal person and not to its agents.[35]

Obviously, this goal could not be achieved, if the legal person could pass on the fine in full to the natural person responsible for it. However, in order to avoid this result, it is only necessary to apply the general principles for the calculation of damages which require that certain profits obtained by the injured persons should be deducted from their damages claim.[36] After all, this is the direct result of the difference hypothesis (i.e. calculation of damages by comparing the injured person's actual situation with the situation it would have been in but for the event causing the damages) pursuant to s.249(1) BGB which applies to all claims for damages.[37] Its applicability to managerial liability is generally recognised.[38] As the legal person, the company, has not only been harmed by the fine but has also profited from the unlawful act, its overall damages are lower than the fine imposed on it. Thus, the profit unlawfully obtained must be deducted from the company's liability claim against its director or members of the management board. Moreover, in that regard the burden of proof must be allocated in such a way that it is not for the directors or board members to prove the benefit of the company, but that the company must prove that its disadvantages resulting from the infringement exceed the advantages in the amount claimed.[39] This is justified, because there will generally be asymmetry of information in favor of the company,[40] since the director or board member will usually have left the company by the time they are being held liable as such proceedings usually take place only after the conclusion of the fine proceedings. By applying the principle of offsetting disadvantages and advantages and by placing the burden of proof on the company it is thus ensured that the company cannot keep any unlawfully obtained financial benefits.

bb) The Purpose of Retribution On the other hand, the corporate sanction in its repressive function is intended to inflict a disadvantage on the offenders in order to punish them for the infringement (purpose of retribution).[41] However, no restrictions on internal recoupment of the fine (i.e. holding the board members or directors liable for breach of duty) can arise from this purpose. The purpose of retribution is fulfilled by the payment of the fine by the company.[42] In its decisions the BGH has acknowledged that the purpose of retribution does not preclude a damages claim against the person having caused the company to be fined.[43]

[29] See *Bünnemann*, ZIP 2023, 2669, 2674.
[30] See *Engelhart/Rübenstahl/Tsambikakis*, in: Esser/Rübenstahl/Saliger/Tsambikakis, Wirtschaftsstrafrecht, 2017, s.30 OWiG, para.2 with further references.
[31] Legislative Proposal for OWiG 1968, BT-Drucks. V/1269 p.59; BVerfG, 26 February 1997–1 BvR 2172/96, BVerfGE 95, 220, 242; KG, 18 March 1986–1 Kart 18/85, NJW-RR 1987, 637, 638.
[32] See in fn. 31
[33] The same being true for persons managing the affairs of other entities, e.g. partnerships, associations of persons etc.
[34] Legislative Proposal for OWiG 1968, BT-Drucks. V/1269 p.59.
[35] Legislative Proposal for OWiG 1968, BT-Drucks. V/1269 p.59.
[36] *Backhaus/Brand*, jurisPR-HaGesR 6/2015 Note 3; *Bayer/Scholz*, GmbHR 2015, 449, 450; *Drescher*, Liber discipulorum Möschel, 2021, 91, 96; *Fleischer*, DB 2014, 345, 350; *Fleischer*, BB 2008, 1070, 1073; *Kersting*, ZIP 2016, 1266, 1271= FIW Jahrbuch 2018 (2019), 81, 89, 95; *Rust*, ZWeR 2015, 299, 308.
[37] *Kersting*, ZIP 2016, 1266, 1271= FIW Jahrbuch 2018 (2019), 81, 96 with further references.
[38] BGH, 15 January 2013–II ZR 90/11, NJW 2013, 1958, para.26; *Fleischer*, DStR 2009, 1204, 1210; *Spindler*, in: MüKoAktG (fn. 1), s.93, para.209; *Ziemons*, in: Michalski, 4th Ed. 2023, s.43 GmbHG, para.465.
[39] *Kersting*, ZIP 2016, 1266, 1273= FIW Jahrbuch 2018 (2019), 81, 100.
[40] *Kersting*, ZIP 2016, 1266, 1274= FIW Jahrbuch 2018 (2019), 81, 102.
[41] *Engelhart/Rübenstahl/Tsambikakis*, in: Esser/Rübenstahl/Saliger/Tsambikakis, Wirtschaftsstrafrecht (fn. 30), s.30 OWiG, para.2.
[42] *Bayer/Scholz*, GmbHR 2015, 449, 452; *Bünnemann*, ZIP 2023, 2669, 2672; *Kersting*, ZIP 2016, 1266, 1267= FIW Jahrbuch 2018 (2019), 81, 84; *Rust*, ZWeR 2015, 299, 306; *Suchy*, NZG 2015, 591, 592.
[43] BGH, 31 January 1957–II ZR 41/56, BGHZ 23, 222, 224; BGH, 14 November 1996–IX ZR 215/95, NJW 1997, 518, 519; BGH, 15 April 2010–IX ZR 189/09, NJOZ 2011,460. See also *Drescher*, Liber discipulorum Möschel, 2021, 91, 93.

b) Preventive Purposes of Corporate Sanctions

In addition to the purpose of repression, the corporate sanction also serves preventive purposes by setting incentives to further compliance and by deterring from behaviour that could lead to future infringements.[44]

aa) Incentivising Directors & Board Members In particular, setting proper incentives for the directors and board members is essential, since they are, after all, those who behave unlawfully and cause the company to be sanctioned.[45] On the one hand, such an incentive in German law already exists due to the individual fines imposed directly on the natural persons acting unlawfully (i.e. the board members and directors). On the other hand, the corporate sanction also serves this purpose. It ensures that directors or board members do not commit infringements because they believe the infringement to be in the company's best interest.[46] This purpose is not defeated by managerial liability for the fines imposed on the company. It cannot be assumed that the directors and board members are more inclined to commit infringements because their own liability would compensate the company for any financial disadvantages (see in more detail infra IV)2.b)aa)(4)).

bb) Incentivising Proper Selection and Supervision of Directors & Board Members Partly, the purpose of the fine imposed on the company is also considered to be that the company should be encouraged to carefully select and supervise directors and board members.[47] However, basing an exclusion of managerial liability on this consideration, is unconvincing for a number of reasons.

On the one hand, a significant deterrent effect towards the company is already achieved through its primary responsibility for fines.[48] Whether the company can actually recover the fine from its agents by holding them liable and, if so, to what extent, is generally uncertain *ex ante*.[49] *Ex ante*, and only that is relevant, corporate sanctions therefore do set an incentive for careful selection and monitoring of directors.

In addition, the line of argument that the company is to be incentivised, by the threat of fines, to carefully select and supervise its board members and directors is based on an incorrect understanding of the company law implications of the corporate sanction: The essence of corporations is their own legal personality. It is the corporation that acts and enters into legal relations. In this respect, it is itself a body corporate that can only be addressed as such from the outside. The internal and external sphere of the corporation are strictly separated. Externally, the corporation acts as a single entity, it is not its organs who act or their individual members, but the corporation. Internally, the corporation's internal sphere and the allocation of competences must be considered: who is competent to take what decisions for the corporation, who executes these decisions, who represents the company? The internal liability regime is a vital part of this system of allocation of competence. Taking this into account, one has to decide: Either one sees the corporation itself as the liable entity or one understands the fine imposed on the corporation as a sanction meant to affect the shareholders. On the basis of the former understanding, the final allocation of the financial disadvantage must be determined by the internal law of the corporation. Addressing the fine to the corporation accepts the allocation of responsibility within the internal sphere of the corporation and does not modify it.[50] Addressing the fine to the corporation is therefore by no means equivalent to addressing the corporation's assets as the ultimate target of the sanction.[51] For the corporation as a legal entity, all of the legal principles and functional mechanisms relating to it—in particular also the internal allocation of responsibility—are equally important. The internal allocation of responsibility within the corporation as well as the legal consequences for breach of duties form an inseparable whole. Both are integral parts of the corporation and neither can simply be disregarded if a sanction is imposed "on the corporation".

This would only be possible if one opted for the second understanding of the corporate sanction and therefore did not regard the corporation itself as liable, but understood the imposition of the fine on the corporation to be really meant as a sanction imposed on the shareholders. The separation between the corporation and its members would be reduced to a mere formality.[52] At least in cases in which shareholders can be held liable for the payment of the fine, as would be possible in partnerships,[53] the separation between the assets of the corporation and the assets of its members would disappear. If the goal is to encourage shareholders to carefully select and supervise directors and board members in the future, the logical consequence would be to also hold shareholders of limited

[44] *Engelhart/Rübenstahl/Tsambikakis*, in: Esser/Rübenstahl/Saliger/Tsambikakis, Wirtschaftsstrafrecht (fn.30), s.30 OWiG, para.2; *Meyberg*, in: BeckOK OWiG, 41. Edition, s.30, para.11; *Rogall*, in: KK-OWiG, 5th edn (2018), s.30, para.16.
[45] *Arnold* (fn. 1), para.38; *Fleischer*, DB 2014, 345, 348; *Kersting*, ZIP 2016, 1266, 1268= FIW Jahrbuch 2018 (2019), 81, 87; *Rust*, ZWeR 2015, 299, 305.
[46] See *Engelhart/Rübenstahl/Tsambikakis*, in: Esser/Rübenstahl/Saliger/Tsambikakis, Wirtschaftsstrafrecht (fn. 30), s.30 OWiG, para.2; *Rogall*, in: KK-OWiG s.30, para.16. On the existence of such a motivation for cartel infringements, see *Wils*, WuW 2023, 583, 587.
[47] KG, 18 March 1986–1 Kart 18/85, NJW-RR 1987, 637, 638; *Hahn* (fn.1), p.130; *Meyberg*, in: BeckOK OWiG (fn. 44), s.30, para.11; *Rogall*, in: KK-OWiG (fn. 44), s.30, para.16.
[48] LG Dortmund, 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443, 444; *Kersting*, ZIP 2016, 1266, 1268= FIW Jahrbuch 2018 (2019), 81, 87.
[49] LG Dortmund, 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443, 444; *Bünnemann*, ZIP 2023, 2669, 2673; Kersting, ZIP 2016, 1266, 1268= FIW Jahrbuch 2018 (2019), 81, 87; *Werner*, jM 2024, 6, 11.
[50] See also in fn. 49.
[51] BGH, 11 March 1986—KRB 8/85, BeckRS 1986, 31168721; *Bayer/Scholz*, GmbHR 2015, 449, 453. Contrary *Ost*, FS Schroeder 2018, 589, 592.
[52] See *Backhaus/Brand*, jurisPR-HaGesR 6/2015 Note 3; *Reuter*, BB 2016, 1283, 1288 et seqq.
[53] See *Steitz*, in: Henssler/Strohn, 5th edn (2021), s.128 HGB, para.22.

liability companies liable for fines imposed on the company if the company is unable to pay. Yet, this logical conclusion is not drawn.

To understand the corporate sanction as directed against the shareholders is also unconvincing for other reasons.[54] Due to the absence of an actual culpable commission of the infringement by the shareholders, one can hardly consider them to be at fault. Since, externally, the shareholders do not act as such for the corporation, the only remaining link between them and the infringement is the selection and supervision of board members or directors. Theoretically, a connection in the sense of negligent causation of the infringement by the shareholders' careless selection and supervision of the corporation's organs may be conceivable. In reality, however, such a connection will hardly ever exist (particularly as the shareholders do not owe a duty of careful selection and supervision to the corporation[55]) and would ultimately be a mere assumption.[56] After all, a careful selection and supervision of board members or directors is also not rewarded by the law.[57] While one may benefit from the fact that the probability of an infringement and imposition of a fine is reduced, even the most careful and extensive compliance system will not shield the corporation from the imposition of a fine if an infringement nevertheless occurs. It is therefore incompatible with the constitutional principle of culpability to regard the corporate sanction as a sanction for the shareholders as the shareholders have no way of avoiding the sanction.[58] Corporate sanctions can only be reconciled with the principle of culpability if one understands the impact of the financial disadvantages on the shareholders as a mere legal reflex. On no account, however, can the shareholders be considered to be the ultimate target of the fine. Therefore, the sanction's aim cannot be to incentivise the shareholders. It is already hard to explain from a logical point of view that a provision imposing sanctions intends to target persons who have not themselves infringed the provision and who are themselves not addresses of the provision. Also, from the point of view of legal ethics this would not be a convincing result. As a consequence, the addressee of the sanction is the corporation in its entirety and this precisely includes the allocation of responsibility within the internal sphere and thus the corporation's internal liability regime.

From a corporate law perspective, it is therefore correct to highlight two things: On the one hand, it is to be emphasised that the recovery of the fine through managerial liability does not relieve the company from being burdened with the fine. It only allocates the burden within the company, to which the board members or directors also belong. On the other hand, it is to be underscored that the shareholders do not owe a duty of supervision to the corporation or its management and that breaches of duty by a supervisory board (or its members) are not imputed to the shareholders.[59] The preventive function of the corporate sanction therefore does not justify the exclusion of managerial liability for fines either.

3. Prohibition of Double Jeopardy (Article 103(3) GG (German Constitution) and Principle of Proportionate Punishment

The internal recovery of the fine through managerial liability is also not in conflict with the constitutionally guaranteed prohibition of double jeopardy.[60] While it is true that board members and directors may be subject to a personal fine imposed on them individually and also have to pay compensation to the company, this nevertheless does not constitute double jeopardy. In this regard, the separation between sanction-law and civil law has to be taken into account. The managerial liability claim is not a sanction, but a civil law claim for damages. Hence it cannot conflict with the prohibition of double jeopardy.[61] This parallelism of sanctions and damages claims occurs in other areas of the law as well, without the compatibility with the prohibition of double jeopardy being doubted.

4. Result

Both managerial liability under corporate law and corporate sanctions serve their own purposes. If one concludes that these purposes collide with each other, they must be brought into balance by weighing them up against each other. Such a weighing up exercise would have to lead to the conclusion that managerial liability for fines does exist, since the recoupment of the fine through managerial liability is ultimately necessary in order to effectively prevent infringements and to achieve an appropriate balance of interests within the corporation. However, for these same reasons, there is no conflict of purposes between corporate law and sanction law as regards the question of recovery of fines through managerial liability. The law of corporate sanctions does not pursue any objectives that would generally oppose the possibility of managerial liability for fines. Only the corporate sanctions' purpose of disgorgement must be taken into account. For this, however, not the purposes of corporate sanctions are decisive but rather general

[54] See, correctly, BGH, 11 March 1986–KRB 8/85, BeckRS 1986, 31168721: liability for fines is 'no special preventive measure aimed at members of a particular legal person'. Different, however, LAG Düsseldorf, 20 January 2015–16 Sa 459/14, NJOZ 2015, 782, 790; *Dreher*, FS Konzen, 2006, p.85, 106; *Verse*, FS Krieger, 2020, p.1025, 1030; Heyers, WuW 2022, 413, 415.
[55] *Drescher*, Liber discipulorum Möschel, 2021, 91, 100; see also BGH, 11 March 1986–KRB 8/85, BeckRS 1986, 31168721.
[56] See *Arnold* (fn. 1), para.42; *Reuter*, BB 2016, 1283, 1292.
[57] See *Arnold* (fn. 1), para.42.
[58] See also *Reuter*, BB 2016, 1283, 1292.
[59] *Drescher*, Liber discipulorum Möschel, 2021, 91, 98, 100; see also BGH, 11 March 1986–KRB 8/85, BeckRS 1986, 31168721.
[60] *Ruttmann* (fn.1), p.161 Different opinion *Baur/Holle*, ZIP 2018, 459, 464; *Friedl*, ZWeR 2023, 428, 440; *Leclerc*, Der Kartellbußgeldregress, 2022, p.226; *Verse*, FS Krieger, 2020, 1025, 1035; *Verse*, in: Scholz GmbHG (fn. 1), s.43, para.311.
[61] See the references in fn. 60

principles of damages law. Therefore, apart from the offsetting of advantages and disadvantages, which occurs under the general rules of damages law anyway, it is not possible to derive from the law of corporate sanctions any arguments against managerial liability for fines imposed on the corporation.

IV) Particularities of Competition Law

The cardinal question if corporate sanctions can, in general, be recovered by means of managerial liability thus has to be answered in the affirmative. The OLG Düsseldorf, however, despite having expressed doubts as to the existence of managerial liability for fines, ultimately leaves this question unanswered. It was able to leave this question open as it found that particularities of competition law prohibited managerial liability for competition law fines.[62] The LG Dortmund, on the other hand, is correct in not recognising such particularities of competition law, and consequently applies the general rules of managerial liability, and finds managers to be liable for competition law fines imposed on the corporation.[63]

1. The Objectives of Competition Law Fines

In competition law, it is true that, as regards to the objective of competition law fines, there are certain particularities, which must be assessed with a view to managerial liability. However, it becomes apparent that these particularities neither require nor justify the exclusion of managerial liability for competition law fines.

a) No Risk of Regaining Unlawfully Obtained Profits

As previously shown, corporate fines serve both a repressive and preventive purpose. With regard to the repressive purpose of disgorging unlawfully obtained profits, this objective does not require an exclusion of managerial liability for fines.[64] The purpose of the fine to disgorge illegal profits is not defeated by managerial liability if the principle of offsetting disadvantages and advantages is taken into account. Then, as far as the fine disgorges unlawfully obtained profits, there is no managerial liability. If the company demands compensation for the part of the fine that disgorges its illegal profits, the company organ being held liable can point to the fact that this part of the damage has already been offset by corresponding advantages that have accrued to the company.[65]

However, in this context the burden of proof in connection with the offsetting of advantages and disadvantages requires a separate examination. In principle, the burden of proof for any advantages obtained lies with the party that has caused the damage and is being held liable,[66] in this case the directors or board members. Yet, this would not be appropriate in the context of managerial liability for (competition law) fines. On the one hand, there regularly is a an asymmetry of information in favour of the company.[67] This applies in particular when the company organ (i.e. the director or board member)—as will regularly be the case at the time of liability proceedings—no longer holds a position at the company at all.[68] On the other hand, there would be an unacceptable risk that the company would ultimately regain its illegal profits only because of the allocation of the burden of proof.[69] Therefore, in these cases the burden of proof needs to be allocated differently: It is for the company to prove that the disadvantages it suffered as a result of the competition law fine imposed on it exceed the advantages it derived from its participation in the cartel.[70]

Besides that, there are no particularities of competition law. It is true that, in practice, the German Federal Cartel Office regularly declares an imposed fine not to be intended to disgorge unlawfully obtained profits and at the same time does not exercise its competence to issue a separate disgorgement order according to s.34 GWB (German Act Against Restraints of Competition).[71] However, this administrative practice is unlawful because a disgorgement is required by law and has to be carried out one way or the other.[72] Ultimately, there is thus a risk that the fine (contrary to the Federal Cartel Office's declaration) still partly disgorges illegal profits. These profits would then be regained by the company in the event of managerial liability for the entire fine (including a disgorgement part of the fine). This would be contrary to the fine's disgorgement purpose. However, this risk does not provide a sufficient basis for excluding managerial liability for fines. The correct application of the law cannot (and must not) be deduced from an incorrect and actually unlawful exercise of discretion by administrative authorities in a related field. Further, the courts cannot, on the one hand, accept the classification of the fine as a mere penalty fine imposed by the Federal Cartel Office and, on the other hand, simultaneously call this classification into question. That would, however, be

[62] OLG Düsseldorf, 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489, paras 152, 160; LAG Düsseldorf, 20 January 2015–16 Sa 459/14, NJOZ 2015, 782; LG Saarbrücken, 15 September 2020, 7 HK O 6/16, NZKart 2021, 64.
[63] LG Dortmund, 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443; LG Dortmund, 14 August 2023, 8 O 5/22 (Kart), NZKart 2023, 496.
[64] See in fn. 63.
[65] *Kersting*, ZIP 2016, 1266, 1271= FIW Jahrbuch 2018 (2019), 81, 95. Agreeing with this *Wagner-von Papp* (fn. 1), pp.1, 17, 31.
[66] BGH, 24 April 1985–VIII ZR 95/84, BGHZ 94, 195, 217 juris, para.66.
[67] *Kersting*, ZIP 2016, 1266, 1274= FIW Jahrbuch 2018 (2019), 81, 102.
[68] See *Grooterhorst*, AG 2011, 389.
[69] *Kersting*, ZIP 2016, 1266, 1274= FIW Jahrbuch 2018 (2019), 81, 102.
[70] *Kersting*, ZIP 2016, 1266, 1274= FIW Jahrbuch 2018 (2019), 81, 102.
[71] *Kersting*, NZKart 2022, 659 with further references.
[72] *Kersting*, NZKart 2022, 659 with further references.

the case if the courts argued, on the one hand, that as the fine is a mere penalty fine (without any disgorgement part) there is no possibility of offsetting advantages and disadvantages when quantifying a possible damages claim, and on the other hand, that as the fine is not a mere penalty fine (thus including a disgorgement part) the managerial liability for the fine must be excluded to prevent the risk of a return of unlawfully obtained profits to the company. Either it is a mere penalty fine without any disgorgement part or it is not a mere penalty fine, but includes a disgorgement part. If it is a mere penalty fine, then a recourse against the company organs is possible, because the question of the company regaining illegal profits does not arise at all. Yet, if it is not a mere penalty fine, but a fine that includes a disgorgement part, then the unlawfully obtained profits can be taken into account when quantifying the damages and be offset against the disadvantages suffered (i.e. the fine), thus reducing the damages claim against the directors or board members.

For determining whether a fine is a mere penalty fine or whether it contains a disgorgement part, the correct view is that it is only relevant whether, objectively, the fine has a disgorgement effect.[73] Whether such an effect is intended by the administrative authority is irrelevant.[74] If a disgorgement part is included in the fine, this can to be taken into account when quantifying damages claims of the company against its directors or board members which would ensure that there is no regaining of unlawfully obtained profits by the company.

b) No Impairment of the Penalty Function

Regarding the penalty function there are no notable differences between the competition law fine and corporate sanctions in general (see supra III)). The penalty function is fulfilled by the payment of the fine by the company. A subsequent recovery of the fine from the company organs by the company therefore does not affect the penalty function. Also, this result is not challenged by any considerations under European law (see in detail infra IV)2.).

c) No Impairment of the Preventive Purpose

Also, an examination of the preventive purpose shows no differences between competition law fines and corporate sanctions in general (see *supra* III)2.b)). A recovery of fines through managerial liability does not counteract the preventive effect of the fine, but rather promotes it. The possibility of managerial liability directly affects those who can commit competition law infringements through their own actions. In this way, a targeted deterrence is ensured.[75] The possibility of managerial liability for fines is therefore not in conflict with the European law principle of effectiveness (see in detail infra IV)2.b)).

d) No General Risk of Financial Burden of Fine being passed on to the D&O Insurance

Opponents of managerial liability for fines often argue that managerial liability would in practice regularly result in a *de facto* passing on of the fine to the D&O insurance.[76] This is unconvincing for several reasons. From the outset an argument according to which managerial liability is covered by the D&O insurance and therefore excluded is hardly convincing: either managerial liability for fines is insured, then the liability claim exists. Else managerial liability is excluded, in that case it cannot be (and does not need to be) insured. The question is whether the company has a claim for managerial liability. If it has such a claim, then the company will be relieved of the financial burden imposed by the fine. In this case, however, it is irrelevant who is ultimately burdened. From the point of view of competition law, the insurance is not a worse debtor than the company organs. In short: the existence of insurance should have no influence on the existence of the insured claim. If insurance is a problem, insurability should be excluded. Both a restriction of managerial liability and a restriction of insurability would ultimately require a teleological reduction of the relevant corporate or insurance law provisions (i.e. reducing the scope of the provision that is indicated by its wording on account of its *ratio legis*). If such a teleological reduction is necessary anyway in order to avoid the unwanted result (passing on of fines to the D&O insurance), it seems much more appropriate to do this within the insurance contract and not within the upstream relationship between the board members or directors and the corporation.

Apart from this, however, it is also questionable whether the preventive purpose of the fine is at all impaired in its effectiveness by an existing D&O insurance policy.[77] In fact, D&O insurance policies will often not cover the managerial liability claim because the competition law infringement is based on an intentional action by the board member or director; and for such intentional actions, at least in cases of *dolus directus*, exclusions will regularly apply.[78] Often, the general terms and conditions of D&O insurance even include a general exclusion for damages caused by competition law

[73] BFH, 7 December 2022–I R 15/19, DStR 2023, 996 para.20; *Drüen/Kersting*, Steuerrechtliche Abzugsfähigkeit von Kartellgeldbußen des Bundeskartellamts (2016), para.199.
[74] See the references in fn. 73
[75] *Bayer/Scholz*, GmbHR 2015, 449, 452; *Jansen* (fn.1), p.213; *Lindner/Otting/Thelen*, GmbH-StB 2015, 167.
[76] OLG Düsseldorf, 27.7.2023, VI-6 U 1/22 (Kart), NZKart 2023, 489, para.165; LG Saarbrücken, 15 September 2020, 7 HK O 6/16, NZKart 2021, 64, para. 123. See also *Wagner-von Papp* (fn.1), p.1, 19.
[77] See, however, the references in fn. 76.
[78] LG Dortmund, 14 August 2023, 8 O 5/22 (Kart), NZKart 2023, 496, 497; *Kersting*, ZIP 2016, 1266, 1267= FIW Jahrbuch 2018 (2019), 81, 84. On the insurability of managerial liability for fines and the liability of the insurance also at dolus eventualis in detail *Thomas*, NZG 2015, 1409, 1416; see also *Dreher*, VersR 2015, 781; *Fabisch*, ZWeR 2013, 91, 116.

infringements or fines in general.[79] Furthermore the insured sum is limited. *Ex ante*, the director or board member therefore always has to expect that the insurance will not cover the managerial liability claim for fines, which should prompt caution and which furthers the preventive purpose of corporate sanctions. In addition, there are usually also deductibles in the insurance policy (cf. s.93(2) sentence 3 AktG), which, however, are insurable themselves.

If, however—maybe in the area of the directors' or board members' liability for mere negligence—one considered managerial liability to overly impair the preventive purpose of competition law fines because of the insurance coverage, denying managerial liability for the fine would be the wrong solution. Denying managerial liability would weaken the preventive purpose even more, because it would completely immunise the agents that act for the company (i.e. directors and board members) from liability and thus even incentivise misconduct. The appropriate solution in this case would be to rather take action on the insurance level and to exclude the insurability of such damages or to require a sufficiently high (and itself non-insurable) deductible.[80]

e) Interim Result

As a result, there are therefore, with regard to their purpose, no relevant differences between corporate sanctions in general and competition law fines which would require to derogate from general principles.

2. Implications of European Law

Recently, doubts were raised as to whether managerial liability for competition law fines was compatible with European law.[81] These concerns are unfounded. The third sentence of art.4(3) TEU obliges the Member States to '*refrain from any measure which could jeopardise the attainment of the Union's objectives*'. In our context, this specifically concerns the enforcement of European competition law, in particular the prohibitions set out in arts 101, 102 TFEU. These are (also) enforced by fines intended to deter from competition law infringements, see art.23 of Regulation 1/2003 and art.13 of Directive 2019/1/EU. The ECJ deems the effectiveness of those sanctions as a prerequisite for the coherent application of arts 101 and 102 TFEU.[82] Against this backdrop, it is necessary to answer the question whether managerial liability for competition law fines jeopardises the effectiveness of competition law enforcement. In this respect, beyond all dogmatic considerations, the effects of managerial liability for competition law infringements in the overall legal system must be taken into account.

a) No Prohibition on Sanctioning Directors or Board Members

Insofar as managerial liability is allowed, this means that not only the corporation but also its organs (directors or board members) are burdened with the fine. The organs' exposure to the fine may appear in the form of a claim for damages brought against them; it is, however, rooted in the fine, so that the organs are also sanctioned via the fine. However, this does not undermine a decision taken by the European legislator to only affect the corporation and not its board members or directors with the fine. No such decision has been taken. In particular, such a decision cannot be derived from the fact that, under art.23 of Regulation 1/2003, the Commission may only impose fines on undertakings and that, under art.13 of Directive 2019/1/EU, the Member States are only obliged to grant their competition authorities the possibility of imposing fines on undertakings. This is not a decision against the exposure of the directors and board members of companies to sanctions.[83] First of all, those who make this argument would also have to consider imposing a fine on natural persons to be inadmissible under national law insofar as they are accused of infringements of European law. Yet, this conclusion is not drawn,[84] and rightly so, as it would not pass scrutiny in the light of art.12(3), Recital 8 Regulation 1/2003 as well as art.23(1) Regulation 2019/1. Also, it must not be overlooked that the financial harm inflicted on the undertaking is not the ultimate objective of the European legislation, but only a means to enforce competition law. Against this backdrop, it is not possible to justify that an exposure of directors and board members to competition law fines should be excluded under European law. Deterring direct actors from competition law infringements strengthens, not weakens, the enforcement of competition law.

Finally, such a view would interfere with the respective national company law. Although neither 1/2003 nor Directive 2019/1/EU is based on provisions conferring competences regarding company law on the EU, such an interference with national company law might not be inadmissible from the outset. It is much more likely, however, that the European legislator's decision to only consider the imposition of fines on the corporation is not meant as an exclusion of managerial liability but to the contrary counts on managerial liability being provided by (national) company law. Managerial liability is also provided for in European law, which for the liability of the board members of a European Company (Societas Europaea, SE) refers, for example, to national law in art.51 of Regulation 2157/2001.

[79] See, for example, Gesamtverband der Versicherer, Musterbedingungen, AVB D&O, as of May 2020, A-7.10; Gothaer, D&O AVB Gothaer s.3(2); see also *Franck/Seyer*, pp.26; *Splinter* (fn. 1), Aktienrechtliche Organhaftung und D&O-Versicherung, 2021, p.61 with further references.
[80] *Franck/Seyer* (fn. 1), p.27. See also *Ruttmann*, pp.172, who ultimately affirms insurability.
[81] *Wils*, WuW 2023, 583, 588; *Wagner-von Papp* (fn. 1), pp.1, 20.
[82] ECJ, 11 June 2009, C-429/07, EU:C:2009:359, *X BV*, para.7.
[83] *Arnold* (fn. 1) , para.30; *Koch*, Gedächtnisschrift Winter, 2011, pp.327, 335. See also *Wagner-von Papp* (fn. 1), pp.1, 17. Apparently of a different opinion *Friedl*, ZWeR 2023, 428, 444.
[84] See *Wils*, WuW 2023, 583, 589.

b) No Violation of the Principle of Effectiveness

Therefore, there is no merit in arguments that managerial liability is not permitted under European law because European law requires that board members or directors must not be sanctioned or burdened with the financial effects of a sanction. Yet, the argument cannot be dismissed out of hand that board member or director liability must not jeopardise the effectiveness of the corporate sanction and that that is why managerial liability should be excluded.[85] However, such an argument is unconvincing as well.

aa) Purpose of Corporate Sanctions The consideration that managerial liability for fines must be excluded in order to ensure that the undertaking is burdened with the fine is based on the unproven premise that the purpose of corporate sanctions is to burden the shareholders, and the shareholders only. However, this premise would first have to be established which is not possible as this premise does not exist. The *ratio legis* of the corporate fine is to burden the undertaking with the fine. This purpose is already fulfilled if the undertaking is the primary addressee of the fine and as such primarily obliged to pay.

(1) Shareholders as Addressees within the Undertaking? The law does not specify who ultimately has to bear the financial burden of the fine within the undertaking, the shareholders or the directors/board members.[86] This is a downstream question which is not, at least not explicitly, addressed by European law. This question can only be answered by considering the purpose of the fine, i.e. the enforcement of competition law by deterring from competition law infringements. In this respect, *Wils* argues that shareholders have a financial interest in competition law infringements. Accordingly, they should be incentivised to avoid competition law infringements by diligently selecting and supervising board members and directors and by setting proper incentives for them in turn. He therefore wants to burden the shareholders and in order to do so needs to exclude managerial liability.[87] This is unconvincing.

Although *Wils*'s approach recognises the need to affect board members and directors, who should be carefully selected, supervised and provided with the right incentives, he refrains from affecting the company organs directly, but rather engages with their principals. This is counterintuitive from the start, unnecessarily complicated and results in efficiency losses due to the detour via the shareholders. In addition, this unnecessarily reduces the board members' or directors' incentives for compliance. Instead of ensuring compliance by the undertaking by addressing directly the agents (i.e. company organs) acting directly for the undertaking,[88] this approach shields the agents from liability, while at the same time burdening the shareholders, who are at best, if at all, only indirectly responsible. However, it is by no means convincing to release the agents (directors or board members) from their liability towards the principal (shareholders) hoping that as a consequence the principal will induce the agent to comply with the law. How is the principal supposed to do that if the most effective way of doing so, the threat of liability, has just been knocked out of his hands?[89] The LG Dortmund therefore rightly considers managerial liability to be the only possible sanction for non-compliance and thus regards its recognition in principle as an unescapable consequence.[90]

(2) Contractual Incentives for Company Organs Instead of Managerial Liability? The suggestion to use contractual options in order to sanction conduct of board members or directors that constitutes or leads to competition law infringements[91] is unconvincing: On the one hand, it is uncertain whether such options will have been agreed on in advance. In addition, at least as regards the German Aktiengesellschaft (German stock corporation, public limited company), it is unclear who should enter into this agreement on behalf of the company. The boards have no interest in this, especially since they (according to the view rejected here) are not subject to any statutory liability. In this context, the consistent (but strange) approach would be to consider it a breach of duty by the board not to contractually draft a liability regime in order to make up for the lack of a statutory liability regime. Ultimately, this would lead to a liability by law, which—according to the view rejected here—was not supposed to exist in the first place.

On the other hand, however, the following is true: if statutory managerial liability has to be excluded for reasons of European law, one cannot be allowed to contractually agree upon such liability. In that regard, *Wils's* suggestion to use contractual options instead of managerial liability is misguided.[92] If one takes the effects into account, and only those are decisive, it is irrelevant whether a contractual penalty is set, a bonus is reclaimed or withheld, or whether a fine is recouped by means of managerial liability.[93] In all cases, the undertaking is, at least partially, economically relieved from the fine. One cannot, like *Wils*, refer to the judgment of the ECJ on the

[85] *Wils*, WuW 2023, 583, 588; *Wagner-von Papp* (fn. 1), pp.1, 20. See as well as regards fines imposed by the Commission, LG Saarbrücken, 15 September 2020, 7 HK O 6/16, NZKart 2021, 64, para.121.
[86] See also *Drescher*, Liber discipulorum Möschel, 2021, 91, 98: "Managerial liability does not eliminate the corporate sanction, but only distributes the burden within the corporation."
[87] *Wils*, WuW 2023, 583, 589.
[88] Regarding the need to incentivise the corporation's organs see *Backhaus/Brand*, jurisPR-HaGesR 6/2015 under C; *Rust*, ZWeR 2015, 299, 305.
[89] See *Franck/Seyer* (fn. 1), p.23; *Lohse* (fn. 1), s.50, para.97.
[90] LG Dortmund, 7 June 2023, 8 O 5/22 (Kart), NZKart 2023, 443, 444.
[91] See *Wils*, WuW 2023, 583, 589.
[92] *Wils*, WuW 2023, 583, 589.
[93] *Franck/Seyer* (fn. 1), p.22.

tax deductibility of fines (which in any event does not fit here, see infra IV)2.b)dd)) and point out that this results only in a partial relief for the company which is unproblematic. This judgment also concerns only partial relief, which, however, the ECJ did consider to be problematic. In addition, one would also have to acknowledge that in many cases managerial liability would also mean only a partial relief for the undertaking and, consequently, would then have to consider managerial liability to be unproblematic as well.

(3) Shielding Company Organs from Liability Despite Lack of Shareholder Influence is Dysfunctional The exclusion of managerial liability for competition law fines deprives the corporation of its most effective instrument of controlling the behaviour of its directors or board members.[94] Therefore, burdening the shareholders with the financial effects of fines imposed on the corporation by shielding its organs from liability becomes completely dysfunctional if, due to their limited influence, the shareholders have no means of preventing competition law infringements, e.g. by monitoring and selecting its organs and by creating incentive structures.[95] These means are not available to shareholders. How should the shareholder of a public limited company monitor, select, set incentives? That would be the task of the supervisory board. If the supervisory board fails to fulfil its duties, the members of said board would normally themselves be liable (pursuant to ss.116, 93 AktG). Should this liability claim of the corporation also be excluded? Burdening the shareholders with the financial effects of the fine does not add anything to the deterrent effect in these cases. They may be afraid, but they cannot do anything. Other subsequent reactions that would be available to the shareholders, such as dismissal of directors or board members, may be a useful addition to managerial liability. However, they cannot nearly exert the same influence on the corporate organs.[96]

Moreover, the understanding of the competition law fine as a sanction ultimately intended to affect the shareholders is also based on a reversal of perpetrator and victim which is highly questionable from the point of view of legal ethics. Due to the fine imposed on the corporation and its loss of reputation the shareholders are themselves the victims of the competition law infringement. A co-responsibility of the shareholders for the competition law infringement cannot be based solely on a profit-orientated corporate culture.[97] For the shareholders, their share in the company is part of their property. Expectations of profitability are therefore legitimate, even if they manifest themselves in a performance-based system of remuneration for the directors or board members. Therefore, the expectations of the shareholders regarding profit cannot be sufficient to justify burdening only the shareholders with the adverse financial effects of the fine and to rule out any managerial liability.

(4) Exclusion of Managerial Liability to Avoid Advantages for the Undertaking? Therefore, from a preventive point of view, a definitive allocation of the sanctioning effect to the shareholders in order to incentivise them to carefully select and monitor directors and board members to prevent (with uncertain success) competition law infringements is unnecessarily complicated and hardly useful. On the contrary, shielding board members and directors from liability is counterproductive. There seems to be no empiric evidence that such an approach would actually be more effective than allowing the recoupment of fines via managerial liability.

In this context, *Wils* argues that it has already been observed that competition law infringements were committed by directors or board members because they believed to act in the best interest of the company.[98] This argument is probably based on the consideration that directors or board members would refrain from competition law infringements if they expected them to be ultimately detrimental to the company. However, in order to develop an argument against managerial liability for competition law fines based on these premises, one would have to draw a downright absurd conclusion. It would have to be assumed that the directors or board members would include in their calculation that a fine is detrimental to the company, but that this disadvantage would be outweighed by the recovery of the fine through managerial liability, so that an infringement would ultimately be in the interest of the company and should therefore be committed (to their own disadvantage!). Only then would an exclusion of managerial liability counter an incentive to commit competition law infringements in the interest of the undertaking. The assumption that the directors' or board members' liability for competition law fines would motivate them to infringe competition law cannot be convincing. The opposite is the case.

Additionally, it should be borne in mind that the undertaking would also be deprived of any advantages arising from the competition law infringement by means of claims for damages or the disgorgement of benefits. Furthermore, a managerial liability claim is excluded in any event insofar as the company has acquired an advantage because of the competition law infringement. This must be taken into account—at least under German law—by deducting from the damages claim the benefits gained because of the loss-causing event (see supra III)2.a)aa) and IV)1.a)). This alone should make it sufficiently clear to the organs that an infringement of competition law is not in the interest of the undertaking.

[94] See references in fn. 89
[95] *Arnold* (fn. 1), para.43; *Drescher*, Liber discipulorum Möschel, 2021, 91, 100; *Jansen* (fn. 1), p.215; *Reuter*, BB 2016, 1283, 1291; *Reuter*, ZIP 2018, 2298, 2303.
[96] *Franck/Seyer*(fn. 1), p.23.
[97] In this direction, however, *Wils*, WuW 2023, 583, 587.
[98] *Wils*, WuW 2023, 583, 589.

(5) Importance of D&O Insurance As already stated (see supra IV)1.d)), no arguments against the approach of directly addressing the acting natural persons and deterring them directly from competition law infringements through their personal liability can be derived from the existence of a D&O insurance.

(6) Interim Result Against this backdrop, exclusively burdening the shareholders with the adverse effects of competition law fines, which would be the result of an exclusion of recovery of fines, appears to be problematic under European law. It would be problematic, because of all people the exclusion of managerial liability would shield those persons from liability who commit the competition law infringements themselves. At the same time, the shareholders burdened with the adverse effects would at best have an indirect influence on the prevention of competition law infringements; in many cases, especially in public corporations, they would have no influence at all.

If conversely, recovery of fines through managerial liability is permitted, the situation is very different: The impending liability for the fine provides a clear incentive for the directly acting board members or directors to act lawfully.[99] At the same time, the shareholders will also not be relieved from their responsibility. As in a first step the company is sanctioned, the fine initially affects the shareholders. *Ex ante* they cannot predict with certainty as to whether and to what extent the recovery of the fine against the directors will be possible. Hence, the shareholders still have a strong incentive to carefully select and monitor the board members as well as provide appropriate incentive structures in order to prevent competition law infringements. Apart from that, particularly the leniency program (see infra IV)2.b)ee))—which fully relieves the company and its organs from the fines—shows that burdening the shareholders is not a dogma and that the threat of liability *ex ante* is sufficient.

As a result, the objective behind the corporate sanction does not support the exclusion of managerial liability for fines. Initially, the objective is limited to the fining of the company. This is not called into question by the possibility of subsequent recovery from the management. If, in a second step, one asks about who should bear the burden within the undertaking, it is not to be assumed that only the shareholders should be burdened. On the contrary: a lack of managerial liability would be problematic with a view to European law. Of course, this only means that recovery of fines via managerial liability is not excluded under European law. It does not mean that European law requires managerial liability, because board members and directors can also be incentivised to act lawfully by different means, e.g. by imposing fines on them personally (see infra IV)2.b)bb)).

bb) Importance of Personal Sanctions Imposed on Directors and Board Members According to our findings above, European law does not only not exclude managerial liability for competition law fines. In fact, it rather became clear that the enforcement of competition law is put at risk if no sanctions are imposed on directors or board members which means that sanctions are required. It goes without saying that this does not necessarily dictate how exactly directors and board members must be sanctioned. But since European law itself does not give the Commission the power to impose fines directly on board members or directors and also does not require national law to provide for this possibility (art.23 of Regulation 1/2003, art.13 of Directive 2019/1/EU), it is, in the first instance, only the managerial liability for competition law fines that remains as a way of sanctioning directors and board members. In this case, recoupment of fines via managerial liability would then not only not be prohibited, but required under European law.

Nevertheless, as far as national law ensures deterrence of company organs in another way—for example by imposing personal fines on board members and directors—managerial liability could, from a European law perspective, also be denied. However, this would require that the deterrent effect of the personal fines is sufficiently high and comparable to the deterrent effect of managerial liability.

Yet, for German law, this must be denied at the moment. Considering the amount of renumeration paid to board members or directors the maximum personal fine of EUR 1 million according to s.81c(1) sent. 1 GWB is clearly insufficient. The maximum fine would only be available for the most serious cases anyway, so that the amount of the fine would normally be significantly lower.[100] In addition, German law lacks a prohibition for third parties—in particular for the company—to pay the fine imposed on the board member or director.[101] This incentivises the company organs to calculate as follows: in comparison to their yearly salary and bonuses (that are maybe even achievable by competition law infringements) the fine is very low; the discovery of the infringement is uncertain; additionally, even if the infringement is discovered, the director or board member may still hope that the company pays the fine, so that, in return, they would help with the investigation of the infringement and possible submission of a leniency application. In the end, compared to a recoupment of the fine by the company

[99] At the time the offence is committed it is not possible for the board members/directors to foresee who the company will ultimately hold liable. In retrospect, it may be more favourable for the company not to make a claim against the board member/director who directly acted with intent, because his insurance cover does not apply, and instead to fall back on another board members/directors who have merely negligently breached their supervisory duties. Ex ante, however, there is uncertainty in this respect, which encourages both to fulfil their duties. Finally, the OLG Düsseldorf, 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489, case discussed here shows that claims can also be asserted against board members / directors who act intentionally.

[100] See *Krauß*, NZKart 2017, 179, 180. See on the principles of the assessment of fines for natural persons *Janssen*, Managerhaftung bei Kartellrechtsverstößen, 2013, pp.73.

[101] BGH, 7 November 1990–2 StR 439/90, BGHSt 37, 226, 229; see also BGH, 6 April 1964–II ZR 11/62, BGHZ 41, 223, 229; BGH, 8 July 2014–II ZR 174/13, BGHZ 202, 26, 29 = ZIP 2014, 1728 (m. *Selter*, ZIP 2015, 714), see as well *Maier-Reimer*, EWiR 2014, 609.

via managerial liability (that often cannot be waived, see s.93(4)(5) AktG), the incentives set by personal fines are significantly lower, in fact they are too low.

Under German law, another problem arises. It is true that, in national cases, the Federal Cartel Office makes use of the possibility of directly fining natural persons.[102] However, the imposition of personal fines on board members or directors can only replace the incentive effect of managerial liability, if this also applies to cases where the fine was imposed by the European Commission.[103] In these cases, the Federal Cartel Office would have to take action again, reassess the case of the Commission, and then only fine the board members and directors. In theory, this may be legally possible;[104] in practice, however, it does not take place as it would unnecessarily require resources that would be missing elsewhere in competition law enforcement. Even if a cartelist will not know from the outset whether the cartel would be prosecuted by the European Commission or the Federal Cartel Office, this reduces the deterrent effect. In extreme cases, it would even favour the larger cartels, as the acting parties may assume that they are more likely to be prosecuted by the Commission.[105]

As a result, from a European law point of view, personal fines for board members or directors can certainly replace managerial liability for competition law fines. However, they would then have to be designed in such a way that their deterrent effect is comparable. In addition, it must also be ensured that these personal fines are imposed on board members or directors even if the undertaking's fine has been imposed by the Commission. At present, these conditions are lacking in German law, so that managerial liability for competition law fines cannot be dispensed with and under European law must not be dispensed with, it is indispensable.

cc) The Disgorgement Function of Competition Law Fines under European Law However, problems with regard to the effectiveness of competition law enforcement could arise, if recoupment of the fine via managerial liability ultimately resulted in a residual profit from the infringement for the company. After all, it is accepted that the fine imposed by the European Commission is also intended to disgorge unlawfully obtained profits.[106] The internal recoupment of the fine by the company from the company organs via managerial liability must therefore not have the effect of letting the company keep—or of returning to it—the profit resulting from the infringement. Therefore, if recovery of fines via managerial liability is accepted, the offsetting of benefits resulting from the infringement from the damages claim is also mandatory under European law. It must also be applied in such a way as to ensure that no unlawful profits remain with the company. This purpose is in fact achieved by the proposed modification of the burden of proof,[107] so that the disgorgement function of the fine imposed under European law does not preclude managerial liability for the fine. Given this, it would not be convincing if one wanted to exclude managerial liability only because not all Member States' legal systems differentiate between the sanctioning and the disgorgement part of fines and because an offsetting of advantages and disadvantages may not be known everywhere. The principle of effectiveness does not require national laws to adapt to under-complex solutions in other national laws. If, in other jurisdictions, due to the lack of differentiation between the sanctioning and the disgorgement part of fines, only the exclusion of managerial liability remained as an option to prevent companies from (partially) keeping the illegal profits obtained, this cannot become a mandatory solution for Member States that draw such a differentiation and can reach solutions in accordance with European law through the adjustment of damages by offsetting advantages and disadvantages.

dd) Case-law on the Tax Deductibility of Competition Law Fines not Applicable In support of his assumption that managerial liability for fines violates the principle of effectiveness *Wils* also refers to the judgement of the ECJ on the tax deductibility of fines.[108] That cannot convince either. First of all, this judgement is of little significance for the deductibility of competition law fines as a whole.[109] Insofar as *Wils*[110] refers to a statement by the ECJ, according to which the tax deductibility of fines could potentially impair their effectiveness, that argument does not apply either. A closer examination shows that in the judgment cited, the ECJ did not rule at all on the substantive law question of whether the tax deductibility of fines is in fact in conflict with the principle of effectiveness in that regard.[111] The decisive point, however, is that the question of how tax deductibility affects the effectiveness of the fine is very different from the question of how managerial liability for the fine affects its effectiveness. Whereas, in the former case, the financial disadvantage caused by the loss is effectively eliminated to a certain extent, in the second case, the only question is how the damage caused by the fine is to be distributed within the company.[112] In this

[102] See *Krauß*, NZKart 2017, 179, 180.
[103] See also LG Dortmund, 14 August 2023, 8 O 5/22 (Kart), NZKart 2023, 496.
[104] Fining natural persons under German law remains possible after initiation of proceedings by the Commission despite the blocking effect of art.11(6) of Regulation 1/2003, *see Bardong*, in: MüKoWettbewerbsR , 4th edn (2003), art.11 VO 1/2003, para.85.
[105] See also LG Dortmund, 14 August 2023, 8 O 5/22 (Kart), NZKart 2023, 496.
[106] ECJ, 28 June 2005–C-189/02, *Dansk Rørindustri*, para.292; ECJ, 14 May 2014–T-406/09, *Donau Chemie*, para.250; *Biermann*, in: Immenga/Mestmäcker, 7th Ed. 2024, preliminary remarks on Article 23 (VO 1/2003) para.27; *Otto*, Der Kartellgehilfe als Bußgeldadressat im Europäischen Kartellrecht, 2015, pp.97.
[107] See in fn. 106.
[108] *Wils*, WuW 2023, 583, 588.
[109] See *Drüen/Kersting* (fn. 73), para.216.
[110] ECJ, 11 June 2009, C-429/07, EU:C:2009:359, *X BV*, para.39.
[111] *Drüen/Kersting* (fn.73), para.220.
[112] See also *Drescher*, Liber discipulorum Möschel, 2021, 91, 98.

respect, it has already been shown above that placing an exclusive burden on shareholders is not only not required under European law, but that an exclusion of recourse (by excluding managerial liability) is problematic under European law, particularly if there is no other sufficient sanctioning of the company organs, for example by sufficiently deterrent personal fines (see supra IV)2.b)bb)).

ee) No Impairment of Leniency Programs Finally, it is also not convincing to consider that managerial liability would impair the effectiveness of leniency programs, because, due to fear of personal liability, board members or directors might not be willing to participate in leniency applications.[113] In that regard, however, it must first be noted that the leniency program itself serves the purpose of effectively enforcing the prohibition on cartels. Therefore, even if there were frictions between private enforcement and the leniency program, one would have to question whether they should really be resolved in favour of the leniency program. In that case, claims for damages by injured parties would also have to be regarded as excluded from managerial liability. However, such conflict does not exist. The board members and directors have an interest in uncovering the infringement because a successful leniency application also eliminates or at least reduces their own managerial liability. Finally, if they are indispensable for uncovering the infringement, board members can also be additionally motivated in other ways.[114]

c) Result: No Violation of the Principle of Effectiveness

To sum up: the availability of managerial liability for competition law fines does not violate European law. Firstly, the decision of the European legislator to only provide for fines to be imposed on companies and not also personally on board members and directors does not mean that board members or directors must not be burdened with fines or their effects. Secondly, burdening board members or directors with the economic consequences of a corporate fine is not contrary to the principle of effectiveness. Placing the economic burden of fines on shareholders only, can, at best, achieve the actual objective of deterring from competition law infringements only in a complicated and indirect manner if the shareholders are thus encouraged to carefully select and monitor the board members or directors and to create appropriate incentive structures for them. Managerial liability achieves this goal directly and significantly more reliably by holding the board members and directors liable. Thirdly, it can be concluded that managerial liability for fines is not only not excluded under European law, but can even be required. This is particularly the case if—as in Germany—there are insufficient possibilities to personally sanction the board members and directors. Fourthly, the right to recover the fine via managerial liability presupposes that no illegal profits resulting from the infringement are kept or regained by the company. This can be achieved by the offsetting of advantages and disadvantages when calculating the damages.

3. The Amount of the Fine

The OLG Düsseldorf points out that the maximum amount of fine that can be imposed for competition law infringements is significantly higher than for any other infringement.[115] While natural persons could be fined with a maximum of one million euros (s.81c(1) GWB), the fine imposed on undertakings is much higher and can amount to up to 10% of their annual turnover (s.81c(2) GWB). In the opinion of the OLG Düsseldorf this shows that the legislator wanted to burden the undertaking with the adverse effects of the corporate fine.[116]

However, the elevated maximum amount of the fine does not constitute such a significant difference from other cases of corporate sanctions that it would require a derogation from general principles and thus an exclusion of managerial liability for fines. The fact that the maximum fine for undertakings differs from the maximum fine imposable on natural persons, although the reason for the fine is identical, is not a phenomenon that can be found exclusively in competition law. Outside of competition law, this follows from the general rule of s.17(3) Sentence 2 OWiG, according to which the economic circumstances of the offender must also be taken into account. However, it is common that the economic circumstances of a corporation are different from those of its management. Moreover, this also follows from the disgorgement function of the fine, since the corporation generally benefits from economic advantages resulting from unlawful conduct of its organs in the first place and the directors or board members participate in these advantages only indirectly (e.g. due to bonuses linked to the profit). It may be true that due to s.81c(2) GWB the fines imposed on undertakings may significantly exceed the fines that may be possible in accordance with the general principles of the law on regulatory offences. This is, however, merely a gradual deviation from the general law on regulatory offences which does not justify any deviation from general principles.

The fact that an exclusion of managerial liability for fines cannot arise from the objectives pursued by corporate sanctions has already been explained above (see supra III)2.). The amount of fines can therefore not

[113] See *Arnold* (fn. 1), para.53, who rejects the argument. It also cannot be found in LAG Düsseldorf, cited by Arnold (loc. cit.), 20 January 2015–16 Sa 459/14, NJOZ 2015, 782. Also rejecting this consideration *Binder/Kraayvanger*, BB 2015, 1219, 1228; *Kersting*, in Geiger, VGR, Gesellschaftsrecht in der Diskussion 2018, 2019, Diskussionsbericht zu Arnold, para.2.
[114] *Werner*, jM 2024, 6, 12. See, for example, *Konrads*, Entschärfung des Haftungsrisikos des verantwortlichen Vorstands einer Aktiengesellschaft zum Zwecke der Inanspruchnahme einer kartellrechtlichen Kronzeugenregelung, 2012; *Konrads*, ZWeR 2016, 429, 432.
[115] OLG Düsseldorf, 27 July 2023, VI-6 U 1/22 (Kart), NZKart 2023, 489 para. 160. So also *Friedl/Titze*, ZWeR 2015, 318, 328; *Leclerc*, NZKart 2021, 220, 224.
[116] See the references in fn. 115.

be an indication of such a purpose either.[117] This is also true from the point of view of the infringers, although they ultimately may be held liable for a corporate fine in an amount that may be many times higher than the fine imposed on them personally: The infringers have to take their victim the way it is, especially since the directors or board members of a company know their company and therefore the maximum fine of 10 % of the annual turnover will not be surprising *in concreto*.[118]

Furthermore, the reference to the possible amount of fines loses significance in relation to the otherwise existing liability risks of board members and directors. After all, it is not an exceptional feature of competition law that a breach of duty by board members or directors of a company can cause damages that by far exceed their financial capacity.[119] This follows from the fact that the board members and directors are responsible for the management of a legal entity whose financial circumstances are not comparable to those of private individuals. Wrong decisions therefore have different consequences than for private individuals. Exorbitant claims for damages are therefore not uncommon.[120] This lies in the nature of the matter. Board members and directors of a company bear a significantly higher proportion of the operational risk of a company than a mere employee. Yet, this is usually also reflected in their remuneration. Limitations of liability in their favour are therefore in principle not necessary in order to achieve an appropriate balance of interests.[121] Granting privileges to board members and directors with regard to competition law fines would therefore not fit into the system. There are no grounds to proceed differently in the case of competition law infringements than in the case of other infringements or other breaches of managerial duty.

4. Problematic Differentiation of the OLG Düsseldorf Between German and European Competition Law Enforcement

Finally, it should be emphasised that the disincentives to board members and directors associated with the exclusion of recoupment of fines via managerial liability can only be compensated by a personal fine imposed directly on these board members or directors (see supra IV)2.b)bb)). However, such a personal fine cannot be imposed in the case of competition law enforcement by the European Commission, but only in the case of national competition law enforcement. Apart from the fact that a personal fine for directors under German law cannot compensate for the exclusion of managerial liability as the fine is too low under German law, this leads to a highly problematic differentiation: depending on whether competition law infringements are prosecuted at European or national level, the board members are either liable or not liable. This seems arbitrary and would lead to false incentives, especially if the competition law infringement has cross-border effects so that board members and directors can expect investigations, if any, to be conducted on the European level. This also opposes an exclusion of managerial liability for fines, and does not support it.[122]

V) Conclusion

It has been shown that undertakings can recoup corporate fines imposed on them through managerial liability and that that is true for both fines imposed by the European Commission and for fines imposed by a national competition authority. The current discussion does not seem to take sufficient account of the fact that companies are not physical beings themselves, but can only act through natural persons. Natural persons enter into contracts on behalf of the company and natural persons are also those who commit the infringements that are sanctioned by fines. This fact is taken into account by company law through its rules regarding the allocation of responsibility within the company. This allocation of responsibility is clearly based on the premise that setting proper incentives for the company organs requires that these organs be liable for the consequences of their actions, for breaches of duty. This makes immediate sense. There is no reason to derogate from this for regulatory offences in general and competition law infringements in particular. The opposite view is ultimately not consistent in itself. On the one hand, it is postulated that the fine should be imposed on the corporation precisely because the corporation (or: undertaking) is the one to whom the prohibitions of competition law apply and which is responsible for the infringement. On the other hand, this view wants to disable internal mechanisms designed to prevent infringements and thus deprive the corporation of its most effective means to ensure compliance within the framework of its internal organisation. It cannot be argued against this that, in addition to corporate sanctions under German law, there is also the possibility of directly fining the persons who directly act for the corporation. Apart from the fact that this possibility does not exist in European competition law in the case of fines imposed by the European Commission, this instrument is

[117] Contrary *Beck*, NZKart 2023, 654, 656.
[118] *Kersting*, ZIP 2016, 1266, 1270= FIW Jahrbuch 2018 (2019), 81, 92. In this sense, the established case law of the Federal Court of Justice in cases where the physical constitution of the victims has contributed to or intensified damage to their health, cf. BGH, 29 February 1956–VI ZR 352/54, BGHZ 20, 137, 139; BGH, 11 June 1974–VI ZR 37/37, NJW 1974, 1510; BGH, 19 April 2005–VI ZR 175/04, NJW-RR 2005, 897, 898.
[119] See *Bayer/Scholz*, GmbHR 2015, 449, 455.
[120] On the liability of *Winterkorn* in the diesel scandal [total claims for damages in the amout of approx. EUR 288 million] see FASZ of 11 February 2024, p.24; manager magazine of 9 June 2021, *https://www.manager-magazin.de/unternehmen/autoindustrie/volkswagen-martin-winterkorn-zahlt-11-2-millionen-euro-schadensersatz-a-a615f546-d512-4183-af77-22c70a7c4458*, and Zeit, *https://www.zeit.de/wirtschaft/2021-06/volkswagen-martin-winterkorn-schadenersatz-dieselskandal-ex-vw-chef-falschaussage*, 9 June 2021; internet sources last checked 31 August 2024. See also *Bayer/Scholz*, NZG 2014, 926, 927; *Bayer/Scholz*, GmbHR 2015, 449, 455; *Koch*, AktG (2023), s.93 para.3.
[121] *Hauger/Palzer*, ZGR 2015, 33, 77.; *Kersting*, ZIP 2016, 1266, 1269= FIW Jahrbuch 2018 (2019), 81, 92; *Schöne/Petersen*, AG 2012, 700, 701.
[122] Correct: LG Dortmund, 14 August 2023, 8 O 5/22 (Kart), NZKart 2023, 496.

unavailable to the corporation itself and, moreover, in its current design, is not capable of achieving a sufficient behavioural effect.

In particular, managerial liability for competition law fines is also in the interest of the shareholders. After all, they are the ones who ultimately suffer the adverse effects of the fines, although, generally, they are not responsible for the infringement. This may be compatible with the principle of personal responsibility because the financial disadvantages suffered by the shareholders are a mere legal reflex of the imposition of the fines on the company. However, if one wants to understand the corporate fine as having the purpose of setting incentives for the shareholders, this would turn things upside down. In that case, the mere legal reflex of corporate fines is suddenly turned into the objective of the fine. Given the fact that shareholders lack or have only negligible possibilities of preventing infringements, this would be problematic with regard to the principle of personal responsibility and also hardly appropriate on the merits.

Finally, the European principle of effectiveness does not preclude recoupment of fines via managerial liability. To the contrary, it rather follows from the principle of effectiveness that a possibility of recouping fines through managerial liability is mandatory as the existing possibilities for personal fines against board members or directors provide an insufficient level of deterrence. In fact, the Commission cannot impose any fines on board members or directors and, under German law, the level of fines is too low to set proper incentives and to ensure deterrence.