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Antitrust Fines and Managerial Liability

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ABSTRACT

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

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

JEL classification: K21, K22, K42, L40

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I. Introduction

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

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

Although courts have relied on various doctrinal considerations rooted in national law to reject actions for indemnity[1] against (former[2]) managers, the principal instrumental argument that has been invoked is the interrelation between managerial liability and the deterrent objective of antitrust fines. In the context of EU antitrust infringements, this argument may have a particular legal relevance: given the obligation of sincere cooperation, Member State law must not undermine the effective sanctioning of EU antitrust law violations – whether fines are imposed by the Commission or by national antitrust authorities. The effectiveness requirements of EU law may therefore be crucial when considering managerial liability under national law.

Against this background, this paper focuses on whether the deterrent effect contemplated by antitrust fines indeed requires a ban or a limitation of managerial liability. It will be argued that neither is the case. While recourse may weaken the deterrent effect against the company and its shareholders, its prohibition – as well as the prohibition of penalties or salary cuts that consequently would also have to be assumed – would take an essential instrument for controlling managers' behaviour out of the company's hands. This also holds true when the availability of D&O insurance is included in the analysis. It is true that, owing to deficiencies in the design of D&O insurance and its regulatory framework, the deterrent effect of cartel fines may not play out perfectly. However, we do not observe that these deficiencies would reach a magnitude that rendered the preventive effect of managerial liability of antitrust fines impossible or undermined it on a broad scale. Finally, although unlimited recourse may entail a risk of over-deterrence vis-à-vis the managers, because of various cushioning mechanisms these risks are not to be regarded as so significant that a limitation would appear indispensable to do justice to the policy of antitrust fining.

We will present our findings in six steps. First, we will point to four cases where managerial liability for antitrust fines has been litigated before a court. While, in one Dutch case, a former

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

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

director has been held liable, adjudication in the UK and Germany provides us with a good illustration of how courts have justified a denial of recourse liability against directors and officers and how they have framed their argument (section II). Second, we will show that it is the essential aim of antitrust fines to prevent infringements and that the intended deterrent effect is based on threatening a cash outflow from the company in the event of an infringement. Consequently, as a matter of principle, when defining the scope of managerial liability for antitrust fines, company law must have regard to the deterrence rationality of these. If an infringement of EU antitrust law is involved, this might result in EU law principles having a regulatory impact on national company law (section III). In the three main sections of this contribution, considering managerial liability as a corporate governance instrument, we explore whether, to ensure adequate deterrence, as envisaged by the law of antitrust fines, management's liability should be barred or limited to prevent either under-deterrence of the company or over-deterrence of the management. We will advocate that none is required (sections IV, V, and VI). Thereafter, we will take a brief look at the parallel issue of managerial liability for antitrust damages the company owes to cartel victims (section VII). Section VIII concludes.

II. Illustration: Successful Action for Liability in the Netherlands – Denial of Recourse Claims in the UK and Germany

Instances of managerial liability are typically negotiated out of the public eye.[3] For different reasons, the parties involved – the companies and their (former) managers, as well as the insurers – have an interest in reaching a discreet settlement. This applies even more when recourse liability for antitrust fines is at issue. Yet the fact that these disputes are usually resolved by way of out-of-court settlements or arbitration proceedings does not mean that the legal framework was irrelevant. After all, the parties are negotiating in the shadow of the law.

In the following, we present four cases that nevertheless have come to light as they have been litigated before the courts. While the court in the *Heiploeg* case ruled in favour of the plaintiffs, the recourse claims were dismissed in the three other cases. These latter judgments are particularly instructive for us because they contain considerations as to why managerial liability can be regarded as problematic in cases of antitrust fines.

1. The *Heiploeg* Case

The Dutch District Court of Noord-Nederland provides us with an example for a judgment confirming the liability of a former director for an antitrust fine.[4] In 2013, the European

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[3] One notable reason is that companies waive recourse claims against their managers before a leniency application is filed to ensure full cooperation with the competition authorities in the fastest way possible. If the threat of liability and/or individual sanctions prevents suspected managers from supporting the investigation, the prospect of a waiver of liability and indemnification of other sanctions may serve as an incentive to cooperate. Depending on the applicably company law, the legality of these waivers and promises of indemnification may be doubtful. See Franz Jürgen Säcker, 'Gesellschafts- und dienstvertragsrechtliche Fragen bei Inanspruchnahme der Kronzeugenregelung' (2009) *Wirtschaft und Wettbewerb* 362, 372. Note that the company could not incentivize managers to cooperate through a waiver if there was no liability for antitrust fines in the first place.

[4] Rechtbank Noord-Nederland 23.9.2020, *Gerald Willem Breuker*, ECLI:NL:RBNNE:2020:3292. See Tialda Beetstra and Mariska Van De Sanden, 'The Dutch District Court of Noord-Nederland holds a former

Commission had fined four companies for their participation in the North Sea shrimps cartel.[5] The fine imposed on Heiploeg was the highest, amounting to approximately EUR 27 million. Because the company went bankrupt in 2014, it was Heiploeg's trustees in bankruptcy who claimed damages from various former managing and supervisory directors. While most directors settled with the trustees (apparently after consultation with their D&O insurers[6]), one did not and, consequently, was sued in court.

The court found that the defendant director had been directly involved in the administration of the (fined) price fixing arrangements and, thus, had violated his managerial duties owed to the company. Consequently, the claim based on directors' liability under Article 2:9 of the Dutch Civil Code succeeded, and the former director was held personally liable for damages of more than EUR 13 million. The court apparently did not take exception to the fact that, by way of such an indemnity action based on managerial liability, the company (or its shareholders) could effectively relieve themselves of a substantial part of the fine. The court did not discuss whether this would call into question the effectiveness of the sanction, in particular its deterrent effect.

In discussing the requirement of 'relativity' ('*relativiteit*'),[7] the court referred to the ECJ's finding in *Courage* that the 'practical effect' of Article 101(1) TFEU 'would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.[8] In *Courage*, as is well known, the ECJ had clarified that an innkeeper's right to claim antitrust damages from a brewery must not be a priori denied on the grounds that he himself was a party to the supply contract in violation of Article 101 TFEU. The ECJ had thus forced a change in English law, from which the Court of Appeal had meant to derive an exclusion of the damages claim based on the 'unclean hands' defence and the presumption that Article 101 TFEU was not intended to protect parties to an agreement in violation of antitrust law.[9] By referring to the *Courage* doctrine at this point, the Dutch court seemed to imply that recourse claims by the fined company against its (former) director must not be excluded from the outset on the grounds that the company was itself responsible for the antitrust infringement (in that the conduct of its director establishes the company's fault). This would represent a remarkable extension of the ECJ's statement in *Courage* into the realm of managerial liability and, indeed, would address concerns[10] that led

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director personally liable for the North Sea shrimps cartel *(Gerard Willem Breuker)*' (September 2020) Concurrences N°97360.

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

[6] Rechtbank Noord-Nederland 23.9.2020, *Gerald Willem Breuker*, ECLI:NL:RBNNE:2020:3292, para 2.34.

[7] Rechtbank Noord-Nederland 23.9.2020, *Gerald Willem Breuker*, ECLI:NL:RBNNE:2020:3292, paras 4.52–53. The requirement of 'relativity' is a principle of Dutch tort law laid down in Article 6:163 of the *Burgerlijk Wetboek*, the Dutch Civil Code. The provision aims at limiting tortious liability: 'there is no obligation to pay compensation if the violated norm does not aim to protect against the damage as suffered by the injured party'. According to the case law of the Dutch Supreme Court, 'when answering the question of whether the requirement of article 6:163 BW … is fulfilled it comes down to the purpose and purport of the violated norm, on the basis of which it must be ascertained to which persons, to which damage and to what manners in which the damage occurs the protection of the violated norm extends'. Hoge Raad der Nederlanden 20 September 2019 NJ 2020/233, ECLI:NL:HR:2019:1409, para 3.1.3. A corresponding provision has been adopted, for example, in Article 3:201 of the Principles of European Tort Law (PETL).

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

[9] See Case C-453/99 *Courage v Crehan* ECLI:EU:C:2001:465, paras 11–12.

[10] But cf. Tialda Beetstra and Mariska Van De Sanden, 'The Dutch District Court of Noord-Nederland Holds a Former Director Personally Liable for the North Sea Shrimps Cartel *(Gerard Willem Breuker)*'

the Court of Appeal of England and Wales (which, of course, is no longer bound by ECJ case law), as we will see in the next section, to deny managerial liability in the same scenario. In any case, the Dutch District Court assumed that, in the case of a fining for violation of EU antitrust law, general principles of EU law could have an impact on the scope of possibly ensuing managerial liability. This is an aspect that we will discuss in more detail below.[11]

Finally, it is noteworthy that the director's liability insurance company apparently stated that there was no insurance coverage because the claim had been filed late.[12] Moreover, the insurance company also reserved the option to refuse payment because the insurance policy excluded deliberate intent.[13]

2. The *Safeway Stores* Case

Under English law, the judgment in *Safeway Stores v Twigger* set a precedent for the denial of managerial liability for an antitrust penalty. In 2005, the UK's then antitrust authority, the Office of Fair Trading ('OFT'), had launched an antitrust investigation against Safeway because of its participation in the 'dairy retail price initiatives'. In a decision of 26 July 2011, the authority imposed a penalty of GBP 5,691,553 on the firm for illegal coordination pursuant to section 2(1) in Chapter I of the Competition Act 1998.[14]

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

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

In the principal judgment, delivered by Longmore LJ, the significance of this consideration is essentially explained by how competition law conceptualizes the 'undertaking' as the

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(September 2020) Concurrences N°97360, 5 (suggesting that the judgment might have disregarded Heiploeg's responsibility for the antitrust violation as the action was brought by the trustees in bankruptcy and not by the company itself).

[11] See below sub III.3.

[12] See Rechtbank Noord-Nederland 23.9.2020, *Gerald Willem Breuker*, ECLI:NL:RBNNE:2020:3292, para 4.2.

[13] Tialda Beetstra and Mariska Van De Sanden, 'The Dutch District Court of Noord-Nederland Holds a Former Director Personally Liable for the North Sea Shrimps Cartel *(Gerard Willem Breuker)*' (September 2020) Concurrences N°97360, 5.

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

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

[16] *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 [16] (Longmore LJ).

addressee of the antitrust laws and the ensuing liability of the company for the antitrust infringement, reaching the conclusion that '[t]he liability is a "personal" one and that is enough to make the acts of the company "personal" for the purpose of the application of the maxim [*ex turpi causa non oritur actio*]'.[17]

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

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

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

While the Supreme Court did not permit an appeal,[22] some observations in its subsequent judgment in *Jetivia v Bilta*[23] have raised expectations that the court might consider overruling *Safeway* if seized again on this matter.[24] The case did not involve antitrust infringements but a carousel fraud that raised questions regarding the attribution of knowledge and state of mind of directors to the company and when this would bar action of the company against directors for breach of fiduciary duty. In their judgment, Lord Toulson and Lord Hodge disagreed with the principal reasoning in *Safeway Stores*. Pointing to criticism in the academic literature,[25] they argued that the company's personal responsibility for the antitrust infringement and its ensuing personal liability for the penalty could not in itself explain why the company should be barred from having recourse for the antitrust penalty against its

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[17] *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 [27] (Longmore LJ).
[18] *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 [36] (Lloyd LJ), [43] (Pill LJ).
[19] *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 [29] (Longmore LJ).
[20] *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472 [44], [46] (Pill LJ).
[21] Anna Morfey and Conall Patton, '*Safeway Stores Ltd v Twigger*: The Buck Stops Here' [2011] *Comp Law* 57, 63.
[22] Order dated 4 April 2011.
[23] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23.
[24] Aidan Robertson, 'Pulling the Twigger: Directors and Employees Back in the Firing Line for Damages after Jetivia in the Supreme Court?' (2015) 36 ECLR 325, 326.
[25] Peter Watts, 'Illegality and Agency Law: Authorising Illegal Action' [2011] *Journal of Business Law* 213, 220.

directors. Such a limitation of recourse would instead require countervailing policy reasons.[26] Lord Toulson and Lord Hodge accepted that

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

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

3. The *Villeroy & Boch* Case

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

For stock companies under German law – such as the plaintiff in the *Villeroy & Boch* case – section 93(2) of the Stock Corporation Act[34] codifies directors' liability for breach of duties owed to the company. Based thereon, the plaintiff claimed that the former CEO was liable for damages of approximately EUR 2.3 million resulting from the fine imposed by the Commission and of approximately EUR 143,000 from legal advice in course of the antitrust proceedings. This relatively small proportion – in relation to the total fine and the total legal fees[35] – resulted from the fact that the action only concerned the cartel violations committed by the Austrian subsidiary during the defendant's term of office.[36]

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[26] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23 [159]–[161] (Lord Toulson and Lord Hodge).
[27] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23 [162] (Lord Toulson and Lord Hodge).
[28] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23 [52] (Lord Mance).
[29] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23 [83] (Lord Sumption).
[30] *Jetivia v Bilta Ltd (in Liquidation)* [2015] UKSC 23 [31] (Lord Neuberger).
[31] *Bathroom Fittings and Fixtures* (Case COMP/39092) [2010] OJ C 348/12.
[32] See Case C–656/13 P *Villeroy & Boch Austria GmbH v Commission* ECLI:EU:C:2017:54.
[33] LG Saarbrücken 15.9.2020, 7 HK O 6/16 *Vorstandsregress* Juris.
[34] Section 93(2), 1st sentence of the German Stock Corporation Act reads: 'Members of the management board acting in dereliction of their duties are liable as joint and several debtors to compensate the company for any damage resulting from their actions'. (Translation taken from <https://www.gesetze-im-internet.de/englisch_aktg/index.html>.)
[35] In total, the lawyers' fees amounted to around EUR 3.2 million, LG Saarbrücken 15.9.2020, 7 HK O 6/16 *Vorstandsregress* Juris, para 32.
[36] See OLG Saarland 16.2.2022, 1 U 114/20, p. 9 (on file with the authors; not yet published in a database).

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

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

Thus, the court was outspoken in indicating that it was ready to consider the pass-on of an antitrust fine by way of recourse actions to directors and, ultimately, to D&O insurers, as unacceptable and, indeed, in the case of an infringement of EU competition law as a violation of the principle of effectiveness.

On appeal, the Saarland Higher Regional Court upheld the dismissal of the case on the grounds of the statute of limitations. With regard to the possibility of a recourse as such, the court left it at characterizing the Regional Court's considerations as 'respectable' ('*beachtlich*').[38]

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

4. The *Thyssenkrupp* Case

A few years older but clearly attracting more attention were the indemnification proceedings in the *Thyssenkrupp* case. After the Bundeskartellamt had imposed two fines totalling EUR 191 million[40] on ThyssenKrupp GfT Gleistechnik GmbH owing to its participation in the rail

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

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

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

[40] See the Bundeskartellamt's press reports of 5.7.2012 (EUR 103 million fine imposed on ThyssenKrupp) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/05_07_2012_Schienenkartell.html?nn=3591568> and of 23.7.2013 (EUR 88 million fine imposed on ThyssenKrupp), <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_07_2013_Schienen.html?nn=3591568> (accessed 5 October 2022).

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

The Düsseldorf Regional Labour Court dismissed the claim at second instance, rejecting the possibility of recourse in general. The court based its decision on various considerations, with the main thread of argument relating to the sanctioning effect of the antitrust fines. It was emphasized that any fine imposed on a company was based on an implicit finding that the company had not sufficiently monitored its managers. Fining, according to the court, is intended to prompt the company to exercise adequate control.[43] The court then went on to explain that precisely this kind of sanctioning effect was envisaged by antitrust fines – be it under EU law or under German law – and thus concluded:

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

The court apparently considered this aspect so important that it subsequently repeated it using different language:

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

Furthermore, we may identify a consideration similar to the 'consistency' rationale put forward by the Court of Appeal in *Safeway*.[46] The Düsseldorf court maintained that, if the directors' liability under company law prevented the company and the company owners from being held accountable, the civil justice system would effectively 'correct' a decision of the law of (antitrust) fining. This, however, would mean that 'the legal order contradicts itself'.[47]

On appeal, however, the Federal Labour Court overturned the judgment on formal grounds, finding that it was not the (specialized) labour courts but the ordinary courts of the civil justice system that were competent to hear cases involving recourse claims for the compensation of antitrust fines.[48] Consequently, the litigation was referred to the competent Regional Court, though ultimately it did not have to decide the case because the parties settled the case out

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

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

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

[44] LAG Düsseldorf 20.1.2015, 16 Sa 459/14 Juris, para 166.

[45] LAG Düsseldorf 20.1.2015, 16 Sa 459/14 Juris, para 167.

[46] See above n 16 and accompanying text.

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

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

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

Even if the Regional Labour Court's judgment thus did not stand, given that it was overruled only for formal reasons, and given the depth of the court's reasoning, it should be assumed that it will nevertheless remain an important point of reference for the further debate on the recourse for antitrust fines in Germany.

5. Conclusion

While we observe one judgment in the Netherlands where a (former) director was found liable for an antitrust fine (*Heiploeg*), in both the UK and Germany the courts have so far rejected the availability of such recourse claims. However, in neither jurisdiction has the issue been settled by supreme court precedents. In the UK, the judgment in *Safeway* provides for a binding authority at Court of Appeal level, but, following *Jetivia*, an overruling by the Supreme Court seems conceivable. In Germany, we find statements in lower court judgments, which were either rendered as a mere obiter dictum (*Villeroy & Boch*) or which were overturned, albeit for other reasons (*Thyssenkrupp*).

Analysing those judgments, we may identify three considerations that are particularly remarkable for present purposes.

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

Second, if the effectiveness of fines for infringement of EU antitrust law is at issue, not only is this a question of consistency of values within the domestic legal system; it may also become an issue of EU law.

Third, the most crucial consideration underpinning the denial of recourse claims lies in the assumption that allowing the company to pass on the antitrust fine to its directors and officers (and possibly further on the D&O insurers) would undermine the deterrence effect as intended by the fine. Therefore, the argument goes, there would no longer be sufficient incentive on part of the company to ensure that antitrust infringements are avoided by selecting and monitoring directors and officers.

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

In this section, we will show that, in any event, three premises of the courts seeking to deny actions for indemnity are valid. First, deterring antitrust infringements is the principal objective of antitrust fines. Second, the fines are meant to have a preventive effect by affecting the shareholders of the company that is held responsible for an infringement. Therefore, in deciding whether or not a company may take recourse against its (former)

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

directors or officers (thus effectively relieving the shareholders), company law must also have regard to the deterrence rationality of antitrust fines. Third, where a fine is imposed by the Commission, or by a Member State competition authority or court for infringing Articles 101 or 102 TFEU, the adequate consideration of antitrust fines' rationality is not a matter of domestic (company) law alone but, via the principle of effectiveness, it is also governed by EU law.

1. Deterrence as the Guiding Objective of Antitrust Fines

It is the guiding objective of antitrust fining to deter infringements.

a) Even in its early case law, the ECJ clarified that it is the object of the fines provided for in Article 15 of Regulation 17 to 'suppress illegal activities and to prevent any reference'.[50] This has been reaffirmed and specified in later adjudication, the court stipulating that:

> It is settled case-law … that the fines imposed for infringements of [now] Article [101 TFEU] … are designed to punish the unlawful acts of the undertakings concerned and to deter both the undertakings in question and other operators from infringing the rules of Community competition law in future.[51]

Here, as in other judgments,[52] the Court of Justice has made it explicit that the purpose of the fine must be both to specifically deter the addressed undertakings from further infringements and to have a general preventive effect, encouraging other market participants to be law-abiding. The design of the fines under Article 23 of Regulation 1/2003 as an instrument for ensuring antitrust compliance is, after all, already laid down in the underlying legislative competence pursuant to Article 103(2)(a) TFEU. The Commission mirrors these requirements in its guidelines on fines, taking it upon itself to 'ensure … the necessary deterrent effect'.[53]

b) The disgorgement of gains improperly made from an antitrust infringement is not to be considered an objective of antitrust fines in its own right, understood in the sense of a pursuit of corrective justice.[54] This is illustrated by the Commission's fining guidelines, which provide for the option 'to increase the fine in order to exceed the amount of gains' attributable to the infringement[55] – yet under the heading 'specific increase for deterrence' and, thus, only as a means to ensuring the fines' deterrent purpose.[56] In any case, fining could at most be viewed

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

[51] Case C–289/04 P *Showa Denko KK v Commission* ECLI:EU:C:2006:431, para 16. See also Case C-100 to 103/80 *Musique Diffusion Francaise v Commission* ECLI:EU:C:1983:158, paras 105–06. Prevention of antitrust infringements has been identified in the literature as the primary goal of fines under EU law. See, e.g., Ralf Sauer and Manuel Kellerbauer, 'Infringement Decisions and Penalties' in Luis Ortiz Blanco (ed), *EC Competition Procedure* (4th edn, OUP 2021) para 11.31 ('the essential purpose of penalties is to deter and persuade') and Jörg Biermann, in Torsten Körber, Heike Schweitzer, and Daniel Zimmer (eds), Immenga/Mestmäcker, Wettbewerbsrecht Band 1 EU (6th edn, C.H. Beck 2019) Vor Art. 23 VO 1/2003 para 25 ('In the center of the Commission's and the ECJ's practice of imposing fines is negative general prevention').

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

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

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

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

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

as a very imperfect mechanism for rectifying the injustice inflicted by antitrust violations because the fines collected do not reach the parties aggrieved by antitrust violations. The conferring of claims for antitrust damages constitutes a more suitable instrument for the pursuit of corrective justice.[57]

Therefore, the disgorgement of gains attributable to the infringement must, as such, not be regarded as a guiding principle for antitrust fining. It is thus not a viable normative basis for drawing implications for indemnity procedures, and for evaluating and possibly justifying the courts' reluctance to pass on (in part) antitrust fines to managers responsible for an infringement.[58] This insight does not preclude limiting managerial liability for antitrust fines for grounds of distributional justice, or simply 'fairness', which might be inherent to company law – as long as it does not undermine the deterrence rationality.[59]

c) Via the ECN+ Directive, the EU legislature has laid down requirements regarding the preventive function of fines imposed under national law for violations of Articles 101 and 102 TFEU. National competition authorities must have the power to impose 'effective, proportionate, and dissuasive fines',[60] either directly in administrative proceedings or by applying for the imposition of such fines in judicial proceedings.[61] The requirement pursuant to which sanctions must be 'dissuasive' points directly to an intended preventive effect: 'A penalty is dissuasive where it prevents an individual from infringing the objectives pursued and rules laid down by Community law.'[62] More specifically, to ensure a sufficient 'deterrent effect of fines'[63] and, thus, 'dissuasiveness' in the aforementioned sense, the ECN+ Directive prescribes that Member States must set the possible maximum amount of the fine at a level 'not less than 10 % of the total worldwide turnover of the undertaking … in the business year preceding the decision'.[64]

d) With regard to UK law, it shall suffice to point to Article 36(7A)(b) of the Competition Act 1998, which stipulates that the CMA, 'in fixing a penalty … must have regard to … the desirability of deterring both the undertaking on whom the penalty is imposed and others from' infringements. Thus, the UK legislature has recognized specific and general deterrence as central objectives of the imposition of fines in the same way as it is enshrined in the ECJ's case law.

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[57] See below n 177 and accompanying text.

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

[59] See also below n 165 and accompanying text.

[60] This requirement is based on a line of jurisprudence that goes back the ECJ's *Greek Maize* judgment, see below n 86 and accompanying text.

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

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

[63] Recital 49 of ECN+ Directive.

[64] Article 14 of ECN+ Directive.

2. Intended Deterrent Mechanism: Burden Shareholders, Incentivizing Them to Prevent Antitrust Infringements

While deterrence as the objective of antitrust fines has been repeatedly and unambiguously confirmed by legislatures and courts, there are hardly any clear statements as to how, in detail, the intended preventive effect is meant to unfold in the case of a company subject to a fine. As far as we can see, the ECJ, for example, has never explicitly stated that it is the shareholders of a company to whom the effect of an antitrust fine is directed. Since it is the 'undertaking' within the meaning of Articles 101 and 102 TFEU that infringes EU antitrust law, the court has held that, as a matter of general, the 'personal liability for an infringement and the principle that the penalty must be specific to the offender and the offence' relates only to the 'undertaking per se'.[65]

Nevertheless, the court's adjudication on the implementation of the fining rules in cases of changes in the control structure allow some more specific conclusions to be drawn. While it is beyond the scope of this contribution to lay out in detail how the deterrence rationale unfolds in the ECJ's doctrine of 'economic continuity',[66] for our purposes a reference to one basic rule will suffice: those who control a company (natural or legal persons) when the infringement was committed have to answer for the infringement regardless of whether the company had been sold before the adoption of the fining decision.[67] Therefore, for example, in the case of a wholly owned subsidiary that had stopped its illegal activities before being sold, only the subsidiary and the original parent company, not the succeeding parent company, will be held jointly liable.[68] Moreover, if the subsidiary that committed the infringement was transferred during the continuing infringement, the successive parent companies are each jointly and severally liable with the subsidiary. However, each of the parent companies is jointly and severally liable for only a part of the antitrust fine, to be assessed according to the gravity and the duration of the infringement for which it is individually responsible.[69]

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

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

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

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

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

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

> Antitrust fines are intended to … ensure that the fine affects the assets used for specific economic purposes of the economic operators who benefit from the offense, so that antitrust [infringements] are ultimately not profitable and the undertakings are induced to comply [with antitrust laws].[70]

Thus, the desired deterrent effect is to be achieved, irrespective of the corporate structure underlying the undertaking that committed the antitrust infringement, in that the fine will result in an outflow of funds from those assets to which the financial benefits from the infringement have accrued.

All this leads to the conclusion that the antitrust fines are indeed intended to have their preventive effect by making the shareholders of the company responsible for an infringement bear the fine. This insight, however, should only be taken as the starting point for an analysis of whether the deterrence objective indeed requires that actions for indemnity against directors and officers have to be excluded or limited: a question that we will address below.[71]

The fact that EU law, with the deterrence objective in mind, leaves leeway for differentiated national rules regarding the ultimate internal allocation of fines is evident from the case law on joint and several liability. As held by the ECJ, the internal allocation of the fine between a parent company and its subsidiary is to be determined by national courts, applying national law 'in a manner consistent with EU law'.[72] The latter qualification must be read as an emphasis that the domestic rules on internal fine allocation must not undermine the deterrence objective associated with fines. The ECJ then remarked that:

> EU law does not preclude the internal allocation of such a fine in accordance with a rule of national law which determines the individual shares of those held jointly and severally liable by taking account of their relative responsibility or culpability for the commission of the infringement for which the undertaking of which they formed part is responsible, as well as, where appropriate, a rule applicable by default, under which, if it cannot be shown by the companies claiming that there should not be equal shares that some companies have a greater degree of responsibility than others for the undertaking's participation in the cartel during a specific period, the companies concerned must be considered to be equally liable.[73]

Even though this statement does not concern the allocation of a fine within one company but relates to the allocation between various companies (which are part of one economic unit), it may bear some relevance for our topic. If the ECJ had considered it (solely) decisive for effective deterrence that those who benefit as shareholders during the time of an infringement are ultimately burdened with the fine, then it would have seemed logical to require, at least as a default rule, that the parent company of a wholly owned subsidiary that had been sold before the infringement was detected and punished, must bear the fine internally.[74] Indeed, the court held that the question of who has derived an economic benefit

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

[71] See below sub III.

[72] Case C-231/11 P *Commission v Siemens Österreich and Others et Siemens Transmission & Distribution and Others / Commission* ECLI:EU:C:2014:256, paras 58–62, and Case C-247/11 P *Areva and Others v Commission* ECLI:EU:C:2014:257, paras 151–52.

[73] Case C-231/11 P, *Commission v Siemens Österreich and Others et Siemens Transmission & Distribution and Others / Commission* ECLI:EU:C:2014:256, para 71.

[74] This was indeed the allocation rule as initially stipulated by at least one lower court in Germany. See LG München I 16.3.2011, 37 O 11927/10, Juris, para 121.

from the infringement can be quite significant for the ultimate allocation of the fine. However, the court also found that this aspect must not be regarded as the sole decisive factor.[75]

Certainly, from a deterrence perspective, the relevant rationalities when assessing fine allocation are different depending on whether a fine needs to be internally distributed, on the one hand, between a parent company and a wholly owned subsidiary and, on the other hand, between shareholders and managers. Yet we may safely derive from the case law that the ECJ leaves room to take those rationalities into account and does not demand an allocation rule that is overly simplified so that it might work contrary to the actual deterrent objective.

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

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

Pursuant to the principle of sincere cooperation, as embodied in Article 4(3) TEU, the Member States have to assist the Union 'in carrying out tasks that flow from the Treaties'. Therefore, Member States must refrain from any conduct that has the potential to undermine the effectiveness of measures taken by the EU institutions. The ECJ has elaborated and developed this general principle in various settings. For example, national time limits for bringing proceedings must not be intended to limit the effects of a judgment of the EU courts.[76] Member States must also refrain from entering international treaties that could limit the scope and effectiveness of EU law.[77] Where EU law provides for individual rights, the ECJ has specified Member States' loyalty obligations through the doctrine of *Rewe* effectiveness,[78] stipulating that applicable national rules must not be 'framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)'.[79] In addition, the national courts' obligation to ensure that adequate effect is given to EU law may even require the establishment of new remedies, the best-known example probably being Member States' liability under *Francovich*.[80]

Against this background, it is clear that, if a company's opportunity to recover (parts of) an antitrust fine imposed by the Commission from its (former) managers indeed jeopardized the

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[75] This is in line with the case law of the Bundesgerichtshof, the German Federal Court of Justice, implementing the ECJ's judgment *Siemens Österreich* and *Areva*. See BGH 18.11.2014, KZR 15/12 *Calciumcarbid-Kartell II* Juris, paras 32–79.

[76] Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* ECLI:EU:C:2002:435, para 36.

[77] Case C-469/98 *Commission v Finland (Open Skies)* ECLI:EU:C:2002:627, para 112.

[78] This case law was first laid down in Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188, para 5, and Case C-199/82 *Amministrazione delle finanze dello Stato v San Giorgio* ECLI:EU:C:1983:318, para 14.

[79] Case C-505/14, *Klausner Holz Niedersachsen* ECLI:EU:C:2015:742, para 40.

[80] Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ECLI:EU:C:1991:428, para 36.

preventive effect of the fine, the principle of loyal cooperation would oblige the Member States to intervene and, if necessary, to adapt established doctrines of national company law. For otherwise, under the aforementioned presumption, the Commission would not be able to fulfil its task of ensuring compliance with the antitrust rules. In line with this, the ECJ found a significant reduction in the effectiveness of an antitrust fining decision if the company could deduct the fines from its taxable profits.[81] Acting as amicus curiae before the Belgian Constitutional Court, the Commission argued that national measures allowing fines to be tax deductible would jeopardize the punitive and deterrent purpose of the fine and, thus, would go against the principle of sincere cooperation laid down in Article 4(3) TEU.[82]

The duty of loyal cooperation under Article 4(3) TEU addresses all Member State institutions, including the courts. In fact, as has been stressed by the ECJ, 'it is for the national courts to interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of EU law'.[83] This obligation has its limits in general principles of law. The EU principle of effectiveness does not require courts to adjudicate *contra legem*.[84]

Where the Member States enforce Articles 101 and 102 TFEU by imposing fines under national law,[85] they are likewise bound by the principle of loyal cooperation pursuant to Article 4(3) TEU. It is to be noted, however, that, starting from the *Greek Maize* case, the ECJ has substantiated the principle as it applies to the enforcement of EU law by Member States through a particular strand of case law. Accordingly, Member States 'must ensure … that infringements of Community law are penalized under conditions, both procedural and substantive … which, in any event, make the penalty effective, proportionate and dissuasive'.[86] This latter triad of attributes has been taken up by the EU legislature and has been inserted in various measures of secondary law including, as noted before, in Article 13 and recital 40 of the ECN+ Directive.[87] While, therefore, a conceivable erosion of the deterrent effect of national antitrust fines through actions for indemnity against (former) directors and officers could be measured against these requirements of 'effective, proportionate and dissuasive' sanctioning, it is not apparent that this yardstick would in any way differ from the general requirements developed under the principle of sincere loyalty. In fact, there is nothing to be said against assuming a uniform standard to be derived from Article 4(3) TEU as to ensuring an effective sanctioning of EU law.[88] This is in line with the

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[81] Case C 429/07 *Inspecteur van de Belastingdienst v X BV* ECLI:EU:C:2009:359, para 39. The ECJ had to rule only on the legality of the amicus curiae submission, not on the substantive issue as such.

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

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

[84] Case C-505/14, *Klausner Holz Niedersachsen* ECLI:EU:C:2015:742, para 32.

[85] See Article 5 of Regulation 1/2003.

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

[87] See above sub III.1.

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

fact that, in scenarios that do not concern the effectiveness of a sanction imposed by a national authority as such but where procedural aspects of the enforcement of EU antitrust law by national authorities are at stake, the ECJ does not refer to the *Greek Maize* test but to the general case law on Article 4(3) mentioned above.[89]

In sum, we may conclude that, in cases of infringements of Articles 101 and 102 TFEU, it is (also) a matter of Union law, namely of effectiveness requirements based on Article 4(3) TEU, if the deterrent effect of antitrust fines might be undermined by actions for indemnity against (former) directors or officers. This is true regardless of whether these fines were imposed by the Commission or by a national competition authority or court.

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

Company law must not turn a blind eye to the impact that managerial liability may have on the deterrent effect of antitrust fines. In particular, where a fine for the infringement of EU antitrust law is at issue, it follows from EU law principles that possible repercussions must be analysed and considered. In this section, we will argue that, while these assumptions were correctly made – for example, by the German courts as presented above – the conclusion drawn is not convincing: the preservation of the antitrust fines' deterrent effect does not require that actions for indemnity against managers be rejected.

1. Deterring Individuals vs Deterring Companies

Contemplating whether managerial liability must be precluded to preserve the effectiveness of antitrust fines, one must first appreciate that a company responds differently to financial sanctions than individuals do. If an individual is punished with a fine for an infringement of the law or is to be deterred from an infringement by the threat of a fine, the underlying preventive mechanism is straightforward. The (potential) infringer should include the possibility of a fine in her calculation of whether it is worthwhile or not to break the law. If the amount of the fine is set correctly, considering potential profits from the infringement and the probability of detection and punishment, it will deter deliberate breaches of the law.[90] Things

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Courts – The EU Legislative Framework (Edward Elgar 2015) 2.19; Christian Heinze, *Schadensersatz im Unionsprivatrecht* (Mohr Siebeck 2017) 42–44.

[89] Case C-439/08 *VEBIC* ECLI:EU:C:2010:739, para 57 ('Although Article 35(1) of the Regulation [1/2003] leaves it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of the competition authorities designated thereunder, such rules must not jeopardize the attainment of the objective of the regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities'). Compare Case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462, para 63 ('… it must be recalled that Article 10 EC [now Article 4(3) TEU] requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty').

[90] Note the dispute as to whether an optimal sanction should be calculated on the basis of the damage caused ((net) harm-based) or of the profit made by the cartel (gain-based). Ultimately, this only concerns the question of whether efficiency gains that might occur – e.g. due to savings in production costs – should also be disgorged from the infringer or whether incentives for an 'efficient breach' should be left. For the former position, see Wouter P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183, 191–193 and, for the latter position, William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 *University of Chicago Law Review* 652, 656, and Richard A. Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 394. It is submitted that the former position is indeed to be preferred, because, by setting the antitrust laws, a line is drawn between business practices that are socially desirable and those which are not. For making this choice, legislatures are democratically

are more difficult when – unlike in the case of hardcore cartels, for example – individuals cannot readily anticipate the dividing line between legal and illegal conduct. The conditions[91] and the amount of the fine may then be used to control what effort the individual will make in order to identify this line as accurately as possible (through obtaining legal advice etc.), and how he or she will behave in the event of remaining legal uncertainty. The aim is that individuals are not deterred from activities that are, in fact, perfectly legal and socially desirable just because they are unclear about the legality of those activities.[92]

Where a fine, however, does not address an individual but a company, and if ownership and management do not coincide in one (or more) person(s), this mechanism is complicated by an agency problem. If, as assumed above, in this scenario the fines are conceptually designed to address the company's shareholders, then the point is not that they themselves should be deterred from committing antitrust infringements but that they should be incentivized to ensure that those who run the company's business do not commit antitrust violations and organize an adequate compliance system within the company to prevent infringements by other employees.

For this, it must be clear at the outset that, vis-à-vis the company, its managers are genuinely obliged to refrain from and to actively prevent antitrust infringements. While the existence of such a legal obligation will usually be obvious and well understood,[93] it is crucial that the owners of a company abstain from signalling (in whichever form) that antitrust infringement might be acceptable if the owners benefit as breaches remain undetected or sanctioning is not effective. It must, in other words, be clear that the duty to refrain from and to prevent antitrust violations does not exist merely on paper.

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

To ensure that managers observe the 'legality obligation' they owe to their company, the shareholders – or, depending on the organizational form of the company, a body elected by them, such as a supervisory board[94] – need to overcome a generic agency problem: assuring that the managers respond to the shareholders' interest to prevent antitrust violations (as

legitimized and can be held accountable. Sanctions should therefore be aimed at respecting this boundary line, not deliberately leaving open the door for an 'efficient breach'.

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

[92] See John M. Connor and Robert H. Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 *Cardozo Law Review* 427, 431n16.

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

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

reinforced by the threat of fines) rather than pursing their own personal interests. Various mechanisms are available for this purpose.[95]

First, the criteria for selecting managers certainly play a role. Company law provides for certain general (statutory) requirements for taking a position as a director or comparable managerial positions.[96] Beyond this, however, there will typically be broad discretion in the selection process, in the exercise of which an attempt can be made to find criteria that vouch for compliance with the law. For instance, it has been suggested that increased female representation in management positions can have the benefit of making compliance with competition law more likely.[97] Moreover, it is conceivable that the assessment centres that are regularly conducted nowadays could also specifically test antitrust compliance. Generally speaking, for a company genuinely interested in avoiding cartel violations (and not just in not getting caught), the trick is to select managers who are intrinsically motivated[98] not to act opportunistically and to ensure antitrust compliance.

Second, the conditions for employment may have an impact on managers' incentives to abstain from and prevent antitrust infringements. Incentive-based compensation should not entail the exertion of undue pressure – but even then may in fact weaken or even overpower intrinsic motivation for (antitrust) compliance.[99] Moreover, it is well understood that certain compensation schemes may promote a willingness to engage in collusive behaviour (although not necessarily through illegal coordination).[100] Abandoning these schemes lowers the risk that antitrust infringements will be initiated by management or not effectively stopped.

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[95] As lucidly summarized by Stephen Calkins 'Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties' 60 (1997) *Law and Contemporary Problems* 127, 147 ('[A company] can emphasise the quality of its people, by hiring honest employees, encouraging them to live healthy lives, and taking care of them in time of need. It can create good incentives, by tying compensation to long-term results, by refraining from exerting undue pressure, and by paying supra-competitive wages employees will not want to risk losing. It can teach and remind. It can monitor and audit. And it can threaten with whatever draconian consequences are in its power').

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

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

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

[99] John Armour, Henry Hansmann, and Reinier Kraakman (n 98) 36.

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

Third, managerial activities can be monitored. The more intensive this monitoring is, the lower the risk of managerial misconduct.[101] To effectively deter breaches of managerial obligations, any indications of misconduct should be followed up.[102]

In addition, however, it is essential that managers face dissuasive sanctions for breaching their antitrust compliance obligations.

3. Internal Monetary Sanctions as Critical Mechanism to Ensure Management's Antitrust Compliance

Depending on the legal framework, in the event of antitrust infringements, managers may face a variety of sanctions from public enforcement and from third parties ('external sanctioning'). National antitrust authorities may impose fines on individuals acting on behalf of and in the interest of the company.[103] In some jurisdictions, most notably in the US but also in the UK, managers may face criminal prosecution.[104] Moreover, antitrust infringements may result in disqualification proceedings for directors. In the UK, this sanctioning tool is legally endorsed and generally applicable.[105] In most jurisdictions, however, it is only rudimentary.[106] Furthermore, parties aggrieved by an antitrust infringement may bring damages actions against directors and officers.[107] Finally, the discovery of antitrust violations alone might lead to a loss of a manager's reputation, resulting in a loss of future income.[108]

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

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

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

[104] Sections 188–190A of the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013. Criminal sanctions have also been discussed with a view on EU antitrust law. See, e.g., Wouter Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 World Competition 117. In Germany, bid-rigging is a criminal offence under section 298 of the Criminal Code and may in part also be prosecuted as fraud under section 263 of the Criminal Code. For other cartel law violations, parts of the literature consider criminal liability for fraud under section 263 of the Criminal Code to be possible. See Thomas Lampert and Susanne Götting, 'Startschuss für eine Kriminalisierung des Kartellrechts?' [2002] Wirtschaft und Wettbewerb 1069. However, this latter issue has not been addressed in case law. See Florian Wagner von Papp, 'What If All Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011) 157, 165.

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

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

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

However, it is crucial to understand that the availability and effectiveness of these external sanctioning mechanisms are, as a matter of principle,[109] irrelevant when analysing the mechanism of antitrust fines' deterring effect when imposed on a company. Given that antitrust fines are intended to incentivize shareholders to ensure that a company does not infringe the antitrust law, it is solely a matter of which governance instruments are available to the shareholders (or bodies acting on their behalf) to sanction managers for breach of antitrust compliance obligations. Thus, it becomes evident that the availability of indemnity actions against managers (or holding them monetarily liable in some other way) is an essential and indeed indispensable governance instrument. Two observations are essential for this insight.

First, one might ask: if shareholders are barred from recourse, then surely they could threaten directors and officers with financial sanctions of another kind, such as by way of contractual penalties, a clawback of bonuses or other kind of variable compensation,[110] or a reduction in future salary? Yet a closer look reveals that, from the perspective of those who see managerial liability as unduly weakening the effectiveness of fines against the company, those financial sanctions should not be allowed either. After all, a contractual penalty, a clawback of past incentive-based compensation, or a reduction in future salary on the grounds of an antitrust fine means that, in fact, the shareholders ultimately do not have to (fully) shoulder the financial burden of the fine imposed, but that it is (in part) passed on to the directors and officers. Therefore, those who assume that indemnity actions should generally be prevented to ensure the effectiveness of antitrust fines must, to implement this notion consistently, also insist on banning any other form of monetary sanction that involves a flow of money from the company's management to its shareholders triggered by the imposition of an antitrust fine.

Furthermore, to follow this train of thought, the question arises: what governance instruments are left to a company that is barred from using monetary sanctions? It seems to us that, if the employment has not already ended, the company's options are basically limited to terminating the manager's contract for misconduct and removing her from her post. Further,

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

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

[109] Certainly, a connection exists because shareholders might report breaches of managerial duties to the authorities and/or might make them public, thus triggering public sanctions and sanctions by third parties against management. From the shareholders' point of view, this is ambiguous because the discovery of an antitrust infringement caused by managerial misconduct may result in sanctions against the company, from which they themselves will suffer.

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

the company could look at damaging the person's reputation, for example by issuing a bad employment reference or otherwise signalling the person's failure to the market.

Hence, if – first – the exclusion of all indemnity actions would consequently also have to entail the exclusion of all other monetary sanctions and if – second – the remaining (non-monetary) sanctions have only little, or at any rate insufficient, deterrence potential, then the former should be dispensed with in the interest of effective prevention of antitrust infringements. In other words, even if managerial recourse liability effectively reduces the fine to be borne by the shareholders, the availability of such a recourse should not be excluded. Otherwise, shareholders would be deprived of an essential and possibly their most effective (internal) governance instrument for responding adequately to a looming antitrust fine. Therefore, all in all, a ban on managerial liability for antitrust fines would be counterproductive for the effective prevention of antitrust infringements.

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

> Safeway's direct liability … under the Competition Act arose through the acts of its directors and employees as its agents, but should the company therefore be denied the right to hold its errant directors and employees to account? … Unless there are special circumstances, the innocent shareholders should not be made to suffer twice. The reasoning in Safeway, if taken to its logical conclusion, would also mean that the company could not lawfully dismiss the errant employees or directors; for to rely on their misconduct would be to rely on its own misconduct …[111]

While this statement is framed as a criticism on the scope of the principle of *ex turpi causa non oritur actio* as assumed by the Court of Appeal in *Safeway*, it is based essentially on the same reasoning as we have developed above: an innocent shareholder would 'be made to suffer twice' if, on the one hand, she had to bear the fine imposed on the company and if, on the other hand, the denial of any actions for indemnity also took out of her hands the most effective governance instrument for deterring antitrust infringements by directors and officers from the outset.

4. Beyond the Agency Problem: Managerial Liability as Supporting Deterrence Mechanism

Managerial liability can also enhance the effectiveness of antitrust fines by preventing the deterrent effect from fizzling out as the company merely prices the fine in as a cost factor. Ideally, this is not necessary for effective deterrence because the fine is calculated in such a way that, from a company's point of view, a deliberate infringement of antitrust law does not promise any positive return anyway. However, given that the probability of detection is uncertain, especially in the case of cartelization, and that fines – for competition policy and other reasons – cannot be (further) increased without further ado, practically, the deterrent effect against the company itself may be too weak.

Therefore, sanctions against the acting managers can be a useful and, indeed, necessary additional measure in terms of effective antitrust enforcement. This applies primarily to the various mechanisms that directly address management such as individual fines,

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

disqualification proceedings or liability for damages towards aggrieved third parties. In principle, however, this also holds true to sanctioning through recourse actions. In practice, however, their effectiveness depends on the managers having to seriously expect that the company will ultimately enforce liability against them, which may be doubtful especially in the relevant scenario where, ex ante, a profitable antitrust infringement seems possible for a company. The effectiveness of liability as a deterrent mechanism therefore depends to a large extent on legal mechanisms to enforce recourse liability against (former) managers, for example by way of shareholder derivative suits and by duties of the company's supervisory board.

5. Conclusion

Ensuring effective deterrence through fines imposed on companies does not require managerial liability to be excluded for antitrust fines. The availability of recourse actions against directors and officers (or the option to hold them financially liable in some other way) is an essential and indeed indispensable governance mechanism. If it were withheld from shareholders, they would not be able to respond adequately to the threat of sanctions through antitrust fines. Hence, a ban on managerial recourse liability would in fact hinder the preventive effect as intended by the fine. Furthermore, beyond its use as an instrument to overcome a company's agency problems, managerial liability may be conceived as one element of sanctioning those who are individually responsible for a company's antitrust infringement, thus effectively supplementing sanctions directed against the company.

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

Managers' liability risks for misconduct are nowadays widely hedged by D&O insurance taken out by the company. While D&O insurance is formally structured as third-party insurance, it may be practically equivalent to first-party insurance: the company pays the premiums to cover the damage (as, for instance, caused by an antitrust fine) it suffers from the misconduct of its managers.[112] This raises the question of whether managerial liability for antitrust infringements in combination with D&O insurance borne by the company has the effect of unacceptably weakening the deterrent effect intended by the antitrust fines. Indeed, it was the prospect that the antitrust fine might ultimately be borne by the managers' D&O insurance that led the Court of Appeal in *Safeway Stores*[113] and the Landgericht Saarbrücken in *Villeroy & Boch*[114] to the conclusion that managerial liability for antitrust fines should be excluded.

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

Insurance protection has to cope with moral hazard: those who know that they might be liable for faults but do not have to bear the damages may have too little incentive to invest in

[112] Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 278–79.
[113] See the quotation above, n 20.
[114] See the quotation above, n 37.

avoiding liability and in keeping potential damages to a minimum. Therefore, to succeed economically, insurers must find and use mechanisms to incentivize the insured to invest in damage prevention: adjustment of insurance premiums to the individual damage risks as revealed, for instance, in the event of a claim and the stipulation of deductibles and caps, as well as other limitations on insurance coverage.[115] Thus, as a matter of principle, the availability of insurance does not eliminate the preventive effect of liability but does cushion and channel it. In this sense, *Graystone* concluded an empirical study on deterrence and automobile liability insurance by stating:

> The major conclusions of this work provide strong support for the hypothesis: Liability insurance does not remove the deterrence to accident-causing behavior provided for by the fault determinations of the tort system.[116]

However, for instance with regard to managerial liability in Germany, it has been critically observed that it appears to be common practice for companies to take out group D&O insurance for all members of the managing board and the supervisory board. These corporate policies, it is said, are based on a flat rate but not on an individual risk assessment of the managers whose behaviour is being insured. It therefore appears that the usual D&O insurance operates without sophisticated mechanisms for risk assessment such as those known from motor vehicle liability insurance.[117] It is understood that the stipulation of a mandatory deductible under German stock corporation law is a regulatory response to that insufficient preservation of incentives to avoid harm. Section 93(2), 3rd sentence of the German Stock Corporation Act provides that:

> [w]here the company has taken out insurance to protect a member of the management board against risks arising from their professional activities for the company, the insurance policy is to provide for a deductible of at least 10 per cent of the damage, up to a minimum of 150 per cent of the annual fixed remuneration of the member of the management board.[118]

Yet this provision does not preclude managers from taking out (additional) personal insurance for their own account, thus effectively covering *any* liability risk. This appears to be common practice. While the company must not bear the premiums for such additional personal insurance, in practice it will often do so indirectly through a surcharge on managers' regular remuneration.[119]

Now, it is conceivable that, with regard to this personal insurance, mechanisms such as risk-adjusted premiums and deductibles would step in to promote prevention incentives. However, learned observers doubt that the volume of this type of insurance would be large enough to make individual risk classification worthwhile for the insurer or that deductibles

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[115] Gerhard Wagner, 'Tort law and liability insurance' in Michael Faure (ed), *Tort Law and Economics* (Edward Elgar 2009) 377, 389–92.

[116] Richard W. Graystone, 'Deterrence in Automobile Liability Insurance – The Empirical Evidence' (1973) 40 *Insurance Counsel Journal* 117, 126.

[117] Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 246–47, 272.

[118] Section 93(2) 3rd sentence of the German Stock Corporation Act. Translation taken from <https://www.gesetze-im-internet.de/englisch_aktg/index.html>.

[119] Gerhard Wagner and Fabian Klein, 'Directors' and Officers' Liability in Germany' in Simon Deakin, Helmut Koziol and Olaf Riss (eds), *Directors' and Officers' (D&O) Liability* (de Gruyter 2018) 159, 197–198, para 141.

would be agreed that are sufficiently high to encourage managers to take adequate preventive action. Therefore, to ensure a sufficient level of preventive effect through liability, it has been suggested that taking out personal insurance to cover the mandatory deductible for D&O insurance should be prohibited.[120]

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

In the light of the criticism of the design of D&O insurance policies, which could possibly also be raised in this or a similar way in other jurisdictions, the question may arise: must the availability of managerial liability for antitrust fines be made conditional on regulatory intervention in D&O insurance to ensure that it does not undermine the deterrent effect of managerial liability?

We do not see any convincing reasons for this to date. There may be reasonable doubt, given deficiencies in the design of D&O insurance and the regulatory framework applicable to it, that managerial liability is universally translated well into incentives to avoid liability. From the perspective of the deterrent effect intended by the antitrust fines, however, not every imperfection in the internal control of management through liability should be taken to mean that the fines' deterrent effect would have to be regarded as having failed. Two considerations seem essential to us for assuming that, despite all plausible criticism of the status quo, it should not be interpreted as allowing for an inappropriate relief for the shareholders and a failure of antitrust fines' deterrent effect.

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

Second, although not legally required for D&O insurance where the insured persons (the managers) and the policyholder (the company) are not identical,[121] policies regularly exclude coverage for damages caused by a deliberate or knowing infringement of the law on the part of the insured managers.[122] Insurers will be forced into such an exclusion to reduce moral

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[120] Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 273 and 280.

[121] In any case, this is the legal situation according to German insurance law, and apparently also in the UK. See Gerhard Wagner and Fabian Klein, 'Directors' and Officers' Liability in Germany' in Simon Deakin, Helmut Koziol, and Olaf Riss (eds), *Directors' and Officers' (D&O) Liability* (de Gruyter 2018) 159, 205 para 173, and Anna Morfey and Conall Patton, '*Safeway Stores Ltd v Twigger*: The Buck Stops Here' [2011] *Comp Law* 57, 63.

[122] See A-7.1 AVB-D&O (General Conditions of Insurance for D&O Insurance provided by the German *Gesamtverband der Versicherer*, individual insurance contracts may differ; published, e.g. in Oliver

hazard to a manageable level. This, however, means that for participation in hardcore cartels and, thus, for a large proportion of the fined antitrust infringements, the question of an excessively restricted liability effect due to D&O insurance does not even arise. This was apparently the case in *Heiploeg*,[123] and in *Thyssenkrupp* one may speculate that an exclusion of coverage for deliberate infringements was one essential reason why the company agreed to a settlement with the insurer that only included a reimbursement of a small fraction of the antitrust fine.[124]

3. Conclusion

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

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

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

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

The management of a company operates in the economic interest of the shareholders. While directors and officers may participate in their company's economic success through variable compensation components (which, thus, generate incentives for loyal, profit-maximizing

Lange, *D&O-Versicherung und Managerhaftung* (2nd edn, C.H. Beck 2022) 2277). This commonly used term excludes coverage to a greater extent than the exclusion for intentionally caused damage as stipulated under section 103 of the German Insurance Contract Act. In the *Heiploeg* case (above sub II.1) it was reported that insurance company considered not covering the former directors' liability for the antitrust fine because the insurance policy excluded 'deliberate intent'. Tialda Beetstra and Mariska Van De Sanden, 'The Dutch District Court of Noord-Nederland Holds a Former Director Personally Liable for the North Sea Shrimps Cartel *(Gerard Willem Breuker)*' (September 2020) Concurrences N°97360, at p. 5.

[123] See above n 13.

[124] See above n 49.

conduct), they may at best only internalize the benefits of their activities to an extent.[125] Instead, it is the essence of a company that it is the shareholders on whose assets the success and failure of the company are reflected. Against this background, it seems evident that a fine that is designed to effectively deter a company from violating antitrust law, if fully passed on to its management, may easily exceed the level that would be necessary for preventing the latter from an infringement. For the plausibility of this insight, one need not even think of the fines amounting to several billions of euros that the Commission has occasionally imposed in cartel cases[126] and abuse proceedings.[127] It is safe to assume that the EUR 191 million for which ThyssenKrupp sued its former managing director to indemnify for an antitrust fine in the same amount[128] exceeded his assets several times over.

If managerial liability for breaching antitrust compliance obligations may thus easily exceed the optimal level and, indeed, may threaten to destroy their economic existence, this entails risks of an excessive preventive effect. However, these risks materialize only under certain conditions and, in practice, they may also be limited by countervailing instruments and effects. Before elaborating on these aspects,[129] one might ask: why are those (potential) risks of directors' and officers' excessive liability even of relevance when evaluating and controlling the deterrent effect of antitrust fines?

Where excessive liability looms, managers have an incentive to act with undue risk aversion. They might invest excessively in compliance measures,[130] avoid business activities solely because they are in the vicinity of antitrust law, or even avoid activities in business lines just because they have proven to be susceptible to antitrust infringements. If the company thus fails to exploit its business potential, this would, at first sight, appear to be a problem (only) for the shareholders: shouldn't they, in their own well-understood interest, avoid over-deterrence via the company's rules on managers' liability and their practical implementation and application? Yet, for one thing, depending on the applicable company law, liability may be mandatory or, even if designed as a default rule, may prove 'sticky' because of information problems or transaction costs. Moreover, if one is prepared to derive from antitrust fines' deterrence objective restrictions on managerial liability to avoid under-deterrence, one should consequently also keep in mind the risks of over-deterrence.[131] After all, it is not only in the shareholders' interest but also of general interest that companies do not forgo business activities that are, in fact, perfectly legal and may thus be regarded as

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

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

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

[128] See above n 42 and accompanying text.

[129] See below VI.3.

[130] Bruce H. Kobayashi, 'Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations' (2001) 69 *George Washington Law Review* 715, 735–37; Douglas H. Ginsburg and Joshua D. Wright, 'Antitrust Sanctions' (2010) 6 *Competition Policy International* Autumn 2010, 3, 8; Gregory J. Werden, Scott D. Hammond, and Belinda A. Barnett, 'Deterrence and Detecting of Cartels: Using All the Tools and Sanctions' (2011) 56 *The Antitrust Bulletin* 207, 210–11.

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

socially desirable but from the firm's perspective might be legally unclear.[132] In other words, there is no trade-off between maximizing shareholder value and overall social welfare[133] when allowing companies to effectively and efficiently address their agency problems in order to prevent antitrust infringements. As the deterrent effect of antitrust fines might thus in fact disturb rather than ensure functioning markets, the indirect effect it has on managers' incentives must not be readily disregarded. If there is indeed a substantial risk of over-deterrence (which will be discussed below), then limits on managerial liability could implicitly be derived from the law on fines. For prevention to be effective but not excessive, managers should then not be burdened with the full damage that a company suffers from an antitrust fine.

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

Managers can avoid liability by acting lawfully towards their company. Therefore, at first glance at least, over-deterrence might seem only a theoretical problem.[134] Yet, at second glance, it becomes clear that it is only personal activities, carried out with the awareness of illegality, that managers can safely reduce to zero. However, over-deterrence remains a real problem because, first, the dividing line between what is and is not legal under antitrust laws cannot always accurately be anticipated. In *Google Shopping*, the Commission imposed a fine of EUR 2.4 billion[135] for conduct when its illegality, from an ex ante point of view, seemed to quite a few observers at least doubtful.[136] Second, it is also not precisely defined which antitrust compliance measures management are legally required to take in order to prevent infringements by a company's employees or by a subsidiary for whose infringements the parent company could be fined.[137] Thus, taking into account uncertainties in both the antitrust laws and the legally owed antitrust compliance efforts, managers cannot always simply choose to act legally; in these scenarios, an excessive threat of liability can result in socially undesirable over-caution by a company's management.

[132] See John M. Connor and Robert H. Lande, Cartels as Rational Business Strategy: Crime Pays' (2012) 34 *Cardozo Law Review* 427, 431n16.

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

[134] This was implicitly assumed, for example, in the context of cartelists' infringement for umbrella damages by AG Kokott, Case C-557/12 *Kone and Others* ECLI:EU:C:2014:45, para 68. See Jens-Uwe Franck, 'Umbrella Pricing and Cartel Damages under EU Competition Law' (2015) 11 *European Competition Journal* 135, 143–44.

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

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

[137] Case C-97/08 P *Akzo Nobel and Others v Commission* ECLI:EU:C:2009:536, paras 54–63.

3. Mechanisms Hedging Against (Potential) Over-Deterrence

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

The prospect of managerial liability for antitrust fines may result in over-deterrence because, even if the directors and officers are willing to comply with the antitrust laws, they cannot always clearly anticipate how a court will ultimately decide on the lawfulness of a certain conduct or the adequateness of an established compliance organization. The potentially excessive effect of this liability can be mitigated by granting the directors and officers certain discretionary powers. However, as will be illustrated, the rules on liability provide only for a rather uncertain and wide-meshed safety net against the risks of over-deterrence.

Dealing with uncertain antitrust standards. While company laws do routinely limit judicial review of management's business decision via a 'business judgment rule',[138] the adequate handling of uncertainties in the management's assessment of the legal situation appears less clear. German stock corporation law provides a good example of this. Board members have a strict duty to examine the legal situation, to obtain legal advice from qualified lawyers, and to check the plausibility of any advice given. If these duties have been observed, liability can be excluded for lack of negligence, even if subsequently the conduct proves to be in violation of antitrust law.[139] The true problematic case, however, is when the antitrust assessment remains uncertain ex ante, either because a particular scenario has not yet been adjudicated or because the actual or potential effects of a conduct cannot be readily discerned. In individual cases, legal advice or economic expert opinions may reduce uncertainty but ultimately cannot eliminate it; it might only make it recognizable to board members.

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

> [An] undertaking … acts at its own risk if the legal opinion obtained by it shows that the legal situation is unclear. In that case, the undertaking is at least negligent in accepting that by its market behaviour it infringes the rules of European competition law.[140]

While there is no legal precedent on the related liability of board directors under German stock corporation law, most academic writers deny such a strict approach. The ensuing

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[138] See, for instance, section 93(1) of the German Stock Corporation Act ('In managing the affairs of the company, the members of the management board are to exercise the due care of a prudent manager faithfully complying with the relevant duties. No dereliction of duties will be given in those instances in which the member of the management board, in taking an entrepreneurial decision, was within their rights to reasonably assume that they were acting on the basis of adequate information and in the best interests of the company'). Before this 'business judgment rule' was included in the Stock Corporation Act, it had already been recognized in the case law of the German Federal Court of Justice. See BGH 21.4.1997, II ZR 175/95 *ARAG/Garmenbeck* BGHZ 135, 244, 253; Juris, para 22.

[139] See BGH 20.9.2011, II ZR 234/09 *ISION* Juris, para 18.

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

question, of course, is: what level of risk of acting illegally should a board member be allowed to impose on her company? It seems widely acknowledged that, if the uncertainty results from a lack of precedent in case law, it should be allowed to rely on any of several similarly plausible alternative constructions of the law. In addition, however, it has also been argued that a legal risk could be regarded as permissible even where a certain conduct contradicts precedents of the highest courts, provided that their authoritative power has been weakened, for example if the court via obiter dictum has indicated its willingness to reconsider its precedent, because of changes in the legal or factual framework, or because of well-founded and broad criticism in the academic literature.[141] Moreover, it has been noted that possible drawbacks the company would have to suffer if the legal position adopted by the board member proves to be incorrect in retrospect (such as the imposition of an antitrust fine) must also be taken into account.[142]

It is therefore entirely possible that, if it consciously engages 'in a particular cause of action [that] is more likely to be permissible than not',[143] a company may be fined but has no recourse against its board members. In the absence of clear legal precedent, however, under German law this remains unsettled for the time being.

Compliance organization and 'business judgment rule'. Illegal conduct by employees – with the resulting adverse effects for the company such as fines and damages to be paid as well as a loss of reputation – is, from the company's perspective, a business risk whose handling by the company the courts should assess on the basis of the 'business judgment rule'. While, thus, there seems to be agreement among legal writers that the board members should enjoy broad discretionary powers regarding the establishment and design of a compliance organization,[144] there is no clear precedent for this either.[145] Deliberate judicial restraint is indicated, especially given the evident risk of hindsight bias: the fact that an antitrust infringement occurred despite the established compliance system, possibly even a hardcore cartel initiated by employees, must not in itself justify the conclusion that the compliance system was inadequate. Given this obvious risk of hindsight bias, even the recognition of broad discretionary powers for board members can only be expected to provide partial protection against over-deterrence.

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

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

[143] Douglas W. Haws and Thomas J. Sherrard, 'Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases' (1976) 62 *Virginia Law Review* 1, 33–34 (defining an 'odds opinion' as reflecting 'an attorney's belief that a particular cause of action is more likely permissible than not, although there is no clear legal precedent directly on point').

[144] Holger Fleischer (n 142) § 93 para 56; Gerald Spindler (n 141) § 93 para 115.

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

b) D&O insurance

Given the availability and widespread taking out of D&O insurance, managers' liability risks for misconduct to the detriment of the company are nowadays widely hedged. Therefore, if there is a threat of an excessive deterrent effect on management due to a (complete) passing on of the company's antitrust fine in the event of a negligent breach of duty by directors and officers, this will be substantially mitigated by insurance coverage. Potential for over-deterrence, albeit to a limited extent, may still exist, however, mainly due to three factors.

First, antitrust fines imposed on a company may well exceed the coverage limits of D&O insurance. It was reported that in Germany, for example, coverage limits of between EUR 75 and 300 million were common before 2010, depending on the size of the balance sheet total.[146] For the largest companies, it is probably safe to assume that managers are protected from personal liability to the extent of high triple-digit millions.[147]

Second, over-deterrence may loom despite D&O insurance if the contract provides for a deductible that exceeds the level for optimal prevention. Whether this possibility is of any practical significance remains uncertain to us. At least in Germany, the opposite phenomenon can be observed: managers are practically not subject to any deductible. While German stock corporation law provides for a mandatory deductible, this provision typically runs empty in practice, because the managers cover the insurance gap through personal insurance which may even (indirectly) be financed by the company.[148]

Third, D&O insurance policies generally exclude coverage for damages caused by a deliberate or knowing infringement of the law on part of the insured managers.[149] In line with this policy, it was reported that in the *Heiploeg* case the insurance company considered not covering the defendant director's liability as the insurance policy excluded deliberate intent.[150] In *Safeway Stores*, however, insurance coverage was apparently not thought to be precluded despite managers' direct involvement in an illegal exchange of pricing information[151] and in *Thyssenkrupp* it was reported that the insurance company paid at least parts of the damage even though the company had initially argued that the defendant manager had been directly involved in cartelization.[152]

While in theory the exclusion of insurance coverage for deliberate or knowing infringements may not provoke over-deterrence because the insured can simply desist from illegal behaviour, there is a grey area in which it is not certain whether a court will, in retrospect, assume (only) that the illegality had to be considered possible (not excluding coverage) or, in fact, that there was a knowing breach of the law. Furthermore, it is also possible that a D&O

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[146] Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 235.

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

[148] See above n 118 and accompanying text.

[149] See above n 122.

[150] See above n 13 and accompanying text.

[151] See above n 21 and accompanying text.

[152] See above n 49 and accompanying text.

insurance policy excludes coverage already in the scenario where a manager considered an antitrust breach merely as possible but approved the risk of illegal dealings.[153]

c) Conclusion

Managers' discretionary power, granted by the courts in the face of legal uncertainty and with a view to compliance organization (and associated judicial restraint ex post), as well as the availability of D&O insurance, provide protection against over-deterrence risks that may arise from liability for antitrust fines. However, depending on how these mechanisms are developed, designed, and used in a certain legal framework, risks of over-deterrence may remain in individual cases.

4. Does EU Antitrust Law Force a Limitation of Managerial Liability for Antitrust Fines?

If a fine is imposed for violation of EU antitrust law, be it by the Commission or by national authorities or courts, it must be compatible with the principle of proportionality. This is recognized in case practice,[154] explicitly stated in the ECN+ Directive,[155] and essentially a matter of course, because the imposition of a fine substantially interferes with the fundamental rights of the addressees. Therefore, where a company is fined by a national authority for an infringement of EU antitrust law,

> the Member States must ensure … that infringements … are penalised under conditions, both procedural and substantive, which are proportionate and dissuasive … [T]he principle of proportionality requires, first, that the penalty imposed should correspond to the gravity of the infringement and, second, that when setting the amount of the fine, account should be taken of the individual circumstances of the particular case.[156]

This, however, says little about whether EU law must make it its business if a fine for violation of EU antitrust law discloses an *indirect* effect of excessive deterrence on the management via indemnity actions provided for under (national) company law. At any rate, in its adjudication on fines as an enforcement instrument, the ECJ has made it clear that the appropriateness of a sanction must be measured against the objective of the law to be enforced.[157] On this basis, in the context of antitrust enforcement, it would seem consistent if EU law kept an eye on the risks of indirectly excessive deterrence caused by national law insofar as those effects might ultimately undermine antitrust law's regulatory objective. Since EU law uses the general principle of effectiveness for examining whether national law hinders the adequate deterrence of EU law infringements,[158] it seems consequent to use the

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[153] Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 250.

[154] Case T-236/01 *Tokai Carbon v Commission* ECLI:EU:T:2004:118, para 244.

[155] Article 13 and recital 40 of the ECN+ Directive.

[156] Case C-385/21 *Zenith Media Communications* ECLI:EU:C:2022:866, paras 34–35.

[157] Case C-418/11 *Texdata Software* ECLI:EU:C:2013:588, para 52 ('measures provided for under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question: where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued').

[158] See for one the doctrine of so-called *Rewe* effectiveness, pursuant to which national law must not be 'framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)'. Case C-505/14 *Klausner Holz Niedersachen* ECLI:EU:C:2015:742, para. 40. See for another the requirements for effective sanctioning as developed

principle of proportionality to examine whether there is a risk of over-deterrence measured against the objective of the provisions to be enforced. After all, where a fine for the infringement of EU antitrust law, due to excessive internal liability of management under national law, leads to companies being unnecessarily[159] prevented from exploiting their economic potential, this may be seen as thwarting the objective of antitrust law. In this scenario, such an indirect consequence may not be readily regarded as merely remote or accidental. Given that a company's supervisory body or (new) management, which may be competent for indemnity actions, is under a duty to maximize the company's profits, it seems entirely predictable that a legal opportunity to pass on an antitrust fine to the (former) management via a damages action is used in practice.

Nevertheless, if one follows this in principle, there should be no doubt that national legislatures enjoy wide regulatory leeway. Given the complexity of the interplay of different regulatory frameworks (antitrust law and company law) that determine the practical effect of antitrust fines and given that the rules governing management's internal liability may at most have only an indirect effect on the effectiveness of antitrust fines, judicial review should be exercised with restraint. A breach of a general EU principle should only be presumed if it can clearly and manifestly be shown that the liability regime is likely to have an over-deterrent effect on management that is unacceptable in the light of the objectives of EU antitrust law.

We have seen that, on the one hand, managers' liability for antitrust fines imposed on the company carries risks of counterproductive over-deterrence. On the other hand, a limited judicial review of business judgments, if also applied regarding compliance organization and if used, in an adapted form, in scenarios of an uncertain legal situation, may effectively cushion the risks of over-deterrence. Moreover, the availability of D&O insurance protects, to a large extent even if not always completely, against the overreaching effect of managers' internal liability. Considering the above and the broad scope of discretion for national legislators, we cannot see that a general EU law principle would have to force a general limitation on managerial liability for a company's fine imposed for violation of EU antitrust law.

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

Even if, as we conclude, general EU law principles do not force a cap on managers' liability for antitrust fines, such a limitation may nonetheless appear to be a sound mechanism to protect against an excessive deterrent effect. It could be implemented through either legislative or judicial intervention.

a) Legislative intervention: liability cap based on variable compensation

In Germany, the controversy over indemnity actions against management in antitrust fines is being paralleled by a general debate on the adequate stock corporation law framework for managers' liability. The challenge is to achieve a convergence of interests between shareholders and management, while giving the latter sufficient incentives to comply with

following the *Greek Maize* case (above n 86), stating that Member States must provide for sanctions that ensure a 'genuinely dissuasive effect'. Case C-81/12 *Asociaţia Accept* ECLI:EU:C:2013:275, para 63. See also Advocate General Kokott Case C-387/02 *Berlusconi and Others* ECLI:EU:C:2004:624, para 89.

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

their obligations to the company (including legal compliance) without provoking excessively risk-averse behaviour. Ideally, therefore, managers should expect to have an adequate proportionate share of both profits and losses regarding defined projects.

Based on this principle, a system is conceivable in which the amount of the managers' personal liability was based on the variable components of the remuneration agreed. In order to eliminate (false) incentives to forgo variable components in compensation for this reason, there would have to be an alternative amount of personal liability based on fixed salaries.[160] If a separate provision were considered for liability for breach of compliance obligations and the resulting antitrust fines, liability could be limited to the amount of the variable components of the compensation during the period of the antitrust infringement or, if higher, to 50 per cent of the average fixed salary during this period. Moreover, to account for limited probability of detection, the liability cap could be increased by a multiplier (about three or four).

The implementation of such a flexible concept of a limitation on personal liability might appear too ambitious. A more pragmatic approach to avoid over-deterrence would be to limit managers' personal liability to the coverage limit of the D&O insurance. It might seem unusual at first glance to align liability with insurance (and not vice versa). However, this is consistent if one takes into account that, as we pointed out above, while the D&O insurance may formally be designed as third-party insurance, from an economic point of view it constitutes first-party insurance, because it is concluded at the expense of the party (namely the company) whose interests it protects.[161]

The above highly plausible suggestions for a legal arrangement of a limitation of management's internal liability were made (mainly) with a view to German stock corporation law.[162] Nonetheless, those who believe a (legally imposed) liability cap is necessary to protect the company and its shareholders against excessively risk-averse behaviour on the part of management may draw inspiration from this. But one should certainly bear in mind that a robust second-best solution, considering the actual legal and factual framework, is the best one can hope for when designing a statutory limitation on management's liability.

b) Judicial intervention based on equity considerations

As an alternative to a (fixed or variable) statutory limit on managerial liability, the law may grant the court discretion to reduce the damages recoverable on grounds of equity.

In the UK, under section 1157 of the Companies Act 2006, the court may grant relief (wholly or in part) to managers from liability for breach of duty if they have acted 'honestly and reasonably and … ought fairly to be excused'. The introduction of such a statutory provision allowing the judge to reduce the damages to be compensated was also suggested for Germany.[163]

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[160] Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 274–75 (suggesting a liability amount equal to the sum of the variable components of compensation from the preceding three years or, if higher, one and a half years' fixed salary).

[161] See the quotation above at note 112.

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

[163] Gregor Bachmann (n 162) E32 and E123.

It seems doubtful, however, whether a reduction based on equity considerations is a sound approach to avoiding risks of excessive preventive effects. When weighing their options ex ante, directors and officers cannot reliably consider such a reduction if, ex post, courts have discretion to reduce liability in individual cases (or not).[164] That the possibility of ex post reduction by courts cannot well calibrate the preventive effect of liability should not be surprising. Its legitimacy derives from equity considerations, i.e. from notions of distributive justice. In view of managers' liability for antitrust fines, the concept is meant to address whether the distribution of the burden of the antitrust fine between company (shareholders) and managers is fair and equitable,[165] not whether managers' liability creates optimal incentives to avoid antitrust fines.

In the absence of statutory authorization, courts might establish ad hoc limitations on managers' internal liability. A notable example is the first instance decision of the labour court in the *Thyssenkrupp* case, which considered limiting the liability of the managing director for the company's antitrust fine to EUR 1 million. The court based this ceiling for managerial liability on section 81(4) of the German Competition Act, according to which a fine imposed on natural persons for antitrust infringements must not exceed EUR 1 million.[166] In the end, the court did not have to commit itself to this position, as it did not consider the requirements for managerial liability to be met. While the court in its judgment was obviously concerned with equity considerations, the liability ceiling can also be understood as a pragmatic, albeit crude, approach to avoiding risks of over-deterrence. Conceptually, this approach does not fit well, mainly because, in the context of antitrust fining, EUR 1 million does not serve as a cap but marks the upper limit of a fining range.[167] In other words, a fine of this amount would be imposed on an individual only for the most serious conceivable case of antitrust infringement. At any rate, it only applies in the case of intentional injury; in the case of negligence, the upper limit for an antitrust fine is EUR 500,000.[168] With the rationalities that should guide a limitation of managerial liability to protect against over-prevention, these upper limits for individual fines have no relation.

c) The principle of set-off of benefits

Although not designed with the impetus to calibrate the deterrent effect of liability, under German law,[169] the principle of set-off of benefits (*Vorteilsausgleichung*) may give courts

[164] Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 277.

[165] Whether and in which scenarios a reduction of liability appears to be necessary for reasons of distributive justice is beyond the scope of this contribution. In Germany, some authors recognize a duty of care of the company towards its directors and officers, which would require a limitation of liability; others strictly reject this approach. For the former position, see, e.g., Walter Bayer, 'Legalitätspflicht der Unternehmensleitung, nützliche Gesetzesverstöße und Regress bei verhängten Sanktionen' in Georg Bitter and others (eds), *Festschrift für Karsten Schmidt* (Otto Schmidt 2009) 85, 97; for the latter position, see, e.g., Gerhard Wagner, 'Organhaftung im Interesse der Verhaltenssteuerung – Skizze eines Haftungsregimes' (2014) 178 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 227, 276–77.

[166] ArbG Essen 19.12.2013, 1 Ca 657/13 Juris, para 140.

[167] See Walter Bayer and Philipp Scholz, 'Zulässigkeit und Grenzen des Kartellbußgeldregresses' *GmbH-Rundschau* 2015, 449, 454.

[168] Section 17(2) of the German Act on Regulatory offences (Gesetz über Ordnungswidrigkeiten).

[169] For a comparative overview of equivalent legal institutions in European legal systems, see Christian von Bar and Eric Clive (eds) *Principles, Definitions and Model Rules of European Private Law*, Vol. 4 (Oxford

leeway to reduce managers' liability for antitrust fines that have been imposed on the company. Under this doctrine, where a person who has suffered a recoverable damage at the same time also derives a benefit from the event that triggered the underlying liability, the liable party may deduct that benefit if two conditions are met: first, there must be a causal link between the event giving rise to liability and the benefit; and, second, offsetting the benefit does not contradict the objective of the underlying damages liability, i.e. it does not unreasonably burden the aggrieved party and does not unduly benefit the liable party.[170] As a matter of principle, it is on the liable party to show that and in what amount the injured party has obtained a benefit that can be set off.[171]

Thus, in the context of managerial liability for antitrust fines, the question arises whether a manager who is liable for the damage the company sustained due to the antitrust infringement may put forward that the company has made extra profits owing to the (fined) antitrust infringement, which, pursuant to the principle of set-off of benefits, can be deducted from antitrust fine. In the *Thyssenkrupp* case, the Düsseldorf Regional Labour Court regarded an offsetting of benefits of the company to be applicable in principle, without, however, committing itself to this position. In fact, the court emphasized that the subject is controversially discussed in the academic literature, where it is also argued that offsetting should be rejected because this is seen as unduly discharging the liable party, namely the liable manager.[172]

If higher profits accrue to a company because of an antitrust infringement, this benefit indeed is a direct consequence of the very event that gives rise to managerial liability. However, insofar as the managerial liability is necessary to address the agency problem inherent in a company and thus to enable the deterrent objective of an antitrust fine imposed on a company to be realized in the first place, i.e. to be translated into compliance efforts by the management, this objective of managerial liability would be undermined by an offset. On the other hand, insofar as the antitrust fine for which a manager is to be liable exceeds the amount of a threat of liability necessary to effectively discipline her,[173] there is nothing in the objective of managerial liability to prevent the offsetting of cartel profits accrued by the company. Therefore, depending on the fact that the liable manager can show sufficiently high benefits on part of the company, courts may in fact use the principle of set-off of benefits to allocate an antitrust fine imposed on the company between shareholders and management in such a way that the latter's compliance violations are sufficiently deterred but the former are not unduly relieved of the antitrust fine. However, this would probably only become relevant in practice if the courts were to grant the liable managers certain evidentiary relief.

University Press 2009) 3750–3759. The corresponding model provision under the Draft Common Frame of Reference is 'VI. – 6:103: Equalisation of benefits.'

[170] BGH 6.6.1997, V ZR 115/96 Juris, para 7.

[171] BGH 31.1.1991, IX ZR 124/90 Juris, para 9.

[172] LAG Düsseldorf 20.1.2015, 16 Sa 459/14 Juris, para 169. However, the majority of observers, including the two authors cited by the court, consider the set-off of benefits to be permissible. See Holger Fleischer, 'Kartellrechtsverstöße und Vorstandsrecht' (2008) *Betriebs-Berater* 1070, 1073; Frank Sebastian Hack, *Vorstandsverantwortlichkeit bei Kartellrechtsverstößen* (Peter Lang 2012) 82–84; Walter Bayer and Philipp Scholz, 'Zulässigkeit und Grenzen des Kartellbußgeldregresses' *GmbH-Rundschau* 2015, 449, 454–455.

[173] See above sub VI.5.a).

Otherwise, it will often not be possible to prove and quantify benefits linked to an antitrust infringement.

6. Conclusion

The prospect of unlimited managerial liability for antitrust fines does pose risks of an undesirable over-deterrence. Those risks are not merely theoretical, because – given the uncertainties in both antitrust law itself and antitrust compliance duties – managers may not simply choose to breach or not breach their legality obligations owed to the company. However, the law may take care of those risks by granting managers discretion in the face of legal uncertainty and with a view to compliance organization. In addition, the availability and indeed widespread use of D&O insurance provides extensive, though incomplete, protection against excessive liability risks. While, therefore, the latter may remain a serious problem in individual cases, this may not be assumed to be the case in general. Therefore, and given that the rules on managerial liability have at any rate only an indirect impact on the dissuasiveness of antitrust fines, a need for a liability cap cannot be deduced from general principles of EU law requiring proportionate sanctioning. If national legislatures nonetheless opt for an introduction of such a limitation, then this should ideally be based on the variable components of the remuneration.

VII. A Brief Sideways Glance at Managerial Liability in the Follow-Up of Antitrust Damages Actions

If managerial misconduct leads to the company having to pay antitrust damages to aggrieved parties, the question as to whether the company may seek contribution from its (former) directors and officers arises in the same way as in the case of an antitrust fine.[174]

Antitrust damages and fines share the objective of deterring competition infringements. The deterrent rationality of actions for damages resulting from infringements of the EU antitrust rules rests on the ECJ's effet utile interpretation of Articles 101 and 102 TFEU, as emphasized in its seminal judgment in *Courage*[175] and constantly reaffirmed since then.[176] Thus, insofar as the objectives of antitrust fines and damages are congruent, the question of possible under-deterrence of the company or over-deterrence of its management by recourse liability may arise – but also be answered – in the same way.

However, given the widespread acceptance that damages actions are also designed to 'compensate' victims of antitrust violations, an instrumental distinction may be observed. Thus, alongside prevention of antitrust infringements, the ECJ identified the pursuit of corrective justice as an objective in its own right.[177] The right to full compensation as

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[174] Aidan Robertson, 'Pulling the Twigger: Directors and Employees Back in the Firing Line for Damages after Jetivia in the Supreme Court?' (2015) 36 ECLR 325, 326.
[175] Case C-453/99 *Courage and Crehan* ECLI:EU:C:2001:465, para 27.
[176] Case C-882/19 *Sumal* ECLI:EU:C:2021:800, paras 35–37.
[177] Case C-536/11 *Donau Chemie* ECLI:EU:C:2013:366, para 24. See Jens-Uwe Franck and Martin Peitz, 'Cartel Effects and Component Markers' Right to Damages' (2020) 43 *World Competition* 209, 209–210. The crucial question, though, remains how the notion of corrective justice can meaningfully be employed to define the (legitimate) limits of antitrust damages liability. Jens-Uwe Franck and Martin Peitz, 'Suppliers as Forgotten Cartel Victims' (2018) 15 *NYU Journal of Law & Business* 17, 46–49.

enshrined in Articles 1(1) and 3 of the Antitrust Damages Directive[178] is often viewed as endorsing this objective.[179]

However, insofar as it is the company that compensates aggrieved parties for inflicted damage – which is in fact the most common scenario in antitrust liability cases – issues of internal distribution between the company and its management are irrelevant in this respect. Only in the exceptional scenario that the company is insolvent at the time an antitrust action for damages is brought might managerial liability become relevant for the compensation of cartel victims. This may be illustrated by the *Heiploeg* case:[180] while that litigation involved the liability of (former) managers for an antitrust fine, it is equally conceivable that Heiploeg's bankruptcy trustee could seek compensation from former managers to indemnify the company against an antitrust damages obligation it owes to antitrust victims.

Thus, because of such a scenario and because of the pursuit of corrective justice associated with antitrust damages actions, should managerial liability be made more stringent than for antitrust fines? We do not think so. In the scenario outlined, a successful action for indemnity by the bankruptcy trustee would arguably benefit all creditors of the company, not only antitrust damages creditors. What is more, where an antitrust infringement results from joint behaviour, undertakings involved are jointly and severally liable for the inflicted harm.[181] Therefore, in the cartel case, even in the event of insolvency of a company, full compensation of a cartel victim will only in very rare occasions depend on managerial liability.

A system of internal managerial liability well balanced to solve the underlying agency problem should therefore not be disturbed to slightly change the generally low risk of payment default. Those who see a need to effectively increase the chance of full compensation for cartel victims through managerial liability should instead advocate direct personal liability for those who participated in cartelization or otherwise promoted an antitrust infringement.[182] Certainly, such direct managerial antitrust liability vis-à-vis third parties could entail the risk of an over-preventive effect on management, depending in particular on the distribution of damages between company and managers and on the company's bankruptcy risk, an aspect we cannot discuss here. At any rate, we see no compelling reason why management's liability to the company should be framed differently for antitrust damages claims than for antitrust fines.

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

[179] At least at second glance, however, it becomes clear that the principle of full compensation as enshrined in Articles 1(1) and 3 of the Antitrust Damages Directive as such tells us little about which detriments of which parties related to an antitrust infringement must be compensated (or not) and according to which policy objectives this decision is to be made. Jens-Uwe Franck, 'Private Enforcement in Germany' in Ferdinand Wollenschläger et al (eds), *Private Enforcement of European Competition and State Aid Law* (Wolters Kluwer 2020) 77, 82–83.

[180] See above sub II.1.

[181] See Article 11(1) of the Antitrust Damages Directive.

[182] See above n 107 and accompanying text.

VIII. Conclusion

This contribution has examined what impact the protection of the deterrence objective of antitrust fines should have on managerial liability toward the company. We endorse the view that the civil justice system must not decide on managerial liability in isolation from antitrust (fining) law, solely based on conventional principles of company law. It is thus conceivable that the liability of directors and officers might have to be excluded or restricted if the policy of the fine would otherwise be undermined. Where a fine is imposed by the Commission, or by a Member State competition authority or court for infringing Articles 101 or 102 TFEU, the adequate consideration of antitrust fines' rationality is not a matter of domestic (company) law alone but, via the principle of effectiveness, it is also governed by EU law.

Based thereon, we have three major findings. First, while we recognize that antitrust fines are meant to have a preventive effect by affecting the shareholders of a company held responsible for an infringement, the barring of actions for indemnity against managers responsible for antitrust infringements is not called for to prevent an under-deterrence of the company or its shareholders. Rather, managerial recourse liability must be maintained as an indispensable governance instrument for solving the agency problems that entail risks of the management not investing adequately in antitrust compliance in the first place. Our findings are thus in line with the view of Flaux J on the policy of antitrust penalties as endorsed in the judgment at first instance in the *Safeway Stores* case:

> The suggestion that undertakings will only be deterred from breaching the [Competition] Act [1998] if they are prevented from suing the individuals who caused the breach is completely illogical. I accept [counsel for the claimants'] submission that passing on the penalty to the very people who caused the unlawful acts would not be inconsistent with the 1998 Act.[183]

Second, this holds true also when taking into account the availability of D&O insurance. We recognize that, given the common practice of group insurance and other deficiencies in the design of D&O insurance, managerial liability will often not be translated ideally into incentives to reduce the risk of antitrust infringements being committed. However, as far as we can observe the status quo of D&O insurance, we do not see that its availability would render the preventive effect of managerial liability for antitrust fines impossible or undermine it on a broad scale so that managerial liability would have to be made dependent on such intervention. In other words, as things stand, managerial liability with D&O insurance, even if imperfectly designed from a deterrent perspective, is preferable to a (general) rejection of managerial liability for antitrust fines.

Third, we recognize that the risks of over-deterrence entailed by managerial recourse liability may be relevant legally, especially in light of general principles governing the sanctioning of EU law, and that, in view of the level of antitrust fines, the existence of such risks cannot be denied. However, we see in practice strong mitigating mechanisms at work: the acceptance of managers' discretionary power in the face of legal uncertainty and regarding compliance organization on the one and the availability of D&O insurance on the other. While we see that, in certain scenarios, considerable risks of over-deterrence may remain, these findings

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

do not make it appear necessary to derive from the deterrence objective of antitrust fines a mandatory limitation of managerial recourse liability. Whether or not to restrict managerial liability should rather be viewed as a policy decision within the discretion of company law legislation and jurisprudence.

Against this background, EU (antitrust) law therefore does not prescribe any restrictions on managerial liability pursuant to (national) company law for antitrust fines. Insofar as, for example, German courts have argued to the contrary, this is not convincing.

Finally, it remains to be emphasized that in this article, starting from the question of whether the deterrent rationale of antitrust fines requires a denial or limitation of managerial liability or D&O insurance, we have only provided a partial analysis of how managerial liability for antitrust fines should be designed. Beyond the main findings of our analysis, we have noted that, in a particular jurisdiction, there may be good reasons to restrict managerial liability – be it to avoid over-deterrence of management or possibly to satisfy considerations of corrective justice. The amount of profit-related compensation during the period of an infringement can provide good guidance in this regard. Furthermore, depending on the prevailing practice of D&O insurance and the respective corporate and insurance law framework, there may be good reasons to legally limit the coverage of managerial liability by D&O insurance. Thus, while, as a matter of principle, we do not see that the deterrence rationality of antitrust fines would necessarily require a limitation on recourse liability or D&O insurance, we certainly do not purport to know how managerial liability should ideally be designed in any particular jurisdiction to achieve the deterrence objective associated with antitrust fines.