ALERT MEMORANDUM

German Highest Civil Court Refers Question of D&O Liability for Corporate Antitrust Fines to CJEU

February 25, 2025

On February 11, 2025, the German Federal Court of Justice (*Bundesgerichtshof*, "**BGH**") referred to the EU's Court of Justice ("**CJEU**") the question of whether directors or officers can be held liable for their companies' antitrust fines.[1] The CJEU will determine whether the corresponding German regulation contravenes Article 101 TFEU.

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Case Background[2]

The case originated from a 2018 German Federal Cartel Office ("FCO") fine of €205 million imposed on several steel industry companies, a trade association, and ten individuals.3 The Defendant, who served both as managing director of one company (Plaintiff 1) and chairman of that company's holding company board (Plaintiff 2), was amongst those fined for his thirteen-year involvement in a price-fixing cartel.

Subsequently, both companies filed civil claims against the Defendant based on directors' and officers' liability under statutory corporate law ("D&O Liability"). They sought compensation for the FCO-imposed fine (€4.1 million) plus fees and expenses, as well as fact-finding and defense costs from the cartel proceedings (€1 million).

Additionally, they requested a declaration of the Defendant's liability for potential third-party damage claims arising from the FCO-established antitrust violation.

Under German company law, managing directors and officers are liable for breaches of duty towards their companies, as stipulated in the German Limited Liability Companies Act (GmbHG) and the German Stock Corporation Act (AktG).[4]

1 Federal Court of Justice, Decision of February 11. 2025 – KZR 74/23, press release No. 31/2025.
2 For details of the proceedings and an overview of the various legal opinions on this matter see our alert dated September 1, 2023, available here.
3 German Federal Cartel Office press release of July 12, 2018; available here.
4 See § 43(2) of the German Limited Liability Companies Act (GmbHG) and § 93(2) sentence 1 of the German Stock Corporation Act (AktG).

While both the Regional Court and the Higher Regional Court of Düsseldorf affirmed D&O Liability in principle, they rejected the claim with respect to the cartel fine and auxiliary damages like fact-finding and defense costs incurred in the course of the fine proceeding.[5]

The Higher Regional Court reasoned that allowing D&O Liability for the fine and related costs would undermine the corporate fine's purpose of preventing antitrust violations.[6] Companies might have insufficient incentive to prevent violations if they could seek compensation from their directors and officers in particular. Specifically, the Court focused on the particularities and the purpose of the antitrust sanction regime.[7] The Court emphasized that corporate fines primarily aim to sanction the company rather than individuals, as evidenced by the separate fining system for individuals[8] - illustrated in this case by the separate €126,000 fine already imposed on the Defendant. This separation would be undermined if companies could simply pass on their fines.

Furthermore, the Court stated that cartel fines serve to skim off any profits the company may have obtained through the cartel infringement, a purpose that would be defeated if companies could seek recourse against individuals.[9] Finally, the Court also highlighted the practical limitation that the substantial corporate fines would exceed typical D&O insurance coverage.

Plaintiffs subsequently appealed to the BGH to pursue further their recourse claims.

BGH's Request for a Preliminary Ruling

The BGH confirmed that the Defendant's cartel participation constituted an intentional breach of the duty to comply with all legal provisions applicable to the company in its relationship with third parties (so-called duty of legality)[10], and found that the Plaintiffs suffered damages from the fine.[11] However, rather than ruling directly, the BGH has referred the matter to the CJEU for clarification on the fundamental purpose of cartel fines.[12]

While EU Member States must ensure that national competition authorities can impose effective, deterrent fines for Art. 101 TFEU violations, the key question is whether the D&O Liability provisions should be narrowly construed to prohibit passing on corporate fines, as the Higher Regional Court of Düsseldorf held. The BGH's presiding judge Kirchhoff indicated that absent such a restriction, the standard D&O Liability rules would likely apply.

In a previous case, the CJEU took the view that Art. 101 TFEU prohibits partial tax deductibility of corporate fines as this would reduce the deterrent effect,[13] suggesting that it may favor a narrow interpretation of the D&O Liability rules.

The ruling, expected in 2026, will significantly impact both companies seeking to recover cartel fines and D&O insurers. If D&O Liability is found to cover antitrust violations, D&O insurers will likely need to substantially revise their policies to manage increased risk exposure.

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5 Regional Court of Düsseldorf, Judgment of December 12, 2021 – 37 O 66/20 (Kart); Higher Regional Court of Düsseldorf, Judgment of July 27, 2023 – 6 U 1/22 (Kart), available here.

6 Higher Regional Court of Düsseldorf, Judgment of July 27, 2023 – 6 U 1/22 (Kart), paras. 178 *et seqq*; see further in our alert dated September 1, 2023, available here.

7 Higher Regional Court of Düsseldorf, Judgment of July 27, 2023 – 6 U 1/22 (Kart), paras. 173 *et seqq*; see further in our alert dated September 1, 2023, available here.

8 Higher Regional Court of Düsseldorf, Judgment of July 27, 2023 – 6 U 1/22 (Kart), paras. 173 *et seqq*

9 Higher Regional Court of Düsseldorf, Judgment of July 27, 2023 – 6 U 1/22 (Kart), paras. 178 *et seqq*.

10 Federal Court of Justice, Decision of February 11. 2025 – KZR 74/23, press release No. 31/2025.

11 Federal Court of Justice, Decision of February 11. 2025 – KZR 74/23, press release No. 31/2025.

12 Federal Court of Justice, Decision of February 11. 2025 – KZR 74/23, press release No. 31/2025.

13 ECJ, Judgment of June 11, 2009 – C-429/07 (ECLI:EU:C:2009:359).