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## INTRODUCTION

It remains exciting - in Germany, two courts are currently dealing with the question of the recoverability of (cartel) fines in the internal relationship and their limits. The Regional Court of Dortmund and the Higher Regional Court of Düsseldorf have apparently come to completely different conclusions. The outcome of this case law dispute, which will presumably be decided before the Federal Supreme Court, will also have groundbreaking significance for Austria - with corresponding effects on D&O insurance solutions.

## RECOURSE AGAINST FORMER MANAGING DIRECTORS - CASE LAW IN GERMANY

Contrary to previous case law, the Regional Court of Dortmund[1] stated in an advisory decision[2] that a recourse claim by the company against the managing director for an antitrust fine imposed on the company must also be recognised. This follows from § 43 para. 2 dGmbHG. According to Art 101 (1) TFEU, participation in a prohibited cartel constitutes a breach of the managing director's duty of legality. A managing director as an organ of the company may not participate in such an offence, but must rather contribute to preventing such an offence. The court stated that the company can only act through its executive body, i.e. the managing director, which is why the right of recourse against the managing director is the only possible sanction. It was not to be expected that the regulatory sanctions would be undermined as, on the one hand, full payment of the recourse claim by the natural person could not usually be achieved anyway due to the amount of the fine and the sums insured under the relevant D&O insurance policies were likely to be regularly exceeded. On the other hand, the company would have to make advance payments anyway and would therefore bear the insolvency risk of its executive body. A possible contravention of the effet utile would therefore not be expected. There would also be no false incentives, as the corresponding risks would remain for the companies.

Up to now, it has been predominantly argued in Germany that the recourse of a cartel fine against the company to the executive body violates the effet utile pursuant to Art 101 and 105 TFEU because the company would thereby pass on parts of the fine to members of the executive body.[3] In a recent decision, the Higher Regional Court of Düsseldorf also ruled accordingly that board members/managing directors are not personally liable for (cartel) fines imposed on the company



1 vgl LG Dortmund 21.06.2023, 8 O 5/22.
2 Bei einem Hinweisbeschluss handelt es sich um einen nicht verbindlichen Beschluss des Gerichts, bei dem es seiner Hinweispflicht aus § 139 dZPO nachkommt. Das endgültige Urteil wird für den 30.08.2023 bzw 25.10.2023 erwartet.
3 vgl LG Saarbrücken 10.11.2020, 7 HK O 6/16.

by way of recourse. According to the Higher Regional Court of Düsseldorf, such recourse to company management bodies would undermine the assessment under antitrust law and the company could completely evade its responsibility. This applies all the more if the board member is covered by a D&O insurance policy and the sum insured is higher than the fine imposed. The purpose of the corporate fine is rather that the fine affects the company and remains there in order to encourage the company to monitor its executive bodies accordingly. Furthermore, the law provides for different upper limits for the levels of sanctions for natural persons and legal entities. The Higher Regional Court of Düsseldorf rejects considerations that natural persons would not be able to pay fines anyway or would be insured against them; these circumstances would depend on the random circumstances of the respective situation.[4]

In response to this decision by the Higher Regional Court of Düsseldorf, the Regional Court of Dortmund felt compelled to comment on the reasoning of the Higher Regional Court of Düsseldorf in a further decision: If the possibility of recourse were rejected, situations would be conceivable in which controlling companies would neither face a personal fine for antitrust law violations nor would they have to fear recourse for fines. As a result, this could lead to them being induced to engage in behaviour that violates antitrust law. The purpose of the sanction would also not be undermined if recourse to fines were authorised, as the company would also suffer other consequences, such as the risk of being excluded from public contracts. Furthermore, the amount of corporate antitrust fines is regularly in the three-digit million range. Damages in this amount are not usually covered by D&O insurance solutions. In addition, most cases are likely to involve intent, which is another reason why D&O cover is likely to be ruled out in principle.[5]

Both courts reject considerations of a mere limitation of recourse claims from corporate cartel fines. Both courts recognise the admissibility of the objection that a recourse claiming company must accept the objection of offsetting benefits from the cartel law infringement.

We are not convinced by the content of the Dortmund Regional Court's reasoning. The assumption of the Regional Court of Dortmund that the sums insured under industrial D&O solutions would reach the level of corporate antitrust fines is also belied by practical experience. Ultimately, the Regional Court of Dortmund overlooks the fact that the often exorbitant forensic and consulting costs alone of dealing with cartel offences on the part of the companies concerned reach into the tens of millions of euros or US dollars and their recoverability as corporate damages is beyond question. These cost recourses alone would threaten the existence of a controlling company and naturally require a high degree of incentive for legally compliant behaviour. In this respect, the Higher Regional Court of Düsseldorf rightly recognises the behaviour-controlling effect of a corporate fine on the entire organisation of a company - in particular its shareholders.

**ON THE RECOURSE OF CORPORATE FINES UNDER AUSTRIAN LAW**

In Austria, § 25 GmbHG and § 84 AktG form the basis for claims for damages by the company against its managing directors or board members. Advantages that the company has gained from

4 vgl LG Düsseldorf 27.07.2023, VI-6 U 1/22.
5 Vgl LG Dortmund 14.08.2023, 8 O 5/22.

the behaviour must be offset against the liability claim.[6] The question of whether it is permissible to pass on the fine imposed on a legal entity to the executive body has not been answered by the highest courts. While there are generally no significant objections to the subsequent voluntary assumption by the company of fines imposed personally on the controlling company , there are many that argue against the permissibility of recourse of corporate fines against a corporate body:[8]

The Constitutional Court found that the attribution of unlawful and culpable behaviour to the natural person is permissible if there is a sufficient connection between the natural person and the legal entity. Ultimately, it is the association's responsibility to ensure that the association acts in accordance with the law and it must select the appropriate decision-makers.[9] The Constitutional Court's confirmation is therefore in line with the considerations of the Austrian legislator: Section 11 VbVG stipulates that sanctions and legal consequences that affect the company due to the provisions of the VbVG cannot be passed on to decision-makers or employees. The reason for this seems obvious: since the economic beneficiary is the one who should be penalised under the liability of the association, a possible transfer would run counter to precisely this purpose of the liability of the association.[10] Such recourse would be immoral under general civil law principles and therefore inadmissible.[11]

Another reason can be found in the assessment of the amount of the fine. For example, Art. 83 para. 1 GDPR stipulates that fines must be "effective, proportionate and dissuasive in each individual case". The amount of the fine is determined by the addressee, which is the legal entity in the case of association fines. A corresponding appropriateness corrective is not applied in the case of recourse against the decision-maker.[12] Overall, therefore, there are good reasons why recourse against corporate fines is inadmissible.

**THE POSSIBILITY OF INSURABILITY**

Assuming that the recourse of a corporate fine against the responsible body is permissible, the next step is to examine whether the insurance of such a risk for the body is legally permissible at all. The insurance solution of choice here is D&O insurance[13] , where it is common practice to indemnify against justified recourse from fines imposed on the company - is this permissible?

First of all, it should be noted that so-called "advance indemnification" of a corporate body is essentially inadmissible.[14] Agreements in which it is stipulated that a third party will assume in advance the fines and penalties imposed directly on corporate bodies or employees are immoral.[15] This is justified by the fact that criminal offences are to be prevented, regardless of whether it is a company body authorised to represent the company or ordinary employees. A corresponding



6 *Reich-Rohrwig* in Straube/Ratka/Rauter, WK GmbHG § 25, Rz 276 ff.
8 *Strasser*, Versicherbarkeit von DSGVO-Geldbußen und Regressansprüchen daraus, ZFR 2018/188, 405 f.
9 VfGH G 497/2015, G 679/2015.
10 *Kalss* in Lewisch, Wirtschaftsrecht und Organverantwortlichkeit (2015), 87.
11 vgl ErläutRV 994 BlgNR 22. GP 30, § 11 VbVG.
12 *Strasser*, Versicherbarkeit von DSGVO-Geldbußen und Regressansprüchen daraus, ZFR 2018/188, 406.
13 *Hafner/Perner*, D&O-Versicherung: Struktur und Inhalt, ZFR 2018/185, 369.
14 RIS-Justiz RS0016830.
15 vgl RIS-Justiz RS0016830.

agreement with the company or an insurer and the associated acceptance of any risk would completely eliminate this preventive effect.[16]

On the other hand, a subsequent assumption of fines imposed directly on the natural person may be permissible under certain circumstances. In order for this to be permissible, it must be examined whether the natural person can also be accused of behaviour in breach of duty within the company and, furthermore, whether the assumption of the penalty is also in the interests of the company.[17] However, there are also limits here: If the deliberate misconduct was intentional, a subsequent assumption is also immoral in any case.[18]

Similar questions of assessment as to prior indemnification also arise with regard to the insurance of any recourse claims arising from fines, if recourse to fines is permitted, but this undermines the indirect control of behaviour.[19] One aspect that could speak against the insurability of recourse claims is that the penalties and fines imposed would ultimately be passed on to the general public in the form of increased D&O premiums.[20] On the other hand, it seems unobjectionable to recourse to the unlawfully and culpably acting body for those financial losses that go beyond the actual penalty (legal fees, damages incurred by a third party, etc.).[21]

**CONCLUSION**

It will be interesting to see how the BGH resolves this dispute in Germany. The resulting clarification will have considerable significance for D&O insurers in Austria and Germany in terms of claims handling, but will probably also have repercussions on the current provisions for insuring recourse against fines in D&O general terms and conditions of insurance. The risk of the D&O insurer that, apart from one or a few intentionally acting cartelists (who would of course be denied D&O cover), other controlling companies (especially in group structures) can be accused of organisational or supervisory fault in one form or another is in any case considerable.

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16 *Kalss* in Lewisch, Wirtschaftsrecht und Organverantwortlichkeit (2015), 89.
17 *Funk-Leisch/Weber/Wildmoser,* Versicherbarkeit des Regresses gegen Vorstände wegen der Verhängung von Unternehmensstrafen, ZFR 2018/187, 401.
18 vgl OGH 3 Ob 2400/96d.
19 *Strasser*, Versicherbarkeit von DSGVO-Geldbußen und Regressansprüchen daraus, ZFR 2018/188, 409.
20 *Ihlas* in Langheid/Wandt, VVG[2] 320 D&O Rz 213.
21 *Strasser*, Versicherbarkeit von DSGVO-Geldbußen und Regressansprüchen daraus, ZFR 2018/188, 409.