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By PwC Deutschland | 14 February 2025

ECJ referral: Federal Court of Justice requests preliminary ruling on managing director‘s liability for cartel fines

The Federal Court of Justice has asked the European Court of Justice (ECJ) for a preliminary ruling whether Art. 101 TFEU precludes a provision in national law according to which a company that has been fined for a breach of antitrust law can take recourse against its managing directors or board members.

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In the main proceeding before the Federal Court of Justice it must be clarified, among other things, whether EU law requires a restrictive interpretation of Section 43 (2) of the Act on Limited Liability Companies (GmbHG) and Section 93 (2) Sentence 1 of the German Stock Corporation Act (AktG). The detailed rules for assessment of the fines are a matter for the Member States. However, according to ECJ case law, the Member States must ensure that the national competition authorities can impose effective, proportionate and dissuasive fines on companies if they intentionally or negligently infringe Art. 101 TFEU.

The Federal Court of Justice goes on to explain that these fines are intended to punish unlawful acts by the companies concerned and to deter both these companies and other economic operators from future infringements of the competition rules of Union law. The effectiveness of fines imposed on companies could be impaired if the company could fully or partially exonerate itself from the burden of the fine by recourse to the management body.

As the ECJ has indicated in its past case law, a fine could lose much of its impact if the company concerned would be entitled to deduct the fine - even partially - for tax purposes. The question therefore remains as to whether it would impair the purpose of the antitrust penalty if the company's fine would be passed on to the managing director in accordance with company law.

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Keywords

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