

The Condition of Fault in Private Enforcement of Competition Law – a Comparative Analysis of U.S. v. Polish and European Approach

by

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Abstract

The purpose of the Polish Act on Claims for Damages for Remedying the Damage Caused by Infringements of Competition Law, based on and implementing EU law – the Damages Directive, was to enable undertakings to effectively use private enforcement of their damages claims from competition law offenders. Infringement of competition law is classified as a tort according to the said Act on Claims. Therefore, the Act on Claims refers to tort liability rules. The conditions of classic tort liability in domestic law do not have exactly the same dogmatic meaning and scope as the conditions of public or private liability for the infringements of domestic and EU competition law. In practice, their application by national courts may rise many questions regarding conformity between domestic and EU law. This paper aims to analyse one of the key conditions of tort liability, that is, the fault of both the undertaking – the offenders, as well as the fault

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of their governing bodies and officers. If one were to understand the notion of fault within the limits laid down by civil law, and follow the literal wording of the Polish Civil Code's provisions referring to the fault condition, the efficiency of private enforcement of damage claims arising from infringements of competition law would be doubtful. Therefore, the aim of this paper is to provide the readers with such an interpretation of the notion of fault, as a condition of liability of undertakings, that the legislative purpose of the Act on Claims is achieved and that the principles of efficiency and equivalence of the EU law are observed. In order to present a comprehensive picture, this paper will also discuss the case law of the CJEU concerning 'anti-trust fault', accompanied by a comparative analysis of the German and French approach to the fault condition as well as United States antitrust laws in the same area.

Resumé

L'objectif de la loi polonaise sur les actions en dommages et intérêts pour les infractions au droit de la concurrence, qui se base sur le droit de l'UE et le transpose était de permettre aux entreprises d'utiliser efficacement l'exécution privée de leurs demandes de dommages et intérêts auprès des auteurs d'infractions au droit de la concurrence. La violation du droit de la concurrence est qualifiée comme un délit civil selon la loi sur les demandes d'indemnisation. Par conséquent, la loi sur les demandes d'indemnisation renvoie aux règles de responsabilité délictuelle. Les conditions de la responsabilité délictuelle classique en droit national n'ont pas exactement la même signification et portée dogmatique que les conditions de la responsabilité publique ou privée pour les infractions au droit national et européen de la concurrence. Dans la pratique, leur application par les tribunaux nationaux peut soulever de nombreuses questions concernant la conformité entre le droit national et le droit de l'UE. Le présent document vise à analyser l'une des principales conditions de la responsabilité délictuelle, à savoir la faute de l'entreprise ainsi que la faute de ses organes et dirigeants. Si on voulait comprendre la notion de faute dans les limites fixées par le droit civil, et suivre la formulation littérale des dispositions du code civil polonais relatives à la condition de faute, l'efficacité de l'exécution privée des demandes de dommages et intérêts résultant d'infractions au droit de la concurrence serait incertaine. Par conséquent, le présent article vise à fournir aux lecteurs une interprétation de la notion de faute, en tant que condition de la responsabilité des entreprises, qui permette d'atteindre l'objectif législatif de la loi sur les demandes d'indemnisation et de respecter les principes d'efficacité et d'équivalence du droit de l'UE. Afin de présenter un cadre complet, cet article examine également la jurisprudence de la CJUE concernant la "faute antitrust", accompagnée d'une analyse comparative des approches allemande et française de la condition de faute ainsi que des lois antitrust américaines dans le même domaine.

Key words: anonymous fault; compensatory liability; corporate fault; infringement of competition law; intent; interchange fees; negligence; private enforcement.

JEL: K21, K41, K42

I. Introduction

This paper will analyse the issue of one of the key conditions of undertakings' compensatory liability for infringements of competition law, namely fault. The Polish Act on Claims for Damages for Remedying the Damage Caused by Infringements of Competition Law (hereinafter, Act on Claims)¹, implementing the Damages Directive,² opened the way for Polish consumers and undertakings to enforce damages actions under private law. Under Article 10 of the Act on Claims, the provisions of the Polish Civil Code³ (hereinafter, PCC) on wrongful acts (torts) apply to the liability for damage caused by an infringement of competition law. The tort liability regime applies here.

As regards public liability of undertakings for infringing competition law, the Polish Competition Authority (President of Office of Competition and Consumer Protection, UOKiK) has to establish two primary conditions:

- 1) objective unlawfulness in the form of infringing relevant provisions of the Act on Competition and Consumer Protection (Polish Competition Act; hereinafter, PCA)⁴ or relevant EU legislation⁵,
- 2) unintentional fault (negligence), at least, on the side of the infringing party.

These are the conditions that must be met in order for the Polish Competition Authority to be able to impose a fine. Proving that these conditions are met before the Polish Competition Authority is not tantamount to demonstrating the conditions of liability for tort.

Under torts liability, there are three primary, universal conditions (Śmieja, 1981, p. 348): damage (Article 361 § 2 PCC), the event with which the law associates the obligation to remedy it, and the causal link between the damage and the event (Article 361 § 1 PCC). The conditions listed above apply to all normative cases of compensatory liability and they do not apply to the party

¹ Act of 21 April 2017 on Claims for Damages for Remedying the Damage Caused by Infringements of Competition Law (Journal of Laws 2017, item 1132; hereinafter, Act on Claims).

² Directive 2014/104/EU of the European Parliament and of the Council 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, OJ L 349, 5.12.2014, p. 1–19 (hereinafter, Damages Directive).

³ Act of 23 April 1964 – Civil Code (consolidated text: Journal of Laws 2019, item 1145; hereinafter, PCC).

⁴ Article 6 and 9 of Act of 16 February 2007 on competition and consumer protection (consolidated text: Journal of Laws 2019, item 369; hereinafter PCA).

⁵ Article 101 and 102 of the Treaty on the Functioning of the European Union.

that caused the damage and to the legal assessment of the event that caused the damage, but rather to the object of liability. They are all included in one category of primary, universal conditions.

The second category of conditions includes those conditions embodied in specific provisions of law governing liability for damage and exhibiting differences depending on the basis for liability (e.g. with regard to unlawfulness – Article 6 PCA or Article 101 TFEU). The conditions include unlawfulness understood as the feature of the event causing damage and circumstances related to the principle of liability – here: fault.

Considering the advanced level of organization and functioning of undertakings like companies, when compared with partnerships or sole proprietorship, in the context of determining fault, the analysis in this paper concerns the condition of fault of an undertaking operating as a limited liability company or a joint-stock company. The term ‘firm’ is also used in this paper as synonymous to an undertaking operating as a legal entity (a company).

In addition to the analysis of the legal doctrine, I will refer to the case of interchange fees⁶, which makes it possible to verify the adopted interpretations in the context of efficiency of private enforcement (action for damages resulting from an infringement of competition law).

II. Fault – the meaning of the notion in the field of tort liability

The term fault consists of a subjective component (psychological attitude of the perpetrator to the act – meaning prevailing in criminal law) or negligence (failure to exercise due diligence) and objective component i.e. unlawfulness (conduct contrary to commonly binding law).

In the context of civil-law relations, in the overwhelming majority of cases the subjective component of fault takes the form of negligence that consists of the failure to exercise due diligence. The normative theory of fault adopted in civil law objectifies the criteria of negligence, which is derived not only from the applicable provisions (Article 353 PCC), but also from evidentiary reasons (Banaszczyk, 2008, p. 1215). Making the criterion of due diligence objective (applying an abstract measure), which manifests itself in disregarding the actual personal features of the perpetrator, makes it easier to prove fault.

⁶ Damages action of individual undertakings for infringing Article 6 PCA and Article 101 TFEU by joint determination of the interchange fee rates by banks and card organisations MasterCard and VISA (a suit was lodged with the Regional Court in Warsaw in April 2018 based on the CJEU judgment of 11 September 2014, Case C-382/12 *MasterCard and others v Commission*, ECLI:EU:C:2014:2201).

The model of due diligence (Article 355 PCC) does not need to be the same in every case, as it follows from Article 355 PCC that a debtor is obliged to exercise due diligence that is generally required in relations of a given type. This facilitates an assessment that takes into consideration the conduct of the perpetrator under strictly defined, specific conditions. The measure of due diligence defined in Article 355 PCC is termed as ‘ordinary’, or ‘normal’ diligence (Okolski et al., 2005, p. 497). This type of diligence is exercised in relationship to a given type, which means that it is possible to formulate a differentiation of the diligence standard due to the differences that exist between individual relationships.

An increased measure of due diligence with respect to commercial relationships between undertakings (Article 355 § 2 PCC),⁷ as well as officers of companies (Article 483 § 2 of the Code of Commercial Companies and Partnerships⁸) (Okolski et al., 2005, p. 497), constitute examples that modify the ordinary (general) standard of due diligence. The doctrine of law assumes that the measure of diligence in such relationships is tightened when compared to the normal measure of diligence, due to the higher requirements that a debtor must comply with. These requirements are twofold: 1) they must have a relevant level of education and 2) a relevant level of qualifications arising from practice (Okolski et al., 2005, p. 186).

III. Corporate – organizational – anonymous fault

The concept of fault discussed above should be referred to the fault of a company as the perpetrator of the infringement, i.e. the fault of a legal entity, as per Article 416 PCC (Machnikowski, 2009, p. 416). If damage is caused by a legal entity – a company, we then assume that the wrongful act was committed by a person (or persons) holding an office in the legal entity. In the case of companies, due to the division of rights and duties within the organizational structure, the body whose fault will be most often analysed, is the management board (Article 201 of the Code of Commercial Companies and Partnerships, hereinafter: CCCP – applicable to Polish limited liability companies (PL: *spółka z o.o.*) and Article 368 CCCP – applicable to Polish joint-

⁷ In line with Article 355 § 2 PPC: ‘Due diligence of the debtor within the conducted business activity shall be determined taking into account the professional character of this activity’.

⁸ Act of 15 September 2000 – Code of Commercial Companies and Partnerships (consolidated text: Journal of Laws 2019, item 505; hereinafter: CCCP).

stock companies (PL: *spółka akcyjna*).⁹ Due to the organizational structure of companies that is separate from other legal entities, and the standards (rules) of corporate governance applied to them,¹⁰ the notions of fault of a legal entity and corporate fault will be used interchangeably in this paper.

When comparing the fault of a natural person and a legal entity – its body (management board), it becomes clear that several problems appear at the outset of analysing the fault of a legal entity that do not appear when analysing the fault of natural persons.

The first problem is related to the fact that multiple bodies exist within the organizational structure of a legal entity, and they often include multiple decision-makers, often via a majority vote, and in such a manner that makes it impossible to determine the positions of an individual member or their ultimate participation in making a given decision (Machnikowski, 2009, p. 417). Another problem is of wider significance, being a consequence of the difficulties that arise from the first one, namely the notion of anonymous fault, organizational fault, in the area of tort liability of legal entities.

In the event a company is represented by one person, the matter becomes rather simple: the damage is caused by improper conduct of one person alone. The matter becomes complicated when the causal conduct took the form of a joint action of multiple members of the bodies, where not all of them were at fault, or a joint action of two or more bodies at the given legal entity. In such a situation, it must be decided whether the possibility of charging some members of these bodies determines the fault of the legal entity. Some commentators assume that if more than one body participates in committing the act that has caused damage (the decision of the management board was approved by the supervisory board or by the owner body), fault of even one of those bodies constitutes fault of the legal entity. In the case of a collective body, we can talk about fault if it can be assigned to at least one of its members or a member that did not participate in that body but knew about it and could have prevented it (Machnikowski, 2009, p. 417).

⁹ This, obviously, does not exclude fault of other bodies, i.e. the supervisory board or general meeting, yet due to the primary role of the management board – managing the affairs of the company and representing it towards third parties – the management board expresses the intent of the company in external relations.

¹⁰ While discussing the measure of diligence of companies, one should bear *soft-law* regulations in mind – corporate governance principles concerning primarily public companies, expressed or codified in a collection entitled ‘Good Practices of Companies Listed on the Warsaw Stock Exchange’. The principles of corporate governance (supervision) were first written down in 2002 in the form of a codified collection adopted by the bodies of the Warsaw Stock Exchange as the so-called Good Practices in Public Companies. The current version is available at: https://www.gpw.pl/pub/GPW/files/PDF/GPW_1015_17_DOBRE_Practices_v2.pdf (19.12.2019).

The position presented above is accurate. It is supported by a normative – civil-law-based theory of fault, and the associated increased measure of diligence applied to legal entities, as well as the consideration of the legal balance of entities – the injured party and the perpetrator of the damage. If the party injured by a tort (wrongful act) (caused by a company) were to be required to prove the fault of each of the members of a collective body, it would be practically impossible to prove such fault. The organizational structure of a company towards third parties in its external aspect is limited to the knowledge of the legal framework under which it operates,¹¹ and to non-confidential information about the company, which is publicly available. On the other hand, the internal, actual division of the individual decision-making powers among the individual members of the collective body is unknown to third parties/entities.

The issue of interchange fees is an excellent example illustrating the significant difficulties in proving fault. Given the structure of the organization and the internal division of competences in banks or international card organisations¹² as well as the duration of the infringement,¹³ it is excessive to impose on the injured trader (e.g. retailer – card merchant) the obligation to prove the fault of each body or each individual member of the body of the defendants (banks and card organizations). The principles of effectiveness and equivalence of EU legislation, expressed in Articles 4 and 11 of the Damages Directive, obligates Member States to such implementation as to make sure that the enforcement of the damages action is not unduly difficult or impossible.¹⁴

Moreover, the high level of organization of the company as a professional market participant, implies higher expectations of the company's environment as to the compliance of its operations with the law and the prudence requirements. These requirements are formulated towards the organization – the legal entity – without taking into account the individual features of the persons who manage the company. For these reasons, when it comes to legal entities, no account is taken of the so-called 'state of mind' – the mental attitude of the party that caused damage or the issue of sanity of the natural persons that comprise the given body.

The second important issue related to the fault of legal entities is the notion of the so-called 'anonymous fault'. In terms of tort liability of legal entities, in practice we do not often make individual determinations of fault; rather, we stop

¹¹ First of all, the provisions of the Polish Code of Commercial Companies and Partnerships.

¹² Acting as companies and within capital groups.

¹³ Reaching an agreement between trusted organizations and banks on determining interchange fee rates together took many years.

¹⁴ See motive 11 of the Damages Directive, invoked in section V of this paper.

at establishing the so-called anonymous fault, that is, at the determination of the culpable perpetration of an unnamed person from a given group (Machnikowski, 2009, p. 417; Dąbrowa, 1970, p. 550). Such a finding is sufficient to assign liability to a legal entity. However, it introduces an element of objectification of this liability. Thus justification for it is sought in the broadly understood elements of unlawfulness, not fault understood from the subjective point of view of the party who caused the damage directly (disregarding all or any personal features of the perpetrator – as the perpetrator remains unnamed) (Machnikowski, 2009, p. 417; Głowacka, 2016, p. 25).

In the context of the analysis of Article 416 PCC, some commentators emphasized that the concept embodied in it has never found much application in practice, as evidenced by the relatively small number of rulings issued on its basis, with the courts themselves invoking Article 415 PCC, disregarding the notion of the fault of a body of a legal entity, thus reducing the ‘fault’ of a legal entity to the unlawfulness of conduct related to the tasks it was bound to perform (Safjan, 1994, p. 193–194). The notion of liability of a legal entity mentioned by Safjan is based on the so-called ‘anonymous fault’. It makes it possible to assign the fault of a specified legal entity (company) on the basis of the establishment of improper conduct (unlawfulness of acting) of undefined natural persons operating within the given organizational structure.

The concept of objectifying the liability of legal entities (companies) proposed by Safjan, and stopping at establishing that the act was unlawful and deciding not to charge individual members of the company’s governing bodies, is approved in legal theory and case law,¹⁵ but it goes beyond the literal wording of Article 416 PCC (Safjan, 1994, p. 193–193; Dąbrowska, 1970, p. 12; Machnikowski, 2009, p. 417).

Regarding anonymous fault, two important problems must be discussed: 1) the issue of determining fault if it is not possible to establish the causing act of the legal entity’s body, 2) cases of causing damage as a result of defective organization of the legal entity or irregularities in the operation of the legal entity that cannot be attributed to a specific person acting as a body (Machnikowski, 2009, p. 417; Dąbrowa, 1970, p. 550).

In these situations, commentators (Machnikowski, 2009, p. 417; Safjan, 1994, p. 193–194) and the case law¹⁶ use the terms: ‘organizational fault’ or ‘nameless fault’, though in reality there is no fault component in them, understood as

¹⁵ See: judgment of the Supreme Court dated 10 July 1998, ref. no I CKN 786/97, PiM 1999, No 3 p. 133; judgment of the Supreme Court dated 11 May 2005, ref. no III CK 652/04, Legalis; judgment of the Court of Appeal in Kraków dated 24 October 2013, ref. no I ACa 839/13, Legalis; judgment of the Court of Appeal in Szczecin dated 21 October 2008, ref. no III APa 11/08, Legalis.

¹⁶ See: *ibidem*.

an individual charge. Attention is drawn to the fact that, in general, the link between negligence among the management and the supervision of the entity and the defective functioning of the legal entity is too distant to warrant such an allegation, and yet it seems appropriate to hold the legal entity liable. Compensatory liability here is then objective.

The academic literature notices important practical considerations for this concept with no clear legal grounds for such liability (Machnikowski, 2009, p. 418). Article 416 PCC clearly indicates “through a fault on the part of its body”. Moreover, the theory of law mentions that objectification of liability of legal entities is related to the risk of simplifications in determining the perpetration and unlawfulness of conduct. The fact that it is not necessary to charge individuals may result in abandoning any closer attempts to analyse the cause of the damage. Here it can be argued that the causal link is to take place between the damage and the act of the legal entity (unlawfulness). Fault is a ‘product of unlawfulness’ (Szpunar, 1947, p. 112; Sośniak, 1959, p. 78), it is an assessment of unlawful conduct, and there is no causal relation to the damage.

Ultimately, the commentators (Machnikowski, 2009, p. 418; Safjan, 1994, p. 193–194) rightly assume that the tendency in legal practice (case law) to objectify the liability of legal entities, stopping at establishing the unlawfulness of the act, without making an attempt to charge individuals – members of the bodies of a legal entity, corresponds to the requirements posed by modern trade and market conditions. “In spite of all the doubts that are related to the acceptance of the notion of anonymous fault, it has one fundamental advantage – it makes it possible to enforce financial liability for conduct of legal entities that is improper and causes damage to others, undertaken outside the sphere of contractual obligations” (Głowacka, 2016, p. 34; Śmieja, 2009, p. 439).

The concept of anonymous (organizational) fault developed in the theory of law and case law under Articles 415 and 416 PCC is correct. Its compatibility with the reality of the modern market, and commercial relationships on it, is visible in the area of infringements of competition law.

The Act on Claims, in its Article 3, establishes the liability of the perpetrator of the infringement on the basis of fault. However, it does not specify the form of fault – and therefore it may be both intentional, as in the case of cartels (Stawicki, 2016), or unintentional (negligence – failure to exercise due diligence). The German equivalent of the Act on Claims,¹⁷ in its Article 33a, explicitly mentions two forms of fault ‘[...] intentionally or negligently [...]’.

¹⁷ Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, *Federal Law Gazette* (Bundesgesetzblatt, BGBl.) 2005, Part. I, 1954-196 – last amended by Article 10(9) of the Act of 30 October 2017.

Competition law infringements are defined in Articles 6 and 9 PCA and these legal provisions are not new. They do not express any potential ‘market conduct’ that would be unknown to Polish undertakings. The objective features of the acts infringing competition law are so specific and definitive in their manifestations that they require conscious action on the side of the participants. The awareness of the participants (a component of fault in the subjective sense) includes at least the potential effects of the actions taken. While interpreting the increased measure of diligence of management board members, it is assumed that what is meant is the ‘diligence based on conscientiousness and the required level of expertise necessary to perform a given function. This includes, command of organizational and financial processes as well as managing human resources and knowledge of the applicable law and its consequences in terms of business operations’ (Okolski et al., 2005, p. 502; Kidyba, 2013; Wajda, 2009, p. 186–188; Błaszczuk, 2011, p. 259–262; Sołtysiński et al., 2008, p. 1907). Knowing legal regulations governing the activities of the company, including those that restrict them, is the primary duty of the management board and it is necessary in order for it to perform its functions properly within the company. Professional market participants cannot hide behind ignorance or unawareness of the law affecting them. Imposing a burden of proof of the state of mind of individual members of the management board on an injured person, in the event of damage arising from infringing competition law, which is often continuous in nature,¹⁸ is an impossible task for an injured person.

IV. The standard of fault in private enforcement of U.S. antitrust law

Basically, the same meaning of fault as it is understood under Polish Civil Code¹⁹ is assumed by the U.S. case law and theory of law in the area of antitrust. American antitrust case law imposes on plaintiffs the burden of the defendant’s specific intent under Section 2 of the Sherman Act²⁰ and lesser burden of general intent under Section 1 of the Sherman Act. Section 1 of the Sherman Act generally refers to conspiracy agreements and Section 2 to abuse of a dominant position (monopolization). The legal standard of general intent under Section 1 means that the plaintiff generally must demonstrate only that

¹⁸ Joint setting of interchange fee rates by the MasterCard and VISA card organizations and banks was of a continuous nature.

¹⁹ See: section II and III of this paper.

²⁰ Sherman Antitrust Act of 1890: An Act to protect trade and commerce against unlawful restraints and monopolies (15 U.S.C. §§ 1–38).

the defendant intended to engage in the conduct that is asserted to violate the law,²¹ not to engage in the conduct for a particular reason or with particular knowledge (e.g. to harm the victim). General intent is linked to negligence.

The 'negligence standard' holds the defendant liable if he fails to take care, when the burden of taking care is less than expected incremental losses.²² To sum up 'general intent' – the negligence standard in U.S. antitrust law has in essence a similar meaning to the notion of negligence under Polish civil law and more broadly European – Member States' civil laws (the failure to exercise due diligence).

Under Section 2, plaintiffs must produce evidence that is consistent with a specific intent to monopolize, in the sense that the overwhelming – perhaps the sole – purpose of the defendants is to reduce competition (harm competition). The plaintiff must prove that the defendant acted solely or primarily out of intent to gain or maintain monopoly power (Cass and Hylton, 2001, p. 16). The 'specific intent' standard constrains courts from penalizing a dominant firm when its conduct involves a mixture of potentially pro-consumer and pro-competition as well as competition restricting actions. The specific intent standard can be compared to intentionality under Polish and European – Member States' civil laws.

The term 'specific intent' is not synonymous with subjective intent, which has the same meaning as the European notion of intentionality under criminal law (the state does mind). The 'general' and 'specific' intent constitute the inquiry conducted on the basis of objective evidence, respecting the necessary consequences of actions. Therefore, it can be said that the concept of fault in U.S. antitrust law is consistent with the normative theory of fault adopted by Polish and other EU Member States' civil laws. It objectifies the criteria of negligence or intent as a form of fault, which is derived not only from the applicable law but also from evidentiary reasons. Rather than asking for direct evidence of what the defendant had in mind, the objective approach asks what can be inferred as a state of mind reasonably attributable to the defendant in light of his conduct (Cass and Hylton, 2001, p. 5). That is the reasoning pattern applied in tort cases when evaluating fault under the Polish Civil Code.

The American approach to subjective intent in antitrust law reflects the real, insurmountable obstacles for the plaintiff in successfully plead the case.

²¹ It requires proof merely of the intent to carry out the conduct set forth in the complaint – defendant knew that he was taking a particular action, not that he did so with the purpose of bringing about a particular (undesirable) result.

²² The negligence standard is often referred to as the Hand formula, since Judge Learned Hand was the first to state it explicitly in a court opinion. See: *United States v Carroll Towing Co*, 159 F.2d.169 (2d. Cir. 1947).

First, it is difficult to obtain reliable evidence of subjective intent for a firm's business practices. The problem is not the well understood point that entities such as companies, as distinct from individuals, cannot form 'intent' (Shepsle, 1991, p. 239). This point is true for firms and groups, therefore it is useful to treat a group activity as purposive in many settings (Cass and Hylton, 2001, p. 17). Comparing a firm to a group of people with diverging internal interests, American commentators reasonably assume that various individuals within a firm share one/united common interest in profit – seeking business that is the pursuit of making money. The problem, however, is that in the pursuit of that purpose, the comments made by individuals within the firm can be misleading if taken at face value as evidence of corporate intent, given the common practice of speaking in the language of war or of sports contests (Posner, 1976, p. 190).

Second, subjective intent evidence is often relatively of modest value. Where there is a real intent to do something illegal, well-advised firms are unlikely to provide much in the way of helpful evidence. Lawyers will routinely advise clients not to leave in their files any memoranda or statements suggesting a desire to eliminate competitors²³. If antitrust plaintiffs were required to prove subjective intent through reference to statements that provided clear evidence of it, it would be an extraordinary case for any firm to retain 'smoking gun' memoranda in their files (Posner, 1976, p. 189–190).

Therefore, general and specific intent is based on an objective approach. Under the objective approach, as indicated above, the court infers specific intent on the basis of evidence indicating the absence of credible (not plausible) efficiency justifications for the monopolist conduct.²⁴ It has to be proved by the defendant.

The U.S. approach to a firm's intent is analogous to my position regarding anonymous (organizational; corporate) fault.²⁵ A professional market participant cannot hide behind ignorance or unawareness of the law affecting them.

It has to be emphasised that the above described definitions and distinctions between the general and specific intent standard in American antitrust law have been controversial, particularly in monopolization cases. A growing number of scholars in the law and economics area have suggested that intent should play no role at all in antitrust analysis (Cass and Hylton, 2001, p. 37; Posner, 1976, p. 190; Fisher, 1988, p. 969–70; McGowan, 1999, p. 485, 513; Quinn,

²³ See: *Barry Wright Corp. v ITT Grinnell Corp.*, 724 F. 2d. 227, 232, (1 Cir. 1983); *A.A. Poultry Farms v Rose Acre Farms*, 881 F.2d. 1396, 1402 (1t Cir 1989).

²⁴ See: *Aspen Skiing Co. v Aspen Highlands Skiing Corp.* 472 U.S. 585 (1966); *Eastman Kodak v Image Tech. Servs.*, 504 U.S. 451 (1992).

²⁵ See: section III of this paper.

1990, p. 607),²⁶ which is the position that Judge Hand declared in the Alcoa²⁷ case that “no monopolist monopolizes unconscious of what he is doing”. A minority of antitrust commentators have argued, on the other extreme, that intent should be determined either wholly or in part by a subjective inquiry (Cass and Hylton, 2001, p. 37; Gifford, 1996, p. 1021–23; Wachs, 1999, p. 485, 498–99). The courts approach is in between, as mentioned above – the case law standards are general intent (negligence) for conspiracy agreements and specific intent (intention) for abusing a dominant position cases.

V. The European approach to the condition of fault in private enforcement

In the context of the Damages Directive, fault as a condition for damage claims arising from the infringement of national or EU competition law was mentioned in motive 11 of the Damages Directive’s Preamble. The purpose of the Damages Directive – as formulated in this motive – imposes on the national courts applying national laws governing the fault condition for compensating damages – an obligation to stay within limits of acceptability set by EU law. The limits of the principles of effectiveness and equivalence and the requirement of adequate judicial protection describe what kind of national law may be applied to an EU law based case. The limits are to be understood in a result oriented way (*effect utile* of the EU law). National law that does not fit the limits should be interpreted or disapplied, so that achieving the aims of EU law is no longer threatened (Havu, 2014, p. 6).

Effect utile of EU competition law has, as indicated above, an important impact on the fault condition in private enforcement of competition law. The Damages Directive is not the only source of law concerning both the fault condition as well as other conditions of liability for competition law infringements. According to Article 3(1) Regulation 1/2003²⁸, Articles 101 and 102 of TFUE are directly applied by national courts in cases for damages claims arising from infringements of EU law solely or alongside with infringements of domestic competition law.

²⁶ On the case against intent see: *A.A. Poultry Farms, Inc. v Rose-Acre Farm, Inc.*, 881 F.2d 1396, 1402 (7 Cir. 1989); *Barry Wright Corp. v ITT Grinnel Corp.*, 724 F.2d 227,232 (1 Cir. 1983).

²⁷ *United States v Aluminum Co. Of America*, 148 F.2d 416, 432 (2d Cir. 1945).

²⁸ Regulation of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1–25.

Regarding motive 10 of the Damages Directive, Article 1(1) read together with Article 2(1) and (3) of the Damages Directive, establish that the scope of the Damages Directive covers only damages claims arising from infringements of national competition law that predominantly pursue the same objectives as Articles 101 and 102 TFEU, and that are applied to the same case and in parallel to EU competition law pursuant to Article 3(1) Regulation No 1/2003. Advocate General Julianne Kokott aptly summarized this issue in the *Cogeco Communications Inc.* case²⁹ “Considering Article 1(1) together with Article 2(1) and (3), it therefore follows that the material scope of Directive 2014/104 is restricted to disputes in relation to claims for damages that are – at any rate also – based on infringements of EU antitrust law. Conversely, claims based exclusively on infringements of national competition law are not covered by the material scope of the Directive. This is explained by the objective of the Directive, which, as stated in Article 1 thereof, seeks to ensure equivalent protection in the internal market for everyone. A sufficient relationship to the internal market is, however, present only in cases in which the ‘inter-State clause’ of Article 101 TFEU or Article 102 TFEU is satisfied, that is to say, in cases in which – least potentially - an appreciable effect on trade between Member States can be assumed”.

The Polish Act on Claims transposing the Damages Directive to domestic law went further than the scope of the said Directive. It covers both damages claims arising from an infringement of Articles 101 and 102 TFEU or from an infringement of Articles 6 and 9 of the PCA. The latter two provisions of Polish competition law have almost the same purpose and meaning as Articles 101 and 102 TFEU. However, they can refer only to domestic cases (with no impact on trade among Member States).

The result is that, on the one hand, when it comes to Poland – we do not have – or at least should not have – a divergence in defining, understanding and application of the conditions for damages liability whatever the legal basis of the infringement is (Articles 6 or 9 PCA or Articles 101 and 102 TFEU). On the other hand, the conditions of liability for these two types of delicts (torts arising from EU or domestic competition law infringements) could be understood differently in comparison to classic tort damages claims. Taking into consideration CJEU case law regarding the causal link in competition law cases, it is obvious that the causal link in EU competition law goes much further³⁰ than the typical causal relationship that has to be proved in domestic,

²⁹ Opinion of AG Kokott delivered on 17 January 2019, Case C-637/17 *Cogeco Communications Inc. v Sport TV Portugal, SA, Controlinvest-SGPS, SA and NOS-SGPS, SA*, ECLI:EU:C:2019:32, para. 58.

³⁰ See: opinion of AG Kokott delivered on 9 July 2019, Case C-435/18 *Otis Gesellschaft m.b.H. and others v Land Oberösterreich and others*, ECLI:EU:C:2019:651; opinion of AG

classic tort cases. However, this does not seem to be a problematic issue when evaluated from the objective perspective rather than the dogmatic one. The compensation and deterrent function of damages claims arising from an EU competition law infringement is connected with the interests of the internal market (its proper functioning and development). The function of EU competition law – protection of the internal market – is much broader, with multiple interested participants, than the function of damages, which is to compensate damage between only two interested participants (injured person and infringer).

Tort (delict – unlawful act) is a common legal institution in EU and U.S. law. Law relating to torts in both legal systems (European and American) understands fault as a condition for a damages claim in a broad meaning that encompasses both intention and negligence. The notions of negligence and intention have in essence the same meaning in European and U.S. law.

However, we currently encounter slightly different requirements regarding fault as a condition for damage claims in different Member States. The Ashurst study (2004)³¹ indicated that in many Member States fault was a condition for awarding compensation in non-contractual damages claims (torts), and in several Member States, fault had to be separately proven by the plaintiff.³² In Austria, Estonia, Germany, Hungary, Italy, Lithuania and Slovenia fault is reputedly presumed.

Diverging approaches to the fault condition exist in French and German law. Article 1240 of the French Code Civil requires the claimant to prove that fault on the part of the defendant caused damage. Under French tort law, the infringement of any legal provision, whether administrative, civil or criminal, constitutes fault for the purposes of Article 1240. Therefore, any infringement of French competition law can be considered to satisfy this condition. The fault has an objective sense – satisfied by illegality (Ashton, 2018) and is irrebutably presumed.³³ According to the German Antitrust Law (GBW), only in the case of a cartel is the fault rebuttably presumed. The general rule expressed in § 33a GBW states as follows: ‘Whoever intentionally or negligently commits an infringement pursuant to § 33 (1) shall be liable for any damages arising from the infringement’. Under German law, fault has a ‘subjective’ meaning

Kokott delivered on 30 January 2014, C-552/12 *Kone AG and Others v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:45.

³¹ Waelbroeck et al. (2004). *Study on the conditions of claims for damages in case of infringement of EC competition rules*, prepared for the European Commission, Comparative report, Ashurst.

³² According to the Ashurst study, the fault in relations to infringements of competition law is required in Austria, Denmark, Estonia, Finland, Germany, Greece, Italy, Poland, Portugal and Spain.

³³ Ashurst study, p. 51.

in the sense that it is distinguished from the objective condition of liability which is illegality (unlawfulness).

When it comes to EU law referring directly to the fault condition in damages claims arising from the infringement of competition law – it is non-existent. EU law does not mention directly anything on fault or requiring fault as a condition for awarding compensation,³⁴ apart from motive 11 of the Damages Directive. Some authors suggest that there is no fault requirement in EU law applicable to competition restrictions' damages actions, which means that liability is strict (Monti, 2010, p. 294; Komninos, 2009, p. 397–98). Moreover, some commentators assert or imply that national law may not require fault either (Milutinovic, 2007, p. 729–730 and 2010, p. 113–116; Komninos, 2008, p. 194–195, Van Bael-Bellis, 2010, p. 1235).³⁵

Taking into consideration the purpose of the Damages Directive, and the direct delegation to national laws to provide and evaluate further conditions i.e. the culpability condition (fault – recital 11 of the Damages Directive), it would be a step too far to say that the fault requirement is not compatible with the limits of acceptability set for national law by EU law (similarly, Havu, 2014, p. 9). The issue of fault is absent in the core wording of the Damages Directive, but it was discussed by the Commission during the works on the Directive.³⁶ The White Paper considered the inclusion of rules on a rebuttable presumption of fault. According to that proposal, once the claimant had proven an infringement of EU competition law, the offender would be held liable unless able to show that the infringement was the result of a genuinely excusable error.³⁷ It is worth noting that genuinely excusable error (lack of fault) could never be present solely on the basis of ignorance of the law – an issue confirmed by EU case law, discussed below.

³⁴ CJEU judgments: of 20 September 2001, Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, ECLI:EU:C:2001:465; of 13 July 2006, joint Cases C-295/04 to C-298/04 *Vincenzo Manfredi and others v Lloyd Adriatico Assicurazioni SpA and Others*, ECLI:EU:C:2006:461; of 14 June 2011, Case C-360/09 *AG v Budeskartellamt*, ECLI:EU:C:2011:389; of 6 November 2012, Case C-199/11, *Europese Gemeenschap v Otis NV and Others*, ECLI:EU:C:2012:684; of 5 June 2014, Case C-557/12 *Kone & Others*, ECLI:EU:C:2014:1317.

³⁵ The author argues that after *Manfredi* it seems to be the case that national law cannot set out additional conditions for compensation. Hence, liability for competition infringement related damages may only be strict.

³⁶ Proposition concerning fault was included in the White Paper on damages actions for breach of EC antitrust rules in 2008 (White Paper on Damages Actions for breach of the EC antitrust rules COM (2008) 165 final – Brussels 2.4.2008). It was discussed before that in the Green Paper in 2005 (Green Paper on Damages Actions for breach of the EC antitrust rules COM (2005) 672, Brussels 19.12.2005).

³⁷ See White Paper *Supra* note, Section 2.4.; Working Document SEC (2008) 404, paras. 176–179.

Evaluation of what constitutes intentional or negligent infringement of competition law may be found in the Court of Justice case law on applying competition law prohibitions and fines for competition law infringements. This evaluation has not been focused on fault as a condition for awarding damages, but it seems appropriate to state that negligence and intention used as specific competition law concept, overlap with intention and negligence in infringing competition law when tort law raises the issue (Havu, 2014, p. 12).

Taking into consideration Articles 16 Regulation 1/2003, referring to cooperation with national courts and the uniform application of EU competition law, as well as *effect utile* of Articles 101 and 102 TFEU and motive 11 of the Damages Directive, the case law of the CJEU is binding on national courts (in both follow-on and stand-alone actions). Therefore, judgments of the CJEU evaluating the fault condition in cases where infringements of competition law were sanctioned by fines are of crucial importance for defining the EU approach to the fault condition in competition damages cases.

The Court of Justice specified in *Brasserie du Pecheur*³⁸ that Union law, in this regard, confers a right to claim for compensation if the breach of law in question is sufficiently serious. The Court held further that the concept of fault does not have the same meaning in all national legal systems; its application in any sense in addition to uniform Union rule would create more problems than it would solve (Ashton, 2018). The Court held as follows: '[...] the obligation to make reparation for loss or damage caused to individuals cannot however depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order'.

The *Brasserie du Pecheur* case cannot be applied without reservations in damages cases arising from competition law infringements as it refers to damages claims for a violation by a Member State of a Treaty obligation. However, the case law of the CJEU, invoked by the Damages Directive as a benchmark to evaluate conditions for damages liability, goes beyond the scope of competition cases. More distant to competition cases judgements (case law concerning other fields) may include relevant reasoning and further guidance on fault as a concept of EU law as well as on combining EU and domestic law in an appropriate way (Havu, 2019, p. 189, 191).

³⁸ CJEU judgment of 5 March 1996, Cases C-46/93 and 49/93 *Brasserie du Pecheur SA v Bundesrepublik Deutschland and The Quenn v Secretary of State for Transport*, ex parte: *Factortame Ltd and others*, ECLI:EU:C:1996:79.

Case law on fines, as mentioned above, constitutes an appropriate comparison and it even contains instances where the limit between negligence and intention is considered irrelevant.³⁹

In *General Motors Continental NV*⁴⁰ advocate general defined negligent infringement of competition law – as opposed to intentional infringement – stating that ‘the concept of negligence must be applied where the author of the infringement, although acting without any intention to perform an unlawful act, has not seen the consequences of his action in circumstances where a person who is normally informed and sufficiently attentive could not have failed to foresee them’ (this is a due diligence standard defining negligence under Polish⁴¹ and other European – Member States laws).

When it comes to intention, in case *Herlitz AG v Commission*,⁴² the General Court stated that for an infringement of competition rules ‘to be considered to have been committed intentionally, it is not necessary for the undertaking to have been aware that it was infringing a prohibition laid down by those rules; it is sufficient that it was aware that the object of the offending conduct was to restrict competition’ – it is exactly the same understanding as the U.S. specific intent standard. Furthermore, the General Court noted that an undertaking could not have been mistaken about the implications of a contractual clause that had clear wording and whose object was to restrict, and even prohibit, exports, and thereby to partition the market. Thus, the undertaking in question had to ‘be considered to have acted intentionally’ (Havu, 2014, p. 14).

In *Schenker*, the CJEU was considering whether erroneous advice given by a legal advisor experienced in competition law matters, and relying on an evaluation presented by the national competition authority, exculpates undertaking. The Court of Justice was not moved by the undertaking reasons for erring as to lawfulness and recalled earlier case law illustrating that ignorance of competition law does not matter if the relevant undertaking cannot have been unaware of the anticompetitive nature of the conduct.⁴³ The Court of Justice stated that ‘the fact that the undertaking concerned has characterised 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’.⁴⁴

³⁹ CJEU judgment of 14 October 2010, Case C-280/08 *P. Deutsche Telekom AG v Commission*, ECLI:EU:C:2010:603, paras. 123–132.

⁴⁰ CJEU judgment of 13 November 1975, Case C-26/75 *General Motors Continental NV*, ECLI:EU:C:1975:150.

⁴¹ See section II of this paper.

⁴² CFI judgment of 14 July 1994, Case T-66/92 *Herlitz AG v Commission*, ECLI:EU:T:1994:84.

⁴³ CJEU judgment of 18 June 2013, Case C – 681/11 *Bundeswettbewerbshilfebehörde and Bundeskartellamt v Schenker & Co. AG and others*, ECLI:EU:C:2013:404.

⁴⁴ See C – 681/11 *Schenker*, paras. 36–37.

The objective nature of the liability of undertakings for competition law infringements was established by the CJEU in two cases – *Pioneer*⁴⁵ and *Volkswagen*.⁴⁶ In both cases, in which the Commission imposed fines, the penalised companies claimed that the decision to engage in anti-competitive practices was taken by the employees of those companies, without the knowledge of the managing officers. In the *Pioneer* case, the CJEU recognised that in order for the Commission to apply the fine for the competition law infringement, it is not necessary to prove the action nor the knowledge of the partners or the main managers of the undertaking. It is sufficient that an action was performed by a person who was authorized to act on behalf of the undertaking.⁴⁷ In the *Volkswagen* case, the CJEU went even further by stating that the first instance court had applied the law correctly, by finding that the infringement of competition law was intentional in nature, despite the fact that the persons who behaved improperly within the undertaking or were responsible for the defective organization of the business were not identified.⁴⁸ Arguing its position regarding fault, the CJEU pointed out that, first, the imposition of fines by the Commission in the event of an intentional or through negligence violation, are not of a criminal law nature.⁴⁹ Secondly, if the view of the appellant was to be upheld, this would impinge seriously on the effectiveness of Community competition law.⁵⁰

What can be implied clearly from the CJEU case law are the following features of a fault standard:

- 1) there is no need to individualise the fault of the personnel (managers) of the undertaking – which is the essence of the anonymous, organizational concept of fault;
- 2) ignorance of the law does not exclude undertakings from liability – which is the essence of the objective approach to the negligence standard (increased measure of due diligence when it comes to undertakings and officers of companies);
- 3) intentionality is defined by the object of competition law protection – the purpose of an undertaking’s conduct has to be to harm competition and it is derived from the objective patterns of conduct of a reasonable and foreseeable undertaking.

⁴⁵ ECJ judgment of 7 June 1983 in joined cases C-100-103/80 *SA Musique Diffusion Francaise and others v Commission*, ECLI:EU:C:1983:158.

⁴⁶ CJEU judgment of 18 September 2003, Case C-338/00 *Volkswagen AG v Commission*, ECLI: EU:C:2003:473.

⁴⁷ *Ibidem*, para. 98.

⁴⁸ *Ibidem*.

⁴⁹ *Ibidem*, para. 96.

⁵⁰ *Ibidem*, para. 97.

Keeping in mind the above CJEU case law referring to the fault condition and the most recent CJEU judgments and opinions (particularly *Skanska* and *Otis*⁵¹), the risk of diverging legal standards (EU versus domestic) concerning the fault condition is to some extent resolved.

In both ‘types of torts’ (classic delict – unlawful act versus competition law infringement), the conditions for liability are the same: infringer, unlawful act, damage, casual link between damage and unlawful act and fault. What can differ, as mentioned earlier, is their understanding under domestic law and EU competition law.

The general conclusion drawn from the recent CJEU case law is as follows: for cases covered by Regulation 1/2003 and the Damages Directive, (constitutive, substantial) conditions of damage claims are to be evaluated in the light of Articles 101 or 102 TFEU (by its direct application – *effet utile*) and the CJEU case law adopted under these articles.

In the *Skanska* case,⁵² AG Wahl recognized that the interplay between EU law and the domestic laws of the Member States in regulating claims for antitrust damages based on infringements of EU competition law is the fundamental aspect of private enforcement of EU competition law. The principles governing private liability for a breach of EU competition law are to a large extent based on the case law of the CJEU. Nevertheless, private enforcement of EU competition law also relies on domestic private law and procedural rules.⁵³ In this respect, he underlined that while the CJEU has set out a right to claim damages on the basis of Article 101 TFEU, it has thus far refrained from clearly defining the essential conditions of private liability. Moreover, it is clear that the procedural and substantive framework necessary to obtain damages before a court of law lies, as a matter of principle, within the realm of domestic law. As the CJEU has held in judgments delivered since *Courage* and *Manfredi*, in the absence of EU rules on the matter, Member

⁵¹ Opinion of AG Kokott delivered on 9 July 2019, Case C-435/18 *Otis Gesellschaft m.b.H. and others v Land Oberösterreich and others*, ECLI:EU:C:2019:651; opinion of AG Wahl of 6 February 2019, Case C-724/17 *Vantaan kaupunki v Skanska Industrial Solutions Oy, NCC Industry Oy, Asfaltmix Oy (Skanska)*, ECLI:EU:C:2019:100 (hereinafter: *Skanska*)

⁵² Opinion of AG Wahl, *Skanska* and CJEU judgment of 14 March 2019, C-724/17 *Skanska*, ECLI:EU:C:2019:100.

⁵³ See paras. 22 and 26 of AG Wahl’s Opinion in *Skanska* “Generally speaking, as far as extra-contractual liability in European legal systems is concerned, a party may, through a private law action for damages, seek compensation for harm caused by a particular conduct or action. However, depending on the legal system, the precise contours of such claims brought before courts of law are governed by strikingly different rules and principles. The different legal traditions among the EU Member States explain why divergences exist, inter alia, as regards the type of conduct that may give rise to liability (based for example on tort, delict, quasi-delict or strict liability); the scope of persons regarded as injured parties; causation; the persons that may be held liable for the alleged harm; and the categories of harm that may be compensated”.

States are to lay down the detailed rules governing the exercise of the right to claim compensation for harm resulting from a breach of Article 101 TFEU (or Article 102 TFEU). Member States are, however, to ensure that those domestic rules comply with the principles of equivalence and effectiveness. These domestic rules cannot be less favourable than those governing actions for breaches of similar rights conferred by domestic law, and that those rules do not render the exercise of rights conferred by EU law excessively difficult or practically impossible (as also directly expressed in motive 11 of the Damages Directive).⁵⁴

The CJEU upheld the AG Wahl's views referring to the full effectiveness of Article 101 TFEU when it comes to the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU (the question who is liable – is directly governed by EU law not domestic law).⁵⁵ Additionally, the CJEU agreed with the advocate general that private enforcement claims are an integral part of the system for the enforcement of EU competition rules, fulfilling two functions (compensation and deterrence).⁵⁶

However, the CJEU did not refer to AG Wahl reflections and considerations regarding the demarcation line between domestic and EU law when it comes to the constitutive conditions of damage claims arising from infringements of competition law.

The view of AG Wahl in the *Skanska* case, as to which law (EU or domestic) covers the conditions of liability resulting from infringements of EU competition law, was supported by AG Juliane Kokott in the *Otis* case.⁵⁷ She stressed that domestic law rules refer to detailed rules governing the exercise (execution) of the right to claim damages (answering the question: how damages should be awarded), whereas constitutive conditions, including appropriate legal basis of the right to claims, are directly defined by Article 101 TFEU (answering the question: should damages be awarded?). Therefore, according to her opinion, previously expressed in the *Kone* case,⁵⁸ the issue

⁵⁴ See Opinion of AG Wahl, C-724/17 *Skanska*, paras. 37–41.

⁵⁵ In *Skanska*, the Damages Directive could not be applied *ratione temporis* to the facts of the case.

⁵⁶ See paras. 28 and 45 respectively of the judgment in C-724/17 *Skanska*. AG Wahl underlined that in the context of EU competition law, actions for damages are intended to fulfill both functions: compensatory and deterrent. He also stressed that a right to claim compensation was not, however, established simply to ensure that harm caused by anticompetitive conduct is repaired. Rather, such a right was tied to the need to ensure the full effectiveness of EU competition law.

⁵⁷ See opinion of AG Kokott, C-435/18 *Otis*, paras. 44 and 45.

⁵⁸ CJ judgment of 5 June 2014, Case C-552/12, *Kone*, ECLI:EU:C:2014:1317 and AG Kokott's opinion in the *Kone* case.

of the causal relationship between the infringement and the damage belongs to the latter category, i.e. it is a substantial prerequisite of the right to claim damages (constitutive condition of this right). Consequently and consistently, the delegation to domestic law indicated in motive 11 of the Damages Directive “[...] Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive” refers to rules governing the execution (enforcement) of the right to claim damages, not the substantial meaning of the conditions.⁵⁹ Otherwise, if the legal criteria upon which national courts evaluate conditions of liability were different in different Member States, then the purpose of Article 101 TFEU would be jeopardized (it aims to grant a consistent framework to all undertakings operating on the internal market – a level playing field).

From the objective-oriented perspective, the above presented demarcation line between domestic law and EU law, referring to the conditions of liability, is clearly understandable and convincing. However, when it comes to the practical side of this exercise, the rules governing the enforcement of the right to claim damages are obscure when applied to conditions of liability. Relating them to the causal link, AG Kokott indicates that they refer to evidentiary rules (how much and what kind of evidence is required to prove the causal link).

Reflecting on the fault condition under Polish law (civil law), we do not find any particular, detailed rules governing this condition, also in the procedural area (evidence rules). The domestic law regarding torts simply says that whoever injured another by fault is liable to redress the damage (Article 415 PCC). All notions and concepts concerning fault described in the previous chapters of this paper⁶⁰ were and still are developed by the case law and academic literature. The law by itself – substantial and procedural – does not provide us with any further or detailed descriptions or requirements (what should be done to fulfill the fault condition). The evidence procedure does not differentiate standards and rules of proof between tort and other sorts of civil liability. Therefore, even though I do agree as to the merit with AGs Wahl and Kokott, I would not say that wording ‘other conditions for compensation under national law, such as imputability, adequacy or culpability’ refer to enforcement of the right to compensate. The wording states that these conditions of liability defined and applied as they are in domestic law will apply in private enforcement of competition law, as far as they do not contradict with the case law of the CJEU, the principles of effectiveness and

⁵⁹ See opinion of AG Kokkott, Case C-435/18 *Otis*, paras. 55, 56.

⁶⁰ See section II and III of this paper.

equivalence, the Damages Directive and full effectiveness of Articles 101 and 102 TFEU.

This issue is of the interpretation of the law, not its application. It works similarly as the issue how to interpret domestic law in conformity with EU law.⁶¹ As AG Kokott rightly observed in the *Cogeco* case, the principle of interpretation of national law in a manner consistent with EU law is limited by general principles of law (legal certainty and non-reactivity) and also cannot serve as the basis for a *contra legem* interpretation of national law.

The crucial distinction between private enforcement of EU competition law cases and ‘typical directive – national law conflict cases’ is that in the former the right to compensate (claim damages) arises directly from EU law (Articles 101 and 102 TFEU). The claimant relies directly on EU law and this difference allows, in my opinion, to overcome the ‘interpretation conflict’ with the domestic law. National courts can waive the application or ‘domestic evaluation’ of those conditions of liability which jeopardize the purpose of Articles 101 and 102 TFEU (*effect utile*) as defined in private enforcement by the CJEU case law and the principle of effectiveness.

Taking as an example the causal link, there would be some discussion as to what is the scope of this condition, because Polish civil law requires an adequate causal link in Article 361(1) PCC. It is narrower than the interpretation of the causal link established by the CJUE⁶². As aptly reflected by Havu (2017): ‘Damages and causation decisions by national courts may be too strict in a manner which contravenes principles of EU law or the Directive, but the challenge is that, in the current state of EU law, it is overwhelmingly difficult to pinpoint clear limits of acceptability for national courts findings’. The line of the case law defining the conditions of damages liability is vague and non-exhaustive (Havu, 2019, p. 191). However, national courts, obliged by Regulation 1/2003, Articles 101 and 102 TFEU and the Damages Directive, should follow the understanding of the causal link condition as it is established so far by the CJEU.

The same logic applies to the fault condition. As presented earlier, academic literature is divided on the fault condition standard. On one hand, it is argued that the fault condition is required in many jurisdictions and that Regulation 1/2003 requires fault – or at least negligence – to impose fines for anticompetitive conduct (Walle, 2013, p. 164–165; Monti, 2018, p. 47). On the other hand, it has been also argued that liability is strict (Komninos, 2008,

⁶¹ See CJEU judgment of 4 July 2006, Case C-212/04 *Konstantinos Adeneler and others v Ellinikos Organismos Galaktos* (ELOG), ECLI:EU:C:2006:443, paras. 108–113; CJEU judgment of 7 August 2018, Case C-122/17 *David Smith v Patrick Meade and others*, ECLI:EU:C:2018:631, paras. 37–45; opinion of AG Kokott in *Cogeco* case, para. 105.

⁶² Opinion of AG Kokott, Case C-435/18 *Otis*; Case C-552/12 *Kone*.

p. 194–197). There is not enough CJEU case law to establish the standard of fault or at least its precise scope, as we can do, to some extent, with the causal link issue after the *Kone* and *Otis* cases.⁶³ Keeping in mind, the above presented reasoning – according to which *effet utile* of Articles 101 and 102 TFEU, the principles of effectiveness of EU competition law and the case law should ‘prevail; in controversial cases with diverging meanings of conditions of liability – when it comes to fault – the notion of this condition is still open. However, basing on existing case law,⁶⁴ it drifts towards a strict liability standard.

V. Summary

Taking into account the objectives of the Damages Directive and the Polish Act on Claims implementing it, the case law of the CJEU, the objectives of competition law and the degree of organization of companies, an objective theory of fault of undertakings – offenders committing competition law infringements (corporate fault – anonymous, organizational fault) should be adopted. The condition of fault, understood in this way, should be applied in private enforcement cases. *De lege ferenda* consideration should be given to appropriate rewording of the content of Article 416 PCC, so that at least with respect to companies one could literally interpret the principle of objective *ex delicto* tort liability out of this provision.

In private enforcement cases, the fault condition should be interpreted primarily in the light of the principles of effectiveness and equivalence and full effects of EU competition law. Then the right to claim for damages arising from infringements of competition law will be executable and the deterrence aim will be achieved. The perspective of the aforementioned principles of EU law is essential because in any antitrust case the fault condition would be very difficult to prove for claimant because of information asymmetry and the market standing differences between the plaintiff and the defendant.⁶⁵ Claimants (especially customers or co-operators at lower level in the network) do not poses significant amounts of knowledge on the actions of the alleged infringer or about the alleged infringer’s knowledge of the relevant circumstances.

⁶³ *Ibidem*.

⁶⁴ Joint Cases C-295/04 to C-298/04 *Manfredi*; Case C-26/75 *General Motors Continental NV*; Case T-66/92 *Herlitz*; Case C – 681/11 *Schenker*; joined cases C-100-103/80 *SA Musique Diffusion Francaise*; Case C-338/00 *Volkswagen AG*.

⁶⁵ See Case C-453/99 *Courage*.

Interpretation and application of national law referring to the fault condition has to be open-ended. If, for example a national Polish court would stick to the narrow – subjective meaning of fault established under tort liability, and would require taught evidences of such a fault (defendants corporate documents⁶⁶), it would render claiming damages practically impossible or excessively difficult. Therefore, the only practically available evaluation of fault in such a cooperative infringement is to assume organizational, anonymous fault of the cooperating offenders.

The existing case law of the CJEU referring to the fault standard is closer to an objective fault standard. According to such an objective approach, the inquiry concerning fault stops at establishing the unlawfulness of the act and evaluation of this fact from the objective due diligence pattern, without attempting to file individualised charges against the members of the body of the legal entity. Member States' laws referring to the fault condition should be interpreted and applied with such an objective approach as defined above. Analysing the U.S. general and specific intent standard, it is clear that both these legal conditions do have objective meaning and are intertwined with the factual circumstances defining legality/unlawfulness of an act of unfair competition. They do not refer to the subjective side of the unlawful act but focus on objective, reasonable expectation towards company conduct in the light of competition law prohibitions.

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⁶⁶ See section III of this paper.

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