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The Violation of Consumer Interests as a Qualifying Element of Unfair Competition, and Its Legal Framework

ABSTRACT

This article examines the role of consumer interests as a qualifying element in the assessment of unfair competition under Georgian competition law. Although the Law of Georgia on Competition requires the simultaneous violation of business ethics, competitor interests, and consumer interests for conduct to be classified as unfair competition, this cumulative approach does not align with European Union standards or the jurisprudence of the Court of Justice of the European Union (CJEU). Through a comparative legal analysis of Georgian legislation, EU directives – particularly the Unfair Commercial Practices Directive (2005/29/EC) and leading CJEU case law, the article argues that unfair competition may exist even in the absence of harm to consumer interests. The study highlights inconsistencies in the Georgian legal framework, including the absence of a legal definition of “consumer”, and the narrow interpretation of “end user,” both of which hinder the effective assessment of market conduct. Drawing on Georgian Competition and Consumer Agency (GCCA) decisions and relevant EU practice, the article demonstrates the significance of the “average consumer” standard, and the broader concept of the “transactional decision” in evaluating the impact of deceptive or misleading conduct. It concludes that consumer harm should operate as an independent criterion aimed at safeguarding free consumer choice, while unfair competition should be assessed according to its broader effect on market integrity. The

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article recommends legislative refinement to harmonize Georgian law with EU standards, and to ensure a coherent and effective system for combating unfair competition.

Keywords: Unfair competition, consumer interests, consumer protection, average consumer, transactional decision, misleading practices, competition law, EU law approximation, unfair commercial practices, comparative advertising; Georgian competition law; CJEU case law.

I. Introduction

In today's economic reality, the effective enforcement of competition law is crucial for the full protection of free market principles. Economic growth naturally results in increased consumer demand, which, in turn, expands the supply of individual goods and services. This expansion provides additional momentum for intensifying competition among undertakings operating within specific goods or services markets.¹

An increase in the quality or intensity of competition may, in some cases, drive undertakings to engage in unfair market practices. Such unfair commercial activities are harmful not only to competitors and other undertakings operating in the market, but also to end users. The latter is reflected in the fact that unfair market practices influence consumers' economic behavior and, in some cases, may lead them to make decisions that are detrimental to their interests.²

Under Georgian competition legislation, the qualifying circumstances of an undertaking's market action are considered to be the behavior of a market participant, which may be expressed by the undertaking through the appropriation of the shape, packaging, or appearance of another undertaking's goods; the imitation of another's trademark, design, or product appearance; and similar actions. Alongside these prerequisites, the general part of Article 11³(2) of the Law of Georgia "On Competition" (hereinafter - the Law) also identifies harm to consumers as one of the criteria for determining unfair competition. Moreover, in the same article, the legislator emphasizes the interests of consumers when defining the specific elements of unfair competition, particularly in cases involving the creation of false impressions for consumers, or inducing them to take certain economic action.

¹ Liu and Li, 2025, 1176.

² Alexander, 2023, 332.

The above approach of the legislator demonstrates that the consumer is one of the key legal figures in the Law on Unfair Competition. Additionally, it is noteworthy that in Article 11³(2) of the Law, the legislator provides examples of acts constituting unfair competition, which do not represent an exhaustive list under the *Numerus Clausus* principle. This grants the executive body the discretion to assess actions not explicitly listed in the Law as unfair competition, and to impose appropriate legal liability on the undertaking.

Nevertheless, the Law overlooks the very concept of the consumer, and fails to define the meaning in which the term is used in Georgian competition law, particularly in the context of unfair competition. The aim of this paper is precisely to identify the characteristics and substantive aspects of this legal figure. Accordingly, the study seeks to define the elements and scope of the consumer concept within the framework of unfair competition law. To this end, the analysis draws on both Georgian and European best practices, as well as relevant scholarly approaches.

II. The Principle of Fair Competition

The legal doctrine of unfair competition is one of the fundamental instruments for protecting economic freedom and ensuring a fair market. Its primary aim is to create conditions for equal and fair competition among market entities. The prohibitions established under this doctrine encompass actions that fundamentally violate the principles of fair conduct and honest dealing in the market, thereby unfairly granting a competitive advantage to a specific undertaking.³

Before assessing the dishonesty of an action, it is essential to first define what constitutes an act carried out in good faith. Georgian competition legislation does not provide a definition of this concept. However, for the purposes of competition law, it is appropriate to rely on the approaches developed in Georgian civil legislation to establish a working definition of good faith. In particular, Article 8 (3) of the Civil Code of Georgia introduces general principles related to good faith conduct. According to this provision, participants in a legal relationship are obliged to exercise their rights and fulfill their obligations in good faith. As the Supreme Court of Georgia explains: "This provision is not declaratory in nature, and a breach of trust and good faith generally constitutes grounds for imposing obligations on the violator."⁴ Therefore, the principle of good faith is a cornerstone of private law, recognized as a universal standard in civil

³ Henning-Bodewig, 2006, 8.

⁴ Ruling No. სბ-221-213-2012 of the Civil Chamber of the Supreme Court of Georgia of 21 May 2012.

law. Its role is not only to achieve fair outcomes, but also to prevent unjust ones.⁵ If we extend this approach to competition law, it can be argued that the requirement of good faith obliges undertakings to conduct their market activities with due regard for the rights of other undertakings and consumers.

The functional definition of the concept of “unfairness” is provided by Directive 2005/29/EC⁶ of the European Union (hereinafter - the UCPD Directive), according to which a commercial practice is considered unfair if it is contrary to the requirements of good faith and professional diligence, and if it substantially distorts or is likely to substantially distort the economic behavior of the average consumer in relation to the goods or services offered to them or intended for them.⁷ This also applies where the practice has, or is likely to have, a significant adverse effect on the economic behavior of the average member of a group of consumers, when the commercial practice is directed at a specific target group.⁸ A similar definition is provided in the Law of Georgia on Consumer Protection (hereinafter - the Consumer Protection Law),⁹ which transposes the above-mentioned UCPD Directive in the context of Georgia’s obligations under the Association Agreement¹⁰ through the legal approximation process. Accordingly, Chapter VI of the Consumer Protection Law is fully dedicated to the prohibition of unfair commercial practices.

In addition, unfair competition is defined in Article 10^{bis} of the Paris Convention for the Protection of Industrial Property, which Georgia joined in 1991. This provision obliges the member states of the Union to provide effective protection against unfair competition for the citizens of other member states. According to the Convention, an act of unfair competition is considered to be any act that is contrary to honest practices in industrial or commercial matters.¹¹

Regarding the legislative definition of unfair competition, it can be noted that in the Georgian legal framework, it is provided in Article 11³ of the Law, where the

⁵ Chanturia, 2017, 50-51.

⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive).

⁷ Van Boom, 2016, 3.

⁸ Ibid., Art. 5(2)(a)(b).

⁹ Law of Georgia on The Protection of Consumer Rights, Art. 24(2).

¹⁰ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part. Annex XXIX.

¹¹ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, Art. 10^{bis}.

legislator defines unfair competition as an act, by an undertaking, that contradicts the norms of business ethics and violates the interests of a competitor or a consumer. Paragraph 2 of the same article lists specific examples of actions that may be regarded as unfair conduct.¹²

III. The Relationship between the Concept of the Consumer and the Notion of Unfair Competition

In the European Union legal framework, the concept of the consumer is defined in Directive 2011/83/EU.¹³ According to Article 2(1), a consumer is a natural person who is acting for purposes outside their trade, business, craft, or profession. A similar approach is adopted in Article 4(i) of the Law of Georgia on Consumer Protection, which defines a consumer as a natural person who acquires goods or services for personal use. This definition is harmonized across several key EU directives, including the UCPD Directive on Unfair Commercial Practices, Directive 93/13/EEC¹⁴ on Unfair Terms in Consumer Contracts, and Directive 2000/31/EC¹⁵ on Electronic Commerce. Particularly relevant to the present discussion is the UCPD Directive, which aims to protect consumers from unfair business practices, such as misleading, aggressive, or manipulative conduct, that may distort their economic behavior. Although the scope of the UCPD Directive is limited to business-to-consumer (B2C) relations, it serves as an important legislative basis for evaluating unfair commercial conduct.

In the Georgian legislative framework, the term “consumer” is also used in the Law; however, the Law does not provide a legal definition specifying who is meant by a consumer. At the same time, the Law identifies three cumulative criteria for assessing unfair competitive behavior: (1) a contradiction of the norms of business ethics, (2) a violation of the interests of a competitor, and (3) a violation of the interests of the consumer. This formulation indicates that, for an action to be qualified as unfair competition, both the interests of a competitor and those of the consumer must be infringed. While the term “consumer”, as defined in European Directives and the Law of Georgia on Consumer Protection, refers to a natural person who purchases goods or

¹² The Law of Georgia on Competition, Art. 11³.

¹³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights.

¹⁴ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

¹⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce).

services for personal use, a broader interpretation is found in Article 2(f) of the Methodological Guidelines for Market Analysis (hereinafter - the Methodological Guidelines), developed by the Georgian Competition and Consumer Agency (hereinafter - the Agency). According to this provision, a consumer is defined as a person who purchases goods or services either for personal use or for entrepreneurial purposes. Additionally, the Law separately refers to the term “final consumer”.

It is noteworthy that, according to Article 1(2) of the Methodological Guidelines, the document may be used in the process of reviewing a concentration notification as defined by law, investigating a case, monitoring the market, and conducting other types of proceedings. However, it is advisable to apply the definition of “consumer” in line with the specific purpose of the document, where, in the context of market analysis, the consumer is understood more broadly and functionally. The Agency adopts this broader interpretation of the consumer in the context of assessing unfair competition, where the violation of consumer interests constitutes one of the qualifying elements. In contrast, German legislation regulates acts of unfair competition within the framework of a separate legal act, the Gesetz gegen den unlauteren Wettbewerb (UWG), which aims to protect competitors, consumers, and other market participants from unfair commercial practices, while also safeguarding the public interest in maintaining fair competition.¹⁶

Under the German UWG, a consumer is defined as a natural person who purchases goods or services for personal consumption.¹⁷ The law considers an act to be unfair if it disparages or diminishes a competitor’s trademarks, products, or services. Furthermore, it qualifies as unfair conduct when a competitor offers consumers goods or services similar to those of another undertaking in a way that misleads the consumer and damages the competitor’s reputation.¹⁸ In addition, the relevant German legislation incorporates both provisions regulating comparative advertising and norms prohibiting unfair commercial practices.¹⁹

An important clarification regarding the qualification of misleading conduct and unfair competition was provided by the Court of Justice of the European Union in the case *Gut Springenheide GmbH and Tusky v. Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*.²⁰ This case concerned product labeling and its

¹⁶ Act against Unfair Competition (UWG), Sec. 1 (Purpose and Scope of Application).

¹⁷ Ibid., (UWG) para. 2, Definitions.

¹⁸ Ibid., (UWG) para. 4 Protection of Competitors.

¹⁹ Henning-Bodewig, 2006, 131.

²⁰ Gut Springenheide GmbH and Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung, [CJEU], C-210/96, 16 July 1998.

relation to unfair competition. In response to the preliminary question of whether the determination of misleading conduct should be based on the subjective perception of consumers or an objective standard, the Court stated that the assessment must rely on the model of the average consumer in the European Union, namely, a consumer who is reasonably well-informed, observant, and circumspect. The evaluation of whether a practice is misleading must consider the overall impression created by the product and its packaging. Where necessary, consumer perception may be substantiated through evidence-based research, such as consumer surveys. As noted, legislation prohibiting unfair competition serves to protect the competitive structure of the market by ensuring that no economic actor gains an advantage through unfair practices. The purpose of these provisions is not only to safeguard the interests of competitors, but also to protect consumers from being misled. In line with EU law, and the case law developed by the Court of Justice of the European Union, the standard for assessing unfair competition relies on the concept of the average consumer, defined as a reasonably well-informed, observant, and circumspect individual. This refers to a natural person acting outside the scope of their professional or entrepreneurial activities, who has access to information but whose economic behavior may be influenced by advertising or other forms of commercial presentation. Unlike business entities, such individuals generally lack the specific knowledge and experience necessary to make fully informed decisions. Given that the likelihood of misleading an individual consumer is significantly higher than misleading a business entity, it would be more logical for Article 11³ of the Law to adopt a similar standard. Specifically, in determining the violation of consumer interests, the law should reflect the understanding of the “average consumer” as applied in German legislation and the jurisprudence of the European Court of Justice. However, the cumulative requirement that, in addition to a violation of business ethics and the interests of a competitor, the interests of the consumer must also be violated, represents a legislative flaw. In some cases, an act may qualify as unfair competition even without any harm to consumer interests. For example, in L’Oréal SA and Others v. Bellure NV and Others,²¹ the Court of Justice of the European Union examined whether a trader could be engaged in unfair conduct despite providing accurate information to consumers regarding the origin and characteristics of the goods. In that case, Bellure was selling imitations of L’Oréal perfumes, and clearly informed consumers that the products were replicas. Furthermore, Bellure directly compared its perfumes with the original L’Oréal products and used

²¹ L’Oréal SA v. Bellure NV, [CJEU], C-487/07, 18 June 2009.

similar packaging and appearance designs. While the case also involved trademark issues, L'Oréal argued that Bellure was unlawfully exploiting its market reputation by using unfair comparative advertising, thus gaining an unfair advantage. The key issues before the Court were: (1) whether comparative advertising using a well-known trademark could be prohibited even in the absence of consumer confusion or harm to the original brand, and (2) whether stating or implying that a product is a replica of a well-known brand constitutes unfair use of that brand's reputation. The Court held that it is unfair to advertise a product by taking advantage of the reputation of a well-known trademark, even if there is no likelihood of confusion among consumers. Such conduct violates the principle of fair competition and constitutes unfair commercial behavior.²² This judgment demonstrates that the protection of fair market conditions may require legal intervention even when consumer interests are not directly harmed.

The aforementioned decision demonstrates that, even in the absence of consumer confusion or misrepresentation, an action may still be qualified as unfair competition. However, Georgian legislation, with its cumulative criteria, prevents the possibility of assessing an undertaking's conduct as unfair competition without also establishing harm to consumer interests. A clear illustration of this limitation is the decision by the Chairman of the Agency to refuse the initiation of an investigation in a case concerning the similarity and use of a competing company's brand name.²³ In that instance, the complainant failed to provide additional evidence to substantiate the alleged brand confusion, such as statistical data, consumer complaints, or feedback, leading to a refusal to initiate proceedings. This demonstrates how the cumulative requirement in the law functions as a barrier to launching investigations in certain cases, even when the conduct may affect the competitive structure of the market. Moreover, the use of the term "end user" in the law, without a clear legal definition, represents an additional legislative gap. While EU law defines an end user as a natural person,²⁴ Georgian legislation does not provide a corresponding definition. As a result, the term "end user" is interpreted narrowly, allowing only a natural person to be considered as such under Georgian law.

Therefore, the norms prohibiting unfair competition serve a protective function aimed at safeguarding those market participants who are most in need of protection,

²² See also: World Intellectual Property Organization (WIPO), 1994, 27-37.

²³ Order No. N04/412 of the Chairperson of the Georgian Competition and Consumer Agency of 25 April 2025.

²⁴ Regulation (EC) No. 178/2002 of the European Parliament and of the Council of 28 January 2002, Art. 3(18).

and who represent the relatively weaker side, namely, consumers. It is the consumer, as an individual, who is most susceptible to the effects of unfair advertising, product packaging, appearance, and similar practices. Accordingly, misleading the consumer as an individual should be a key criterion in the assessment of unfair competition, in line with the standards developed by the Court of Justice of the European Union.

IV. Violation of Consumers' Interests

In the context of unfair competition, the infringement of consumer interests refers to commercial activities carried out by a competing undertaking that impair the consumer's ability to make a free and informed choice. The consumer, as an individual, represents the relatively weaker party in terms of access to information, and lacks the level of knowledge typically possessed by business entities.²⁵ This imbalance is precisely why certain forms of unfair commercial conduct, such as brand imitation, packaging appropriation, and similar practices, can undermine the consumer's informed decision-making, and ultimately constitute a violation of their interests.

In order to assess whether a trader is harming the consumer's interests in the course of an unfair commercial practice, it is important to consider the objectives of the UCPD Directive and the standard of economic behavior expected of the consumer. Article 5 of the UCPD Directive outlines the qualifying circumstances of an unfair commercial practice.²⁶ In particular, such a practice may involve misleading or aggressive conduct that influences the economic behavior of the consumer. According to the Directive, a commercial practice is considered unfair if it is contrary to the requirements of good faith and substantially distorts, or is likely to distort, the economic behavior of the average consumer. A similar approach is reflected in the Law of Georgia on Consumer Protection, which does not treat the change in the consumer's economic behavior solely as a fixed or actual result.²⁷ Rather, it also considers potential or anticipated changes in behavior that may not manifest in a concrete outcome. For example, a consumer may ultimately choose not to enter into a contractual relationship with a trader, or may decide against purchasing a product that is similar to one offered by a competing company. Nonetheless, the trader's unfair conduct may have already influenced the consumer's economic behavior. In such cases, the con-

²⁵ Lakerbaia, 2021, 74.

²⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (Unfair Commercial Practices Directive), Art. 5.

²⁷ Law of Georgia on The Protection of Consumer Rights, Art. 24.

sumer is entitled to receive complete, reliable, and unambiguous information about the origin, quality, and characteristics of the product. Ensuring this right is essential for protecting the consumer's ability to make informed economic decisions.²⁸ The consumer's right to make an informed choice based on free will may be violated in the context of unfair competition. To ensure that consumers have access to accurate and complete information, the Directive protects them from misleading commercial practices carried out by traders.

The wording used in Article 2(k) of the UCPD Directive, transactional decision,²⁹ provides a broad definition. Specifically, it states: "*Transactional decision' means any decision taken by a consumer concerning whether, how, and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product, or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting.*"³⁰

Accordingly, the concept of economic behavior encompasses a wide range of decisions made by the consumer in relation to goods or services, which may be expressed either through action or inaction.³¹

Regarding the definition of a transactional decision, the Court of Justice of the European Union (CJEU), in its judgment in Case *Trento Sviluppo srl v. Autorità Garante della Concorrenza e del Mercato*,³² addressed the question of whether a commercial practice must meet multiple criteria to be considered misleading under Article 6 of the UCPD Directive. In this judgment, the Court clarified the role of the "transactional decision" in assessing the unfairness of a trader's conduct. In particular, the Court held that a transactional decision includes not only the final decision to make a purchase, but also actions directly linked to that decision, taken prior to entering into a contractual relationship, such as entering a store or contacting the trader based on misleading information. As stated in the judgment: "Any decision taken by the consumer as to whether or not to purchase, or how and on what terms, is a transactional decision. Accordingly, this concept includes not only the decision as an intended result, but also the actions directly related to that decision, and it is not

²⁸ Ibid., Art. 5, 10.

²⁹ The term "transactional decision" specified in the Law of Georgia on The Protection of Consumer Rights is translated as "conclusion of a contract".

³⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (Unfair Commercial Practices Directive), Art. 2(k).

³¹ Alexander, 2023, 328.

³² *Trento Sviluppo srl v. Autorità Garante della Concorrenza e del Mercato*, [CJEU], C-281/12, 19 December 2013.

necessary to enter into a contractual relationship for an action to be qualified as a transactional decision.”

It is noteworthy that in Georgian legislation, the term “transactional decision” is codified as “conclusion of a transaction”, often formulated as: “**...the consumer has concluded or may conclude a transaction that they would not have concluded otherwise.**”³³ However, in light of the objectives of the UCPD Directive, the term “transactional decision” should be interpreted in accordance with the Directive’s definition and the standards developed by the Court of Justice of the European Union. Georgian law should thus align with this broader understanding and incorporate the CJEU’s interpretation into its legal practice.

The Agency adheres to the economic behavior test developed by the Court of Justice of the European Union in several of its decisions, and assesses consumer transactional decisions in accordance with the norms of the UCPD Directive. Specifically, the Agency recognizes that a change in the consumer’s economic behavior does not only refer to a final result, such as the conclusion of a transaction, but also encompasses unfair commercial practices that cause or are likely to cause the consumer to make a decision they would not have made otherwise.³⁴

According to the explanatory document on the UCPD Directive developed by the European Commission,³⁵ the broad concept of a transactional decision, as standardized by the Court of Justice, expands the scope of a trader’s conduct, even in cases where the unfair behavior is not limited to an already established contractual relationship between the consumer and the trader. For instance, the document notes that a consumer’s visit to a store, spending additional time online to complete a booking, clicking on a link or advertisement, continuing to use a service, or even “scrolling” for browsing purposes, may all constitute transactional decisions within the meaning of the Directive.³⁶

Thus, the UCPD Directive does not require proof of an actual materially adverse change in the economic behaviour of the consumer as a result of the practice; rather, it allows for an assessment of whether the commercial practice is likely to influence the economic behaviour of the average consumer.

³³ Law of Georgia on The Protection of Consumer Rights, Art. 26 (1,2)

³⁴ Order No. N04/564 of 2 June 2025, issued by the Chairperson of the Georgian Competition and Consumer Agency. See also Order No. N04/1197 of 9 December 2024, Order No. N04/346 of 10 April 2025, and Order No. N04/345 of 10 April 2025 issued by the Chairperson of the Agency.

³⁵ Commission Notice - Guidance on the Interpretation and Application of Directive 2005/29/EC concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, 2021.

³⁶ Ibid., paragraph 2.4., Transactional decision test.

The UCPD Directive also considers it an unfair commercial practice when a trader provides false or misleading information about the geographical or commercial origin of the goods being sold, in a way that is likely to deceive the consumer and lead them to conclude, or be likely to conclude, a transaction they would not have otherwise entered into.³⁷ Such conduct may also give rise to circumstances that qualify as unfair competition, particularly in relation to the packaging and perceived commercial origin of the goods.

Therefore, unfair competition law also takes into account the protection of consumer interests. However, the distinction lies in the fact that unfair competition is assessed within a systemic context that is, in terms of how the conduct affects the functioning of the market as a whole, whereas consumer protection law focuses on the individual consumer and whether they were, or could have been, misled, deceived, or harmed.³⁸ Nevertheless, when identifying an act of unfair competition and assessing the element of harm to consumer interests, the competent authority must apply the aforementioned test of economic behaviour. Accordingly, it should evaluate whether the conduct in question has influenced or is likely to influence the consumer's economic decision-making and, on that basis, determine whether consumer interests have been harmed.

V. Forms of Influence on Consumers' Economic Behavior

1. Introduction

As noted, in modern market conditions, the preservation of a competitive environment and the protection of consumers' informed choice are closely interdependent. Unfair competition, whether expressed through the actions or omissions of a trader, not only hinders the development of a fair competitive environment, but also negatively affects consumers' economic behavior, ultimately undermining market integrity and impeding the country's economic progress.

Although competition law primarily focuses on business interests and their protection, its intersection with consumer rights and the principle of informed choice highlights the broader societal interest in these regulatory processes. As noted in legal scholarship, the objectives of competition law can be categorized into two dimen-

³⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (Unfair Commercial Practices Directive), Art. 6(1)(b).

³⁸ Liu and Li, 2025, 1179.

sions: institutional and individual. While the institutional objective is to protect the framework of free competition, the individual dimension emphasizes the interests of entrepreneurial entities and consumers, that is, individual persons.³⁹

The Georgian Law “On Competition” outlines examples⁴⁰ of conduct that may qualify as violations of consumer interests, many of which will be examined in the following sections.

2. Misappropriation of a Competitor’s or a Third Person’s Form of Goods, Their Packaging or Appearance

It is worth noting that, historically, the concept of unfair competition was closely linked to the protection of industrial property, a connection that is clearly reflected in the Paris Convention of 1883. This relationship remains relevant today, particularly in the context of assessing the similarity between trademarks, and the confusion such similarity may cause for consumers. However, despite their shared objective of promoting a fair market, intellectual property law and competition law serve distinct purposes. Intellectual property law is primarily concerned with the protection of proprietary rights, while competition law is focused on fostering free trade and ensuring a competitive market environment.⁴¹ As previously mentioned, unfair competition is defined in Article 10bis of the Paris Convention, which Georgia acceded to in 1991.⁴² This provision obliges member states to provide effective protection against unfair competition to citizens of other member countries. According to the Convention, unfair competition is understood as any act that is contrary to honest practices in industrial or commercial matters.

Article 10^{bis} (3) of the Paris Convention prohibits all acts that are likely to create confusion in any way with the establishment, goods, business, or commercial activities of a competitor. The provision in the Law regarding the appropriation of the shape, packaging, or appearance of goods indicates a clear connection with the relevant provisions of intellectual property law. In particular, the use of a competitor’s trademark and/or design may constitute not only an infringement of that competitor’s intellectual property rights, but, in a broader context, a violation of fair competition in the market.⁴³

³⁹ Adamia, 2022, 18.

⁴⁰ Law of Georgia on Competition, Art. 11³.

⁴¹ Henning-Bodewig, 2006, 4.

⁴² Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, Art.10^{bis}.

⁴³ Höpperger and Senftleben, 2005, 2-3.

The Court of Justice of the European Union, in the case Walter Rau Lebensmittelwerke v. De Smedt PVBA,⁴⁴ held that the packaging of goods can have a significant impact on consumers, and that the appearance and packaging of a product form part of a trader's competitive advantage. The Court emphasized that state regulations should not create unjustified obstacles in this regard.

The case concerned Belgian legislation, which required that margarine to be sold exclusively in cube-shaped packaging to ensure that consumers could easily distinguish it from butter. While the regulation aimed to protect consumers, the Court ruled that it was incompatible with the principle of the free movement of goods within the EU internal market, as it imposed a disproportionate restriction on trade.

Regarding the appropriation of appearance, the decision of the Georgian Competition and Consumer Protection Agency in the Bashkir Soda case is particularly noteworthy.⁴⁵ In this case, the complainant alleged that a competing company was using packaging similar to the complainant's trademark, thereby harming the complainant undertaking and misleading consumers. It was established that the complainant owned exclusive rights to two trademarks registered both internationally and nationally, while the respondent held exclusive rights under a licensing agreement, which were protected as a design. However, according to the complainant, the competitor was not using its own registered design, but was instead imitating the packaging of the complainant. The Agency examined the issue under the concept of appropriation of appearance, and relied on criteria⁴⁶ developed in trademark law, particularly drawing from EU practice.⁴⁷ The standard used for comparison was whether the appropriation of appearance created a likelihood of confusion or confusion arising through association on the part of the consumer. Applying this standard, the Agency compared the packaging based on the common criteria of visual, phonetic, and semantic similarity, and concluded that the visual similarity between the complainant's and respondent's packaging, due to their shared figurative and verbal elements, was so significant that they could be perceived as nearly identical. An interdisciplinary approach was also evident in the Agency's decision in the Tsereteli Mexican case,⁴⁸ where the dispute

⁴⁴ Walter Rau Lebensmittelwerke v. De Smedt PVBA, [CJEU], Case 261/81, 10 November 1982.

⁴⁵ Order No. N04/374 of 29 April 2024 issued by the Chairperson of the Georgian Competition and Consumer Agency.

⁴⁶ Ibid., 31.

⁴⁷ For comparison, see: SABEL BV v. Puma AG, [CJEU], C-251/95, 11 November 1997; Lloyd Schuhfabrik Meyer, [CJEU], C-342/97, 22 June 1999; Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH, [CJEU], C-120/04, 6 October 2005.

⁴⁸ Order No. N04/877 of 28 November 2023 issued by the Chairperson of the National Competition Agency of Georgia.

involved a competitor's use of a similar name "Tsereteli Mexican" versus "Mexican Tsereteli N1". In that case as well, the assessment was based on auditory, visual, and conceptual criteria to determine the similarity of the signs.⁴⁹

It is worth noting that the protection of a registered trademark under trademark legislation provides the right holder with stronger legal mechanisms. However, the norms of unfair competition may also be applied in cases involving unregistered trademarks or signs that are not eligible for protection under intellectual property law. This is why the legal provision refers more broadly to the appropriation of the appearance, packaging, or shape of goods. Although this principle is recognized in most legal systems, including Georgia, and there are numerous points of intersection between trademark law and unfair competition law, it is important to emphasize the distinct purposes underlying each area. The concept of "similarity to the point of confusion" is treated similarly under both regimes, and in both cases, the consumer serves as the point of reference in the assessment. For example, in the case of *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijzen Handel BV*,⁵⁰ the Court of Justice of the European Union examined the criteria for evaluating whether such similarity is sufficient to create confusion in the mind of the average consumer.

In particular, similarity likely to cause confusion must be assessed from the perspective of the average European consumer, who is reasonably well-informed, observant, and circumspect but not excessively attentive. The evaluation must consider the verbal, visual, and conceptual similarity of the marks; the identity or similarity of the goods or services; and specific factors, such as whether the sign contains a component with a strong, distinctive character. The overall impression conveyed by the signs plays a crucial role, and the Court emphasized the use of a global appreciation test to determine likelihood of confusion.

The Court of Justice of the European Union further elaborated on consumer deception in the case *Gut Springenheide GmbH and Tusky v. Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*,⁵¹ which involved product labelling and unfair competition. The central question was whether misleading the consumer should be assessed based on the consumer's subjective perception or an objective standard. The Court clarified that the assessment must be based on the model of the average consumer in the European Union, who is reasonably well-informed,

⁴⁹ Ibid, 28.

⁵⁰ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijzen Handel BV*, [CJEU], C-342/97, 22 June 1999.

⁵¹ *Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung*, [CJEU], C-210/96, 16 July 1998.

observant, and circumspect. The evaluation should focus on the overall impression created by the product and its packaging. Where necessary, consumer perception may be substantiated by empirical evidence, such as market surveys.

Although in both cases the likelihood of confusion must be assessed based on the standard of the average consumer, in competition law, this assessment must be guided by the specific purpose of that legal framework. The objective of competition law is to combat unfair commercial practices, rather than to protect property rights. While these two areas are indeed interconnected, their legal aims differ: intellectual property law focuses on safeguarding exclusive rights, whereas unfair competition law seeks to preserve fair market conduct. In many cases, unfair competition law serves as a complementary mechanism - intervening where intellectual property law does not provide sufficient protection.⁵²

3. Dissemination of Improper, Unfair, Unreliable, or Clearly False Advertising

The law links the dissemination of unreliable advertising to the outcome in which the consumer is misled and induced to engage in certain economic behavior.⁵³

The dissemination of unreliable or obviously false advertising is prohibited by the UCPD Directive, and is regarded as an unfair commercial practice manifested through action.⁵⁴ A similar approach is reflected in Article 25(4) of the Consumer Protection Law, which states that the marketing of goods or services, including comparative advertising that creates confusion with a competitor's trademark, name (designation), or other distinctive signs, constitutes a misleading commercial practice expressed by action.

The UCPD directive explanatory guideline discusses⁵⁵ misleading advertising in connection with the Misleading and Comparative Advertising Directive (hereinafter referred to as the Comparative Advertising Directive).⁵⁶ Although the Compar-

⁵² Henning-Bodewig, 2006, 5.

⁵³ Law of Georgia on Competition, Art. 11³(2)(a).

⁵⁴ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (Unfair Commercial Practices Directive), Art. 6(2)(a).

⁵⁵ Commission Notice - Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market, 2021, 1.2.6 (Interplay with the Misleading and Comparative Advertising Directive).

⁵⁶ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 (Misleading and Comparative Advertising Directive).

ative Advertising Directive regulates relations between business entities, the general standard of assessment established by the Directive is also applicable in the context of business-to-consumer (B2C) relations. Furthermore, Article 4(a) of the Comparative Advertising Directive prohibits comparative advertising if it is misleading within the meaning of Articles 6 and 7 of the UCPD. Accordingly, the two Directives are interrelated: One addressing B2C relations, and the other focusing on B2B relations.

The Court of Justice of the European Union examined the relationship between the two directives in a Carrefour case,⁵⁷ which concerned unfair and misleading comparative advertising. Carrefour had published an advertisement comparing the prices of its products with those of a competitor. However, the comparison was made between Carrefour's hypermarkets and the smaller supermarkets of a competitor. The Court held that comparative advertising is not misleading when the factual information it contains is accurate. Nevertheless, when the comparison involves stores of different formats, as in this case – between a hypermarket and a supermarket, the advertisement must clearly present this distinction so as not to mislead consumers. Otherwise, such conduct may fall under Article 7 of the UCPD and Articles 4(a) and (c) of the Comparative Advertising Directive. The Court confirmed that factual accuracy alone is insufficient in comparative advertising if it omits material information that could influence the consumer's economic behaviour. When the context is not adequately conveyed, the advertisement may be deemed unfair competition, causing harm to both consumers and competitors.

Regarding unfair advertising, the Georgian Competition and Consumer Protection Agency addressed the issue in one of its decisions,⁵⁸ where an undertaking was found guilty of disseminating inappropriate advertising. Specifically, two companies registered under the same name, but with different identification numbers,⁵⁹ were operating in the same product market (sales of computer equipment, household appliances, and kitchen appliances). The respondent undertaking used the well-established and widely recognized brand name of its competitor to advertise on various electronic platforms. The Agency assessed whether the dissemination of such advertising violated consumer interests, and concluded that consumers must have full control over their choices and be able to distinguish between the two com-

⁵⁷ Carrefour Hypermarchés SAS v. ITM Alimentaire International SASU, [CJEU], C-562/15, 23 February 2017.

⁵⁸ Order No. N04/88 of 20 July 2021 issued by the Chairperson of the National Competition Agency of Georgia, 29-35.

⁵⁹ LLC "Algorithm" (ID No. 205043237) and LLC "Algorithm" (ID No. 402084980).

panies when deciding to purchase a particular product or service. In the case at hand, the information provided in the advertisements created a false impression for consumers, particularly given that both the complainant and the respondent operate in the same market and offer similar goods/services. The Agency evaluated the situation from the perspective of the average consumer and found that, when encountering an advertisement under the name “Algorithm”, the average consumer would most likely believe they are dealing with the complainant, LLC “Algorithm”. Consequently, the Agency held that the respondent failed to ensure a market environment where consumers are protected from confusion between the two companies and can thus make informed decisions.

Based on the above, when commercial communication intentionally or indirectly misleads the consumer, it can no longer be regarded merely as a marketing tactic aimed at boosting sales. Rather, it constitutes a form of anti-competitive behavior. Such actions not only infringe upon the consumer’s right to make an informed choice, but also create unfair practices that, in turn, erode overall trust in the market.

4. Undertaking of a Competitor’s Business Reputation, Its Unreasonable Criticism or Discrediting

In EU law, damage to the reputation of a competitor, as well as unfounded criticism or discrediting, are addressed within the framework of the Comparative Advertising Directive, and are considered classic examples of unfair competition.⁶⁰ The Court of Justice of the European Union addressed the issue of discrediting a competitor in the Pippig Augenoptik case,⁶¹ holding that criticism which exceeds the bounds of objective assessment and is based on emotional language or insults may be deemed unfair. The Court further outlined the characteristics of an objective comparison: namely, that only goods or services serving the same purpose and meeting the same needs may be compared; the comparison must be based on verifiable factual data; and it must not be influenced by subjective or emotionally charged narratives. Advertising must not tarnish or discredit a competitor’s reputation, either directly or indirectly.

⁶⁰ Directive 2006/114/EC of the European Parliament and of the Council of 12 Dec. 2006 concerning Misleading and Comparative Advertising, 2006 O.J. (L 376) 21, Art. 4(d).

⁶¹ Pippig Augenoptik GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH, [CJEU], C-44/01, 8 April 2003.

Under the law, damage to reputation is defined as the creation of a false impression regarding an enterprise, its products, entrepreneurial activity, or commercial operations.⁶² It is noteworthy that, according to the amendments to the Law of Georgia “On Freedom of Speech and Expression”, in the case of a defamation lawsuit, the person who considers himself the addressee of the defamation must state which statement he considers defamatory, what factual errors this statement contains, and why it is damaging to the plaintiff’s reputation. In turn, the defendant bears the burden of proving that the disputed statement does not contain a materially false fact.⁶³ This means a redistribution of the burden of proof: liability may arise if the defendant cannot demonstrate the accuracy of the contested statement. Thus, the institution of defamation in Georgia is now more similar to the practice of the European Court of Human Rights, where a clear distinction is made between factual assertions and value judgments.⁶⁴ In these cases, the Court emphasized that while facts must be accurate and verifiable, value judgments are protected expressions that cannot be proven true or false. In European human rights law, freedom of expression is protected under Article 10 of the European Convention on Human Rights and Article 11 of the Charter of Fundamental Rights of the European Union. This protection extends to commercial speech and advertising, but it is not absolute. The ECtHR has held that freedom of expression may be restricted where statements are misleading, defamatory, or unfairly undermine business reputation.⁶⁵ In addition, the distinction from competition law becomes even clearer: whereas in a defamation dispute the plaintiff must go through the process of proving in court that the statement was defamatory, in cases of unfair competition, no such confirmation is required. It is sufficient for the Competition Agency to establish the existence of expected harm, which may be expressed in misleading consumers or creating an inaccurate perception regarding the activities of a competitor.

The Agency examined the issue of reputational damage to an undertaking in a case involving the dissemination of information by LLC “DNA” on Facebook that allegedly harmed the reputation and interests of LLC “Design House”. The Agency evaluated whether the Facebook post constituted a defamatory statement specifically,

⁶² Law of Georgia on Competition, Art.11³, Paragraph 2, Subparagraph (c)

⁶³ Law of Georgia on Freedom of Speech and Expression, Art.13.

⁶⁴ Lingens v. Austria, [ECtHR] App. No. 9815/82, 8 July 1986; Oberschlick v. Austria (No. 1), [ECtHR] App. No. 11662/85, 23 May 1991; Jerusalem v. Austria, [ECtHR] App. No. 26958/95, 27 February 2001.

⁶⁵ Steel and Morris v. United Kingdom, [ECtHR] App. No. 68416/01, 15 February 2005.

whether it created an inaccurate perception of the complainant's business, products, or commercial activity, and/or amounted to unfounded criticism or discrediting.⁶⁶

Given that Design House LLC, a seller of electric fireplaces, uses social media to disseminate information, its Facebook page serves as one of the main sources of information for consumers. The Agency also assessed the target consumer base of both parties and considered the situation where a consumer interested in purchasing an electric fireplace may receive negative information about a competitor's product. In such cases, the consumer may be dissuaded from entering into a contractual relationship with that competitor. Accordingly, the Agency evaluated the existence of expected harm, which may manifest in the consumer's decision to avoid concluding a contract with the affected company.

VI. Conclusion

The examples discussed in the article demonstrate that the role of the consumer and the protection of their interests are important in the process of assessing unfair competition. The current legislation in Georgia considers the violation of the consumer's interests as a cumulative qualifying circumstance when assessing unfair competition; however, the research presented in the article, supported by the analysis of the decisions of the Court of Justice of the European Union, shows that unfair competition may occur without harming the consumer's interests, and that this cumulative requirement should not act as a barrier when assessing a competitor's conduct.

In addition, the law does not specify who is meant by the term "consumer". Therefore, it is important to define the term more precisely in order to assess harm to the consumer's interests according to the standard of the average consumer. To evaluate a consumer's economic behavior, unfair conduct must affect the consumer's interests in such a way as to cause, or potentially cause, a change in their economic behavior. It is also important that the executive body, when assessing unfair conduct, follows the approach of the Court of Justice of the European Union, and considers not only actual harm to the consumer's interests, but also any expected harm.

This article clearly shows that harm to the consumer's interests in competition law should be treated as a separate, independent criterion that protects the consumer's free choice alongside the integrity and fairness of the market, and that the consumer should be understood as a natural person.

⁶⁶ Order No. N04/132 of 30 May 2018 issued by the Chairperson of the Georgian Competition Agency. For comparison, see also Order No. N152 of 14 September 2016 issued by the Chairperson of the Competition Agency.

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