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The Concurrence of Legal Remedies in Cases of Unauthorized Use of Trademarks: A Georgian Legal Perspective

ABSTRACT

The aim of the article is to examine a practical issue concerning the concurrence of legal remedies in cases of unauthorized use of trademarks. The main objective of this research is to determine the circumstances under which the competition law and intellectual property law of Georgia intersect; to identify the statutory remedies established by the relevant legislation addressing unfair practices, and to analyze instances of legal-procedural remedies concurrence.

The protection of trademarks is recognized as part of the broader framework for preventing unlawful competitive practices. The concept of "unfair competition" is expressly defined in the Law of Georgia on Competition. Even though the same concept is not literally found in the Law of Georgia on Trademarks, the concept of unfair practices is nevertheless implied and governed by it. Furthermore, the Paris Convention for the Protection of Industrial Property, assumed to be a part of intellectual property law, explicitly provides a definition of unfair competition. As the concept of unfair competition is implied in both competition law and intellectual property law, the intersection between the two is evident.

In Georgia, the enforcement of claims related to the unauthorized use of trademarks often involves the participation of administrative bodies in resolving disputes between private parties, with the scope of available legal remedies being notably broad.

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The article examines and identifies the interaction of competition law and intellectual law, and the concurrence of legal protection mechanisms deriving from this interaction.

Keywords: Unfair Competition, Trademark Infringement, Intellectual Property, Reputation, Misleading.

I. Introduction

The transformation of the trademark into a significant tool for marketing goods has led to the establishment of distinct legal principles, including "trademark infringement" and "unfair competition".[1] In this context, it is noteworthy that, in practice, cases involving trademarks often involve an intersection between intellectual property law and competition law.[2] In contemporary legal doctrine, the protection of trademark rights is regarded as an integral component of preventing unfair competition.[3] Since the principles of trademark infringement and unfair competition are largely shared, dual liability under intellectual property law and competition law is primarily relevant in terms of the differing remedies.[4]

It is noteworthy that, in Georgia, the enforcement of claims regarding the unauthorized use of trademarks involves the participation of administrative bodies in resolving disputes between private law subjects, which significantly broadens the scope of legal remedies. It is important to identify the legal remedies arising from the legal institutions mentioned above, so that the party whose right has been violated can make an informed choice between the available means of remedy, based on the respective legal consequences. This initially determines the relevance of the present article. It should be noted that the article does not address these issues from the perspective of the consumer, but rather defines legal remedies from the standpoint of the party who is at the same time competitor and holder of the exclusive right to the trademark.

Given the scarcity of Georgian judicial practices and legal literature on the topic, the article is particularly relevant, underscoring the importance of academic inquiry. It aims to explore practical issues, especially the competition between legal protection

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1 Robert, 2020, 1187.

2 მენაბდიშვილი, 2014, 167 [Menabdishvili, 2014, 167].

3 Dornis, 2017, 9.

4 Robert, 2020, 1187.

remedies in cases of unauthorized use of trademarks. The objective of this research is to highlight the circumstances under which competition law and intellectual law intersect, to identify legal remedies derived from intellectual property and competition legislation, and to examine the legal overlap in the enforcement of such rights.

II. Unfair Competition at the Intersection of Intellectual Property and Competition Law

1. Dual Legal Basis

Disputes arising from trademark infringement and unfair competition are similar and frequently overlap. In the case of commercial practices, examples include taking advantage of a competitor's reputation, or creating confusion by using similar trademarks, or through making misleading statements.[5] The purposes for these legal actions differ. Legislation governing the protection of trademarks is primarily aimed at preventing the misappropriation of formal trademarks, whether registered or established through use. By contrast, under the rules on unfair competition, the mere risk of deception is sufficient to trigger liability, regardless of the existence of any exclusive right.[6] It is also important to note that a claim for trademark infringement may be brought only by the holder of the exclusive right, whereas a claim to prevent unfair competition can generally only be initiated by the competing economic operator.[7] Consequently, the potential overlap between these legal protection remedies in cases of unfair commercial practices arises only when the claimant simultaneously holds exclusive trademark rights and acts as a competing economic agent.

Georgian legislation related to the protection of trademarks is consolidated in the Law of Georgia on Trademarks.[8] From the standpoint of trademark legislation, the Paris Convention for the Protection of Industrial Property merits mention, as its ratification by the Georgian government renders it part of Georgian Legislation.[9] The latter also includes provisions on unfair competition, and defines it as an act of competition which contradicts honest practices of entrepreneurial or commercial activities.[10]

[5] Hilty and Henning-Bodewig (ed.), 2007, 147.

[6] Dornis, 2022, 18.

[7] Ibid., 17.

[8] Law of Georgia "On Trademarks", 5 February 1999.

[9] The Paris Convention for the Protection of Industrial Property, 20 March 1883.

[10] Ibid., Art. 10bis (2).

The Paris Convention indentifies specific forms of unfair competition, including the prohibition of acts likely to cause confusion regarding a competitor, their goods or commercial activities, as well as discrediting a competitor or their products through statements or indications that may mislead the public about the origin, method of production, manufacturer, characteristics, and other attributes of the goods.[11] In contrast, the Law of Georgia on Trademarks does not directly define unfair competition. Instead, it grants the holder of an exclusive right the authority to prohibit a third party from using a trademark without consent, including any sign that is identical or similar to the protected trademark. The right holder may prevent third-party use in commerce if it creates a risk of consumer confusion, misleads the public, or results in an unfair commercial advantage and damage to the reputation of the trademark.[12]A precondition for exercising this exclusive right is the occurrence of trademark infringement.

The right to claim trademark infringement is granted if, as a result of the use of the same or a similar trademark in relation to identical or similar goods, there exists a risk or likelihood of misleading the public. The scope of protection extends to the use of similar trademarks for similar goods if such use can cause confusion.[13]

It should be noted that the Law of Georgia on Trademarks grants exclusive rights to the owner of a trademark only with respect to a protected trademark.[14] However, protection does not necessarily imply mandatory registration or formal authorization; rather, it is the factual use of a trademark that may grant the user exclusive rights.[15]

Article 11^3 of the Law of Georgia on Competition adopts a broad definition of unfair competition, encompassing activity by an economic agent that contradicts the norms of business ethics and violates the interests of both competitors and consumers. At the same time, it should not be overlooked that the Law of Georgia on Competition does not apply to relationships related to intellectual property rights, except in cases where such rights are used to restrict or eliminate competition.[16]

On the basis of this provision, it is reasonable to assume that where free and fair competition is unlawfully restricted, the Law of Georgia on Competition may also apply to relationships involving trademarks. Article 11^3 provides a list of specific forms

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11 The Paris Convention for the Protection of Industrial Property, 20 March 1883, Art. 10bis (3).

12 Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2).

13 გაბუნია, 2001, 276 [Gabunia, 2001, 276].

14 Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2).

15 Judgment No. AS-306-2020 of the Supreme Court of Georgia, 18 November 2020, para. 27.

16 Law of Georgia "On Competition", 8 May 2012, Art.1 (4) (b).

of unfair competition. Several of these are particularly relevant to the intersection between competition law and intellectual property law.

In particular, unfair competition may manifest through the use of various means of communication, including through improper, dishonest, unreliable or obviously false advertising, or in the dissemination of information about goods or services that misleads the consumer and encourages them to take certain economic actions.

According to the same article, unfair competition also includes misappropriation of the form, packaging or appearance of the goods of a competitor or third party, an act which damages a competitor's reputation (creating a false impression about the competitor's enterprise, goods, or commercial activities).[17] The term "economic agent" itself is characterized as an actual or potential economic agent operating in the relevant market.[18]

According to the abovementioned, to apply provisions to the relationships between private individuals in the case of unfair competition, the claimant and respondent must be competitors: there must be a relevant market.[19]

As discussed above, the concurrence of trademark protection and unfair competition remedies is particularly relevant in situations where the injured party is both the holder of exclusive trademark rights and a competitor of the party using the trademark without authorization.

At first glance, the possibility of the concurrent application of trademark law and unfair competition law appears to be the rule rather than the exception.[20] The preamble to the European Trade Mark Directive indicates that the Directive does not preclude the application of other provisions of Member States' laws beyond trademark legislation, including, among others, provisions relating to unfair competition.[21] A similar provision is also reflected in the German Trademark Act, which states that the protection of trademarks under this act does not preclude the application of other legal provisions related to such trademarks.[22]

17 Ibid., Art. 11^3 (2) (a), Art. 11^3 (2) (c) and Art. 11^3 (2) (d).

18 Ibid., Art. 3 (c).

19 Decision of the Georgian National Competition Agency "on the admissibility of the complaint submitted by S.I.E LLC (ID: 401987597), initiation of case investigation, and formation of an investigation group, in accordance with Order N04/40 of 11 April 2022, issued by the Chairperson of the Georgian National Competition Agency, regarding the investigation carried out in the case of S.I.E LLC."

20 Dornis, 2022, 10.

21 Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks, recitals (40).

22 Act on the Protection of Trade Marks and other Signs, 25 October 1994, Section 2.

2. Specific Cases of Concurrent Application

As mentioned above, the Law of Georgia on Competition considers the dissemination of information about goods or services that misleads consumers, inducing them to undertake certain economic action, as unfair competition. This type of communication may include inappropriate, unfair, unreliable, or false advertising.[23] The prohibition of the risk of misleading also covers confusion caused by the use of trademarks.[24] According to the Law of Georgia on Trademarks, the holder of an exclusive right may prohibit a third party from using a sign that creates a risk of confusion or association between trademarks.[25]

Notably, where consumers are misled, the legal remedies provided by both principles of protection operate as alternatives. The test for consumer deception is largely similar under both trademark law and unfair competition. Consequently, in cases involving consumer deception, legal remedies provided under both protection principles may act alternatively.[26]

Under the Law of Georgia on Trademarks, the owner of an exclusive right is entitled to prohibit a third party from using a sign that creates a likelihood of confusion or association between the respective signs. Accordingly, where circumstances establishing a likelihood of confusion are identified within the framework of the Law on Trademarks, this may simultaneously indicate the presence of consumer deception within the meaning of the Law of Georgia on Competition. Based on the above, scenarios envisaged in subparagraph (b) and (c) of Article 6 (2) of the Law of Georgia on Trademarks may equally be assessed within the scope of the legislation on unfair competition, thereby giving rise to a concurrence of legal remedies between the Law of Georgia on Trademarks and the Law of Georgia on Competition.

The Court of Justice of the European Union (CJEU) clarified in one of its decisions that, despite the differences in the object of protection, in cases of bad-faith use of the reputation of a trademark, the legislation on unfair competition and trademark protection must be interpreted in a consistent manner.[27] The Directive on Misleading and Comparative Advertising prohibits comparative advertising if it unfairly takes advantage of the reputation of a competitor's trademark, trade name, or other distin-

[23] Law of Georgia "On Competition", 8 May 2012, Art. 11^3 (2) (a).

[24] Dornis, 2022, 28.

[25] Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2) (b) (c).

[26] Dornis, 2022, 23-24.

[27] L'Oréal and Others [CJEU], C-487/07, 18 June 2009, par. 77.

guishing marks, or of the designation of origin of a competing product.[28] Under the 2008 Trademark Directive, the holder of a trademark with special rights may prohibit a third party from using a similar or identical trademark, even if it is not being used for identical goods or services, if the trademark has a reputation in the Member States and the third party is unfairly benefiting from the reputation of a competitor's trademark, trade name, or other distinguishing marks.[29]

Although in the abovementioned case, the Court of Justice of the European Union (CJEU) based its decision on trademark law, it also clarified that comparative advertising, which presents the advertiser's product as an imitation of the product bearing a trademark, is also incompatible with fair competition, and that the benefit derived from the use of such a trademark is the result of unfair competition.[30] Additionally, the Federal Supreme Court of Germany noted in one of its decisions that the violation of trademark law, which includes the bad faith exploitation of a trademark's reputation, also falls under the scope of Germany's act against unfair competition, in addition to the German Trademark Protection Act.[31] A similar provision is also indicated in the Law of Georgia on Trademarks, which grants the holder of a trademark with exclusive rights to prohibit a third party from using a trademark that is identical or similar, and which is protected in Georgia, especially when it has a good reputation and such use unjustifiably creates favorable conditions for the third party, or harms the reputation or distinctiveness of the trademark.[32] Accordingly, it may be reasonably assumed that Article 6 (2) (d) of the Law of Georgia on Trademarks likewise falls within the scope of the concept of unfair competition as defined by the Law of Georgia on Competition. In such circumstances, the rights-holder may, at their discretion, elect the most appropriate legal remedy for the protection of their rights.

According to the Law of Georgia on Trademarks, the holder of an exclusive right may not prohibit a third party from using a protected trademark in civil circulation where such use is necessary for the identification of goods, or for indicating their characteristics.[33] In this case, the law obliges the third party to use the protected trade-

[28] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), Art. 4(f).

[29] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, Art. 10 (2)(c).

[30] L'Oréal and Others [CJEU], C-487/07, 18 June 2009, par. 79.

[31] Dornis, 2022, 28-29.

[32] Law of Georgia "On Trademarks", 5 February 1999, Art. 6 (2) (d).

[33] Ibid., Art. 7 (1) (c).

mark in compliance with the principles of good faith in entrepreneurial activity.[34] It is noteworthy that the German Trademark Protection Act contains an identical provision, but with the difference that it specifies the possibility for the holder of the exclusive right to impose such a restriction if the third party uses the trademark contrary to honest practices in industrial and commercial matters.[35]Accordingly, based on the reconciliation of Georgian and German trademark legislation, it is clear that if the third party does not use the trademark in good faith, the holder of the exclusive right still has the right to prohibit the third party from using the trademark. The CJEU has ruled that unfair practice among other cases exists when it affects the value of the trademark by taking unfair advantage of its reputation or distinctive character, or discredits the trademark.[36] In addition, it is worth noting that the violation of good faith and moral principles is clearly covered by the doctrine of unfair competition.[37] Based on the above, it can be reasonably assumed that the right to prohibit a person with an exclusive right based on Article 7 (1) (c) of the Law of Georgia on Trademarks falls within the scope of the Law of Georgia on Competition.

III. Legal Remedies Available to the Holder of a Violated Right

1. Claims of the Holder of an Exclusive Right

As mentioned above, exclusive rights grant the owner the ability to prohibit third party from using the trademark without consent, a sign that is identical or similar to the protected trademark resulting in the consumer undertaking certain economic action to prohibit a third party from using the trademark without his consent, a sign that is identical or similar to his protected trademark. [38] On that basis, holders may prohibit a third party from using the mark in civil circulation if this creates a risk of confusion or misleading the consumer, or results in an unfair commercial advantage and damage to the reputation of the mark.[39] It is noteworthy that, in addition to the abovementioned remedies, holding the exclusive right also includes the ability of the

[34] Ibid., Art. 7 (3).

[35] Act on the Protection of Trade Marks and other Signs, 25 October 1994, Art. 23 (2).

[36] Gillette Co. v. LA-Laboratories Ltd. [CJEU], C-228/03, 17 March 2005, par. 49.

[37] Dornis, 2022, 34.

[38] Law of Georgia “On Trademarks”, 5 February 1999, Art. 6 (2).

[39] Ibid., Art. 6 (2) (b) (c).

trademark owner to request the withdrawal of the protected mark from civil circulation or the destruction of goods bearing such a mark.[40] However, it is important to note that the holder of the exclusive rights may request prohibition only with respect to these goods for which the trademark is registered or recognized.[41]

In such cases Georgian law on Trademarks indicates that disputes can be subject to judicial review.[42] Trademark owners may alternatively apply to an administrative body requesting prohibition the use of a trademark. For example, in the event of unauthorized use of trademark or the manufacture of marked goods, the trademark owner requests the tax/customs authority to detect and prevent unlawfully marked goods, which results in the imposition of a fine under the Code of Administrative Offences of Georgia and the withdrawal of counterfeit goods from civil circulation.[43] It is worth mentioning that when a trademark is used as a domain name the authority to restrict the domain or cancel its registration is vested in the Communication Commission of Georgia. The Commission upon the request of the holder of the exclusive right to trademark cancels a domain registration within administrative proceedings.[44]

Based on the analyzes above in civil proceedings the holder of an exclusive right is entitled to claim one of the following alternative remedies: compensation for damages, confiscation of income received by the infringer, or a one-time monetary award.[45] The damage mentioned in this article includes both the actual loss and the profit loss.[46] However, it's not easy to distinguish between actual damages and on-time compensation under the Law of Georgia on Trademarks. The legislator unequivocally recognizes the one-time compensation as an independent claim and offers an alternative competition between claims,[47] which means that the right holder must choose either damages or compensation. As for the claim for a one-time compensation, it should be noted that the Civil Code of Georgia does not recognize such liability for breach of an obligation. At the same time, the Law of

[40] Ibid., Art. 45 (1) (b).

[41] Michaels and Norris, 2013, 173.

[42] Law of Georgia "On Trademarks", 5 February 1999.

[43] ბუაძე, შეყილაძე და ჟორჟოლიანი 2020, 7 [Buadze, Sheqiladze da Zhorzholiani, 2020, 7].

[44] Decision No. 793/16 of the Georgian National Communications Commission of 30 November 2017 regarding the examination of the complain of JSC TBC Bank against Caucasus Online LLC.

[45] Law of Georgia "On Trademarks", 5 February 1999, Art. 45 (5).

[46] Ibid., Art. 45 (5) (a).

[47] Ibid., Art. 45(5).

Georgia on Trademarks sets a minimum amount for one-time monetary compensation. Namely, the amount of monetary compensation is deemed to be the sum the infringer of the exclusive right to the trademark would have paid upon obtaining a license to use the trademark.[48]

2. Competitors' Demands and Methods of Implementation

In light of the preceding analysis, the core provisions regarding unfair competition are provided for in the Law of Georgia on Competition. The body authorized to implement these provisions is a public legal entity – the Georgian Competition and Consumer Agency.[49] The Law of Georgia on Competition provides several mechanisms to ensure the prohibition of unfair competition through the Agency. The following chapter will discuss how these mechanisms operate to achieve that goal.

The Law of Georgia on Competition also recognizes the right of a competitor to bring a violation directly before the court without prior recourse to the Agency, designating the Tbilisi City Court as the competent authority. [50] According to the law, a complainant may be any economic agent who believes that a violation of the Law of Georgia on Competition has caused them direct damage. Such a complainant may file a corresponding complaint with the Georgian Competition and Consumer Agency.[51]

The law defines an economic agent as a natural or legal person, or other association, engaged in economic activity.[52] Unlike the Law of Georgia on Trademarks, the Competition Law authorizes the Agency to investigate a case of alleged violations, both on its own initiative and in response to a complaint from an economic agent.[53] To address unfair competition, an economic agent may apply to the Agency and request appropriate action be taken within the scope of its powers. Such actions may include measures to ensure that the conduct of a competing economic agent complies with the Law of Georgia on Competition.[54] The operative part of several decisions of the Georgian Competition and Consumer Agency, based on the provisions discussed above, prohibits an economic agent from using a trademark that is identical or con-

[48] Ibid., Art. 45 (7).

[49] Law of Georgia "On Competition", 8 May 2012, Art. 4(1).

[50] Ibid., 28 (1) and 28 (2).

[51] Ibid., Art. 3 (o).

[52] Ibid., Art. 3 (a).

[53] Ibid., Art. 18 (1) (a).

[54] Ibid., Art. 18 (1) (g).

fusingly similar to another, in order to prevent consumer confusion between competing economic agents.[55] For instance, in one case, the Agency ordered a company to bring its actions into compliance with competition legislation by modifying the appearance of a bus to minimize the risk of consumer confusion between economic agents. The defendant was also prohibited from using a graphic symbol similar to the plaintiff's registered trademark.[56] Hence, in the event of unfair competition, it is also possible to demand the termination of a continuing infringement, expressed in the destruction of marketing materials (brochures or information available on the Internet).[57] In another Agency decision, it was noted that the defendant was ordered to remove misleading information or images from a social network site that contained the disputed trademark.[58]

The Law of Georgia on Competition also grants the Georgian Competition and Consumer Agency the right to accept or reject conditional obligations. If the Agency considers that the risk of an alleged violation of the law will no longer exist as a result of the fulfillment of the conditional obligation undertaken by the defendant economic agent, it shall accept the conditional obligation undertaken by the violator to take specific actions. The Agency shall make a final decision without assessing the fact of the alleged violation of the law, and shall set a deadline for the defendant to fulfill the conditional obligation. If the defendant fails to do so, the investigation of the case shall be resumed.[59] Such obligations are known in EU competition law as "commitments", which means the undertaking of obligations by the party involved that will ensure the elimination of anti-competitive conduct. In the case of a "commitment

[55] Decision of the National Competition Agency of Georgia "on the recognition of the complaint of S.E.A. LLC (ID: 401987597) as admissible, initiation of the investigation of the case and creation of an investigation team" in accordance with the order of the Chairman of the National Competition Agency of Georgia No. 04/40 of April 11, 2022 (case of "S.E.A. LLC"); Decision of the National Competition Agency of Georgia on the investigation of the case carried out in accordance with the order of the Chairman of the National Competition Agency of Georgia N04/66 of June 29, 2021 (case of Delta Development Group).

[56] Decision of the National Competition Agency of Georgia on the recognition of the complaint of "S.E.A. LLC" (ID: 401987597) as admissible, initiation of the investigation of the case and creation of an investigation team" in accordance with the order of the Chairman of the National Competition Agency of Georgia N04/40 of April 11, 2022 (case of "S.E.A. LLC").

[57] Dornis, 2022,16.

[58] Decision of the National Competition Agency of Georgia "On the recognition of the complaint of JSC "Virsaladze Scientific Research Institute of Medical Parasitology and Tropical Medicine", the initiation of the investigation of the case and the creation of the investigation group" in accordance with the order of the Chairman of the National Competition Agency of Georgia No. 78 of June 14, 2016 (the case of the Institute of Parasitology).

[59] Law of Georgia "On Competition", 8 May 2012, Art. 23 (6), 23 (7).

decision", the authority does not assess whether a legal violation has occurred; instead, the decision is made without evaluating the alleged breach of the law.[60] The effectiveness of such decisions in the EU comes due to the fact that the parties avoid a fine or a subsequent claim for damages.[61]

Continuing with other illustrations, the Georgian Competition and Consumer Agency has the right to submit recommendations that are binding to the economic agent for consideration.[62] An example of issuing such a recommendation is the case where the Agency, although it did not find unfair competition in one of its cases, instructed the offending company to remove certain information from social networks and websites. The Agency monitored the company's electronic resources and took appropriate measures to ensure that accurate and relevant information about the company was displayed on its online platforms.[63]

In addition to the measures discussed above, it should be emphasized that the Georgian Competition and Consumer Agency is authorized to impose a fine on an economic agent for a violation of the Law of Georgia on Competition, including in the case of unfair competition.[64] The above-mentioned law determines the limits of the imposition of a fine, but defining the amount is a discretionary power of the Agency.[65]

It is beyond dispute that the question of damages plays a central role in ensuring effective protection of the rights of economic agents. However, the Law of Georgia on Competition does not explicitly provide for the right of an economic agent to claim compensation for damages suffered as a result of unfair competition. Moreover, under European law, the existence of actual damage is not required to establish unfair competition: the presumption of damage is sufficient.[66] Nevertheless, unfair competition inevitably causes harm to competing economic agents, making it important to determine the legal basis for a compensation claim for damages.

[60] Explanatory Note on the draft law of Georgia N07-3/373/9 "On the Amendments to the Law of Georgia "On Competition", 19 June 2019.

[61] Jenny, 2015, 712.

[62] Law of Georgia "On Competition", 8 May 2012, Art. 18 (1) (g^2).

[63] Decision of the National Competition Agency of Georgia No. 01/608 of December 1, 2020 "On refusal to initiate an investigation based on the complaint" (Information Communications Systems LLC case).

[64] Law of Georgia "On Competition", 8 May 2012, Art. 33 (5).

[65] Decision of the National Competition Agency of Georgia on the recognition of the complaint of "S.E.A. LLC" (ID: 401987597) as admissible, initiation of the investigation of the case and creation of an investigation team" in accordance with the order of the Chairman of the National Competition Agency of Georgia N04/40 of April 11, 2022 (case of "S.E.A. LLC").

[66] De Very, 2006, 160.

In Continental European legal systems, unfair competition is generally addressed through tort law.[67] For example, in France, judicial practice under the Civil Code allows an economic agent who suffers damage due to misleading practices, imitation, unfair competition, or disclosure of trade secrets, to claim compensation.[68] Similarly, under Georgian law, the Civil Code of Georgia provides for general tort liability, according to which a person who causes harm to another person by an unlawful, intentional or negligent act is obliged to compensate them for this harm.[69] It is not unreasonable to assume that in cases of unfair competition, the claimant may seek compensation for incurred damages before a court, provided that the prerequisites of tort liability are established: the existence of damage, an unlawful, intentional or negligent act, and a causal link between the act and the resulting harm.

When assessing the issue of compensation for damage arising from the competition law, it is important to answer the question as to whether determining unfair competition is the exclusive competence of the Georgian Competition and Consumer Agency, and accordingly, whether the Agency's decision should precede the claim for compensation for damage under civil law. In this context, legal remedies such as administrative proceedings before the Agency, administrative court review, and civil litigation may overlap or compete - a topic that is discussed in more detail in the following chapter.

IV. Competition of Legal – Procedural Mechanisms of Enforcing a Claim

The foregoing research shows that, in cases of unfair competition, where the holder of an exclusive right simultaneously acts as a competing economic operator, the injured party may restore the infringed right through various legal mechanisms. Protection may be sought either under intellectual property law or under competition law, which at first glance creates the appearance of an alternative concurrence of claims. Such alternative concurrence exists where claims pursuing the same objective are based on legal grounds of equal standing: a so-called concurrence of laws. In situations of alternative concurrence, courts generally determine which legal norm should be applied with priority. According to modern legal understanding, alterna-

67 Hilty and Henning-Bodewig (ed.), 2007, 111.

68 Ibid., 55.

69 Civil Code of Georgia, 26 June 1997, Art. 992.

tive concurrence of legal ground arises where two or more legal bases simultaneously apply to the same factual circumstances, but their cumulative application is excluded because they lead to identical legal effects.[70] In cases of unauthorized trademark use in the specific cases mentioned above, alternative concurrence appears to exist where the injured party seeks an injunction prohibiting the use of the trademark. However, since the systems of legal protection under both intellectual property law and competition law also involve the participation of administrative authorities, the issue extends beyond substantive and enters the sphere of procedural-law concurrence. This may limit the injured party's ability merely to choose a legal basis for the claim and shift the responisbility to the court to select the applicable legal ground,[71] since the injured party must choose the appropriate procedural legal mechanisms, which may be available under just one of the applicable legal regimes. This is an issue that becomes particularly significant with respect to pecuniary claims. It also raises the question as to whether such claims may be brought on the basis of competition law before the competent authority or court.

As noted above, as both the intellectual property law and competition law provide for legal protection mechanisms that involve administrative authorities, the situation involves not only a concurrence of substantive legal norms, but also a concurrence of procedural rules. This raises questions of which procedural mechanism should be used, within which type of proceeding the injured party should assert its claim, and how the legal protection mechanisms provided under these two legal regimes relate to one another.

1. Body Authorized to Determine Unfair Competition

Various administrative bodies are involved in resolving disputes related to trademark protection and prevention of unfair competition, among them the Georgian Competition and Consumer Agency, which is authorized to establish a violation of the Law of Georgia on Competition. The latter grants the person with the violated right the ability to directly apply to court without applying to the Agency.[72] It is noteworthy that the above-mentioned provision does not specify what request an economic agent can apply to the court with, or whether the dispute should be considered within the framework of administrative or civil proceedings. Further ambi-

[70] ჩაჩავა, 2019, 36 [Chachava, 2019, 36].

[71] Ibid., 37.

[72] Law of Georgia "On Competition", 8 May 2012, Art. 28 (1).

guity regarding the issue is created by the Law of Georgia on Competition, which states that, when appealing an Agency's decision, the court is authorized to fully review the act of the administrative body, including the amount of compensation demanded.[73] Given that the decision of the Georgian Competition and Consumer Agency constitutes an individual legal act,[74] it is reasonable to interpret the reference in the Law of Georgia on Competition to the court's authority to review such decisions not as a power to determine the existence of a violation of the law. Rather, this authority should be understood as the court's competence, under administrative procedural legislation, to declare an act issued by the Agency invalid if it was adopted without properly examining and assessing circumstances of essential importance to the case, and to require the administrative body to issue a new decision after duly considering those circumstances.[75]

It is of particular interest that EU member states have developed different approaches regarding legal-procedural mechanisms for preventing unfair competition. In some countries, unfair competition is determined and damages are awarded in civil proceedings by interpreting the general provisions of the Civil Code, such as in France, where claims for damages resulting from unfair competition are based on tort liability.[76]

In other countries, unfair competition is based on specific legislation, such as in Germany, which has an independent law on unfair competition, from which disputes arising are subject to consideration in civil proceedings,[77] and which is not part of the German Competition Act.[78] The aforementioned law envisages consideration of both the prevention of a violation of the law and the issue of compensation for damages by a competing economic agent within the framework of civil proceedings.[79] However, it is worth noting that with regard to other actions restricting competition, which are provided for in the German Competition Act, the establishment of a violation by the agency is not a prerequisite for a claim for compensation for damages.[80] Based on the

73 Ibid., Art. 33[2] (2).

74 Judgment № ბს-913(2კ-20) of the Supreme Court of Georgia, 11 February 2022; Judgment N ბს-1145-1139(კ-17) of the Supreme Court of Georgia, 22 February 2018; Judgment N ბს-500-497(კ-17) of the Chamber of the Supreme Court of Georgia, 14 July 2017.

75 Administrative Procedure Code of Georgia, 23 July 1999, Art. 32 (4).

76 LaFrance, 2011, 1422.

77 "Act Against Unfair Competition", the version published on 3 March 2010, Section 14.

78 Competition Act, the version published on 26 June 2013.

79 "Act Against Unfair Competition", the version published on 3 March 2010, Section 14.

80 Competition Litigation in Germany, <https://www.globalcompliancenews.com/antitrust-and-competition/competition-litigation-in-germany> [24.10.2025].

above, it is clear that, in the European Union, the issue of establishing unfair competition is also subject to consideration under civil proceedings.

It is noteworthy that the explanatory note to the Law of Georgia on Free Trade and Competition (the predecessor law of the Georgia on Competition) states that a person may directly apply to the court to request the prevention of a violation of the law and compensation for damage.[81] The explanatory note of the Law of Georgia on Competition indicates that a decision of the Competition Agency shall be used solely in disputes concerning claims for damages pursued under civil proceedings.[82] Since the parties to the dispute arising from the Law of Georgia on Competition are private individuals and competing economic agents, the possibility of directly applying to the court through administrative proceedings to request compensation for the damage caused should be excluded, since the main feature of the consideration of administrative cases is that one of the parties, the plaintiff or the defendant, must necessarily be an administrative body.[83] Based on the above, Article 28 of the Law of Georgia on Competition should be interpreted in such a way that a person with a violated right can bypass the Agency and apply directly to the court to request the prevention of the violation of said law, and to seek compensation for damages within the framework of civil proceedings. In addition, it is reasonable that allowing a different approach and granting the Agency the exclusive authority to establish unfair competition contradicts the right to a fair and timely review of the case guaranteed by the Constitution of Georgia,[84] since a person must first file a complaint with the Georgian Competition and Consumer Agency, whose decision is subject to administrative appeal, and only then initiate a dispute through civil proceedings, which would be associated with considerable time and costs.

2. The Binding Nature of Decisions of Administrative Bodies

An important issue concerns whether the decision of the Georgian Competition and Consumer Agency should be regarded as a prerequisite for filing a claim for damages. Equally significant is the question of whether such a decision is necessary to bring a claim for damages in civil proceedings. As noted above, the explanatory

[81] Explanatory Note on the draft law of Georgia N07-2/180/8 "On the Amendments to the Law of Georgia on Free Trade and Competition", 13 Mart 2014.

[82] Explanatory Note on the draft law of Georgia N07-3/373/9 "On the Amendments to the Law of Georgia "On Competition", 19 June 2019.

[83] ვაჩაძე და სხვ., 2005, 57-58 [Vachadze et al., 2005, 57-58].

[84] Constitution of Georgia, 24 August 1995, Art. 31 (1).

note to the Law of Georgia on Competition clarifies that the Agency's decisions are intended to be used exclusively in disputes concerning claims for damages pursued through civil proceedings.[85] However, the note does not specify under which procedural category these decisions fall, nor does it clarify their precise relationship to a claim for damages.

To address this, it is necessary to consider whether findings of unfair competition in the Agency's decision fall within the category of facts that a plaintiff is not required to prove under the Civil Procedure Code of Georgia. According to procedural law, a plaintiff is exempt from presenting evidence to prove facts that have been established by a final court judgment in the same civil case, or in another civil case involving the same parties.[86] This clearly indicates that only a final court judgment between the same parties is binding in subsequent proceedings.

The decision of the Georgian Competition and Consumer Agency, however, does not fall into this category, as it represents an act of an administrative body rather than a court judgment. Accordingly, such a decision should not be treated as an established fact, but may serve only as evidence subject to judicial evaluation.

At the same time, it can be argued that the Agency's decision provides grounds for simplified proceedings in claims for damages arising from a particular tort. Under Georgian civil procedural law, in claims for damages, the fact of damage is considered proven if it is confirmed either by a final court judgment, or by an administrative act issued by a competent authority or official in the case of administrative offense.[87]

Although such judgments are typically criminal in nature, it remains unclear whether a decision of the Georgian Competition and Consumer Agency qualifies as an administrative legal act in the context of administrative offense cases. Notably, the Code of Georgia of Administrative Offenses does not explicitly classify violations of the Law of Georgia on Competition as administrative offenses, nor does the competition law itself make reference to administrative offenses.

According to the Administrative Offenses Code, administrative offenses include violations of public order, violations of citizens' rights and freedoms, or breaches of governance rules subject to administrative liability.[88] Importantly, the Code also

[85] Explanatory Note on the draft law of Georgia N07-3/373/9 "On the Amendments to the Law of Georgia "On Competition", 19 June 2019.

[86] Civil Procedure Code of Georgia, 14 November 1997, Art.106 (a) and Art.106 (b).

[87] Ibid., Art. 309^{20} (2).

[88] Code of Georgia of Administrative Offenses, 15 December 1984, Art. 10.

recognizes that the legislation on administrative offences in Georgia is composed not only of the Code itself, but also of other legislative acts of Georgia.[89] Based on systematic analyses, for an act to be regarded as an administrative offence, it is not necessary for it to be expressly defined in the Code of Administrative Offences. Furthermore, the scope of regulation of the Law of Georgia on Competition encompasses the principle of protecting free and fair competition from unlawful restriction, while the latter includes the implementation of unfair competition as noted above – accompanied by sanctions that are an administrative liability. Accordingly, it is reasonable to consider that a decision adopted by the Georgian Competition and Consumer Agency may be regarded as an individual legal act issued in case of an administrative offence. Based on the foregoing, the party that incurred the damage should have the possibility to claim damages within the simplified procedure if they first file a complaint with the National Georgian Competition and Consumer Agency, which establishes unfair competition.

The same approach should be applied to disputes related to trademark protection laws. As noted, a person with the right to the trademark may apply directly to the court to enforce their claims. In certain cases, as mentioned above, the injured party may request that the tax or customs authorities seize and halt the circulation of illegally marked goods. Such action can result in fines and confiscation under the Code of Administrative Offenses. Since the decision of the tax or customs authority constitutes an administrative finding, it can serve as *prima facie* evidence in simplified tort claims, relieving the party which has incurred damage from proving the damage in court. Similarly, this approach should apply when a trademark is used for domain names in cybersquatting cases, and the rights-holder appeals to the National Communications Agency to cancel the domain. Said Agency has the power to impose sanctions under the law on Electronic Communications and the code of Administrative Offenses of Georgia.[90]

Therefore, as noted above, a party that has incurred damages should be entitled to claim compensation through simplified proceedings, provided that the Georgian Competition and Consumer Agency has first established the violation. Conversely, if the party does not use the simplified procedure, the administrative agency's decision should be treated solely as written evidence in the civil proceedings.

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89 Ibid., Art. 2.

90 Law of Georgia "On Electronic Communications", 2 June 2005, Art. 11 (1).

V. Conclusion

The issue of the concurrence of legal remedies in cases of unauthorized trademark use encompasses a number of aspects. On the one hand, the provisions governing trademark protection and the prevention of unfair competition may overlap, as they establish both similar and distinct requirements and legal consequences for the holder of the infringed right. On the other hand, each legal institution provides the entitled person with a variety of legal mechanisms through which their rights may be enforced.

Competition arises between the legislation on competition and on intellectual property in cases of unauthorized use of trademarks, as well as in situations involving the risk of misleading consumers, unfair use of a trademark's reputation, and cases of unfair use of protected trademarks. In such cases, the rights-holder should have the opportunity to choose the appropriate legal remedy: either to apply first to the relevant administrative body with a request to prohibit the use of the trademark, and subsequently to the court for compensation of damages, or to apply directly to the court with both claims.

It should be noted that in both areas of law – trademark protection and unfair competition – non-pecuniary claims are primarily aimed at prohibiting unauthorized use of the trademark. The difference lies only in the procedural means by which these claims are enforced. A person holding an exclusive right may apply either to the court or, in certain cases, to the relevant administrative body. Similarly, in cases of unfair competition, the party who incurred damages should be able to apply alternatively either to the court within civil proceedings, or to the Georgian Competition and Consumer Agency with a request to prohibit the use of the trademark.

With regard to the procedural competition between remedies arising from competition law and intellectual property law, it is reasonable that the authority to determine the existence of unfair competition should not be vested exclusively in the Georgian Competition and Consumer Agency. Accordingly, the filing of a civil claim should not depend on a prior decision of the Agency. Therefore, the party that incurred damages should have the right to apply directly to a civil court, both for the cessation of the violation and for the compensation of damages.

At the same time, the decisions of administrative bodies – whether of the Georgian Competition and Consumer Agency, the Communication Commission, or the

tax/customs authorities – should not be granted the evidentiary status of a fact exempt from proof within the meaning of Article 106 of the Civil Procedure Code of Georgia. However, it would be reasonable to regard such decisions as those adopted in administrative offence proceedings, which may be used by the court for the purpose of simplified consideration of damage claims. In such cases, if the party that incurred damages first applies to the administrative body and subsequently to the court, they would no longer be required to prove the existence of damage, causation, or fault. Conversely, if the claim for damages is pursued through ordinary litigation, the administrative body's decision should be treated as one form of written evidence in civil proceedings.

Based on the above, in cases of unfair competition arising in the context of unauthorized use of a trademark, the authorized party should be afforded the opportunity, in light of their legal interest, to choose the appropriate means of legal protection mechanisms between those provided by the legislation on trademark protection and those established under the law on the prevention of unfair competition.

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