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The Role of the Supreme Court in Civil Proceedings in Poland

ABSTRACT

The Supreme Court, present in most legal systems, serves a distinct function. As a court of law than a court of fact, it does not rehear cases in another instance; instead, it reviews appeals such as cassation complaints, actions seeking a declaration of unlawfulness of a final judgement, or other extraordinary appeals. As states have a great deal of freedom in structuring their judicial systems, provided the fundamental right of access to a court is upheld, various limitations in accessing the Supreme Court are often applied. These restrictions ensure that only cases of genuine importance reach this highest judicial body.

The institution of pre-judgment serves this very purpose, allowing the Supreme Court to perform its functions unhindered. It would be possible to introduce more far-reaching restrictions, such as regarding cases involving property claims. At the same time, it is necessary to enhance the professional nature of proceedings before this court, which is achieved in part through the requirement of mandatory representation by an advocate.

Keywords: Supreme Court, cassation appeal, appeal for a declaration of unlawfulness of a final decision, extraordinary appeal, pre-judgment, obligatory assistance of an advocate.

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I. Introduction

The issues related to the Supreme Court concern the right to a court, which is one of the fundamental human rights expressed in several acts of international law: Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome on 4 November 1950,[1] as amended by Protocols Nos. 3, 5, 8, and supplemented by Protocol No. 2; Article 14 of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966;[2] in Article 47 of the Charter of Fundamental Rights of the European Union of 30 March 2010;[3] and in Article 45(1) of the Constitution of the Republic of Poland of 2 April 1997.[4] The latter consists of:

1. The right of access to a court – the right to initiate a procedure before a court;
2. The right to an adequate and fair judicial procedure, in accordance with the requirements of fairness and publicity, which entails:
   - the right to be heard,
   - the obligation to allow the parties to participate in the proceedings,
   - the obligation to disclose in a legible manner the reasons for the decision, which is intended to prevent its arbitrariness and high-handedness,
   - to ensure the predictability of its course for the parties.[5]

It is important to note in this regard that it is not clear from any act of international law how the judicial system is to be shaped – in terms of the number of instances and possible remedies – in each country. The Convention standard can be upheld even if the case is heard in only one instance,[6] and even when the instantiation of proceedings is carried out within the framework of the so-called horizontal instance. Therefore, it can be argued that the role of the Supreme Court justifies the limitations introduced by the legislator, which will be discussed below. A legal remedy that does not occur in practice, i.e., an application for the annulment of a final decision, will be omitted.

[1] Journal of Laws of the Republic of Poland of 1993, No. 61, item 284, as amended; hereinafter: EKPC.

[2] Journal of Laws of the Republic of Poland of 1977, No. 38, item 167 (appendix).

[3] OJ EU C No. 83, 389 et seq.

[4] Journal of Laws of the Republic of Poland of 1997, No. 78, item 483, as amended.

[5] See e.g. judgments of the Constitutional Tribunal of the Republic of Poland: of 16 March 1999, SK 19/98, Case law of the Constitutional Court (OTK) 1999, No. 3, item 36; of 2 October 2006, SK 34/2006, OTK-A 2006, No. 9, item 118; of 11 September 2007, P 11/2007, OTK-A 2007, No. 8, item 97; of 20 November 2007, SK 57/2005, OTK-A 2007, No. 10, item 125.

[6] See e.g. judgments of the ECtHR: of 23 February 1994, application No. 18928/91, Fredin v Sweden; of 19 February 1998, application No. 16970/90, Jacobsson v Sweden.

II. Instanstitutionality of proceedings and the Supreme Court

According to Article 176(1) of the Constitution of the Republic of Poland, court proceedings shall be "at least two-instance." It may be assumed that such standardisation (by design) preserves the standard of the right to a court, as it ensures that the decision of the court of first instance is reviewed. At the same time, it is debatable whether "instantiation" means that the first and second instance courts remain hierarchically subordinated, i.e. the so-called vertical (devolutive) model of appealing judgments, when we deal with courts situated at different levels of the judiciary, or whether appealability may be realised within the framework of the so-called horizontal (non-devolutive) instance, when appeals are heard by a different composition of the same court.[7] While horizontal appealability has its merits and, to a certain extent, implements the two-instance (or more) principle and the right to a court (in particular as regards the speed of the proceedings), it should nevertheless concern less important formal issues.

The basic model of the two-instance principle should concern the referral to a higher court to hear a case at second instance.[8] In other words, instantiation combined with devolution requires adjudication 'on the case', and to this extent the Constitution of the Republic of Poland requires a two-instance procedure.[9]

However, it is not only about the merits of the case, but also about the review of procedural decisions that end the proceedings in a case, in particular, when their subject matter is the return of the statement of claim and the rejection of the appeal lodged against the decision of the court of first instance, which ends the proceedings as a whole. This refers primarily to an order rejecting an appeal against a judgment (in procedural proceedings) or a decision on the merits (in non-litigious proceedings), but also, for example, to the rejection of an appeal against an order for payment, the rejection of a complaint against an order rejecting a statement of claim, or the rejection of a complaint against an order discontinuing proceedings.

Thus, while the introduction of non-devoluntary measures is not *a limine* inadmissible in the light of international and constitutional law, the traditional instantiation of

[7] See e.g.: Wiśniewski, 2005, 299; Łazarska 2012, 303; Michalska-Marciniak, 2013, 81 et seq.

[8] See e.g. judgments of the Constitutional Tribunal of the Republic of Poland: of 12 September 2006, SK 21/05, OTK-A 2006, No. 8, item 103; of 16 November 2011, SK 45/09, OTK-A 2011, No. 9, item 97; of 22 October 2013, SK 14/13, OTK-A 2013, No. 7, item 100.

[9] See e.g. judgments of the Constitutional Tribunal of the Republic of Poland: of 2 June 2010, SK 38/09, OTK-A 2010, No. 5, item 46; of 12 April 2012, SK 21/11, OTK-A 2012, No. 4, item 38.

proceedings, i.e. with the participation of the court of second instance, definitely better realises the principles indicated. Indeed, it is essential that the court proceedings are structured in such a way that the parties are able to present their arguments regarding the subject matter of the dispute before the courts of two instances.

The above does not mean that every decision made in civil (and more broadly, judicial) proceedings must be subject to an appeal, and even less so by means of a devolutive measure. Article 78 of the Constitution of the Republic of Poland indicates that each party has the right to challenge judgments and decisions rendered at first instance, but exceptions to this principle and the procedure for challenging are determined by law. The subjective right to appeal against judgments and decisions issued at first instance derives from this provision, while judgments issued at second instance may remain unappealed.[10] At the same time, the legislator has a certain degree of freedom to shape the means of appeal, bearing in mind, of course, the need to comply with the above standards. Only in proceedings which are not covered by Article 176(1) of the Constitution of the Republic of Poland is it indicated that it is possible to adopt a solution in which non-devoluntary legal remedies constitute the rule, e.g. in administrative (non-judicial) proceedings.[11] If, on the other hand, an appropriate remedy is provided for in the judicial proceedings, access to that remedy must not be restricted in a way that would prejudice the essence of that remedy, or in a way that is disproportionate.[12]

Two systems of appeal can be distinguished:

a) Revision – the court of second instance examines the appeal, checking the correctness of the issued decision from the point of view of the raised charges;

b) Full appeal (*cum beneficio novorum*) – the court examines the case.

The Polish legislator has shaped the appeal as a devolutive measure of a "full" character. As indicated in the case law, the purpose of the appeal proceedings is to re-examine the case within the limits of the appeal, generally in the manner in which it should be examined by the court of first instance. The court of second instance therefore considers the "case" and not the appeal itself, a consequence of which is, inter alia, the exceptional nature of the cassation ruling (overturning the contested decision

[10] Grzegorczyk P, 2016, side No. 18.

[11] Kmieciak, 2012, 11 et seq.

[12] See e.g. judgments of the ECtHR: of 23 November 1993, application No. 14032/88, Poitrimol v. France; of 15 February 2000, application No. 38695/97, Garcia Manibardo v. Spain; of 28 July 2009, application No. 8958/04, Smyk v. Poland.

and referring the case back to the court of first instance). The court of second instance cannot simply respond to the applicant's pleas, but must, irrespective of their content, make its own findings and then assess them in terms of substantive law.[13] The court of second instance hearing the case on appeal is not bound by the substantive law infringements raised in the appeal, but is bound by the procedural law infringements raised in the appeal. However, within the limits of the appeal, it shall take into consideration *ex officio* the invalidity of the proceedings.[14] Consequently, if the second instance court perceives violations of substantive law, it should rectify them within the limits of the appeal, which means that the decision of this court should comply with the substantive law, regardless of the appeal allegations in this respect.

Thus, the instantiation of proceedings is implemented within the courts of first and second instance. A party should be able to have their case heard on its merits by these courts. Against this background, the position of the Supreme Court is therefore specific. When talking about instances of civil proceedings, we are talking about ordinary legal remedies, i.e. those available against non-final judgments within ordinary courts. Meanwhile, the Supreme Court is not located within this judiciary and it is not a third instance. *De lege lata*, judicial proceedings are two-instance, with the courts of second instance in civil proceedings being the district and appellate courts. From Article 176(1) of the Constitution of the Republic of Poland, the right to appeal against a second instance court decision cannot be derived.[15] In jurisprudence, the position has become established that Article 45(1) of the Constitution of the Republic of Poland does not cover access to the Supreme Court, and that the provisions of the Constitution of the Republic of Poland provide the legislator with the freedom to create a means of appeal against judgments made in the second instance. An element of the right to a court is not the right to lodge an appeal to the Supreme Court (in civil or criminal cases), and, therefore, a party has no claim to the state to shape the applicable provisions in such a way as to ensure that the case is heard by the Supreme Court.[16] Nonetheless, to the extent that the legislature provides for access to the Su-

[13] See e.g. order of the Supreme Court (of the Republic of Poland) of 4 October 2002, III CZP 62/02, Case law of the Supreme Court of the Civil Chamber (OSNC) 2004, No. 1, item 7; judgment of the Supreme Court of 7 May 2009, IV CSK 513/08.

[14] Resolution of 7 judges of the Supreme Court – legal principle of 31 January 2008, III CZP 49/07, OSNC 2008, No. 6, item 55.

[15] See e.g. judgments of the Constitutional Tribunal of the Republic of Poland: of 11 March 2003, SK 8/02, OTK-A 2003, No. 3, item 20; of 31 March 2009, SK 19/08, OTK-A 2009, No. 3, item 29; of 12 January 2010, SK 2/09, OTK-A 2010, No. 1, item 1.

[16] See e.g. judgments of the Constitutional Tribunal of the Republic of Poland: of 6 October 2004, SK 23/02, OTK-A 2004, No. 9, item 89; of 16 January 2006, SK 30/05, OTK-A 2006, No. 1, item 2; orders

preme Court, the proceedings before that Court may be subject to evaluation from the point of view of the standards of the right to a court.[17] In other words, although access to the Supreme Court is not an element of the right to a court, if the legislator has decided to allow parties to challenge second instance decisions, even under certain conditions, the right to a court should be preserved in this respect.

III. Restrictions on Access to the Supreme Court

1. General Remarks

As highlighted, the Supreme Court is not a court of third instance: it is an extraordinary court – a court of law that does not hear the merits of the case, but considers the appeal. It does not determine the facts, and the appeal cannot raise objections that attempt to circumvent the findings of fact and the assessment of evidence made by the substantive (common) courts.

In a cassation review, the Supreme Court does not review the assessment of evidence itself, but only its legality. The applicant may challenge the manner in which the evidence was collected in violation of the rules governing the evidence procedure. The Supreme Court only decides whether the court of second instance, in applying the provisions of law, or in interpreting them, has made such material errors as to justify the annulment of the contested judgment or decision. The substantive examination of the case belongs to the court of first instance, and then, following an appeal, to the court of second instance. Not every case therefore has to be heard by the Supreme Court. As a consequence, the appeals brought before this Court are not of a universal nature, which is determined by the specific scope of control and the restrictions of *rationis materiae* and *rationis valoris* character.[18] It provides an opportunity to remove from the legal market decisions rendered in invalid or manifestly defective proceedings, and its essence is based on the protection of the public interest.

Access to the Supreme Court is not an absolute right, as it is not a *sine qua non* component of the right to a court. It may therefore be subject to various limitations, which are recognised in multiple legal systems, not only in Polish law. In the context of Article 6(1) of the ECHR, it is emphasised that any waiver of the guarantees provided

of the Constitutional Court of the Republic of Poland: of 11 September 2013, TS 83/13, OTK-B 2013, No. 6, item 606; of 9 October 2014, TS 277/13, OTK-B 2014, No. 5, item 453.

[17] Grzegorczyk and Weitz, 2016, side No. 62.

[18] Ereciński, 2009, 686.

for in that provision must be explicit and made with full awareness of its consequences, while ensuring that the party's right to legal assistance from a qualified attorney remains unaffected.[19] The framework of the study does not allow for a detailed discussion of all the restrictions, so only the most characteristic ones will be discussed.

2. Subjective Restrictions

The least restrictions apply to entities which may file an appeal to the Supreme Court against a substantive decision of a common court, or a decision ending the proceedings in a case. As regards the cassation appeal and the appeal for a declaration of unlawfulness of a final decision, there is even an extension of the subjective scope, as it may be brought by a party, but also – as a rule – by the Prosecutor General, the Ombudsman or the Ombudsman for Children, i.e. the "guardians of public order". This is reflected in the grounds for bringing the latter complaint – if the unlawfulness of the judgment is due to: for the Prosecutor General – violation of the fundamental principles of legal order; for the Ombudsman – violation of constitutional freedoms or human and civil rights; and for the Ombudsman for Children – violation of children's rights (Article 424^2 of the Code of Civil Procedure). However, the filing of a cassation appeal by a party excludes – to the contested extent – the filing of a cassation appeal by these entities.

In non-trial proceedings, we have an additional extension of the subject matter, as the indicated guardians of public order may lodge a cassation appeal – within four months from the date the decision becomes final – in cases for taking away a person subject to parental authority or guardianship, conducted on the basis of the 1980 Hague Convention (Article 519^1 para. 2^1 and 2^2 of the Code of Civil Procedure).

The introduction of the possibility of appealing against final judgments by the above-mentioned entities is an important and obvious solution, consistent with the assumption that the proceedings before the Supreme Court include primarily a public aspect, i.e., that they are to serve public purposes, such as: elimination from circulation of obviously defective judgments, supervision of uniformity of jurisprudence, etc.

On the other hand, in the case of an extraordinary appeal, there is actually a subject limitation, as it can only be brought by: a Prosecutor General, Ombudsman, or, within the scope of their jurisdiction, the President of the General Prosecutor's

[19] See: Peukert, 1985, 144; judgments of the ECtHR: of 6 December 1988, application No. 10590/83, Barberà, Messegué and Jabardo v. Spain; of 24 June 1993, application No. 14518/89, Schuler-Zgraggen v. Switzerland; of 18 October 2006, application No. 18114/02, Hermi v. Italy.

Office of the Republic of Poland, an Ombudsman for Children's Rights, Ombudsman for Patients' Rights, Chairman of the Financial Supervision Commission, Financial Ombudsman, Ombudsman for Small and Medium Enterprises, or President of the Office of Competition and Consumer Protection.[20] This means that a party who considers that there are grounds for filing an extraordinary appeal must address one of these entities (in practice, these are most often the Prosecutor General and the Ombudsman), who make a preliminary selection. Their decision determines whether the extraordinary appeal will be brought. This is important insofar as there is no pre-judgment institution (discussed below) for the filing of this appeal. If this were not the case, it is clear that the Supreme Court would be "flooded" with extraordinary appeals. It is these entities that must assess whether the grounds for filing an extraordinary appeal exist, and their decision (positive or negative) is not subject to appeal. If an extraordinary appeal is brought, the Supreme Court is not in a position to refuse to accept it for examination, with the consequence that it must examine it on its merits (assuming that it is brought in time and that all requirements are met).

3. Subject-Matter Restrictions

As the Supreme Court is not a court of third instance, not every case has to come before it to hear an appeal. A number of exceptions are therefore provided for:

I. Cases in which a cassation appeal in procedural proceedings is inadmissible (Article 398^2 of the Code of Civil Procedure):
   1. Cases concerning property rights, in which the value of the object of appeal is lower than PLN 50,000 (except for cases for compensation for damage caused by issuing a final unlawful decision), and in cases concerning labour law and social security – lower than PLN 10,000 (except for cases for granting and withholding a pension or a disability pension, and for coverage by social security);
   2. Cases concerning divorce, separation, alimony, rent or lease and infringement of possession;
   3. Concerning penalties for disciplinary action, certificate of employment and related claims, as well as concerning deprivation of rights or their equivalent;

[20] Pursuant to Article 89 para. 2 of the Act of 8 December 2017 on the Supreme Court (consolidated text Journal of Laws of the Republic of Poland of 2024, item 622).

4. Adjudicated in summary proceedings;
5. Against a judgement establishing the non-existence of marriage, or declaring a marriage invalid, if at least one of the parties has entered into matrimony after the judgement has become final;
6. In which an appeal has been dismissed against a judgement dismissing a manifestly unfounded claim (unless the cassation appeal has been lodged by an entity upholding public policy);

II. Cases in non-litigious proceedings (Article 519^1 of the Code of Civil Procedure) in which a cassation appeal is available:
   1. In the area of personal law, property law and inheritance law, whereby, in cases: (i) family, guardianship and guardianship law are only entitled in adoption cases and cases concerning the division of joint property after the cessation of joint property ownership between spouses, unless the value of the subject of the appeal is lower than PLN 150,000; (ii) are not entitled in cases concerning: forfeiture of property; administration with respect to joint ownership or usufruct; securing of the estate and inventory, disclosure of inheritance items, administration of an undisclosed estate and dismissal of the executor of a will; liquidation of joint ownership and division of the estate, if the value of the object of appeal is lower than PLN 150,000; liquidation of unclaimed deposits;
   2. For the removal of a person under parental authority or guardianship conducted on the basis of the 1980 Hague Convention;
   3. In registration proceedings only against decisions of the court of second instance on registration or deletion of an entity subject to registration.

When there is no cassation appeal, a party may request that the illegality of a final judgment or a decision on the merits of a second-instance court concluding proceedings in a case be established if damage has been caused to a party by its issuance. Exceptionally, if the unlawfulness results from the violation of fundamental principles of the legal order or constitutional freedoms or rights of a human being and a citizen, the unlawfulness of a final judgment of a court of first or second instance ending the proceedings in a case may be requested if the party has not used the legal remedies to which it is entitled, unless it is possible to amend or revoke the judgment through other legal remedies to which the party is entitled (Articles 424^1 and 519^2 of the Code of Civil Procedure). This is a rarely-used remedy, as, in most "more serious" cases, a

cassation appeal is available. Moreover, the Supreme Court refuses to accept such a complaint for examination if it is manifestly unfounded (Article 424^9 of the Code of Civil Procedure).

In the case of an extraordinary appeal, there are no subject matter limitations, except: (i) a judgment declaring a marriage non-existent, declaring a marriage invalid, or declaring a divorce, if at least one of the parties has married after such a judgment has become final; (ii) a decree of adoption (Article 90 para. 3 of the Supreme Court Act) – in these cases the extraordinary appeal is inadmissible. However, there are limitations as to the grounds for its lodging – it may be lodged if it is necessary to ensure compliance with the principle of a democratic state of law implementing the principles of social justice, provided that:

1. A final decision of a common court ending the proceedings violates the principles or freedoms and rights of a human being and a citizen set out in the Constitution of the Republic of Poland or;
2. The decision grossly violates the law by misinterpreting it or misapplying it, or;
3. There is an obvious contradiction of significant findings of the court with the content of the evidence gathered in the case

   – and the decision cannot be reversed or amended under other extraordinary means of appeal (Art. 89 para. 1 of the Supreme Court Act), provided that these allegations were not the subject of a cassation appeal admitted for review by the Supreme Court. The sole exception concerns the allegation of contradiction between the court's findings and the evidence, which cannot serve as a basis for a cassation appeal.

As can be seen, an extraordinary complaint can be brought even in a case in which the Supreme Court has previously ruled (as to a cassation appeal), which has been criticised. In practice, however, extraordinary appeals in such cases do not occur, and concern decisions of common courts in cases, for example, concerning consumers (e.g. such as to foreign currency-linked loans – denominated or indexed), or inheritance (when two conflicting orders of inheritance have been issued).

4. Obligatory Assistance of an Advocate

Pursuant to Article 87^1(1) of the Code of Civil Procedure, in proceedings before the Supreme Court, parties must be represented by attorneys or legal counsels, and in intellectual property cases also by patent attorneys (the so-called obligatory assis-

tance of an advocate). This provision regulates the postulatory capacity of parties in cassation proceedings, i.e. the capacity of a party, its body, legal representative and attorneys who are not advocates or legal advisers or, alternatively, patent attorneys, to perform procedural acts in person.[21] This applies to any appeal brought before the Supreme Court. While, before the ordinary courts, any person (party, participant in the proceedings) who has full procedural capacity may perform procedural acts on his or her own, before the Supreme Court he or she must – as a rule – be represented by a professional attorney. The filing of an appeal in person by a party lacking postulatory capacity is affected by an irremovable deficiency, and results in its rejection without a call to supplement this deficiency.[22] The same is the case when an appeal is brought by a party in person and the pleading is subsequently signed (after the deadline for bringing it) by a lawyer appointed as the party's agent.

The above does not apply to:

1. Proceedings for exemption from court costs and for the appointment of an advocate or legal adviser;
2. When a party, its body, its legal representative or its representative is a judge, a public prosecutor, a notary public, a professor, or a doctor habilitated in legal sciences, as well as when a party, its body or its legal representative is an advocate, a legal adviser or an adviser to the General Prosecutor's Office of the Republic of Poland, and in intellectual property matters a patent agent;
3. Legal representation of the State Treasury or a state legal person is performed by the General Prosecutor's Office of the Republic of Poland.

This solution is related to the professionalisation of proceedings before the Supreme Court, which is not a court of fact, but a court of law. It is intended to ensure the efficiency of the proceedings through the formulation of pleadings at the appropriate level. Since a pleading is filed by a professional representative, i.e. one who has obtained the relevant professional qualifications (advocate, legal adviser, patent agent), it is assumed that its formal and substantive level is much higher than a pleading filed by a person who does not have such qualifications and skills.

[21] Gil, 2025, thesis No. 1.

[22] See e.g. orders of the Supreme Court: of 5 October 2010, IV CZ 67/12; of 23 February 2012, V CZ 132/11; of 30 November 2023, II UZ 71/22; of 5 August 2024, III CZ 105/24; of 14 November 2024, I CSK 3518/24.

A consequence of the obligatory assistance of an advocate is also the possibility of refusal to prepare and file an appeal by an *ex officio* representative. In such a case, he/she is obliged to immediately notify the party and the court thereof, no later than within two weeks from the date of notification of his/her appointment as a legal aid attorney *ex officio*, together with his/her opinion on the lack of grounds for filing such a motion (Article 118 para. 5 of the Code of Civil Procedure). It is emphasised that, as a rule, the obligatory assistance of an advocate can and should lead to favourable outcomes for both the parties to civil proceedings and the court.[23]

In general, therefore, the role of a professional attorney in the Supreme Court proceedings is fundamental. This is because, while until the final conclusion of the proceedings, and even somewhat longer,[24] every civil law entity has postulatory capacity, the coercion in question is implemented from the moment of filing an appeal to the Supreme Court – with the exceptions indicated. In practice, it happens that parties do not comply with this requirement, filing pleadings on their own, treating the Supreme Court as another instance court where the case can be heard on merits, which obviously has no justification or legal basis.

5. Pre-Judgment (Pre-Court)

This is an institution unknown to the proceedings before the common courts. 'Pre-judgment' (pre-court) is not a code term: it is a legal language term, used in the literature and case law. It refers to two extraordinary remedies brought before the Supreme Court: a cassation appeal and an appeal for a declaration of unlawfulness of a final decision (the latter is brought relatively rarely, so the following will refer to a cassation appeal, but the arguments will refer to both).

In essence, a pre-judgment is a kind of "limitation" on the admissibility of the appeal of the parties to the Supreme Court, allowing for the refusal to accept the cassation appeal for examination.[25] The essence of it is the right to refuse to accept these appeals for examination and thus to terminate the case without a substantive examination of the complaints indicated. A sort of selection of cases is made. At this stage, therefore, the Supreme Court does not enter into the merits of the contested decision, but, acting single-handedly in a closed session, assesses whether an action brought in

[23] See e.g. Jarocha, 2025, 211.

[24] A party or his or her non-professional representative may himself or herself, submit a request for a statement of reasons for a decision of the court of second instance, and then apply for the appointment of an *ex officio* representative to represent him or her before the Supreme Court.

[25] See e.g. Zembrzuski, 2011, 91 et seq.

a civil case should be examined on the merits by a three-person panel of the court. It is thus a 'preliminary court,' so to speak.[26]

The Supreme Court's decision to accept or refuse to accept a cassation appeal for examination is not subject to any appeal. If the cassation appeal is accepted for examination, the panel that will consider it on merit is bound by this, and therefore cannot refuse to accept it for examination (this does not exclude, however, the rejection of the appeal).

The consequence of the above is that the applicant is obliged to include in the cassation appeal a request for its acceptance for examination and a justification for the appeal (Article 398^4 para. 2 of the Code of Civil Procedure). In accordance with Article 398^9 para. 1 of the Code of Civil Procedure, the Supreme Court accepts the cassation appeal for examination if one of the following prerequisites (cassation grounds) occurs:

1) There is an important legal issue in the case – it is a new issue, not yet resolved in the jurisprudence, the resolution of which may contribute to the development of the law. In such cases, the applicant is obliged to present an abstract issue together with arguments leading to divergent legal assessments, and demonstrate that it has not been resolved in the jurisprudence hitherto, and that its resolution is important not only for the resolution of this particular case, but also for other similar cases, contributing to the development of the law. The issue cannot be casuistic and serve to provide the applicant with an answer as to the legal classification of specific elements of the factual basis of the contested decision.[27] There is therefore no relevant legal issue in the case, nor is there a need for interpretation of the law if the Supreme Court has already taken a position on the legal issue or on the interpretation of the law, and has expressed its view in previous judgments, and there are no circumstances that justify a change of that view[28];
2) There is a need to interpret legal provisions giving rise to serious doubts or causing divergences in judicial decisions – it is necessary to indicate the provision of law the interpretation of which gives rise to doubts, determine the scope of the necessary interpretation, and demonstrate that the interpretation doubts are of a serious nature and require the Supreme Court to

[26] Gudowski, 1999, 37.

[27] See e.g. orders of the Supreme Court: of 30 April 2015, V CSK 598/14; of 15 April 2021, I CSK 720/20; of 15 March 2023, I CSK 6274/22; of 23 January 2025, I CSK 2630/22.

[28] See e.g. orders of the Supreme Court: of 19 March 2012, II PK 294/11; of 26 November 2024, I CSK 2723/24.

take a stance. If the basis for the motion in this respect is the assertion of discrepancies in judicial decisions resulting from different interpretations of a provision by courts, it is necessary to indicate the divergent decisions, analyse them, and demonstrate that the discrepancy results from different interpretations of the provision[29];

3) There is an invalidity of the proceedings – the invalidity of the proceedings constitutes an autonomous and sufficient ground for accepting the cassation action for examination[30]; this ground differs from the others in that, irrespective of whether the appellant has invoked the invalidity of the proceedings in the cassation appeal, the Supreme Court takes into consideration *ex officio*, within the limits of the appeal, the question of the invalidity of the proceedings before the court of second instance,[31] and invalidity of the proceedings at the first instance if the plea in cassation is based on the failure of the second instance court to consider the invalidity of the proceedings at the first instance.[32] This refers to situations where: (a) a court action was inadmissible; (b) a party lacked judicial or procedural capacity, a body appointed to represent him or her, a legal representative, or if the party's representative was not duly authorised; (c) there is a case pending between the same parties concerning the same claim, or if such a case has already been finally judged; (d) the composition of the adjudicating court was inconsistent with the provisions of law, or if a judge excluded by law took part in the examination of the case; (e) a party has been deprived of the possibility to defend its rights; (f) a district court has ruled in a case in which a regional court has jurisdiction regardless of the value of the subject matter of the dispute (Article 379 of the Code of Civil Procedure);

4) The cassation appeal is obviously justified – it is necessary to demonstrate a qualified form of a violation of substantive or procedural law consisting of its obviousness, visible prima facie, using basic legal knowledge, and this

[29] See e.g. orders of the Supreme Court: of 24 February 2012, II PK 274/11; of 15 April 2021, IV CSK 617/20; of 11 December 2024, I CSK 2930/24.

[30] Zembrzuski, 2008, 294.

[31] See e.g. judgments of the Supreme Court: of 21 November 1997, I CKN 825/97, OSNC 1998, No. 5, item 81; of 10 May 2000, III CKN 416/98, OSNC 2000, No. 12, item 220; of 7 June 2013, II CSK 720/12; orders of the Supreme Court: of 12 June 2020, V CSK 22/20; of 9 October 2020, I CSK 32/20.

[32] See e.g. judgment of the Supreme Court of 13 September 2012, V CSK 384/11; order of the Supreme Court of 23 January 2025, I CSK 2630/22.

obvious violation must result in the issuing of a manifestly incorrect decision[33]; the infringement must therefore be flagrant.

This definition of cassation grounds achieves the following objectives for justice and the public interest:

- to catch complaints brought against genuinely defective and incorrect judgments;
- to concentrate on the most important, complicated, precedent-setting cases, and thus those most likely to contribute to the development of the law and the unification of jurisprudence;
- to control the number of cases coming before the Supreme Court, which prevents unlimited appeals and streamlines civil proceedings.

The acceptance of a cassation appeal for review is therefore permitted only on specified, qualified grounds, and this catalogue is exhaustive. It is not sufficient to refer to any circumstances which, according to the applicant, justify the acceptance of the cassation appeal for examination. The use of vague and indefinite concepts ('substantial issue,' 'serious doubts,' 'obvious grounds') favours a more flexible regulation of the cassation pre-judgment.[34] The criteria for accepting a cassation appeal more or less involve an element of judgement, and, as such, fall within the Supreme Court's discretionary competence.[35] Nevertheless, it is accepted that the pre-judgment is a rational regulator of access to the Supreme Court that does not violate constitutional rights and guarantees. In doing so, it does not limit the right of a party to initiate a cassation review, but creates a limitation 'within' the cassation proceedings[36].

In the case of an appeal for a declaration of unlawfulness of a final decision, the basis for refusing to take it into consideration is, as indicated above, its obvious unfoundedness. Unlawful in this sense is only a decision whose irregularity is flagrant, of a qualified, elementary and obvious nature. The decision must be contrary to fundamental and non-differentiated provisions, to generally accepted standards of decision-making, or to a particularly grossly erroneous interpretation or misapplication of the law. The grounds for upholding the action are that the decision is vitiated

[33] See e.g. orders of the Supreme Court: of 8 October 2015, IV CSK 189/15; of 25 August 2021, II CSK 155/21; of 5 April 2023, I CSK 6859/22; of 23 January 2025, I CSK 3415/24.

[34] Zembrzuski, 2022, thesis No. 17.

[35] Wiśniewski, 2021, thesis No. 3.

[36] See e.g. judgment of the Constitutional Tribunal of the Republic of Poland of 31 March 2005, SK 26/02, OTK-A 2005, No. 3, item 29; Ereciński, 2016, thesis No. 1.

by an established defect of a fundamental and obvious nature.[37] It is therefore not a question of any misconduct on the part of the ordinary court. In practice, it is difficult to demonstrate a gross and obvious misconduct by this court.

IV. Conclusions

The study identifies the most important restrictions on access to the Supreme Court. Undoubtedly, the restrictions are indeed significant, but they cannot be said to violate the right to a court. They are justified by the role of the Supreme Court and the specificity of the proceedings before it. It is not an ordinary court, within the instantiation of civil proceedings, but a court of extraordinary character. There is no legal remedy against its rulings (although there are attempts in practice to use a complaint for the resumption of proceedings when it comes to Supreme Court rulings). The limitations outlined are of a different nature, but their primary objectives are to professionalise the proceedings before the Supreme Court and to limit the impact of appeals to the "court of law", so that it deals with cases that actually require interference. Meanwhile, in practice, parties often treat appeals to the Supreme Court (in particular the most commonly used cassation appeal) as a means of initiating another, third instance, in order for that court to hear the case under the rules applicable to courts of first and second instance.

The range of cases in which a cassation appeal can be brought is too broad. This applies in particular to property claims, in respect of which the lower limit of appeal has been set too low – the amounts of PLN 50,000 (in general) and PLN 10,000 in labour and social insurance cases do not result in the proper selection of cassation appeals, especially since, in the case of so-called division cases, this limit is PLN 150,000. Since these limits were introduced several years ago, taking into account changes in the value of money, increases in the prices of goods and services, in particular the value of real estate, inflation over this period, etc., as well as the role of the Supreme Court, it seems reasonable to raise the lower limit for property cases to at least PLN 150,000, for labour cases to PLN 50,000, and for division cases to PLN 250,000. The distinction between labour cases is important, as labour disputes typically involve relatively small monetary claims. Setting the base threshold too low would therefore unduly restrict the Supreme Court's ability to intervene and shape case law in this area.

[37] See e.g. order of the Supreme Court of 15 January 2025, I CNP 23/24.

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The Cross-Border Conversion of Companies

ABSTRACT

The cross-border conversion of companies, introduced to Directive 2017/1132 of 14.6.2017 relating to certain aspects of company law by the amendment made through Directive 2019/2121,[1] establishes a harmonized legal framework enabling companies to transfer their registered office to another Member State. This paper aims to analyze the premises of cross-border conversion and the legal effects of said conversion. During the transfer of a registered office, the legal and economic positions of shareholders, employees, and creditors may be affected. The paper provides a comprehensive overview of the protection mechanisms afforded to these groups under European Union law.

Keywords: freedom of establishment, conversion, registered office, employees, creditors, shareholders, protection.

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[1] Directive (EU) 2017/1132 relating to certain aspects of company law, 14 June 2017, OJ 2017.169.46, amended - as regards cross-border conversions, mergers and divisions - by the Directive (EU) 2019/2121, 27 November 2019, OJ 2019.321.1.

I. Introduction

The freedom of establishment for companies, resulting from Article 49 TFEU,[2] encompasses the right of a company formed under the legislation of a Member State to decide on the place of its business activity and the location of its registered office within the European legal and economic territory.[3] Under Art. 49 of the TFEU, in conjunction with Art. 54 of the TFEU, the freedom of establishment grants companies formed in accordance with the law of a Member State and having a registered office, central administration or principal place of business within the European Union, to set up undertakings (primary establishment) as well as agencies, branches and subsidiaries (secondary establishment) under the conditions laid down by the legislation of the destination Member State for its own companies.[4] It thus provides the right of a company established under the law of a Member State to convert itself into a company governed by the law of another Member State (corporate mobility). The cross-border conversion enables the removal of restrictions on the freedom of establishment, particularly in Member States where such an operation was not allowed under national legislation. A notable example is the *Polbud* case in Poland, where the European Court of Justice confirmed that requiring the liquidation of a company prior to its cross-border conversion constitutes a disproportionate restriction on the freedom of establishment under EU law.[5] The Polish legislator implemented the provisions on cross-border conversion into the Polish Commercial Companies Code[6] (Art. 580^{1}-580^{19}), which aligns national law with Directive 2019/2121, and simultaneously abolished the rule that transferring a company's registered office to another Member State necessitates the liquidation of said company.[7]

Under Art. 86b of the Directive 2017/1132, "cross-border conversion" means an operation whereby a company, without being dissolved or going into liquidation, converts the legal form under which it is registered in a departure Member State into the legal form of the destination Member State, as listed in Annex II, and transfers

[2] Treaty on the Functioning of the European Union, 2007/C 306/01, of 13 December 2007, consolidated version, 2008, OJ C115/13.

[3] Oplustil, 2024, 5.

[4] Gerner-Beuerle, 2019, 111.

[5] Polbud-Wykonawstwo sp. z o.o. w likwidacji, [CJEU] C-106/16, 25 October 2017, EU:C:2017:804.

[6] Code of Commercial Companies (and Partnerships), 15 September 2000, JL, 2024.18,96, hereinafter abbreviated as CCC.

[7] Amended Articles 270 p. 2 and 459 p. 3 CCC state that winding up of a company is a consequence of transferring the register office abroad, unless the transfer of the register office is to another Member State or a state that is party to the Agreement on the European Economic Area.

at least its registered office to the destination Member State, while retaining its legal personality. The definition uses crucial terms concerning cross-border conversion: "departure" Member State and "destination" Member State. A departure Member State means a Member State in which a company is registered prior to a cross-border conversion, and the destination Member State means a Member State in which a converted company is registered as a result of a cross-border conversion. The term "converted company" means a company formed in a destination Member State as a result of a cross-border conversion.

The provisions on cross-border conversion provide adequate protection for different groups of interest, particularly shareholders, employees, and creditors. On the other hand, the provisions on conversion impose additional requirements in those Member States where the admissibility of relocating the registered office was accepted before the aforementioned amendment, such as in Italy[8].

II. Premises of Cross-Border Conversion

As stated above, under Art. 86b of the Directive 2017/1132, cross-border conversion means an operation whereby a company, without being dissolved or going into liquidation, converts the legal form under which it is registered in a departure Member State into a legal form of the destination Member State, as listed in Annex II, and transfers at least its registered office to the destination Member State, while retaining its legal personality.

In essence, the term "conversion" means a transfer of the company's registered office into another Member State. A comparable procedure is governed by the provision of Regulation 2157/2001 of 8 October 2001 on the Statute of the European Company.[9] However, unlike the SE, which retains its legal form irrespective of the transfer of its registered office, a company undergoing cross-border conversion may adopt a different legal form in the destination Member State, subject to the applicable national laws.

The definition of cross-border conversion stipulates that a "company" may convert its legal form into another legal form, as listed in Annex II. The wording of this definition imposes the conclusion that a company (without further specification of the type of company) is only eligible to undergo conversion into another legal form

[8] Vale Építési kft, [CJEU] C-378/10, 12 July 2012, EU C:2012:440.

[9] Council Regulation No 2157/2001 on the Statute for a European company (SE), 8 October 2001, OJ EU L.2001.294.1. Under Article 8 para. 1 of the Regulation, the registered office of an SE may be transferred to another Member State. Such a transfer shall not result in the winding up of the SE or in the creation of a new legal person.

(not necessarily a company), provided that the resulting legal form is likewise listed in Annex II.

Annex II predominantly refers to companies.[10] In the Polish context, in contrast, two types of companies, limited liability company (*spółka z ograniczoną odpowiedzialnością*) and *joint-stock company* (*spółka akcyjna*), and even one partnership: limited joint-stock partnership (*spółka komandytowo-akcyjna*), are listed in Annex II. Notably, while the limited joint-stock partnership is classified as a partnership under Polish law, it is treated as a company in other Member States, such as France, Spain, and Germany. This broader classification across jurisdictions justifies its inclusion in Annex II. Unlike the limited joint-stock partnership in Poland, in all other Member States, it is a type of company, which is why this legal form is listed in Annex II. Polish law also recognizes another type of company in Poland (*prosta spółka akcyjna*), which is not listed in Annex II, because it is a new legal form admissible in Poland only since 1 July 2021, and is thus currently excluded from the scope of permissible cross-border conversions under the applicable EU framework.[11]

The prevailing interpretation that only companies of the legal forms listed in Annex II may undergo cross-border conversion is supported by two principal considerations. First, it arises from a comparison with the provisions governing cross-border mergers, which adopt a broader interpretation of the term "company", as reflected in Article 119 of Directive 2017/1132. Second, it is grounded in the explicit wording of Article 86b of the Directive, which defines both "company" and "cross-border conversion" with direct reference to Annex II.

While it could be argued that Annex II merely identifies the permissible legal forms of companies in the destination Member State, it is crucial to observe that Art. 86b of Directive 2017/1132 provides a definition of "company" specifically for the purpose of cross-border conversion, so that "company" indeed means a limited liability company of a type listed in Annex II. In light of the definition of cross-border conversion and the interpretation of the term "company", a conclusion is drawn that only entities whose legal form in the departure Member State is included in Annex II are eligible to convert into a legal form likewise listed in Annex II in the destination Member State.

[10] In France: *société anonyme, société en commandite par actions, société à responsabilité limitée, société par actions simplifiée*; in Spain: *sociedad anónima, sociedad encomanditaria por acciones; soceidad de responsabilidad limitada*; in Germany: *die Aktiengesellschaft, die Kommanditgesellschaft auf Aktien, die Gesellschaft mit beschränkter Haftung*.

[11] Adversely, Oplustil believes that a Polish simple joint-stock company may undergo conversion; however, converting companies from other Member States into a Polish simple joint-stock company shall not be admissible. See: Oplustil, 2024, 51; Similarly: Jara, 2024, Art. 580[1] MN 3.

III. Consequences of Cross-Border Conversion

Pursuant to Art. 86r of Directive 2017/1132, cross-border conversion entails three essential legal consequences. First, all the company's assets and liabilities shall be those of the converted company, including all contracts, credits, rights, and obligations. This principle is commonly referred to in Polish legal doctrine as a "continuity principle".[12] Second, the company's shareholders shall become the shareholders of the converted company, unless they have exercised their right to dispose of their shares as referred to in Article 86i. Third, the rights and obligations of the company arising from contracts of employment, or from employment relationships existing at the date on which the cross-border conversion takes effect, shall be those of the converted company.

With respect to the situation of creditors, the cross-border conversion may result in a change of jurisdiction due to the transfer of the registered office to the destination Member State. The legal frameworks governing creditor protection differ significantly among Member States, which adds significant complexity to the cross-border operation process, and can lead to uncertainty both for the companies involved and for their creditors. As such, creditors should be granted by the Member States the ability to apply for safeguards. When assessing such safeguards, the appropriate authority should take into account whether a creditor's claim against the company or a third party is of at least an equivalent value, and of a commensurate credit quality, as it was before the cross-border operation, and whether the claim may be brought in the same jurisdiction[13].

It should be emphasized that although the assets and liabilities of the company remain those of the converted entity, the operation requires the transfer of at least the registered office to the destination Member State. This means that the conversion does not require relocating the company's principal place of business to that Member State.[14] In other words, a company's registered and operational head offices do not have to coincide.[15] Under ordinary circumstances, the registered office is typically located in a State where the principal place of business is conducted and the central administration, i.e., management board or board of directors, operates.[16] Nevertheless,

[12] Oplustil, 2024, 429; Pinior and Strzępka, 2024, 1329.

[13] Recitals 22-23 of the Preamble to Directive 2019/2121.

[14] Oplustil and Mucha, 2020, 143; Oplustil, 2024, 82.

[15] Gerner-Beuerle and Schillig, 2019, 140.

[16] Under Article 41 of the Polish Civil Code, 23 April 1964, JL 2024.1061, unless statutory law or articles of association do not provide otherwise, a legal person's central office shall be where its managing organ operates.

this principle holds limited practical relevance in contemporary corporate practice. Given the widespread availability of advanced communication technologies, corporate management may be effectively exercised remotely.

In practice, concerns may arise regarding the genuine purpose of relocating a registered office to another Member State, particularly when a transfer of the place of business activity does not accompany such relocation. In a cross-border conversion, the authority issuing the pre-conversion certificate, attesting to the completion of the procedure in the departure Member State, shall examine whether or not a cross-border conversion is set up for abusive or fraudulent purposes leading to or aimed at the evasion or circumvention of EU or national law, or for criminal purposes (Art. 86m sec. 8 of the Directive).[17] This assessment enables the authority to determine whether transferring the registered office to another Member State without a simultaneous relocation of the business activity has legal and economic justification.

Consequently, the legal position of the stakeholders, particularly the employees, may vary depending on the location of the business enterprise. If the business enterprise, or organised part thereof, remains in the departure Member State, the employees' rights shall be governed by the law applicable to the departure Member State.[18] Conversely, transferring the principal place of business to another Member State may give rise to redundancies and other employment-related consequences.[19] Consequently, the applicable law may shift as a consequence of transferring a business enterprise or branches to a destination Member State.[20] Nevertheless, the converted company shall be responsible for all the obligations arising from employment contracts or any employment relationships, independently of all the protection mechanisms introduced by European Law.

In contrast, the legal position of shareholders is subject to a different set of considerations. The transfer of a company's registered office into another Member State invariably results in a change of the law applicable to the exercise of shareholders' rights (*lex societatis*).[21] In recognition of this shift, the European legislator has introduced enhanced protection measures for shareholders, particularly in the form of the right to dispose of shares (sell-out).

17 Teichmann, 2022, 376.

18 Teichmann, 2019, 10.

19 The Act on particular rules for terminating employment relationships with employees for reasons unrelated to employees, 13 March 2003, JL 2024.61.

20 Roest, 2019, 84; Jara, 2024, Art. 580[4], MN 17.

21 Garcimartín and Gandía, 2019, 20.

IV. Protection Mechanisms under Directive 2017/1132

1. Creditors' Protections (Art. 86j of Directive 2017/1132)

The legal framework governing cross-border conversions within the European Union provides a multi-layered system of protection for creditors whose claims antedate the disclosure of the draft terms of the cross-border conversion and have not fallen due at the time of such disclosure.

First, the creditors should be provided with safeguards in the draft terms of cross-border conversion. Under Article 86d point (f) of the Directive, the draft terms shall include any safeguards offered to creditors, such as guarantees or pledges.

Second, creditors who are dissatisfied with the safeguards provided in the draft terms may file a petition, within three months of the disclosure of the draft terms of the cross-border conversion, to the appropriate administrative or judicial authority for adequate safeguards, provided that such creditors can credibly demonstrate that, due to the cross-border conversion, the satisfaction of their claims is jeopardised and the company has failed to provide adequate protection (Art. 86j of the Directive). For example, under Polish law (Art. 580^{12} CCC), creditors who credibly demonstrate that their satisfaction is at stake due to a company conversion may request judicial protection. In such a dispute, a civil court competent to adjudicate commercial matters – having jurisdiction over the company's registered office in the departure Member State – shall, upon the request of a creditor submitted within three months of the disclosure of the draft terms of conversion, decide whether to grant the safeguard. The creditor's demand does not suspend the issue of a pre-conversion certificate by the registry court; however, the enforcement of security depends on the effectiveness of the cross-border conversion. As a result, the converted company shall provide the safeguard after registration of the cross-border conversion in the destination Member State.[22]

Third, apart from the above-stated protection system, Member States shall ensure that creditors whose claims antedate the disclosure of the cross-border conversion's draft terms have the right to institute proceedings against the company in the departure Member State within two years of the date the conversion has taken effect. The option of instituting such proceedings shall be in addition to other rules on the choice of jurisdiction that are applicable pursuant to EU law.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2021 on jurisdiction and the recognition and enforcement of judgments

[22] Pinior and Żaba, 2024, 1369.

in civil and commercial matters[23], imposes the rule that the court of a Member State, having jurisdiction over the company's registered office, has jurisdiction in civil and commercial matters.[24] After the date of the cross-border conversion, applying the rule provided for in Regulation 1215/2012, the court of the Member State having jurisdiction over the converted company would have jurisdiction in disputes with creditors. However, under Directive 2017/1132, after the date of the cross-border conversion, creditors whose claims antedate the disclosure of the draft terms will have the option of initiating proceedings before the court of the departure Member State. Scholarly commentary underlines that this jurisdictional exception significantly enhances creditor protection: it mitigates the financial and procedural burdens associated with pursuing claims in a foreign jurisdiction, and it serves as a deterrent against the strategic relocation of companies aimed at evading domestic obligations.[25]

2. Employee Protection

2.1. Participation Rights

The Directive provides a protection system in cross-border operations (mergers, divisions, conversions) analogous to the formation of a European company.[26] The protection includes all forms of employee involvement, i.e., employees' rights to information and consultation (Art. 86k) and employee participation (Art. 86l). The latter is governed by the before-and-after principle, mandating that the rights on participation granted to the employees before the operation shall remain in force after the cross-border operation.[27] The protection of participation rights is essential for Member States that provide employees' rights to elect or nominate supervisory or administrative board members, such as Germany[28] or the Netherlands.[29]

Primarily, participation rights, in the context of cross-border conversion, depend on the legal framework in the destination and departure Member States. For instance,

[23] OJ L.351, 20.12.2012.

[24] Article 4 in connection with Article 63 of the Regulation.

[25] Dumkiewicz, 2024, 3; Jara, 2024, Art. 580[12], MN 9.

[26] Directive 2001/86/EC supplementing the Statute for the European Company with regard to the involvement of employees, 8 October 2001, OJ L 294, 10.11.2001.

[27] Teichmann, 2019, 11; Garcimartín and Gandía, 2019, 35; Oplustil, 2024, 525.

[28] In the case of Germany, the participation rights result from the Act of 2 May 1976 (Gesetz über die Mitbestimmung der Arbeitnehmer, BGBl I S. 1153) and the Act of 18 May 2004 (Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat, BGBl I S. 974)

[29] See on varying forms of participation: Roest, 2019, 78.

a Polish company originating from a jurisdiction where no employee participation system is in place, that converts its legal form into a German company, which operates under a statutory employee participation regime, will be required to implement employee participation rights, provided that the converted entity satisfies the conditions stipulated under German law. Conversely, no such obligation arises when a Polish company converts into a Czech company, as the Czech legal system similarly lacks a mandatory employee participation framework.

Second, the protection mechanism for participation rights applies to a company departing for a state with a lower level of participation rights.[30] Article 86l sec. 2; of the Directive sets out two cumulative conditions under which employee participation rights must be addressed in the context of a cross-border conversion. The first condition is that, within six months prior to the disclosure of the draft terms of the cross-border conversion, the company must have employed an average number of employees equivalent to at least four-fifths of the applicable threshold laid down in the law of the departure Member State, thereby triggering employee participation. The second condition is that the law of the destination Member State does not provide:

a) a level of employee participation at least equivalent to that existing in the company prior to the cross-border conversion, assessed by the proportion of employee representatives among the members of the administrative or supervisory body; or

b) an entitlement for employees of establishments of the converted company located in other Member States to exercise participation rights equal to those granted to employees employed in the destination Member State.[31]

For example, if the departing company meets the criteria in the departure Member State (e.g., in Germany), and the destination Member State does not provide for at least an equivalent level of employee participation (e.g., Poland), the protection mechanism resulting from Art. 86 l sec. 2 of the Directive must be invoked. In such circumstances, the Directive establishes a comprehensive framework for negotiations with a special negotiating body to safeguard employee participation rights.[32]

Moreover, employee protection is reinforced through the scrutiny of legality conducted by the competent authority responsible for issuing the pre-conversion certificate, pursuant to Article 86m of the Directive. This authority is required to examine all documentation prepared in the course of the conversion process, including, where applicable, arrangements concerning employee participation.

[30] Garcimartín and Gandía, 2019, 35; Roest, 2019, 89.

[31] Roest, 2019, 89.

[32] Ibid., 93.

2.2. **Additional Protection Mechanism**

In addition to the above-mentioned continuity principle, stating that the rights and obligations of the company arising from contracts of employment or from employment relationships, and existing at the date on which the cross-border conversion takes effect, shall be those of the converted company (Art. 86r p. c.), the Directive introduces further measures protecting the interest of employees in the cross-border procedure. Specifically, the draft terms of the conversion must include mandatory information regarding the likely repercussions on employment (Art. 86d). Moreover, the procedure requires the preparation of a report, addressed to both shareholders and employees, informing them of the legal and economic aspects of the conversion and the implications for the company's future business (Art. 86e). The report shall detail the expected impact of the conversion on employment relationships, as well as, where applicable, any measures that will be made to safeguard those relationships; any material changes to the relevant conditions of employment or the location of the company's places of business; and how those factors will affect company subsidiaries.

Nevertheless, the actual situation of the employees shall depend on the scope of assets transferred to the destination state, as outlined above, given that the law applicable to employees is determined by the location of the employing establishment or the performance of work.[33] Accordingly, employee protection will continue to be governed by the national labour law of the departure Member State, provided that the place of work or service remains within its jurisdiction.

The protection of employees' rights shall be subject to scrutiny by the competent authority during the issuance of the pre-conversion certificate. This control mechanism is intended to prevent so-called artificial arrangements aimed at abusive or fraudulent purposes, which may unduly prejudice the rights of stakeholders, including employees.[34] Guidance on interpreting potential abuses of employee rights is provided in Recital 35 of Directive (EU) 2019/2121, which acknowledges that, under certain circumstances, the cross-border operation could serve for abusive or fraudulent purposes, such as for the circumvention of the rights of employees, social security payments or tax obligations, or for criminal purposes. In particular, it is crucial to counteract 'shell' or 'front' companies set up to evade, circumvent, or infringe EU or national law.[35]

[33] Davies and others, 2019, 217.

[34] Teichmann, 2019, 13; Garcimartín and Gandía, 2019, 37; Roest, 2019, 97; Davies and others, 2019, 203; Schmidt, 2019, 237; Jara, 2024, Art. 580[12], MN 9.

[35] Oplustil, 2024, 323; Dumkiewicz, 2024, Art. 580[13].

3. Protection of Shareholders

As a consequence of a cross-border conversion, shareholders may find themselves subject to a different legal regime, as they become shareholders of a company governed by the law of the destination Member State rather than that of the departure Member State. In such circumstances, it is essential to ensure that, at a minimum, shareholders who voted against the approval of the draft terms are granted the right to exit the company and to receive cash compensation equivalent to the value of their shares.[36]

The decision on cross-border conversion falls within the competence of the general meeting of shareholders. The shareholders' resolution requires a majority of no less than two-thirds, but not more than 90%, of the votes attached to the shares, or to the subscribed capital represented at the general meeting (Art. 86h of Directive 2017/1132). In any event, the voting threshold shall not be higher than that provided for in national law to approve cross-border mergers.[37]

Pursuant to Art. 86i of Directive 2017/1132, Member States are obliged to ensure that shareholders voting against the approval of the draft terms of the cross-border conversion have the right to dispose of their shares for adequate cash compensation, provided their demand is submitted no longer than one month after the general meeting deciding thereon.[38] Member States shall determine the period within which the cash compensation is to be paid, which may not exceed two months from the date the cross-border conversion takes effect.

The acquisition of shares by the company in this context constitutes an exception to the general prohibition on a company acquiring its own shares.[39] Under Polish law, in the context of cross-border conversion, the company may acquire its own shares either on its own account, or on behalf of those shareholders who remain in the converted company (Art. 580^{11} para. 5 of the Commercial Companies Code), depending on the decision of the remaining shareholders or of the company itself.[40]

Certain scholars argue that the remaining shareholders should be given priority in acquiring shares over the company.[41] The acquisition of shares must be completed before the effective date of the cross-border conversion by concluding contracts be-

[36] Recital 18 of Directive 2019/2121.

[37] Under Polish law, the required majority is three-quarters of votes, representing at least half of the subscribed capital (Art. 580^{10} para. 3 CCC).

[38] Under Polish law, the demand shall be submitted no longer than ten days after the general meeting (Art. 580^{11} para. 3 CCC).

[39] Oplustil, 2024, 472; Dumkiewicz, 2024, Art. 580^{11}, MN 3.

[40] Pinior and Żaba, 2024, 1368.

[41] Oplustil, 2024, 472; Dumkiewicz, 2024, Art. 580^{11}, MN 3.

tween the company and the eligible shareholders.[42] The payment for the shares may be effected within two months following the conversion date, in which case the obligation to pay rests with the converted company.

Furthermore, shareholders who have declared their decision to exercise the right to dispose of their shares, but who consider that the cash compensation offered by the company has not been adequately set, are entitled to claim additional cash compensation before the competent authority under national law. The rights to dispose of shares shall be governed exclusively by the law of the departure Member State, and the exclusive competence to resolve any disputes relating to those rights lies within the jurisdiction of that departure Member State.

Member States shall establish a time limit within which claims for additional cash compensation may be submitted.[43] They may also provide that the final decision regarding such compensation shall apply uniformly to all shareholders who have exercised their right to dispose of shares. This approach reflects the principle of equal treatment of shareholders, and efficiently uses time and resources to fulfil obligations towards shareholders.[44]

V. Conclusions

The cross-border conversion of a company results in the continuation of the legal personality by the converted company, and all the assets and liabilities of the company, including all contracts, credits, rights and obligations, shall be those of the converted company. Notwithstanding this continuity, the legal positions of the three principal stakeholder groups: creditors, employees, and shareholders, are subject to distinct considerations, each necessitating tailored protective measures.

Creditors must be afforded adequate safeguards in the draft terms of the cross-border conversion. Any disputes arising from these safeguards may be pursued through supplementary proceedings before the competent authority. Crucially, the principal protective mechanism encompasses disputes concerning the safeguards themselves, and any claims predating the disclosure of the draft terms. Following the conversion, creditors whose claims arose prior to such disclosure retain the right to initiate legal proceedings before the courts of the departure Member State.

[42] Oplustil, 2024, 473; Dumkiewicz, 2024, Art. 580^{11}, MN 5.

[43] Under Polish law, the demand shall be submitted within two weeks after the general meeting (Art. 580^{11} para. 6 CCC).

[44] Schmidt, 2019, 259; Oplustil, 2024, 470; Dumkiewicz, 2024, Art. 580^{14}, MN 5; Jara, 2024, Art. 580^{11}, MN 14.

The protection of employees operates on two distinct levels. First, the protection refers to employee involvement, i.e., employees' rights to information, consultation, and employee participation, which is governed by the "before-and-after" rule. Pursuant to said principle, any participation rights conferred upon employees prior to the cross-border operation shall remain effective after the conversion. Second, the contractual and employment rights are preserved under the "continuation rule". However, the practical implications for employees depend on the scope of asset transfer to the destination Member State. The applicable law governing employment relationships is determined by the location of the employing establishment, or the place where the work is performed.

The legal status of shareholders transforms as a result of a conversion and the consequent change in the applicable legal framework. Shareholders become company members governed by the law of the destination Member State. Member States are obliged to ensure that shareholders who voted against the approval of the draft terms are granted an exit right, entitling them to receive cash compensation equivalent to the fair value of their shares. Furthermore, shareholders who deem the offered compensation inadequate are entitled to seek additional cash compensation before the competent authority, in accordance with national law.

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Cross-Border Mediation Proceedings within the European Union

ABSTRACT

This article examines the nature and principles of cross-border mediation. Within the European Union, this form of mediation is used in cases where one of the parties to a dispute resides or is established in a different Member State from the other parties, or where the parties have different nationalities. It mainly concerns disputes and conflicts in family matters (residence of the child, exercise of parental authority, access to the child, and the like). However, the use of this type of mediation is broader. It can, for example, be used in civil and commercial disputes (such as in the enforcement of contracts between business partners) and in consumer matters.

With ongoing social and economic development, and the diminishing of barriers between countries, the importance of cross-border mediation is likely to increase. The article primarily examines the fundamental principles common to the various systems of the EU Member States and discusses the main instruments of international law on which these are based. This article also considers the advantages and disadvantages that continue to prevent mediation from being recognised as an effective tool.

Keywords: Alternative dispute resolution, cross-border mediation, European Union.

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I. Introduction

Mediation is now a leading alternative for resolving disputes, potentially implying litigation.[1] Its roots lie in the idea of restorative justice, within which the parties are seen as partners and their conflict is understood as interconnected rather than isolated. Its resolution involves other people, including those closest to them, who are better able to identify the needs of the parties than state authorities.[2] Mediation is seen as a set of different types of activities aimed at organising and mediating a dialogue between the parties in a dispute of different aetiology. These activities are primarily logistical and mediatory in nature, and guide and support the opponents in reaching mutually acceptable arrangements.[3]

Mediation is promoted primarily because of its effectiveness and the steadily increasing volume of court proceedings, which in turn leads to longer waiting times for final decisions. It also represents a significantly cheaper alternative, as it involves far lower costs than judicial proceedings. Structured consensualism in the form of mediation therefore greatly facilitates the resolution of various types of disputes. Its foundation is dialogue-oriented, based on an exchange of views and arguments supporting the parties' positions, with the aim of reaching an agreement that brings the dispute to a close.

A concept closely connected with mediation is the participation of the public in seeking amicable solutions to disputes, which corresponds to the demands of civil society. It is also consistent with the principles of a democratic state governed by the rule of law, where the idea of subsidiarity forms a key foundation. Implementing this idea ensures the right balance and complementarity between mediation and judicial proceedings. This article analyses the scope of cross-border relations in the European Union, compares selected issues related to mediation, and assesses its advantages and disadvantages in the context of general European regulations.

Mediation should be characterised by a considerable degree of flexibility, as this is essential for achieving compromise.[4] It may also serve as a way to defuse the emotions accompanying a conflict,[5] evident in both family and criminal law proceed-

1 Menkel-Meadow, Love and Schneider, 2013, 442.

2 Zalewski, 2012, passim.

3 Krajewska, 2009, 85; Cichobłaziński 2010, 51.

4 See: Lo, 2014, 121.

5 Wdzięczna, 2010, 94.

ings. The mediator oversees the entire process of reaching an agreement and, as an impartial observer, intervenes when one of the parties goes beyond the permissible boundaries. This very feature – flexibility – clearly distinguishes mediation from court proceedings, which lack such adaptability and are marked by formalism that limits party autonomy.

Another important aspect is that mediation takes place under far less stressful conditions than traditional court proceedings, enabling the parties to influence both the course and the outcome of the process directly. In this sense, they take the matter "into their own hands". While mediation offers many advantages, it is not without weaknesses. These include weaker procedural guarantees, ineffective enforcement mechanisms for mediated settlements, inequality of the parties to the conflict, sometimes unnecessary bureaucratisation, relatively low efficiency (although there is an increasing trend here), or the lack of a stabilising effect on relations between the parties over the long term.[6]

Over the years, however, many of these shortcomings have been gradually reduced as experience accumulates.

Nonetheless, mediation should be viewed not as a substitute for the administration of justice, but as an institution that supports it and enhances the efficiency of the courts. Mediation proceedings, in terms of their scope of influence, can be divided into proceedings of an internal and cross-border nature. The former are based exclusively on the internal legal norms of the country concerned. The latter, on the contrary, are based not only on domestic norms, but also on European and foreign laws. For this reason, they are characterised by a significantly higher degree of complexity.

Owing to its many advantages, mediation is already present in almost all branches of law. It is used in civil proceedings, criminal proceedings, family law cases and even in sports law. Naturally, it also plays an important role in areas with a broader scope of influence, including European law. Despite the diversity of of mediation processes across the EU Member States, interest in this method of dispute resolution continues to grow, as does the number of successfully completed mediations. Over time, several core standards – fundamental characteristics that must always be respected – have been developed. Five of these key features deserve particular mention.[7] The first of these is voluntariness. This means that no party may be coerced into en-

[6] Kulesza, 1995, 12.

[7] Mediation in European Union Countries, <https://e-justice.europa.eu/64/PL/mediation_in_eu_countries> [20.09.2025].

tering mediation. It also prohibits the use of deception or manipulation in order to induce mediation. Another element is confidentiality, which requires that the course and content of the mediation remain undisclosed. This obligation primarily applies to the mediator, although it may be waived if both parties consent. Confidentiality is also subject to material limitations – for example, in criminal proceedings, it does not extend to the most serious offences. This exception is justified by the need to balance confidentiality with the protective aims of criminal law. The next feature immanent to mediation is the impartiality of the mediator. He or she must not sympathise with or be associated in any way with any of the parties. The mediator must oversee the course of the proceedings, ensure an appropriate relationship between the parties, and guide their actions towards reaching an agreement. The mediator is there to support negotiations, tone down conflicting situations, and help both parties to reach a compromise, without imposing his or her own view of the matter. Closely related to this is the principle of immediacy, which recognises that, in some situations, the mediator may need to act as an intermediary – relaying the parties' intentions, arguments and positions to prevent direct confrontation. The next feature of mediation, closely related to the previous one, is neutrality, which reinforces the prohibition against the mediator influencing the final outcome, or steering the parties toward a preferred solution. The last feature is the principle of acceptance, which consists of the parties agreeing to a specific person conducting the mediation and enforcing its rules. An extension of this feature is the possibility to change the mediator if he or she does not meet the above-mentioned standards, or abandons the mediation.

II. The Nature of Cross-Border Mediation and Its Basis

Mediation is increasingly recognised as a valuable tool for resolving a wide range of disputes involving natural persons, legal entities, and even unincorporated organisations.[8] The topic has been addressed internationally for many years, and, over time, mediation has gained prominence due to its numerous positive features. As Ewa Anna Wdzięczna aptly notes,[9] it represents a clear and accessible expression of new ideas reflected in various EU documents.

Cross-border mediation arises when one party to a dispute is domiciled or established in a different country from the other parties, or when the parties have different

[8] Nadja, 2019, 446-447.

[9] Wdzięczna, 2010, 94.

nationalities. In practice, it is most commonly applied in family law cases, but it is also increasingly used in civil and commercial disputes. More broadly, mediation is generally admissible in proceedings that allow for the possibility of settlement. It can occur before, during, or even after the judicial stage of proceedings, and in some cases, may be initiated at the enforcement stage.[10]

Mediation in cross-border cases consists of three stages. The first stage defines the framework of the proceedings. It is up to the mediator to explain to the parties the purpose and the rules of the procedure, his or her role in it, and to gain acceptance for the proposed method of mediation. The second stage is exploratory in nature. Here, the mediator becomes acquainted with the position of the parties and their view of the facts of the case. There is also room at this stage for more detailed consultations (identifying concerns about the proceedings and their potential course) and for relieving stress, mutual tensions or other emotions (if needed). The third stage involves creating a list of issues to be addressed during mediation, outlining its plan and duration. Contentious issues are distinguished from consensual ones, and a consensus is developed on areas of conflict. Naturally, this model may not be suitable in every case; accordingly, slightly different models may emerge, incorporating more or fewer elaborated individual elements.

These elements require the mediator to take a more active role, assisting more prominently in facilitating compromise – particularly by presenting the ranges of potential agreement, identifying areas where consensus can be reached quickly or later, and highlighting issues that are unlikely to be resolved amicably. In this context, the conclusion of the mediation itself can be considered "zero-sum". This procedure can either lead to a compromise or (for various reasons) failure to achieve this goal. In the case of an amicable settlement, the mediator should draw up a detailed written agreement in such a way that it has the necessary legal force in all legal systems represented by the parties. If, on the other hand, no consensus is reached, the mediator should make a written summary of the negotiations, indicating the points in dispute. It is then possible to initiate or return to court proceedings.

The costs of mediation are generally lower than resolving a dispute through the courts, although they can still pose a barrier for some parties. Mediation costs typically include the mediator's fees and any expenses incurred in organising the process. It should be noted – while also open to criticism – that EU law addresses legal costs

[10] Zienkiewicz, 2011, 124-125.

only marginally. The preamble to Directive 2008/52/EC of the European Parliament and of the Council only indicates that mediation is intended to be a "cost-effective" method of out-of-court dispute resolution, and leaves it to the national legislator to define the limits of this "cost-effectiveness". More specifically, the costs of mediation are addressed in the Recommendation.[11]

The institution of mediation in cross-border relations within the European Union is intended to facilitate access to alternative dispute resolution methods at any stage of a dispute, and to promote such methods.[12] For this reason, the Directive in question contains instruments that also guarantee the enforceability of the settlement agreement and therefore addresses issues of enforceability. It provides that an application for the enforceability of a settlement agreement must be made in accordance with the procedure established by the legislation of the relevant Member State. Once granted, the agreement is also recognized and enforceable in other Member States, in line with applicable EU and national regulations.

In 2004, the European Commission established the European Code of Conduct for Mediators. This soft law standard sets out norms and standards of conduct for mediators and organisations overseeing the provision of mediation services. It contains elements of a fair mediation standard, further underlining their importance.[13]

The Commission drafted a Directive of the European Parliament and of the Council on certain aspects of mediation,[14] which was adopted by the European Parliament and the Council with slight modifications.[15] As far as the resolution of cross-border family disputes is concerned, among the most important pieces of European legislation are Recommendation No. R (98) 1 of the Committee of Ministers of the Council of Europe to Member States on family mediation, adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Vice Ministers,[16] and a specific

[11] Recommendation No. R 87/20 of the Committee of Ministers to Member States on Social Responses to Juvenile Delinquency.

[12] Morek, 2008, 93.

[13] See: <european-code-of-conduct-on-mediation-comissao-europeia-2004.pdf> [20.09.2025].

[14] European Commission Proposal of 22 October 2004 for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, cf. <http://parl..sejm.gov.pl> [20.09.2025]; European Parliament Legislative Resolution of 29 March 2007 on the Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters, cf., <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0088+0+DOC+XML+V0//PL> [20.09.2025].

[15] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (OJ EU L of 24 May 2008).

[16] Ibid., 3-8, EUR-Lex 32008L0052.

document in the form of the Hague Conference on Private International Law's Practical Guide (Guide to Good Practice) to the 1980 Hague Convention on the Civil Aspects of Child Abduction, Vol. IV – Mediation.[17] Recommendation No. R (98) 1 primarily defined the scope of family mediation. It accepted that mediation may be used in all conflicts between members of the same family who are linked by ties of consanguinity or marriage, and persons who have been or remain in family relationships. The recommendation furthermore establishes a standard for mediation in this type of case, analogous to the one discussed above, and emphasises the need to promote this way of resolving disputes by creating broad information campaigns. These are intended to identify mediation as the best means of resolving family conflicts of an international nature. The Guide to Good Practice Act, on the other hand, emphasises the growing importance of mediation in cross-border family disputes. It is designed to strengthen the effective implementation and enforcement of the 1980 Hague Convention on the Civil Aspects of Child Abduction, and the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children.

The Mediation Directive, which has been in force since 13 June 2008,[18] directed Member States to implement the relevant provisions by 20 May 2011. The task of the directive is to promote mediation in the Member States. This entails the following recommendations:[19]

- To promote the training of mediators and ensuring the highest possible quality of mediation;
- The right of judges to propose that the parties involved in the proceedings participate in mediation;

[17] 1980 Hague Convention on the Civil Aspects of International Child Abduction (Convention on the Civil Aspects of International Child Abduction, signed at The Hague on 25 October 1980, ratified by the Republic of Poland on 10 August 1992, OJ 1995, No. 108, item 528), the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children was concluded within the framework of the Hague Conference on Private International Law on 19 October 1996, ratified by the Republic of Poland on 27 July 2010, OJ 2010. No. 172, item 1158) and the Practical Guide to the 1980 Hague Convention, Vol. IV - Mediation. Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - MEDIATION, Hague Conference on Private International Law 2012.

[18] Directive 2008/52/EC of the European Parliament and of the Council of 21.05.2008 on Certain Aspects of Mediation in Civil and Commercial Matters (OJ L 136, 24.05.2008, 3).

[19] <https://www.europarl.europa.eu/cmsdata/226405/EPRS_ATAG_627135_Mediation_Directive-FINAL.pdf> [20.09.2025].

- That agreements reached through mediation should be enforceable and, to that end, obtain an enforcement clause;
- To guarantee the confidentiality of mediation;
- To guarantee the possibility of initiating and continuing court proceedings after mediation – the running of procedural deadlines may be suspended for the duration of the mediation proceedings.

III. Cross-Border Mediation in Civil and Commercial Matters

Cross-border mediation also applies to civil and commercial proceedings.[20] However, it should be remembered that the European Single Market stands as a distinctive and tightly-knit economic community, uniting 27 jurisdictions, which somewhat casts a shadow over the standardisation of standards. Mediation in this field began on 12.12.2003, when the European Parliament adopted a Green Paper on alternative dispute resolution in civil and commercial matters. In light of the increasing number of such cases, fueled by expanding economic connections and the demand for effective resolution, this solution is now indispensable. Yet, the Green Paper remains limited, addressing solely mediation in commercial law matters.[21] Mediation also includes, for example, disputes arising from virtual transactions (online dispute resolution). Consequently, the Directive of the European Parliament and of the Council 2008/52/EC of 21 May 2008, on certain aspects of mediation in civil and commercial matters (the Mediation Directive), was enacted. This document attaches great importance to enforcement issues, and includes certain standards for Member States, particularly regarding the requirement to incorporate specific provisions into their domestic legal systems. However, these relate to general mediation standards (characterised at the outset), such as the principle of confidentiality or the objectives of mediation proceedings. Member States are, however, free to create these standards in detail.

Furthermore, the document highlights competence-related aspects, including the requirement to provide information on the European Code of Conduct for Mediators and to ensure its public availability.[22] In an effort to not unduly hamper the flow

[20] Cross-Border Mediation in Family Matters, <http://www.bibliotekacyfrowa.pl /Content/ 43447/ 007. pdf.> [20.09.2025].

[21] Kalisz, 2010, passim.

[22] Steffek, 2012, 8.

of trade, and to deal with conflict in a more efficient, swift and cost-effective manner, multinational corporations are increasingly turning towards alternative methods for managing disputes. As indicated by Bashir Adan Mohamed: "more than two-thirds of multinational corporates state that they prefer commercial arbitration over traditional litigation, either alone, or in combination with other alternative dispute resolution mechanisms, such as mediation, to resolve cross-border disputes."[23] The benefits of using mediation in cases of this type are well illustrated by a comparison of costs and duration.

The average period of mediation within the EU is between 43 and 90 days. The average difference in cost between litigation and mediation is €9,179 for litigation and €3,371 for mediation. For example, in Austria, the average cost of litigation would be around €13,095, and of mediation €10,000; in Belgium €12,286 and € 3,478, respectively; in Denmark: €21,159 and €6,500, in Ireland: €15,606 and €1,250; in Spain: €8,015 and €1,833. According to available sources, in Italy, a successfully mediated dispute can save 860 days and in excess of €7,000.[24]

However, against the backdrop of legal solutions in individual countries, there are significant discrepancies in the advancement of regulations. As rightly pointed out by A. Pera,[25] "Some Member States have considered the 'Mediation Directive' as an occasion to reflect in a comprehensive way on the regulation concerning conflict resolution. States like Germany, France and Italy have promulgated new, comprehensive laws and regulations, which do not follow the limitation of the EU Directive in scope, especially having regard only to cross-border disputes. Other legal systems, such as England and Austria, have limited the legislative reform only to cross-border disputes." This author comes to the correct conclusion: "The latter choice determines a dichotomous set of rules, respectively for internal disputes and cross-border ones, and demonstrates in itself that national attitude and traditions are far from each other, and that the call for harmonisation is not necessarily shared and welcome in such area of law. Many good intentions – at a European level – are not enough, as the way to hell is paved with good intentions." This issue undoubtedly requires a separate comparative study, as the aim should be to achieve the fullest possible harmonisation of solutions.[26]

[23] Mohamed, 2020, 6.

[24] Fiodorova, 2017, 196.

[25] Pera, 2014, 118.

[26] See: Skënderi, 2023, passim.

IV. Cross-Border Mediation in Family Matters

When analysing mediation in cross-border cases, it should be noted that they have a specific character[27] which necessitates special consideration by mediators. This type of mediation, applied in family cases, may involve, among other things, parties coming from different cultural backgrounds. Multiculturalism in descriptive terms, moreover, has a developmental trend,[28] which makes it possible to forecast an increase in the popularity of this type of mediation. Not only legal or psychological, but also sociological and pedagogical knowledge is becoming particularly important here. A good solution in these situations is to entrust the conduct of the mediation to two mediators who come from the countries of origin of the parties. Generally speaking, consideration should then be given to mediating with the involvement of other participants, such as suitably selected family members, educationalists or psychologists. Such extensive involvement of others is generally beneficial for the parties. Similarly, the implementation of indirect mediation, i.e. without the parties meeting face-to-face, may sometimes prove beneficial.[29] It should also be borne in mind that not all family conflicts should be referred to mediation: some issues should only find their finality before a court. This is dictated by varying factual or legal circumstances. Important contraindications to mediation include, for example, abuse by one party over another (domestic violence), addictions, mental illnesses and emotional disturbances of various aetiologies. In cross-border mediation, the degree of complexity is increased by the need to analyse the coherence of the rules of international law and the domestic laws of at least the two states in which the parties have their habitual residence. If these remain mutually coherent, then the mediation conditions developed will prove authoritative at the enforcement stage, allowing the parties' arrangements to be properly taken into consideration. The parties therefore need expert legal assistance here, in particular, information on the internal rules of the state of permanent residence. Unhindered and close cooperation between the mediator, the parties to the mediation, and the attorneys, is essential. However, these difficulties are well worth addressing, as family mediation offers significant, tangible benefits. It contributes to better communication between family members, reduces the level of conflict, promotes consensus, consolidates and regulates contact between parents and children,

[27] Zagórska, 2013, 103-115.

[28] Budyn-Kulik, 2022, 48.

[29] Kalisz, 2010, passim.

reduces the social and economic costs of proceedings, and significantly reduces the time needed to resolve the dispute.[30] When the parties to a mediation come from different EU Member States, cultural differences may also become apparent. It is enough to note that EU rules are based on place of residence rather than nationality. This alone shows that mediation may involve individuals from diverse cultural backgrounds.[31] From this perspective, it is also important that the parties can use their native language, which results in freedom of communication and full transparency.

However, linguistic constraints must not have a detrimental effect on the situation of the parties. It is a desirable state of affairs in cross-border mediation for the mediator to speak the languages of both parties.[32] The specificity of this type of mediation is also influenced by the very place of residence of the parties. In the case of face-to-face mediation, this affects the mediation meetings, and may imply logistical difficulties. In some situations, however, the considerable distance between the parties has a positive effect, as it allows the parties to tone down their emotions and distance themselves from the dispute, thus enhancing the grounds for negotiation, and achieving a satisfactory outcome for the parties. Often, however, the distance between the place of mediation and the parties' place of residence generates high travel and accommodation costs.

V. Summary

Mediation is to justice as diplomacy is to international politics, and it should be treated as the first and most natural way to resolve a conflict.[33] Cross-border mediation remains closely dependent on the interrelationship of both the parties to the proceedings, as well as the internal legal systems of the individual Member States. To ensure its effectiveness, it is essential to introduce appropriate legal measures that address not only the ability to conduct cross-border mediation, but also the norms governing potential implementation issues, thereby guaranteeing the enforcement of the parties' agreement. The EU has taken positive steps to regulate and promote cross-border mediation between Member States.[34] Ideally, this will be continued. However, the

[30] Recommendation No. R (98) 1 of the Committee of Ministers of the Council of Europe to Member States on Family Mediation and Explanatory Memorandum, adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of vice ministers.

[31] Yousofi, 2024, 129.

[32] See: Carroll, 2023, 131-145;

[33] López-Barajas Perea, 2012, 4.

[34] Esplugues, 2013, 333.

scope of national regulations varies considerably, and is sometimes too general, potentially leading to legal conflicts, especially at the stage of implementing settlements. It therefore seems reasonable to take steps to clarify EU regulations, so as to improve the solutions thus far introduced, and to further harmonise cross-border mediation, making it more consistent across the EU. This, in turn, will be among those elements contributing to the improvement of business activity.

Due to advancing globalisation, to which the development of new technologies and remote communication has contributed in no small measure, a systematic increase in the importance of cross-border mediation can be predicted. An observable slowdown, however, may result from the excessively wide discretionary power of Member States under European law to create this type of standard. In view of this, it is becoming particularly important for Member States of the European Union to monitor proceedings and to attempt to eliminate any shortcomings that have been identified. Of course, this should only concern strictly legal matters, for the sake of the principle of confidentiality of mediation.

It remains vital to ensure the swift enforcement of settlements in all Member States. This is currently perhaps the biggest issue with mediation.

In many countries, mediation is still a marginalised issue, hence the importance of promoting this instrument as to the benefits it brings both the participants of the proceedings and the state authorities.

An important task is to gradually raise public awareness, with the emphasis that this is a "soft", as it were "flexible", way of resolving a dispute. This is, in fact, a fully consensual mode, where the final solution is delegated to the parties. By the same token, specialised training is required for those professionally involved in the dispute (mediators, judges, attorneys of the parties, etc.). Indeed, cross-border mediation is, for a number of reasons, clearly more complex than mediation conducted under national orders. It is undoubtedly a "higher level of mediation", requiring specialised knowledge and prior experience at the level of national mediation.

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Legal Aspects of Cooperative Governance and Alternative Dispute Resolution under Polish Cooperative Law

ABSTRACT

The Author takes into consideration the similarities and differences between the intra-cooperative dispute resolution system and the arbitration clause. The intra-cooperative dispute resolution system is specific only to Polish cooperative law. Therefore, the analysis is carried with reference to the Polish legal system. Also, the comparison between the intra-cooperative dispute resolution system and the arbitration clause is considered with reference to the internationally recognized cooperative principles. In Author's opinion two of those principles: democratic governance and autonomy and independence give grounds for the cooperative governance model. This model complies with the rules of intra-cooperative dispute resolution system and arbitration clause.

Keywords: intra-cooperative dispute resolution system, arbitration clause, cooperative principles, Poland

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I. Introduction

Cooperatives around the world follow a set of agreed-upon principles that define the essential characteristics of this form of organization. These cooperative principles date back to 1844,[1] when the Rochdale pioneers founded their consumer cooperative based on them. These principles are as follows:

1. Open and voluntary membership
2. Democratic member control
3. Member economic participation
4. Autonomy and independence
5. Education, training and information
6. Cooperation among cooperatives
7. Concern for community.[2]

In 1937, 1966, and 1995, the Rochdale pioneers' cooperative principles were recognized by the International Cooperative Alliance as fundamental for cooperatives.[3] Today, the cooperative principles are a part of the Declaration of Cooperative Identity, and are included in the articles of association of the International Cooperative Alliance (Appendix A).[4]

In Europe, the cooperative principles influenced many countries' national legislation on cooperatives, with Portuguese and Spanish laws written to include the cooperative principles as legal provisions.[5] However, this phenomenon is not limited to Western Europe, as the Vietnamese Law on Cooperatives, of 20th of June 2023, also included in Article 8 cooperative principles as legal provisions.[6]

In my view, two of the cooperative principles can be directly linked to alternative dispute resolution (ADR). These principles shape the particular features of ADR when applied to disputes between a cooperative and its members. Specifically, the principle of democratic member control (2nd cooperative principle) and the principle of autonomy and independence (4th cooperative principle) should be taken into consideration. Both of these principles can be recognized as fundamental to the mod-

[1] Rhodes, 2012, 25-30.

[2] Articles of Association of International Cooperative Alliance (ICA), <https://ica.coop/en/media/library/governance-materials/ica-articles-association> [05.06.2025].

[3] Birchall, 1997, 57-59, 64-71.

[4] Articles of Association of International Cooperative Alliance (ICA) <https://ica.coop/en/media/library/governance-materials/ica-articles-association> [05.06.2025].

[5] Meira, 2018, 16; Fajardo, 2017, 521; Hagen, 2021, 1-15.

[6] Compare: Cao Vu, Nguyen and Cao, 2025, 251-277.

el of cooperative governance. Under Polish cooperative law, cooperative governance should be recognized in the provisions on intra-cooperative dispute resolution and arbitration clauses included in the cooperative charters.

This paper seeks to explain the legal concept of cooperative governance, and to describe ADR involving cooperatives and their members under Polish law. The uniqueness of Polish cooperative law in this regard justifies this research purpose. In Poland, cooperative law uniquely incorporates provisions establishing an intra-cooperative dispute resolution system. No other cooperative legislation worldwide contains a comparable mechanism. It is designed to resolve disputes between a cooperative and its members in accordance with democratic principles. At the same time, Polish civil procedure includes general provisions governing arbitration clauses.

The research thesis argues that the concepts of cooperative governance and ADR converge within two legal frameworks: the intra-cooperative dispute resolution system, which is exclusive to Polish cooperative law, and the arbitration clause, which represents a general ADR mechanism. The article was prepared using the dogmatic method of legal analysis.

II. Cooperative Governance

Cooperative governance should be regarded as a concept reconstructed from the principles of democratic member control and cooperative autonomy. Under the second cooperative principle, members govern their cooperative in a democratic manner: every member has one vote at the general assembly, regardless of their contribution to the cooperative by asset or number of transactions.[7]

Democratic control within a cooperative is also reflected in the election of its management and supervisory bodies. Every member may stand as a candidate for these bodies, and all members participate equally in the voting process. Moreover, democratic governance extends to decisions concerning the admission of new members and the exclusion of existing ones, for example when bylaws, statutory law, or equity principles are violated (Article 17, paragraph 1 and Article 24 paragraph 1-3 of the 1982 Cooperative Law).

One of the fundamental characteristics of a cooperative is that members may join and leave it throughout the course of its legal existence. This is reflected in the first cooperative principle, which is the principle of open and voluntary membership. The

[7] Draperi, 2012, 15-16.

first cooperative principle reflects the ideology of the cooperative movement, which is based on freedom to contract and freedom of association[8]. Everyone, eligible under the cooperative incorporation act, should be able to join the cooperative and benefit from it. No one can be forced to become a cooperative member. On the other hand, anyone who no longer wishes to associate in the cooperative can leave its structure by terminating their membership. The application of the first cooperative principle requires democratic governance. It is because the applying members can appeal to the general assembly in the case of denying their membership declaration by the board (Article 17, paragraph 4 of the 1982 Cooperative Law).

These ideas are recognized by cooperative legislations worldwide. However, under Polish law, the scope of members' democratic control extends further, encompassing not only governance, but also the conditions of transactions with the cooperative (Article 18, paragraph 7 of the 1982 Cooperative Law).[9] Such transactions (esp. *actos cooperativos*, Germ. *Zweckgeschäft*), are contracts made by the cooperatives with their user members to achieve the economic objective of the cooperative[10]. This economic objective is essentially connected with the economic betterment of the members of the cooperative. By bettering the economic situation of members, cooperatives make a positive impact on society. Their social mission is not merely an addition to their economic objectives, but is fully aligned and coherent with them.

As disputes can arise between members and a cooperative in the course of relations governed democratically, the principle of cooperative autonomy and independence allows cooperatives to include provisions on intra-cooperative dispute resolution and arbitration clauses in their charters. This principle establishes that cooperatives must remain free from undue influence by third parties, including government bodies. Polish legal doctrine also emphasizes that disputes between members and a cooperative should, wherever possible, be resolved internally within the organization.[11]

Both the principles of democratic governance and cooperative autonomy can be regarded as meta-norms that guide the application of other cooperative principles. It means that other cooperative principles should be interpreted in accordance with the democratic and autonomous structure of the cooperative. For example, economic participation of members should not be cherished over ensuring their democratic control which is guaranteed regardless of the size of capital provided by the member.

8 Bierecki, 2021, 65-72.

9 Bierecki, 2022, 195-196.

10 Münker, 2016, 6, 17; Fici, 2017, 40-45.

11 Wrzołek-Romańczuk, 2020, 170.

Moreover, in my opinion, the principle of autonomy should take precedence over the principle of democratic member control: true democracy can only be realized in an autonomous organization or society. Cooperative autonomy ensures that cooperatives are controlled by their members, and remain independent from the state, its agencies, and external contractual parties, such as investors.[12] Without preserving autonomy, cooperatives cannot fulfill their primary purpose of serving the needs of their members, as external interests – whether of the state or investors – could override member priorities.

This is what happened in Poland. Under the communist regime, cooperatives were controlled by the state. The cooperative definition in effect at the time explicitly required cooperatives to carry out: 1) economic activities in accordance with the national economic plan, and 2) social and educational activities for the benefit of the Polish People's Republic (Article 1 of the Act of 17th February 1961, On Cooperatives and their Associations).

Today, Polish cooperative law emphasizes the significance of the principle of cooperative autonomy over democratic member control. For instance, second-tier cooperatives can derive from the "one member–one vote" principle (Article 36, paragraph 2 of the 1982 Cooperative Law). In Polish law, such possibility also exists in the case of farmers' cooperatives, even though this is a type of first-tier cooperative (Article 5 point 10 of the 2018 Farmers' Cooperatives Law). However, no cooperative may relinquish the principle of autonomy, as it is essential to ensuring that the organization serves its members' interests above all else.

III. The Intra-Cooperative Dispute Resolution Procedure

Both of the principles of cooperative autonomy and democratic member control are manifested in the intra-cooperative dispute resolution process. This procedure allows disputes to be resolved autonomously within the cooperative, while ensuring that decisions are made democratically, typically through a resolution of the general assembly following the "one member – one vote" principle.

The application of the intra-cooperative dispute resolution process requires explicit provisions in the cooperative's charter. According to Article 32, paragraph 1 of the 1982 Cooperative Law, the charter may provide that in matters specified therein, a member has the right to appeal a resolution of the cooperative body to another

[12] Novkovic, 2015, 45-47; Ferraz Teixeira, 2024, 89; Meira and Ramos, 2019, 135-170.

cooperative body specified in the statute, within the framework of intra-cooperative proceedings. In such cases, the charter should specify the principles and procedures of intra-cooperative process, including, in particular, the deadlines for filing and considering an appeal.

However, in cases involving exclusion from a cooperative, statutory law itself provides a procedure for challenging the resolution on exclusion (Article 24, paragraph 6 of the 1982 Cooperative Law). This procedure allows a member to appeal to the general assembly regardless of the charter's provisions on intra-cooperative dispute resolution. It applies only when the supervisory board issues the exclusion decision, and is referred to in the literature as a *quasi* intra-cooperative dispute resolution proceeding.[13]

Under Article 32 paragraph 1 of the 1982 Cooperative Law, both pecuniary and non-pecuniary disputes may be resolved through the intra-cooperative dispute resolution procedure. These cases must be connected either to membership in the cooperative, or to transactions conducted with the cooperative. In practise, the most common disputes concern admission to the cooperative or exclusion from it.

However, disputes over admission may be resolved internally only if the person seeking admission has a legally protected claim to become a member. Such a claim exists when the person has already acquired a share in the cooperative prior to requesting admission. Acquisition of a share may occur, for instance, through inheritance (Article 16a of the 1982 Cooperative Law), or, in the case of the European Cooperative Society *(Societas Cooperative Europea)* by contract, in accordance with Article 4 section 11 of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute of the European Cooperative Society (SCE).[14]

Polish law also provides an exception for farmers' cooperatives: a person who has submitted a declaration of intent to join a cooperative may acquire a share by contract even before being formally admitted (Article 11 section 6 of the 2018 Farmers' Cooperatives Law). Therefore, a law sometimes links a claim of admission with acquisition of a share, but the general rule in global cooperative legislation is that, despite the principle of open membership, a person joining a cooperative does not have a legal claim to admission.[15]

It should be emphasized that disputes regarding exclusion from a cooperative are of significant importance both for cooperative members and also the coopera-

[13] Bierecki and Pałka, 2024, 108-109.

[14] Bierecki, 2017, 272.

[15] Fici, 2013, 55-57.

tive itself. Accordingly, the intra-cooperative dispute resolution procedure provides a useful forum in which the alleged fault of a member can be assessed by fellow members.

In the judgment of 29th of February 2024,[16] the Polish Supreme Court clarified the interpretation of Article 24 paragraph 2 of the 1982 Cooperative Law. It states that a member may be excluded from a cooperative if, due to their intentional fault or gross negligence, their continued participation is incompatible with the provisions of the statute, or with the principle of good practice. The basis for adopting a resolution to exclude a member from the cooperative may only be events resulting from the cooperative member's fault, qualified by intentional fault or gross negligence.

Intentional fault means that a person intends to achieve a certain state and takes actions to achieve it. Negligence, on the other hand, is a form of unintentional fault, occurring when a person does not intend to achieve a certain state or bring about a certain result, but fails to exercise due diligence. Gross negligence refers to negligence bordering on intentional fault. In light of the aforementioned regulation, it is therefore insufficient to attribute unintentional guilt in the form of recklessness or negligence to a cooperative member if it is not gross in nature. The line between negligence and gross negligence must be drawn based on the specific circumstances of each case. Matters concerning admission to, or exclusion from, a cooperative have a non-pecuniary character, because under Polish law, membership in a cooperative is not a commercial relationship but a personal one. Membership cannot be sold or otherwise transferred, nor can any *iura in re aliena* burden it.

However, in its judgements of 6th of December 2000[17] and 30th of April 1985,[18] the Polish Supreme Court explained that membership can be a basis for a pecuniary right under certain conditions. This exception concerns dividends granted on the basis of the personal legal relationship of membership; although rooted in this personal status, the right to a dividend is unquestionably pecuniary. Disputes over dividends may be resolved through intra-cooperative dispute resolution procedures. This mechanism offers a legal means of circumventing statutory rules on challenging resolutions of the general assembly, since the decision granting dividends is adopted by that body.

However, even when applying the intra-cooperative dispute resolution procedure, a member can still challenge the resolution by filing a lawsuit to the court. In

[16] Case no. II CSKP 2374/22, published in Legalis no. 3056003.

[17] Case no. III CKN 1040/98, published in Legalis under no. 315841.

[18] Case no. II CZ 47/85, published in Legalis under no. 24755.

such a case, the intra-cooperative proceeding is discontinued (Article 42 paragraph 3, and Article 32 paragraph 3 of the 1982 Cooperative Law). This not only regards disputes on dividends, but also on exclusion from the cooperative, as a member can file a lawsuit challenging the resolution on exclusion directly to the court, regardless of the intra-cooperative and quasi intra-cooperative proceedings (Article 24 paragraph 6 p. 1-2 of the 1982 Cooperative Law). Disputes on admission to the cooperative can also be submitted directly to the court, but only if the plaintiff had acquired a share in the cooperative before demanding the admission.

By contrast, cases not related to the personal status of membership, but arising from cooperative transactions, are pecuniary in nature. A cooperative transaction constitutes an economic relationship between the member and the cooperative, even when it is governed by labor law – for example, in workers' cooperatives, where the cooperative transaction takes the form of a cooperative employment contract.

IV. The Arbitration Clause

The arbitration clause is not tied to the idea of resolving disputes internally within the organization in the same way that intra-cooperative dispute resolution procedures are. Nevertheless, because the law, namely Article 1163 paragraph 1 and 3 of the 1964 Code on Civil Procedure, allows this clause to be included in the cooperative's charter, its application ultimately stems from principles of democratic member control and the cooperative's autonomy and independence – in other words, from the concept of cooperative governance. The charter's provisions are introduced in a democratic manner, and only under the autonomous decision of the members of the cooperative. The key difference, compared to intra-cooperative dispute resolution, is that arbitration does not involve resolving the dispute by a democratic vote of the cooperative's members (who themselves constitute one of the parties to the dispute).

The charter is a specific type of contract which binds the members and the cooperative itself. Therefore, the charter is a fundamental agreement for the arbitration clause. The clause binds the cooperative and its bodies, and the members (Article 1163 paragraph 1 and 3 of the 1964 Code on Civil Procedure). Because the arbitration clause has an autonomous character, the invalidity of the cooperative's charter does not render the arbitration clause defective or invalid.[19]

Article 1163 paragraph 1 and 3 of the 1964 Code on Civil Procedure states that the arbitration clause applies to disputes arising from membership in the cooper-

[19] Bierecki, 2023, 48-54.

ative. It creates confusion due to the non-pecuniary character of the membership, and because cooperative transactions create legal relations separate from membership. Non-pecuniary cases may be submitted to an arbitration court for a decision only if a court settlement can be reached in them (Article 1157 paragraph 2 of the 1964 Code on Civil Procedure). Since the 1982 Cooperative Law enumerates the grounds for termination of membership, including exclusion, no judicial settlement can be reached with respect to the very existence of membership.[20] For the same reason, a judicial settlement is also impossible in disputes concerning admission to a cooperative, given the continuous and personal nature of membership. Only disputes over dividends satisfy the pecuniary requirement for arbitration. Therefore, among disputes arising from membership, only those concerning dividend rights qualify for arbitration.

Disputes arising from cooperative transactions are, by contrast, pecuniary in nature, and therefore qualify for arbitration. But can those cases be submitted under the arbitration clause included in the cooperative's charter? Articles 1163 paragraph 1 and 3 of the 1964 Code on Civil Procedure provide that such clauses apply to disputes arising from membership in the cooperative. Although cooperative transactions are based on the member's status – since only members may participate in them – they are, in substance, economic relations. On this basis, disputes arising from cooperative transactions should be regarded as falling within the arbitration clause included in the cooperative's charter.

Yet, under general provisions of arbitration, the application of such a clause would be limited. Employment disputes and disputes with consumers may only be submitted to arbitration if the clause has been made after the dispute has arisen (Articles 1164 and 1164[1](1) of the 1964 Civil Procedure Code). These restrictions protect employers/traders from abusing their dominant position over employees or consumers. Applied to cooperative transactions, these safeguards effectively render the charter-based arbitration clause inoperative whenever a member has the status of an employee or a consumer. This situation typically occurs in workers' (employee) cooperatives and consumer cooperatives. Consequently, only in producers' cooperatives – where the members are traders who supply goods to the cooperative for distribution (e.g., farmers' cooperatives) – can the arbitration clause in the charter be applied broadly and without such statutory limitations.

[20] Ibid., 58.

V. Conclusion

Under Polish cooperative law, both the intra-cooperative dispute resolution procedure and the arbitration clause have strong foundations in the concept of cooperative governance. It is very relevant to the importance of these alternative dispute resolutions models for the cooperative's members. It ensures the members influence on these procedure and lack of interference of other entities and governmental bodies. The key difference in these models of alternative dispute resolutions lies in resolving the dispute by a democratic vote of the cooperative's members (who themselves constitute one of the parties to the dispute). This is the case of intra-cooperative procedure. However, democratic control also influences the arbitration clause. This clause is included in the cooperative's charter. Therefore, application ultimately stems from principles of democratic member control and the cooperative's autonomy and independence – in other words, from the concept of cooperative governance. The charter's provisions are introduced in a democratic manner, and only under the autonomous decision of the members of the cooperative.

However, due to civil procedure law and taking into account the types of disputes that arise between a cooperative and its members, the intra-cooperative dispute resolution procedure is better suited to their nature than an arbitration clause. This procedure may be applied to disputes stemming from both membership relations and cooperative transactions, regardless of whether the dispute involves pecuniary or non-pecuniary issues. It also aligns with the enumerated grounds for termination of membership, and is not constrained by the restrictions imposed on employers and traders for the protection of employees and consumers.

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The Legal Nature of Labour Relations and International Regulations in the Digital Economy Era

ABSTRACT

This article explores the transformative impact of the digital economy on the legal nature of labour relations, specifically focusing on the challenges of regulating online work. As digital labour platforms facilitate the internationalisation of business, they challenge traditional concepts of state jurisdiction and obscure the legal status of workers, often blurring the lines between employees and independent contractors. The study analyses the distinct approach of European Union (EU) private international law, which prioritises an autonomous interpretation of the "worker" concept based on factual subordination and control rather than formal contractual labels. This is contrasted with the current legal landscape in Georgia, where judicial practice regarding digital platform workers is absent, and legislation recognises the "information society service" but the it is designated to protect consumer rather than labour rights. Furthermore, the article examines modern forms of labour organisation, including the legal distinctions between remote work, hybrid work, and platform work, while highlighting the lack of regulation for remote work in the Labour Code of Georgia compared to other European jurisdictions. Ultimately, the author argues for the necessity of comprehensive legal reform and international cooperation to align Georgian legislation with emerging forms of employment and ensure the fair protection of labour rights across borders.

Keywords: Labour relations, digital economy, platform work, gig economy, remote work, employment status.

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I. Introduction

The transnational nature of labour relations is multifaceted[1] Digital technologies have fuelled the growth of the digital economy that is rapidly evolving[2] giving rise to new business models in parallel with traditional ones[3] and facilitating internationalisation of business.[4] Work conducted via the internet now links people, businesses, and processes across borders through electronic devices.[5]

In this environment, digital labour platforms play a particularly important role, enabling employers to locate and hire professionals from a wide range of fields.[6] Yet the expansion of online work challenges the traditional concept of state jurisdiction, as digital spaces transcend national boundaries. This makes international cooperation among global actors crucial[7] for defining the term "employee" and promoting the fair and equal protection of labour rights. The need is particularly pressing given that many platforms deny the existence of employment relationships with the workers they rely on, and often wield disproportionate power over them.[8] In Georgia there is no judicial practice regarding the legal status of workers on digital labour platforms, and their legal status remains unclear.[9]

Despite the existence of transnational labour relations, there is still no unified or standardized legal framework governing such relations.[10] Because digital platforms enable access to job opportunities from anywhere in the world,[11] an employee may work under the jurisdiction of one state, while the employer (who may be a respondent in court) falls under the jurisdiction of another. It is important to note that EU private international law, particularly in the context of employment relations, adopts a distinctapproach that serves a supranational interest.[12]

In this context, transnational labour relations require a coordinated legal response that reflects the realities of modern digital work. The rapid growth of platform-based

1 Grušić, 2015, 46.

2 Tapscott, 2014, 54.

3 OECD, 2014, 73.

4 Sobczak, 2012, 139.

5 აბესაძე, 2023, 119 [abesadze, 2023, 119].

6 Berg, Cherry and Rani, 2019, 106.

7 De La Chapelle and Fehlinger, 2016, 13.

8 Dofessez, 2022, 27.

9 ტაკაშვილი, ხვედელიძე და შენგელია, 2021, 5 [t'ak'ashvili, khvedelidze da shengelia, 2021, 5].

10 Grušić, 2015, 2.

11 Berg, 2019, 108.

12 Grušić, 2015, 300-302.

and remote employment underscores the need for international cooperation and legal harmonization to ensure fair and equal protection of labour rights across borders. This article explores the challenges and implications of regulating labour in the digital era, with particular focus on the European and Georgian legal landscapes, and highlights the need for comprehensive legal reform to align Georgian legislation with emerging forms of employment.

II. The Legal Nature of the Employment Contract in the Digital Era

The legal status of an employee in the digital economy is vague, especially when an employer hires an employee as an independent contractor or consultant.[13] To protect employees' rights and preserve the exclusive jurisdiction of courts in EU member states, the Brussels I bis Regulation is applied.[14] In parallel, the Rome I Regulation determines the applicable law to contractual obligations in civil and commercial matters thereby providing the criteria for deterning which member state's law shall apply in the event of a conflict of laws.[15] Accordingly, establishing the existence of an employment relationship – and defining the worker's legal status – is essential for the proper application of EU law. This ensures legal certainty both in determining which national law governs the employment relationship, and which judicial forum is competent to hear the related disputes.[16]

The purpose of an employment contract is to establish a labour relationship based on the free expression of will, in which the employer and the employee are considered equal parties. The existence of certain core elements is essential for identifying an employment relationship which include the organised labour performed by the employee, remuneration for that work, [17] compliance with the instructions of the em-

[13] აბესაძე, 2023, 118-121 [abesadze, 2023, 118-121].

[14] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), OJ L 351, 20.12.2012, p.1, (Consolidated Version: 26.02.2015), Recital 14.

[15] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), OJ L177, 4.7.2008, p.6, (Consolidated Version: 24/07/2008), Art 1(1), Recital 6,

[16] Pretelli, 2021, 582.

[17] Labour Code of Georgia, Art. 2(1-2); Decision No. AS-975-2023 of the Civil Chamber of the Supreme Court of Georgia of 10 October 2023, para. 58; Decision No. AS-1203-2022 of the Civil Chamber of the Supreme Court of Georgia of 23 December 2022, para. 53; Ruling No. AS-1691-2019 of the Civil Chamber of the Supreme Court of Georgia 4 November 2021, para. 22.

ployer[18] and the existence of a subordinate relationship between the employer and the employee.[19] It must be noted that "labour relations" is a broad concept which refers to all relations when the employee performs a job for their employer in exchange for remuneration.[20] CJEU defines a worker as any person performing, for remuneration, work, the nature of which is not determined by himself, for and under the control of another, regardless of the legal nature of the employment relationship.[21] The CJEU further clarifies that, for an employment relationship to exist, a person must, over a certain period of time, perform services for and under the direction of another, receive remuneration in return, and engage in effective and genuine activities rather than purely marginal or ancillary tasks.[22] The definition of an employment relationship under national law is irrelevant when determining whether a person qualifies as a worker for the purposes of EU law: if a person meets the conditions specified in the employment contract, then this person is considered a worker.[23]

In turn, the gig economy[24] has raised new issues regarding the definition of the terms *self-employed* and *employee* under both EU law and national law.[25] In accordance with the CJEU, the terms which are defined by the EU law cannot be interpreted by invoking national law unless the Community law makes express reference to the law of the Member States.[26] Otherwise, uniform interpretation of the law cannot be reached.[27] In defining the term "employee", the EU law applies an autonomous interpretation that is similar in concept. The laws of Member States and the European Union are not subject to interpretation based on the internal legal orders of individual Member States,[28] in order to avoid national legal principles imposing constraints on

[18] Decision No. AS-1203-2022 of the Civil Chamber of the Supreme Court of Georgia of 23 December 2022, para. 54.

[19] Yodel Delivery Network Ltd [CJEU], Case C-692/19, EU:C:2020:288, 22 April 2020, para. 37.

[20] აბესაძე, 2023, 124 [Abesadze, 2023, 124].

[21] Deborah Lawrie-Blum v. Land Baden-Württemberg [ECJ], Case 66/85, 22, ECLI:EU:C:1986:284, 3 July 1986, para. 12.

[22] Menegatti, 2019, 29.

[23] Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH [CJEU], Case C-229/14, EU:C:2015:455, 9 July 2015, para. 34-36.

[24] The gig economy is the collection of markets that match providers to consumers on a gig (or job) basis in support of on-demand commerce *SEE*., Donovan, Bradley and Shimabukuro, *What Does the Gig Economy Mean for Workers?*, Congressional Research Service, 2016, 1.

[25] Dofessez, 2022, 45.

[26] Commission v Portugal [ECJ], Case C-55/02, 22, EU:C:2004:605, February 2002, para. 45 and para. 49.

[27] Ibid., para. 45.

[28] Van Hoek, 2009, 8.

the interpretation of EU concepts.[29] The importance of the autonomous interpretation of the EU law is emphasised by the CJEU.[30] Consequently, the two terms mentioned above are interpreted according to their general meaning and significance, notwithstanding the wording of the contract. In particular, an employee performs work under the direction of the employer in terms of working time, workplace and job description; does not assume the commercial or business risks of the employer; and becomes an integral part of the production process, thereby establishing economic unity with the business.[31]

Regarding self-employment, courts have clarified that employment cannot be classified as self-employment if a person performing services under a contract carries out the same tasks as other employees under standard employment contracts.[32]

In the gig economy, therefore, a person may be classified as an employee or a worker depending on the nature of the job and the contractual requirements imposed by digital platforms.[33] For example, France's Cour de Cassation has ruled that delivery company staff and Uber drivers are employees under employment contracts.[34] Similarly, Belgium's Administrative Commission has recognised employment relations between Deliveroo and its drivers.[35]

It should be taken into consideration that Georgian legislation recognizes the digital economy and does regulate it, with the law defining it as an "information society service", and following EU regulations regarding such. [36] According to the law, an

[29] Ender Balkaya v Kiesel Abbruch- und Recycling Technik GmbH [CJEU], Case C-229/14, EU:C:2015:455, 9 July 2015, para. 33.

[30] Syndicale Solidaires Isère v. Premier ministre and others [CJEU], Case C428/09, ECLI:EU:C:2010:612, 14 October 2010, para. 28. Ruhrlandklinik gGmbH v. Ruhrlandklinik gGmbH [CJEU], C-216/15, ECLI:EU:C:2016:883, 17 November 2016, para. 36.

[31] FNV Kunsten Informatie en Media v Staat der Nederlanden [CJEU], Case C413/13, EU:C:2014:2411, 4 December 2014, para. 36.

[32] Ibid., para. 42.

[33] ტაკაშვილი, ხვედელიძე და შენგელია, 2021, 4 [t'ak'ashvili, khvedelidze da shengelia, 2021, 4].

[34] Dofessez, 2022, 28-29.

[35] Ibid., 32.

[36] Comp., Information Society Service provided for remuneration, at a distance – that is, the without the parties being simultaneously present, by electronic means and at the individual request of a recipient of services. "At a distance" means that the service is provided without the parties being simultaneously present; "by electronic means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request. *SEE,* Directive (EU) 2015/1535 of the Europe-

Information Society Service is considered a form of e-commerce[37] when the following characteristics are met: individual demand for a service, the service is reimbursed, the service is performed by electronic means, or the service is performed online- in particular, when the parties' physical presence is not required. To clarify, electronic means are electronic devices used to store and process data, as well as to deliver a service to the destination and to receive a service through wires, radio-waves and electromagnetic tools.[38] Consequently, the gig economy satisfies the criteria of being an information society service, as recognized by Georgian legislation; however, the purpose of the law is to protect customers' rights, and the responsible authority is the Competition Agency of Georgia.[39]

III. Modern Forms of Labour Organisation

1. Legal Aspects of Remote and Hybrid Work

As digital technologies evolve, the place where work is carried out and the employee's traditional workplace no longer have to coincide.[40] Remote work and hybrid work have become important features of modern-day labour relationships.[41] The principal criteria of remote work is the following: 1) a job is performed remotely from the workplace; 2) in order to realize the remote work, telecommunication and information technologies are employed.[42] It is important to note that remote work has weakened the territorial and physical connection to a traditional workplace. Companies can now hire employees from anywhere in the world, a shift that has significantly reshaped the concept of the "habitual place of work" in international private law.[43] The habitual place of work can be defined as the place where, or from which, the employee principally performs their obligations towards their employer,

an Parliament and of the Council of 9 September 2015, *Laying Down a Procedure for the Provision of Information in the Field of Technical Regulations and of Rules on Information Society Services* (codification) (Text with EEA relevance), OJ L 241, 17.9.2015, Art. 1(1b).

37 Georgian Law "On Electronic Commerce", Art. 1(2).

38 Ibid., Art. 2(a).

39 Response No. 02/3470 of the National Competition Agency of Georgia, dated November 28, 2023.

40 Ahlers, 2016, 89, 92.

41 Grušić, 2022, 2.

42 Athanasiadou, 2021, 2.

43 Grušić, 2022, 4-5.

but a key factor remains the determination of the state to which the professional activity is most closely related.[44]

The concept of "remote work" appears in the labour laws of various European countries. According to Ukrainian law, remote work is defined as a form of labour organisation where an employee performs a job outside of the employer's buildings, at their place of residence, or in another place of their choosing, and the job includes the use of information and communication technologies.[45]

Slovakian law differentiates between "working from home" – when remote work is performed from the employee's household instead of being performed from the employer's workplace, and "telework" – when work is performed from the employee's household and the work is carried out using information technology in which electronic data transmission by distance takes place on a regular basis.[46]

Since the COVID19 pandemic, Poland has regulated the issue of remote work in the labour code,[47] defining it as "remotely performed permanent or part-time work at the workplace indicated by the employee (including at the employee's home address), in each case with prior agreement from the employer."[48]

Unlike Slovakia and Ukraine, the Labour Code of Georgia does not recognize the concept of remote work. However, there was a Government Resolution of Georgia, according to which remote work implied working from home, or, in critical cases, from another location, provided that the number of workers at the site did not exceed 10 people.[49] This Resolution referred to the rules of conduct in a specific emergency situation and could not be applied to general conduct rules; therefore, Georgian legislation does not protect the rights of remote workers.

Employment through posted work differs from remote work. A person is considered a posted worker if they temporarily perform work in another EU Member State that is not their usual place of employment.[50] A posted worker always returns to

[44] Nogueira and Others v Crewlink Ltd, Moreno Osacarpar v Ryanair, formerly Ryanair Ltd [CJEU], Joined Cases C-168/16 and C-169/16, EU:C:2017:688, 14 September 2017, para. 29.

[45] Gusarov and Melnyk, 2021, 171.

[46] Bulla, 2021, 12.

[47] Kobroń-Gąsiorowska, 2022, 173.

[48] Remote work – Ministry of Family and Social Policy, *SEE*, <https://www.gov.pl/web/family/remote-work#:~:text=occasional%20remote%20work%20will%20be,provide%20materials%20and%20work%20tools).> [22.11.2023]

[49] Resolution No. 322 of the Government of Georgia of 23 May 2020 "On the Approval of the Rules of Isolation and Quarantine", Art. 6(4) (version of May 23, 2020, repealed as of July 4, 2023).

[50] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services, OJ L 018 21.1.1997, p. 1, (Consolidated Text: 30.07.2020), Art. 2(1).

their usual place of employment after the posting or business trip is completed.[51] In this case, the legal status of the employee is defined in accordance with the legislation of the Member State to whose territory the worker is posted.[52] It is of note that in the context of individual employment contracts, work performed in a foreign country is considered temporary if the employee is anticipated to return to their home country to continue their duties after completing the assignment abroad.[53] Moreover, the conclusion of a new employment contract with either the original employer, or an employer belonging to the same group of companies as the original employer, does not, in itself, preclude the classification of the employee's assignment abroad as temporary.[54]

2. Legal Framework Platform Work (Gig Economy)

Alongside from remote work, the number of workers employed on digital labour platforms is also growing within the development of the "platform economy."[55] The work of a digital platform is organised online and involves three parties: the online platform, the worker, and the client. The work is carried out on a contractual basis, with individual tasks or projects, and the service is provided on demand.[56]

It is particularly important to note that European countries interpret the legal status of platform workers differently,[57] and they assess each case based on its specific factual circumstances.[58]

The European Commission has put forward a legislative initiative aimed at regulating the status of workers employed on digital platforms. A "digital labour platform" is a natural or legal person that provides a service remotely by electronic means – such as through a website or mobile application – at the request of a recipient of the service.

[51] Mulox IBC v Geels [ECJ], Case C-125/92, EU:C:1993:306, 13 July 1993, para. 25.

[52] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the Posting of Workers in the Framework of the Provision of Services, OJ L 018 21.1.1997, 1, (Consolidated Text: 30.07.2020), Art. 2(2).

[53] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p.6, (Consolidated Version: 24/07/2008), Recital 36.

[54] Ibid.

[55] EU Rules on Platform Work, *SEE,* <https://www.consilium.europa.eu/en/policies/platform-work-eu/> [22.04.2025]

[56] Eurofond, EurWork, Platform Work, 2018, *SEE,* <https://www.eurofound.europa.eu/en/topic/platform-work> [01.05.2025].

[57] Aloisi, 2022, 13-14.

[58] Pretelli, 2021, 583.

It also organises work performed by individuals in return for payment, regardless of whether the work is carried out online or at a specific location. Moreover, a digital labour platform uses automated monitoring systems or automated decision-making systems.[59] "Digital platform work" means work that is organised by a digital labour platform and carried out by an individual based on a contractual relationship between the digital labour platform or intermediary and that individual, regardless of whether a contractual relationship exists between the individual or the intermediary and the recipient of the service. [60]

There is a distinction between a person who "performs platform work" and "a platform worker." A person performing platform work is an individual who carries out such work, regardless of the nature of the contractual relationship or how that relationship is designated by the parties involved. In contrast, a platform worker refers to any person performing platform work who has, or is deemed to have, an employment contract or employment relationship as defined by the law, collective agreements, or established practice in force in the EU Member States, taking into account the case-law of the CJEU.[61] According to the EU standard, a platform is considered an employer if it owns the key assets, sets the price of the service, and establishes mandatory instructions regarding the provision of the service through contractual terms, including the obligation to provide the service.[62]

IV. Conclusion

The digital transformation of the economy has significantly reshaped traditional notions of employment, posing new legal challenges in defining and regulating employment relationships. Business is becoming more internationalised with the development of digital technologies. The adoption of the new technologies complicates both the determination of labour relations and the definition of the status of the parties involved in those relations. In particular, the ambiguous status of workers in the gig economy and digital labour platforms has brought the need for a clear legal framework that balances flexibility with the protection of workers' rights.

[59] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work (Text with EEA relevance) OJ L, 2024/2831, 11.11.2024, Art. 2(a).

[60] Ibid., Art. 2(b).

[61] Ibid., Art. 2(c-d).

[62] Pretelli, 2021, 583; Aloisi, 2022, 13-14.

Under EU law, the classification of individuals as "employees" or "self-employed" is based not on contractual labels, but on the factual nature of the working relationship – especially regarding such characteristics as subordination, remuneration, and the degree of control exercised by the employer. The autonomous interpretation of employment under EU law ensures uniformity across Member States, and prevents circumvention through national legal variations, as long as the EU law is superior to the Member States' national laws.

Modern labour organisation encompasses both remote work and employment relationships established through digital labour platforms. In remote work, the traditional territorial link between the employee and the employer's physical workplace is weakened, as work is increasingly carried out in virtual spaces. Similarly, platform work shifts the entire work process online, with individuals performing tasks remotely through the use of modern information and communication technologies. The emergence of remote and hybrid work has further complicated the application of private international law principles, particularly concerning the determination of habitual place of work and applicable jurisdiction. While some European countries have introduced and adapted their labour codes to accommodate these new realities, others, including Georgia, have only partially addressed the legal status of remote workers, often through temporary or emergency measures.

Unlike Georgian legislation, the concept of a labour relationship under European law is broader, and encompasses all forms of employment in which an individual performs work for an employer in exchange for remuneration. A key characteristic of such a relationship is that the employee does not bear the employer's commercial risks; instead, their working hours, place of work, and tasks are determined by the employer. The employee thus becomes an integral part of the enterprise, forming an economic unit with the business.

In determining employment status, EU law prioritises the actual nature of the working relationship over formal contractual terms, applying its own autonomous interpretation to define who qualifies as a worker. This approach is particularly important when assessing the status of remote workers, individuals performing platform work, and platform workers. Moreover, platform work necessitates careful legal scrutiny, as platform workers may be subject to employer-like control despite being formally classified as independent contractors.

While Georgian law does recognise the digital economy, and includes gig economy services under the framework of information society services, its primary focus is

on consumer protection. As a result, it does not address the legal status of remote or platform workers, leaving their employment rights and protections undefined within the current legal framework.

To ensure legal certainty, consistency, and fairness, it is critical to recognise the evolving nature of labour in the digital era. Legal systems must respond by adopting definitions and standards that reflect actual working conditions rather than formal contractual terms. Continued harmonisation at the EU level is necessary to ensure that all workers, regardless of the form or platform through which they work, enjoy adequate protection under labour law.

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Challenges of Recent Developments in the Field of Artificial Intelligence to Future Civil Law Legislation and Practice

ABSTRACT

The swift advancement of artificial intelligence (AI) has brought about significant transformations in a number of fields, including law. AI has had a big impact on civil law, a fundamental area of legal systems around the world, in areas including dispute resolution, liability, contract formulation, and privacy. The development of artificial intelligence, its main uses in civil law, and the opportunities and problems that have arisen, are all covered in this article. It offers insights into how legal systems are adjusting to AI's increasing presence, and the necessity of future regulation to address ethical and legal problems, by examining case studies and current legislative frameworks.

Keywords: Artificial Intelligence (AI), Civil Law, Liability, Privacy, Smart Contracts, Intellectual Property (IP) Rights

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I. Introduction

Over the past 70 years, artificial intelligence (AI), which John McCarthy first described as "the science and engineering of making intelligent machines", has advanced remarkably.[1] The foundation for the quick development of AI technologies, which have progressively impacted many facets of society, was established by this early idea. Symbolic AI initially dominated the discipline, emphasizing logic and rule-based systems.[2] Advancements in machine learning (ML), natural language processing (NLP), and computer vision have empowered AI systems to handle increasingly dynamic and complex tasks, such as robotic systems, autonomous driving, predictive analytics, and language comprehension.[3] The 2024 EU Artificial Intelligence Act defines an 'AI system' as a machine-based system designed to function with different degrees of autonomy, and potentially adapt after deployment. It determines how to produce outputs – such as predictions, content, recommendations, or decisions – based on the input it receives, with the aim of affecting physical or digital environments, either explicitly or implicitly.[4]

Artificial intelligence (AI) encompasses a fast-evolving array of technologies that deliver substantial economic, environmental, and social value across numerous industries and sectors. By improving predictive accuracy, streamlining operations and resource use, and providing tailored digital solutions, AI grants businesses a key competitive edge. Additionally, AI contributes to positive societal and environmental impacts in areas such as healthcare, agriculture, food safety, education and training, media, sports, culture, infrastructure, energy, transport and logistics, public administration, security, justice, resource efficiency, environmental monitoring, biodiversity protection and restoration, as well as climate change mitigation and adaptation.[5] In summary, the adoption of AI across different sectors has reshaped conventional workflows and business models, frequently leading to improved efficiency, accuracy, and overall productivity.[6]

However, alongside its advantages, AI also brings new ethical and legal challenges.[7] Depending on how it is applied, used, or developed, AI can potentially pose risks

1 McCarthy, 1959, 77.

2 Newell and Simon, 1956, 61.

3 Goodfellow, Bengio and Courville, 2023, 54; Supriyono, Wibawa, Suyono and Kurniawan, 2024, 1.

4 Artificial Intelligence Act, 2024, Art. 3.

5 European Union, 2024, Recital (4)

6 Rashid and Kausik, 2025, 1.

7 UN, 2025, 83

and cause harm to public interests and fundamental rights protected under EU law. Such harm can take both a tangible and intangible form, including physical, psychological, social, or economic consequences.[8] AI's growing capabilities have sparked important debates around accountability, privacy, and fairness.[9] These issues are especially critical within civil law, where AI affects domains such as contract law, tort law, property rights, and personal privacy.[10] The introduction of AI systems has prompted major reassessments of long-standing legal doctrines, compelling legislators to modify traditional legal structures to address challenges related to liability, data protection, and the interpretation of contracts.

As AI technologies advance, legal systems must also adapt to uphold justice and accountability in an increasingly AI-driven world.[11] This task is especially difficult due to AI's growing autonomy and its capacity to make decisions with minimal or no human oversight. In response, legal experts and practitioners have emphasized the need for flexible legal frameworks capable of addressing the distinct risks and opportunities posed by AI. Given the complexity and breadth of these challenges, interdisciplinary collaboration is essential - bringing together lawyers, technologists, and ethicists to develop regulations that promote innovation while safeguarding ethical principles.

This article will examine the influence of AI on critical areas of civil law, including contract law, tort law, property law, and privacy rights. It will also address the ethical challenges posed by AI technologies – such as bias and discrimination – and the regulatory difficulties governments and institutions encounter in responding to these concerns. Lastly, the article will outline potential avenues for legal reform, drawing on existing legal precedents and current academic discourse to offer a well-rounded framework for navigating the intersection between AI and civil law.

II. The Development of Artificial Intelligence

AI has evolved through several waves of innovation, reflecting the interplay between technological progress and societal needs. The first wave of AI, which emerged in the mid-20th century, focused on rule-based systems and symbolic reasoning. These systems, exemplified by the Logic Theorist and the General Problem Solver, relied on explicit algorithms to solve problems within well-defined domains.[12]

[8] Artificial Intelligence Act, 2024, Recital (5).

[9] Shrestha, 2021, 375; Rashid and Kausik, 2024, 28; Cheong, 2024, 1; Radanliev, 2025, 4.

[10] Bertolini, 2020, 9-14.

[11] Cheong, 2024, 1.

[12] McCarthy, 1959, 77; Newell and Simon, 1956, 1-4.

The 1980s witnessed the rise of expert systems, such as MYCIN and DENDRAL, which applied domain-specific knowledge to perform diagnostic and analytical tasks. Despite their success in narrow fields, expert systems faced scalability and adaptability challenges, leading to a period of diminished interest known as the "AI winter".[13]

The resurgence of AI in the 2000s was driven by advancements in machine learning and the availability of large datasets. Algorithms such as support vector machines and neural networks enabled computers to learn from data, improving their ability to recognize patterns and make predictions.[14] This era also saw the rise of big data analytics, which further enhanced AI's capabilities in fields such as healthcare, finance, and marketing.[15]

In recent years, the development of deep learning and generative AI models has marked a new milestone in AI innovation. Systems like OpenAI's GPT series and DeepMind's AlphaFold demonstrate the ability of AI to generate human-like text, predict protein structures, and solve complex problems with minimal human intervention.[16] The increasing integration of AI into society raises profound legal and ethical questions.[17] As AI systems become more autonomous, traditional distinctions between human and machine actions blur, challenging the attribution of liability and the application of existing legal norms. For instance, the EU AI Act seeks to establish harmonized rules for high-risk AI systems, addressing issues such as transparency, accountability, and safety.[18] Furthermore, the use of AI in decision-making processes has prompted debates about fairness, discrimination, and accountability. Scholars argue that ensuring the compatibility of AI-driven decisions with fundamental legal principles requires interdisciplinary collaboration and continuous regulatory adaptation.[19]

III. AI's Influence on Key Areas of Civil Law

1. Contract Law

AI is reshaping contract law by automating contract drafting, negotiation, and performance monitoring. Smart contracts, powered by blockchain and AI, execute predefined terms automatically without human intervention. While these innovations

[13] Russell and Norvig, 2021, 24; UN, 2025, 13.

[14] Hinton, Osindero and Teh, 2006, 1527.

[15] Brynjolfsson and McAfee, 2014, 28-30; UN, 2025, 54.

[16] Brown et al, 2020, 1877; Jumper et al., 2021, 583.

[17] UN, 2025, 21.

[18] See: Artificial Intelligence Act, 2024.

[19] Clarke, 2019, 410; Smith and Jones, 2023, 405; Díaz-Rodríguez et al., 2023, 2-3; Longo et al., 2024, 2; Almada, 2024, 116.; Cheong, 2024, 2.

enhance efficiency, they also raise questions about consent, interpretation, and the resolution of disputes arising from ambiguous or erroneous AI-generated terms.[20]

Courts and legislators face the challenge of determining the legal validity of AI-drafted contracts and addressing liability when errors occur. For example, if an AI system misinterprets contractual terms, it remains unclear whether the liability lies with the developer, the user, or the AI itself.[21] In the case of *ProCD, Inc. v. Zeidenberg*,[22] the court examined issues of contract formation in the context of software licenses, providing insights into how technological intermediaries influence agreements. However, the application of similar principles to AI-generated contracts remains unresolved, necessitating further judicial and legislative clarification.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) provides a framework for understanding the obligations of parties in international transactions. However, its provisions do not explicitly address the use of AI in contract formation, leaving gaps in interpretation. As AI continues to play a significant role in drafting and executing agreements, scholars suggest revising or supplementing such frameworks to account for the unique challenges posed by AI technologies.[23]

2. Tort Law

AI systems' increasing autonomy complicates the assignment of liability in tort law. For instance, in cases involving autonomous vehicles, determining whether the manufacturer, software developer, or user is at fault is challenging. Traditional principles such as negligence and strict liability must be adapted to address these scenarios.[24]

The concept of "foreseeability" becomes critical in assessing liability for AI-related harm. Since AI systems are designed to learn and evolve over time, predicting their behavior in dynamic environments is often difficult. This uncertainty complicates the evaluation of whether harm was foreseeable and preventable. Courts must also grapple with whether AI systems themselves can be considered agents capable of responsibility, or if accountability rests solely with the human entities involved in their design, programming, and deployment.

One prominent case that highlights these challenges is the 2018 fatal collision involving an Uber autonomous vehicle in Arizona. Investigators and legal experts de-

[20] Clarke, 2019, 413; Almada, 2024, 28; Cheong, 2024, 2.

[21] Artificial Intelligence Act, 2024, 57.

[22] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 7th Cir. 1996.

[23] Clarke, 2019, 414; Cheong, 2024, 2.

[24] Artificial Intelligence Act, 2024, Art. 99, 101.

bated whether fault lay with the vehicle's software, the human safety driver, or Uber's overall operational decisions. Such incidents illustrate the need to redefine legal doctrines, such as product liability and contributory negligence, to account for the unique nature of AI systems.[25]

Scholars argue that adopting a strict liability framework for high-risk AI applications, as suggested in the European Union's AI Act, could provide greater clarity and protection for victims of AI-related harm. However, balancing innovation with accountability remains a contentious issue (European Union, 2024). Additionally, the Restatement (Third) of Torts in the United States provides foundational principles for addressing negligence and product liability, but these principles may require reinterpretation in the context of AI.[26]

3. Property Law

AI technologies are also impacting property law, particularly in intellectual property (IP) rights. AI-generated works, such as music, art, and software, raise questions about authorship and ownership. Current IP laws often assume human authorship, creating a legal vacuum for AI-generated creations.[27]

Debates continue over whether AI should be recognized as a legal entity capable of holding IP rights, or whether ownership should default to the developer or user. Resolving these issues requires balancing innovation incentives with protecting human creators. For example, the *Naruto v. Slater* (2018) case, which dealt with animal authorship, provides an indirect analogy, demonstrating the courts' reluctance to extend authorship rights beyond humans. Similarly, AI-generated creations challenge traditional legal definitions of "authorship".[28]

The World Intellectual Property Organization (WIPO) and various national agencies are exploring policies to address these gaps. In 2022, the European Patent Office rejected an AI system named DABUS as an inventor in a patent application, emphasizing the necessity of human authorship under current frameworks.[29] Such cases highlight the need for harmonized global standards that address the complexities of AI-driven innovation.

[25] Smith and Jones, 2023, 45.

[26] American Law Institute, 1998, generally; Lior, 2025, passim.

[27] U.S. Copyright Office (B), 2023, Part. 2.

[28] Acosta, 2012, passim.

[29] European Patent Office, 2022, para. 4.6.4.

4. Privacy and Data Protection

AI's reliance on vast amounts of data poses significant privacy challenges. Civil law frameworks, such as the European Union's General Data Protection Regulation (GDPR), impose strict requirements on data collection, processing, and sharing. However, AI systems often operate in ways that obscure accountability, making it difficult to ensure compliance with privacy laws.[30]

The use of AI in surveillance, predictive policing, and consumer profiling raises ethical concerns about consent, bias, and discrimination.[31] For example, AI-driven facial recognition systems deployed in public spaces have been criticized for their potential to violate individuals' privacy and disproportionately target minority groups.[32] Such practices highlight the tension between public safety objectives and individual rights.

Legal systems must address these issues by enhancing transparency and accountability mechanisms for AI applications. Scholars suggest adopting "explainable AI" standards that require developers to provide clear documentation of how AI systems process data and reach decisions.[33] Additionally, privacy-by-design principles, as outlined in the GDPR, should be integrated into AI development to ensure that data protection is a foundational aspect of these technologies.

High-profile legal cases, such as *Schrems II* (2020), which invalidated the EU-US Privacy Shield framework, underscore the importance of safeguarding privacy in a globalized digital economy. Policymakers must collaborate internationally to establish coherent regulations that protect individuals while enabling the cross-border use of AI technologies.[34]

IV. Ethical and Regulatory Challenges

1. Bias and Discrimination

Artificial intelligence (AI) systems, though powerful and efficient, are not free from biases that are inherently embedded in the data they process. These biases can lead to harmful discriminatory outcomes, especially in crucial areas such as hiring, lend-

[30] GDPR, 2016, Recital.

[31] UN, 2025, 61.

[32] Smith and Jones, 2023, 45.

[33] Clarke, 2019, 413; Radanliev, 2025, 5.

[34] European Court of Justice, Case C-311/18 Data Protection Commissioner v Facebook Ireland and Schrems (Schrems II), 2020; Artificial Intelligence Act, 2024, Recital (1); UN, 2025, 6.

ing, and law enforcement. One significant concern is that AI systems can perpetuate historical inequalities if they are trained on biased datasets that reflect societal prejudices. For instance, if an AI system used in hiring decisions is trained on data that includes a history of underrepresentation of certain groups, such as women or ethnic minorities, the algorithm may replicate those patterns and systematically disadvantage these groups.[35]

In the context of law enforcement, predictive policing tools have been found to disproportionately target minority communities, as they are often trained on arrest data that may over-represent certain demographic groups due to existing law enforcement practices. The case of the COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) system highlights the potential for AI-driven systems to reinforce biases in the criminal justice system. Research has shown that the COMPAS system was more likely to incorrectly assess Black defendants as high risk for reoffending compared to white defendants, even when controlling for prior criminal history.[36] This raises serious concerns about the fairness and accuracy of AI-based decision-making processes.

In response to these challenges, there is a growing call for civil law to evolve and address the harm caused by biased AI systems. One proposed solution is the establishment of clear legal standards for fairness in AI-driven decision-making. These standards would require companies and public institutions to regularly audit AI systems for potential biases and to ensure that their use does not lead to discriminatory outcomes. The implementation of such regulations would be aimed at creating accountability and transparency, with the goal of reducing the impact of bias on vulnerable groups.

The European Union's General Data Protection Regulation (GDPR) and its provisions on "automated decision-making" are important examples of efforts to regulate AI systems in a way that addresses bias and discrimination. Under the GDPR, individuals have the right to contest decisions made solely based on automated processing, which includes profiling. This legal framework places an emphasis on fairness, transparency, and accountability in automated decision-making processes.[37] Similarly, in the United States, the Algorithmic Accountability Act of 2019 was proposed to require companies to conduct impact assessments of their automated decision-making systems, ensuring that they do not perpetuate discrimination.[38]

[35] Angwin, Larson, Mattu & Kirchner, 2016, passim.

[36] Ibid., passim; Picard, Watkins, Rempel, & Kerodal, 2019, 3-4.

[37] European Commission, 2016, Recital (85).

[38] See: Algorithmic Accountability Act, 2019.

Moreover, scholars have proposed a range of solutions to mitigate bias in AI, including the use of "fairness-aware" algorithms that adjust decision-making processes to avoid discrimination based on race, gender, or other protected characteristics.[39] These approaches aim to detect and correct biases before they translate into discriminatory outcomes, which could, in turn, provide more equitable AI systems.

2. Accountability and Transparency

The complexity and opacity of many artificial intelligence (AI) algorithms, often referred to as the "black-box" nature, present significant challenges in ensuring accountability for AI-driven decisions. This term "black-box" refers to AI systems whose internal processes are not easily interpretable or understandable, even by the developers who created them. As AI systems become more integrated into critical decision-making sectors such as healthcare, criminal justice, and finance, the inability to explain how decisions are made raises concerns about fairness, responsibility, and the ability to challenge potentially harmful outcomes.

The lack of transparency in AI systems undermines trust and complicates efforts to hold parties accountable when these systems make erroneous or discriminatory decisions.[40] For example, in the case of automated risk assessments in criminal justice, such as those conducted by the COMPAS system, the inability to scrutinize how the algorithm arrived at its decision makes it difficult for defendants and their legal teams to contest the accuracy or fairness of the risk assessments used to determine sentencing.[41] Without the ability to understand the rationale behind an AI-driven decision, individuals affected by these systems may not have a meaningful opportunity to challenge them, thereby impeding justice.

Legal scholars have argued that AI systems should be subject to principles of explainability and transparency, requiring developers and institutions to disclose information about how their algorithms function and how decisions are made.[42] One of the primary recommendations for addressing this challenge is the establishment of legal frameworks that mandate clear, understandable explanations for AI decisions, especially when such decisions have significant impacts on individuals' rights and

[39] See: Dastin, 2018.

[40] Radanliev, 2025, 7.

[41] Angwin et al., 2016, passim.

[42] Binns, 2018, 149.

interests. A robust legal requirement for explainability would ensure that affected parties are not left in the dark about the reasons behind decisions made by AI systems, and that they have the means to contest or appeal these decisions.

The European Union's General Data Protection Regulation (GDPR) provides a foundational example of a legal approach to the problem of transparency and accountability. Under Article 22 of the GDPR, individuals have the right not to be subject to decisions based solely on automated processing, including profiling, where such decisions have a significant legal effect. Importantly, this includes the right to obtain an explanation of the logic behind such decisions, thus addressing concerns about AI systems operating in an opaque manner.[43] This regulation emphasizes the need for transparency in automated decision-making and ensures that individuals are provided with meaningful information about how their data is being used to make decisions that affect them.

Furthermore, scholars have suggested that AI systems should be designed with "explainability by design", meaning that the AI algorithms must be inherently capable of providing understandable justifications for their decisions.[44] This approach would shift the burden from individuals seeking to understand the system to the developers, who would be required to implement transparent processes from the outset.

In the United States, the Algorithmic Accountability Act of 2019 reflects growing concerns about AI transparency. The Act mandates that companies conducting business with AI systems perform audits to assess their performance, identify potential biases, and ensure that their systems are explainable and transparent. Such legislative efforts aim to hold organizations accountable for the algorithms they deploy and to ensure that individuals are not subjected to harmful or discriminatory decisions without recourse.[45]

Legal frameworks governing AI transparency and accountability are critical not only to ensure fairness but also to protect fundamental rights, including the right to be heard and to contest decisions that could impact an individual's life. As AI continues to play a more prominent role in decision-making processes, the call for greater transparency and accountability is likely to grow, compelling legal systems worldwide to adapt to this technological reality.

[43] European Commission, 2016, generally.

[44] Lipton, 2016, 36.

[45] U.S. Congress, 2019, Secdtion 2.

3. Regulatory Frameworks

The rapid development of artificial intelligence (AI) technologies has outpaced the ability of existing legal frameworks to adequately regulate their use, particularly when it comes to issues such as accountability, ethics, and safety.[46] This regulatory lag presents a significant challenge, as laws that were not designed with AI in mind are often ill-equipped to address the complexities posed by these technologies. As AI systems continue to permeate every aspect of society, from healthcare to law enforcement, it becomes increasingly necessary to create new legal structures that can address the unique risks and benefits posed by AI, while balancing innovation with protection.

One of the primary issues with current legal frameworks is that they are typically limited by national borders, while AI technologies and their impact are inherently global. The cross-border nature of AI introduces a range of challenges, including jurisdictional issues, enforcement difficulties, and the need for the harmonization of standards across countries. For instance, an AI system developed in one country may be deployed in another, where local laws may conflict with the regulations in the country of origin. This presents a complex challenge for both regulators and businesses seeking to ensure compliance and avoid regulatory breaches in multiple jurisdictions.[47]

To address these challenges, international cooperation is essential. However, there is no universally accepted global standard for AI governance, and different countries and regions have begun developing their own regulatory approaches.[48] This disparity can create regulatory fragmentation, where a lack of coordination between legal systems hinders the effective oversight of AI technologies.[49] Some argue that this "race to the bottom" could lead to inconsistent or lax regulations that fail to protect consumers or uphold ethical standards.[50]

One notable initiative aimed at establishing a comprehensive regulatory framework for AI is the European Union's Artificial Intelligence Act (AI Act), which was proposed in April 2021. The AI Act is designed to provide a structured, risk-based approach to the governance of AI in the EU, classifying AI systems according to their

[46] UN, 2025, 152.

[47] Scherer, 2016, 354.

[48] UN, 2025, 111-136.

[49] Bertolini, 2025, 27-30.

[50] Bryson, 2017, 273.

risk levels and implementing appropriate regulatory measures for each category. For example, high-risk AI systems, such as those used in critical infrastructure, healthcare, and law enforcement, would be subject to strict requirements for transparency, accountability, and oversight. The Act also introduces provisions for ensuring that AI systems are free from bias and discrimination, setting clear guidelines for transparency and explainability in AI-driven decisions.[51]

Despite the potential of the AI Act to serve as a model for AI regulation in Europe, its applicability on a global scale remains uncertain. While the EU's approach to AI governance may influence other jurisdictions, it is unclear whether the global community will be able to reach a consensus on how to regulate AI effectively. The United States, for example, has taken a more market-driven approach to AI regulation, focusing on voluntary guidelines and industry standards rather than comprehensive legal mandates.[52] Other countries, such as China, have pursued their own regulatory frameworks, reflecting different priorities and values, particularly concerning surveillance and data privacy.[53] The lack of a unified international regulatory framework creates significant challenges for cross-border cooperation and enforcement, making it difficult to address global AI-related risks.

To facilitate effective AI regulation, scholars have suggested the creation of international treaties or organizations focused on AI governance. Such frameworks could help harmonize standards, create shared enforcement mechanisms, and provide clear guidelines for dealing with cross-border legal issues. This could include establishing international norms for the development and deployment of AI, setting clear ethical guidelines, and ensuring transparency and accountability in AI systems.[54]

Overall, while initiatives like the EU's AI Act represent an important step toward addressing AI governance, the road to comprehensive, globally applicable AI regulations is long, and requires significant international cooperation. Until a globally coordinated framework is developed, countries and regions will continue to grapple with the challenges of regulating AI in a way that fosters innovation while protecting public interest.[55]

[51] Artificial Intelligence Act, 2024, Recital (70).

[52] Calo, 2017, 399.

[53] Cheng and Zeng, 2022, 794; Radanliev, 2025, 9.

[54] Gasser and Almeida, 2017, 58; Cheong, 2024, 2; Radanliev, 2025, 10; UN, 2025, 150.

[55] UN, 2025, 87.

V. Case Studies

1. Autonomous Vehicles

The rise of autonomous vehicles (AVs) presents significant challenges for tort law, particularly regarding liability in accidents involving self-driving cars. As AI technologies enable vehicles to operate without human intervention, the traditional framework for determining liability – usually based on human error or negligence – becomes increasingly complex. Autonomous vehicles rely on algorithms and sensor systems to make decisions, raising the question of whether liability should be attributed to the manufacturer, software developer, or user in the event of an accident. This legal uncertainty has sparked considerable debate and underscores the need for clear guidelines on how the law should treat AI in the context of autonomous vehicle accidents.

At the heart of the issue is the question of fault. In traditional motor vehicle accidents, liability is often determined based on the principle of negligence, where the driver's actions (or lack thereof) are assessed to determine if they failed to meet a reasonable standard of care. However, in the case of AVs, the role of the human driver may be significantly diminished or non-existent. This raises critical questions about how responsibility should be assigned when an autonomous vehicle is involved in an accident.

One approach is to hold the manufacturers of autonomous vehicles accountable for defects in the design or functionality of the vehicle. In cases where a malfunction in the vehicle's sensors, algorithms, or software directly leads to an accident, manufacturers could be held strictly liable under product liability law. For example, in the case of Uber's autonomous vehicle, which was involved in a fatal pedestrian accident in 2018, the National Transportation Safety Board (NTSB) concluded that the vehicle's software was inadequate in detecting and responding to the pedestrian in time to avoid the collision.[56] While the company was not found to be criminally liable, the incident highlighted the need for clear guidelines regarding the responsibilities of manufacturers to ensure the safety of their autonomous systems.

Software developers, too, could face liability if the accident is found to be due to programming errors or insufficient testing of the autonomous system. The complexity of AI systems means that even small errors in programming or algorithmic decision-making can have catastrophic consequences. For instance, the "Tesla Autopilot" feature, which has been involved in several high-profile crashes, has raised

[56] National Transportation Safety Board, 2019, 44.

questions about whether software developers or car manufacturers should be held liable when the system fails to detect obstacles or respond to changing road conditions appropriately.[57]

However, in some cases, users of autonomous vehicles may also bear responsibility, especially if they fail to intervene when the system malfunctions or if they misuse the vehicle in a way that violates safety guidelines. For example, some AV systems still require human oversight, and failure to engage with the system when prompted could contribute to an accident. In these instances, liability might be shared between the manufacturer, software developer, and user, depending on the circumstances.

The evolving legal landscape surrounding autonomous vehicles emphasizes the need for comprehensive tort law reforms that address the specific challenges posed by AI and self-driving technology. Some scholars have suggested that a hybrid approach to liability could be most effective, where manufacturers and developers are held strictly liable for defects in the system, while users are held liable for misuse or failure to maintain the vehicle according to manufacturer instructions.[58] Additionally, some propose the creation of a new legal category of "AI liability" to address the unique characteristics of AI-driven decision-making in AVs.[59] This would involve considering the role of AI as an independent decision-maker and evaluating its actions according to a distinct set of standards.

Recent developments in both legal cases and policy initiatives show a growing recognition of the need for clearer guidelines on the role of AI in autonomous vehicle accidents. For instance, the European Union's Artificial Intelligence Act includes provisions for the regulation of high-risk AI applications, including autonomous vehicles, and seeks to establish rules for transparency, accountability, and liability.[60] Such regulations could provide the legal clarity necessary to address the complexities of AI in tort law, ensuring that victims of autonomous vehicle accidents have clear avenues for seeking redress.

2. AI-Generated Content

The emergence of AI-generated art and literature has raised fundamental questions about intellectual property (IP) law, particularly regarding authorship, originali-

[57] Calo, 2017, 419.

[58] Wang, 2022, 101.

[59] Goodman and Flaxman, 2017, 50.

[60] See: Artificial Intelligence Act, 2024, Recital (72), (27) & (11).

ty, and copyright protection. As AI technologies, such as deep learning and neural networks, continue to evolve, they are increasingly capable of producing content – ranging from visual art to written works – that appears to be indistinguishable from human-created works. However, current IP laws, which have traditionally been built around human authorship and creativity, struggle to address the unique challenges posed by AI-generated content.

One of the key challenges lies in determining who owns the rights to works created by AI. Under traditional copyright law, the work of an author or artist is protected by copyright if it meets two key criteria: originality and authorship by a human creator. However, in cases where AI systems are responsible for generating the content, determining who qualifies as the author – if anyone – becomes a complex issue.[61]

A landmark case that highlighted this challenge occurred in the United States when the U.S. Copyright Office ruled that works generated entirely by artificial intelligence could not be copyrighted unless a human demonstrates significant creative input. In this particular case, an individual had sought to copyright a series of artworks produced by an AI system, claiming that the machine's creative output was worthy of protection under U.S. copyright law. The Copyright Office, however, rejected this claim, affirming that copyright protection requires human authorship and that works produced solely by machines or algorithms do not meet the statutory requirements.[62] This decision emphasized the notion that copyright is inherently tied to human creativity and rejected the notion of non-human authorship.

This ruling underscores the growing need for clearer legal definitions of authorship in the context of AI-generated content. As AI continues to advance and produce increasingly sophisticated works of art, literature, and music, it becomes more difficult to draw a clear line between works created by humans and those produced by machines. Legal scholars have argued that the traditional framework for copyright law, which assumes human agency as the foundation for creativity, must evolve to accommodate the unique characteristics of AI-generated works.[63] Some propose a more flexible approach to authorship, where the person or entity that develops or operates the AI system might be considered the author, or where new categories of IP protection could be created specifically for AI-generated works.[64]

[61] Singh and Sharma, 2024, 1.

[62] U.S. Copyright Office (A), 2023, 306.

[63] Sobel, 2024, 49.

[64] Samuelson, 2016, 1185.

Another issue raised by AI-generated content is the question of originality. Copyright protection is granted to works that are original, meaning they must reflect the unique creative expression of the author. However, if an AI system generates a work based on existing data or patterns, it may be argued that the resulting content is not truly original, as it is derived from pre-existing sources.[65] This raises important questions about the nature of creativity and originality in the age of AI, and whether traditional concepts of authorship and originality are still adequate in the context of machine-generated content.

The question of whether AI-generated works should be eligible for copyright protection is not only a legal issue but also an ethical one. Some have argued that recognizing AI as the author of creative works could undermine the value of human creativity and the rights of human creators. Others contend that AI-generated content could serve as a tool for expanding creativity and providing new opportunities for human artists and authors. For example, AI-generated art may inspire new forms of collaboration between human creators and machines, leading to innovative and ground-breaking works of art.[66]

The U.S. Copyright Office decision, while significant, represents just one step in a broader legal conversation that will need to evolve as AI continues to reshape creative industries. International legal bodies, such as the World Intellectual Property Organization (WIPO), have also begun to explore these issues, with some advocates pushing for new international standards for AI-generated content.[67] These discussions may lead to the development of more comprehensive frameworks for recognizing the intellectual property rights of AI systems and their creators, ensuring that the legal landscape can keep pace with technological innovation.

In conclusion, the rise of AI-generated content challenges existing intellectual property frameworks, particularly with regard to authorship, originality, and copyright. As courts and legal scholars continue to grapple with these issues, the development of new legal definitions and frameworks will be crucial to ensuring that creators – whether human or machine – can adequately protect and benefit from their intellectual property.

[65] Ginsburg, 2017, 68.

[66] Elgammal, 2017, generally.

[67] Cuntz, Fink and Stamm, 2024, 2.

VI. Future Directions

As artificial intelligence (AI) continues to shape numerous sectors, from healthcare to finance, its impact on civil law will only grow in significance. To address these developments, legal systems around the world must evolve and adapt to accommodate the unique characteristics of AI technologies. The current legal framework, with its traditional principles and doctrines, often struggles to address the complexities of AI-driven systems. Consequently, a proactive and adaptive approach will be required to ensure that civil law effectively addresses the challenges posed by AI. Several key strategies are essential for meeting this goal.

1. Develop Adaptive Legal Principles

The first major step toward addressing AI's growing influence on civil law is the development of adaptive legal principles that accommodate the specificities of AI technologies. Traditional legal doctrines, such as tort law, contract law, and intellectual property law, were designed with human agents in mind. As such, they often fail to adequately address the distinctive features of AI, such as machine learning, autonomy, and the capacity for AI systems to evolve based on large datasets. For instance, in the context of liability for AI-driven actions, existing tort principles – such as negligence or strict liability – may not fully capture the complexities of AI behavior, especially when it comes to autonomous systems that make decisions without human intervention.[68]

Legal scholars have suggested that AI-specific regulations could be developed to address these issues. For example, creating a separate legal category for "AI responsibility" could allow courts to distinguish between the actions of humans and those of autonomous systems. Furthermore, adaptive legal principles could take into account the dynamic and evolving nature of AI technologies. This would require ongoing updates to the law to ensure that it can effectively regulate new developments in AI. Some scholars advocate for the creation of "AI law", a specialized area of law that evolves alongside technological advancements.[69]

2. Foster Interdisciplinary Collaboration

Another crucial direction for the future of AI in civil law is fostering interdisciplinary collaboration between legal professionals, technologists, and ethicists. AI systems

[68] Sullivan, 2019, 160.

[69] Vallor, 2018, 148.

are inherently complex and multidisciplinary in nature. As such, legal professionals need to collaborate with AI researchers, engineers, and ethicists to fully understand how AI systems function, their potential risks, and the ethical dilemmas they may present. This collaboration is necessary not only to create effective regulations, but also to ensure that legal frameworks align with technological realities.[70]

Ethicists, in particular, play a key role in shaping the moral guidelines for AI development and use. AI systems are often designed with goals such as efficiency and optimization, which can sometimes conflict with ethical concerns about fairness, justice, and accountability. Legal professionals can benefit from working alongside ethicists to ensure that legal systems address these ethical dilemmas, particularly in areas such as discrimination, bias, and transparency in AI algorithms.[71] Additionally, technologists must be involved in legal discussions to provide insights into the practical limitations and capabilities of AI systems, ensuring that legal frameworks are both realistic and forward-looking.

Scholarly collaboration has been increasingly recognized as essential in AI regulation. For example, the European Commission's high-level expert group on AI, which includes legal scholars, engineers, and ethicists, provides a model for how interdisciplinary teams can work together to draft policy recommendations and regulatory frameworks.[72]

3. Enhance Public Awareness

The third direction for addressing AI's impact on civil law is enhancing public awareness of the risks and benefits associated with AI. Policymaking related to AI is often dominated by technical jargon and complex issues that can be difficult for the general public to understand. This gap in knowledge can lead to misinformed decision-making by lawmakers and a lack of public accountability for AI developers. Educating the public about AI's potential and its risks is therefore a vital step in ensuring informed policymaking and fostering a transparent dialogue between stakeholders.[73]

Public awareness can also help foster greater trust in AI technologies. When individuals understand how AI systems function and what risks they may pose – such as data privacy concerns, algorithmic bias, and automation-induced job displacement

[70] Custers, 2023, 349.

[71] Bryson et al., 2017, generally.

[72] European Commission, 2019, generally.

[73] Clarke, 2019, 417.

– they are more likely to support responsible regulation and ethical AI practices.[74] Furthermore, creating public forums for discussing AI's societal implications can help ensure that AI technologies are developed with the interests of society in mind. Governments and private companies can collaborate with educational institutions to offer resources that explain AI's impact on civil rights, safety, and employment.

For example, the U.K. government's "AI Roadmap" highlights the need for public engagement and awareness in its strategy for AI regulation, including a public consultation process on ethical guidelines for AI development.[75] By promoting widespread understanding of AI, policymakers can ensure that regulations reflect not only expert opinions, but also the needs and concerns of the general public.

In conclusion, addressing AI's growing influence on civil law will require adaptive legal principles, interdisciplinary collaboration, and enhanced public awareness. As AI continues to evolve, it is crucial for legal systems to develop frameworks that accommodate the unique challenges posed by these technologies. By fostering collaboration among legal professionals, technologists, and ethicists, and by prioritizing public engagement, legal systems can ensure that AI is regulated in a manner that balances innovation with protection, transparency, and fairness.

VII. Conclusion

The development of artificial intelligence (AI) has revolutionized various sectors, ranging from healthcare to transportation, and its influence is increasingly being felt in the realm of civil law. AI technologies, while offering unprecedented opportunities for efficiency, innovation, and problem-solving, also introduce significant challenges, particularly in areas such as liability, privacy, and ethics. The task of integrating AI into civil law frameworks is complex, requiring both the adaptation of traditional legal principles and the creation of entirely new regulatory structures. Legal systems must evolve to ensure that AI is developed and deployed in a way that balances the benefits of innovation with the protection of fundamental rights and societal values.

The first challenge lies in adapting existing legal principles to account for the unique characteristics of AI systems. Traditional civil law doctrines, such as those governing contracts, torts, and intellectual property, were created with human actors in mind. As AI becomes increasingly autonomous, these legal frameworks must be

[74] UN, 2025, 52.

[75] UK Government, 2021, generally.

reassessed and updated to deal with the implications of AI behavior. For example, in the area of tort law, determining liability for harms caused by AI-driven decisions – such as accidents involving autonomous vehicles or wrongful outcomes generated by algorithms – requires a reassessment of established legal concepts such as negligence and causality.[76]

AI's ability to learn from large datasets and make independent decisions introduces new complexities that traditional law is ill-equipped to handle. As AI systems become more autonomous, the question of accountability becomes central. To address this, scholars have suggested that legal frameworks should include specific provisions that govern AI systems' actions and the potential liability of developers, manufacturers, and users.[77] This may require the introduction of new legal categories, such as "AI liability", which could serve as a bridge between the traditional legal concepts and the novel challenges posed by intelligent machines.

Given the unique challenges AI presents, there is a growing consensus that new regulatory frameworks are necessary. Legal systems must not only adapt existing laws, but also create entirely new regulations that can govern the development, deployment, and use of AI technologies. Governments around the world are beginning to recognize the need for such frameworks. For example, the European Union has been at the forefront of developing comprehensive regulations for AI with the introduction of the *AI Act*, a pioneering effort to regulate high-risk AI applications and ensure they comply with safety, privacy, and ethical standards.[78]

International regulatory cooperation will also be essential to address cross-border challenges. AI's global nature means that regulatory approaches must be harmonized across jurisdictions to avoid legal fragmentation and to ensure consistency in standards. The development of international agreements on AI governance will be crucial to creating a regulatory landscape that fosters innovation while protecting fundamental rights.[79]

In particular, the regulation of AI-generated content, privacy concerns, algorithmic bias, and the ethical use of AI require comprehensive legal measures that go beyond traditional frameworks. For instance, the issue of AI bias – whether in lending, hiring, or law enforcement – has prompted discussions about the need for explicit

[76] Shrestha, 2021, 375.

[77] Kayal, 2019, 136.

[78] See: Artificial Intelligence Act, 2024.

[79] Scherer, 2016, 393-398; UN, 2025, 63.

legal standards to ensure fairness and prevent discriminatory outcomes.[80] Legal scholars have argued that AI regulation must be proactive, taking into account both the capabilities of AI and the societal risks it may pose.

To maintain fairness and adaptability in legal systems amid AI advancements, continuous collaboration is vital. Policymakers, legal experts, technologists, ethicists, and the public must engage in sustained discussions. Crafting effective AI regulations demands a collective approach, incorporating varied viewpoints. As AI technology progresses, interdisciplinary cooperation will be crucial to developing laws that are both technically grounded and ethically robust.[81]

Raising public awareness and encouraging active participation are just as important. Promoting open and informed discussions about the advantages and dangers of AI allows legal frameworks to align with societal values and priorities. Involving the public ensures that policymakers can make decisions that safeguard essential rights – including privacy, equality, and non-discrimination – while still supporting technological progress that serves the greater good.[82]

As AI becomes increasingly integrated into daily life, it is essential for legal systems to remain adaptable and responsive to new challenges. Crafting flexible legal principles, supported by forward-thinking regulatory frameworks and inclusive societal engagement, will be key to guiding the future of AI in a manner that promotes innovation while protecting fundamental rights and upholding ethical standards.

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[80] Binns, 2018, 149.

[81] Bryson et al., 2017, generally.

[82] Clarke, 2019, 411; UN, 2025, 4.

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The Scope of Judicial Discretion when Considering the Admissibility of Claims Filed against Gender-Based Violence Survivors

ABSTRACT

Strategic Lawsuits Against Public Participation (SLAPP) represent an increasingly prevalent mechanism for constraining the freedom of expression of gender-based violence survivors. This study argues that defamation lawsuits filed against survivors constitute continued psychological and economic violence under Georgian law, functioning as instruments of intimidation and manipulation. Drawing upon European Court of Human Rights jurisprudence – particularly *Ismayilova v. Azerbaijan* regarding states' obligations to ensure safe environments for public participation – the analysis examines how SLAPP litigation intersects with Georgian procedural frameworks.

Employing hermeneutical and comparative legal methodologies, the study analyses Georgian judicial practice alongside anti-SLAPP mechanisms in California (Code of Civil Procedure para. 425.16) and Canada (Courts of Justice Act para. 137.1). The research demonstrates that Georgian legislation provides adequate foundation for protecting survivors' expression rights through Article 5(2) of the Law on Freedom of Speech and Expression, which affords defendants procedural opportunity to petition for dismissal at the preparatory stage. Analysis of Tbilisi City Court and Supreme Court decisions reveals that the fundamental challenge lies in courts' formalistic interpretation – particularly restrictive application of courtroom speech privilege failing to protect statements submitted to law enforcement or the Public Defender's Office.

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The paper acknowledges competing constitutional values including due process rights, presumption of innocence, and legitimate reputational interests. Nevertheless, it recommends that courts reallocate evidentiary burdens according to the *in dubio pro libertate* principle and adopt progressive interpretations of courtroom speech privilege encompassing statements submitted to competent authorities.

Keywords: SLAPP Litigation; Courtroom Speech Privilege; Defamation; Admissibility Stage; Freedom of Expression

I. Introduction

Gender-based violence continues to constitute a significant global challenge, and Georgia is no exception.[1] Yet contemporary research indicates that the reporting rate among victims of violence remains low,[2] a trend often linked to social and institutional barriers,[3] including a relatively new phenomenon – the use of defamation lawsuits against women who publicly speak about violence perpetrated against them.

This practice, known as SLAPP (Strategic Lawsuit Against Public Participation), represents an attempt to silence women by restricting their freedom of expression, which, in turn, negatively impacts the women's movement in general.[4] A defamation lawsuit filed against a woman who has experienced violence may be considered a form of psychological[5] or economic[6] violence, as it effectively functions as a means of intimidation, humiliation, and psychological manipulation.[7] The weaponization of defamation lawsuits against violence survivors represents a manifestation of broader SLAPP dynamics that extend beyond gender-based violence cases. SLAPP litigation operates across multiple spheres – corporate, political, and governmental – as a mechanism to suppress inconvenient speech and public participation.[8] While this analysis focuses

1 See: Kirtava and Okruashvili, 2024; World Health Organization, 2021; Council of Europe, 2022.

2 Global Database on Violence against Women, <https://evaw-global-database.unwomen.org/> [06.01.2025].

3 Mala and Weldon, 2018, 50.

4 Leader, 2019, 2.

5 Law of Georgia "On Prevention of Violence Against Women and/or Domestic Violence, Protection and Assistance of Victims of Violence", Art. 4(b).

6 Ibid., Art. 4(e).

7 Lucindo, 2022, 597.

8 Borg-Barthet, 2024, 841.

specifically on cases involving gender-based violence survivors, it is essential to recognize that anti-SLAPP protections serve multiple constitutional values, and address systemic power imbalances that transcend any single category of targeted speech.

Georgian legislation protects both freedom of expression[9] and a person's right to defend their reputation.[10] However, balancing these two rights becomes particularly difficult when it concerns statements made by women who have experienced violence.[11]

During the course of one of the most popular women's movements in recent times, the #MeToo campaign,[12] various legal challenges became evident in terms of realizing freedom of expression.[13] Women who have experienced violence encounter numerous challenges when attempting to speak publicly about experiences of gender-based violence, with particularly significant concerns being the threat of defamation lawsuits and the problem of shifting the burden of proof onto the victim.[14]

A 2024 study revealed that the low rate at which violence survivors approach relevant authorities remains a significant challenge. Among other factors, sexist attitudes prevalent in society were identified as a contributing cause to this phenomenon.[15] Promoting public discourse about gender-based violence is an effective means of reducing stereotypes,[16] with the sharing of personal experiences directly by women who have survived violence being particularly important.[17] In turn, speaking openly about violence and naming perpetrators serves as a means of warning others, which indeed constitutes a public interest.[18]

The research examines the scope of judicial discretion in the admissibility phase of lawsuits filed against women who have experienced violence. The study aims to develop recommendations on how courts should exercise their discretionary authority when identifying SLAPP lawsuits, in order to prevent secondary victimization of violence survivors and unjustified restrictions on freedom of expression, while promoting both procedural transparency and predictability, as well as implementing

[9] Constitution of Georgia, Art. 17(1); Law of Georgia "On Freedom of Speech and Expression", Art. 3(1).

[10] Civil Code of Georgia, Art. 18(2).

[11] See: ბახტაძე, 2024, 85-86 [bakht'adze, 2024, 85-86].

[12] Me too, <https://metoomvmt.org/> [06.01.2025].

[13] Ligon, 2020, 962.

[14] Andrews, 2022, 127.

[15] Kirtava and Okruashvili, 2024, 13.

[16] The World Bank, 2017, 76; Gogolashvili, 2023, 11.

[17] Ni Ma, 2024, 7741.

[18] Doty, 2020, 64.

gender-sensitive approaches in SLAPP lawsuit proceedings. This analysis builds upon established international scholarship recognizing SLAPP litigation as continued victimization, with particular attention paid to applications within Georgian legal frameworks. While the conceptual linkage between strategic litigation and ongoing abuse has been explored in other jurisdictions, the specific intersection with Georgian procedural law and judicial discretion presents unique interpretive challenges. The paper employs hermeneutical research methodology to analyze Georgian legislation and judicial practice regarding the exercise of court discretion at the admissibility stage. Using comparative legal methodology, it examines legal approaches to the scope of judicial discretionary authority. The research analyzes how courts should balance interests between freedom of expression and protection of reputation at the admissibility stage, particularly in cases involving women who have experienced violence.

The work is structured in four main sections. The first and final sections are dedicated to the introduction and conclusion, respectively. The second section consists of two subsections: the first examining the identification of SLAPP lawsuits as a form of ongoing violence, and the second exploring the court's role in preventing secondary victimization. The third section, through three subsections, analyzes judicial freedom of speech, standards for distributing the burden of proof, and the practical application of gender-sensitive and victim-centered approaches.

II. Contextualizing SLAPP Lawsuits at the Admissibility Stage

Strategic Lawsuits Against Public Participation (SLAPP) are defined as legal actions aimed at restricting an individual's right to participate in public discourse through litigation filed not with genuine expectation of success, but rather to intimidate or punish the defendant.[19] The integrity of public discourse is fundamentally compromised when intimidation becomes a normalized or acceptable tactic.[20] SLAPP lawsuits are problematic not only because they are unfounded and unsubstantiated, but also because they restrict public participation and threaten free communication. Although SLAPP suits manifest in various forms, defamation represents the most prevalent allegation within these actions.[21]

[19] Ligon, 2020, 966.

[20] Braun, 1999, 972.

[21] Lucindo, 2022, 590-591.

SLAPP lawsuits impede the constitutional right of the public to effect political change.[22] For cases involving defamation claims against women who have experienced violence, assessing the genuine purpose of the litigation at the initial admissibility stage is essential for reaching fair and objective decisions. This assessment becomes particularly critical considering that survivors are frequently compelled to undergo protracted and costly evidence-gathering processes, encompassing numerous compulsory procedures, including the obligation to testify and provide explanations on case-related matters against their will.[23] This procedural burden creates additional trauma for survivors, and may effectively silence legitimate testimony about abuse, undermining both individual justice and broader social accountability mechanisms. However, the legal response to strategic litigation involves more than a simple binary between freedom of expression and reputation protection. Anti-SLAPP mechanisms must balance multiple competing values: due process rights, equal access to courts, prevention of secondary victimization, protection of legitimate defamation claims, preservation of judicial resources, and maintenance of public discourse integrity.[24] This multi-dimensional framework requires nuanced judicial analysis that considers the interconnected nature of these constitutional and procedural principles.

1. Identifying SLAPP Lawsuits as Continued Violence at the Admissibility Stage

Defamation lawsuits filed against women who have experienced violence must necessarily be examined through a gender-sensitive approach.[25] This approach primarily entails activating anti-SLAPP mechanisms at the initial admissibility stage of litigation. Such early intervention is critical because defamation lawsuits against survivors often function as instruments of continued psychological and economic violence, strategically deployed to silence legitimate testimony and deplete survivors' financial and emotional resources.[26] In jurisdictions where freedom of expression legislation incorporates anti-SLAPP provisions, additional procedural mechanisms are

[22] Johnston, 2002-2003, 288.

[23] Ligon, 2020, 965.

[24] Borg-Barthet and Farrington, 2024, 848.

[25] Convention of Council of Europe "On Preventing and Combating Violence against Women and Domestic Violence", Art. 12 (1).

[26] George, 2025, 294.

established to reject defamation lawsuits at the admissibility stage.[27] Such regulatory frameworks for protecting freedom of expression provide a defensive strategy against defamation claims, specifically enabling the dismissal of lawsuits that interfere with constitutional free speech rights and aim to harass those who exercised their freedom of expression, where the plaintiff's genuine objective is merely to exhaust the defendant's energy and resources.[28] Anti-SLAPP regulations equip defendants with the opportunity to file special motions to dismiss unfounded lawsuits in cases where the sole purpose of the litigation is to silence the defendant.[29]

Evidence of gender-based violence experiences may be substantiated through various formal channels, including appeals to law enforcement authorities that result in criminal proceedings or restraining orders,[30] court-issued protective orders,[31] or even recommendations establishing instances of sexual harassment or gender discrimination issued by the Public Defender.[32]

The judicial identification of the genuine objectives behind lawsuits filed against women who have experienced violence represents a practical realization of the *ubi jus ibi remedium* principle (where there is a right, there is a remedy).[33] In cases involving restrictions on the freedom of expression of women who have experienced violence, national legislation establishes a burden of proof distribution standard, whereby the proponent of the restriction (the plaintiff) must substantiate their claim.[34] The plaintiff must present evidence that the defendant directly disseminated false information about them.[35] While such distribution of the burden of proof creates a standard for fair and objective consideration of defamation cases that have already been admitted to proceedings, it does not provide a legal basis for identifying and rejecting SLAPP lawsuits at the admissibility stage. The current judicial practice in Georgia demonstrates a critical gap: at the admissibility stage of lawsuits involving survivors of vio-

[27] Code of Civil Procedure of California, Section 425.16.

[28] Weisbrot, 2020, 356-357.

[29] ბახტაძე, 2024, 90 [bakht'adze, 2024, 90].

[30] Law of Georgia "On Prevention of Violence against Women and/or Domestic Violence, Protection and Support of Victims of Violence", Art. 10 (1).

[31] Ibid.

[32] Law of Georgia "On Elimination of All Forms of Discrimination", Art. 6.

[33] ბახტაძე, 2024, 54 [bakht'adze, 2024, 54].

[34] Law of Georgia "On Freedom of Speech and Expression", Art. 7(6).

[35] Decision of the Civil Chamber of the Supreme Court of Georgia of February 20, 2012, №as-1278-1298-2011.

lence, courts do not evaluate whether a complaint constitutes a SLAPP action, as the court has not deliberated on this issue during the admission of cases to date.[36]

Consequently, SLAPP lawsuits present a significant challenge to the realization of the right to participate in public discourse, particularly for women who have experienced violence. Despite the existence of anti-SLAPP mechanisms and the recognized need for gender-sensitive approaches, Georgian judicial practice does not identify SLAPP lawsuits at the admissibility stage. This complicates the protection of women who have experienced violence from continued psychological and economic abuse, perpetrated through defamation lawsuits. The established uniform practice confirms the necessity for a methodological shift to ensure effective filtration of SLAPP lawsuits at early stages of judicial proceedings.

2. The Significance of Judicial Discretion in Preventing Secondary Victimization

Secondary victimization refers to the victimization process that occurs not as a direct result of criminal conduct, but rather due to the attitudes and responses directed toward victims by institutions and individuals.[37] This phenomenon represents a particularly pernicious form of non-primary victimization, wherein claims regarding the victim's personal character are asserted,[38] constituting the fundamental basis of SLAPP lawsuits filed against them. Such procedural victimization operates as a sophisticated form of continued abuse that exploits legal mechanisms to perpetuate power imbalances and control dynamics.

The protection of gender-based violence survivors' rights during judicial proceedings constitutes an integral component of their right to privacy and dignity.[39] The European Court of Human Rights has emphasized in numerous decisions the necessity of safeguarding against secondary victimization and stigmatization during legal proceedings.[40] This jurisprudential consensus highlights the critical function of judicial discretion in creating procedural environments that recognize the unique

[36] Decision of the Civil Cases Board of Tbilisi City Court of November 21, 2023, №2/18681-22; Decision of the Civil Chamber of Tbilisi Court of Appeals of December 9, 2020, №2b/318-20.

[37] Handbook on Justice for Victims, 1999, 9.

[38] შალიკაშვილი, თანდილაშვილი და ბახტაძე, 2023, 34 [shalik'ashvili, tandilashvili da bakht'adze, 2023, 34].

[39] J.L. v. Italy [ECtHR], App. no. 5671/16, 27 August 2021, para. 119.

[40] Ibid., paras. 139-141; C. v. Romania [ECtHR], App. no. 47358/20, 30 October 2022, paras. 82-85.

vulnerabilities of survivors, and implement appropriate protective measures without compromising the fundamental principles of due process.

States maintain a positive obligation to protect individuals from violence perpetrated by third parties,[41] including domestic violence,[42] cyberbullying,[43] workplace harassment,[44] sexual harassment in professional environments,[45] and other forms of abuse. The state fulfills this positive obligation partly through judicial protection of the privacy and dignity of women, who have experienced violence, during court proceedings. This protection becomes particularly imperative in cases involving survivors of sexual violence, for whom judicial proceedings frequently constitute a form of "ordeal" or profound distress.[46] The institutional recognition of these proceedings as potentially traumatic experiences necessitates specialized judicial approaches that balance evidentiary requirements with trauma-informed practices.

Therefore, the prevention of secondary victimization is intrinsically linked to the appropriate exercise of judicial discretion throughout legal proceedings. This discretion represents a crucial instrument for safeguarding victims' rights and privacy, particularly in defamation cases that may function as continued abuse mechanisms. The implementation of gender-sensitive approaches at the admissibility stage of litigation serves as a preventive measure against the weaponization of legal processes, and contributes to maintaining the integrity of judicial systems as venues for substantive justice rather than instruments of continued victimization.

III. Court Ruling on Case Dismissal Georgia

Anti-SLAPP legislative mechanisms were first developed in common law jurisdictions, specifically in the United States and Canada.[47] In the United States, these laws aim to reduce the abusive use of litigation intended to suppress activities protect-

41 Sandra Janković v. Croatia [ECtHR], App. no. 38478/05, 5 March 2009, para. 45; C. v. Romania [ECtHR], App. no. 47358/20, 30 October 2022, paras. 62-66.

42 Buturugă v. Romania [ECtHR], App. no. 56867/15, 11 February 2020, paras. 74, 78-79.

43 Volodina v. Russia (no. 2) [ECtHR], App. no. 40419/19, 14 December 2021, paras. 48-49.

44 Špadijer v. Montenegro [ECtHR], App. no. 31549/18, 9 November 2021, para. 100.

45 Khamtokhu and Aksenchik v. Russia [ECtHR], App. nos. 60367/08 and 961/11, 13 March 2014, para. 82.

46 Aigner v. Austria [ECtHR], App. No. 28328/03, 10 May 2012, para. 37; F. and M. v. Finland [ECtHR], App. no. 22508/02, 17 October 2007, para. 58; S.N. v. Sweden [ECtHR], App. no. 34209/96, 2 July 2002, para. 47; Vronchenko v. Estonia [ECtHR], App. no. 59632/09, 18 July 2013, para. 56.

47 Bollinger, 2023, 6.

ed by the First Amendment of the federal Constitution, and to encourage public participation.[48] Currently, more than thirty U.S. states have adopted anti-SLAPP legislative provisions, either as specialized legislation or as provisions within civil procedure codes.[49] These laws, while varying in scope and criteria for identifying SLAPP cases, share a fundamental characteristic – they effectively ensure the identification of such cases at an early stage of proceedings and provide mechanisms for their dismissal. For example, California's civil procedure norms protect freedom of expression related to public interest matters, allowing defendants to file special motions to strike such lawsuits.[50]

Georgian legislation does not recognize anti-SLAPP mechanisms; nevertheless, the current legal framework adequately safeguards the freedom of speech of women who have experienced violence. The Georgian Law on "Freedom of Speech and Expression" provides defendants with the opportunity to petition the court at the preparatory stage to refuse the admission of a lawsuit.[51] During the court's consideration of such petitions, the fair distribution of the burden of proof aimed at protecting freedom of speech, and the application of gender-sensitive approaches, constitute effective means for protecting the freedom of speech of women who have experienced violence. This dual approach – procedural protection combined with substantive sensitivity – creates a critical safeguard in cases where vulnerability intersects with expression rights.

The development of anti-SLAPP mechanisms in common law systems demonstrates that effective legal protection requires both a clear legislative framework and the active role of courts in interpreting and applying these provisions. Although in Georgia these mechanisms are presented only as general provisions in the Law on "Freedom of Speech and Expression", the role of judicial practice is decisive – it is precisely the courts' interpretation of the law and its broad application that determines how effectively freedom of expression will be protected from SLAPP lawsuits. This interpretive authority permits the judiciary to develop robust protections even in the absence of explicit statutory language, creating a potential pathway for jurisprudential evolution that could strengthen expression rights without requiring legislative amendment.

[48] Simpson, 2016, 173.

[49] State Anti-SLAPP Laws, <https://anti-slapp.org/your-states-free-speech-protection> [06.01.2025].

[50] Code of Civil Procedure of California, Part 2, Title 6, Chapter 2, Art. 1, para. 425.16(a), (b)(1), and (e).

[51] Law of Georgia "On Freedom of Speech and Expression", Art. 5 (2).

1. Judicial Speech Privilege

Judicial speech privilege represents a fundamental principle of democratic justice that enjoys special protection within the Georgian legal framework.[52] Georgian legislation establishes a robust legal structure that ensures a high standard of freedom of expression for participants in judicial proceedings. The legislature's use of broad language – protecting statements made "before various public institutions" – suggests intentional inclusivity that extends beyond formal courtroom proceedings to encompass pre-litigation institutional engagement.[53]

Correspondingly, procedural legislation establishes mechanisms that ensure the effective realization of this privilege.[54] The court is obligated, even at the preparatory stage of a case and with the participation of the parties, to verify the existence of grounds for applying this privilege.[55] Simultaneously, the law insulates statements made within the scope of judicial speech from any liability.[56] It is precisely this legislative procedure that ensures individuals do not encounter obstacles when freely expressing their positions in court.

Despite the relatively progressive legislative mechanism, its practical implementation presents numerous challenges regarding the protection of freedom of expression for women who have experienced violence. The essence of effective anti-SLAPP legislation lies in the recognition that legislative norms alone are insufficient to protect targeted individuals, as the filing party does not need to win the case for the lawsuit itself to serve as a weapon against the targeted individuals.[57] The qualification of a statement as privileged judicial speech is interpreted in an extremely formalistic manner, and does not consider statements made by women who have experienced violence about their experiences of violence as protected by this privilege, despite the fact that these statements are made before the Public Defender or law enforcement agencies.[58] This restrictive interpretation creates a significant protection gap precisely where vulnerability intersects with truth-telling, undermining both access to justice and public discourse on matters of significant societal concern.

[52] Ibid., Art. 3 (1).

[53] Ibid., Art. 5 (1)(b).

[54] Civil Procedure Code of Georgia, Art. 209 and 273.

[55] Law of Georgia "On Freedom of Speech and Expression", Art. 5 (2).

[56] Ibid., Art. 18.

[57] Braun, 1999, 984.

[58] Decision of the Civil Cases Panel of Tbilisi City Court of November 21, 2023, Case №2/18681-22; Decision of the Civil Cases Chamber of Tbilisi Court of Appeals of December 9, 2020, Case №2b/318-20.

The Georgian legal system provides important guarantees for judicial speech privilege, expressed through both substantive and procedural protection mechanisms. The law not only recognizes the privilege of judicial speech, but also ensures its effective implementation at the preparatory stage of proceedings, and protects statement authors from potential liability. However, the practical implementation of these norms faces numerous obstacles, particularly in their application to gendered contexts. The formalistic interpretation fails to account for the power dynamics inherent in cases involving violence against women, creating a systemic disadvantage that undermines both individual justice and broader social accountability mechanisms.

Consequently, when courts deny privilege to survivors' statements that mirror official submissions, they effectively create disincentives for institutional engagement, undermining both the Public Defender's investigative function and law enforcement complaint processes – contradicting the privilege's systemic purpose of encouraging official participation.

2. Standards Governing the Allocation of Evidentiary Burden in Expression-Related Litigation

If the interests of proper case preparation for court proceedings require it, the judge is authorized to schedule a preparatory hearing.[59] Defamation lawsuits filed against women who have experienced violence are precisely the type of cases that necessitate preparatory hearings.[60] At the preparatory stage, both the plaintiff and the defendant are obligated to prove the circumstances upon which they base their claims and objections.[61]

Regarding the distribution of the burden of proof, the Law of Georgia "On Freedom of Speech and Expression" establishes principles that ensure the priority protection of freedom of expression in the legal system.[62] The primary mechanism for effective protection of freedom of expression is the restriction of rights only on the basis of incontrovertible evidence.[63] This approach derives from international legal practice, according to which restrictions on fundamental human rights must be strictly regulated and substantiated.[64] Articles 3, 4, and 5 of the Georgian Law

[59] Civil Procedure Code, Art. 205, Part 1.

[60] Law of Georgia "On Freedom of Speech and Expression", Art. 5 (2).

[61] Civil Procedure Code of Georgia, Art. 102 (1).

[62] Law of Georgia "On Freedom of Speech and Expression", Art. 7.

[63] Handyside v. United Kingdom [ECtHR], App. no. 5493/72, 7 December 1976, para. 49.

[64] Sunday Times v. United Kingdom [ECtHR], App. no. 6538/74, 26 April 1979, para. 59.

"On Freedom of Speech and Expression" establish the principle of *in dubio pro libertate* (in case of doubt, decide in favor of liberty) in various contexts. Specifically, in matters of determining public figure status, public attention, and opinion status, any doubt is resolved in favor of freedom.[65]

With respect to the distribution of burden of proof, Article 7, Paragraph 6 of the law is paramount, stipulating that the burden of proof falls upon the initiator of the restriction. This approach aligns with European Court practice, where the justification for restricting freedom of expression is incumbent upon the state regarding the impossibility of proving any evaluative judgment.[66] Only with a fair distribution of the burden of proof can the court properly investigate and determine whether the statement was disseminated within the bounds of freedom of speech. First instance courts merely formally note in their decisions that the statement is not protected by the legally established privilege.[67] The challenge of balancing expression rights with reputation protection becomes further complicated when considering the presumption of innocence principle. When survivors publicly discuss experiences involving alleged criminal conduct,[68] courts must navigate the tension between protecting legitimate speech about matters of public concern and preserving fair trial rights for accused individuals. This balance requires judicial recognition that anti-SLAPP protections serve not only free speech values, but also access to justice principles, while simultaneously ensuring that procedural safeguards do not inadvertently undermine due process rights. The *in dubio pro libertate* standard must therefore be applied with careful attention to these competing constitutional imperatives, particularly when public statements concern conduct that may be subject to parallel criminal proceedings.

The challenge of developing mixed legal systems and protecting freedom of expression for victims of gender-based violence is gaining significant importance in the contemporary legal landscape, although anti-SLAPP legislation in European Union member states is still evolving.[69] Consequently, studying the judicial practices of

[65] Lindon, Otchakovsky-Laurens and July v. France [ECtHR], App. nos. 21279/02 and 36448/02, 22 October 2007, para. 46.

[66] Lingens v. Austria [ECtHR], App. no. 9815/82, 8 July 1986, para. 46.

[67] Tbilisi City Court Civil Chamber Decision of January 31, 2020, N2/4250-18, para. 5.8.

[68] Brandt, 2021, 6.

[69] European Parliament legislative resolution of 27 February 2024 on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), P9_TA(2024)0085.

leading states in this direction – the United States and Canada – becomes particularly relevant. This examination will substantially benefit both the proper conceptualization of the issue in Georgian reality, and the search for problem-solving approaches. The Canadian system, which has developed into a fully-fledged hybrid of continental and common law traditions,[70] represents a unique example of the harmonious coexistence of various legal institutions. The practice of U.S. courts, especially in matters of freedom of expression, serves as an essential guiding source for developing democracies,[71] and the Georgian model of protecting freedom of expression largely shares American ideals.[72] Georgia's legal system, which is primarily based on continental law principles and is gradually integrating elements of common law, will be able to better protect the rights of gender-based violence victims and ensure a fair balance between freedom of expression and the proper administration of justice by adopting the experiences of these two countries.

The 2024 decision by the United States District Court for the Eastern District of Virginia establishes a significant precedent regarding the protection of freedom of expression for survivors of gender-based violence. This case examines the balance between safeguarding rights under Title IX of the Educational Amendments of 1972 (20 U.S.C. paras. 1681-1688), and preventing the abuse of judicial processes. The plaintiff initiated a defamation lawsuit against a former student, who subsequently filed an anti-SLAPP motion. The defendant argued that the lawsuit was filed in retaliation for her sexual harassment complaint. This dispute exemplifies the delicate balance that courts must maintain: the court determined that defamation lawsuits often navigate the boundary between freedom of expression and abuse of judicial process.[73] The court partially granted the defendants' motion and dismissed the case against the survivor of violence, resulting in the termination of eight out of nine complaints on various grounds, including qualified privilege and lack of evidence.[74] The court's reasoning reflects a nuanced understanding of how retaliatory litigation can function as a silencing mechanism against misconduct reporters in academic settings where power dynamics are pronounced.

Various U.S. courts have established in numerous cases that the Constitution does not protect lawsuits that lack reasonable basis and factual foundation, but which are

[70] Jukier and Howes, 2024, 160.

[71] Tsomidis, 2022, 383.

[72] Gegenava, 2022, 97.

[73] Wright v. The Rector & Visitors of George Mason Univ., 1:24-cv-2 (PTG/IDD) (E.D. Va. Sep. 19, 2024).

[74] Ibid.

instead filed for retaliatory purposes.[75] In such instances, courts are obligated to ensure fair application of disciplinary and legal processes within the framework established by Title IX of the Educational Amendments of 1972 (20 U.S.C. paras. 1681-1688), avoiding gender bias and maintaining appropriate balance.[76] This case demonstrates judicial evolution in analyzing the intersection of defamation law and anti-retaliation protections, establishing methodological criteria for distinguishing legitimate claims from those designed to silence complainants.

In another defamation case, the court examined the defendant's anti-SLAPP motion under Section 137.1 of the Canadian "Courts of Justice Act", placing the burden of proof on the defendant regarding the connection between the alleged defamatory statements and public interest. After the defendant confirmed that her statement concerned protection from workplace harassment, the court concluded that the public interest in protecting such expression outweighed the damage to the plaintiff's reputation, rejected the defamation lawsuit, and thus prevented the use of legal proceedings as a weapon against freedom of expression.[77] Both U.S. and Canadian judicial approaches demonstrate transnational recognition of the need to protect public interest speech in misconduct allegation contexts, through frameworks that balance reputational interests against broader societal benefits.

In a case examined by the Tbilisi City Court, a female survivor of violence faced defamation claims regarding statements made on social media that mirrored those simultaneously submitted to investigative authorities. The defendant motioned for the court to request information from investigative agencies, which the judge granted, procuring case materials. Despite the court's verification of the defendant's good faith – as her social media statements precisely matched those made to investigators regarding her experience of violence – the court declined to classify the statement as privileged court speech and proceeded with the case.[78] In another notable case reviewed by the Supreme Court of Georgia, statements made by a female violence survivor concerning sexual harassment committed against her were substantially identical to findings established by the Public Defender. Nevertheless, the court failed to properly redistribute the burden of proof, and disregarded the fact that the violence survivor, who openly discussed gender-based discrimination against her in the me-

[75] Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743 (1983); Darveau v. Detecon, Inc., 515 F.3d 334, 341 (4th Cir. 2008).

[76] Wright v. The Rector & Visitors of George Mason Univ., 1:24-cv-2 (PTG/IDD) (E.D. Va. Sep. 19, 2024); Sheppard v. Visitors of Virginia State University, 993 F.3d 230, 237-38 (4th Cir. 2021).

[77] Marcellin v. LPS, 2022 ONSC 5886 (Ontario Superior Court).

[78] Tbilisi City Court Civil Cases Panel decision of November 21, 2023, №2/18681-22.

dia, should have been protected by privileged court speech immunity, given that she made identical statements before the Public Defender.[79]

While Georgian legislation does not explicitly define a SLAPP lawsuit, European Union recommendations provide systematic indicators for identifying strategic lawsuits that Georgian courts can apply at the admissibility stage. Courts should evaluate whether litigation demonstrates: (a) exploitation of power imbalances through superior resources or institutional influence; (b) legally insufficient or factually unfounded arguments; (c) disproportionate remedies designed to burden rather than compensate; (d) cost-escalating procedural tactics including forum manipulation or excessive motions; (e) targeting of individual speakers rather than responsible institutions; (f) accompanying intimidation or public discrediting campaigns; (g) patterns of litigation harassment or refusal to pursue alternative resolution; or (h) coordinated multiple lawsuits based on identical circumstances.[80] The presence of multiple indicators – particularly power exploitation, procedural abuse, and intimidation tactics – creates strong presumptions that a litigation serves strategic silencing purposes rather than legitimate defamation remedies.

Comparative practice demonstrates that U.S. and Canadian courts extend qualified privilege to institutional misconduct reporting, presume retaliatory intent when defamation suits follow official complaints, and prioritize public accountability over reputational concerns. Georgian courts systematically reject these approaches despite statutory authorization establishing the *in dubio pro libertate* principle, and placing burden of proof on restriction initiators. Judicial practice demonstrates excessive formalism in interpreting speech privileges, declining to protect survivors' statements that mirror official submissions, and applying restrictive interpretations that favor plaintiffs over expression rights. This formalistic approach particularly disadvantages violence survivors whose testimonies, even when corroborated by official findings, receive inadequate procedural protection. The implementation gap between legislative intent and judicial application creates deterrent effects on reporting and public discourse participation, undermining both violence mitigation objectives and transparency regarding systemic gender-based discrimination, while demonstrating that effective anti-SLAPP protection requires consistent application of existing principles rather than new legislation.

[79] Supreme Court of Georgia Civil Cases Chamber ruling of April 13, 2022, №ას-358-2021.

[80] Council of Europe, Recommendation CM/Rec(2024)2 of the Committee of Ministers to member States on countering the use of strategic lawsuits against public participation (SLAPPs), 2024, para. 8.

3. Implementation of Gender-Responsive Judicial Frameworks in Victim Protection

The filing of SLAPP lawsuits aimed at silencing women who have experienced violence has severe consequences and intimidates victims.[81] Ensuring unimpeded public debate about gender-based violence, particularly enabling women who have experienced violence to disseminate information about their personal experiences, constitutes an exceptional circumstance where free and unrestricted exchange of information is essential.[82] Public discourse on sexual violence has broad social implications.[83] Consequently, it is imperative that alleged perpetrators cannot silence victims through fear of expensive and protracted litigation.[84]

In its decision on the Ismayilova case, the European Court emphasized the state's obligation to ensure a safe environment for individuals to participate in public debates without fear, particularly regarding sensitive issues such as gender-based violence.[85] This approach enables outcome-oriented, healthy public discourse on socially significant issues, as even a public statement by a single woman who has experienced violence about her personal experience may sufficiently relate to the public interest.[86]

The Supreme Court of Georgia[87] and the European Court of Human Rights[88] have disregarded formalistic and rigid approaches in numerous civil case decisions. In one defamation case filed against women who had experienced violence, the court placed the burden of proof on the plaintiff to demonstrate that the information in the defendant's statement was untrue and that she acted with malicious intent.[89] This approach should be unequivocally assessed as positive, though insufficient in combating SLAPP lawsuits.

The court should, on the one hand, examine the evidence presented by the parties, which in this case comprises documents submitted by the defendant to the rele-

[81] Doty, 2020, 55.

[82] Hurry, 2022, 100.

[83] Leader, 2019, 473.

[84] Ligon, 2020, 350.

[85] Khadija Ismayilova v. Azerbaijan [ECtHR], App. nos. 65286/13 and 57270/14, 10 April 2019, para. 158.

[86] Leader, 2019, 470.

[87] Decision of the Civil Chamber of the Supreme Court of Georgia dated July 5, 2024, No. ას-1492-2023, para. 27.3.3; Decision of the Civil Chamber of the Supreme Court of Georgia dated October 9, 2024, No. ას-816-2024, para. 25.

[88] Bartaia v. Georgia [ECtHR], App. no. 10978/06, 26 July 2018, para. 34.

[89] Decision of the Civil Chamber of the Supreme Court of Georgia dated November 27, 2020, No. ას-1705-2019.

vant authorities. On the other hand, the court should request case materials from investigative services, courts, or the Public Defender's Office. The reliability of evidence presented by parties, and the ability to authentically establish their validity and genuineness, is essential for reaching a correct and objective decision.[90] In cases where the court determines that a woman who has experienced violence has addressed relevant authorities with a statement substantially similar in content to her public statement, such a statement should be considered courtroom speech and granted the privilege established by law. This approach primarily constitutes a disregard for formalism,[91] which is particularly important for ensuring a fair balance between essentially unequal subjects (a woman who has experienced violence and a potentially vindictive perpetrator). Privilege determinations remain subject to interlocutory appeal to prevent irreversible harm from erroneous admissibility decisions.

Georgian court practice has established that courts evaluate evidence based on their inner conviction, which must be founded on comprehensive, complete, and objective examination of such evidence.[92] This principle necessitates implementing a gender-sensitive approach that recognizes power dynamics and systemic barriers in gender-based violence cases.

The gender-sensitive approach extends courtroom speech privilege to statements about which the victim has already addressed relevant authorities. This procedural safeguard acknowledges the interconnected nature of legal proceedings and survivor testimony, preventing strategic bifurcation of survivor speech across different forums. This approach ensures their protection from SLAPP lawsuits, and contributes to healthier public discourse on gender-based violence. It represents a critical advancement in balancing defamation concerns with the public interest, while preserving remedies for genuinely defamatory speech. Such an approach fully aligns with standards established by the European Court of Human Rights, and facilitates the fulfillment of the state's positive obligation to create a safe environment. This alignment strengthens domestic legal frameworks and demonstrates a commitment to evolving standards, recognizing the intersection of gender justice, free expression, and procedural fairness.

[90] Decision of the Civil Chamber of the Supreme Court of Georgia dated December 6, 2024, No. ას-1050-2024, para. 62.

[91] Volokh, 1995, 576.

[92] Decision of the Civil Chamber of the Supreme Court of Georgia dated November 28, 2024, No. ას-112-2024, para. 9.

IV. Conclusion

The use of SLAPP lawsuits against survivors of violence represents a form of continued victimization specifically designed to constrain their freedom of expression and inhibit their participation in public discourse. While Georgian legislation lacks dedicated anti-SLAPP mechanisms, the existing legal framework nevertheless provides sufficient jurisprudential foundation for protecting survivors from such strategic litigation.

Critical analysis of judicial practice reveals that the fundamental challenge lies not in legislative deficiencies, but rather in the courts' formalistic interpretation of existing provisions. Particularly problematic is the restrictive application of courtroom speech privilege, which fails to extend protection to statements previously submitted by survivors to law enforcement authorities, judicial bodies, or the Public Defender's Office.

The incorporation of international jurisprudential approaches, particularly those developed in the United States and Canada, is essential for the evolution of Georgia's judicial framework. These comparative jurisdictions demonstrate that effective anti-SLAPP protections can be implemented within existing legislative structures when courts adopt gender-sensitive interpretive methodologies and establish appropriate equilibrium between expressive freedoms and legitimate reputational interests.

The parameters of judicial discretion at the admissibility stage necessitate comprehensive implementation of gender-sensitive and survivor-centered approaches, comprising three interconnected elements:

1. Conceptualizing SLAPP litigation as a manifestation of continued victimization, thereby acknowledging the systemic deployment of legal mechanisms against survivors of gender-based violence;
2. Reallocating evidentiary burdens according to the *in dubio pro libertate* principle, thereby ensuring procedural equity and recognizing power asymmetries between litigants;
3. Advancing progressive interpretations of courtroom speech privilege that encompass statements previously submitted to competent authorities, thereby preserving the efficacy of institutional protection mechanisms.

Effective implementation requires robust safeguards against privilege abuse, while maintaining protection integrity. Courts must distinguish between legitimate

privilege claims and attempts to immunize defamatory speech through procedural manipulation. Key safeguards include: documentary verification requirements that prevent fabricated institutional submissions; temporal limitations that connect privilege to genuine institutional engagement rather than retrospective justification; substantive similarity standards that ensure privilege protects institutional speech rather than unrelated public statements; and clear exceptions for malicious fabrication or substantial factual divergence between official and public statements. These safeguards preserve both expression rights and reputational protections, while preventing legal system weaponization by any party.

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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 $11^3(2)$ 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 11[3](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. ას-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/EC[6] 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 Agreement[10] 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 11^3 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/EEC[14] on Unfair Terms in Consumer Contracts, and Directive 2000/31/EC[15] 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. 11^3.

[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 11^3 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 examples[40] 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 10bis (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. 11^{3}.

[41] Henning-Bodewig, 2006, 4.

[42] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, Art.10bis.

[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 criteria[46] 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. Klijsen 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. Klijsen 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 discusses[55] 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. $11^3(2)(a)$.

[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.11[3], 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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