Mihaela Daciana Natea, Simion Costea
(coordinators)

EU Enlargement and Resilience: Legal and Economic Reforms on Georgia's Path to Integration

L'Europe unie/ United Europe
Special volume
No 22 / 2025

Paris and Cluj, Napoca Star

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

The present research is published with the support of the European Union and represents an outcome within the EU project Jean Monnet Center of Excellence in European Security and Disinformation in Multicultural Societies – no. 101047907 – ESDMS.

Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union. Neither the European Union nor the granting authority can be held responsible for them.

Această cercetare este realizată cu sprijinul Uniunii Europene şi reprezintă un rezultat în cadrul proiectului UE Jean Monnet Center of Excellence in European Security and Disinformation in Multicultural Societies – nr. 101047907 – ESDMS.

Finanţat de Uniunea Europeană. Opiniile şi punctele de vedere exprimate aparţin însă doar autorului (autorilor) şi nu le reflectă neapărat pe cele ale Uniunii Europene. Nici Uniunea Europeană, nici autoritatea finanţatoare nu pot fi făcute responsabile pentru acestea.

Descrierea CIP a Bibliotecii Naţionale a României
EU enlargement and resilience : legal and economic reforms on Georgia's path to integration : L'Europe unie - United Europe - special volume - no 21/2024 Paris-Cluj Napoca / coord.: Mihaela Daciana Natea, Simion Costea. - Cluj-Napoca : Napoca Star, 2025
ISBN 978-630-354-001-6

I. Natea, Mihaela Daciana (coord.)
II. Costea, Simion (coord.)

34
330

Editorial / Argument

L'histoire, lorsqu'elle est mise en perspective avec l'élargissement de l'Union européenne et la résilience des États candidats, comme la Géorgie, prend une dimension particulièrement pertinente. La transformation juridique et économique en cours, soutenue par les réformes d'intégration européenne, est un processus complexe qui exige une attention académique particulière.

Dans cet ouvrage, historiens, juristes et économistes explorent ces enjeux sous différents angles. L'élargissement de l'UE ne se limite pas aux adaptations législatives ; il implique une refonte des structures économiques, des politiques énergétiques et une harmonisation des droits fondamentaux. Cette diversité d'approches souligne l'interdisciplinarité nécessaire pour comprendre ces mutations.

Cet ouvrage collectif témoigne de la richesse des perspectives académiques et de la nécessité d'un dialogue constant entre disciplines, nations et générations. Il s'inscrit pleinement dans l'esprit d'une Europe unie et résiliente, tournée vers l'avenir.

Relire le passé disait-il, est l'incessant labeur des historiens qui rend l'histoire, ce «collectif singulier» (R. Kosselek), vivante et vigoureuse. Mais les rythmes des relectures ne suivent pas tranquillement le fil des saisons et du nécessaire renouvellement des thématiques universitaires. Il est des temps où la relecture s'accélère, quand les heurts du présent multiplient les rappels du passé et, aussi les appels du passé. Nous nous ne considérons pas que l'histoire appartient aux historiens et qu'il convient de pourchasser toutes les contre-vérités historiques des ouvrages relevant de l'histoire. En revanche, l'usage des connaissances historiques décontextualisées, le détournement à des fins politiques ne peuvent que nous questionner. En ce sens, le travail de déconstruction engagé par nombreux historiens émane d'une nécessaire attention sur la manipulation et détournement de l'histoire pour des raisons politiques (S. Costea, M. Natea[1]). Au cours des dernières décennies, les scènes d'intervention de l'historien se sont multipliées: témoin, expert auprès des tribunaux, médias, commissions etc. Une position ambivalente de l'histoire qui est confrontée à une demande sociale contradictoire mais pressante. L'historien devient tributaire de son objet et d'une écriture prescriptive et non descriptive.

Le monde contemporain, observe impuissant l'accroissement spectaculaire des capacités technologiques, des richesses au sein de certaines puissance et des violences réelle et symbolique (P. Bourdieu). Des peules d'autres nations s'enfoncent dans la pauvreté, tandis qu'au sein de tous les États se creusent les inégalités, le chômage et l'exclusion. Toutes ces contradictions qui s'affichent désormais de toutes parts, ne peuvent que produire une histoire traversée elle-même par les conflits et des mémoires écorchées voire occultées (A. Mokni).

[1] Natea, Mihaela Daciana, Costea, Maria, Costea, Simion, *European Security and Multicultural Societies, Dealing with a Russian Empire Revival*, L'Harmattan, Paris France, 2024.Costea, Maria, Costea, Simion (ISI) "Ukraine between EU and Eurasian Regional Project in 2013", p.113-131, in Transylvanian Review (Center for Transylvanian Studies and the Romanian Academy), Vol. XXIV, Supplement No. 1, 2015. Costea, Maria, Costea Simion (ISI), „The Management of the EU's Eastern Partnership Project: A New Stage in the European Neighbourhood Policy", p.409-433, in Transylvanian Review (Center for Transylvanian Studies and the Romanian Academy), Vol. XX, Supplement No. 4, 2011. Costea, Simion (ISI), „The Culture of the European Accession Negotiations", p.50-56, in vol. Globalization and intercultural dialogue: multidisciplinary perspectives Tîrgu-Mureş, Arhipelag XXI, 2014, 2014. Costea, Simion, "EU-Ukraine Relations and the Eastern Partnership: Challenges, Progress and Potential", p.259-276, in European Foreign Affairs Review (College of Europe BRUGGE and University of Montreal), volume 16, issue 2, 2011.Dolidze, M, Chemutai, V. Georgia Monthly Economic Update, November 2024, World Bank Group. Natea, Mihaela Daciana, *„Fabricating truth: from a hybrid war to political fake news. Study case on Romanian illiberal parties' discourse in the context of the Ukrainian war",* in *Civil Szemle,* Special Issues V/2023, pp. 155.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

En même temps, on assiste à une montée en puissance des questionnements historiographiques et épistémologiques intimement liés à la conjoncture historiographique nouvelle qui naît des critiques, remises en cause et recompositions des démarches accordant une place prépondérante à l'explication économique et sociale dominantes dans l'historiographie française à partir des années 1960. Une conjoncture que certains ont qualifiée de « crise de l'histoire sociale » et qui a été thématisée en France à travers les expressions de « temps des doutes », ou « temps des incertitudes » (R. Chartier) voire de « crise de l'histoire » (G. Noiriel) et qui a amené les historiens à interroger à nouveaux frais ce que « faire de l'histoire » (M. de Certeau) veut dire, conduisant à ce qu'on a pu interpréter comme un « tournant réflexif » de la discipline.

Nous constatons quel enrichissement l'histoire a trouvé quand elle a entrepris d'exhumer les muets de l'histoire: les minorités, les femmes, les immigrés, les colonisés, les mémoires de guerre…Ces mémoires ont fécondé l'histoire, il ne faut pas l'oublier. L'histoire telle qu'on la pense aujourd'hui est une histoire ornée par les mémoires plurielles, et c'est cette histoire-là qu'il faut porter et transmettre, concrètement enrichie par ces mémoires controversées et ces pluralismes. Cette fécondation a fait naître une tout autre histoire, celle du tournant historiographique, celle à partir de laquelle un événement n'est pas un dossier fini, mais « ce qui devient ». Un événement n'est jamais conclu, n'est jamais achevé, il est toujours ouvert à des additions de sens et des accommodations postérieures (M. Jerbi), à une histoire des traces narratives, à une histoire de la fabrication même de l'histoire, à une histoire de l'après-coup.

Dans ce contexte suffisamment anxiogène, jaillit le plaisir de travailler et d'écrire avec des **historiens, des juristes, des économistes, des experts en études européennes,** de plusieurs pays. Ce recueil réside dans la richesse des perspectives et des approches diverses qu'ils apportent. Chaque auteur de ce livre, en fonction de sa culture, de ses traditions académiques et de son contexte géographique, a une manière unique d'analyser les événements, ce qui peut enrichir les travaux collaboratifs. Cela permet, non seulement de croiser différentes méthodologies, mais aussi d'explorer des sujets sous des angles parfois inattendus, ouvrant ainsi des horizons nouveaux pour la recherche historique.

De plus, la collaboration internationale (comme le colloque du 16/17 janvier 2025 à UMFST Tîrgu-Mureş, Roumanie[2]) peut favoriser des échanges universitaires, émerger d'idées stimulants et créer des ponts entre des périodes, des facultés et des événements qui, autrement, pourraient rester cloisonnés dans des récits nationaux distincts. Travailler avec mes collègues de divers pays sur des projets d'envergure mondiale, comme **les processus d'élargissement de l'UE**, la construction européenne et **l'adhésion de la Géorgie**, permet de nuancer et d'approfondir les analyses.

Enfin, il y a également une dimension humaine et personnelle, car la rencontre avec des collègues d'autres pays peut générer des amitiés et des collaborations durables, tout en enrichissant la compréhension mutuelle et le respect des différentes traditions intellectuelles.

La résilience et l'intégration européenne, traités dans ce colloque, ces concepts à la fois complexes et universels, se déploie sous différentes formes et nuances à travers le monde. Si elle renvoie à la capacité d'un individu, d'une communauté ou d'une société à surmonter les épreuves, à se relever des chocs et à s'adapter, elle prend des visages multiples, façonnés par les contextes culturels, sociaux, politiques et économiques des sociétés qui en sont les témoins. Ce livre collectif, écrit par des auteurs provenant de différents horizons et continents (historiens, juristes, économistes, experts européens), témoigne de cette diversité d'approches et d'expériences.

Les contributions réunies dans cet ouvrage partent du principe que la résilience n'est pas simplement une réaction face à la souffrance ou à l'adversité, mais un processus dynamique de

[2] Events – Jean Monnet Center of Excellence on European Security and Disinformation in Multicultural Societies

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

reconstruction, de transformation et de renouveau. Chaque auteur, à travers sa propre culture, son histoire, ses recherches et ses engagements, explore des facettes variées de ce phénomène.

À travers ces pages, le lecteur découvrira des récits poignants, des analyses profondes, mais aussi des témoignages d'espoir. La résilience n'est pas une destination, mais un chemin. C'est ce chemin que nous invitons à parcourir ensemble, avec l'humilité et la sagesse des peuples qui, à travers le monde, ont su transformer leurs épreuves en forces collectives. Cette diversité d'approches montre que, bien que les défis auxquels l'humanité fait face soient souvent d'une grande similitude, la manière de les appréhender varie selon les contextes et les croyances. Cependant, au fond, l'essence de la résilience reste commune: c'est cette capacité à se relever et à créer du sens dans l'adversité.

Ce travail n'est pas seulement un recueil d'essais rédigé par des spécialistes de plusieurs pays: **Géorgie et Estonie, Chine, Belgique, France et Tunisie, Pologne et Roumanie.** C'est un hommage à la volonté humaine, un hommage à toutes ces professeurs universitaires, qui œuvrent pour reconstruire, réparer et réinventer. Il est également un appel à la solidarité internationale, car c'est dans l'échange des savoirs, dans la confrontation des expériences et dans l'unité face à l'adversité que réside l'une des plus grandes forces de la résilience.

Nous espérons que cet ouvrage vous invitera à réfléchir sur votre propre résilience, à reconnaître vos forces intérieures et à cultiver, à votre tour, cette capacité à transformer les crises en opportunités de croissance. Dans un monde souvent fracturé, la résilience est, plus que jamais, un vecteur de paix, d'harmonie et de renouveau.

Bravo aux Professeurs Mihaela Daciana Natea et Simion Costea. Un grand merci pour cette excellente organisation.

Bravo aux contributeurs de Géorgie et Estonie, Pologne, Chine, Belgique, et merci de leur implication pour faire réussir ce colloque international et cette volume spécial.

Aux lecteurs: Bonne et agréable lecture.

PROFESSEUR DR. HEDI SAIDI
Université Catholique de Lille (France)
et Université de Sfax (Tunisie)
Chevalier de la Légion d'honneur
Chevalier des Palmes Académiques

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Section 1
EU Enlargement, Security, and Hybrid Threats

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

The European Union's Handling of Hybrid Threats: In Search of the Enlargement Dimension

PROFESSOR DR. YOURI DEVUYST[1]
VRIJE UNIVERSITEIT BRUSSEL, BRUSSELS SCHOOL OF GOVERNANCE

***Abstract**: At present, the EU's strategic documents on countering hybrid threats contain hardly any links to the accession process. A more robust defence of an enlarging EU requires the effective operationalisation of the principle of enhanced mutual resilience against hybrid threats between the EU and the candidate countries, including in the upcoming European Democracy Shield.*
***Keywords**: European Union; hybrid threats; accession; enlargement; mutual resilience.*

INTRODUCTION

Because "the level of hybrid attacks has not been so high for decades", European Commission President Ursula von der Leyen has pledged that her new 2024-2029 College will put in place a European Democracy Shield to defend democracy from hybrid threats[2] and "prevent hostile foreign actors from interfering in our democratic processes, undermining them and, ultimately, destroying them".[3] The Shield would include a dedicated structure for countering foreign information manipulation and interference, more powerful cyber-defence tools, transparency on foreign funding of the EU's public life, bolstering intelligence and detection capabilities, and a new horizontal set of restrictive measures against hybrid threats.[4] This priority was reflected in the mission letters of at least five members of the new European Commission,[5] but not in the letter to

[1] Prof. Dr. Youri Devuyst (email: Youri.Devuyst@vub.be) has been teaching European Union history, constitutional law and political institutions at the Vrije Universiteit Brussel (VUB) since 1994. He is currently affiliated with VUB's Brussels School of Governance. He studied at VUB (Doctorate in Political Science; LL.M. International & Comparative Law; Advanced Master International & European Law) and at the Johns Hopkins University's School of Advanced International Studies in Bologna and Washington DC (MA International Relations). His research interests focus on EU enlargement, EU institutional evolutions, and EU-US relations.

[2] In this paper, the concept of hybrid threats is understood as it was defined by the European Commission and the High Representative for Foreign Affairs and Security Policy in their Joint Framework on countering hybrid threats: a European Union response (Brussels, 6 April 2016 JOIN(2016) 18 final), p. 2: "the concept aims to capture the mixture of coercive and subversive activity, conventional and unconventional methods (i.e. diplomatic, military, economic, technological), which can be used in a coordinated manner by state or non-state actors to achieve specific objectives while remaining below the threshold of formally declared warfare. There is usually an emphasis on exploiting the vulnerabilities of the target and on generating ambiguity to hinder decision-making processes. Massive disinformation campaigns, using social media to control the political narrative or to radicalise, recruit and direct proxy actors can be vehicles for hybrid threats".

[3] Ursula von der Leyen, Statement at the European Parliament plenary as candidate for a second mandate 2024-2029, (Strasbourg, 18 June 2024), Accessed on 30.11.2024 https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_24_3871.

[4] Ursula von der Leyen, Europe's choice: Political guidelines for the next European Commission 2024-2029 (Strasbourg, 18 June 2024), Accessed on 30.11.2024 https://commission.europa.eu/document/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en, p. 23.

[5] See the mission letters for the members of the 2024-2029 Commission, Accessed on 30.11.2024 https://commission.europa.eu/about-european-commission/towards-new-commission-2024-2029/commissioners-designate-2024-2029_en. See, in particular, the mission letters to the Executive Vice-President for Tech Sovereignty, Security and Democracy, the Vice-President/High Representative for Foreign Affairs and Security Policy, and the Commissioners for Defence and Space, for Internal Affairs and Migration, and for Democracy, Justice, and the Rule of Law. In addition, the mission letter to the Commissioner for Preparedness and Crisis Management tasks her with the development and implementation of an EU Preparedness Union Strategy, in follow-up of the report by Sauli Niinistö, "Safer Together: Strengthening Europe's

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

the new Commissioner for Enlargement.[6] This might seem somewhat astonishing given the frequent reports of hybrid attacks and foreign interference in the democratic processes of candidate countries such as Georgia, Moldova, Serbia and Bosnia and Herzegovina; all countries whose fate will have a major impact on the EU's own future.[7]

Still, the omission is less surprising when considering that the EU has a long practice of insufficiently reflecting the accession perspective in its key policy documents on hybrid risks. This persistent lack of a comprehensive strategic vision on the link between EU enlargement and countering hybrid threats is studied in detail the following two sections of this paper. To overcome the current situation, and ensure that a robust defence of the EU goes hand with a successful EU enlargement path, the final section of the paper outlines that the EU's strategy to counter hybrid threats, including the announced European Democracy Shield, should be based on the principle of enhanced mutual resilience between the EU and the candidate countries, thus ensuring the effective transition of these countries into EU member states in the crucial field of combatting and deterring hybrid attacks.

THE EU'S FOUNDATIONAL AND CONCEPTUAL TEXTS ON COUNTERING HYBRID THREATS: THE ABSENCE OF AN EXPLICIT ENLARGEMENT PERSPECTIVE

This section is based on an in-depth reading of the EU's foundational and conceptual policy documents on countering hybrid threats. These texts systematically put hybrid threats in the context of developments in the EU's neighbourhood and emphasise the need for cooperation with relevant partner countries. However, none of this leads to a strategic reflection on the interaction between the accession process and hybrid threats.

The EU's first foundational text in this field is the 2016 Joint Framework on countering hybrid threats. In the wake of Russia's illegal occupation of the Crimea in 2014, the civil war in Syria, and the Islamic State's conquering of territories in northwestern Iraq and eastern Syria in 2014-2015, the Joint Framework highlighted the EU's dramatically changed security environment and the challenges to peace and stability in the EU's eastern and southern neighbourhood. In that context, the Joint Framework logically underscored the need to further intensify the exchange of operational and strategic information "with *enlargement countries* and within the Eastern Partnership and Southern Neighbourhood" to help combat organised crime, terrorism, irregular migration and trafficking of small arms, and promote partners' resilience to hybrid activities.[8] Significantly, this is one of the few times the word "enlargement" is mentioned in the EU's foundational texts on hybrid threats. The 2016 Joint Framework had some immediate operational consequences, such as the creation in mid-2016 of the EU Hybrid Fusion Cell inside the EU Intelligence and Situation Centre, with the task to raise situational awareness and to provide strategic analysis to the EU decision-makers.[9]

Civilian and Military Preparedness and Readiness" (Brussels, 30 October 2024), Accessed on 30.11.2024 https://commission.europa.eu/document/5bb2881f-9e29-42f2-8b77-8739b19d047c_en.

[6] Marta Kos – Mission letter (Brussels, 17 September 2024), Accessed on 30.11.2024 https://commission.europa.eu/document/1a2d0ad0-270d-441b-98c8-b6be364d8272_en.

[7] Thomas De Waal, Dimitar Bechev & Maksim Samorukow, Between Russia and the EU: Europe's Arc of Instability (Carnegie Europe & Carnegie Russia Eurasia Center, 2024), Accessed on 30.11.2024 https://carnegieendowment.org/research/2024/05/bosnia-moldova-armenia-between-russia-eu?lang=en&center=russia-eurasia.

[8] European Commission and High Representative for Foreign Affairs and Security Policy, Joint Framework on countering hybrid threats: a European Union response (Brussels, 6 April 2016 JOIN(2016) 18 final), p. 14.

[9] European Commission and High Representative for Foreign Affairs and Security Policy, Report on the implementation of the 2016 Joint Framework on countering hybrid threats and the 2018 Joint Communication on increasing resilience and bolstering capabilities to address hybrid threats (Brussels, 28 May 2019, SWD(2019) 200 final), p. 2.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

The EU's second foundational text in this policy domain – the 2018 Joint Communication on increasing resilience and bolstering capabilities to address hybrid threats – was adopted following Russia's nerve agent attack in Salisbury (United Kingdom) in March of the same year.[10] It stressed the necessity for building stronger internal-external links in chemical, biological, radiological and nuclear security and for improved coordination and cooperation on strategic communication with key regional and international partners, but without making a link with EU enlargement.

Following the Joint Communication, the years 2018-2020 saw the approval of an abundance of new EU policy documents on the theme of countering hybrid threats and disinformation.[11] They often called for a strengthening of the EU's cooperation with the relevant international actors and neighbouring partners, while lacking an explicit link with the accession process. For example, the 2019 Council conclusions on complementary efforts to enhance resilience and counter hybrid threats highlighted the importance of a comprehensive, whole-of-government and whole-of-society approach to security in order to effectively address hybrid threats.[12] However, the Council omitted any mentioning of the accession process and missed the opportunity to clarify how the EU could help prepare the candidate countries for the whole-of government and whole-of-society approach.

The absence of a thorough consideration of the EU enlargement process in the EU's main documents on countering hybrid threats did not change after Russia's full-scale invasion of Ukraine. The EU's 2022 Strategic Compass for Security and Defence devoted a specific chapter to hybrid threats and it vowed to strengthen the EU's response options, resilience capacities and cooperation both within the EU and in support of partner countries, but without mentioning the accession path.[13] Likewise, the 2022 Council conclusions on a framework for a coordinated EU response to hybrid campaigns[14] as well as the 2022 Council conclusions on Foreign Information Manipulation and Interference (FIMI)[15] reiterated that the EU would step up its efforts to reach out to partner countries in order to counter hybrid threats and the manipulation of information without mentioning the accession process.

Following the intensification of Russia's hybrid campaign throughout Europe in 2023-2024, the European Council of June 2024 again strongly condemned all types of hybrid activities "including intimidation, sabotage, subversion, foreign information manipulation and interference, disinformation, malicious cyber activities and the instrumentalization of migrants by third countries".[16] The same European Council also adopted the Union's Strategic Agenda 2024-2029, but

[10] European Commission and High Representative for Foreign Affairs and Security Policy, Joint Communication on increasing resilience and bolstering capabilities to address hybrid threats (Brussels, 13 June 2018 JOIN(2018) 16 final).

[11] See, for example, European Commission, Communication - Tackling online disinformation: a European Approach (Brussels, 26 April 2018, COM(2018) 236 final); European Commission, Communication - Securing free and fair European elections (Brussels, 12 September 2018, COM(2018) 637 final); European Commission & High Representative for Foreign Affairs and Security Policy, Joint Communication - Action Plan against disinformation (Brussels, 5 December 2018 JOIN(2018) 36 final); European Council, Conclusions (Brussels, 22 March 2019, EUCO 1/19), para. 9; European Council, Conclusions (Brussels, 20 June 2019, EUCO 9/19), para. 6-7; European Commission, Communication on the EU Security Union strategy (Brussels, 24 July 2020 COM(2020) 605 final); Council conclusions on safeguarding a free and pluralistic media system (Brussels, 27 November 2020, 13260/20); Council conclusions on strengthening resilience and countering hybrid threats, including disinformation in the context of the COVID-19 pandemic (Brussels, 15 December 2020, 14064/20).

[12] Council Conclusions on complementary efforts to enhance resilience and counter hybrid threats (Brussels, 10 December 2019, 14972/19).

[13] Council of the EU, A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security (Brussels, 21 March 2022, 7371/22).

[14] Council conclusions on a framework for a coordinated EU response to hybrid campaigns (Brussels, 21 June 2022, 10016/22), para. 2, 4, 8.

[15] Council conclusions on foreign information manipulation and interference (FIMI) (Brussels, 18 July 2022, 11429/22), para. 2.

[16] European Council Conclusions (Brussels, 27 June 2024, EUCO 15/24), para. 40.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

without laying a conceptual bridge between the commitment to "strengthen its resilience, preparedness, crisis prevention and response capacities, in an all-hazards and whole-of-society approach" and the accession process.[17] It is therefore not entirely astonishing that the 2024 Commission Communication on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders did not contain a single reference to accession, enlargement or the candidate countries.[18]

To some limited degree, the Commission's 2020 European Democracy Action Plan and 2023 Communication on Defence of Democracy can be singled out as exceptions to the absence of an enlargement dimension in the EU's strategic documents on hybrid threats. Without going into any depth, the European Democracy Action Plan at least acknowledged the importance of raising awareness of European values and building resilience against disinformation "in particular in the European Neighbourhood and *Enlargement region*". By way of example, it mentioned the Media Freedom Rapid Response pilot project for countering violations of press and media freedom "in Member States and *candidate countries*".[19] Likewise, the Commission's Communication on Defence of Democracy recognised that responding to external threats attacking the democratic process constituted "a priority in *EU enlargement policy*" and that the EU's Western Balkan media programme, support for electoral reform in the Western Balkans, and several TAIEX activities against disinformation had to be seen in "*the context of enlargement*".[20] However, this did not lead to broader strategic considerations encompassing EU enlargement.

The documents cited above make clear that the EU has been actively mobilising against hybrid threats coming from Russia. It did attach major importance to hybrid developments in its neighbourhood and to cooperation with the relevant partner countries. At the same time, EU enlargement has not been given any structural consideration in this context. None of the foundational and overarching texts on the EU's response to hybrid threats have devoted a full paragraph to the enlargement process. Where the texts did acknowledge the accession dimension, this was done in a very brief manner and without any elaboration of the strategy behind it. While this might be understandable in the pre-2022 era, when accession issues were not in the forefront of EU politics, it is more difficult to comprehend after the 2022 applications by Ukraine, Moldova and Georgia and the EU's renewed enlargement drive.

COUNTERING HYBRID THREATS IN PRACTICE: TOPICAL RATHER THAN STRATEGIC ACCESSION SUPPORT

The conclusions of the preceding section do not mean that the EU has not been taking concrete action against hybrid threats in the candidate countries. As will be detailed in this section, the EU has made significant efforts to support the partner countries that have applied for EU membership, but again, those efforts have not been framed in a strategic and comprehensive accession context.

To shed light on the enlargement dimension in the EU's practice of countering hybrid threats, this paper analyses references to the EU accession process in (a) the annual progress reports by the Commission and the European External Action Service (EEAS) on the implementation of the 2016 Joint Framework on countering hybrid threats and the 2018 Joint Communication on increasing

[17] Ibid., Annex: Strategic Agenda 2024-2029.
[18] European Commission, Communication on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders (Brussels, 11 December 2024, COM(2024) 570 final).
[19] European Commission, Communication on the European democracy action plan (Brussels, 3 December 2020 COM(2020) 790 final), p. 13, 21, 25.
[20] European Commission, Communication on defence of democracy (Strasbourg, 12 December 2023, COM(2023) 630 final).

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

resilience and bolstering capabilities to address hybrid threats[21]; and (b) the annual reports on EEAS Activities to counter foreign information manipulation and interference (FIMI).[22] This analysis is complemented by its mirror image, through an examination of the passages on hybrid threats in the Commission's annual enlargement package, which consists of (a) a general Commission Communication on enlargement policy that takes stock of the developments over the past year and (b) individual country reports in which the Commission services present their detailed annual assessment of the state of play in each candidate country.[23]

(a) Overall findings

A first overall finding is that, within the EU enlargement context, the hybrid threat concept made its debut rather late. Looking at the annual Commission Communications on enlargement policy, the first mentioning of hybrid threats came in an annex of the 2019 version. It was only in 2020 that hybrid threats made their way into the main text. This is remarkable since the foundational EU policy documents in the field dated from 2016 and 2018, and the annual reports on countering hybrid threats had included references to some of the candidate countries since 2017. It thus proved far from self-evident to incorporate the transversal hybrid threats theme in the EU's traditional accession logic that focuses on the transposition of the EU *acquis* through pre-established negotiating chapters.

Secondly, after 2020, Commission's annual enlargement packages reported on actions countering hybrid threats mainly under negotiating chapters 31 (Foreign, security and defence policy) and 10 (Digital transformation and media). The percentage of text devoted to hybrid threats remained very modest.

Thirdly, it is striking and somewhat of a paradox that even the annual Communications on enlargement policy refrained from putting hybrid threats in a more strategic accession context, apart from stating on occasion that disinformation campaigns were aiming to discredit the EU and the ambition of membership. The only time hybrid threats figured in the overall conclusions and recommendations of the annual Communication on enlargement policy, in 2022, illustrated the point. The conclusions highlighted the priority of strengthening the capacities of the Western Balkans against hybrid threats such as cyber security, enhancing the resilience of critical infrastructure, and countering disinformation. However, the rationale that preceded this conclusion could have been used for any country situated in the EU's neighbourhood, whether a candidate country or not. It stated as follows:

The "current geopolitical challenges call for strengthening our cooperation with the region, whose security is ultimately tied up with that of the EU itself. The EU has long been the most important economic partner of the Western Balkans. With the adoption of the EU's Strategic Compass, the foundations are laid for the EU and its Member States to further entrench their role as the region's most important security and defence partners, acting also in close cooperation with likeminded international security actors".[24]

---

[21] See the annual progress reports by the European Commission and the EEAS on the implementation of the 2016 Joint Framework on countering hybrid threats and the 2018 Joint Communication on increasing resilience and bolstering capabilities to address hybrid threats (from 2017 to 2023), Accessed on 30.11.2024 https://defence-industry-space.ec.europa.eu/eu-defence-industry/hybrid-threats_en.

[22] See the annual reports on EEAS Activities to counter foreign information manipulation and interference (FIMI) (from 2021 to 2023), Accessed on 30.11.2024 https://www.eeas.europa.eu/eeas/eeas-stratcom%E2%80%99s-responses-foreign-information-manipulation-and-interference-fimi-2023_en.

[23] See the European Commission's annual enlargement packages (from 2015 to 2024), Accessed on 30.11.2024 https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en.

[24] European Commission, 2022 Communication on EU Enlargement Policy (Brussels, 12 October 2022, COM(2022) 528 final), p. 35, point 11.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Not a word in this rationale referred to the enlargement process, or to the need of combatting hybrid threats and disinformation as an essential precondition for a successful accession.

Fourth, EU actions to counter hybrid threats in the Western Balkans and the Eastern Partnership countries seemed largely driven by events, in particular the Russian invasion of Ukraine, and not by a long-term EU strategy related to the candidate status of the countries in question. None of the annual reports on countering hybrid threats and FIMI mentioned that Bosnia-Herzegovina, Ukraine, Georgia and Moldova had been granted candidate status in 2022-2023. Furthermore, the number of times a country was mentioned in these reports did not seem related to its candidate country status. For example, with respect to Georgia, the highest number of EU support actions were signalled in 2020 (i.e. before it applied for EU membership), in the form of cyber resilience activities in reaction to cyber-attacks that targeted the country in October 2019.

(b) Dominant themes

In conformity with the definition of hybrid threats in the 2016 Joint Framework, the analysed reports used the concept in a relatively open and flexible way. In practice, however, only two themes were treated in a systematic manner: disinformation and cybersecurity. Other hybrid threats, for example, related to critical infrastructure, economic coercion or espionage were hardly mentioned.

Regarding disinformation, the Communications on enlargement policy underlined year after year that the Western Balkans were facing particularly intense FIMI campaigns: during the Covid-19 pandemic, after the Russian invasion of Ukraine, and in the run-up to elections. The reports also stressed that such campaigns found a particularly fertile local ground given the region's low media literacy, low trust in institutions, limited space for professional journalism and low level of media freedom. The bulk of the disinformation was reported to be produced and disseminated by domestic actors for domestic purposes, but third states' proxies were also signalled, in particular Russia-sponsored. Their aim was to undermine public trust in democratic institutions, deepen polarisation, challenge the EU's credibility, and derail the region from its EU path. In the same vein, after 2022, Ukraine, Moldova and Georgia also became the target of a reinforced wave of information manipulation after their applications for EU membership, mainly to discredit their aspirations to join the EU.

Cyber resilience and cybersecurity were a subject that more easily fit the traditional pre-accession focus on conformity with the EU law. Thus, the 2023 Communication on enlargement policy signalled progress on alignment with the EU *acquis* in cybersecurity in Albania, North Macedonia, Montenegro, Ukraine and Moldova. At the same time, the 2024 country reports emphasised the need for Bosnia and Herzegovina, Montenegro, North Macedonia, Georgia, Moldova and Ukraine to fully implement the 5G Cybersecurity Toolbox measures. In the same vein, North Macedonia, Serbia, Georgia and Ukraine were prodded to achieve legal alignment with the EU Directive on measures for a high common level of cybersecurity across the Union (NIS2).

(c) Main intervention tools to counter hybrid threats

In addition to the two dominant policy domains, the reports also highted several key EU intervention tools.

First, in response to the disinformation campaigns mentioned above, every single report on countering hybrid threats and FIMI underscored the central role of the EEAS Strategic Communication Division (StratCom).[25] The reports highlighted in particular the numerous actions of the East StratCom Task Force (created in 2015) and the StratCom's Western Balkans Task Force

[25] For the background, see https://www.eeas.europa.eu/countering-disinformation/tackling-disinformation-information-work-eeas-strategic-communication-division-and-its-task-forces_und_en (Accessed on 30.11.2024).

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

(operational since 2017) to improve the EU's strategic communication with the partners (with the help of the EU Delegations), uncover, compile and debunk Russian disinformation, ensure support for independent media, conduct public and cultural diplomacy, and regularly coordinate with the Member States and NATO.

The second policy instrument highlighted in the analysed activity reports were the civilian missions under the common security and defence policy (CSDP) to address hybrid threats. They included the EU Monitoring Mission Georgia (that started after the military conflict with Russia in 2008), the EU Advisory Mission Ukraine (that started after the Russian invasion of the Crimea in 2014), and the EU Partnership Mission in Moldova (that started in 2023) to strengthen the areas of crisis management and hybrid threats, including cybersecurity and countering FIMI.

A third key tool that was put in the spotlights in many annual activity reports were the Hybrid Risk Surveys. Following a 2017 pilot project with Moldova, Hybrid Risk Surveys were launched with Georgia, Jordan, Albania, North Macedonia, Kosovo and Montenegro. The purpose was to help identify each country's key hybrid vulnerabilities, formulate specific recommendations to increase each partners' resilience, and ensure that EU assistance would specifically target those areas, and develop an appropriate framework for provision of support in becoming more resilient to hybrid threats.

Fourthly, the European Peace Facility (EPF) was reported to have financed and delivered cyber defence to the Ukrainian Armed Forces, the Moldovan Armed Forces and the Georgian Military Defence Cybersecurity Bureau.

Fifth, another instrument, highlighted particularly in 2023, was support under the Rapid Response Pillar of the Neighbourhood, Development and International Cooperation Instrument (NDICI) for Moldova as well as Albania, Montenegro and North Macedonia to increase their resilience to hybrid threats resulting from Russia's war of aggression against Ukraine, in particular disinformation and cyber threats.

Sixth, several reports highlighted how the successive generations of the Instrument for Pre-Accession Assistance (IPA) had been mobilised to support reforms in the partner countries to strengthen resilience against hybrid threats and FIMI. This included the 2019 regional programme to strengthen cyber resilience in the Western Balkans under IPA II (2014-2020) and the 2023 comprehensive regional cybersecurity programme for the Western Balkans under IPA III (2021-2017).

Finally, it is worth signalling the numerous references in the activity reports to support provided under the Commission's Technical Assistance and Information Exchange instrument (TAIEX) in the form of expert missions and workshops in the domain of cybersecurity, strategic communication, disinformation and critical information infrastructure.

(d) Country-specific comments

Looking at the annual reports on countering hybrid threats and FIMI, Ukraine was the country that was mentioned the most.[26] This is not surprising considering the disinformation campaign that accompanied the Russian invasion of the country. On the other side of the spectrum, the EU reports on countering hybrid threats and FIMI (that largely focus on achievements and positive cooperation with the EU) very seldom mentioned Serbia and Bosnia and Herzegovina.[27] In the Commission's annual enlargement package reports, however, these two countries (as well as Georgia in 2024), were the subject of strong critical remarks.

[26] In total, Ukraine was mentioned 98 times in the annual reports on countering hybrid threats (of which 50 times in the 2020 report) and 68 times in the annual reports to counter FIME (of which 49 times in the 2022 report).

[27] Serbia was never mentioned in any of the annual reports on countering hybrid threats and only once in the 2023 reports to counter FIME. Bosnia and Herzegovina was mentioned once in the 2018 report on countering hybrid threats and once in the 2023 reports to counter FIME.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

The 2022, 2023 and 2024 Communications on enlargement policy each time summoned Serbia to take urgent action to protect its citizens against foreign information manipulation and interference and from anti-EU narratives. It was also noted that several Russian state-sponsored outlets on the EU sanctions list were broadcasting the Kremlin's disinformation from Serbia, with spill-over effects across the region. This message was reinforced in the country reports on Serbia. The 2024 report underlined that the Serbian authorities needed, as a matter of priority, to take much more responsibility for proactive and objective communication on Serbia's EU accession process and the EU and for countering disinformation in its national media. The country report also pointed out that Serbia did not align with EU declarations and restrictive measures in reaction to cyber-attacks in 2023 and 2024, and that it should as a matter of priority improve its alignment with EU common foreign and security policy and avoid actions and statements that go against EU foreign policy positions.

Regarding Bosnia and Herzegovina, the 2024 country report noted that the country lacked an overall assessment or policy framework for addressing hybrid threats. It also remained the only country in the region without a countrywide strategy on cybersecurity, which rendered it vulnerable to recurring cyber-attacks. With a local provider continuing to carry the signal of the RT channel, Bosnia and Herzegovina was prodded to make further efforts on closing space for foreign information manipulation and interference, and to take actions towards building societal resilience against all forms of hybrid threats.

With respect to Georgia, the 2024 Communication on enlargement policy stressed that its authorities needed to stop spreading disinformation against EU values and step up actions to combat disinformation. The 2024 country report on Georgia added that, since the re-introduction of the draft law on transparency of foreign influence in April 2024, harsh anti-EU messages, actively spread by high level ruling party officials and MPs, had become recurrent. Furthermore, in the run-up to the 2024 Parliamentary elections, the report noticed an amplification of disinformation narratives by ruling party officials and government-affiliated media. The report regretted that cooperation with the EU on hybrid threats and countering disinformation was limited. It observed there was little evidence of political will to take measures to limit the spread of manipulative narratives, including targeting the EU. Like Serbia, Georgia declined to align with the statement of October 2024 by the High Representative for Foreign Affairs and Security Policy, on behalf of the EU, strongly condemning Russia's intensifying campaign of hybrid activities against the EU, its Member States and partners.[28]

TOWARDS A STRATEGIC VISION OF THE ENLARGEMENT DIMENSION IN THE EU'S HANDLING OF HYBRID THREATS

The annual reports reviewed above provide an impressive overview of EU actions in support of partner country resilience against hybrid threats, mobilising a wide array of policy tools, with a strong thematic focus on countering disinformation and ensuring cybersecurity. However, none of these reports presented the EU's actions as part of a comprehensive strategic vision on the link between EU enlargement and countering hybrid threats. The lack of a broader perspective on the accession dimension of hybrid threats can be seen as a logical corollary of the way enlargement was treated in the EU's foundational policy documents on countering hybrid threats. The recent flood of hybrid attacks against the democratic political and electoral processes in the candidate countries underscores that the current state-of-play is not satisfactory. Creating resilience against hybrid attacks

[28] Statement by the High Representative on behalf of the EU on Russia's continued hybrid activity against the EU and its Member States (Brussels, 8 October 2024), Accessed on 30.11.2024 https://www.consilium.europa.eu/en/press/press-releases/2024/10/08/hybrid-threatsrussia-statement-by-the-high-representative-on-behalf-of-the-eu-on-russia-s-continued-hybrid-activity-against-the-eu-and-its-member-states/.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

in the candidate countries requires an EU policy upgrade and the development of a strategic vision that seems largely absent at present.

The main rationale for such a strategic approach is that hybrid attacks are putting at risk the fundamentals of the European construction. First, hybrid campaigns actively try to undermine the values underpinning the EU such as democracy, the rule of law, pluralism and tolerance as well as the principle of mutual trust. As the Court of Justice of the EU has held, the "fundamental importance" of those values and of the mutual trust principle resides in the fact that "they allow an area without internal borders to be created and maintained".[29] It is no exaggeration, therefore, that hybrid actions that erode EU values and the mutual trust principle, are also undercutting the EU itself. Secondly, as former Finnish President Sauli Niinistö has emphasized in his report on the strengthening of the EU's civilian and military preparedness, hybrid action also affects the democratic decision-making processes. Hostile actors exploit the dependencies and vulnerabilities of individual (new and old) member states to interfere with and undermine EU decision-making through targeted pressure. In Niinistö's view, this poses "a significant risk to the EU's readiness for decisive crisis response and its capacity for proactive preparedness, ultimately putting at stake the Union's legitimacy, credibility, and ability to deliver for citizens".[30] Looked at from the perspective of the integrity of the EU's political system, providing support to countries in transition to become member states should, therefore, be conceptualized very differently from assisting other partner countries struggling with hybrid threats outside the EU.

Mutual trust in an enlarging EU requires mutual resilience of the member states and the incoming countries. When Niinistö pleads for an EU that "emphasises mutual resilience as a key element of its diplomacy and external action", this should be applied as a matter of priority and in an enhanced or intensified manner with the candidate countries.[31] The EU should consequently extrapolate its own interests in resilience building against hybrid threats to include the applicants. This should be one of the top priorities of the European Democracy Shield announced by President von der Leyen.

The successful inclusion of the enhanced mutual resilience perspective (involving both EU and the candidate countries) in the European Democracy Shield calls for a roadmap that ensures (a) a better definition of the hybrid concept, with a concrete identification of its main components and (b) a sharper and more proactive operationalisation at EU-level of what enhanced mutual resilience entails for the EU and the candidate countries alike.

On the need for a better definition, it must be signalled that the concept of hybrid threats has been the subject of much debate during recent years.[32] Some have highlighted that the "the term nicely captures the blurring of public and private, state or non-state, formal and informal that is characteristic of new wars"[33] and shows that "[n]o single aspect of the threat facing Europe exists in isolation from others".[34] Others have expressed serious doubts on the concept's inherently open and flexible nature, considering it as "a misguided attempt to group everything Moscow does under one

[29] Court of Justice of the EU, Judgment of 28 October 2022, C-435/22, *PPU, HF*, EU:C:2022:852, para. 92; Judgment of 22 February 2022, C-562/21 PPU and C-563/21, *PPU, XY*, EU:C:2022:100, para. 40; Judgment of 15 October 2019, *Dorobantu*, C-128/18, EU:C:2019:857, para. 46.

[30] Sauli Niinistö, "Safer Together: Strengthening Europe's Civilian and Military Preparedness and Readiness", Brussels, European Commission, 30 October 2024, p. 62.

[31] Ibid., p. 15 and 137.

[32] Chiara Libiseller, 'Hybrid warfare' as an academic fashion, in "Journal of Strategic Studies", Vol. 46, No. 4, 2023, p. 858–880.

[33] Mary Kaldor, "New & Old Wars: Organized Violence in a Global Era", Stanford, Stanford University Press, 1998, p. 2.

[34] Daniel Fiott and Roderick Parkes, Protecting Europe: The EU's response to hybrid threats, in "Chaillot Paper", No. 151 (EU Institute for Security Studies), 2019, p. 2.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

rubric"[35] and as "an elusive and catch-all term" that Western decision-makers should "forget", while shifting their "focus on the specificity and the interconnectedness of the threats they face".[36] Several strategic analysts have pointed out that the "conceptual ambiguity" behind the hybrid term makes it very difficult to develop an effective counterstrategy. "Logically", states Tarik Solmaz, "it is not possible to develop an efficient defence strategy against a threat that is not exactly identified in its scope and features".[37] Likewise, Jan Joel Andersson and Thierry Tardy emphasise that "the confusion intentionally created by hybrid tactics is likely to further complicate the ability of EU countries and institutions to craft a truly coherent and comprehensive response".[38] In this sense, Bettina Renz and Hanna Smith conclude that the hybrid threats concept is not merely "unsuitable as an analytical tool" but "could even be playing into Russia's hands".[39]

Notwithstanding such critical comments, the EU policy documents reviewed in this paper make clear that "the hybrid terminology is now firmly established and seems poised to continue being used in strategic planning".[40] This use should, however, not be without taking on board the gist of the criticism. For the European Democracy Shield to become successful, the different components of the hybrid threats concept should be better identified in the new roadmap, in a manner that facilitates delineating institutional responsibilities and formulating operational countermeasures.[41] This is not to dispute the necessity for a whole-of-government and whole-of-society approach (as highlighted in several EU documents), but those approaches are impossible to implement without a clear breakdown of what is needed where and when, and guidance and leadership through a new control and command system. At the same time, room should be made in the roadmap for handling new or unexpected hybrid problems, for which predefined standard operating procedures are not yet available.[42] This requires an operational European control and command system with the capacity to react in a quick manner. Crucially, and in the spirit of enhanced mutual resilience, the European Democracy Shield and its operational roadmap should come with clear pro-active guidance and support for the candidate countries regarding each identified line of action. No longer can the EU afford to forget candidate countries and the accession process in its main EU policy documents on tackling hybrid threats.

Additionally, the EU should give itself the means to determine the existence in a candidate country of a serious and persistent failure to effectively counter hybrid threats. Such a determination should, in last resort, bring the accession process to a halt, until the failure has been remedied. In implementation of the mutual resilience principle, it would be invoked in case a candidate country systematically refuses to take the necessary measures, including by aligning itself with EU's CFSP statements and policies to counter hybrid threats. It might also be relied upon when a candidate country has persistently been incapable of tackling hybrid threats, particularly those affecting its democratic political processes, pluralism, tolerance, and the rule of law. In such a case, moving

[35] Michael Kofman and Matthew Rojansky, A Closer look at Russia's 'Hybrid War', in "Kennan Cable" (Wilson Center), No. 7, 2015.
[36] Damien Van Puyvelde, Hybrid war: Does it even exist?, in "NATO Review", 7 May 2015, Accessed on 30.11.2024 https://www.nato.int/docu/review/articles/2015/05/07/hybrid-war-does-it-even-exist/index.html,
[37] Tarik Solmaz, 'Hybrid warfare': A dramatic example of conceptual stretching, in "National Security and the Future", Vol. 23, No. 1, 2022, 89-102, p. 96.
[38] Jan Joel Andersson and Thierry Tardy, Hybrid: what's in a name?, in "Brief Issue" (EU Institute for Security Studies), No. 32, 2015, p. 3.
[39] Bettina Renz and Hanna Smith, Russia and Hybrid warfare - going beyond the label, in "Aleksanteri Papers" (University of Helsinki), No. 1, 2016, p. 1.
[40] Mikael Wigell, Harri Mikkola and Tapio Juntunen, "Best Practices in the whole-of-society approach in countering hybrid threats", Brussels, European Parliament Policy Department for External Relations, PE 653.632, May 2021, p. 11.
[41] *Ibid.*
[42] Robert Person, Isak Kulalic and John Mayle, Back to the future: the persistent problems of hybrid war, in "International Affairs", Vol. 100, No. 4, 2024, p. 1749-1761.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

forward with a country's accession would only undercut the integrity of EU decision-making and the sustainability of its own functioning. As already stated by the Delors Commission in 1992: "to proceed to enlargement in a way which reduces [the EU's] effectiveness would be an error".[43]

BIBLIOGRAPHY/REFERENCES:

Studies published in journals and think tank series:

Andersson Jan Joel and Thierry Tardy, Hybrid: what's in a name?, in "Brief Issue" (EU Institute for Security Studies), No. 32, 2015.

De Waal Thomas, Dimitar Bechev & Maksim Samorukow, Between Russia and the EU: Europe's Arc of Instability (Carnegie Europe & Carnegie Russia Eurasia Center), 2024, Accessed on 30.11.2024 https://carnegieendowment.org/research/2024/05/bosnia-moldova-armenia-between-russia-eu?lang=en&center=russia-eurasia.

Fiott Daniel and Roderick Parkes, Protecting Europe: The EU's response to hybrid threats, in "Chaillot Paper", No. 151 (EU Institute for Security Studies), 2019.

Kofman Michael and Matthew Rojansky, A Closer look at Russia's 'Hybrid War', in "Kennan Cable" (Wilson Center), No. 7, 2015.

Libiseller Chiara, 'Hybrid warfare' as an academic fashion, in "Journal of Strategic Studies", Vol. 46, No. 4, 2023, p. 858–880.

Person Robert, Isak Kulalic and John Mayle, Back to the future: the persistent problems of hybrid war, in "International Affairs", Vol. 100, No. 4, 2024, p. 1749-1761.

Renz Bettina and Hanna Smith, Russia and Hybrid warfare - going beyond the label, in "Aleksanteri Papers" (University of Helsinki), No. 1, 2016.

Solmaz Tarik, 'Hybrid warfare': A dramatic example of conceptual stretching, in "National Security and the Future", Vol. 23, No. 1, 2022, 89-102.

Van Puyvelde Damien, Hybrid war: Does it even exist?, in "NATO Review", 7 May 2015, Accessed on 30.11.2024 https://www.nato.int/docu/review/articles/2015/05/07/hybrid-war-does-it-even-exist/index.html.

Book:

Kaldor Mary, "New & Old Wars: Organized Violence in a Global Era", Stanford, Stanford University Press, 1998.

EU institutional documents and publications:

Council conclusions on a framework for a coordinated EU response to hybrid campaigns (Brussels, 21 June 2022, 10016/22).

Council conclusions on complementary efforts to enhance resilience and counter hybrid threats (Brussels, 10 December 2019, 14972/19).

Council conclusions on foreign information manipulation and interference (FIMI) (Brussels, 18 July 2022, 11429/22).

Council conclusions on safeguarding a free and pluralistic media system (Brussels, 27 November 2020, 13260/20).

Council conclusions on strengthening resilience and countering hybrid threats, including disinformation in the context of the COVID-19 pandemic (Brussels, 15 December 2020, 14064/20).

Council Decision (CFSP) 2024/2643 of 8 October 2024 concerning restrictive measures in view of Russia's destabilising activities, OJ L, 2024/2643, 9 October 2024.

Council Regulation (EU) 2024/2642 of 8 October 2024 concerning restrictive measures in view of Russia's destabilizing activities, OJ L, 2024/2642, 9 October 2024.

[43] European Commission, Europe and the challenge of enlargement (24 June 1992), in "Bulletin of the European Communities, Supplement 3/92", p. 14, para. 18.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Council, A Strategic Compass for Security and Defence - For a European Union that protects its citizens, values and interests and contributes to international peace and security (Brussels, 21 March 2022, 7371/22).
Court of Justice of the EU, Judgment of 15 October 2019, *Dorobantu*, C-128/18, EU:C:2019:857.
Court of Justice of the EU, Judgment of 22 February 2022, C-562/21 PPU and C-563/21, *PPU, XY*, EU:C:2022:100.
Court of Justice of the EU, Judgment of 28 October 2022, C-435/22, *PPU, HF*, EU:C:2022:852.
European Commission and High Representative for Foreign Affairs and Security Policy, Joint Framework on countering hybrid threats: a European Union response (Brussels, 6 April 2016 JOIN(2016) 18 final), p. 14.
European Commission and High Representative for Foreign Affairs and Security Policy, Report on the implementation of the 2016 Joint Framework on countering hybrid threats and the 2018 Joint Communication on increasing resilience and bolstering capabilities to address hybrid threats (Brussels, 28 May 2019, SWD(2019) 200 final), p. 2.
European Commission and High Representative for Foreign Affairs and Security Policy, Joint Communication on increasing resilience and bolstering capabilities to address hybrid threats (Brussels, 13 June 2018 JOIN(2018) 16 final).
European Commission and High Representative for Foreign Affairs and Security Policy, Joint Communication - Action Plan against Disinformation (Brussels, 5 December 2018 JOIN(2018) 36 final).
European Commission, Communication - Securing free and fair European elections (Brussels, 12 September 2018, COM(2018) 637 final).
European Commission, Communication - Tackling online disinformation: a European approach (Brussels, 26 April 2018, COM(2018) 236 final).
European Commission, Communication on countering hybrid threats from the weaponisation of migration and strengthening security at the EU's external borders (Brussels, 11 December 2024, COM(2024) 570 final).
European Commission, Communication on defence of democracy (Strasbourg, 12 December 2023, COM(2023) 630 final).
European Commission, Communication on the EU Security Union strategy (Brussels, 24 July 2020 COM(2020) 605 final).
European Commission, Communication on the European democracy action plan (Brussels, 3 December 2020 COM(2020) 790 final).
European Commission, Europe and the challenge of enlargement (24 June 1992), in "Bulletin of the European Communities, Supplement 3/92".
European Council Conclusions (Brussels, 27 June 2024, EUCO 15/24).
European Council, Conclusions (Brussels, 20 June 2019, EUCO 9/19).
European Council, Conclusions (Brussels, 22 March 2019, EUCO 1/19).
Niinistö Sauli, "Safer Together: Strengthening Europe's Civilian and Military Preparedness and Readiness" (Brussels, European Commission, 30 October 2024), Accessed on 30.11.2024 https://commission.europa.eu/document/5bb2881f-9e29-42f2-8b77-8739b19d047c_en.
Statement by the High Representative on behalf of the EU on Russia's continued hybrid activity against the EU and its Member States (Brussels, 8 October 2024), Accessed on 30.11.2024 https://www.consilium.europa.eu/en/press/press-releases/2024/10/08/hybrid-threatsrussia-statement-by-the-high-representative-on-behalf-of-the-eu-on-russia-s-continued-hybrid-activity-against-the-eu-and-its-member-states/.
Von der Leyen Ursula, Europe's choice: Political guidelines for the next European Commission 2024-2029 (Strasbourg, 18 June 2024), Accessed on 30.11.2024 https://commission.europa.eu/document/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en, p. 23.
Von der Leyen Ursula, Statement at the European Parliament plenary as candidate for a second mandate 2024-2029 (Strasbourg, 18 June 2024), Accessed on 30.11.2024 https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_24_3871.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Wigell Mikael, Harri Mikkola and Tapio Juntunen, "Best Practices in the whole-of-society approach in countering hybrid threats" (Brussels, European Parliament Policy Department for External Relations, PE 653.632, May 2021).

Collective EU source location:
EEAS, Annual reports on EEAS activities to counter FIMI (from 2021 to 2023), Accessed on 30.11.2024 https://www.eeas.europa.eu/eeas/eeas-stratcom%E2%80%99s-responses-foreign-information-manipulation-and-interference-fimi-2023_en.
European Commission and EEAS, Annual progress reports by the on the implementation of the 2016 Joint Framework on countering hybrid threats and the 2018 Joint Communication on increasing resilience and bolstering capabilities to address hybrid threats (from 2017 to 2023), Accessed on 30.11.2024 https://defence-industry-space.ec.europa.eu/eu-defence-industry/hybrid-threats_en.
European Commission annual enlargement packages (from 2015 to 2024), Accessed on 30.11.2024 https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/strategy-and-reports_en.
European Commission mission letters, Accessed on 30.11.2024 https://commission.europa.eu/about-european-commission/towards-new-commission-2024-2029/commissioners-designate-2024-2029_en.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

The migration crisis as a tool of hybrid warfare – Analysis of selected cases at the borders of the European Union

PROF. DR. HAB. ZBIGNIEW CIEKANOWSKI[1]
WARSAW MANAGEMENT UNIVERSITY, POLAND
DR. SŁAWOMIR ŻURAWSKI[2]
STATE ACADEMY OF APPLIED SCIENCES IN CHEŁM, POLAND
DR. MARCIN OSKIERKO[3]
STATE ACADEMY OF APPLIED SCIENCES IN CHEŁM, POLAND

Abstract: *The aim of this research is to analyze the migration crisis as an element of contemporary hybrid warfare, with particular emphasis on its impact on the security of the European Union. The research focuses on the phenomenon of human smuggling through Poland, which in the geopolitical context is an example of activities in which criminal organizations are used to achieve the goals of third countries. The main problem was formulated: How is the migration crisis, especially organized crime, a tool of hybrid warfare, and what are the consequences of this phenomenon for the security of the European Union? Accordingly, a research hypothesis has been formulated that assumes that the migration crisis, including organized crime, affects political and social destabilization in the European Union countries, and its intensification is directly related to the actions of third countries that use this practice as a tool of hybrid warfare. The research was carried out using the analysis of documents and statistical data, taking into account reports of border services (Border Guard and Frontex) and the analysis of literature on the subject. In addition, the case study method was used in relation to selected cases of detained and revealed foreigners for crossing the state border contrary to the provisions of the law or attempting to cross the state border contrary to the provisions of the law. This analysis allows us to understand the mechanisms of action organized in the context of broadly understood hybrid warfare.*
Key words: security, border, crisis, migration, hybrid war

ADMISSION

The migration crisis plays an important role in complex strategies of hybrid warfare today, becoming a tool of political pressure and social destabilization within the borders of the European Union. Traditionally seen as a socio-economic phenomenon, migration is

[1] Prof. dr hab. inż. dr h.c. **Zbigniew Ciekanowski** ORCID: 0000-0002-0549-894X e-mail: zbigniew@ciekanowski.pl serves as the Rector of the Managemant Academy of Applied Sciences in Warsaw. He is a distinguished expert in human resource management, crisis management, and security. His scholarly contributions include numerous publications, including books on the informational support of crisis management systems.
He has received several prestigious awards, including the Medal of the National Education Commission (2020) and the Individual Award of the Minister of Science and Higher Education in 2019 and 2020. In 2024, the President of Poland conferred upon him the title of Professor, recognizing his significant contributions to the advancement of science and higher education in Poland.

[2] **Sławomir Żurawski** PhD - ORCID: 0000-0001-9527-3391 szurawski@panschelm.edu.pl - Assistant Professor at the Department of Security Sciences at the National Academy of Applied Sciences in Chełm. In 2021, he obtained a doctorate at the Faculty of Aviation Safety at the Air Force Academy in Dęblin. Her scientific and research interests focus on issues related to crisis management, critical infrastructure, cybersecurity and broadly understood security.

[3] **Marcin Oskierko** - ORCID: 0000-0003-3450-6037 moskierko@panschelm.edu.pl PhD in social sciences, in the discipline of security sciences, assistant professor at the Department of Security Sciences of the Polish Academy of Applied Sciences in Chełm, internal auditor, Member of the Association of Internal Auditors of Universities, Polish Geopolitical Society, Polish Political Science Association. Research interests: the system of protection of the borders of the Republic of Poland and the EU, the migration policy of the EU and Polish, the Border Guard in the state security system.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

increasingly being used in hybrid activities that combine a variety of means of confrontation below the threshold of conventional war. Such operations are aimed at weakening state structures, creating social divisions and influencing the political decisions of member states and EU institutions.

An example of the instrumentalisation of the migration crisis was the situation on the Polish-Belarusian border in 2021 and 2022, where Alexander Lukashenko's regime deliberately directed groups of migrants from the Middle East to the EU's external borders. This operation was widely interpreted as an attempt to destabilise the EU and a response to the sanctions imposed on Belarus after the rigged presidential elections and repression of the opposition. Similar actions have been observed before, for example on the Greek-Turkish border in 2020, where Turkey threatened to "open its borders" in order to put pressure on the EU in the context of financial support for refugees.

Introducing migrants into the context of hybrid warfare changes the traditional view of security, requiring the European Union to adapt its response mechanisms. These situations highlight the need for a comprehensive approach to border protection, countering disinformation and creating integrated tools to counter such forms of political pressure. Analysis of cases such as the crisis on the border with Belarus or in the Mediterranean region allows for a better understanding of the dynamics of this type of threat and the development of effective response strategies.

MIGRATION ON THE POLISH-BELARUSIAN BORDER AS AN EXAMPLE OF HYBRID ACTIVITIES

Illegal migration poses a significant challenge to the internal security of the state. Due to their dynamic nature, they are often treated as a dangerous element of migration flows. Border control of people entering the territory of a given state is one of the most important elements of state sovereignty. For this reason, illegal migration is treated as an attack on the sovereignty of the state, which may pose a threat to the ability of the state to exercise control over its spatial and territorial domain[4].

The first attempts at migration blackmail on the part of the Lukashenko regime took place as early as 2002, when in the final phase of accession negotiations between Poland and the European Union, Belarus threatened to allow about 150,000 migrants to enter Europe, allegedly staying in Belarus. Further threats to bring migrants to the Belarusian-EU borders with Poland, Lithuania and Latvia appeared in 2010-2011, when after a meeting of the Border Committee of the Union State of Belarus and Russia in response to the tightening of EU sanctions, General I. Rachkouski warned that the border service would focus on protecting its own territory, and not on protecting neighbouring countries. A noticeable strengthening of border protection was to occur on the Belarusian-Ukrainian section of the state border at the expense of its sections with Poland, Lithuania and Latvia. According to the border services of Belarus, the decision was dictated by an increase in smuggling, as well as the desire to even out the disproportions in border protection. In the opinion of the Belarusian authorities, the border section with the EU was better guarded than the Belarusian-Ukrainian section of the state border[5]. Belarusian journalist T. Giczan stated that the Operation Lock, developed in 2010-2011, was aimed at forcing the European Union to provide financial assistance to strengthen

[4] A. Kukuła, *Protection of the state border by the Polish Armed Forces in the conditions of illegal migration*, Scientific Papers Pro Publico Bono 2022, No. 1 (1), p. 350.

[5] N. Orłowska-Czyż, *Minsk escalates the threat on the Belarusian-EU border*, Analyses, Centre for Eastern Studies, https://www.osw.waw.pl/pl/publikacje/analizy/2012-05-30/minsk-eskaluje-zagrozenie-nagranicy-bialorusko-unijnej, [accessed: 17.08.2023].

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

the border of Belarus[6]. Along with the announcement of the weakening of the state border protection, an intensive media campaign was carried out in Belarus aimed at linking illegal migration with the terrorist threat. The public media reported on operations carried out by the security services related to the liquidation of organized groups responsible for the smuggling of people, while indicating that illegal migrants are mostly linked to terrorist organizations.

The current migration crisis on the external borders of the European Union: Polish-Belarusian, Lithuanian-Belarusian and Latvian-Belarusian, was caused by the political crisis related to the presidential elections in Belarus. As a result of another rigged presidential election, which took place on August 9, 2020, A. Lukashenko received 80.2% of the votes. His main opponent, Sviatlana Tsikhanouskaya, came second, with 9.9% support. who immediately after the announcement of the elections left for Lithuania for fear of persecution.

The crisis on the Polish-Belarusian state border is a tool of political and geopolitical pressure that has two logics: local and global. Local logic is Lukashenko's interest in forcing the West to make political concessions, freezing sanctions imposed on Belarus and getting it out of international isolation. This logic is completely subordinated to the global logic, i.e. the interests of Russia, which imposes
its rules of the game on the EU and NATO in order to establish a new world order[7].

The crisis on Belarus's border with EU and NATO countries can be divided into two phases. In the first phase of the operation in 2020, Lithuanian border guards detained 80 people who had illegally crossed the Belarusian-Lithuanian border. In 2021, more than 4 thousand people were detained in Lithuania alone[8]. In the second phase of the operation, the actions of the Lukashenka regime were mainly aimed at Poland. They were preceded by changes in the Belarusian law on staying in the border zone. Belarus relaxed the Code of Administrative Offences by abolishing, m.in other things, the penalty for illegal stay in the border area, and in June 2021, during the border crisis, the Belarusian Ministry of Foreign Affairs announced the suspension of the implementation of the readmission agreement with the EU in response to the sanctions imposed by them[9]. In August 2021, about 2100 people tried to forcibly cross the Polish-Belarusian section of the state border protected by the Podlaski Border Guard Unit.

In the summer of 2021, a new phenomenon emerged at the EU's external border with Belarus, which was categorised as the instrumentalisation of migration. The instrumentalization of migration has many dimensions and takes place on many levels[10]. *Instrumentalisation of migrants is a situation where a third country triggers irregular migration flows into the Union by actively encouraging or facilitating the movement of third-country nationals to, into or from its territory and subsequently to the external borders, where such actions indicate that a third country intends to destabilise the Union or a Member State. and where the nature of such actions may threaten the basic functions of the State, including its territorial integrity, the maintenance of public order or the protection of national*

[6] M. Oskierko, *The Migration Crisis on the Polish-Belarusian State Border*, [in:] *Threats to NATO's Eastern Flank in the Aspect of Internal Security of Border Areas,* (eds.) D. Dachowicz, L. Elak, Z. Ciekanowski, Prof. Leszek J. Krzyżanowski Edition of the Managerial Academy of Applied Sciences in Warsaw, Chełm-Warsaw 2022, p. 205

[7] P. Usov, *Militarization of the Migration Crisis* [in:] *The Dictator's Border. Poland and Belarus in the face of the border crisis. Report IV* (eds.) J. M. Nowakowski, J. Olędzka, M. Rust, O. Shevchenko, P. Usov, K. Wańczyk, A. Papko, A. Pukszto, University of Warsaw, Centre for East European Studies, Warsaw 2021, pp. 30.

[8] M. Konieczny, Operation *"Sluice" – the refugee crisis related to the smuggling of illegal migrants across the Polish-Belarusian border*, Roczniki Administracji i Prawa 2022, XX, Issue 2, p. 92

[9] K. Wysocki, The Impact of Reflexive Management on the Escalation of the Migration Crisis on the Border of Belarus with the European Union, Cybersecurity and Cybercrime, 2024, Vol. 1(3), pp. 6-7.

[10] A. Nitszke, *Instrumentalization of migration, proceduralization versus humanization of the asylum policy of the European Union,* Politeja No. 1(88/1), 2024, p.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

security[11]. The practice of the so-called instrumentalisation of migrants has been used by the regime of Alexander Lukashenko to test the ability of Poland, Lithuania and Latvia to protect their state borders, and at the same time to test the effectiveness of the European Union in responding to such tensions and threats[12].

The authors of the article analysed the available statistical data developed by the Border Guard. The table below presents foreigners broken down into citizenships detained directly on the state border, in the border zone and outside the zone, who crossed or attempted to cross the Polish-Belarusian state border against the law. From the data prepared by the Border Guard, the authors of the article conclude that in the years 2021-2024, on the Polish-Belarusian section of the state border in the direction of Polish, the largest group of detainees were migrants from the Middle East and Africa, citizens of: Iraq (1742), Syria (731), Afghanistan (669), Somalia (395), Eritrea (274), Ethiopia (260), Yemen (186), Iran (168), Sudan (111) and citizens of other countries in the number of less than several dozen foreigners.

Table. 1. Foreigners detained/revealed by the Border Guard for crossing the state border contrary to the law or attempting to cross the state border contrary to the provisions of the law from Belarus to the Republic of Poland.

Citizenship	2021 r.	2022 r.	2023 r.	I półrocze 2024 r.
Afghanistan	447	25	88	109
Eritrea	0	0	9	265
Ethiopia	4	2	14	240
Iraq	1557	167	16	2
Iran	55	40	35	38
Yemen	19	15	23	129
Somalia	68	3	38	286
Sudan	2	22	11	76
Syria	272	79	86	294

Source: In-house analysis based on Border Guard data

ORGANISED CRIME AS PART OF HYBRID WARFARE

The free movement of people, capital, goods and services in the European Union has a positive impact on the development of a given country, while increasing the risk of the threat of human smuggling. The main contributor to the scale of trafficking is its profitability, and its growth is further driven by closely interlinked social and economic factors[13]. The transit location of Polish affects the scale of activities and the level of organized criminal groups, whose activities are usually focused on

[11] *Request. Regulation on situations of instrumentalisation in the field of migration and asylum, Strasbourg, 14 December 2021, COM(2021) 890 final.*

[12] A. Gruszczak, *Migration Crises in Europe after 2015: Parochialism in Three Scenes,* [in:] *Deinstitutionalization of Public Policies and the War in Ukraine and Migration Challenges in Poland,* (eds.) K. Jasiecki, M. Pacek, ed. European Centre of the University of Warsaw, Warsaw 2023, p. 237.

[13] R. Woźniak & D. Sowulewski, Forms of Smuggling, the Scale of the Phenomenon and the Level of Disclosures, [in:] *Combating Smuggling. A collection of good practices. Different perspectives – a common goal* (eds.) E. W. Plywaczewski, E. Kowalewska-Borys, Difin, Warsaw 2013, p. 39.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

satisfying the demand[14] related to human smuggling. Polish Therefore[15], the Polish-Belarusian section of the state border, which is the external border of the EU, shows the important role Poland plays in shaping the security of the European Union in a holistic approach and in the aspect of migration control[16].

The smuggling of people from Polish to Western Europe is carried out by both individuals, groups of two to several people, who are not systematically involved in this activity, organized criminal groups systematically involved in smuggling people, as well as organized criminal groups (multi-criminal) that have both control over a specific territory and influence [17]. With the increase in the migration crisis, organized criminal groups have emerged on the Polish-Belarusian section of the state border willing to transport migrants from Polish to Western Europe. According to the Border Guard, people involved in the smuggling of illegal migrants initially arrived in their own cars. Later, however, they began to rent vans in Polish. They also hired drivers who paid 4 thousand zlotys for a ride from Podlasie to Germany. On the other hand, foreigners were charged a fee of 10,000 to 13,000 dollars for organized smuggling from their country to one of the countries in Europe[18].

From January to June 2024, the Border Guard detained 357 organizers of illegal border crossings and their helpers, which is an average of 59 smugglers per month. Of the 357 organizers and couriers detained in 2024, 202 were apprehended in Podlasie[19]. Despite the increased number of Border Guards, Police and soldiers, as well as the sealing of the border, illegal immigrants are still arriving in Germany.

Based on statistical data, the authors of the article stated that in the years 2021-2024, the Border Guard detained/identified 4594 foreigners who crossed or attempted to cross the state border from Polish to Germany at the border with Germany. The largest group of detainees were migrants from the Middle East and Africa, citizens of: Syria (1234), Iraq (566), Afghanistan (467), Yemen (158), Iran (113), Eritrea (76) and Somalia (69). Detailed data of foreigners detained/disclosed by the Border Guard for crossing the state border against the law or attempting to cross the state border against the law from Polish to Germany are presented below in Table 2.

Table 2. Foreigners detained/revealed by the Border Guard for crossing the state border contrary to the law or attempting to cross the state border contrary to the law from Polish to Germany.

Citizenship	2021 r.	2022 r.	2023 r.	First half of the year 2024 r.	Sum
Afghanistan	42	85	179	161	467
Eritrea	1	3	15	58	76
Iraq	453	92	11	10	566
Iran	14	32	44	23	113
Yemen	47	42	50	19	158

[14] J. Kawa, *Introduction to the Issue of Illegal Markets – Economic Perspective*, [in:] *Illegal Markets: Origin, Scale of the Phenomenon and the Possibility of Counteracting*, (eds.) W. Plywaczewski, P. Chlebowicz, Olsztyn 2012, p. 33

[15] R. Mroczek, *The cross-border nature of the crime of trafficking in human beings. Criminal and Criminological Legal Issues*, Difin, Warsaw 2024, p. 317.

[16] P. Olbrycht, Security of *the Republic of Poland in the context of the situation on the Polish-Belarusian border in August-December 2021 – legal possibilities and actions taken*, Polityka i Społeczeństwo, 2(20) / 2022, p. 152.,

[17] A. Hołub, B. Tomaszewska-Hołub, *Refugees of the 21st Century. Space of threats – space of challenges*, Nowa Polityka Wschodnia 2022, No. 4 (35), p. 35.

[18] K. Szwed, *They smuggled people, and now they face up to 12 years in prison*, https://www.strazgraniczna.pl/pl/aktualnosci/10993,Przemycali-ludzi-a-teraz-grozi-im-nawet-12-lat-wiezienia.html?search=4416600, [accessed: 27.07.2024]

[19] *Human smuggling has slowed down. Migrants are less likely to manage to get through from Belarus,* https://www.rp.pl/przestepczosc/art40712881-przemyt-ludzi-wyhamowal-migrantom-rzadziej-udaje-sie-przedostac-od-strony-bialorusi, [accessed: 15.07.2024]

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Somalia	8	1	19	41	69
Syria	135	173	804	122	1234
Other Nationalities	434	381	545	550	
In total	**1134**	**809**	**1667**	**984**	**4594**

Source: In-house analysis based on Border Guard statistics for 2021, 2022, 2023 first half of 2024.

The above data are presented in Figure 1.

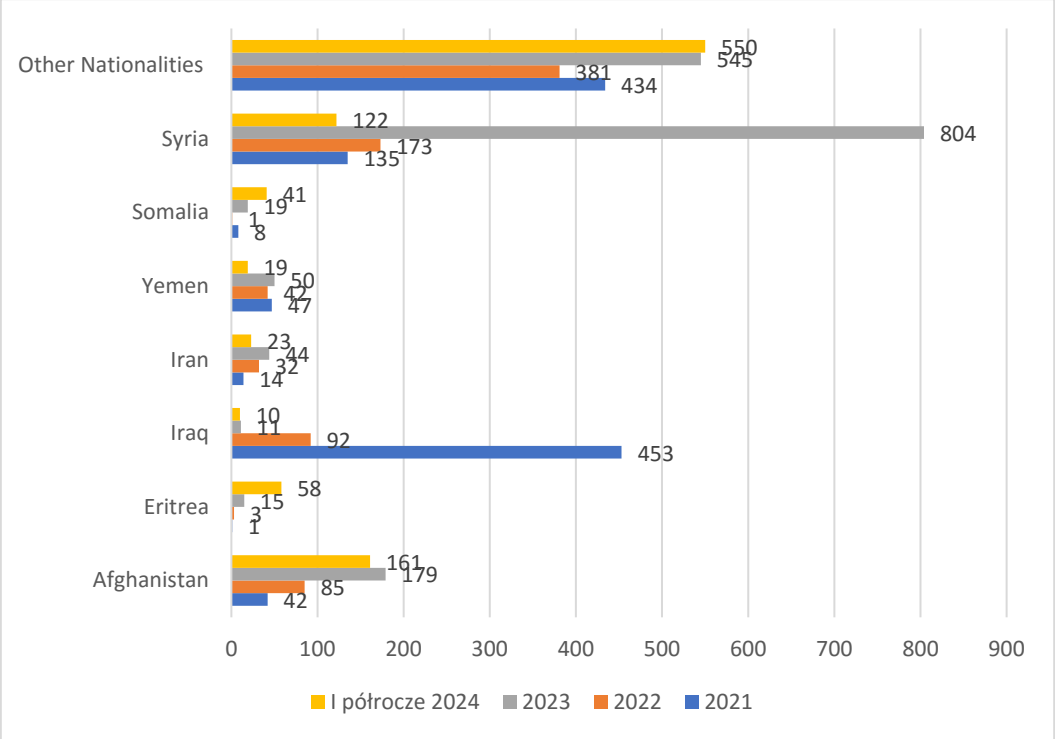

Figure 1. Foreigners detained/revealed by the Border Guard for crossing the state border contrary to the law or attempting to cross the state border contrary to the law from Polish to Germany.
Source: In-house analysis based on Border Guard statistics for 2021, 2022, 2023 first half of 2024.

The year 2023 brought another increase in the pressure of irregular migration, which largely reflected the increasing geopolitical turbulence in Europe's neighbourhood. In 2023, more than 442,000 illegal border crossings (IBCs)2 were detected at the EU's external borders: around 380,000 at entry and 62,000 at exit. The number of detected cases at entry increased by 17% compared to 2022, making 2023 the third consecutive year with a significant increase in the number of illegal entries[20]. Figure 2 shows the detections of irregular border crossings at the EU's external borders.

In connection with illegal migration, 16 October 2023 Germany has temporarily resumed border controls on its land borders with Austria, the Czech Republic, Poland and Switzerland According to the German authorities, the return of border controls is intended to reduce irregular migration, ensure the country's internal security, and protect against terrorism and cross-border crime at the internal borders of the Schengen Area. Due to the increase in migratory pressure, on 16 September 2024 not only border control with Austria, the Czech Republic, Poland and Switzerland was extended for another year, but border control at all German land borders with France, Luxembourg, the Netherlands, Belgium and Denmark was extended.

[20] *Annual Brief 2023*, Frontex.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

In conclusion, in the next few years, European border management will continue to face very difficult geopolitical conditions characterised by a potential increase in migration flows and cross-border crime.

Organized crime is one of the key elements of modern hybrid warfare, as its activities are often mixed with broadly understood state action to destabilize regions, influence political decisions and undermine the legal order. Criminal groups, taking advantage of loopholes in legal systems and institutions, pursue illegal interests that can be used to achieve geopolitical goals, such as destabilizing states, manipulating migration, or disrupting economies.

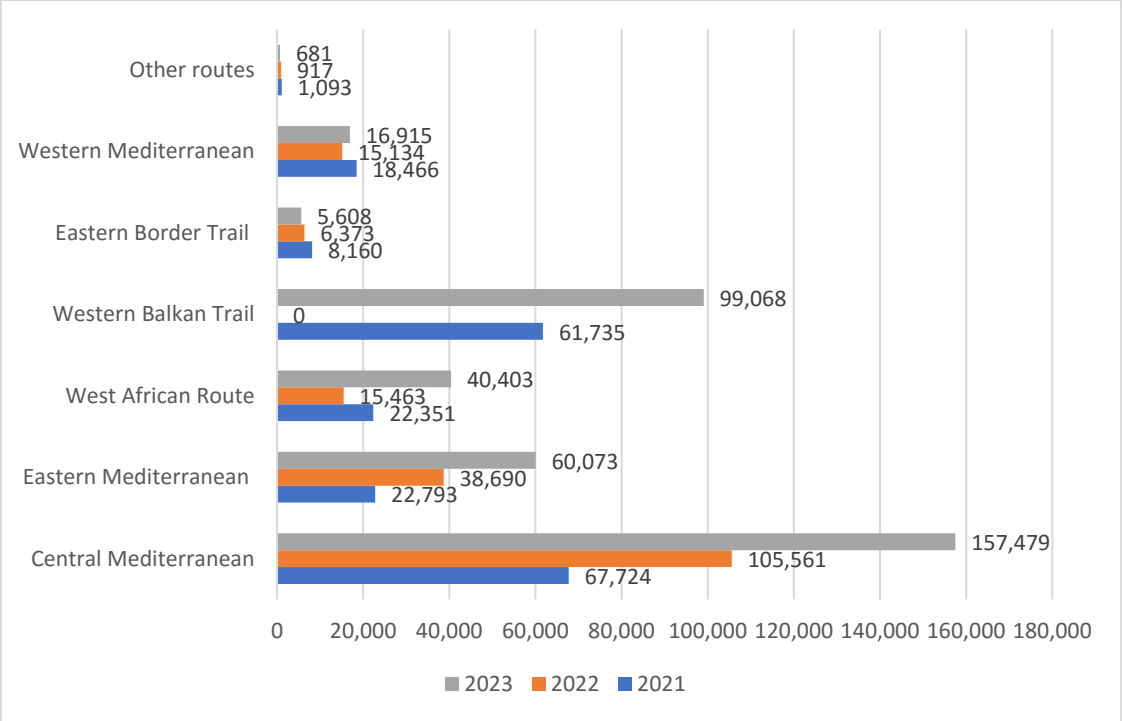

Figure 2. Detect irregular border crossings at the EU's external borders.
Źródło: Annual Brief 2023, Frontex.

Organised crime as a tool of hybrid warfare uses means such as human smuggling, drug trafficking, money laundering and disinformation to strengthen its influence and weaken the security of countries, including the European Union. Such activities, which are often difficult to attribute to a specific state actor, can lead to significant internal and external tensions, especially when criminal organizations cooperate with states that want to use these methods to exert pressure on other countries (e.g., migrant smuggling or the spread of extremist ideologies).

The conclusions from the analysis of this phenomenon show that in order to effectively counteract organized crime as an element of hybrid warfare, it is necessary not only to tighten the activities of law enforcement services, but also to develop preventive strategies that can prevent the use of such methods of destabilization by states with hostile intentions. Countering smuggling of human beings and other forms of hybrid crime requires stronger international cooperation, better intelligence sharing, and a more integrated approach to border protection and critical infrastructure.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

THE EUROPEAN UNION AND HYBRID THREATS

Countering hybrid threats is one of the main strategic challenges of the EU, which sets the directions for the development of the Union's capabilities in the field of international security[21]. The EU is stepping up its efforts to counter hybrid threats, which pose a contemporary challenge to international security. These threats include activities bordering on traditional forms of conflict, such as cyberattacks, disinformation, instrumentalization of migration or sabotage of critical infrastructure, as well as information manipulation to destabilize democratic processes.

One of the important elements of the EU's response was the establishment of new sanctions mechanisms against entities involved in hybrid activities, in particular in the context of Russia's aggressive actions. The sanctions include asset freezes and visa bans against individuals and entities that engage in activities such as information manipulation, cyber acts and violations of the rule of law. These measures are intended to prevent further destabilising campaigns and strengthen internal security Unii[22]. W maju 2024 roku UE ogłosiła powstanie Hybrid Rapid Response Teams (HRRTs). These teams, composed of experts from member states, are to support countries in countering hybrid threats by offering rapid support in crisis situations. The creation of the HRRT, announced in the EU Strategic Compass, is a response to the increased risk of cyberattacks and disinformation and a sign of solidarity among Member States in the face of new challenges[23].

An important step was also the adoption of the Cyber Resilience Act, which introduces requirements for the design of secure software and hardware, and the Cyber Solidarity Act, strengthening the capacity of Member States to respond to large-scale cyber incidents. These regulations respond to the increase in cyberattacks in recent years and aim to improve security coordination across the EU.

The EU is also working to counter radicalisation and disinformation by working with online platforms that are committed to swiftly removing extremist content, and by providing financial and organisational support to protect public spaces. These actions demonstrate the EU's comprehensive approach to hybrid threats, which takes into account both technological and societal aspects[24]. The EU underlines the multidimensionality of hybrid threats using coercive and subversive measures targeting critical vulnerabilities[25]. Hybrid threats range from cyberattacks on critical information systems, to disrupting critical services, to undermining public trust in government institutions and deepening social divisions[26].

In summary, the EU is developing multidimensional strategies and tools to counter hybrid threats, combining prevention, operational and sanctions measures. In the face of growing threats, such as cyber-attacks or information manipulation, united action by Member States is crucial to protect democratic values and the security of citizens.

---

[21] F. Bryjka, *Development of EU capabilities to counter hybrid threats*, no. 9, (117), 2022, p. 1.

[22] *Nowy reżim sankcji: Unia Europejska odpowiada na kampanie hybrydowe Rosji - Polska w Unii Europejskiej*, Portal Gov.pl, https://www.gov.pl/web/ue/nowy-rezim-sankcji-unia-europejska-odpowiada-na-kampanie-hybrydowe-rosji

[23] *Hybrid threats: Council paves way for deployment of rapid response teams - Consilium*, https://www.consilium.europa.eu/pl/press/press-releases/2024/05/21/hybrid-threats-council-paves-the-way-for-deploying-hybrid-rapid-response-teams/

[24] EU Cyber Resilience Act. Shaping Europe's digital future, https://digital-strategy.ec.europa.eu/pl/policies/cyber-resilience-act

[25] H. Wyrębek, Hybrid threats to the information security of the state, Polityka i Społeczeństwo, No. 1, 2023, p. 320.

[26] P. Szymański, NATO and the European Union in the Face of Hybrid Threats, "Centre for Eastern Studies", No. 328, 2020, p. 1.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

SUMMARY

To sum up, the migration crisis is one of the tools of modern hybrid warfare, used by states or groups with geopolitical interests to put pressure on the European Union. This phenomenon manifests itself primarily in the instrumentalization of migration by regimes that deliberately direct the waves of refugees to the EU borders to exacerbate the political and social crisis in the member states. Examples of such actions include the migration crisis on the Polish-Belarusian or Turko-Greek borders, which were aimed at weakening the EU's internal solidarity and influencing political decisions in Brussels. These actions highlight a new reality in security policy, where hybrid threats are intertwined with classic migration challenges.

The conclusions of the analysis indicate that the migration crisis as a tool of hybrid warfare not only threatens the stability of the EU's borders, but also requires the Union to take a faster and more integrated approach to crisis management, including at both the operational and legal levels. Increased cooperation with neighbouring countries, better securing of external borders and more effective fight against disinformation are key elements of strategies that can help mitigate the impact of such threats.

To sum up the above analysis, there is a need to further monitor the development of migration situations at the EU borders, as well as to implement new tools and procedures to respond in the event of an escalation of such crises. This requires an understanding of the evolving strategies of third countries and flexibility to respond to new ways of using migration for political purposes. In addition, further research is needed on the effectiveness of current defences and how to improve them to meet the challenges of today's hybrid threats.

In the face of the growing complexity of threats related to migration and hybrid warfare, it is also crucial to develop international analyses and cooperation with organizations that have experience in managing migration crises and ensuring security in regions with high geopolitical tension. Only such an integrated approach will allow us to effectively counteract the use of migration as a tool to destabilize the EU.

REFERENCES/BIBLIOGRAPHY:

1. *Annual Brief 2023*, Frontex.
2. Bryjka F., *Rozwój unijnych zdolności do zwalczania zagrożeń hybrydowych*, nr 9 (117), 2022.
3. Gruszczak A., *Kryzysy migracyjne w Europie po 2015 r.: zaściankowość w trzech odsłonach*, [w:] *Deinstytucjonalizacja polityk publicznych a wojna w Ukrainie i wyzwania migracyjne w Polsce*, (red.) Jasiecki K., Pacek M., wyd. Centrum Europejskie Uniwersytetu Warszawskiego, Warszawa 2023, pp. 229-249.
4. Hołub A., Tomaszewska-Hołub B., *Uchodźcy XXI wieku. Przestrzeń zagrożeń – przestrzeń wyzwań*, Nowa Polityka Wschodnia 2022, nr 4 (35), pp. 32-50.
5. Kawa J., *Wprowadzenie do problematyki nielegalnych rynków – perspektywa ekonomiczna*, [w:] *Nielegalne rynki: geneza, skala zjawiska oraz możliwość przeciwdziałani*a, (red.) Pływaczewski W., Chlebowicz P., Olsztyn 2012.
6. Konieczny M., Operacja *„Śluza" – kryzys uchodźczy związany z przerzutem nielegalnych migrantów przez polsko-białoruską granicę*, Roczniki Administracji i Prawa 2022, XX, z. 2, pp. 89-102.
7. Kukuła A., *Ochrona granicy państwowej przez siły zbrojne RP w warunkach nielegalnej migracji*, Zeszyty Naukowe Pro Publico Bono 2022, Nr 1 (1), s. 345-356.
8. Mroczek R., *Transgraniczny charakter przestępstwa handlu ludźmi. Zagadnienia prawnokarne i kryminologiczne*, Difin, Warszawa 2024.
9. Nitszke A., *Instrumentalizacja migracji proceduralizacja versus humanizacja polityki azylowej Unii Europejskiej*, Politeja Nr 1(88/1), 2024, pp. 239-251.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

10. *Nowy reżim sankcji: Unia Europejska odpowiada na kampanie hybrydowe Rosji - Polska w Unii Europejskiej,* Portal Gov.pl, https://www.gov.pl/web/ue/nowy-rezim-sankcji-unia-europejska-odpowiada-na-kampanie-hybrydowe-rosji
11. Olbrycht P., Bezpieczeństwo *Rzeczypospolitej Polskiej w kontekście sytuacji na granicy polsko-białoruskiej w okresie sierpień-grudzień 2021 roku – możliwości prawne i podjęte działania*, Polityka i Społeczeństwo, 2(20) / 2022, pp. 142-154
12. Orłowska-Czyż N., *Mińsk eskaluje zagrożenie na granicy białorusko-unijnej*, Analizy, Ośrodek Studiów Wschodnich, https://www.osw.waw.pl/pl/publikacje/analizy/2012-05-30/minsk-eskaluje-zagrozenie-nagranicy-bialorusko-unijnej, [dostęp: 17.08.2023].
13. Oskierko M., *Kryzys Migracyjny na polsko-białoruskiej granicy państwowej*, [w:] *Zagrożenia wschodniej flanki NATO w aspekcie bezpieczeństwa wewnętrznego obszarów przygranicznych*, (red.) Dachowicz D., Elak L., Ciekanowski Z., wyd. im. prof. Leszka J. Krzyżanowskiego Menedżerskiej Akademii Nauk Stosowanych w Warszawie, Chełm-Warszawa 2022, pp. 201-220.
14. *Przemyt ludzi wyhamował. Migrantom rzadziej udaje się przedostać od strony Białorusi*, https://www.rp.pl/przestepczosc/art40712881-przemyt-ludzi-wyhamowal-migrantom-rzadziej-udaje-sie-przedostac-od-strony-bialorusi.
15. Szwed K., *Przemycali ludzi, a teraz grozi im nawet 12 lat więzienia,* https://www.strazgraniczna.pl/pl/aktualnosci/10993,Przemycali-ludzi-a-teraz-grozi-im-nawet-12-lat-wiezienia.html?search=4416600.
16. Szymański P., *NATO i Unia Europejska wobec zagrożeń hybrydowych*, „Ośrodek Studiów Wschodnich", nr 328, 2020, pp. 1-7.
17. *Unijny akt dotyczący cyberodporności. Kształtowanie cyfrowej przyszłości Europy*, https://digital-strategy.ec.europa.eu/pl/policies/cyber-resilience-act
18. Usov P., *Militaryzacja kryzysu migracyjnego* [w:] *Granica dyktatora. Polska i Białoruś wobec kryzysu granicznego. Raport IV* (red.) Nowakowski J. M., Olędzka J., Rust M., Shevchenko O., Usov P., Wańczyk K., Papko A., Pukszto A., Uniwersytet Warszawski, Studium Europy Wschodniej, Warszawa 2021, pp. 27-37.
19. Wniosek. Rozporządzenie w sprawie sytuacji instrumentalizacji w obszarze migracji i azylu, Strasburg, 14 XII 2021 r., COM(2021) 890 final.
20. Woźniak R., Sowulewski D., *Formy przemytu, skala zjawiska i poziom ujawnień*, [w:] *Zwalczanie przemytu. Zbiór dobrych praktyk. Różne perspektywy – wspólny cel*, (red.) Pływaczewski E. W., Kowalewska-Borys E., Difin, Warszawa 2013.
21. Wyrębek H., *Zagrożenia hybrydowe bezpieczeństwa informacyjnego państwa*, „Polityka i Społeczeństwo", nr 1, 2023.
22. Wysocki K., *Wpływ zarządzania refleksyjnego na eskalację kryzysu migracyjnego na granicy Białorusi z Unią Europejską,* Cybersecurity and Cybercrime, 2024, Tom 1(3), pp. 1-24.
23. *Zagrożenia hybrydowe: Rada toruje drogę do rozmieszczenia zespołów szybkiego reagowania - Consilium*, https://www.consilium.europa.eu/pl/press/press-releases/2024/05/21/hybrid-threats-council-paves-the-way-for-deploying-hybrid-rapid-response-teams/

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Economic Diplomacy of Georgia and its strategic role in European Integration

DR. NICOLETA VASILCOVSCHI[1]
QINGDAO UNIVERSITY OF SCIENCE AND TECHNOLOGY, SHANDONG, CHINA
SINO-CANADIAN PROGRAM, SHANDONG, CHINA

Abstract: *Economic diplomacy is one of the main strategic tools, at internal and external level, that allows a country to strengthen its internal economic sectors, to build trade partnerships at regional and international level and to highlight the development of different businesses. The recent changes at the international level showed the need for countries to consider the reuse of their resources or the access to other resources worldwide and to also rethink the use of their Economic Diplomacy. With a large market, in expansion, the European Union promotes through its Economic Diplomacy the development of new economic sectors and new commercial treaties. As a future member of the European Union, Georgia managed to develop different sectors of its internal economic sector over the years, being also more active in the international markets.*

The goal of this paper is to present the main characteristics of economic diplomacy and to show how this area is nowadays a strategic instrument of European integration and economic cooperation. This research paper analyzes the development of Georgian Economic Diplomacy, analyzing different commercial treaties signed between Georgia and European Union. Here is also observed the strategic role of Georgian Economic Diplomacy for the development for Georgian economic growth.

The paper starts with a description of the main concepts, presenting the main characteristics of economic diplomacy, followed by a general description of the commercial treaties signed between Georgia and European Union. This research continues with a description of Georgian economic diplomacy analyzing its particularities for the last two decades. The last part of this research paper presents a general case study concerning the main particularities of Georgian Economic Diplomacy and its role for economic growth as a strategic tool for European Union Integration and Geoeconomic stability. Overall this paper offers a general analysis of economic diplomacy of Georgia and its role for geo-economic cooperation for integration of the country in European Union.

Key words: economic diplomacy, Georgia, European Union, commercial treaties, geoeconomy, economic growth.

INTRODUCTION

The main characteristics of economic diplomacy are analyzed here in order to show how this area can play nowadays the role of a strategic instrument of European integration and economic cooperation. This research paper analyzes the development of Georgian Economic Diplomacy, analyzing different commercial treaties signed between Georgia and European Union. Here is also observed the strategic role of Georgian Economic Diplomacy for the development for Georgian economic growth.

Georgia is a country located in Caucasus Mountains, in the Eastern side of the Black Sea,

[1] Dr. Nicoleta Vasilcovschi - Economics Lecturer, Visiting Lecturer - Qingdao University of Science and Technology, Shandong, China; Social Studies, Economics Lecturer, Sino-Canadian Program, Shandong, China, Economics Lecturer Collaborator with "Stefan Cel Mare" University, Suceava, Romania, email: nicoleta.vasilcovschi@usm.ro . Nicoleta Vasilcovschi holds a PhD in Economics and International Affairs with a Thesis about Economic Diplomacy and Globalization. For the last years, Nicole was a Visiting Lecturer at Qingdao University of Science and Technology, Shandong, China, collaborated with "Ştefan cel Mare" University of Suceava, Romania and taught Economics and Social Studies for an International Alberta Canadian Program in China. Nicole has published several books and articles in the field of international economic relations, as well as several books of poetry. Nicole is part of the Cygnus Suceava team, working as a volunteer for over two decades, and recently, she also collaborated with the InterCollege organization from Denmark, for which she coordinated a creative writing workshop as part of a project that aims to promote poetry among young Europeans. Appreciated for her teaching and researching activity, Nicole Vasilcovschi was awarded in 2020 in China, and in 2018 she received the "Merit of Bucovina" Distinction in Suceava, Romania.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

having Azerbaijan on the East-Southeast, Russia in Northeast, Armenia and Turkey in South and Black Sea on the west. Tbilisi is the capital city of the country, and three main ethnic groups live in different parts of Georgia. In fact, the Northwest areas are inhabited by the Abkhazia group, the Southwest area by the Ajaria group and the Northern areas by Ajaria group.

The main commercial partners of Georgia are European Union and its neighbors countries, Turkey and Russia.

The paper is organized as follow, it starts with a general description of the main concepts, describing the main characteristics of economic diplomacy, followed by a general description of the commercial treaties signed between Georgia and European Union. The research continues with a general description of Georgian economic diplomacy analyzing its particularities for the last two decades, and also observing its main activities at regional and international level. The last part of this research paper includes a general case study concerning the main particularities of Georgian Economic Diplomacy and shows its role for economic growth as a strategic tool for European Union Integration and Geoeconomic stability.

Methodology of research: descriptive research with quantitative and qualitative data based on primary and secondary sources of information.

The qualitative research for this paper is based on data and information that present different views concerning the economic diplomacy and the economic cooperation between Georgia and other countries. Our data sources are based on official government websites, reports, research papers and media articles. After the collection of data, we present a description and synthesis of our findings, as well as a description of economic diplomacy and its importance for economic cooperation.

Our quantitative research is based on official trade reports and research studies focused on economic growth, economic diplomacy and geoeconomics and geostrategies used by Georgia in its collaborations with European Union and with other countries. We particularly observe and evaluate in the last part of this paper the economic impact of the economic diplomacy strategies on Georgian economic growth and its impact for the integration in the European Union and for geoeconomic stability. Our data sources are based on academic papers and research projects, economic reports and governmental websites, showing the importance of the Association Agreement (AA) with European Union in comparison with other international agreements.

Overall this research includes a general analysis of economic diplomacy of Georgia and its role for geo-economic cooperation for integration of the country in European Union.

1. THE MAIN CHARACTERISTICS OF ECONOMIC DIPLOMACY AND THE MAIN COMMERCIAL TREATIES SIGNED BETWEEN GEORGIA AND EUROPEAN UNION

Economic diplomacy represents the main instrument a country has to apply its economic goals and in the area of economic development and to ensure a strong collaboration that countries have at the regional and international level.

Georgia is trying to modernize its economy and to promote a modern economic diplomacy. For instance, in 2022, a number of around 80 members of Georgian missions abroad and the country's Foreign Ministry have been retrained in economic diplomacy. This training took place under the guidance of the European Union, European Bank for Reconstruction and Development and the Foreign Ministry, being initiated by the Enterprise Georgia state campaign. The main goal of this training was to help continue to promote a sustainable economy and an effective impact in the field of foreign affairs with promoting and establishing a successful economic diplomacy that continues to attract investments and increase the level of exports [2].

[2] Staff of Georgian embassies retrained in economic diplomacy. 2022. https://agenda.ge/en/news/2022/2105#gsc.tab=0

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

European Union Commission granted the candidate status to Georgia on December 2023, this making Georgia one of the nine candidates to join European Union, alongside with Moldova, Ukraine, Turkey, Macedonia, Serbia, Montenegro, Bosnia and Herzegovina and Albania.

Over two decades ago Georgia joined the World Trade Organisation and a decade ago, in June 2014, European Union (EU) and Georgia signed an Association Agreement (AA) that started being in force since July 2016. With this agreement was introduced a preferential trade regime - the Deep and Comprehensive Free Trade Area (DCFTA). The main role of this regime is to increase market access between EU and Georgian, better implemented with matched regulations and collaborations.

Concerning bilateral agreements with third countries, Georgia joined 16 free trade agreements (FTAs), including agreements with the European Free Trade Association (EFTA),with Türkiye, and the United Kingdom. However, preferential agreements are in place with some countries with whom the EU does not have preferential agreements, included here are Armenia, Azerbaijan, China the Russian Federation, Turkmenistan and Uzbekistan. Also, in October 2023, Georgia signed a free trade agreement (FTA) with the United Arab Emirates which is currently subject to ratification by both sides. This FTA covers trade in goods as well as trade in services, sanitary and photo-sanitary measures, protection of intellectual property, trade remedies, customs and trade facilitation and others. In February 2024, negotiations on an Economic Partnership Agreement between Georgia and the Republic of Korea were also launched. In present, Georgia has 34 bilateral investment treaties in force with other countries, including with 16 Member States of EU, and also with the United Kingdom and Belarus. Georgia is also in the process of negotiations with Canada and the Republic of Korea on the Foreign Investment Promotion and Protection Agreements.[3]

According to recent researches, European Union remains the main trade partner of Georgia, 20.9% of the country's trade taking place with the EU, followed by 13.8 % of its trade with Turkey and by 11.1% with Russia. It was observed that in 2023, the EU trade with Georgia accounted for 0.1% of its total trade, with a turnover of around € 4.36 billion. In fact, the EU exports to Georgia amounted to €3.6 billion in 2023, an increase of 11.9% compared to 2022. The main export products from European Union into Georgia is represented by machinery and appliances, transport equipment and mineral products. The main imports from Georgia into EU include mineral products, chemical products, and textiles. However, it was also observed that in 2023 the EU imported from Georgia goods of the value of € 752 million, with imports decreasing by 27.5% compared with the previous year [4].

2. GEORGIAN ECONOMIC DIPLOMACY IN THE LAST TWO DECADES

This part of research includes a description of Georgian economic diplomacy analyzing its particularities at regional and international level.

Different studies on Georgian economic diplomacy show this area combined with cultural and public diplomacy and applied at regional level and at the international level, going from

[3] COMMISSION STAFF WORKING DOCUMENT, Georgia 2024 Report, 2024, Brussels p. 92.
[4] EU trade relations with Georgia. Facts, figures and latest developments.2024.
https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/georgia_en

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

collaborations with its neighbor countries to extended collaborations with other countries from European Union, Middle East and America.

Other studies confirm that the Georgian economic diplomacy is based on different roles and functions that relevant institutions follow organizing programs and strategic governmental activities in collaboration with different business associations and chambers of commerce. It is described that the main activities of economic diplomacy are included in the governmental strategies in the structure of diverse programs and projects. As an example included here is *Social and Economic Development Strategy – Georgia 2020* that includes a general governmental view towards the sector of economic diplomacy. Similar with the economic diplomacy of other countries, Georgian economic diplomacy here is portrayed as being opened to more international trade with the enlargement of areas of investments and of Foreign Direct Investment platforms. It's also shown that the Georgian government pays a special attention to encourage export industries, including a modernized logistics, transport, energy and agriculture with the introduction of new tech and the improvements of the present infrastructure [5].

When analyzing the public diplomacy development stages at the regional level through the Black Sea Economic Cooperation Organization were identified a few problems that came from having different economic strategies and interests between Russia and Georgia and between Russia and Ukraine, this influencing as well the increased tensions between Russia and Turkey. It was shown that different priorities in the foreign economic and political orientation of the participating countries also negatively impacted the development of relations [6].

Research on the role of cultural diplomacy of Georgia shows how this area can influence later its economy and implicitly its economic diplomacy, its collaborations that started in the Soviet Union and continued with collaborations with other countries including United Arab Emirates. The main tools of the Georgian cultural diplomacy are presented as being its adaptation and the friendship rhetoric to the international economic changes, with implications in different spheres from social and political to economic implications for Tbilisi and for enhancing an international cooperation as a central starting point for following the complex economic interests of the state of Georgia [7].

The changes of the world's economic system included a globalized system that involves a high degree of regional integration. It's considered that the economic spectrum should play an important role in significantly shaping the foreign policy. Therefore, a strong economic diplomacy for Georgia should involve a development on the long term of its market economy with the goal to join the European Union and to establish free trade relations with the EU, that can directly allow the country to continue to achieve its economic interests and to increase its economic growth [8].

There is not an organized Georgian department of economic diplomacy, but the Department of International Economic Relations applies the main goals of the Georgian economic diplomacy.

In order to facilitate the implementation of national, regional and international investment projects in Georgia and to achieve market access conditions for Georgian exports to foreign markets, the Georgian state needs to monitor the country's macroeconomic indicators and to offer access to transparent information concerning Georgian and international business environments.

---

[5] M.,Skhiereli. *Economic Diplomacy in Georgia: Existing Practice and Future Prospects.* (2019), PMC Research Center: Tbilisi

[6] Miheeva, N. M., et al. "Public diplomacy development stages through the black sea economic cooperation organization." *International Journal of Mechanical Engineering and Technology* 9.11 (2018): 1382-1391.

[7] S. Harris-Brandts and David Sichinava. "Architecture and friendship among nations: the shifting politics of cultural diplomacy in Tbilisi, Georgia." *International Journal of Heritage Studies* 27.12 (2021): 1213-1229.

[8] E. Eteria "Globalization and priorities of economic diplomacy of Georgia." *Проблемы и перспективы развития сотрудничества между странами Юго-Восточной Европы в рамках ЧЭС и ГУАМ* (2010): 337-339.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

The Department of International Economic Relations of the Ministry of Foreign Affairs of Georgia is a structural subdivision of the Ministry of Foreign Affairs, with its main task is to promote the goals of the economic diplomacy of Georgia, including the development of multilateral and regional economic relations.

By using information analysis, development of suggestions and recommendations on different issues of cooperation with foreign states and with international organizations. This Department makes use of diplomatic means to attract foreign investment capital and to use the suitable technical assistance. In its activities, this department follows Georgian Constitution and legislation, international agreements and the legislation under the guidance of the Georgian Ministry of Foreign Affairs.

Some of the main functions of this department include:

- coordination of international economic activities and promotion of cooperation between Georgia and international organizations in order to represent Georgia's international obligations;
- analysis of data and promotion of the development of multilateral and regional foreign-economic relations and developing proposals and recommendations on issues of cooperation with other states and international organizations;
- use of diplomatic means to search for and obtain relevant trade and economic information of potential trade partners, as well as to attract foreign investment capital and technical assistance in order to promote the realization and export of international, regional investment projects of state importance;
- coordination of bilateral intergovernmental economic commissions with different countries,
- preparation of proposals and recommendations concerning conclusion, execution, termination and suspension of economic international agreements with the established procedure,
- consultations for diplomatic representations of Georgia regarding the promotion of the development of multilateral and regional foreign-economic relations [9].

3. A CASE STUDY ON THE IMPACT OF GEORGIAN ECONOMIC DIPLOMACY ON ECONOMIC GROWTH AND ITS STRATEGIC ROLE FOR THE EUROPEAN UNION INTEGRATION AND FOR PROMOTING A GEO-ECONOMIC STABILITY

In September 2024, Georgia's real economy activity grew 8.3 percent and around 6400 new enterprises were registered. Georgia's external trade decreased, going to 17 % in September 2024 from 30 % in August. However it was observed that the exports of cars improved by 43.9 %, while exports of wine fell 25.9 %.[10]

Georgian economic growth is impacted by one particular aspect of tariff policies of Georgia that is one of the most liberal tariff policies in the world with technical regulation. In fact, from 2006 tariffs on imports decreased from 16% to 3% tariff rate and the tariffs on imports were eliminated approximately by 85% on goods, and also there are seasonal tariffs. It was also observed that there are no duties on export, moreover, export form Georgia is free from Value Added Tax (VAT), based on the Tax Code of Georgia, VAT and excise duty are equal for local and imported goods. Another particularity of Georgia's reforms includes the opening of its markets for foreign direct investments

[9] Department of International Economic Relations, 2024. https://mfa.gov.ge/en/structure/181682-saertashoriso-ekonomikur-urtiertobata-departamenti

[10] Dolidze, M, Chemutai, V. Georgia Monthly Economic Update, November 2024, World Bank Group.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

with unconditional mutual recognition of the technical standards from all members of *Organisation for Economic Cooperation and Development* (OECD) and the EU member states [11].

The geostrategic role of Georgian economic diplomacy for European Union integration and for a geoeconomic stability is more and more vital in a global world that goes through different ideological, political and socio-economic changes.

In the present context of internal struggle, Georgia should continue to follow its steps for being a member state of the European Union. In fact, in the recent years in order to establish a modern geoeconomic environment for candidates like Georgia, European Union developed new programs under 2014-2020 European *Neighbourhood Instrument,* offering support in order to improve socio-economic development and different reforms at the level of public administration. For the last decade, Georgia has extended its participation in different EU. Georgia is a member of Horizon Europe, Creative Europe, EU4Youth, the Fiscalis Programme and also the transnational cooperation through the Interreg program *Black Sea Bassin* [12].

Concerning the strategic role of Georgian economic diplomacy for European integration and for promoting a geoeconomic stability in the area, we observed the bilateral allocation for Georgia for the period 2021- 2024 that included around EUR 340 million under the project the *Neighbourhood, Development and International Cooperation Instrument* - Global Europe 2021- 2027 (NDCI- GE). This bilateral cooperation is mandatory because it includes cultural and educational support, with strong financial and technical support as well. Through *The Eastern Partnership Economic and Investment Plan* (EIP), and also in cooperation with European financial institutions, the EU aims to offer Georgia around EUR 3.9 billion in public and private investments. The EIP comes together with a Partnership based on Recovery, Resilience and Reform: post-2020 Eastern Partnership based on the priorities established in 2021 during the Eastern Partnership Summit. This includes more cooperation at the Black sea with improvements for the sectors of environment and energy.

CONCLUSIONS

In summary this paper offers a general analysis of economic diplomacy of Georgia and its strategic role for integration in the European Union, for establishing a sustainable economic growth and for promoting a long-term geoeconomic cooperation.

The economic diplomacy plays a central role for the technological advancements of Georgia and for a sustainable development of its projects and the improvement of its socioeconomic platform. The strategic importance of this area is based on its leading to economic cooperation at regional and international level, helping the country not just to attract new investments but to also promote its key industries abroad.

Representing the country's main economic interests with the wider goal of attracting funds and geostrategic trade partners, Georgian economic diplomacy plays a central role concerning the involvement in international affairs. Its role for continuing negotiations for integration in the European Union can also give a strong opportunity for the country to improve its institutions and to use the technical and financial support from the European Union in order to increase its presence in the international market and to establish a long-term partnership with other countries and an efficient partnership with the European Union.

[11] Natela Malishava. *Trade Diplomacy: Georgian-EU Economic Relations–A Case Study*. Diss. University of East Anglia, 2014, p.43.

[12] COMMISSION STAFF WORKING DOCUMENT, Georgia 2024 Report, 2024, Brussels
Department of International Economic Relations, 2024. https://mfa.gov.ge/en/structure/181682-saertashoriso-ekonomikur-urtiertobata-departamenti, p. 96.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

A modern and strategic Georgian economic diplomacy can increase the country's chances to promote its economic interests abroad and to benefit from a win-win cooperation with European Union and its business parteners.

REFERENCES/BIBLIOGRAPHY:

1. Costea, Maria, Costea, Simion (ISI) "Ukraine between EU and Eurasian Regional Project in 2013", p.113-131, in Transylvanian Review (Center for Transylvanian Studies and the Romanian Academy), Vol. XXIV, Supplement No. 1, 2015.
2. Costea, Maria, Costea Simion (ISI), „The Management of the EU's Eastern Partnership Project: A New Stage in the European Neighbourhood Policy", p.409-433, in Transylvanian Review (Center for Transylvanian Studies and the Romanian Academy), Vol. XX, Supplement No. 4, 2011.
3. Costea, Simion (ISI), „The Culture of the European Accession Negotiations", p.50-56, in vol. Globalization and intercultural dialogue: multidisciplinary perspectives Tîrgu-Mureş, Arhipelag XXI, 2014, 2014.
4. Costea, Simion, "EU-Ukraine Relations and the Eastern Partnership: Challenges, Progress and Potential", p.259-276, in European Foreign Affairs Review (College of Europe BRUGGE and University of Montreal), volume 16, issue 2, 2011.Dolidze, M, Chemutai, V. Georgia Monthly Economic Update, November 2024, World Bank Group.
5. Eteria, E. "Globalization and priorities of economic diplomacy of Georgia." *Проблемы и перспективы развития сотрудничества между странами Юго-Восточной Европы в рамках ЧЭС и ГУАМ* (2010): 337-339.
6. Harris-Brandts, Suzanne, and David Sichinava. "Architecture and friendship among nations: the shifting politics of cultural diplomacy in Tbilisi, Georgia." *International Journal of Heritage Studies* 27.12 (2021): 1213-1229.
7. Malishava, Natela. *Trade Diplomacy: Georgian-EU Economic Relations–A Case Study*. Diss. University of East Anglia, 2014.
8. Miheeva, N. M., et al. "Public diplomacy development stages through the black sea economic cooperation organization." *International Journal of Mechanical Engineering and Technology* 9.11 (2018): 1382-1391.
9. Natea, Mihaela Daciana, Costea, Maria, Costea, Simion, *European Security and Multicultural Societies, Dealing with a Russian Empire Revival*, L'Harmattan, Paris France, 2024
10. Natea, Mihaela Daciana, *„Fabricating truth: from a hybrid war to political fake news. Study case on Romanian illiberal parties' discourse in the context of the Ukrainian war",* in *Civil Szemle,* Special Issues V/2023, pp. 155
11. Skhiereli, M. *Economic Diplomacy in Georgia: Existing Practice and Future Prospects.* (2019), PMC Research Center: Tbilisi
12. *Commission Staff Working Documen*t, Georgia 2024 Report, 2024, Brussels.
13. *Department of International Economic Relations,* 2024. https://mfa.gov.ge/en/structure/181682-saertashoriso-ekonomikur-urtiertobata-departamenti.
14. EU trade relations with Georgia. Facts, figures and latest developments. (2024) https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/georgia_en
15. Table Trade in goods, € billions https://webtools.europa.eu/rest/charts/export/html/
16. Staff of Georgian embassies retrained in economic diplomacy. 2022. https://agenda.ge/en/news/2022/2105#gsc.tab=0

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Section 2
Legal Reforms and Judicial Adaptation for EU Accession. Focus on Georgia

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

The Role of the Constitutional Court of Georgia in Aligning Criminal Procedure Legislation with European Standards

DR. IRINE BOKHASHVILI[1]
CAUCASUS UNIVERSITY (GEORGIA)

Abstract: *The obligation for Georgia to integrate into European and Euro-Atlantic structures is imposed on constitutional bodies within their competences, according to Article 78 of the Constitution of Georgia.* ***The Constitutional Court of Georgia plays a significant role in refining the criminal procedural legislation and aligning it with European standards. This paper focuses on this area, highlighting the key factors that make the Constitutional Court's work particularly effective in interpreting individual provisions of the Criminal Procedure Code of Georgia in line with European standards, compared to other methods of improvement. The trends characteristic of the process of decision-making regarding the constitutionality of various provisions of the Criminal Procedure Code of Georgia by the Constitutional Court have been analyzed and assessed, including the relevance of the issues considered, the dynamics of intensity, and the effective reflection of the judgments on the practice of common courts.***
Keywords: *Constitutional Court; judgment; normative content; constitutionality; Criminal Procedure Code; European standard.*

INTRODUCTION

One of the main preconditions for integration into the European family is a well-functioning justice system that operates according to European standards, which creates a solid guarantee for the effective realization of the essential provisions stipulated by the European Convention on Human Rights[2] (hereinafter referred to as the European Convention).

In the process of adjusting the Criminal Procedure Code[3] (hereinafter referred to as CPC) in accordance with European standards, a significant place is held by the amendments introduced based on judgments of the Constitutional Court of Georgia. The Constitutional Court serves as a kind of bridge in the establishment of European standards within the CPC.

The strengthening of the standards of the European Convention in the CPC has occurred periodically since its adoption, and this trend is increasing. Since the entry into force of the CPC on October 1, 2010, hundreds of amendments have been made through both legislative and constitutional control: from 2010 to the present, 139 laws have been adopted by the Parliament of Georgia, based on which amendments/additions have been introduced to various articles of the CPC; from 2014 to the present, the Constitutional Court of Georgia has made 25 judgments, resulting in 35 amendments to the CPC. The involvement of the Constitutional Court in the process of establishing European standards in the CPC has been characterized by a stable pace. Over the past 10 years, the Constitutional Court has contributed annually to this direction.[4]

The main goal of this work is to highlight the role of the Constitutional Court in the process of integrating European standards into the CPC.[5] Taking into consideration the format of the article, we

[1] Doctor of Law, affiliated professor at Caucasus University, associate professor at East European University;
To the memory of my former supervisor, Professor Apollon Paliashvili, dedicated to his 100th Anniversary!
[2] European Convention on Human Rights, European Convention on Human Rights, Accessed: 29.11.2024;
[3] Criminal Procedure Code of Georgia, CRIMINAL PROCEDURE CODE OF GEORGIA | სსიპ "საქართველოს საკანონმდებლო მაცნე" (matsne.gov.ge), Accessed: 29.11.2024;
[4] The amplitude of the judgments made annually ranges from 1 to 4. For example, in 2015, 4 decisions of the Constitutional Court served as the basis for amendments to the CPC; in 2019 and 2023, there was one judgment each; in 2014, 2016, 2017, 2020 and 2024 there were two judgments each; and in 2018, 2021, and 2022, there were three judgments each;
[5] The aim of the work is not to evaluate the issue from the perspective of constitutional law. The paper analyzes the role of the Constitutional Court specifically in the interests of the criminal procedure. For a direct discussion of the issue within the

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

have tried, on the one hand, to create an overall picture around the researched issue, addressing all the judgments made by the Constitutional Court from various perspectives, and on the other hand, to select several significant judgments of the Constitutional Court for analysis, which, among other issues, relate to a probable cause (as the initial standard of proof) and the current issues of its application at various stages of the criminal procedure (prosecution; investigative actions; preventive measures), which have contributed to the refinement of various procedural institutions in criminal justice and the implementation of updated judicial practices in accordance with European standards.

1. THE CONSTITUTIONAL COURT OF GEORGIA AS AN EFFECTIVE SOURCE OF IMPLEMENTING EUROPEAN STANDARDS IN THE CPC

The obligation for Georgia to integrate into European and Euro-Atlantic structures is imposed on constitutional bodies within their competences, according to Article 78 of the Constitution of Georgia (hereinafter, the Constitution).[6] The Constitutional Court of Georgia is a judicial body of constitutional review which ensures the supremacy of the Constitution and the protection of constitutional human rights and freedoms in a legal state. [7] According to paragraph 3 of Article 26 of the Organic Law on the Constitutional Court of Georgia (the version of December 23, 2022): "When determining a disputed matter, the Constitutional Court may also take into consideration the interpretations provided in the judgments of the European Court of Human Rights on similar legal issues."

The ratification of the European Convention on Human Rights by Georgia took place in 1998, entering into force on May 20, 1999, thereby obligating Georgia to ensure the rights and freedoms protected by the Convention. In the hierarchy of sources of criminal procedure, the European Convention holds superior legal power compared to the Criminal Procedure Code (Article 4, paragraph 5 of the Constitution). When interpreting unclear provisions in the Criminal Procedure Code and/or addressing defects, the approach must align with the European Convention and the standards established by the European Court. At the same time, the European Court is not part of the state's internal judicial system; it does not serve as a fourth-instance court and operates in accordance with the principles of subsidiarity and the margins of appreciation.[8]

The law on amendments to the CPC, passed by the legislative body of Georgia, the Parliament, contains provisions that directly reflect European standards for conducting criminal proceedings. The 16th Protocol to the European Convention came into force on August 1, 2018, which activated the amendment made to the CPC by the law of May 29, 2015, adding Article 304[1]: applying for an advisory opinion of the European Court of Human Rights. According to the law on amendments to the CPC dated October 18, 2022, it was established that a court's ruling/judgment/appeal may reference the norms of the European Convention and its additional protocols, as well as the case law of the European Court of Human Rights on a similar legal issue that the court has relied on. Additionally, the new wording of sub-paragraph "f" of paragraph 3 of Article 303 of the CPC

framework of the Constitutional Court's powers, see, for example: Paata Javakhishvili, "Constitutional Court of Georgia and *de facto* Real Control", in *Journal of Law,* N1, 2017, p.264-276, View of No. 1 (2017): Journal of Law, Accessed: 29.11.2024.

[6] Constitution of Georgia, CONSTITUTION OF GEORGIA | სსიპ "საქართველოს საკანონმდებლო მაცნე", Accessed: 29.11.2024;

[7] Organic Law of Georgia on the Constitutional Court of Georgia, Organic Law of Georgia on the Constitutional Court of Georgia | სსიპ "საქართველოს საკანონმდებლო მაცნე" (matsne.gov.ge), Article 1, Accessed: 29.11.2024;

[8] Jeremy McBride, Levan Meskhoradze, *Guide for Lawyers on the Application of Human Rights Standards in Criminal Proceedings*, 2021, pp. 4-6. (in Georgian), 1680a4516c (coe.int), Accessed: 29.11.2024; Jeremy McBride, *The Doctrines and Methodology of Interpretation of the European Convention on Human Rights by the European Court of Human Rights*, 2021, pp.6,7,31. 1680a20aee (coe.int), Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

introduced a criterion for the admissibility of cassation appeals: a cassation appeal is permissible if "the decision of a court of appeal contradicts the Convention for the Protection of Human Rights and Fundamental Freedoms and/or its Additional Protocol(s) and the case law of the European Court of Human Rights on similar legal issues."

According to established practice, judges of common courts and parties often reference precedents from the European Court in their decisions and motions/appeals. However, this is considered and remains within the specific criminal case at hand and does not significantly impact the overall picture of court practice, except in certain cases where the precedential rulings are made (for example, rulings by the investigation panel of the court of appeals that established judicial practice regarding reviewing the admissibility of evidence based on the judge's own initiative). It is particularly important to note the significance of important interpretations made by the Supreme Court of Georgia in the process of establishing uniform judicial practice, which is the subject of separate study. The role of common courts is more important in another respect. Common courts serve as the main link in the administration of justice, directly identifying problems. If an issue exceeds the competence of the common courts, the court suspends the hearing of the specific case and refers the issue to the Constitutional Court through a constitutional reference, thereby initiating the consideration/resolution of the procedural issue in the context of constitutional law through the Constitutional Court as an effective resource.[9]

The effective implementation of European standards in the CPC through the Constitutional Court of Georgia is determined by several factors: the Constitutional Court is an internal resource of the state that is not part of the system of common courts[10]; in discussing and adopting judgments on issues, the Constitutional Court acts in accordance with the spirit of the European Convention and the standards established by the European Court; when a judgment is adopted declaring a disputed norm unconstitutional, this judgment is reflected as an amendment in the CPC, and the reasoning part of the judgment serves as a guideline in the development of judicial practice on similar issues. Such outcomes can also be observed in cases where the Constitutional Court does not establish the unconstitutionality of a disputed norm through its judicial act (therefore, the act is not reflected in the CPC), but the discussion provided in the reasoning part of the document has a "non-written" effect in judicial practice. In this regard, we would highlight **the Judgment of the Constitutional Court of Georgia No. 3/2/1478 dated December 28, 2021**[11], which noted that the unconstitutionality of certain disputed norms was not confirmed overall; however, it provided very important clarifications regarding the right of the accused to remain silent and the right of giving (a false) testimony as a witness.

It is particularly important to note the "dual" effect of judgments established by the Constitutional Court in certain cases, where the Court identifies and points out a defect in the CPC and calls on the legislative body to initiate relevant amendments. For example, in its **judgment No. 1/4/809 dated December 14, 2018**,[12] the Constitutional Court declared paragraph 10 of Article 120 of the CPC unconstitutional (regarding the right of the prosecution to initial examination of objects, which have been obtained at the request of the defense). The invalidation of this norm was postponed until June 30, 2019, to provide the respondent (the Parliament) with a reasonable opportunity to align criminal legislation with the judgment and rectify the defect. Based on this, a draft law on

[9] Organic Law of Georgia on the Constitutional Court of Georgia, Organic Law of Georgia on the Constitutional Court of Georgia | სსიპ "საქართველოს საკანონმდებლო მაცნე" (matsne.gov.ge), Article 19, paragraph 2, Accessed: 29.11.2024;

[10] Constitution of Georgia, ; CONSTITUTION OF GEORGIA | სსიპ "საქართველოს საკანონმდებლო მაცნე", Article 59, paragraph 1, Accessed: 29.11.2024;

[11] სასამართლო აქტები (constcourt.ge), Accessed: 29.11.2024;

[12] https://www.constcourt.ge/en/judicial-acts?legal=1172, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

amendments to the CPC was submitted on June 12, 2019, which explicitly indicated the Judgment of the Constitutional Court as the aim and necessity for adopting the norm. The law on amendments to the CPC was adopted on October 17, 2019.[13]

2. Following the amendments made to the Criminal Procedure Code of Georgia by the Judgments of the Constitutional Court of Georgia

The subject matter scope of the judgments made by the Constitutional Court, both during the initial phase and in more contemporary periods of the implementation of the CPC, is quite broad and consistently maintains the relevance of the issue.

2.1. The judgment of the Constitutional Court of Georgia on May 23, 2014, No. 3/1/574 (Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia)[14] was the first precedent through which an amendment was made to the existing CPC based on the Constitutional Court's decision.

On the constitutional complaint of February 11, 2014 (N574), Giorgi Ugulava challenged the constitutionality of Article 159 and the second sentence of the paragraph 1 of Article 160 of the CPC. Among other circumstances, the claimant argued that the second sentence of the paragraph 1 of Article 160 of the CPC, which stated: "The court may review the motion without an oral hearing," represented a restrictive norm in relation to the accused. In the claimant's view, this provision violated the right to access a fair trial, which is guaranteed not only by the Constitution but also by Article 6 of the ***European Convention on Human Rights.*** The claimant supported his position by referencing precedents from the European Court of Human Rights.

During the consideration of the case by the Constitutional Court, the experts invited to the proceedings emphasized European standards when presenting their opinions. The Constitutional Court itself, in deliberating the issue, relied on the ***European Charter of Local Self-Government*** and also discussed the European Convention's approaches regarding oral hearings and the presence of the person. The Court paid particular attention to European case law regarding the interpretation of the right to defense. As a result, according to the ruling part of the judgment, the contested provisions were declared unconstitutional: *"***Following acts shall be found unconstitutional: a)***...that normative part of Article 159 of the Criminal Procedure Code of Georgia which provides for dismissal from the office (workplace) of the officials of local self-government elected as a result of universal, equal and direct elections through secret ballot; b) second sentence of section 1 of the Article 160 of the Criminal Procedure Code of Georgia with respect to paragraphs 1 and 3 of Article 42 of the Constitution of Georgia."*

[13] Additionally, in its **judgment No. 1/4/557, 571.576 dated November 13, 2014 ,** JUDICIAL ACTS (constcourt.ge), Accessed: 29.11.2024**,** the Constitutional Court of Georgia declared unconstitutional the normative content of paragraph 3 of Article 329 of the CPC, which prohibited the application of the maximum 9 month pretrial detention term before the preliminary hearing for criminal prosecution cases that had begun before the enactment of this Code. However, considering the interests of objective investigation and fair justice, the Court postponed execution of the decision until May 1, 2015, to allow the relevant authorities time to adopt additional legislative regulations. On April 30, 2015, amendments were made to the CPC, adding paragraph 3^1 to Article 329. According to the explanatory note of the draft law, the procedural legislation was aligned with the judgment of the Constitutional Court and simultaneously established a reasonable time frame for a thorough investigation. In discussing the importance of effective investigation, the Constitutional Court referenced this decision in its **judgment No. 1/4/1330 dated September 23, 2021**, სასამართლო აქტები (constcourt.ge), Accessed: 29.11.2024, in which it declared certain normative content of sub-paragraph "a" of paragraph 6 of Article 33 of the CPC unconstitutional. This decision addressed the restriction of the prosecutor's rights regarding investigative jurisdiction, taking into account the principle of effective investigation.

[14] decisions_2014_I_eng.pdf, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

This judgment was later cited multiple times by the Constitutional Court. In **the judgment No. 2/2/1428 on July 15, 2021**[15], the Constitutional Court relied on this previous judgment, playing a significant role in the reviewing judgments due to newly revealed circumstances under the CPC.[16] The Court reinforced the rights guaranteed under Article 6 (fair trial) and Article 13 (effective remedy) of the European Convention. Following the adoption of the judgment, the developed judicial practice has shown that the amendments introduced did not lead to an overload of cases or significant delays in proceedings, thereby not hindering the proper administration of justice.

Both of the above-mentioned judgments were of decisive importance in **the judgment of the Constitutional Court of Georgia of April 13, 2022, No. 2/2/1506**.[17] According to the ruling part of the judgment: The words 'the motion shall be reviewed without an oral hearing' and 'the decision made may not be appealed' in the second sentence of the paragraph 1of Article 180 of the CPC were declared unconstitutional in relation to the paragraph 1 of Article 31 of the Constitution of Georgia. This ruling undeniably refined the relevant provision of the CPC, especially in terms of ensuring the effective remedy and fair trial rights guaranteed by the European Convention.

2.2. The judgment of the Constitutional Court of Georgia, dated November 20, 2024 No. 1/4/1300 (Giorgi Gulaberidze and Badri Shushanidze v. the Parliament of Georgia)[18]

On March 14, 2018, Giorgi Gulaberidze and Badri Shushanidze filed a constitutional complaint (No.1300) with the Constitutional Court of Georgia. On October 19, 2018, the court partially accepted the constitutional complaint for consideration on merits under the recording notice No. 1/6/1300, specifically regarding the constitutionality of Article 184 of the CPC in relation to paragraph 1 of Article 42 of the Constitution of Georgia. An Amicus Curiae opinion was presented in the case, authored by the Public Defender of Georgia.

In the reasoning part of its decision, the Constitutional Court extensively discussed the right to a fair trial as a composite of various components and emphasized the special role of the right to an oral hearing, its direct connection with the judge's direct examination of evidence, the formation of their inner conviction, and ultimately, the rendering of a fair decision. **According to the ruling part of the Constitutional Court's decision, the normative content of Article 184 of the CPC (as in force until June 29, 2021) was declared unconstitutional. Specifically, it was deemed unconstitutional in cases where the substitute judge, who had not been appointed at the stage of transferring the case to the judge who would hear it, was deprived of the opportunity to anew hear/examine the case or specific evidence when: a) the evaluation of the reliability of evidences which had been examined before the judge's involvement in the case, required his/her direct, personal participation in the hearing; and b) there was a need to clarify a particular issue/evidence, and the substitute judge could not fully evaluate the evidence examined before his/her involvement through reviewing the case materials.**

This is the latest judgment on the basis of which the CPC was amended. However, several months prior to this decision, the Constitutional Court also deliberated on the right of the defendant

[15] https://www.constcourt.ge/ka/judicial-acts?legal=11826, Accessed: 29.11.2024;

[16] The Constitutional Court has also ruled on other problematic issues related to the proceedings in higher courts. Based on **the judgment of September 29, 2015, No. 3/1/608, 609**, the Constitutional Court declared unconstitutional the normative content of the paragraph 4 of Article 306 of the CPC, which excluded the possibility for the Supreme Court of Georgia to rule beyond the scope of a cassation appeal and to release a person from responsibility in cases where a law enacted after the commission of an act decriminalizes the offense. Additionally, the Constitutional Court declared unconstitutional the normative content of the "g" subparagraph of Article 297 of the CPC, which excluded the appellate court's ability to rule beyond the scope of an appeal in cases when there is double jeopardy for the same crimes. https://www.constcourt.ge/en/judicial-acts?legal=744, Accessed: 29.11.2024. See also the **judgment of the Constitutional Court of Georgia of April 13, 2016, No. 3/1/633, 634.** https://www.constcourt.ge/en/judicial-acts?legal=1105, Accessed: 29.11.2024;

[17] https://www.constcourt.ge/ka/judicial-acts?legal=13439, Accessed: 29.11.2024;

[18] https://constcourt.ge/ka/judicial-acts?legal=17416, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

to participate in a hearing, as part of the right to a fair trial in **the judgment of the Constitutional Court of Georgia of July 12, 2024, No. 3/4/1543**[19] (The Constitutional Submission of Telavi District Court on the constitutionality of paragraph 3 of Article 34 of the Criminal Code of Georgia and paragraph 3 of Article 191 of the Criminal Procedure Code of Georgia). The author of the submissions was relying on arguments supported by European Court's case law. The Constitutional Court placed particular emphasis on assessing the compatibility of convicting "procedurally disabled" accused and issuing a judgment of conviction in the absence ("in absentia") of the accused, with the right to a fair trial. According to the ruling part of the decision: **the paragraph 3 of Article 191 of the CPC was declared unconstitutional in relation to the paragraph 1, the first and second sentences of the paragraph 3, and the paragraph 4 of Article 31 of the Constitution. The invalidation of the contested norm was postponed until December 1, 2025**.

It is clear that in the cases examined by the Constitutional Court, important judgments have been made regarding the essential procedural rights of the main participant in the criminal process, the accused, which at the same time represent fundamental principles protected by the European Convention and remain constantly relevant. Simultaneously, the Constitutional Court has also made significant contributions in strengthening the victim's rights guarantees to the adversarial criminal procedure. In this regard, the Constitutional Court has made several important decisions: **the judgment No. 2/12/1229, 1242, 1247, 1299 of December 14, 2018,**[20] which corrected the defect in the CPC related to the unjust differentiation (discrimination) of victims, based on the category of crime, and declared certain provisions of the CPC unconstitutional; **the judgment No. 1/3/1312 of December 18, 2020,**[21] which strengthened the guarantees for the victim in the CPC concerning accessibility to information about the victim himself/herself (despite legitimate interests of the investigation); and **the judgment No. 1/5/1355, 1389 of July 27, 2023,**[22] which established guarantees in the CPC in line with European standards regarding equality and accessibility to the court in relation to victims.

The paper below analyzes the judgments of the Constitutional Court, which, among other issues, concern the first standard of proof, the initial stage of criminal prosecution – probable cause – and its application in various aspects.

2.3. The judgment of the Constitutional Court of Georgia, dated January 22, 2015 No. 1/1/548 (Citizen of Georgia Zurab Mikadze v. the Parliament of Georgia)[23]

The Constitutional Court of Georgia, by its recording notice No. 1/4/548 dated June 28, 2013, accepted for consideration on merits the constitutional claim N548 dated December 21, 2012. The subject of the dispute was the constitutionality of the paragraph 2 of Article 13, the paragraph 3 of Article 76, and the paragraph 1 of Article 169 of the CPC in relation to the paragraph 3 of Article 40 of the Constitution (as amended – the paragraph 7 of Article 31). The disputed norms concerned the standards for recognizing a person as an accused and the grounds for convicting judgments, as well as the criteria for the admissibility of indirect testimony (hearsay).

In the part concerning the compliance of Article 76 of the CPC with the Constitution, the court terminated the proceedings due to amendments made to the CPC. As for the evidentiary standards provided by the paragraph 2 of Article 13 and the paragraph 1 of Article 169 of the CPC (whereby indirect testimony, as provided in Article 76, could be considered one of the valid grounds for bringing charges or for recognizing a person as guilty), and the compatibility of these norms with the Constitution, the court examined the role of evidence as a vital means in criminal proceedings.

[19] https://www.constcourt.ge/ka/judicial-acts?legal=16658, Accessed: 29.11.2024;
[20] https://www.constcourt.ge/en/judicial-acts?legal=1843, Accessed: 29.11.2024;
[21] https://www.constcourt.ge/ka/judicial-acts?legal=10395, Accessed: 29.11.2024;
[22] https://www.constcourt.ge/ka/judicial-acts?legal=15638, Accessed: 29.11.2024;
[23] https://www.constcourt.ge/en/judicial-acts?legal=975, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

In analyzing the substance of the constitutional standard of trustworthiness of the evidence, the court assessed the evidentiary value of hearsay as provided in Article 76 of the CPC (its "direct" or "indirect" character in relation to the fact of the crime)[24] and emphasized the necessity of its thorough scrutiny. The court definitely noted the need to define clear, strict, and precise norms and conditions for the admissibility of indirect testimony. The court thoroughly deliberated on the objectively existing and potential risks and dangers related to indirect testimony, and deemed its automatic admissibility unjustifiable, arguing that its use should only be considered a justified approach in exceptional cases. In its judgment, the court relied on the European Court's case law and the established minimum standards regarding indirect testimony, citing several important precedents, including the judgment in the case of ***Al-Khawaja and Tahery v. The United Kingdom***.[25] In this case, the European Court made significant clarifications concerning Article 6(3)(d) of the European Convention. In its judgment, the Constitutional Court defined the standard of proof beyond a reasonable doubt as being "vital" to reducing the risk of an unfair and unreasonable conviction and to building public trust in the judiciary. In determining the reliability of indirect testimony, the court concluded that the disputed norms could not exclude this risk. Regarding the use of indirect testimony as a basis for reasonable probable cause in criminal prosecution, the court noted that the CPC did not specify the weight to be given to hearsay when recognizing a person as an accused. Furthermore, even in such cases, there was a basis for doubting the reliability of indirect testimony, which contradicted the constitutional standard of trustworthiness.

According to the ruling part of the judgment, the court declared unconstitutional: the normative content of the second sentence of paragraph 2 of Article 13 of the CPC, which provided for the possibility of passing a judgment of conviction based on the indirect testimony as defined in Article 76 of the same Code; and the normative content of the paragraph 1 of Article 169 of the CPC, which allowed for the recognition of a person as an accused based on indirect testimony as defined in Article 76 of the same Code.

The case discussed above is a clear example of how the results of a judgment visibly impact judicial practice. With this combined decision, the substantive scope of the standards of proof was fundamentally altered, and the entire process of evidence evaluation was reset to a new framework. The judgment posed new challenges to criminal justice. There was much discussion in both practical and academic circles regarding the boundaries of the interpretation of "criminal law" mentioned in paragraph 'd' of Article 310 of the CPC (whether it referred to the norms of the CPC, which undoubtedly it did!), as well as whether the new approach to the evaluation of evidence (in cases involving hearsay) applied to cases conducted under the CPC of 1998, dated February 20. In this regard, the practice of the Supreme Court of Georgia is particularly interesting. Immediately after the judgment of the Constitutional Court, there were diverse opinions on the matter. Between November 16, 2015, and August 9, 2016, the Supreme Court filed submissions to the Constitutional Court 11 times, with the main request being the compatibility of the standard of trustworthiness of the evidence provided by Article 10, Paragraph 3 of the CPC of 1998 (in the submission N820, the reference was to the normative content provided by Article 301 of the 1960 CPC, dated December 30) with paragraph 3 of Article 40 of the Constitution.

[24] We agree with this explanation. In both practice and theory, we often encounter ambiguous interpretations regarding indirect testimony. It is important to note that in this case, the term 'indirect' specifically refers to the source of the information, meaning not direct and immediate (for example, eyewitness testimony), but rather as derived from another primary source. It does not necessarily refer to testimony containing information about circumstances indirectly related to the fact of the crime;

[25] ***Al-Khawaja and Tahery v. The United Kingdom (***Applications nos. 26766/05 and 22228/06***)***, https://hudoc.echr.coe.int/eng?i=001-108072, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

By the ruling of the Constitutional Court Plenum on September 29, 2016 (No. 3/3/685, 686, 687, 688, 689, 736, 737, 758, 793, 794, 820),[26] the constitutional submissions were not accepted for consideration on merits. In the reasoning part of the ruling, the court focused on several factors: The court noted that the author of the constitutional submission had failed to indicate why the disputed norm was 'a law or other normative act, which the court must apply when resolving the case'[27]; the court considered that by the submission, the Supreme Court was asking the Constitutional Court to establish the factual grounds for resuming the case[28], rather than to declare the regulatory provisions unconstitutional that were restricting the resuming of the case. The court pointed out that the request for declaring the disputed norm unconstitutional could not become the subject of the Constitutional Court's deliberation because it was not within the competence of the Constitutional Court to examine any law based on the submission. The Constitutional Court is authorized only to examine the law that the court hearing the specific case should apply in resolving that case. As for which legal norm the Supreme Court should apply in a particular case, the Constitutional Court stated that it did not question the Supreme Court's ability to determine this.

Immediately after the adoption of this ruling by the Constitutional Court and in contemporary judicial practice, an approach was established that the judgment of the Constitutional Court No. 1/1/548, dated January 22, 2015, does not constitute grounds for reviewing judgments in criminal cases conducted under the CPC of February 20, 1998.[29]

Probable cause is a universal standard and is used in criminal procedure not only for conviction and accusation but also for the imposition of preventive measures and/or the conduct of investigative actions. In the judgment discussed above, the court did not deliberate on and no amendment was made in the CPC regarding the general norm defining probable cause (Article 3, Paragraph 11 of the CPC). However, later, the standard of probable cause became a subject of discussion by the Constitutional Court multiple times.[30]

2.4. The judgment of the Constitutional Court of Georgia, dated September 15, 2015, No. 3/2/646 (Citizen of Georgia Giorgi Ugulava v. the Parliament of Georgia)[31]

The Constitutional Court, by recording notice N3/5/646, dated June 26, 2015, accepted the constitutional complaint N646 for consideration on merits, in the part that concerned the constitutionality of the following provisions: The normative content of paragraph 2 of Article 205 of the CPC, which allowed for the possibility of a 9-month detention period in each criminal case in which a person was accused of committing a crime prior to their detention; The constitutionality of the normative content of paragraph 11 of Article 3 and paragraph 2 of Article 198 of the CPC, which provided for the use of detention based on probable cause; The constitutionality of third sentence of

[26] https://constcourt.ge/ka/judicial-acts?legal=1074, Accessed: 29.11.2024;

[27] Organic Law of Georgia on the Constitutional Court of Georgia, Organic Law of Georgia on the Constitutional Court of Georgia | სსიპ "საქართველოს საკანონმდებლო მაცნე", Accessed: 29.11.2024, Paragraph 2 of Article 19;

[28] In this part, we may not fully agree with the assessment made by the Constitutional Court that, the stage of reviewing judgments due to newly revealed circumstances, in criminal prosecution cases initiated under the CPC of February 20, 1998, is a resuming of the case rather than its continuation. (See the ruling, paragraph 4).

[29] See, for example: The Ruling of the Supreme Court of Georgia of October 28, 2016, sisxli_7-9_2016.pmd (supremecourt.ge), Accessed: 29.11.2024, pp. 176-187; The Ruling of the Supreme Court of Georgia of October 19, 2022, საქმე N:37აგ.-2022 (supremecourt.ge), Accessed:29.11.2024;

[30] The standard of 'probable cause' was repeatedly addressed by the Constitutional Court in its **judgment of February 25, 2022 (No. 2/1/1434, 1466),** სასამართლო აქტები, Accessed: 29.11.2024, which led to the declaration of the following provisions of the CPC as unconstitutional: The phrase 'or/and a crime has been committed with regard to this property or/and it has been obtained through criminal means' in the paragraph 3 of Article 151 of the CPC; Certain normative content of Article 158 of the CPC; Following this judgment, the CPC was amended by the law of September 23, 2022, thereby aligning the legislation with the Constitutional Court's judgment;

[31] JUDICIAL ACTS, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

paragraph 8 of Article 206 of the CPC; The constitutionality of the phrase "or will commit a new crime" in paragraph 2 of Article 198 of the CPC, as well as the constitutionality of the subparagraph "c" in paragraph 1 of Article 205 of the CPC.

In relation to the case (the disputed normative content of paragraph 2 of Article 205 of the CPC), on July 30, 2015, the Georgian Young Lawyers' Association (GYLA) presented an 'Amicus Curiae Opinion' (Nac646), in which it urged the Constitutional Court to consider the European Court's and the United States Supreme Court's practices with respect to paragraphs 1 and 6 of Article 18 of the Constitution, given that the Constitutional Court's case law on these provisions was not extensive.

An Amicus Curiae Opinion was also presented in the case by 'Transparency International – Georgia' (July 9, 2015, Nac646). The opinion extensively discusses the standards of proof, particularly the standard of probable cause, and the author of the opinion frequently cites European case law.

In interpreting the content of pretrial detention as specified in paragraph 6 of Article 18 of the Constitution, the Constitutional Court took into account the 'autonomous' legal meaning of terms such as 'accused', 'pretrial', and 'detention'. The Court did not adopt its previous practice and provided a new, human-rights-oriented interpretation. The Court referred to international norms and the European Court case law, noting that the key feature of the contested issue was that detention is applied to a person who is presumed innocent, regardless of the stage of the criminal process—whether before trial or during the first-instance court proceedings. **The Court explicitly stated that manipulation of the 9-month pretrial detention period is impermissible!** As a result, the Court concluded that the norms were unclear and indeterminate (for example, the norm did not define a limit of duration on pretrial detention in cases involving multiple independently conducted criminal prosecutions), which was incompatible with the practice of the European Court (Sebalj v. Croatia[32]). Ultimately, the Court sided with the applicant's position, finding that the contested norm, due to its ambiguous content, violated the rights protected under paragraphs1 and 6 of Article 18 of the Constitution.

In its deliberation on the constitutionality of the contested norms regarding the use of detention based on probable cause, the Constitutional Court made an important and correct interpretation of who qualifies as an 'accused person' for the purposes of the Constitution. The Court stated that an accused person is one against whom, on the one hand, the presumption of innocence applies, and on the other hand, there exists evidence-based suspicion (probable cause) that they have committed a crime. Along with reviewing the legitimate purposes, necessity, and proportionality of detention, and the standard of probable cause as the criterion for its use (a lower standard in comparison to other standards), the Court also considered different levels of invasion into the right protected under Article 18 of the Constitution during detention, pretrial detention, and the imposition of imprisonment as a sentence. Regarding the standard of probable cause outlined in paragraph 11 of Article 3 of the CPC, the Court correctly noted that, overall, it did not contradict the Constitution. However, it considered as problematic the lack of clear and unambiguous definition of the contested norm and emphasized the importance of objective factors in its application. Finally, the Court concluded that, **under conditions of good faith interpretation and application**, the contested norms did not violate paragraph 1 of Article 18 of the Constitution.

Regarding the constitutionality of the phrase 'or will commit a new crime' in paragraph 2 of Article 198 of the CPC, as well as the subparagraph 'c' of paragraph 1of Article 205 of the CPC, the Court determined that there was no basis for declaring the contested norms unconstitutional,

[32] Sebalj v. Croatia (Application no. 5432/15), https://hudoc.echr.coe.int/eng?i=001-222898, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

considering that the relevant provisions of the CPC envisioned not an abstract, but a real threat of committing a new crime.

According to the ruling part of its judgment, the Constitutional Court declared unconstitutional the normative content of paragraph 2 of Article 205 of the CPC in relation to paragraphs 1 and 6 of Article 18 of the Constitution. Specifically, the Court found unconstitutional the provision that: 'allows the detention of an accused on a certain criminal case, if after the accusation or emergence of sufficient grounds for presenting an accusation on this criminal case he/she has in unity spent 9 months under the detention on any criminal case conducted against him/her.'

The Constitutional Court has previously discussed the regulatory norms regarding preventive measures in the CPC and the standard of probable cause as the criterion for applying preventive measures. In addition to one of the precedents discussed here**, the Constitutional Court also issued a judgment on June 24, 2022 (No. 3/5/1341, 1660)[33],** which declared unconstitutional the normative content of the first sentence of paragraph 6 of Article 200 of the CPC, which excluded the possibility of a judge releasing a defendant on bail before the defendant deposited bail. In this judgment, when discussing the contested norms, the court frequently references the aforementioned decision (No. 3/2/646).

Based on the Constitutional Court's judgment of September 15, 2015, No. 3/2/646, significant changes were made at both the legislative and judicial practice levels concerning the regulation of the substantive rights of the accused, in accordance with European standards on the restriction of the right to liberty, even for legitimate purposes. In relation to the criminal cases cited in the constitutional complaint, there is also a judgment by the European Court (Ugulava v. Georgia (N2))[34], in which the court found violations of paragraphs 1 and 3 of Article 5 of the Convention. In this case, the European Court relied on the explanations provided in the aforementioned judgment of the Constitutional Court of Georgia when interpreting the content of Article 205 of the CPC.

2.5. The judgment of the Constitutional Court of Georgia, dated December 25, 2020, No. 2/2/1276 (Giorgi Qeburia v. the Parliament of Georgia)[35]

In its recording notice of October 24, 2019, with case file N2/11/1276, the Constitutional Court accepted for consideration on merits the constitutional complaint of November 10, 2017, N1276, in the part that concerned the constitutionality of paragraphs 1 and 4 of Article 119, the paragraph 1of Article 121, and the second sentence of the paragraph 2 of Article 13 of the CPC.

2.5.1 When discussing the constitutionality of paragraphs 1 and 4 of Article 119 of the CPC, the Constitutional Court once again emphasized the importance of the right to private life and described it as "vital for the freedom, identity, and self-realization of a person". The court considered: the procedure for involving a "confidant" and "informant" in a criminal case, as regulated by the Law on Operative and Investigative Activities[36]; the rules for access to information about these persons, treated as state secrets, regulated by the Law of Georgia on State Secrets[37]; and the prosecutor's authority to declassify documents and materials related to operative and investigative activities for use as evidence.[38] The court clarified that: paragraphs 1 and 2 of Article 15 of the Constitution protect

[33] https://www.constcourt.ge/ka/judicial-acts?legal=13808, Accessed: 29.11.2024;

[34] Ugulava v. Georgia (N2) (Application no. 5432/15), https://hudoc.echr.coe.int/eng#{%22itemid%22:[% 22001-222898%22]}, Accessed: 29.11.2024;

[35] https://www.constcourt.ge/ka/judicial-acts?legal=10430, Accessed: 29.11.2024;

[36] Law on Operative and Investigative Activities, https://matsne.gov.ge/en/document/view/18472?publication=52, Accessed: 29.11.2024;

[37] Law of Georgia on State Secrets, https://matsne.gov.ge/en/document/view/2750311?publication=1, Accessed: 29.11.2024;

[38] **The judgment of the Constitutional Court of Georgia, dated July 31, 2015 (No. 2/2/579)**, regarding the admissibility of using information obtained through operative and investigative activities as evidence, is of interest. Based on this

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

two components of private life - an individual's personal and family life, and the inviolability of their personal space and communication, where a person has a reasonable expectation of privacy. The court considered that the case in question concerned only paragraph 2 of Article 15 of the Constitution. The court ruled that the right under this paragraph is not absolute and that one of the prerequisites for interference with this right is the requirement for a court decision as a neutral authority (apart from urgent necessity as an exceptional circumstance, in which case judicial review would still be available ex post). This creates an important safeguard for the protection of the right to privacy. Thus, the contested norms met the formal criteria set out in paragraph 2 of Article 15 of the Constitution. The court confirmed that the objective of the search under the contested norms was in line with the legitimate aims for restricting the right set forth in paragraph 2 of Article 15 of the Constitution, and that the search itself was appropriate for achieving that objective. In assessing the necessity of restricting the right, the court considered the proportionality between the scope of the restriction and the legitimate aim. The court clearly distinguished, on one hand, an anonymous person (as a source of information, verification of which is, in fact, impossible) and, on the other hand, an operative source, noting that since there was no measure that would simultaneously ensure the judge's access to the primary source and protect the interests of the investigation, the contested norm was a necessary means for achieving the goal. In its discussion of the "fair balance," the court explained that in the cases under consideration, it was important to adequately verify the information to a certain degree, and only in such cases could it be considered that the interests of the search outweighed the constitutionally guaranteed right to the inviolability of personal space and communication. In its final conclusion, the court ruled that the contested norms did not violate the Constitution.

The Constitutional Court reached a different conclusion regarding the issue of using the results of the conducted search as the ground for establishing the probable cause necessary for the search. The Court ruled that this practice violates Article 15, Paragraph 2 of the Constitution, and justified its decision with the following reasoning: The Court pointed out that in practice, the contested legal norms could be interpreted in a way that the results of a search were used as a precondition for conducting a search, i.e., as the ground for establishing probable cause. This interpretation raised the need to assess the constitutionality of such a normative approach. Article 15, Paragraph 2 of the Constitution guarantees the right to personal inviolability, and this provision implies that any limitation on such a right should be based on a court decision. The purpose of this constitutional provision is to allow the court to determine the necessity of a restriction. Therefore, before any restriction is imposed, the relevant authority must justify the need or reasonableness of such a limitation. In cases of urgent necessity, the authority must separately justify the need for such urgency before conducting the search. In this context, the Court explicitly deemed the use of search results as a precondition for the justification of a search to be irrelevant and constitutionally unacceptable. Thus, the Court emphasized that any limitation on constitutional rights, including searches, must be clearly and adequately justified before being carried out, and that using conducted search results as grounds for the search violates this constitutional requirement.

2.5.2. In the consideration of the compliance of the second sentence of paragraph 2 of Article 13 of the CPC with paragraph 7 of Article 31 of the Constitution, the Constitutional Court emphasized the universally recognized principle of ***in dubio pro reo*** as an important guarantee for the protection of human rights. In the process of examining this and other circumstances, the Court frequently referenced the judgment No. 1/1/548 from January 22, 2015, which we discussed in Section 2.3 of the presented work. When evaluating the constitutionality of using evidence from a

judgment, the words "of this Code" in paragraph 1 of Article 72 of the CPC were declared unconstitutional. https://www.constcourt.ge/en/judicial-acts?legal=1018, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

law enforcement officer's testimony based on information provided by an operative source or an anonymous person, the Court again emphasized the importance of the interpretation of norms by common courts and particularly highlighted the interpretation of the norm by the Supreme Court. The Constitutional Court agreed with the position that while the use of such testimony as evidence is not excluded, its objective significance for establishing guilt is minimal. The Court pointed out the clear inequality faced by the defense, as the defense does not have the ability to directly examine the person providing the information. The court concluded that the normative content of the second sentence of paragraph 2 of Article 13 of the CPC was in conflict with paragraph 7 of Article 31 of the Constitution.

In conclusion, the Court examined the constitutionality of using physical evidence obtained through a search based on information provided by an operative source or an anonymous person, and the subsequent evidence leading to a conviction. The Court determined that the ineffectiveness of the disputed norm was not due to the standard set forth within it, but rather the risks that the norm entailed (it did not safeguard against these risks), particularly in cases where an untrustworthy police officer might manipulate or fabricate facts. Regarding *"fabricated cases"* (by planting an object to an accused), the Court focused on whether the defense had adequate means of defense and what possibilities the Court had to "dispel doubts about the defendant's innocence". In cases where the use of an item obtained during a search as evidence relies solely on the testimony of a police officer, the Court identified the cause of such situations and considered that if the police officer had the opportunity to obtain other evidences corroborating the reliability of the search result (e.g., video recording, even with a mobile phone) and did not do so, the credibility of his/her actions would be significantly diminished. Finally, the Court declared the normative content of the disputed provision unconstitutional.

According to the ruling part of the judgment, the following were declared unconstitutional: the normative content of the second sentence of paragraph 2 of Article 13 of the CPC, which allowed the use of illegal items obtained during a search as evidence, when the possession of the item by the accused was confirmed solely by the testimony of police officers, and at the same time, the officers could have, but did not take measures to obtain other neutral evidence to corroborate the reliability of the search, in relation to paragraph 7 of Article 31 of the Constitution; the normative content of the second sentence of paragraph 2 of Article 13 of the CPC, which allowed the use of testimony from a police officer based on information provided by an operative source or an anonymous person in convicting an accused, in relation to paragraph 7 of Article 31 of the Constitution; the normative content of paragraphs 1 and 4 of Article 119 and paragraph 1 of Article 121 of the CPC, which treats the outcome of a search as one of the necessary grounds for probable cause required to conduct a search, in relation to paragraph 2 of Article 15 of the Constitution. Taking into account the significant threat to the state's interests, the Court decided to give the relevant authorities a reasonable period to ensure the necessary legislative or other institutional changes related to the disputed norms, and postponed the invalidation of the normative content of the second sentence of paragraph 2 of Article 13 of the CPC until July 1, 2021.[39]

The extent of the implementation of the Constitutional Court's judgment in contemporary judicial practice is particularly noticeable with regard to the inadmissibility of using the results of a search as the basis for conducting the search. In the rulings of the common courts concerning the legalization of the results of a search and seizure carried out under urgent necessity, it is clearly evident that the court first separately assesses the circumstances that led to the need for action under

[39] Based on the mentioned judgment, by the law of June 28, 2021, amending the CPC, a new paragraph 3 was added to Article 13 of the CPC, which established an obligatory standard for corroborating the credibility of the testimony of a police officer regarding the accused's possession of an illegal item obtained during a search, with other neutral evidence, except in exceptional cases where it is objectively impossible to obtain or present other evidence.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

urgent necessity, without considering the fact of the illegal item obtained during the search. The court then proceeds to evaluate the circumstances that, in their totality, should determine the legality of the action performed and the admissibility of the results as evidence.

The Constitutional Court has issued several other important judgments regarding investigative actions. For example: in relation to the procedure for conducting covert investigative actions**, the judgment of the Constitutional Court of April 14, 2016, No. 1/1/625/640,**[40] declared unconstitutional paragraph 31of Article 3 of CPC and paragraph 4 of Article 143^3 of the same Code; **the Constitutional Court's judgment of January 27, 2017, No. 1/1/650,699**,[41] declared unconstitutional the normative content of paragraphs 1 and 4 of Article 136 of the CPC, which excluded the possibility for the defense to request a court ruling for the retrieval of information or documents stored in a computer system or on a computer data carrier; **the Constitutional Court's judgment of October 24, 2019, No. 2/12/1237**[42], where the Court ruled that the disputed norm (paragraph 2 of Article 114 of the CPC, which allowed only the prosecution to examine a witness before a magistrate judge during an investigation) replicated the content of the norm declared unconstitutional by **the judgment of December 14, 2018, No. 2/13/1234/1235**.[43] The Court found that there was no need for consideration on merits of the complaint and declared paragraph 2 of Article 114 of the CPC void, with the invalidation postponed until March 31, 2020, to give the Georgian Parliament a reasonable opportunity to ensure the equality of the parties in criminal proceedings. Based on this, an amendment was made to the CPC by the law of March 20, 2020, and Article 114 of the Criminal Procedure Code was substantially revised.[44]

Conclusion

Based on the analysis presented in this work, we have tried to provide an overview of the involvement and significant role of the Constitutional Court of Georgia in the development of criminal procedure legislation in accordance with European standards, from the adoption of the Criminal Procedure Code on October 9, 2009, to the present. It is clear that over these years, the judgments made by the Constitutional Court have addressed nearly every stage and procedural institution of the CPC, correcting and clarifying numerous gaps and refining the law. As a result of the work carried out by the Constitutional Court, the CPC has significantly changed its "appearance and character" for the better and has become more in line with European standards.

BIBLIOGRAPHY:

Normative Acts

1. Constitution of Georgia, CONSTITUTION OF GEORGIA | სსიპ "საქართველოს საკანონმდებლო მაცნე", Accessed: 29.11.2024;
2. European Convention on Human Rights, European Convention on Human Rights, Accessed: 29.11.2024;
3. Criminal Procedure Code of Georgia, CRIMINAL PROCEDURE CODE OF GEORGIA | სსიპ "საქართველოს საკანონმდებლო მაცნე", Accessed: 29.11.2024;

[40] https://www.constcourt.ge/ka/judicial-acts?legal=2299, Accessed: 29.11.2024;
[41] https://www.constcourt.ge/en/judicial-acts?legal=984, Accessed: 29.11.2024;
[42] https://www.constcourt.ge/ka/judicial-acts?legal=1821, Accessed: 29.11.2024;
[43] https://www.constcourt.ge/en/judicial-acts?legal=1842, Accessed: 29.11.2024;
[44] By **the Constitutional Court's ruling No. 1/20/1219, 1236 dated October 13, 2017,** https://www.constcourt.ge/ka/judicial-acts?legal=1739, Accessed: 29.11.2024, the Court also rejected the constitutional complaint for consideration on merits (due to the existence of overriding norms) and declared the words "This order is not subject to appeal" in Article 91, paragraph 8, and "This order cannot be appealed" in paragraph 1 of Article 240 of the CPC invalid. With this decision, the Constitutional Court corrected the gap in the CPC regarding the right to appeal a judge's order imposing a fine on a process participant for failure to attend a hearing without a valid reason.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

4. Organic Law of Georgia on the Constitutional Court of Georgia, Organic Law of Georgia on the Constitutional Court of Georgia | სსიპ "საქართველოს საკანონმდებლო მაცნე", Accessed: 29.11.2024;
5. Law on Operative and Investigative Activities, https://matsne.gov.ge/en/document/view/18472?publication=52, Accessed: 29.11.2024;
6. Law of Georgia on State Secrets, https://matsne.gov.ge/en/document/view/2750311?publication=1, Accessed: 29.11.2024.

Scientific Literature

1. Jeremy McBride, Levan Meskhoradze, *Guide for Lawyers on the Application of Human Rights Standards in Criminal Proceedings*, 2021 (in Georgian), 1680a4516c (coe.int), Accessed: 29.11.2024;
2. Jeremy McBride, *The Doctrines and Methodology of Interpretation of the European Convention on Human Rights by the European Court of Human Rights*, 2021, 1680a20aee (coe.int), Accessed: 29.11.2024;
3. Paata Javakhishvili, "Constitutional Court of Georgia and *de facto* Real Control", in *Journal of Law,* N1, 2017, p.264-276, View of No. 1 (2017): Journal of Law, Accessed: 29.11.2024.

Decisions

1. The Judgment of the Constitutional Court of Georgia on May 23, 2014, No. 3/1/574, decisions_2014_I_eng.pdf, Accessed: 29.11.2024;
2. The Judgment of the Constitutional Court of Georgia No. 1/4/557, 571.576 dated November 13, 2014, JUDICIAL ACTS (constcourt.ge), Accessed: 29.11.2024;
3. The judgment of the Constitutional Court of Georgia, dated January 22, 2015 No. 1/1/548, https://www.constcourt.ge/en/judicial-acts?legal=975, Accessed: 29.11.2024;
4. The judgment of the Constitutional Court of Georgia, dated July 31, 2015 (No. 2/2/579), https://www.constcourt.ge/en/judicial-acts?legal=1018, Accessed: 29.11.2024;
5. The Judgment of the Constitutional Court of Georgia, dated September 15, 2015, No. 3/2/646, JUDICIAL ACTS, Accessed: 29.11.2024;
6. The Judgment of the Constitutional Court of Georgia of September 29, 2015, No. 3/1/608, 609, https://www.constcourt.ge/en/judicial-acts?legal=744, Accessed: 29.11.2024;
7. The Judgment of the Constitutional Court of Georgia of April 13, 2016, No. 3/1/633, 634, https://www.constcourt.ge/en/judicial-acts?legal=1105, Accessed: 29.11.2024;
8. The Judgment of the Constitutional Court of April 14, 2016, No. 1/1/625/640, https://www.constcourt.ge/ka/judicial-acts?legal=2299, Accessed: 29.11.2024;
9. The Ruling of the Constitutional Court Plenum on September 29, 2016 (#3/3/685, 686, 687, 688, 689, 736, 737, 758, 793, 794, 820), https://constcourt.ge/ka/judicial-acts?legal=1074, Accessed: 29.11.2024;
10. The Judgment of the Constitutional Court of Georgia of January 27, 2017, No. 1/1/650,699, https://www.constcourt.ge/en/judicial-acts?legal=984, Accessed: 29.11.2024;
11. The Ruling of the Constitutional Court of Georgia No. 1/20/1219, 1236 dated October 13, 2017, https://www.constcourt.ge/ka/judicial-acts?legal=1739;
12. The Judgment of the Constitutional Court of Georgia No. 1/4/809 dated December 14, 2018, https://www.constcourt.ge/en/judicial-acts?legal=1172, Accessed: 29.11.2024;;
13. The Judgment of the Constitutional Court of Georgia No. 2/12/1229, 1242, 1247, 1299 of December 14, 2018, https://www.constcourt.ge/en/judicial-acts?legal=1843, Accessed: 29.11.2024;
14. The Judgment of the Constitutional Court of Georgia of December 14, 2018, No. 2/13/1234/1235, https://www.constcourt.ge/en/judicial-acts?legal=1842, Accessed: 29.11.2024;
15. The Judgment of the Constitutional Court of Georgia of October 24, 2019, No. 2/12/1237, https://www.constcourt.ge/ka/judicial-acts?legal=1821, Accessed: 29.11.2024;
16. The Judgment of the Constitutional Court of Georgia No. 1/3/1312 of December 18, 2020, https://www.constcourt.ge/ka/judicial-acts?legal=10395, Accessed: 29.11.2024;
17. The Constitutional Court of Georgia's judgment of December 25, 2020, No. 2/2/1276, https://www.constcourt.ge/ka/judicial-acts?legal=10430, Accessed: 29.11.2024;
18. The Judgment of the Constitutional Court of Georgia No. 2/2/1428 on July 15, 2021, https://www.constcourt.ge/ka/judicial-acts?legal=11826, Accessed: 29.11.2024;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

19. The Judgment of the Constitutional Court of Georgia No. 1/4/1330 dated September 23, 2021, სასამართლო აქტები (constcourt.ge), Accessed: 29.11.2024;
20. The Judgment of the Constitutional Court of Georgia No. 3/2/1478 dated December 28, 2021, სასამართლო აქტები (constcourt.ge), Accessed: 29.11.2024;
21. The Judgment of the Constitutional Court of February 25, 2022 (No. 2/1/1434, 1466), სასამართლო აქტები, Accessed: 29.11.2024;
22. The Judgment of the Constitutional Court of Georgia of April 13, 2022, No. 2/2/1506, https://www.constcourt.ge/ka/judicial-acts?legal=13439, Accessed: 29.11.2024;
23. The Judgment of the Constitutional Court on June 24, 2022 (No. 3/5/1341, 1660), https://www.constcourt.ge/ka/judicial-acts?legal=13808, Accessed: 29.11.2024;
24. The Judgment of the Constitutional Court of Georgia No. 1/5/1355, 1389 of July 27, 2023, https://www.constcourt.ge/ka/judicial-acts?legal=15638, Accessed: 29.11.2024;
25. The Judgment of the Constitutional Court of Georgia of July 12, 2024, No. 3/4/1543, https://www.constcourt.ge/ka/judicial-acts?legal=16658, Accessed: 29.11.2024;
26. The judgment of the Constitutional Court of Georgia, dated November 20, 2024 No. s1/4/1300, https://constcourt.ge/ka/judicial-acts?legal=17416, Accessed: 29.11.2024;
27. ***Al-Khawaja and Tahery v. The United Kingdom (***Applications nos. 26766/05 and 22228/06***)***, https://hudoc.echr.coe.int/eng?i=001-108072, Accessed: 29.11.2024;
28. Sebalj v. Croatia (Application no. 5432/15), https://hudoc.echr.coe.int/eng?i=001-222898, Accessed: 29.11.2024;
29. Ugulava v. Georgia (N2) (Application no. 5432/15), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-222898%22]}, Accessed: 29.11.2024;
30. The Ruling of the Supreme Court of Georgia of October 28, 2016, sisxli_7-9_2016.pmd (supremecourt.ge), Accessed: 29.11.2024, pp. 176-187;
31. The Ruling of the Supreme Court of Georgia of October 19, 2022, საქმე N:37აგ.-2022 (supremecourt.ge), Accessed:29.11.2024.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

The role of the Court of Justice in the implementation of EU policy through the method of comparative interpretation

DR. NINO KHARITONASHVILI
PROFESSOR OF CAUCASUS UNIVERSITY
E-MAIL: nkharitonashvili@gmail.com

Abstract: *One of the features of the biggest international organizations/Unions is to include international courts, through which the the organizations carry out their ideals such as to protect peace, democracy and human rights. The aim of the paper is to review the mission of the European court of justice which has a significant impact on determining the directions of the Union itself, of its member states and of life level of their citizens. Its role in creating/implementing the EU policy is particularly noteworthy. In this regard, the working method of the court which is interpretation is discussed as a tool for policy implementation. his paper focuses on the existing methods of interpretation, especially on the comperative interpretation as the special method. The purpose of the article is to review the importance and potential of comparative interpretation method through a mixed-quantitative, qualitative, and general research methods, as well as comparative analysis.*
Keywords: *comparative; ECJ; EU; justice; interpretation.*

INTRODUCTION

The paper discusses the importance of the Court of Justice of the European Union, the directions of its activities apart from being a judicial body, and the main tool of implementing this activity - the method of interpretation. The term "interpretation," is left undefined by the Treaty on the Functioning of the European Union.[1] This is precisely the starting point of this paper, since defining the essence of interpretation actually determines its scope. According to the German understanding, interpretation is the abstract determination of the meaning of a standard text.[2] Indefiniteness gives it unlimited power and transforms the court as a creator of a new type of legal order.

The classical methods of interpretation are discussed in the article and the attention is payed to special method such is comparative interpretation.[3] The article discusses its role in the work of the court and its development potential. The use of the comparative method becomes especially relevant in the context of differences in legal cultures, which is typical of the European Union. The application of the comparative law method by the Court of Justice of the European Union, especially in the context of major social changes leading to a spontaneous convergence of the legislations of member states, brings a new dynamic. It allows the legal order of the EU to naturally address these changes, aligning the legal culture of the EU with that of the member states. The EU's established motto, "Unity in Diversity," takes on new meanings in the context of the Court of Justice's application of the comparative law method, ensuring "mutual influence between the EU and national legal orders,

[1] Ligia -Valentina Mirisan, The place and role of the comparative law method within the interpretation of the court of justice of the EU, SARA Law Research Center, International Journal of Legal and Social Order, https://www.ccdsara.ro/ijlso ISSN 2821 – 4161 (Online), p. 1-6.
[2] Anweiler, Auslegungsmethoden, S. 25; Buck, Auslegungsmethoden des Gerichtshofs, S. 22; Seyr, Effet utile, S. 56; Zippelius, Juristische Mehtodenlehre, S. 21.
[3] Dr. Suvi Sankari European Court of Justice Legal Reasoning in Context. P. 57. Lasok and Millett 2004, 376, Schermers and Waelbroeck 2001, 10–27, or Brown and Kennedy 1994, 301–322.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

thus creating a common space of law."[4] But there is also criticisms to the comparative method: One review suggests the comparatist must 'go deeply into [the debates within a particular legal system] and try to understand the other legal system on its own terms',[5] suggesting this as a 'jurisprudential approach to comparative law'.[6] The universalisable character of legal reasoning would cast doubt on this at least in so far as it applies to legal reasoning. Most legal theorists claim to offer general accounts of law in a way that is not specific to any jurisdiction. [7] The decisions of national courts applying EU law must be grounded in an interpretation that could be applied by any other national court in similar situations.[8] Moreover, the Court of Justice's use of the comparative law method in drawing on national legal cultures when interpreting EU law should 'be shaped by a requirement of consistency within the EU legal system.' [9]This means the purpose is not to find the 'best' legal solution or the most common one, but one that best fits the EU legal order.[10] The discussion related to this issue is important for the proper development of the comparative interpretation method, so that it does not turn from a means to a weapon and fails to reach the ultimate addressee of the law - the people. Hence, the aim of the study is to identify if the method of interpretation can evolve the law and transform it into an evaluative social phenomenon.

1. THE EU AND EUROPEAN COURT OF JUSTICE (ECJ)

The European Union is a community based on the rule of law. [11]The judicial authority of the European Union is constituted by the The European Court of Justice (ECJ) which was founded in 1952. Today the ECJ could be viewed as one of the most influential and powerful courts in the world. [12] The transformation of the European legal system has turned the ECJ into probably the most influential international legal body in existence.[13] ECJ is not the only international court that can act independently of the desires of powerful states, or be a tipping point actor, and thereby influence politics.[14] It is one of the key institutions of the European Union (EU) and plays a crucial role in the EU's legal system, in shaping and maintaining the legal framework of the European Union, ensuring consistency and adherence to the EU law across its member states in cooperation with the courts and tribunals of the Member States ensures the uniform application and interpretation of EU law.[15] The European Court of Justice consists of two separate courts: the Court of Justice, the General Court. Due to the large number of cases, complaints from individuals, companies and organizations, as well as cases related to competition law, will be heard by the General Court, while the "European Union Civil Service Tribunal" resolves disputes between the EU and its employees. Five of the most

[4] Koen Lenaerts, 2022, p.18 in Ligia -Valentina Mirisan, The place and role of the comparative law method within the interpretation of the court of justice of the EU, SARA Law Research Center, International Journal of Legal and Social Order, https://www.ccdsara.ro/ijlso ISSN 2821 – 4161 (Online), p. 1-6.
[5] Koma ´rek, 'Questioning Judicial Deliberations', 826. Gerard Conway , The Limits of Legal Reasoning and the European Court of Justice, P. 6.
[6] W. Ewald,'TheJurisprudential ApproachtoComparativeLaw:AFieldGuide to "Rats"', American Journal of Comparative Law, 46(4) (1998), 701–707. Gerard Conway , The Limits of Legal Reasoning and the European Court of Justice, P. 6.
[7] Gerard Conway , The Limits of Legal Reasoning and the European Court of Justice, P. 192
[8] Maduro 2009, 375
[9] Maduro 2007, 7.
[10] Dr. Suvi Sankari European Court of Justice Legal Reasoning in Context. P. 57.
[11] Kelemen, R. Daniel, Eeckhout, Piet, Fabbrini, Federico, Pech, Laurent; Uitz, Renáta: ***National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order, VerfBlog,*** 2020/5/26, https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/, DOI: 10.17176/20200527-013240-0.
[12] Gerard Conway, The Limits of Legal Reasoning and the European Court of Justice, P. 192.
[12] Koen Lenaerts, 2022, p.18.
[13] Karen J.Alter, Establishing the Supremacy of European Law, p. 229.
[14] Karen J. Alter, The European court's political Power, Oxford University press, 2009 p. 25.
[15] https://curia.europa.eu/jcms/jcms/Jo2_6999/en/

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

common cases can be distinguished among the disputes considered by the court: 1. Request for a preliminary review, when national courts ask the EU Court to interpret the law; 2. Complaint against the governments of EU member states due to non-application of EU laws; 3. Complaints for annulment of EU laws that allegedly violate EU Treaties and fundamental rights; 4. Complaint against the institutions of the European Union for failure to fulfill the duties assigned to them; 5. Complaints by individuals, companies and organizations against EU decisions or actions.

The Court ensures compliance with EU legislation, supervises the application and interpretation of the Treaty establishing the European Union. The ECJ ensures that EU law is interpreted and applied uniformly across all EU member states. The Court's competence is mandatory and joining the Community, the member states accept its authority; no subsequent authorization is necessary to subject them to its jurisdiction. The decisions of the ECJ are binding on all EU member states. The competence is exclusive according to Article 3 of the Treaty on the Functioning of the European Union — TFEU Since Article 219 [292] forbids member states to resort to any other conflict resolution method where the Treaty is at issue. It has the authority to annul EU legal acts that are not in line with the treaties or fundamental rights. National courts can refer questions on the interpretation and application of EU law to the ECJ for guidance. This ensures a consistent application of EU law across all member states. Subject-wise, the ECJ remains an essentially economic court. Browsing through the court reports of the past years, most judicial attention was devoted to the same 'usual suspects', namely taxation; intellectual property; competition; state aid; internal market (free movement of goods retreating and making way for services and persons); agriculture; public procur[16].

Court of Justice of the European Union has an important unifying role those with the other EU institutions; the courts of the Member States; the Member States themselves; the parties appearing before it; other international courts; and the general public.[17] As it consideres various types of disputes disputes between EU bodies; Disputes between EU bodies and member states; disputes between member states; Disputes between legal and natural persons and EU bodies; A dispute between the European Union and its employees. The primary function of the ECJ is to provide preliminary rulings on questions of EU law referred to it by national courts. It also hears direct actions brought by member states, EU institutions, and individuals against EU institutions or member states.

The ECJ has developed important legal principles, including the doctrines of direct effect and supremacy, which emphasize the priority of EU law over national law[18]. The supremacy of EU law over national law is established by the court through its important decisions, which can be considered as the most important step in his existence. In the "Costa/E.N.E.L." decision the Court stated that EC law is a matter sui generis, which, in contrast to international law, is not only subject to the signatory states, but also to their citizens. Such a view also enables a Union citizen to invoke norms of EC law and the rights arising from them.[19] However, the relationship between the Union and Member State legal orders remains a key issue. Competence issues focus on the potential for and resolution of conflicts between Union and domestic legal requirements. These so-called Kompetenz Kompetenz questions concern the implications of Union legal domestic constitutional norms over the Court's portrayal of Union legal demands.[20] The EU legal order is the backbone that holds the EU together,

[16] Michel Bobek, The Court of Justice of the European Union, The Oxford Handbook of European Union Law, Oxford University Press, P. 176.

[17] Anna Wallerman Ghavanini, The Court of Justice of the European Union as a Relational Actor European Law Open , Volume 2, Special Issue 2: June 2023, p. 233 – 243. DOI: https://doi.org/10.1017/elo.2023, p. 40.

[18] https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en

[19] Costa v ENEL (1964) Case 6/64, Factortame Litigation; Macarthys v Smith (1979) 3 All ER 325; Marshall v Southampton AHA (1986) Case 152/84; Van Gend en Loos (1963) Case 26/62.

[20] Timothy Moorhead, The Legal Order of the European Union The Institutional Role of the Court of Justice, 2014, p. 16.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

and the German Federal Constitutional Court's ruling in *Weiss* poses a profound threat to that legal order.[21] This discussion deepened further afterwards when The German Constitutional Court (case of *2BvR 859/15)* declared that the Court of Justice of the European Union had acted outside their powers as The PSPP measures taken by ECB were ultra vires EU law and German constitutional law; and violated fundamental principles of European and German law such as the principles of conferral and proportionality.[22] This decision made clear the wide possibilities of interpretation and also raised question about the primacy of EU law over national law which still remains unanswered and is likely to deepen in the future.

It is worth noting that the discussion on the directions of its activity is not resolved, and one of its challenges, along with overcrowding, is its bias.Praised by some as the relentless and steady motor of European integration and attacked by others as an example of a clearly biased institution, more ink has perhaps been spilled over the years on discussing the (de)merits of the Court of Justice than any other Union institution.[23] The Court's often presumed and sometimes demonstrated judicial activism has provided one of the key explanatory factors for many of its bolder decisions, and it has become one of the established truths of both critical scholarship and public rhetoric about the Court.[24]

The literature on the ECJ puts forward three different narratives about its role in European integration. Legalist scholarship puts the ECJ in the center of their narrative, portraying the ECJ as a heroic actor capable of pushing European governments and institutions in the direction of greater European integration. International Relations scholars assume that states are at the center of inter national relations in the EU, thus they examine the ECJ as a tool of states to accomplish their objectives. Comparative politics approaches focus on the relationship between ECJ and actors above and below the state that use The European Court and Legal Integration legal system to promote their own objectives.[25] Analyzing all three approaches together and separately once again confirms that, despite differences of opinion, the Court is a key player in the European Union. All of the above-mentioned multifaceted activities require a flexible legal method, for which the interpretation has been correctly chosen. However, interpretation is evaluative in nature and depends on its implementer, which precisely raises questions related to bias towards the dominant ideology at a particular time.

2. INTERPRETATION AS A MAIN WORKING METHOD OF ECJ

In accordance with Article 19 of the Treaty on European Union (TEU), the European Court of Justice shall ensure that in the interpretation and application of the Treaties the law is observed. It follows from that Treaty provision that all EU acts must be interpreted so as to guarantee that the European Union is based on the rule of law. The primary sources of European law are currently the Treaty on the Functioning of the European Union (TFEU/TFEU) and the Treaty on European Union (EU/TEU) according to Art. 1 II TFEU; according to Art. 51 TFEU 37 protocols and two annexes;

[21] Kelemen, R. Daniel, Eeckhout, Piet, Fabbrini, Federico, Pech, Laurent; Uitz, Renáta: ***National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order, VerfBlog,*** 2020/5/26, https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/, DOI: 10.17176/20200527-013240-0.

[22] BVerGR Judgment of 5 May 2020 - 2 BvR 859/15.

[23] Michel Bobek, The Court of Justice of the European Union. The Oxford Handbook of European Union Law. Oxford University Press, P. 170.

[24] Anna Wallerman Ghavanini, The Court of Justice of the European Union as a Relational Actor European Law Open , Volume 2, Special Issue 2: June 2023, p. 233 – 243. DOI: https://doi.org/10.1017/elo.2023.40. H Rasmussen, ***On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*** (Martinus Nijhoff Publishing 1986); M Dawson et al (eds), ***Judicial Activism at the European Court of Justice*** (Edward Elgar Publishing 2013).

[25] Karen J. Alter, The European court's political Power, Oxford University press, 2009. p. 25

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

and according to Art. 6 I EU the Charter of Fundamental Rights. In primary law, the ECJ assumes a clear, hierarchical structure. The relationship between rule and exception plays a special role. The court assumes that all chapters of a treaty follow the same internal form, which places the basic norm at the beginning[26] though the principle of "lex specialis derogat legi generali" states that a general law does not apply if a more specific one is relevant.

The Court of Justice of the European Union (CJEU) provides the sole official interpretation of Union legal norms, employing various methods, including the grammatical method, focusing on the "interpretation of the word," often complemented and corrected by a systematic and teleological interpretation method. None of the methods of interpretation applied by the ECJ must be examined in isolation as the Court of Justice differentiates between the purpose and effectiveness of a norm. The most frequently used method is grammatical as the starting point is therefore always a written text[27]. If an interpretation goes beyond this in order to close a regulatory gap, it is a legal development.[28] Though it is recognized that the most important is Teleological interpretation. Teleological interpretation thus attempts to specify the content of the norm in line with the purpose pursued by the legislator.[29]

The Court also mentions the spirit of the treaties before their system and even before their wording.[30] However, the principle of effectiveness, the so-called "effet utile", plays an important role in the case law of the ECJ. This states that the interpretation to be chosen is the one that best enables the effectiveness of a provision to unfold.[31] One of the central questions of the effet utile is its dogmatic classification. In some cases it is seen as a maxim within teleological interpretation[3233], in others it is treated as an independent method of interpretation,[34] and some voices in the literature classify the effet utile as being in the area of judicial legal development.[35]

Interpretation of the law is characteristic of all legal systems. For example, a Sharia court is overseen by a qadi (judge) who must have studied (legal interpretation) in depth. Though, the US Federal Supreme Court has the same function and is called the defender of the Constitution. It does not make laws, but interprets them. With this function, namely the interpretation of the Constitution, it exercises de facto legislative authority.[36] The interpretation method is also used by the European

[26] Pechstein/Drechsler, EU Methodenlehre, S. 169. in - Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[27] Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[28] Anweiler, Auslegungsmethoden, S. 28f; Everling, JZ 2000, 218; Walter, Rechtsfortbildung durch den EuGH, S. 76ff. in Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[29] Larenz, Methodenlehre, S. 153 in Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[30] EuGH Rs. 26/62, van Gend & Loos, Slg. 1963, S. 1 Rn. 27.

[31] Anweiler, Auslegungsmethoden, S. 219f; Buck, Auslegungsmethoden des Gerichtshofs, S. 208; Mosiek, Effet utile und Rechtsgemeinschaft, S. 6. in Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[32] Case C-421/92 Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. eV.

[33] Mosiek, Effet utile und Rechtsgemeinschaft, S. 7. in Berliner Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[34] Joined Cases C-6/90 and 9/90, Francovich v. Italy, Bonifaci v. Italy Judgment of the Court of Justice of 19 November 1991.

[35] Pechstein, Entscheidungen, S. 217; teilweise: Pechstein/Drechsler, EU Methodenlehre, S. 174. in Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[36] The Federal court system in the united states, An Introduction for Judges and Judicial Administrators in Other Countries, An Introduction for Judges and Judicial Administrators in Other Countries, Article III Judges Division Office of Judges Programs Administrative Office of the U.S. Courts Thurgood Marshall Federal Judiciary Building Washington, D.C. 20544 2010 3rd Edition.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Court of Human Rights, which protects human rights through international conventions.[37] The ECHR used the Universal Declaration of Human Rights (1948)[38] as a starting point to achieve the common goals set by the Council of Europe in the field of fundamental human rights and freedoms and expanded its requirements and adopted The European Convention of Human Rights.[39] Since the Convention was adopted many years ago, it is necessary to adapt it to modernity. In interpreting the Convention, the Court looks for ordinary meaning of the words in their context and in the light of the object and purpose of a provision while seeking to ensure that its interpretation is practical and effective. The emphasis on rights and freedoms being practical and effective is designed to ensure that their object and purpose is realised. and this may also make it is essential to be prepared to look beyond the text of individual provisions in order to establish their meaning.[40]

In modern era the interpretation of the law by the courts has become especially relevant. It should also be taken into account that the nature of the law has changed. Quantitative growth of legal regulations occurs along with this qualitative change. If earlier there were traditional norms that determined what a person could or could not do, which left relatively little space for judicial opinion, now there are new types of rules whose purpose is not to determine the rules of individual behavior. In fact, they seek to shape collective behavior and thereby direct individuals and groups toward social and economic goals and allow for greater discretion.[41] Through the interpretation, such functions of the motivational part of the court decision are fulfilled, such as explaining to the losing party why he lost the process and to what extent it is justified for him to appeal this decision; To legitimize their role, judges must base their decisions on the law, even though it is not always easy to say what the law is. If independent judges decide cases only based on democratically accepted legal norms, they are carrying out the will of the people in specific cases. French civil judges, for example, are allowed to change their interpretations as needed – in the name of "justice" in specific cases or in the name of "legal adaptation or modernization" over time – precisely because interpretation should not replace "law".[42] Interpretation is the tool by which the law can be guided in accordance with certain policies. If you draw a parallel with chess - where, like a process, two sides fight for victory, it is easy to see what role the rules of the game and the correct distribution of its participants are important to achieve the goal. Without the universal rules of chess, it is impossible to play a game, because the essence and purpose of chess will remain unattainable. The essence of the interpretation of the law is the selection of the best "party".[43]

About the essence of the interpretation, a historical case is paradoxical, when Bartholus first made a decision and then looked for his friend Tigranius in the corpus Juris Civiles for norms corresponding to this decision. It did not stem from an arbitrary attitude, but from a desire for justice. This opinion was shared by Radbruch regarding the interpretation of the law: the interpretation of the law is the result of its own result, a creative expansion. The judge hearing the case forms an opinion in advance with his own feeling, what kind of decision he should make, and then uses the interpretation of the law to justify his decision.[44] It can be assumed that justification is a thought

[37] https://www.consilium.europa.eu/en/european-council/.
[38] The Universal Declaration of Human Rights, On December 10, 1948, by the United Nations General Assembly.
[39] The European Convention of Human Rights, Rome, 04.11.1950. the Council of Europe.
[40] Jeremy McBride, The doctrines and methodology of interpretation of the European convention on human rights and by the European court of human rights, Council of Europe, 2021, p. 34.
41 Carlo Guarnieri, Judges, their careers, and independence, Elgar Series: Research Handbooks in Comparative Law, Clark (ed.), Comparative Law and Society, Chap. 10, p. 3.
[42] Mitchel Lasser, Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court, Jean Monnet Working Paper 1/03, 2003, NY 10012, p. 3.
[43] Kharitonashvili N., Comparative civil procedure, Tbilisi, 2022.
[44] Reinhold Cipelius, Doctrine of Legal Methods, Logical Formalism in Law. Beck Publishing House in Munich, 2006. p. 137.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

process after the decision of the case, and the judge actually justifies the decision he made, which he made as a result of inner conviction. On the importance of interpretation, we can safely conclude that it is an important tool of the judicial system, the use of which depends on its owner.

The lack of a definition of the term interpretation in the European Union is not accidental, and it is this uncertainty that ensures the evolution of the field of law assessment and the creation of a new legal order with supranational terms[45]. There is a risk that legal inflation will occur, although it can be prevented by high legitimacy of legal principles.

3. COMPARATIVE INTERPRETATION – AS THE FUTURE OF LAW DEVELOPMENT

The use of the comparative legal interpretation method follows from Article 6(3) TEU, which refers to the "constitutional traditions of the Member States" as part of Union law. Article 19 TEU provides the constitutional authority for the ECJ to engage in a comparative study of the laws of the Member States. It is already widely recognised that the comparative interpretation is the special method of interpretation in European law.[46] The method of comparative law can be defined as an interpretative tool serving the Court of Justice in resolving certain constitutional or legislative gaps, conflicts, and ambiguities. While the method of comparative law focuses primarily on the legislation of member states, it does not exclude international law or even the law of third countries, such as that of the USA."[47] The comperative law itself is based on two methods: micro-comparison and macro-comparison. However, for a comprehensive comparison, it is advisable to use both the micro-comparison and the macro-comparison methods. Macro-comparison is carried out by comparing the general style of procedural systems or procedural codes, and in this regard, the main principles of legal families or legal culture are distinguished. Micro-comparison, which is more widespread, aims to solve specific problems, to study some special procedural mechanism and its functional equivalents in different countries in order to introduce an analogue into national legislation. However, it is difficult to draw an unambiguous line between micro-comparison and macro-comparison.[48] When comparing, it is important to compare not just legal texts, but also real legal rules and legal cultures. A mere verbal comparison of dogmatic institutions or legal rules can mislead comparative researchers and lead to incorrect conclusions. Social problems, their solutions, and the comparison of the results of these solutions should be carried out functionally. Therefore, one should compare not only legal texts or "written law", but also "law in action".[49] When comparing, it should also be taken into account that legal norms of equal rank should be compared.[50]

The first challenge of use this method by cout of Justice is that the legal systems of the Member States have developed completely differently and therefore comparability as such is often limited. The plurality of actors in charge of the application of the law raises the question which of them have the authority of interpreting the integration law and the modalities of such an inter pretation. One of the instruments that could help overcome the lack of uniformity of approaches regarding the interpretation

[45] Martina Bacic, Terminological variation and conceptual divergence in EU Law. https://www.researchgate.net/publication/376522578.

[46] Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[47] Koen Lenaerts, Kathleen Gutman, and Janek Tomasz Nowak, EU Procedural Law, Oxford, 2015, p. 37. in Ligia -Valentina Mirisan, The place and role of the comparative law method within the interpretation of the court of justice of the EU, SARA Law Research Center, International Journal of Legal and Social Order, https://www.ccdsara.ro/ijlso ISSN 2821 – 4161 (Online), p. 1-6.

[48] *Gottwald P.* , Comperative civil procedure, Ritsumeikan Law Review No22, 2005,23-25.

[49] *Gottwald P.* , Comperative civil procedure, Ritsumeikan Law Review No22, 2005,23-25.

[50] Anweiler, Auslegungsmethoden, S. 186. in Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

and application of supranational law by the courts of several member states is the preliminary reference procedure. In the absence of such a procedure the burden of interpretation of supranational law rests on the national courts.[51] However, this approach does not ensure uniformity of interpretation.

Another challenge is that the multilingual feature of EU terms manifests in their co-existing in 23 official languages, which is referred to as multilingual concordance. This implies that all language versions should convey the same legal effect. Multilingual concordance evokes the relation between the translation and the other language versions (Biel 2019).[52] That's exactly the problem that arose in the ECJ decision in Case 100/84, where ECJ found that "no legal conclusions can be drawn from the terminology used".[53] Both terminological variation and conceptual divergence can undermine the uniform application and interpretation of EU law. However, even if terminological convergence is upheld, conceptual divergence can nevertheless be manifested in varying interpretations of EU concepts at the level of the Member states.[54] In general, it should be noted that any translation requires interpretation, and the most difficult task is translation with the same context. As the meaning of a word in EU law does not necessarily have to coincide with its meaning within the legal system of a Member State.[55] This complicates the use of the literal interpretation method as it was towards the interpretation of the term 'spouse' for the purposes of Article 10 of Regulation No 1612/68.267[56] or In the case[57] where The concepts of 'intention' or 'purpose' was disscussed.[58]

As mentioned in the literature The comparative legal interpretation method has two primary scopes of application in Community law: The first one is the extraction of unwritten Community law - If the Court is faced with a problem for which there is not yet a solution under Community law, it falls back on the legal systems of the Member States, in which comparable situations are already regulated. An example of this can be found in the "Hauer" judgment[59] Where ECJ used the Italian and Irish constitutions and the German Basic Law to assess the issue. ECJ in its decisions[60] said that an interpretation of a provision of Community law thus involves a comparison of the different language versions. Finally, if different language versions cannot be reconciled in this way, the ECJ is left with a choice between a narrow interpretation and a broad interpretation, depending on which language versions apply.[61] This confirms that Comparative legal interpretation is an irreplaceable tool for the ECJ to condense the incomplete structure of Community law and to keep the Community legal system in line with the legal systems of its member states. Its fruits include the principles of good faith and the right to be heard.[62]

---

[51] Diyachenko E.B. Application of the EAEU law by national courts and development of judicial dialogue. Law Enforcement Review. 2022;6(4):244-260. https://doi.org/10.52468/2542-1514.2022.6(4).244-260.

[52] Martina Bacic, Terminological variation and conceptual divergence in EU Law. at: https://www.researchgate.net/publication/376522578.

[53] EuGH Rs. 100/84, Kommission/Großbritannien, Slg. 1985, S. 1169 Rn. 16. Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[54] Martina Bacic, Terminological variation and conceptual divergence in EU Law. at: https://www.researchgate.net/publication/376522578

[55] ECJ Case 100/84, Commission v Great Britain, ECR 1985, p. 1169, para. 16.

[56] C-59/85 Netherlands v Reed [1986] ECR 1283.

[57] Haracoglou (R (on the application of Haracoglou) v Department of Education and Skills) [2001] EWHC Admin 678, [2002] ELR 177

[58] Gunnar Beck - The Legal Reasoning of the Court of Justice of the EU (2012, Hart Publishing) [10.5040_9781472566324] - libgen.li 135.

[59] EuGH Rs. 44/79, Hauer, Slg. 1979, S. 3727. Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[60] CILFIT Case 283/81, para. 18, Case 35/75, Matisa v. Hza. Berlin [1975] ECR 1205. In Case 238/84, Hans Ro¨ser [1986] ECR 795.

[61] Gerard Conway , The Limits of Legal Reasoning and the European Court of Justice, P. 149

[62] 7 Pechstein/Drechsler, EU Methodenlehre, S. 174. Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Another application for comparative legal interpretation is liability law in the area of fundamental rights.[63]. Here, the need for a legal comparison arises from the law itself. The former Article 215 II of the EC Treaty and the still applicable Article 188 II of the EAGV both stipulate that "general principles of law common to the legal systems of the Member States" should be used in the case of non-contractual official liability of the Community institutions. In this case, comparative law is therefore not just a subsidiary method, but the method specified by the Treaty and is therefore decisive. In the "Brasserie du pêcheur" judgment[64] the ECJ developed a state liability claim from the legal systems of the member states.

Furthermore, apart from the fact that the comparative law method provides an analytical support for the discovery and development of general principles of EU law[65], it may also be relied upon with a view to clarifying specific provisions of EU law. In other words, it provides a good framework for the ECJ to undertake 'federal common law-making'.[66] As the legal systems of the Member States have developed completely differently and therefore comparability as such is often limited. In order to do justice to this, the ECJ introduces an evaluative element into the comparison.[67] Due to the indeterminacy of written law, it requires the evaluative nature of law. This indicates the future of law, the need for its dynamism, the lesser importance of codification and the superiority of general principles. However, it has the potential to make the law unpredictable if it is not applied in a balanced manner. In case of its application in accordance with the supreme principles of law, it is possible to conclude that the method of comparative interpretation can give law a dynamic and social function and maintain the vitality of such a large union with its diverse legal culture as the European Union.

CONCLUSIONS

Based on all of the above, the Court of Justice is a unifying political player, which makes a significant contribution to the implementation of the European Union's policy. In its implementation, the correctly selected legal method - interpretation - is of key importance. Among the methods of interpretation, one of the significant places is occupied by the method of comparative interpretation. It cannot be attributed to any classical interpretation method, but needs to recognize as a separate special method, since it is an emergency aid for the court when it cannot find an answer in the EU Law sources. That is why it can be concluded that the method of comparative interpretation can play a unifying role of cultures, become a bridge between different cultures of law and internationalize the legal profession.

As for the discussion of how comparative interpretation should be carried out, it can be concluded that its application according to necessity diminishes its significance. Its use in this way has the potential to render the law unpredictable and completely evaluative. It should be applied in accordance with the supreme principles of Supralegal law.

[63] Anweiler, Auslegungsmethoden, S. 282-283. Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

[64] Anweiler, Auslegungsmethoden, S. 283. Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, p. 1-17.

[65] K. Lenaerts and K. Gutman, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice. 38

[66] K. Lenaerts and K. Gutman, '"Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54 American Journal of Comparative Law 55.

[67] Calliess, Berliner Online-Beiträge zum Europarecht, Nr. 28, S. 15; Schroeder, Auslegung des EU-Rechts, JuS 2004, p. 184.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

BIBLIOGRAPHY/REFERENCES:

International acts:

The Universal Declaration of Human Rights, On December 10, 1948, by the United Nations General Assembly.

The European Convention of Human Rights, Rome, 04.11.1950. the Council of Europe.

Literature:

Anna Wallerman Ghavanini, The Court of Justice of the European Union as a Relational Actor European Law Open , Volume 2, Special Issue 2: June 2023, p. 233 – 243. DOI: https://doi.org/10.1017/elo.2023.40.

Anweiler, Auslegungsmethoden, S. 28f; Everling, JZ 2000, 218; Walter, Rechtsfortbildung durch den EuGH, S. 76ff. in Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

Anweiler, Auslegungsmethoden, S. 25; Buck, Auslegungsmethoden des Gerichtshofs, S. 22; Seyr, Effet utile, S. 56; Zippelius, Juristische Mehtodenlehre, S. 21.

Bobek Michel, The Court of Justice of the European Union, The Oxford Handbook of European Union Law, Oxford University Press, P. 176.

Calliess, Berliner Online-Beiträge zum Europarecht, Nr. 28, S. 15; Schroeder, Auslegung des EU-Rechts, JuS 2004, p. 184.

Conway Gerard, The Limits of Legal Reasoning and the European Court of Justice, P. 192.

Cipelius Reinhold, Doctrine of Legal Methods, Logical Formalism in Law. Beck Publishing House in Munich, 2006. p. 137.

Diyachenko E.B. Application of the EAEU law by national courts and development of judicial dialogue. Law Enforcement Review. 2022;6(4):244-260. https://doi.org/10.52468/2542-1514.2022.6(4).244-260.

Guarnieri Carlo, Judges, their careers, and independence, Elgar Series: Research Handbooks in Comparative Law, Clark (ed.), Comparative Law and Society, Chap. 10, p. 3.

Ewald W.,'TheJurisprudential ApproachtoComparativeLaw:AFieldGuide to "Rats"', American Journal of Comparative Law, 46(4) (1998), 701–707. Gerard Conway , The Limits of Legal Reasoning and the European Court of Justice, P. 6.

Dawson Mark, Judicial Activism at the European Court of Justice, Edited by Hertie School of Governance, Germany Bruno De Witte Maastricht University, The Netherlands Elise Muir Maastricht University, The Netherlands Edward Elgar Cheltenham, UK, Northampton, MA, USA.

Gunnar Beck - The Legal Reasoning of the Court of Justice of the EU (2012, Hart Publishing) [10.5040_9781472566324] - libgen.li 135.

Gottwald P. , Comperative civil procedure, Ritsumeikan Law Review No22, 2005,23-25.

Karen J. Alter, Establishing the Supremacy of European Law, p. 229.

Karen J. Alter, The European court's political Power, Oxford University press, 2009. p. 25.

Kelemen, R. Daniel, Eeckhout, Piet, Fabbrini, Federico, Pech, Laurent; Uitz, Renáta: *National Courts Cannot Override CJEU Judgments: A Joint Statement in Defense of the EU Legal Order, VerfBlog,* 2020/5/26, https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/, DOI: 10.17176/20200527-013240-0.

Kharitonashvili N., Comparative civil procedure, Tbilisi, 2022.

Koen Lenaerts, Kathleen Gutman, and Janek Tomasz Nowak, EU Procedural Law, Oxford, 2015.

K. Lenaerts and K. Gutman, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice. 38

K. Lenaerts and K. Gutman, '"Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54 American Journal of Comparative Law 55.

Koma ´rek, 'Questioning Judicial Deliberations', 826. Gerard Conway , The Limits of Legal Reasoning and the European Court of Justice, P. 6.

Lasser Mitchel, Anticipating Three Models of Judicial Control, Debate and Legitimacy: The European Court of Justice, the Cour de cassation and the United States Supreme Court, Jean Monnet Working Paper 1/03, 2003, NY 10012, p. 3.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Larenz, Methodenlehre, S. 153 in Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.
McBride Jeremy, The doctrines and methodology of interpretation of the European convention on human rights and by the European court of human rights, Council of Europe, 2021, p. 34.
Mosiek, Effet utile und Rechtsgemeinschaft, S. 7. in Berliner Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.
Moorhead Timothy, The Legal Order of the European Union The Institutional Role of the Court of Justice, 2014, p. 16.
Mirisan Ligia -Valentina, The place and role of the comparative law method within the interpretation of the court of justice of the EU, SARA Law Research Center, International Journal of Legal and Social Order, https://www.ccdsara.ro/ijlso ISSN 2821 – 4161 (Online), p. 1-6.
Martina Bacic, Terminological variation and conceptual divergence in EU Law. https://www.researchgate.net/publication/376522578.
Pechstein/Drechsler, EU Methodenlehre, S. 169. in - Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17
Suvi Sankari, European Court of Justice Legal Reasoning in Context. P. 57. Lasok and Millett 2004, 376, Schermers and Waelbroeck 2001, 10–27, or Brown and Kennedy 1994, 301–322.
The Federal court system in the united states, An Introduction for Judges and Judicial Administrators in Other Countries, An Introduction for Judges and Judicial Administrators in Other Countries, Article III Judges Division Office of Judges Programs Administrative Office of the U.S. Courts Thurgood Marshall Federal Judiciary Building Washington, D.C. 20544 2010 3rd Edition
Vladimir Yaroshevskiy, Die Auslegungsmethoden des EuGH Zitiervorschlag, Berliner Online-Beiträge zum Europarecht, Nr. 1, S. 1-17.

Online sources:

https://curia.europa.eu/jcms/jcms/Jo2_6999/en/, [Online] [Accessed 26.11.2024].
https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en
https://www.saudiembassy.net/legal-and-judicial-structure-0, [online]
https://www.consilium.europa.eu/en/european-council/

Court Decisions:

Costa v ENEL (1964) Case 6/64, Factortame Litigation.
Macarthys v Smith (1979) 3 All ER 325.
Marshall v Southampton AHA (1986) Case 152/84.
Van Gend en Loos (1963) Case 26/62.
BVerGR Judgment of 5 May 2020 - 2 BvR 859/15
EuGH Rs. 26/62, van Gend & Loos, Slg. 1963, S. 1 Rn. 27
Case C-421/92 Gabriele Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. eV.
Joined Cases C-6/90 and 9/90, Francovich v. Italy, Bonifaci v. Italy Judgment of the Court of Justice of 19 November 1991.
Haracoglou (R (on the application of Haracoglou) v Department of Education and Skills) [2001] EWHC Admin 678, [2002] ELR 177
CILFIT Case 283/81, para. 18, Case 35/75, Matisa v. Hza. Berlin [1975] ECR 1205. In Case 238/84, Hans Ro¨ser
EuGH Rs. 44/79, Hauer, Slg. 1979, S. 3727.
Commission v Great Britain, ECR 1985, ECJ Case 100/84, p. 1169, para. 16..
C-59/85 Netherlands v Reed [1986] ECR 1283.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Infringement of Special Categories of Personal Data and the Data Subject's Rights Under GDPR and Georgian Law

DR. SIMONI TAKASHVILI[1]
AFFILIATED ASSOCIATE PROFESSOR AT SULKHAN-SABA ORBELIANI UNIVERSITY
ASSOCIATE PROFESSOR AT CAUCASUS UNIVERSITY (GEORGIA)

Abstract: *Infringement of Special Categories of Personal Data and the Data Subject's Rights are very problematic legal issues in Georgian law and GDPR. The new law of Personal Data Protection stipulates the general regulation of infringement of special categories of personal data and the data subject's rights. The principle of processing of this personal information is very specific and depends on the several aspects especially in special categories of personal data. The content and the term of the special categories of special data is simillar in different coutries and international legal acts. However, the Georgian approcahes are very specific and it is extremely important to analyze the new legal norms and practical problems.*

The legislative list is exhaustive and strictly defined the types of data that belong to a special category of data. It is also important that special categories of personal data are processed in a different manner than is established during the processing of ordinary categories of personal data. Accordingly, in this present article, there is a comprehensive analysis of the processing of the special categories of personal data under new law of Georgia and GDPR which is the most significant legal act in EU. At the end of this article there are some suggestions, recommendations which might be accepted in Georgian reality.

Keywords: *Special Categories of Personal Data; Data Subject's Rights; private data; special GDPR; Georgian approcahes.*

INTRODUCTION

Protection of special categories of personal data is a challenge of Georgian and not only Georgian law and practice. The issue is relevant from the point of view that the violation of a special category of data, due to its special nature and high degree of protection, assumes stricter legal consequences. These legal consequences are mainly administrative in nature, as the Data Controller and Data Processor are subject to fines. It is clear that imposing a fine on the Data Controller and Data Processor is not beneficial to the data subject. Accordingly, the question arises as to whether the data subject can claim any kind of damages from the Data Controller and Data Processor.

This issue is important as the data subject should have the feeling that his/her violated rights will be redressed (compensated). At the same time, legislation needs to be predictable to enable effective protection of data subject rights. The purpose of this article is to analyze the Georgian legislative norms regarding the processing and violation of special categories of data, to outline the means of protection of the data subject's rights and the rights that the data subject may have the right to demand from the violators.

In addition, it will be analyzed to what extent the Law of Georgia "On Personal Data Protection" and the Civil Code can be used as a legal basis for the data subject's requirements. At the end of the paper, the conclusion will combine the research results and recommendations that should be taken into account in practice.

[1] Simoni Takashvili is PhD graduate at Ivane Javakhishvili Tbilisi State University and an affiliated associate professor at Sulkhan-Saba Orbeliani University and an associate professor at Caucasus University.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

1. THE LEGAL BACKGROUNDS FOR PROCESSING OF THE SPECIAL CATEGORIES OF PERSONAL DATA

Nowadays, processing of the special categories of personal data is very important. The content and the term of the special categories of special data is simillar in different coutries and international legal acts. In EU the special categories of personal data is regulated by General Data Protection Regulation GDPR[1] which entered into force in May 25, 2018. In EU the GDPR is the main source for processing of the all kind of personal data including special categorise personal data. It should be mentioned that despite the desire for harmonization of European data protection laws, the GDPR has given member states a very significant degree of flexibility to set their own lawful processing conditions,[2] which is very important for the States. It can be said that GDPR is a handbook for Georgian controllers, data subjects and all persons who are involved in the new Law of Georgia on Personal Data Protection[3].

Artile 9 of GDPR regulates the processing of special categories of personal data. The list of sensitive data contained in article 9(1) of GDPR is exhaustive and additional types of sensitive data might not be added to it and the list also includes not just direct indications of sensitive data but also the information that can be used to indicate them indirectly.[4]

Special categories of personal data is separated and covered with enhanced protection in comparison with other personal data because of their particular importance for the protection of the right of privacy and the risk of fundamental human rights.[5] Accordingly, the legal norms for protection of the special categories of personal data is more strict and demand the controller to prove the legality of the processing.

According to the Law of Georgia on Personal Data Protection there are a list of special categories of personal data. The list consists of the following data: data connected to a person's racial or ethnic origin, political views, religious, philosophical or other beliefs, membership of professional unions, health, sexual life, status of an accused, convicted or acquitted person or a victim in criminal proceedings, conviction, criminal record, diversion, recognition as a victim of trafficking in human beings or of a crime under the Law of Georgia on the Elimination of Violence against Women and/or Domestic Violence, and the Protection and Support of Victims of Such Violence, detention and enforcement of his/her sentence, or his/her biometric and genetic data that are processed to allow for the unique identification of a natural person.[6]

Therefore, the legislative list is exhaustive and strictly defined the types of data that belong to a special category of data. It is also important that special categories of personal data are processed in a different manner than is established during the processing of ordinary categories of personal data.This issue is regulated by the article 6 of the Law of Georgia on Personal Data Protection, which stipulates the specific conditions for processing the special categories of personal data. Besides the grounds which should be existed in order to process the special categories of data, the law directly states that the controller shall have an obligation to justify the legal basis for the processing of special

[1] REGULATION (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

[2] Peter Carey, *Data Protection, A Practical Guide to UK and EU Law,* Fifth edition, Oxford, 2018, p. 87.

[3] The Law of Georgia on Personal Data Protection, Document Number: 3144-XIმს-Xმპ.

[4] Ludmila Georgieva, Christopher Kuner, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 373.

[5] Mariusz Krzysztofek, *GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union,* Volume 107, Wolters Kluwer, Alphen aan den Rijn, Netherlands, 2019, p. 113.

[6] Art., 3.b. of the Law of Georgia on Personal Data Protection.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

categories of data.[7] Also, the main ground for processing the special categories of personal data is data subject's consent. The processing of sensitive data is permitted when the data subject has given explicit consent.[8] However, the Law of Georgia on Personal Data Protection makes a list when there is no consent needed and the controller has a power to process the sensitive personal data.[9]

2. INFRINGEMENT OF PROCESSING OF SPECIAL CATEGORIES OF PERSONAL DATA

2.1. General Backgrounds under GDPR

Article 82 of the GDPR states that any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered. It means that GDPR confers a right on data subjects to apply to the courts for remedy in any me where the data subjects consider that the processing of their data contradicts the GDPR.[10] The GDPR does not differ the degree of liability for breaching of the ordinary personal data and special categories of personal data.

If the da subject confirms that the processing of the personal data especially special categories of personal data is unlawful, in general both controllers and processors can be liable for compensation claims.[11] However, the portion of the violation of the personal data might be different. The responsibility of a processor extends to the actions of its sub-processors.[12] It would follow from this that a controller will remain jointly liable with its processor for an infredgement by that processor unless it can establish an effective defence.[13]

It should be mentioned that the article 82 is directly applicable in the national system of the Member States which means that even if this article is not emplemented in any coutries' legislation the data subject is able to apply this article and request a compesation on the basis of this article.[14]

One of the the main issue is that who is the appropriate claimant. As it is indicated in the legal literature any person who has suffered damage as a result of breach of the GDPR may file a lawsuit against relevant controller or processor for compensation and it is not necessary for the claimant to be the data subject in relation to the relevant processing.[15] As for the legal nature of the liability and a compensation, it can be said that the liability under GDPR is non-contractual liability and in practice this means that national courts may apply different criteria to qualify an infringement as a ground for compensation and quantify damage or to find that non-contractual liability is engaged in

[7] Art., 6.3. of the Law of Georgia on Personal Data Protection.
[8] Ludmila Georgieva, Christopher Kuner, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 377.
[9] One of the ground might be if as special categories of data are processed to ensure information security and cyber security; or, if the processing of special categories of data is necessary because of the nature of labor obligations and relations, including for making decisions on employment and assessing the working capacity of the employee etc.
[10] Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law,* Fifth edition, edited by Peter Carey, Oxford, 2018, p. 153.
[11] Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law,* Fifth edition, edited by Peter Carey, Oxford, 2018, p. 151.
[12] Rosemary Jay, *Data Protection Law and Practice,* Fifth edition, London, 2020, p. 1118.
[13] Rosemary Jay, *Data Protection Law and Practice,* Fifth edition, London, 2020, p. 1118.
[14] Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1175.
[15] Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law,* Fifth edition, edited by Peter Carey, Oxford, 2018, p. 152.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

particular case.[16] The term damage which is indicated in the GDPR includes financial loss and damage not including financial loss such as distress[17] or moral damages.[18]

One of the famous case which was reviewed by ECtHR was a *I. v Finland* Case where the court made some very important findings on the effectiveness of awarding damages for non-contractual liability for breaches of article 8 ECHR related to unlawful processing of personal data.[19] According to the court:

"The protection of personal data, in particular medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The above considerations are especially valid as regards protection of the confidentiality of information about a person's HIV infection, given the sensitive issues surrounding this disease. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.

The Court notes that the mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an alleged unlawful disclosure of personal data was not sufficient to protect her private life. What is required in this connection is practical and effective protection to exclude any possibility of unauthorized access occurring in the first place. Such protection was not given here."[20]

2.2. The legal backgrounds under Georgian law

As it mentioned, if the controller or a processor infringe the special categories of personal data they are obliged to compensate the damages. However, it should be decided what is the nature of the compensation. More precisely, it should be analyzed what are the legal backgrounds for the compensation.

It is significant that the Georgian legislation does not provide for private legal sanctions (damages) for personal data violations, including special personal data violations, in addition to administrative sanctions. However, this does not mean that the data subject does not have the possibility to apply to the court for compensation.[21]

The Supreme Court of Georgia does not have any practice on the newly enacted law. The only decision that concerns the disclosure of special category data is a case where a clinic has disclosed a person's special category personal data, but the data subject has not claimed any kind of damages for this..[22] In this case, a hospital breached data subject's special categories of data but the subject matter of the dispute was different. More precisely, it was disputed why the claimant (data subject) was stopped in the hospital against his will. Because of this, the clinic was ordered to pay moral damages. Accordingly, the claimant (data subject) did not request compensation for the damages caused due to the violation of his special personal data, which there was a high probability of. Therefore, at this

[16] Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1168.
[17] Rosemary Jay, *Data Protection Law and Practice,* Fifth edition, London, 2020, p. 1121.
[18] In Georgian legal system the term "Moral Damage" is more appropriate.
[19] Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1171.
[20] Case of *I v. Finland,* (Application no. 20511/03), Strasbourg, 17 July 2008.
[21] Compare, Jose Pina-Delgado, *Data Protection in the Internet: Cape Verde's National Report, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 108.
[22] Decision of the Supreme Court of Georgia, as-1444-2022, December 22, 2023.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

moment there is no any prevailing high court practice regarding the infredgement of special categorise of personal data. The new Law of Personal Data Protection does not stipulate direct legal norms for the damages which might be imposed controller or processor.

Accordingly, it is very important to determine the legal backgrounds for compensation under Georgian law. As it mentioned in legal literature for example in UK in the case of Google v Vidal-Hall the court first recognized that misuse of private information is a tort and data subjects can also seek compensation for non-material damage for a breach of data protection law.[23] Therefore, when the data subject demands a compensation and the law of personal data protection does not regulate this issue, some other legal acts should be applied. In georgian reality the main source of the compensation of the non-contractual damages is the Civil Code of Georgia. Accordingly, the data subject might demand the compensation on the basis of the civil code and the general clause of the tort article 992 and the article 18 as a infringement of the personal non-property rights.[24] The article 18 of the Civil Code of Georgia is very specific article and the applicable of this legal norm is under question.

2.2.1. Material Damages

According to the article 992 of the Civil Code of Georgia, a person who unlawfully, intentionally or negligently causes damage to another person shall compensate the damage to the injured party. According to the Georgian prevailing court practice, the article 992 stipulates tort liability and the the essence of tortious liability is that it originates on the basis of non-contractual damage, reinforces the principle of fault liability and gives the victim (creditor) the right to claim damages against the obligee, and the prerequisites for the application of this article are as follows: damage; wrongfulness of action, Causation and fault. [25] According to the general rule, it is not the damage per se that makes a person liable for damages, but the fault.[26] In civil law, the forms of fault are intent and negligence.[27]

Therefore, the legislation and the court practice declare that responsibility under article 992 might be imposed if there is a fault, otherwise the person is not liable for the damages. In the section of tort law Georgian legislation envisages liability without fault but it is very specific articles and related to the a source of increased danger.[28]

The article 82 of GDPR does not require the existance of fault when establishing the liability of comntrollers and processors.[29] However, it should be mentioned that the processors are only liable for damages in the following situations if they breach obligations specifically imposed on them under GDPR and if the processor has acted outside or contrary to the instructions of the controller.[30]

As for the exemption from liability, as it mentioned the controllers and processors are liable for the infredgement in spite of the fault, but controller may be exempt from liability if he/she proves that the damage was caused by a processor's activities outside or contrary to the mandate received

[23] Gabriela Zanfir-Fortuna, *The EU Genaral Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1173. Also, the case is available to the following link: https://www.judiciary.uk/wp-content/uploads/2015/03/google-v-vidal-hall-judgment.pdf [08.06.2024].

[24] Compare, Vassilios Kourtis V., *Data Protection in the Internet: Greece, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 233.

[25] The Supreme Court of Georgia, as-5-2024, March 17, 2024.

[26] Ketevan Kochashvili, *Liability without Fault an Exception to the General Rule of Private Law,* Journal of Law, 2023, 2, Tbilisi, p. 67.

[27] Ketevan Kochashvili, *Fault – as a Condition of Civil Liability (Comparative Law Analysis),* Journal of Law, 2009, #1, Tbilisi, p. 89.

[28] The Supreme Court of Georgia, as-610-2022, February 15, 2023.

[29] Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1176.

[30] Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1176.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

from the controller.[31] Similarly, processor will not be liable for the damages if he/she proves that the damage is in fact a consequence of an action he/she conducted on behalf of the controller within the mandate.[32]

It should be mentioned that during the working process if an employee infrindges someone's special categories personal data, the usual rules as to vicarious liability will apply and the employer will be liable for actions carried out within the scope his/her employment.[33] In Georgian reality the legal backgrounds for this will be the article 997 of the Civil Code, which states that a person shall be obligated to pay the damages caused to a third party by his/her employee's unlawful act when the employee was on duty. No liability shall arise if the employee acted without fault.

2.2.2. Non-Material/Moral Damages

There is no guidance to detrmine the level of payment that might be appropriate for the data subject when he/she has suffered distress.[34] However, if the controller or processor breaches the special categories of personal data it is high probability that the level of the liability will be higher that the ordinary personal data's infredgement. However, does the dada subject have power to demand moral damages in under the question.

The Law of Georgia on Personal Data Protection does not regulates the data subject's right to demand moral damages from processor or controllers. According to the article of 413 of the Civil Code of Georgia monetary compensation for non-property damages may be claimed only in the cases precisely prescribed by law. It means that if there is no specific legal norms for the non-contractual/moral damages it is completely impossible to impose the demanded compensation on the controller or the processor. Therefore, the moral damages in civil law is limited and satisfaction of the demand for compensation for moral damages should be based on the grounds provided by the specific norm. [35]

Accordingly, if there is no specific legal backgrounds for moral damages, it is impossible to demand compensation for moral damages. As it mentioned the Law of Personal Data Protection does not envisages such kind of specific article, but the Law of Georgia on Personal Data Protection stiplutaes that data shall be processed without breach of data subject's dignity.[36] Moreover, the article of 18 of the Civil Code of Georgia says that a person may protect in court, according to the procedures laid down by law, his/her honour, dignity, privacy, personal inviolability or business reputation from defamation. Also, in the case of violation on the basis of the fault, the injured person may also claim compensation for non-property (moral) damages. Moral damages may be recovered independently from the recovery of property damages.[37]

Based on the above, the Georgian legislation envisages the compensation of moral damages only in the event of fault, if information damaging to a person's honor and dignity has been disseminated.[38] Accordingly, in event of the distribution of special categories of personal data and if this data violates the honor and dignity of a person, and at the same time the distribution of this information was caused by fault, gives the data subject the right to demand compensation for moral

[31] Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1176.
[32] Gabriela Zanfir-Fortuna, The EU General Data Protection Regulation (GDPR) A Commentary, edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1176.
[33] Rosemary Jay, *Data Protection Law and Practice,* Fifth edition, London, 2020, p. 1119.
[34] Rosemary Jay, *Data Protection Law and Practice,* Fifth edition, London, 2020, p. 1124.
[35] Ilona Gagua, *The Burden of Proof in Compensating for Non-Pecuniary Damage,* Justice and Law, 4(72)21, Tbilisi, p. 73.
[36] The Law of Georgia on Personal Data Protection Article 4.a.
[37] Article 18.6 of The Civil Code of Georgia.
[38] Compare, Taro Komukai, *Data Protection in the Internet: Japanese National Report, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 265.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

damages. Otherwise, the personal data subject will not have the right to compensation for moral damages. Of course, the burden of proof that the honor and dignity of the data subject was violated by the processing of his special category of personal data is on the claimant – data subject.

As for a dignity and honor, a dignity in the sense of civil law, can be interpreted as the evaluation of person's own moral or other qualities, evaluation of person's own public importance by the person himself and this self-evaluation is based on socially recognized criteria for evaluating moral or other qualities.[39] The definition of honor should take into account a person's social prestige and the attitude of others to this person. [40]

As for the amount of the compensation of moral damages in infringement of special categories of personal data, there is no court practice but there several cases regarding moral damages in general. In several cases the supreme court of Georgia declares that there is no any specific article regarding the calculation of compensation but in the event of the breach of legal norms which causes damages and compensation, the court determines the content and volume of moral damage (which has no material expression) in the form of reasonable and fair compensation. This issue is the subject of the court's evaluative reasoning and must be decided in each specific case, taking into account the individuality and peculiarities of the case itself.[41]

In other cases, the court determines the aim of the compensation of the moral damages. More precisely, the court says that Compensation for moral damages has three functions: first - to satisfy the victim; second - to affect the person causing the damage; Third - to prevent violation of personal rights by other persons.[42] Compensation for non-pecuniary damage does not aim at full restitution of the damage caused, because the damage caused does not have a monetary equivalent and it is impossible to fully compensate it and the amount of compensation for moral damages must be reasonable and fair.[43] The amount of compensation for moral damages is determined taking into account the property status of the person who caused the damage, the degree of fault of the victim and other specific circumstances.[44]

Taking into account the abovemntioned the Law of Georgia on Personal Data Protection is newly enacted, there is no case law on compensation for material or moral damages, but as mentioned, it is likely that the data subject can claim compensation for moral damages only if it is proven that his/her special category of personal data caused damage to the honor and dignity of a person (data subject), otherwise, the data subject should not have the right to compensation for moral damages.

2.3. Jurisdiction of the court

The territorial scope of application of data protection rules is very broad.[45] Accordingly, it is rather difficult to determine the relevant court which has the jurisdiction. The relevant court which has a jurisdiction for the claim will be the court country, where controller has an establishemnt or the courts of the country in which the data subject is habitually resident.[46] The use of the principle of the respodent's place of residence (location) in determining international jurisdiction is very practical

[39] The Supreme Court of Georgia, as-979-940-2014, September 10, 2015.
[40] Sergi Jorbenadze, *The Commentary of Civil Code of Georgia,* Book I, Article 18, Editor Lado Tchanturia, p. 118.
[41] The Supreme Court of Georgia, as-1503-2023, March 22, 2024.
[42] The Supreme Court of Georgia, as-1503-2023, March 22, 2024. Also, as-660-660-2018, July 20, 2018 and as-1040-2018, July 26, 2019
[43] *Ibid*
[44] *Ibid*
[45] Christina Breunig, *Martin Schmidt-Kessel, Data Protection in the Internet: National Report Germany, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, P. 206.
[46] Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law,* Fifth edition, edited by Peter Carey, Oxford, 2018, p. 152.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

and creates profitable conditions for both sides of the process.[47] It will be easier for the respodent to defend its rights in the country of his residence, while it is much easier for the claimant, if he/she wins the case, to demand the seizure and enforcement of his property in the country of the respodent's residence.[48]

Under GDPR the person who claims for compensation does not have a choice of jurisdiction when the controller is a public authority of a Member State because in this situation the Member State where that authority is established has jurisdiction and this rule is priority over other general jurisdictional rules.[49]

In relation to disputes arisen from private international law nature, Georgian courts are guided by the relevant provisions of the Law of Georgia on Private International Law[50] and the Civil Procedure Code of Georgia[51] (unless an international treaty or agreement to which Georgia is a contracting party provides otherwise).[52] According to the the Law of Georgian on Private Intrnational Law, Georgian courts shall have international jurisdiction if a claim concerns damages inflicted by an unlawful or an equivalent act and the act was committed or damages were inflicted in Georgia.[53] According to the Japan law, if damage such a privacy infredgement occures in Japan the Japanese law on tort liability will be applied.[54]

Accordingly, if the harmful event happened in Georgia, Georgian courts have jurisdiction to review the case. In General, cases relating to tort, the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case.[55] However, when the case is related to the infredgement of the special categories of personal data determining the exact place of the harmful event migh be difficult. This situation is especially difficult when a tort is commited a number of or a whole serioes of events. Out of that number of series a particular event will then have to be considered as being of particular importance.[56] It will be very difficult and specific regarding the infredgement of the special categories of personal data.

Based on the above mentioned, it can be said that in most cases in the event of a tort the most important criteria to determine court jurisdiction is the event which coused the damages.[57] Therefore, if data person wants to demand compensation on the basis of the infredgement his/her special categories of personal data Georgian courts will have jurisdiction if the infredgemebt took place or the damages occured in Georgia.

2.4. The applicable law to the subject matter of the dispute

The article 42 of the Law of Georgia on Private International Law regulates the applicable to the subject matter of the dispute if the case is related to the tort. It is important to mentioned that this article is very flexible and gives an opportunity to the claimant to choose which law is more appropriate for his/her interest from the 2 options: a) the law of the country in which an action or a

[47] Zviad Gabisonia, *Georgian Private International Law,* the second edition, Tbilisi, 2011, pp. 412-413.
[48] The Supreme Court of Georgia, a-2135-sh-46-2015, October 26, 2015.
[49] Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020, p. 1177.
[50] The Law of Georgia on Private International Law, Parliamentary Gazette, 19-20, 29/04/1998.
[51] The Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 31/12/1997
[52] The Supreme Court of Georgia, as-287-2020, September 16, 2020.
[53] Article 9.c. The Law of Georgia on Private International Law.
[54] Taro Komukai, *Data Protection in the Internet: Japanese National Report, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 267.
[55] Mathijs H. ten Wolde, Kirsten C. Henckel, *Business and Private International Law in the EU,* second edition, Netherlands, 2023, P. 135.
[56] *Ibid P. 137.*
[57] Compare, Polčák R., Kasl F., Míšek J., *National Report: Czech Republic, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 157.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

circumstance that gave rise to a claim for damages took place or b) the law of the country in which the interests protected by law were prejudiced.[58] Accordingly, if the infringement of special categories of personal data the data subject can choose the most appropriate law for his/her interest.[59] The means of choice of applicable law is very important for data subject. Therefore, it can be said that if the dispute has an international private law nature, the Georgian legislation is useful for the protection of legal rights of the data subject.

CONCLUSION

Based on the presented analyzing, it is possible to say that special categories of personal data are processed in specific cases. Accordingly, as a result of their infredgement, the data subject has the right to demand damages. However, the GDPR gives the data subject the opportunity to claim both material and non-material/moral damages.

The Georgian legislation and the newly enacted Personal Data Protection Law do not contain a direct regulation which gives the power to the data subject to demand compensation for damages. It also should be mentioned that the Supreme Court of Georgia does not have any practice on the newly enacted law. Accordingly, it is very important to determine the legal backgrounds for compensation under Georgian law. In georgian reality the main source of the compensation of the non-contractual damages is the Civil Code of Georgia. Accordingly, the data subject might demand the compensation on the basis of the civil code and the general clause of the tort article 992 and the article 18 as a infringement of the personal non-property rights.

The article 18 of the Civil Code of Georgia is very specific article and the applicable of this legal norm is under question. It si important that Georgian legislation envisages the compensation of moral damages only in the event of fault, if information damaging to a person's honor and dignity has been disseminated. Accordingly, in event of the distribution of special categories of personal data and if this data violates the honor and dignity of a person, and at the same time the distribution of this information was caused by fault, gives the data subject the right to demand compensation for moral damages. Otherwise, the personal data subject will not have the right to compensation for moral damages. Of course, the burden of proof that the honor and dignity of the data subject was violated by the processing of his special category of personal data is on the claimant – data subject. As for the amount of the compensation it is up to the court and there is no guidlines which might be applicable when the court analyzes the infredgement of special categories of personal data. Therefore, in Georgian legal system the compensation from the special categories of personal data will be based on the article 992 and 18 of the Civil Code of Georgia.

Also, as it analyzed above, the court jurisdiction and applicbale law to the subject matter is very important. The Law of Georgia on Private International Law regulates both of the situations and stipulates very specific legal rules for determining applicable law and the relevant court which has jurisdiction. It showed that the most cases in the event of a tort the most important criteria to determine court jurisdiction is the event which coused the damages. Therefore, if data person wants to demand compensation on the basis of the infredgement his/her special categories of personal data Georgian courts will have jurisdiction if the infredgemebt took place or the damages occured in Georgia. As for the applicable law rules, Georgian legislation is very flexible for this issue because the data subject is able to choose the law which is more useful or appropriate for his/her interest.

[58] Article 42.1 The Law of Georgia on Private International Law.

[59] Compare, Vassilios Kourtis V., *Data Protection in the Internet: Greece, , Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020, p. 239.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

BIBLIOGRAPHY/REFERENCES:

Books

Christina Breunig, *Martin Schmidt-Kessel, Data Protection in the Internet: National Report Germany, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020.

Gabriela Zanfir-Fortuna, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020.

Heledd Lloyd-Jones, Peter Carey, *The Rights of Individuals, Data Protection, A practical Guide to UK and EU Law,* Fifth edition, edited by Peter Carey, Oxford, 2018.

Jose Pina-Delgado, *Data Protection in the Internet: Cape Verde's National Report, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020.

Ludmila Georgieva, Christopher Kuner, *The EU General Data Protection Regulation (GDPR) A Commentary,* edited by Christopher Kuner, Lee A. Bygrave, Christopher Docksey, Oxford, 2020.

Mariusz Krzysztofek, *GDPR: General Data Protection Regulation (EU) 2016/679, Post-Reform Personal Data Protection in the European Union,* Volume 107, Wolters Kluwer, Alphen aan den Rijn, Netherlands, 2019.

Mathijs H. ten Wolde, Kirsten C. Henckel, *Business and Private International Law in the EU,* second edition, Netherlands, 2023.

Peter Carey, *Data Protection, A Practical Guide to UK and EU Law,* Fifth edition, Oxford, 2018.

Polčák R., Kasl F., Míšek J., *National Report: Czech Republic, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020.

Rosemary Jay, *Data Protection Law and Practice,* Fifth edition, London, 2020.

Sergi Jorbenadze, *The Commentary of Civil Code of Georgia,* Book I, Article 18, Editor Lado Tchanturia.

Taro Komukai, *Data Protection in the Internet: Japanese National Report, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020.

Vassilios Kourtis V., *Data Protection in the Internet: Greece, Data Protection in the Internet,* editors: Dario Moura Vicente, Sofia de Vasconcelos Casimiro, Switzerland, 2020.

Zviad Gabisonia, *Georgian Private International Law,* the second edition, Tbilisi, 2011.

Studies – published in journals

Ilona Gagua, *The Burden of Proof in Compensating for Non-Pecuniary Damage,* Justice and Law, 4(72)21, Tbilisi, pp. 63-108.

Ketevan Kochashvili, *Fault – as a Condition of Civil Liability (Comparative Law Analysis),* Journal of Law, 2009, #1, Tbilisi, pp. 78-115.

Ketevan Kochashvili, *Liability without Fault an Exception to the General Rule of Private Law,* Journal of Law, 2023, #2, Tbilisi, pp. 66-85.

Law and cases

Case of *I v. Finland,* (Application no. 20511/03), Strasbourg, 17 July 2008.

Decision of the Supreme Court of Georgia, as-1444-2022, December 22, 2023.

REGULATION (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

The Civil Code of Georgia.

The Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 31/12/1997

The Law of Georgia on Personal Data Protection, Document Number: 3144-XIმს-Xმპ.

The Law of Georgia on Private International Law, Parliamentary Gazette, 19-20, 29/04/1998.

The Supreme Court of Georgia, as-5-2024, March 17, 2024.

The Supreme Court of Georgia, as-610-2022, February 15, 2023.

The Supreme Court of Georgia, as-979-940-2014, September 10, 2015.

The Supreme Court of Georgia, as-1503-2023, March 22, 2024.

The Supreme Court of Georgia, a-2135-sh-46-2015, October 26, 2015.

The Supreme Court of Georgia, as-287-2020, September 16, 2020.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Section 3
Economic and Financial Integration. Focus on Georgia

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Social Right of Company Director Under Georgian Law

DR. JUR. GIORGI USTIASHVILI, LL.M/MBL
AFFILIATED ASSISTANT PROFESSOR
CAUCASUS SCHOOL OF LAW, CAUCASUS UNIVERSITY, GEORGIA

Abstract: The Law of Georgia on Entrepreneurs regulates the relationships between directors and business entities. However, the law only deals with commercial aspects of the relationship, and social rights such as a paid vacation, parental leave, and non-discrimination treatment are out of the legal arrangement. Consequently, one of the curtail issues in Georgian company law is the subject of whether directors of a company can exercise these aforementioned rights, and other basic social guarantees defined by the labor legislation and how EU law can influence Georgian corporate law relationships.
Keywords: *EU Law; Georgian company law; directors' rights on vacations; parental leave; discrimination.*

I. INTRODUCTION

The arrangements of perfect legal settings for the regulation of duties and rights of a company's directors are the subject of corporate law. Accordingly, the basic commercial issues such as appointment, resignation, duties, and rights of business entities' directors (managers) are precisely regulated by the Georgian Law of Entrepreneurs. Under this law, it is directly stated that legal relationships between directors and company is a service relationship and respectively, it is a subject to service agreements that should be concluded between them.[1] Furthermore, the above-mentioned law also defined that the provision of labour legislation of Georgia will not apply to directors.[2]

In addition to this, the Law of Georgia on Entrepreneurs defines the essential conditions that compulsorily shall be included in a service contract concluded between a director and business entities.[3] However, this law is completely noiseless about directors's social rights, for instance, the right of vacation, right of maternity and paternity leave, right of sick pay are not defined by this law.

Thus, it can be a demanding issue in Georgian corporate law how social rights can be applied to directors of the business entities. This subject is of importance in light of EU law too, as Georgia signed an Association Treaty with the European Union in 2014[4] as well as Georgia was granted a membership candidacy status from the EU in 2023.[5] It has to be noted that there are some cases when the EU law approaches were broadly defined by the Court of Justice of the European Union (CJEU) and its application to some degree also extended to the relations of companies' directors.[6]

Accordingly, this article will discuss how directors' social rights can be effectively protected under the service contract and how EU law can influence Georgian corporate law practice.

[1] Art.45.1, Law of Georgia on Entrepreneurs, 02/08/2021.
[2] Ibid.
[3] Art.45.3, Law of Georgia on Entrepreneurs, 02/08/2021.
[4] See 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, Concluded on 27/06/2014. Official Journal of the European Union, L 261, Volume 57, 30 August 2014.
[5] See https://www.consilium.europa.eu/en/policies/enlargement/georgia/, Accessed: 09.12.2024.
[6] See C-232/09, Dita Danosa v LKB Līzings SIA. See also Florian Jacoby, in: Reinhard Bork/Carsten Schäfer, GmbHG Kommentar zum GmbH-Gesetz 4. Auflage, Köln, 2019, p.787.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

II. LEGAL REGULATION OF DIRECTORS ACTIVITIES

1. General Concept

A director has significant functions in the corporate managerial structure of every business entity. Generally speaking, directors have a bunch of statutory and transactional duties and rights concerning the company, shareholders, and creditors.[7] Therefore, the creation of the perfect legal frame for regulating directors' activities is a primary subject of Georgian corporate law.

The Law of Georgia on Entrepreneurs mainly created standard duties for corporate directors, such as *duty of care* and *duty of loyalty* which are indicated in the different articles on the law.[8] The primary aims of such duties are the protection of the interests of corporations, shareholders, and in some cases creditors.[9] In addition to that, the aforementioned statutory duties can also be supplemented or extended by the internal corporate documentation, such as the statute of the corporation, shareholders' agreement, and service contract concluded between the director and company.

The Law of Georgia on Entrepreneurs precisely defines and regulates directors' statutory duties, but under the law, there are no provisions for the protection of directors' social and labor rights. Concerning these issues, it needs to be noted that the employment relationship between the director and corporation has specific legal and commercial character, and by the Law of Georgia Entrepreneurs, a company director who has managerial and representational power is not treated as a worker in line of the labor legislation of Georgia and respectively, the provisions of the Labor Code of Georgia and other labor legislation shall not apply to directors and company relationships.[10]

Under the Law of Georgia on Entrepreneurs, the appointment and resignation of company directors have special legal character and procedure. For instance, a director appointed by the shareholders' meeting or other authority corporate body, such as by the supervisory board depending on the corporate governance structure of the entity. The director can be dismissed at any time without reason or restriction.[11] A director's appointment and resignation is a corporate law act that requires registration in an entrepreneur registry.[12] Once registration is completed, a director will have full-fledged power to represent and manage the affairs of the company. After the accomplishment of registration directors fully enter into a legal employment relationship with the corporation and with directors, he/she can conclude a service contract that regulates working and other relationships between the director and the company. Therefore, in corporate internal structure, a service contract can be considered one of the perfectly legal ways to integrate issues of directors' social rights.

---

[7] Martin Schulz, Oliver Wasmeier, The Law of Business Organizations a Concise Overview of German Corporate Law, Berlin Heidelberg, 2012, p.94.

[8] See Arts.50, 51, 53, 54, 208, Law of Georgia on Entrepreneurs, 02/08/2021.

[9] Martin Schulz, Oliver Wasmeier, The Law of Business Organizations a Concise Overview of German Corporate Law, Berlin Heidelberg, 2012, p.94.

[10] Art.45.1, Law of Georgia on Entrepreneurs, 02/08/2021.

[11] Art.44.3, Law of Georgia on Entrepreneurs, 02/08/2021.

[12] See Supreme Court of Georgia, Case No. AS-319-302-2017, par.1.9.1. See also Frank Dornseifer, Germany, in: Frank Dornseifer, Corporate Business Forms in Europe A Compendium of Public and Private Limited Companies in Europe, München, 2005, p.280. Giorgi Giguashvili, George Jugeli, Explanations of Law of Georgia on Entrepreneurs, Tbilisi (in Georgian), 2022, p.92.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

2. Purpose and Structure of Service Contract

2.1. Essential Terms of the Contract

The service contract between a company and its director is a typical civil law transaction based on the general civil code's principles, such as private autonomy of the parties and freedom of contractual relationship which are stipulated by the Art. 319 of the Civil Code of Georgia.[13] The Law of Georgia on Entrepreneurs does not define whether a service contract must be in written or oral form concluded between the parties. Therefore, it should be assumed that a service contract can be concluded in any form.[14] If director without written contract factually begins activities, a verbal agreement is established. A service contract can be concluded in any language. The legal basis and minimum legal requirements regarding the service contract are defined by Art. 45 of the Law of Georgia on Entrepreneurs. According to Art. 45.2 of this law, the service contract with a company's director shall be established on behalf of the company, by the chairperson of the supervisory board or the chairperson of the general meeting of the company defined by the statute or elected by the general meeting which decided on the appointment of the person as a director.[15]

The Art. 45.3 of the Law of Georgia on Entrepreneurs defines the minimum legal conditions and requirements that a service contract shall cover. For instance, the service contract shall specify the amount, form, and cyclicity of the reimbursement and the privileges a director will be authorized to receive during the contract as well as the rights and duties of the company's director that will remain in force even after the expiration of this service contract.[16] However, if some of these conditions are not specified in the contract, this does not mean that the contract is void.[17] It is worth mentioning that in case a service contract does not contain provisions on the reimbursement of a company's director, it shall be deemed that the director is conducting his/her duties free of charge basis.[18] If a company and its director enter into an oral service contract, and the director performs its duties for remuneration. In that case, this arrangement must be explicitly documented in the minutes of the shareholders' meeting. Alternatively, an extract from a bank payment indicating that the director received remuneration for their services can serve as a decisive factor.

Art. 45.4 of the Law of Georgia on Entrepreneurs also contains special provisions for the termination of service contracts. For instance, except otherwise provided by a service contract, the director of the company shall have the right to retract a service contract and thereby terminate his/her position in a company in case the notification in writing form is sent at least one month in advance to the the responsible corporate body of the company, e.g., company's supervisory board, management body, or general meeting of the company, such meeting shall be convened by the director.[19] Following Art. 45.5 of the Law of Georgia on Entrepreneurs, there are also defined terms of cancelation of the service contract, e.g., the resignation of a director shall automatically result in the repudiation of the service contract concluded with the company, except otherwise provided for by the service contract.[20]

---

[13] See Art. 319, Civil Code of Georgia, 26.06.1997. Supreme Court of Georgia, Case No. AS-319-302-2017, para 1.9.1. See also Nino Bakakuri, Martin Gelter, Lasha Tsertsvadze, George Jugeli, Corporate Law A Text Book for Lawyers, Tbilisi, (in Georgian) 2019, p.77.

[14] See Bert Tillmann/Randolf Mohr, GmbH-Geschäftsführer Rechts-und Steuerberatung Vertragsgestaltung, 11. neu bearbeitete Auflage Köln 2020, p.79. Nino Bakakuri, Martin Gelter, Lasha Tsertsvadze, George Jugeli, Corporate Law A Text Book for Lawyers, Tbilisi, (in Georgian) 2019, p.77.

[15] See Art. 45.2, Law of Georgia on Entrepreneurs, 02/08/2021.

[16] Art. 45.3, Law of Georgia on Entrepreneurs, 02/08/2021. See also Florian Jacoby, in: Reinhard Bork/Carsten Schäfer, GmbHG Kommentar zum GmbH-Gesetz 4. Auflage, Köln, 2019, p.785.

[17] Giorgi Giguashvili, George Jugeli, Explanations of Law of Georgia on Entrepreneurs, Tbilisi (in Georgian), 2022, p.93.

[18] Ibid.

[19] Art. 45.4, Law of Georgia on Entrepreneurs, 02/08/2021.

[20] Art. 45.5, Law of Georgia on Entrepreneurs, 02/08/2021.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

A service contract may continue after a company director's resignation to maintain confidentiality insider information and regulate the director's compensation or pension issues.

2.2. Dispositive Terms of the Service Contract

In addition to the aforementioned compulsory legal provisions, parties to the service contract can stipulate any terms in the contract concerning directors' managerial activities, duties, rights, privileges, and social guarantees. Service contracts can regulate the allocation of bonus shares principles, remuneration of traveling expenses, setting up corporate insurance and pension systems, defining directors' compensation rules, etc. Therefore, parties can also negotiate under the service contract directors' social rights,[21] e.g., terms and conditions of the paid and unpaid vacations, directors' weekly working hours, working conditions and healthy working environment, rules and preconditions of maternity and paternity leaves, protection of pregnant directors, creation of the non-discriminatory policy and so on.[22] Hence, due to contractual freedom, parties can install similar clauses in service contracts as they are in the Labor Code of Georgia and other labor legislation.

However, the installation of the above-mentioned social legal provisions depends on the parties' barging possibilities and commercial powers inside the company; for instance, mostly candidacy of the director may get these rights within the service contractual agreements when he or she has demanding professional skills and vigorous practical experiences, or other professional values that give him more barging powers in service contractual negotiation than the company has.

In case the director is without outstanding professional skills and does not have the above-mentioned bargaining power in the negotiation process, such director will not be able to protect its rights and welfares and therefore it can result that right of vacation, terms of working hours, right of maternity leave, guarantees of pregnant directors, etc. being out from the contractual regulations.

Consequently, a service contract that is concluded between a director and a company cannot always be considered an effective legal instrument to protect the above-discussed social rights of the company's directors. On the one hand, the protection of directors' social rights depends on their bargaining powers during the negotiation process, while on the other hand, in ordinary situations stipulation of such rights in the service contract will be the discretion of the company.

3. Legal Regulation of Directors Social Right

3.1. Georgian Court Approach

Arrangement of the legal regulation between a director and corporation is not a newness in Georgian corporate law doctrine and court practice. The previous Law of Georgia on Entrepreneurs also had some points that after directors' appointment, they should have concluded a service contract.[23] However, this issue was vague, because the old law did not provide a full explanation of what the service contract was and what legal elements and terms this contract should have contained.

Concerning the aforementioned issues explanations were made by Georgian legal doctrine[24] and different court practices. Accordingly, in one of its decisions the Tbilisi Appeal Court has explained that the legal relationship between directors and companies has both the corporate law and

[21] See Supreme Court of Georgia, Case No. AS-319-302-2017, para.1.9.3.
[22] See Heinz-Peter Verspay, GmbH-Handbuch für den Mittelstand, Berlin Heidelberg, 2009, p.53.
[23] See Arts. 6, 56, Law of Georgia on Entrepreneurs, 28/10/1994.
[24] See Lado Chanturia, Tevdore Ninidze, Comments to Law of Georgia on Entrepreneurs, Third Edition Tbilisi, (in Georgia) 2002, p.425. See also Nino Bakakuri, Martin Gelter, Lasha Tsertsvadze, George Jugeli, Corporate Law A Text Book for Lawyers, Tbilisi, (in Georgian) 2019, pp. 77-79.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

the labor law elements.[25] Additionally, the Supreme Court of Georgia in one of its decisions has made an explanation that the appointment and resignation of managerial bodies (directors and supervisory board members) of the company are carried out by the legal provision of the Law of Georgia on Entrepreneurs and consequently such issues are not of subject Georgian Labor Code regulations.[26] In addition to that, the Supreme Court has explained that only these legal matters that are not regulated by the Law of Georgia on Entrepreneurs, the charter of the company, and the contract concluded between the director and company can be subject to the Georgian Labor Code regulations (such as the areas that are related to social guarantees, paid vacations and so on).[27]

Statutory regulations of directors' social rights within the corporate law are an essential and at the same time practical issue. To achieve this goal, German corporate law has significant approaches, Art. 38 of the German Limited Liability Act (GmbHG) provides that a director of the company may request its revocation due to the pregnancy fact, taking parental leave, caring for a family member, and illness. A director can make such a request if there is at least one appointed director in the company too. This director's revocation has temporary character and after expiring the revocation terms defined by the Art. 38.3, sub-paragraphs 1 and 2, directors shall be re-appointed again.[28]

As it has already been mentioned, these approaches of a court were related to the assessment of the old version of the Law of Georgia on Entrepreneurs which was canceled in 2021. So, based on court practice, it can be assumed that the legal relationship between the director and the company has a hybrid law nature. Accordingly, most of these relationships were subject to corporate law (Law of Georgia on Entrepreneurs) ruling and the provisions of the Labor Code of Georgia were not applied to these issues. While, some parts of relationships between the company and its directors, for example, social matters, social guarantees, and issues of paid vacation, etc. were subject to Labor Code.[29]

Currently, in practice, it is a very persuasive matter whether the aforementioned court approaches can be still valid and applied to the provision of the new version of the Law of Georgia on Entrepreneurs which was enacted in 2021. This new law directly stated that the legal regulations between the company and director are arranged by the service contract and this service contract is not subject to regulation by the Georgian labor legislation provisions.[30]

3.2. Impact of EU Law on the Corporate Law Relationships

3.2.1. Approaches of CJEU

The matters of the protection of the directors' social rights in business entities can also be a key subject in light of the EU law principles. Therefore, it is significant to review whether the EU law has supremacy over national corporate law regulations. Concerning this matter, one of the important cases of the CJEU is C-232/09, *Dita Danosa v LKB Līzings SIA*.[31] Under this case, the CJEU explained within the meaning of the Council Directive 92/85/EEC of 19 October 1992 following subjects: (1) whether the member of the capital company's Board of Directors is

[25] **Tbilisi Appeal Court,** Case No. **As -952-910-2013,** https://shorturl.at/Y7Vdx, accessed 10.12.2024.
[26] Supreme Court of Georgia, Case No. AS 1634-1533-2012.
[27] Ibid.
[28] Holger Altmeppen, GmbHG, Gesetz betreffend die Gesellschaften mit beschränkter Haftung, Kommentar 11. Auflage, München 2023, pp.785, 805-806. See also Lutter/Hommelhoff, GmbH-Gesetz Kommentar 21 neu bearbeitete Auflage, Köln, 2023, p.993.
[29] See Supreme Court of Georgia, Case No. AS 1634-1533-2012.
Supreme Court of Georgia, Case No. AS-319-302-2017.
Supreme Court of Georgia, Case No. AS-142-2023.
[30] Art.45.1, Law of Georgia on Entrepreneurs, 02/08/2021.
[31] See CJEU Case C-232/09, Dita Danosa v LKB Līzings SIA.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

considered as a 'worker', and, (2) whether member of capital company's Board of Directors can be discharged without restriction, in particular without regard to the fact that this person is concerned pregnant.[32]

The main findings of the CJEU were:

1) Court stated that a Member of the Director board of a capital company who provides services to that company and who is an integral part of the company must be considered a worker with the meaning of Council Directive 92/85/ EEC of 19 October 1992; if directors' activity (a) is carried out for some times; (b) under the direction or supervision of another body of that company; (c) and if in return of those activities, the Board Member receives remuneration.[33] The court also stated that the assessment of those preconditions is the responsibility of the national court.[34]

2) Court admitted that the Council Directive 92/85/ EEC of 19 October 1992 is to be interpreted in such a way that to precluded national legislation which allows dismissal of the Director Member of a capital company without restriction when this person is considered to be a 'pregnant worker' and the decision of dismissal of such director was made on the ground of her pregnancy.[35] The court stated that even if a member of the Director is not a 'pregnant worker,' the fact of this person's dismissal on the pregnant ground can affect women, and thus it constitutes direct discrimination against the sex ground and contrary to the Council Directive 76/207/EEC of 9 February 1976.[36]

Subsequently, under this decision, CJEU has stated that provision of the EU law, especially the Council Directive 92/85/ EEC of 19 October 1992 and the Council Directive 76/207/EEC of 9 February 1976 can interfere with the internal corporate law relationship of member state countries to protect pregnant directors' right. To say in other words, by the court approaches it is required that the internal corporate law relationships in commercial companies shall be in line with the EU law provisions.

3.2.2. EU Law Influence in Georgia Corporate Practice

In the future it will be a very demanding topic in corporate law practice as to what extent the judgment of the CJEU on the Georgian corporate law relationship will be influenced. Now there is neither clear vision, nor Georgian court opinion regarding this matter and therefore can only be made a general assumption by reasoning judgment of the CJEU in connection with Georgian corporate law, i.e., the Law of Georgia on Entrepreneurs (enacted in 2021). So, as for the first part of the CJEU decision, whether under the EU law director can be considered a 'worker' in Georgian corporate law relationships, it is necessary to apply court findings to the relevant provisions of the Law of Georgia on Entrepreneurs and access every element of this law with conjunction of the CJEU decision. So, under Georgian law, a director of the company can be a natural or physical person,[37] the director of the company can be removed from its position at any time without substantial reason, [38] a director is appointed to the position by the shareholder meeting or supervisory board (in case of its existence) [39] after the appointment of a director, a company concludes a special service contract with a director. If there is no information about the remuneration of the director in a contract, it is deemed that the director performs their duty free of charge.[40] A director of a limited liability company, when

[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Art.43.5, Law of Georgia on Entrepreneurs, 02/08/2021.
[38] Art.44.3, Law of Georgia on Entrepreneurs, 02/08/2021.
[39] Art.44.1, Law of Georgia on Entrepreneurs, 02/08/2021.
[40] Art.45.3. Law of Georgia on Entrepreneurs, 02/08/2021.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

exercising managerial authority shall comply with the partners' decisions[41] (subordinative element). In addition to that, while performing managerial functions, a director of the joint-stock company shall coordinate its decisions with the supervisory board in case it is provided by the law or charter of the company.[42] Additionally, the director of joining a joint-stock company shall comply with the decisions of the shareholders' meeting and supervisory board of the company (so there is also a subordinative element like in a LLC).[43]

The CJEU provided three elements in its decision:[44] (a) a director shall carry out the activity; (b) under the direction or supervision of another body of company; (b) getting remuneration for its activity. Owing to, the above-mentioned Georgian internal corporate law principles formaly fully meet requirements defined by CJEU, therefore, it can be supposed that the Georgian legal model of the corporate law relationship between a director and a company falls under the ruling of the CJEU. The influence of EU law requires a reassessment of the fundamental principles of corporate law.

Concerning the second finding of the CJEU, it can be said that if the director of the company is dismissed under Georgian law only on the grounds of her pregnancy, this case will also fall under the ruling of the CJEU because it should be considered a discrimination on the sex ground not only with the EU law but direct discrimination is also prohibited by the Georgian internal legislation.[45] For instance, there is the special law of Georgia on the Elimination of All Forms of Discrimination enacted in 2014 which states that provisions and requirements of this law shall be applied to public institutions, natural and legal persons in all fields, only if such actions are not subject of regulations, other legislation which are in conformity with the provision of this anti-discrimination law.[46]

In addition to that, it should be noted that the Supreme Court of Georgia in one of its decisions has pointed out that although the relationship between a director and a company is regulated by the corporate law and service contract and thus provisions of labor law do not apply to these relationships, non-discrimination and some minimal social law requrments from labor legislation and international treaty - European Social Charter, in some extent should still apply to these relationships.[47] In addition to that, according to the court's opinion, the discriminatory removal of a director by a company will be deemed void under Article 54 of the Georgian Civil Code.[48]

Removal of a pregnant director of a company should not be considered discrimination when the ground for removal has other reasons, such as loss of trust, lack of professional skills, and other commercial circumstances that are not related to pregnancy issues.[49] In case of litigation, under Georgian law the burden of proof of this issue is on the company's side since it is an anti-discrimination suit.[50] Concerning this issue, an interesting practice was developed by German legal doctrine that encourages shareholders of GmbH to justify the removal of pregnant directors

[41] Art.124.2, Law of Georgia on Entrepreneurs, 02/08/2021.
[42] Art.203.2, Law of Georgia on Entrepreneurs, 02/08/2021.
[43] Art.203.3, Law of Georgia on Entrepreneurs, 02/08/2021.
[44]CJEU Case C-232/09, Dita Danosa v LKB Līzings SIA.
[45] See Law of Georgia on the Elimination of All Forms of Discrimination, 02/05/2014.
[46] Art. 3., Law of Georgia on the Elimination of All Forms of Discrimination, 02/05/2014.
[47] Supreme Court of Georgia, Case No. AS-319-302-2017, paras. 1.9.2., 1.9.3.
[48] Ibid paras. 1.9.2.
[49]See Siniša Petrović, Petar Ceronja, CORPOPRATE EFFECTS OF THE 'DANOSA CASE' - IS THE TERMINATION OF MEMBERSHIP IN THE BOARD OF DIRECTORS ALLOWED IN THE CASE OF A PREGNANT MEMBER OF THE BOARD? Croatian Yearbook of European Law and Policy, 8, 437-456, p.451, https://www.cyelp.com/index.php/cyelp/article/view/139, acceced 10.12.2024.
[50] Art. 363[3] Civil Procedure Code of Georgia, 14/11/1997; Siniša Petrović, Petar Ceronja, CORPOPRATE EFFECTS OF THE 'DANOSA CASE' - IS THE TERMINATION OF MEMBERSHIP IN THE BOARD OF DIRECTORS ALLOWED IN THE CASE OF A PREGNANT MEMBER OF THE BOARD? Croatian Yearbook of European Law and Policy, 8, 437-456, p.453, https://www.cyelp.com/index.php/cyelp/article/view/139, acceced 10.12.2024.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

from the position with other grounds that are not connected to pregnancy although such obligation is not directly enshrined by the legislation Law of the limited liability Company of Germany (GmbHG).[51]

III. CONCLUSION

Issues of the creation of perfect legal structures for the regulation of duties and rights of the directors are the primary business of the corporate law. However, the director as a human being also has basic social rights that are protected by the international legal acts, EU law, and internal legislation, especially labor code and anti-discriminatory law. Therefore, some basic public law requirements may interfere with the internal commercial and corporate law relationships.

The Law of Georgia on Entrepreneurs mainly regulates directors' statutory duties; however, there are no clear-cut provisions under this law about director rights, especially social rights, such as rights of paid vacation, organizing healthy working environment, non-discriminatory treatment, and so on. Therefore, take into consideration the above - mentioned issues, several changes shall be made and basic social rights should be defined by the Law of Georgia on Entrepreneurs.

In addition to that, Georgia has the EU candidate country status and accordingly, after becoming a EU member, the EU legal order will also influence Georgian corporate law and other internal legislation. Therefore, EU law requirements shall be observed in internal corporate and commercial relationships.

BIBLIOGRAPHY:

Books:

Bert Tillmann/Randolf Mohr, GmbH-Geschäftsführer Rechts-und Steuerberatung Vertragsgestaltung, 11. neu bearbeitete Auflage Köln 2020;

Florian Jacoby, in: Reinhard Bork/Carsten Schäfer, GmbHG Kommentar zum GmbH-Gesetz 4. Auflage, Köln 2019;

Frank Dornseifer, Germany, in: Frank Dornseifer, Corporate Business Forms in Europe A Compendium of Public and Private Limited Companies in Europe, München 2005;

Giorgi Giguashvili, George Jugeli, Explanation of Law of Georgia on Entrepreneurs, Tbilisi 2022;

Holger Altmeppen, GmbHG, Gesetz betreffend die Gesellschaften mit beschränkter Haftung, Kommentar 11. Auflage, München 2023;

Heinz-Peter Verspay, GmbH-Handbuch für den Mittelstand, Berlin Heidelberg 2009;

Lutter/Hommelhoff, GmbH-Gesetz Kommentar 21 neu bearbeitete Auflage, Köln 2023;

Lado Chanturia, Tevdore Ninidze, Comments to Law of Georgia on Entrepreneurs, Third Edition Tbilisi 2002;

Martin Schulz, Oliver Wasmeier, The Law of Business Organizations a Concise Overview of German Corporate Law, Berlin Heidelberg 2012;

Nino Bakakuri, Martin Gelter, Lasha Tsertsvadze, George Jugeli Corporate Law A Text Book for Lawyers, Tbilisi 2019;

[51] U Baeck and T Winzer, 'Mitglied des Vertretungsorgans einer Gesellschaft als Arbeitneh- mer' (NZG 2011) 101 <http://beck-online.beck.de> accessed 30 August 2012, sited in: Siniša Petrović, Petar Ceronja, CORPOPRATE EFFECTS OF THE 'DANOSA CASE' - IS THE TERMINATION OF MEMBERSHIP IN THE BOARD OF DIRECTORS ALLOWED IN THE CASE OF A PREGNANT MEMBER OF THE BOARD? Croatian Yearbook of European Law and Policy, 8, 437-456, p.453, https://www.cyelp.com/index.php/cyelp/article/view/139, acceced 10.12.2024.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Studies – published in journals:
Siniša Petrović, Petar Ceronja, CORPOPRATE EFFECTS OF THE 'DANOSA CASE' - IS THE TERMINATION OF MEMBERSHIP IN THE BOARD OF DIRECTORS ALLOWED IN THE CASE OF A PREGNANT MEMBER OF THE BOARD? Croatian Yearbook of European Law and Policy, 8, 437-456;

Law:
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, Concluded on 27/06/2014. Official Journal of the European Union, L 261, Volume 57, 30 August 2014.
Civil Code of Georgia;
Civil Procedure Code of Georgia;
Law of Georgia on Entrepreneurs;
Law of Georgia on the Elimination of All Forms of Discrimination;

Cases:
Supreme Court of Georgia, Case No. AS-319-302-2017;
Supreme Court of Georgia, Case No. AS 1634-1533-2012;
Supreme Court of Georgia, Case No. AS-142-2023;
Tbilisi Appeal Court, Case No. **As -952-910-2013;**
CJEU Case C-232/09, Dita Danosa v LKB Līzings SIA;

Online sources:
https://www.consilium.europa.eu/en/policies/enlargement/georgia/

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Challenges and Opportunities of Self-Employment in the Contemporary Labour Market: An Examination of Legal Frameworks [1]

DR. TATIA UBERI
PHD STUDENT OF THE LAW SCHOOL AT CAUCASUS UNIVERSITY, COORDINATE COUNCIL MEMBER AT THE NATIONAL CENTER FOR EDUCATIONAL QUALITY ENHANCEMENT
e-mail:tatia.uberi@gmail.com

Abstract: *The contemporary labour market is experiencing a notable transition towards self-employment, primarily driven by technological advancements. As a diverse range of employment opportunities arises, there is an escalating necessity for a comprehensive legal framework to accommodate these novel work arrangements. This article examines the intricate legal practices surrounding self-employment across various jurisdictions, emphasising potential transformations within the labour market. It scrutinises existing methodologies through the prism of legal precedents and judicial determinations. Furthermore, the article delves into the complex legal definition of self-employed individuals, contrasting traditional and emerging trends within the employment sector. The principal objective of this study is to clarify the legal status, entitlements, and protections afforded to self-employed workers within this evolving employment landscape.*
Keywords: *Labour Law; Development; Labour Market; Self-Employment; Freelancing.*

I. INTRODUCTION

Embracing The Self-Employment Status

The rapid and significant changes in modern society herald the onset of a technological revolution. Advancements in technology are reshaping our societal landscape and paving the way for innovative lifestyles. This transformative period is often referred to as the Fourth Industrial Revolution, characterised by the integration of technology, artificial intelligence, and automation. In this era, humans primarily bear the responsibility of supervising the effective management of processes related to the development and refinement of artificial intelligence.[2]

In the modern era, automation is progressing across all sectors. For example, robotic lawyers are now capable of drafting lawsuits, while artificial intelligence is helping courts.[3] Technological advancements have created numerous opportunities in the labour market, but they also present specific challenges. One of the most pressing global issues is the recruitment and retention of qualified employees.[4]

In the past decade, many developing countries have experienced intellectual migration due to their open economies and the abundance of available human potential.[5] This migration encompasses virtual migration, which involves self-employment and outsourcing. However, this process can

[1]*This research #PHDF-23-2081 has been supported by Shota Rustaveli National Science Foundation of Georgia (SRNSFG)*
[2] Asghar, S., Rextina, G., Tanveer, A., & Illahi Tamimy, M. 2020. *The fourth industrial revolution in the developing nations: Challenges and road map.* Commission on Science and Technology for Sustainable Development in the South (COMSATS). 5.
[3] McGowan, R. 2018. *Judge v robot? Artificial intelligence and judicial decision-making.* UNSW Law Journal, 41(4), 1114.
[4] Stropoli, R. 2024. *Which workers will benefit from AI?* Chicago Book Review.
[5]World Migration. 2023. General section. *An overview of international migration.* [Online] Available at: https://publications.iom.int/system/files/pdf/wmr_2003_1.pdf; [Accessed 10.11. 2024].

result in a "brain drain" effect.[6] The migration of individuals from one location to another can impact a country's financial well-being by potentially reducing tax revenues and leading to substantial government deficits. Nevertheless, it's important to acknowledge that migration can also drive innovation and create a vibrant environment for self-employed individuals within the nation.

Many companies nowadays are implementing employer branding strategies to attract and retain highly talented individuals.[7] As a result, there has been a decline in candidates' willingness to pursue traditional job opportunities, while employee loyalty towards employers has increased.

For instance, according to *Shadow Policies*, a manager allows certain employees to work remotely despite the lack of a formal remote work policy within the organisation. This strategy is employed to retain critical talent. The *2023 State of Hybrid Work* report indicates that 42% of employees would contemplate changing jobs if their employer were to eliminate the option for remote or hybrid work.[8] Also, the Research conducted by *StyleRemote* indicates that 67% of American companies have encountered employee turnover to competitors that provide remote or hybrid work arrangements. This phenomenon is similarly observed among 73% of significant employers globally, including those in the United Kingdom, Germany, and Japan. For instance, *Royle (2024)* highlights that Amazon is facing retention risks due to its new return-to-office mandate, despite an executive's claim that 90% of employees are satisfied with the policy.[9] The *KPMG* report highlights a growing divide in opinions regarding the complete elimination of remote work models between employers and employees, which could have detrimental consequences for organisations. Successful leaders must recognise that employees today have transitioned from merely expressing preferences to forming expectations. There is an increasing anticipation for more flexible work arrangements and an improved work-life balance. Eighty-seven per cent of managers aged 60–90 anticipate a full return to the office, in contrast to 83% of those aged 50–59 and 75% of those aged 40–49. Furthermore, a greater proportion of male managers (84%) predict a return to in-office work than their female counterparts (78%). The mandated adoption of remote work during the pandemic presented numerous challenges for organisations, including the necessity to adapt to new work models and secure appropriate resources and funding.[10]

Considering all the aforementioned facts, it is evident that new styles of employment and opportunities are becoming increasingly popular. Freelancing, often referred to in this context, is one of the most widespread forms of employment globally, including in Georgia.

One of the most common forms of employment today is self-employment, often referred to as freelancing.[11] Freelancers undertake specific tasks for various organisations instead of being tied to a single employer.[12]

---

[6] Smirnova, E., Okhrimenko, I., & Zakharova, A. 2022. *Review of best practices in self-employment taxation.* Public Organization Review, 24(1), 8-9.

[7] IIlic, B., Krušković, T., & Anđelić, S. 2023. *Attracting and retaining employees as a result of effective employer brand management.* International Journal for Quality Research, 17(4), 197.

[8] McGovern, M. 2024, May 7. 4 *new #WorkTok trends you need to know. HR Morning*. [Online] Available at: https://www.hrmorning.com/articles/worktok-trends/[Accessed 10.11.2024].

[9] Royle, O. R. 2024, October 24. *Research reveals that Amazon employees are a flight risk after the new return-to-office mandate even though one executive insists 90% of employees are happy about it. Retrieved from Fortune*. [Online] Available at: *https://fortune.com/.../amazon-exec-workers-rto-happy…* [Accessed 10.11.2024]

[10] Sadovi, M. W. 2024, September 23. *Most chief executive officers anticipate a complete return to the office within three years: KPMG. HR Dive.* [Online] Available at: https://www.hrdive.com/.../ceos-expect-full.../727816/ [Accessed 10.11.2024].

[11] Freelancers Union, 2017. *An independent, annual study commissioned by Freelancers Union & Upwork*. [Online] Available at: https://freelancersunion.org/wp-content/uploads/2023/03/FreelancingInAmericaReport-2017.pdf [Accessed 10.11.2024].

[12] Fudge, J., McCrystal, S., & Sankaran, K. 2012. *Challenging the legal boundaries of work regulation.* Bloomsbury Publishing. 175.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Given the mentioned factors, it is essential to thoroughly examine the emerging employment opportunities and their characteristics to establish a robust legal framework. The defining features of self-employment's legal structure ensure the constitutional right to pursue one's ambitions while enjoying the freedom to work independently for a specified duration.

This article explores key legal practices related to self-employment in various jurisdictions, emphasising the potential for change in the labour market.

It discusses the legal status of self-employed persons from contemporary perspectives and assesses the impact of existing legal regulations on their rights and obligations.

The study seeks to assist self-employed individuals in understanding and establishing suitable value propositions, ensuring adherence to international safety and ethical standards.

Moreover, the study's implications may extend to the job market and economic development by potentially reducing labour migration through the sectoral enhancement of the job market worldwide. A coherent and well-targeted self-employment strategy could attract and retain talented individuals while increasing employee motivation and productivity.

II. SELF-EMPLOYMENT WITHIN THE GEORGIAN INSTITUTIONAL FRAMEWORK

The Constitution of Georgia contains several provisions that demonstrate the nation's commitment to protecting the rights of its citizens and promoting a fair and inclusive community. Article 12 explicitly states that every individual has the right to develop their personality without restrictions.[13] Article 6(2) affirms the state's commitment to fostering a free and open economy, promoting entrepreneurship, ensuring fair competition, and safeguarding the universal right to private property.[14] Article 12 guarantees the right to personal development, while Article 6 highlights the importance of a free economy, entrepreneurship, fair competition, and the protection of private property. Furthermore, Article 26(1) of the Georgian Constitution ensures that every individual has the freedom to choose their profession.[15] Article 5 (1) of the Constitution of Georgia declares that the country is a social state, requiring the state to uphold social justice, equality, and solidarity among its people.[16] The government is dedicated to ensuring that all citizens have access to essential resources, opportunities, and protections for dignified lives, regardless of socioeconomic status. It also highlights the importance of fostering a fair and equitable society. Article 26(1) of the Georgian Constitution stands as the supreme law, safeguarding the freedom to choose one's profession, that promotes social justice, equality, and solidarity.[17] In addition, in 2014, the Association Agreement was signed between Georgia and the European Union.[18] Establishing strong connections, it maintained the shared principles outlined in the Partnership Agreement between the European Communities, their Member States, and Georgia.[19] These connections reinforce the Eastern Partnership, a unique element of the European Neighbourhood Policy. The Parties recognise their

[13] Article 12 of the Constitution of Georgia. [Online] available at: https://matsne.gov.ge/en/document/view/30346?publication=36 [Accessed 10.11.2024].
[14] Ibid. Article 6 (2)
[15] Ibid. Article 26 (1)
[16] Ibid. Article 5 (1)
[17] Shvelidze, Z., In the book: *Georgian Judicial Practice on Labour Disputes (Collection of Reprints)*, 2nd Edition, 2024. 15-16.
[18] *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*. 2014. Official Journal of the European Union. [Online] Available at: https://eur-lex.europa.eu/eli/agree_internation/2014/494/oj [Accessed 10.11.2024].
[19] European Commission. 1997. *Proposal for a Council and Commission Decision on the conclusion of a Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part(COM(97) 557 final).* [Online] Available at: http://aei-dev.library.pitt.edu/47272/1/COM_(97)_557_final.pdf; [Accessed 10.11.2024].

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

mutual ambition to strengthen and expand their relations. They also acknowledge Georgia's aspirations to integrate more closely with Europe.

Article 228 of the agreement affirms that each Party has the right to establish its sustainable development policies and priorities while shaping domestic environmental and labour protection measures. Countries are encouraged to align their laws and policies with globally accepted standards. As long as these amendments adhere to these standards, they are free to adopt approaches that best suit their specific contexts, all while maintaining a commitment to universal principles.[20] Each party in this agreement should ensure that their laws and policies promote and support environmental and labour protection. They must enhance their policies while implementing robust protective measures.

It is an important pathway to European society while protecting constitutional rights to address contemporary public needs.

A primary challenge within the legal framework regulating self-employment is the distinction between independent contractors and employees.

Self-employed individuals come from various professions, such as writers, designers, consultants, and tradespeople. While self-employment can offer considerable freedom and independence, it also includes challenges such as financial management and maintaining a consistent work stream.[21]

According to Article 2(1) of the Law of Georgia on Entrepreneurs, an entrepreneur is defined as either a natural person or a legal entity engaged in an undertaking.[22] Article 2(5) specifies that an individual entrepreneur is not regarded as a legal entity; instead, they operate as a natural person. This means that individual entrepreneurs exercise their rights and fulfil their obligations, making them personally responsible and accountable for their business activities.[23] When an individual entrepreneur engages in business activities, they are personally liable for all obligations to creditors, utilising their entire asset base, unless a prior agreement exists between the entrepreneur and the creditor. This liability is subject to the standard contractual conditions in the Civil Code of Georgia. Typically, self-employed individuals render services within the confines of contractual relationships as defined by the Civil Code of Georgia. (Types of commonly utilised contract forms, including but not limited to, the Contract for Work[24] and Contract on Mandate[25])[26]

On the other hand, an individual entrepreneur is not deemed a separate legal entity but possesses the status of a natural person duly registered under the Law of Georgia on Entrepreneurs. A sole proprietorship is a one-person entity that operates independently within business relations, with restrictions on engaging business partners. Under Article 36 (1)(a) of the Georgia Tax Code, an entrepreneur is defined as a natural person who engages in business activities and is registered as an

[20] Labedzka, A., 2018. *The European Union and shaping of its neighborhood: in pursuit of stability, security and prosperity.* Doctoral thesis, City University of London. [Online] Available at: https://openaccess.city.ac.uk/id/eprint/22196/https://core.ac.uk/download/200199714.pdf [Accessed 10.11.2024].

[21] International Labour Organization. *Non-standard forms of employment. Disguised-employment-dependent-self-employment.* [Online] Available at: https://www.ilo.org/resource/other/disguised-employment-dependent-self-employment [Accessed 10.11.2024].

[22] Article 2(1) Law of Georgia on Entrepreneurs. [Online] Available at: https://matsne.gov.ge/en/document/view/5230186?publication=6 [Accessed 10.11.2024].

[23] Ibid. Article 2(5)

[24] According to The Civil Code of Georgia, Article 629 (1) - *According to a contract for services, the contractor shall be obligated to execute the work delineated within the agreement, whilst the client shall incur a duty to remit the stipulated remuneration to the contractor.* [Online] Available at:*https://matsne.gov.ge/en/document/view*[Accessed 10.11.2024].

[25] According to The Civil Code of Georgia, Article 709 - *Under the contract of mandate, the mandatary shall be required to execute one or more acts as instructed (entrusted) by the mandator, on behalf of and at the expense of the mandator.* [Online] Available at: *https://matsne.gov.ge/en/document/view/* [Accessed 10.11.2024].

[26] Shvelidze, Z., In the book: *Georgian Judicial Practice on Labour Disputes (Collection of Reprints)*, 2nd Edition, 2024. 4.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

individual entrepreneur under the Law of Georgia on Entrepreneurs.[27] Furthermore, following Article 36 (1)(b), a natural person who undertakes activities as specified in Article 3(1) of the Law of Georgia on Entrepreneurs shall also be acknowledged as an entrepreneur. Individual entrepreneurs bear personal liability to creditors for all obligations arising from their entrepreneurial activities, encompassing all their assets. [28]

When considering the engagement of a self-employed individual, it is essential to evaluate their work performance through a comprehensive assessment of their overall workload rather than focusing on a single task. A systematic workload enables self-employed individuals to manage their responsibilities effectively and efficiently, ensuring timely completion and adherence to the requisite quality standards. The legal framework governing self-employment in Georgia is characterised by simplicity, transparency, and minimal bureaucratic impediments. The jurisdiction provides a uniform tax rate for individuals and enterprises and procedures for business registration and licensing. This framework fosters a conducive investment environment that promotes entrepreneurship.

Distinction Between Self-Employment and Employment Relationship

To differentiate self-employment from an employment relationship, the term "employee" should be reserved for natural persons who work "under conditions of organisational order." This distinction is one of the key factors that separates the employment relationship from other forms of work, such as "independent contractor" or "self-employed."[29] The executor shall be tasked with the organisation and management of the work process and shall not be obligated to accommodate the employer's evolving requirements during this process. In instances with an organisational framework and a hierarchy of authority, an individual's work performance may constitute an adequate basis for the classification of the relationship as an employment relationship between the employee and the employer. Consequently, in fulfilling the duties and obligations stipulated in the contract, there exists no requirement for periodic agreement on individual performance specifics with the client. Therefore, irrespective of their profession, all natural persons who perform following the requisite criteria—"under conditions of organisational order"[30] — are deemed to be in an employment relationship under labour law.[31] In the present matter, the characteristics above constitute a critical determinant in differentiating the employment relationship from that of an independent contractor, owing to the absence of organisational direction and subordinate elements. The employment contract is distinguishable from a standard contractual agreement under its adherence to the principle of "subordination." This principle necessitates that the employee adhere to the directives of the employer, who, in turn, is obligated to provide remuneration to the employee. Employees are

[27] Article 36 (1)(a) of The Tax Code of Georgia.[Online] Available at: [Online] Available at: https://matsne.gov.ge/en/document/view/ [Accessed 10.11.2024].

[28] Article 36 (2) *of The Tax Code of Georgia provides that the failure to register, obtain licences, or secure permits by a natural person referred to in the first paragraph who engages in economic activities does not preclude the recognition of the said individual as an entrepreneur for tax purposes.* [Online] Available at: https://matsne.gov.ge/en/document/view/ [Accessed 10.11.2024].

[29] Zaalishvili, V., In the book: Kereselidze, D. and others, 2023. Commentary on the Labour Code of Georgia, Article 3. Tbilisi: p.13.

[30] The decision of the Supreme Court of Georgia (05 June, 2020 case No-as– 934-2018); The decision of the Supreme Court of Georgia (16 March, 20218, case No-as–1432-1352-2017).

[31] Shvelidze, Z., In the book: Shvelidze, Z. and others, 2017. Georgian Labor Law and Inter- national Labor Standards. International Labour Organization, p. 33.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

required to execute their responsibilities personally and in a subordinate capacity, in compliance with the instructions of the employer and applicable labour regulations.[32]

The primary distinguishing feature of the labour contract is its "subordination" status.[33] In other words, the employee consents to work under the employer's guidance in return for compensation. This subordination is a key feature of the employee-employment relationship that distinguishes it from other contractual arrangements.

Self-employment is a form of independent work arrangement, with its characteristics and implications for workers' rights, and offers individuals greater autonomy and flexibility; however, it also comes with legal and regulatory challenges related to labour rights, social protection, and other socioeconomic benefits. Self-employment constitutes a modality of entrepreneurship wherein an individual engages in the operation and management of their business or trade independent of any employment contract. It embodies a category of work in which the individual bears full accountability for all facets of the business operation.[34]

Currently, freelancers in Georgia predominantly specialise in digital technology, internet technology, and computer engineering. However, there is an emerging trend of self-employment in these domains within the current labour market. With the ongoing advancements in technology, professionals across various industries will be allowed to engage in freelance work.[35]

III. Analysis of Judicial Precedents on Legal Framework of Self-Employment under European Union Standards

The freelance economy is experiencing significant growth, with more professionals engaging in independent work. Freelancing provides numerous advantages, including distinctive opportunities and flexible work arrangements. However, many freelancers face financial constraints that hinder their ability to initiate legal proceedings against contracting parties who violate their contractual obligations. Regrettably, certain contracting parties may perceive it to be beneficial to breach their agreements placing the latter in a precarious position. Freelancers may be disadvantaged due to a lack of legal expertise and resources to pursue litigation against the contracting parties. This susceptibility within the freelance economy has resulted in the emergence of the term "naked economy."[36] While freelancing offers many benefits, it also presents challenges. Freelancers must be cautious when entering contracts and ensure the terms are legally binding.

The emergence of the gig economy has precipitated extensive discourse concerning the classification of gig workers. The most pivotal case, **Uber B.V. v. Autorité des transports publics de Paris (2019),** in which the **European Court of Justice (ECJ)** classified Uber drivers as workers rather than self-employed individuals. The ECJ underscored ***Uber's*** exertion of control over essential

[32] The decision of the Supreme Court of Georgia (10 October 2011, case No-as– 1129-1156-2011).

[33] The decision of the Supreme Court of Georgia (17 February 2017, case No as-1132-1088- 2016).

[34] International Labour Organization. 2016. *Disguised employment/Dependent self-employment*. [Online] Available at: International Labour Organization on Non-standard forms of employment> [Accessed 10.11.2024].

[35] The world's largest companies and digital platforms for freelancers: [Online] Available at: https://www.freelancer.com/; https://www.upwork.com/ [Accessed 10.11.2024].

In Georgia, the primary area of employment through digital platforms is in the form of short-term, hourly projects. - [Online] Available at: <https://ido.ge/ [Accessed 10.11.2024].

In the United States, there exists a prominent platform that grants access to esteemed developers and companies across the globe. The core operational framework focuses on extended, full-time projects. This platform provides avenues for individuals with a solid track record and exceptional employer evaluations. Accomplished professionals affiliated with this platform stand the opportunity to land positions at some of the biggest global corporations at competitive remuneration rates. [Online] Available at https://www.turing.com [Accessed 10.11.2024].

[36] Miller, R. M. (2015). *Getting paid in the naked economy.* Touro Law Center Legal Studies Research Paper Series, No.16-13, 279.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

facets of the drivers' activities, including fare determination, ride allocation, and performance monitoring. The court further evaluated the drivers' constrained autonomy regarding their working hours and income, accentuating their economic dependence on ***Uber*** In this significant case, *The European Court of Justice (ECJ)* ruled that ***Uber*** functions as a transportation service rather than merely an information society service. The **ECJ** observed that ***Uber's*** digital platform is inherently linked to the provision of transportation. In contrast to platforms that facilitate peer-to-peer transactions with minimal involvement, ***Uber*** actively managed the entire transaction chain.[37] Given that ***Uber's*** primary function revolved around managing transportation services, it was outside the ambit of the *E-Commerce Directive.*[38]

This ruling established a precedent for platforms both digital and physical capacities under EU law. The classification of platform services hinges on their substantive role in the service chain, rather than solely on their digital interface. It underscored the necessity of balancing the promotion of digital innovation with the assurance of fair competition and consumer protection.

In a similar case, the **ECJ's ruling in Foodora GmbH v. Koerfer (2021)** established a ***Foodor*** courier as a worker, highlighting the platform company's control over the courier's activities and their limited autonomy in determining their working hours and earnings. In these cases, gig workers were categorised as employees based on the level of control exerted by platform companies and the workers' financial reliance.[39] The court's ruling reaffirmed the huge importance of assessing the substantive nature of the working relationship as opposed to the formal classification of the worker. The classification criteria are as, **Control** - The degree to which Foodora exercised authority over the methods of work; **Integration** - The extent to which the rider was assimilated into **Foodora**s' organisational framework, as demonstrated by the use of branding and app-based directives; **Dependence** - The economic and operational reliance of the rider on ***Foodora's*** platform. The ruling is consonant with the overarching policy objectives of the European Union, notably including the proposed *Platform Work Directive,* which establishes a rebuttable presumption of employment for platform workers who are subject to a degree of control.[40] The directive serves to fortify the legal principles pertinent to the matter at hand, thereby promoting enhanced consistency in the classification of employment across Member States. This case constitutes a seminal judgement in labour law, illustrating the complexities inherent in regulating platform work within traditional employment paradigms. By categorising the rider as an employee, the court reaffirmed the primacy of substance over form in employment relationships. This case not only sets a precedent for analogous disputes but also highlights the imperative for more definitive regulatory frameworks to address the dynamic nature of work within the gig economy. As platform work continues to proliferate as a novel mode of livelihood and employment, the challenge of reconciling flexibility, innovation, and worker protections will persist for the judiciary, policymakers, and enterprises in determining whether platform workers are classified as self-employed individuals or employees under labour law.

[37]European Court of Justice. 2019. *Uber B.V. v. Autorité des transports publics de Paris.* (C-434/17).
[38]Directive 2000/31/EC *(E-Commerce Directive)* [Online] Available at https://eur-lex.europa.eu/legal-content [Accessed 10.11.2024].
[39] European Court of Justice. 2021. *Foodora GmbH v. Koerfer (C-55/20).*
[40] Directive (EU) 2024/2831 on *Improving Working Conditions in Platform Work.* [Online] Available at: https://www.europeansources.info/record/proposal-for-a-directive-on-improving-working-conditions- [Accessed 10.11.2024].

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

CONCLUSION

This article examines the legal status of self-employed individuals and the challenges associated with the classification of independent contractors and employees. As self-employment gains prominence in contemporary workplaces, the regulations governing this area have significant implications for the rights, responsibilities, and overall success of independent work.

It is essential to remain informed about legal developments and to advocate for appropriate policies. The classifications presented have significant implications for defining self-employed individuals, including their entitlements to minimum wage, overtime pay, and social security benefits. Platform companies may argue for the independent contractor status of their workers. The changing landscape of the gig economy and the emergence of new platforms and business models may require innovative legal frameworks for worker classification. In the contemporary global environment, freelancers worldwide are increasingly endeavouring to cultivate a robust presence on the international platform as self-employed individuals. Nevertheless, for a successful career, it is imperative to possess a lucid vision, a strategic framework, and a sound legal foundation.

BIBLIOGRAPHY:

1. Asghar, S., Rexтina, G., Tanveer, A. and IllahiTamimy, M., 2020. The Fourth Industrial Revolution in the developing Nations: *Challenges and road map. Commission on Science and Technology for Sustainable Development in the South* (COMSATS). [Online] available at: https://www.southcentre.int/wp-content/uploads/2020/02/RP102_The-Fourth-Industrial-Revolution-in-the-Developing-Nations-Challenges-and-Road-Map_EN-1.pdf; [Accessed 10.11.2024]. (in English).
2. Cook, S. and Rani, U., 2023. *Platform work in developing economies: Can digitalisation drive structural transformation?* International Labour Organisation. Future of work(ers) SCIS Working Paper Number 63. [Online] available at: <https://webapps.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_909792.pdf> [Accessed 10.11.2024]. (in English)
3. Freelancers Union, 2017. *An independent, annual study commissioned by Freelancers Union & Upwork.* [Online] Available at: https://freelancersunion.org/wp-content/uploads/2023/03/FreelancingInAmericaReport-2017.pdf [Accessed 10.11.2024].
4. Fudge, J., McCrystal, S. and Sankaran, K., 2012. *Challenging the Legal Boundaries of Work Regulation.* Bloomsbury Publishing. (in English)
5. Ilic, B., Krušković, T. and Anđelić, S., 2023. *Attracting and retaining employees as a result of effective employer brand management.* International Journal for Quality Research 17(4). (in English)
6. Labedzka, A., 2018. *The European Union and shaping of its neighbourhood: in pursuit of stability, security and prosperity.* Doctoral thesis, City University of London.[Online] available at: <https://openaccess.city.ac.uk/id/eprint/22196/https://core.ac.uk/download/200199714.p> [Accessed 10.11.2024]. (in English)
7. McGowan, R., 2018. *Judge v robot? Artificial intelligence and judicial decision-making.* 41(4) UNSW Law Journal 1114. [Online] available at: <https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/judge_v_robot.html#ftn.d5e24770> [Accessed 10.11.2024]. (in English)
8. McGovern, M. 2024, May 7. 4 *new #WorkTok trends you need to know. HR Morning*. [Online] Available at: https://www.hrmorning.com/articles/worktok-trends/[Accessed 10.11.2024]. (in English)
9. R. Miller. M., 2015. *Getting Paid in the Naked Economy.* Touro Law Center Legal Studies Research Paper Series No.16-13. (in English)
10. Royle, O. R. 2024, October 24. *Retrieved from Fortune*. [Online] Available at: *https://fortune.com/.../amazon-exec-workers-rto-happy…* [Accessed 10.11.2024]. (in English)

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

11. Sadovi, M. W. 2024, September 23. *Most chief executive officers anticipate a complete return to the office within three years: KPMG. HR Dive.* [Online] Available at: https://www.hrdive.com/.../ceos-expect-full.../727816/ [Accessed 10.11.2024]. (in English)
12. Scherer, M., 2022. *Artificial Intelligence and Legal Decision Making.* The Wide Open Journal N/041119. (in English)
13. Smirnova, E., Okhrimenko, I., and Zakharova, A., 2022. *Review of Best Practices in Self-Employment Taxation.* Public Organization Review 24(1). (in English)
14. Stropoli, R., 2024. *Which workers will benefit from AI?* Chicago Book Review. (in English) [Online] available at: <https://www.chicagobooth.edu/review/which-workers-will-benefit-ai> [Accessed
15. Shvelidze, Z., In the book: Shvelidze, Z. and others, 2017. Georgian Labor Law and Inter- national Labor Standards. International Labour Organization. (in Georgian)
16. Shvelidze, Z., In the book: *Georgian Judicial Practice on Labour Disputes (Collection of Reprints)*, 2nd Edition, 2024. (in Georgian).
17. Zaalishvili, V., In the book: Kereselidze, D. and others, 2023. Commentary on the Labour Code of Georgia, Article 3. Tbilisi. (in Georgian).
18. Constitution of Georgia. [Online] available at https://matsne.gov.ge/en/document/view/30346?publication=36 [Accessed 10.11.2024]. (in English).
19. 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. Official Journal of the European Union. [Online] available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A0830%2802%29 [Accessed 10.11.2024]. (in English).
20. Proposal for a Council and Commission Decision on the conclusion of a Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States of the one part and the Russian Federation of the other part (presented by the Commission). [Online] Available at: http://aei-dev.library.pitt.edu/47272/1/COM_(97)_557_final.pdf; [Accessed 10.11.2024].
21. Treaty on the Functioning of the European Union (TFEU) Consolidated Version. 2012. [Online] available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF; [Accessed 10.11.2024]. (in English)
22. Directive 2010/41/EU of The European Parliament and The Council *On the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC.* [Online] available at: https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vihmxwf27tyd; [Accessed 10.11.2024]. (in English).
23. Directive 2000/31/EC *(E-Commerce Directive).* [Online] available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0031;* [Accessed 10.11.2024]. (in English).
24. European Court of Justice. 2021. *Foodora GmbH v. Koerfer (C-55/20).*
25. Civil Code of Georgia. [Online] available at: https://matsne.gov.ge/en/document/view/31702?publication=13; [Accessed 10.11.2024]. (in English).
26. Tax Code of Georgia. [Online] available at: https://matsne.gov.ge/en/document/view/1043717?publication=223; [Accessed 10.11.2024]. (in English).
27. Law of Georgia on Entrepreneurs [Online] available at: https://matsne.gov.ge/en/document/view/5230186?publication=6; [Accessed 10.11.2024]. (in English).
28. European Court of Justice. 2021. *Foodora GmbH v. Koerfer (C-55/20).*
29. European Court of Justice. 2019. *Uber B.V. v. Autorité des transports publics de Paris.*(C-434/17).
30. The Decision of The Supreme Court of Georgia (10 October, 2011; Case No as -1129-1156-2011). (in Georgian)
31. The Decision of The Supreme Court of Georgia (17 February, 2017; Case No as -1132-1088-2016) (in Georgian)
32. The decision of the Supreme Court of Georgia (16 March, 20218; case No-as–1432-1352-2017) (in Georgian)
33. The decision of the Supreme Court of Georgia (05 June, 2020; case No-as– 934-2018) (in Georgian)

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Expansion of Georgian Financial Sector from Perspective of Association Agreement between EU and Georgia

PROFESSOR DR. LEVAN GOTUA[1]
BLACK SEA INTERNATIONAL UNIVERSITY

Abstract:: *In the modern world, financial institutions, which can be combined under the concept of "financial sector", are very different entities. These differences are expressed both in different regimes of state regulation and in financial capabilities, types of activities, size (volume) and many other parameters. Until recently, the financial sector of Georgia included: commercial banks, non-bank depository institutions – credit unions, brokerage companies, independent securities registrars, central depository, specialized depository, stock exchange, investment fund, asset management company, microfinance organizations, non-state pension scheme founders, payment system operators, payment service providers, accountable enterprises and currency exchange offices.*[2] *From February 2023, a completely new category of a microbank has been added to this extensive list of financial sector entities. The purpose of this article is acquaintance with the new structure of Georgian financial sector from a legal point of view, above all, from perspective of Association Agreement between the European Union and Georgia. This implied the preparation of one of the first (if not the first) legal scientific papers related to this topic. It is worth noting and underlining the fact that due to the novelty of the topic, we are largely detached from the relevant local judicial practice or the precedents of the interpretation of current norms by the regulator. Thus, it can be said that the full-scale legal framework for the regulation of Georgia's expanded financial sector, which naturally involves the implementation of a number of subordinate normative acts by the National Bank of Georgia, is still in the process of formation.*

Keywords: *Commercial Banks; EU-Georgia Association Agreement; Financial Sector; Microbank; Microfinance Organization.*

1. INTRODUCTION

As of today, the legal framework regulating the financial sector of Georgia is in the process of expansion. Among others, this is evidenced by the fact that the regulatory body, in particular, the National Bank of Georgia, has recently issued a number of orders, above all, regarding the activities of microbanks.[3]

[1] Doctor of Law; LL.M. (Master of German Law, University of Bremen, Germany); LL.M. *Europae* (Master of European and International Law, University of Bremen, Germany), Professor at Caucasus University; Professor of Black Sea International University, guest lecturer of Tbilisi State University.

[2] Paragraph "a" of Article 2 of the Organic Law of Georgia "On the National Bank of Georgia", 24/09/2009, (edition valid until February 23, 2023).

[3] No. 113/04 "On Approval of the Rules for Mandatory Audit of Consolidated Financial Statements of Microbanks and Disclosure of Information in Explanatory Notes", 22/06/2023; No. 108/04 "On Approving the Rule of Operation of the Common Program of Risk Assessment of Microbanks", 22/06/2023; No. 118/04 "On Approval of Real Estate Valuation Instructions for Microbanks", 22/06/2023; No. 110/04 "On Approval of the Rule of Disclosure of Information by Microbanks within the Framework of Pillar 3", 22/06/2023; No. 121/04 "On Approval of the Rule on Liquidation, Insolvency and Bankruptcy of a Microbank", 22/06/2023; No. 119/04 "On Approval of the Regulation on Suitability Criteria of Microbank Administrators", 22/06/2023; No. 106/04 "On Approval of the Regulation on Acquisition of a Significant Share of a Microbank", 22/06/2023; No. 116/04 "On Establishment of Countercyclical Buffer Rate for Microbanks", 22/06/2023; No. 114/04 "On Determining the Minimum Amount of Supervisory Capital for Microbanks", 22/06/2023; No. 115/04 "On Approval of the Procedure for Creation of Branches, Representative Offices and Other Similar Subdivisions by Microbanks", 22/06/2023; No. 109/04 "On Approval of the Regulation on Leverage Ratio Requirements for Microbanks", 22/06/2023; No. 105/04 "On Approval of Microbank Licensing Rules", 22/06/2023; No. 117/04 "On Approval of the Regulation on Concentration of Risk Positions and Large Risks in Microbanks", 22/06/2023; No. 122/04 "On Introduction of the Temporary Administration Regime in Microbank and Approval of its Operating Procedure", 22/06/2023; No. 120/04 "On Approval of the Rules for Determining Risk Categories of Financial Instruments and Expected Credit Losses for Microbanks", 22/06/2023; No. 107/04 "On Approval of the Conflict of Interest Management Regulation

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Due to the fact that since June 2014 European Union and Georgia are the parties to an association agreement, it seems expedient to examine whether the growth of regulatory field of local regulator, the National Bank of Georgia is in line with the spirit and provisions of such international treaty. Currently, the mentioned expansion of financial sector occurs due to establishment of a new entity – a microbank. Nevertheless, this is not the only entity which has been established since execution of EU-Georgia Association Agreement - in 2020, the Parliament of Georgia adopted a new comprehensive law on "Investment Funds", factually creating yet another type of a juridical person regulated by the National Bank of Georgia.[4] In this paper, we will refer to these two new types of entities multiple times, however, in light of novelty of its regulation, we will be especially focused on microbanks.

It will probably not be a surprise that the new law of Georgia "On Activities of Microbanks" is essentially based on the law of Georgia "On Activities of Commercial Banks". There are many similarities between probably the most important entity of the financial sector of Georgia and a microbank. Accordingly, among other topics covered in this paper, we will also try to demonstrate the differences between commercial banks, microbanks as well as other players of local financial sector.

First of all, a couple of words about the essence and legal definition of a microbank itself. Unlike commercial banks, whose status has been defined in most countries of the world for a long time and, in principle, can be brought under a single universal concept,[5] the category of microbanks is not harmonized at the international level and in the states whose legislation recognizes this type of financial institutions, there are mixed views about their purpose and the scope of activities. In many cases, a microbank is identified with an institution which provides small volume loans[6] or with a microfinance organization, i.e. with an entity that offers financial services to the low-income population,[7] often gives loans only to its own members and additionally trades various insurance, deposit and other products. An interesting precedent was created by the Spanish Banco Social La

for Microbanks", 22/06/2023; No. 123/04 "On Approval of the Rules for Determining and Imposing Monetary Fines against Microbanks and its Administrators", 22/06/2023; No. 112/04 "On Approval of the Corporate Management Code of Microbanks", 22/06/2023; No. 132/04 "On Approval of the Instruction on the Requirements of the Pricing Models of Microbanks", 27/06/2023; No. 138/04 "On Approval of the Regulation of Microbank's Liquidity Coverage Ratio", 27/06/2023; No. 140/04 "On Approval of the Regulation on Operational Risk Management by Microbanks", 27/06/2023; No. 136/04 "On Approval of the Regulation on Interest Risk Management of the Banking Book of Microbanks", 27/06/2023; No. 134/04 "On Approval of the Regulation on Net Stable Funding Ratio for Microbanks", 27/06/2023; No. 137/04 "On Approval of the Regulation on Management of Dealing Operations for Microbanks", 27/06/2023; No. 133/04 "On Establishing, Calculating and Protecting the Limit of the Common Open Currency Position of Microbanks", 27/06/2023; No. 159/04 "On Approval of the Procedure for Issuing and Revoking Consent for the Brokerage Company to Carry out Activities Permitted by the National Bank of Georgia for a Microbank", 28/06/2023; No. 165/04 "On Approval of the Cyber Security Management Framework of Microbanks", 01/07/2023; No. 169/04 "On Establishment of Additional Requirements for Microbanks Based on the Law of Georgia "On the Activities of Microbanks"", 06/07/2023; No. 192/04 "On Approval of the Rules for Classifying and Reporting Loans According to the Taxonomy of Sustainable Financing for Microbanks", 02/07/2023; No. 312/04 "On Approving the Procedure for Completion and Submitting of the Microbank Money Laundering and Terrorism Financing Risk Supervision Report", 11/11/2023.

[4] Although the category of an "investment fund" has been introduced in Georgia back in 2013, applicable statutory regulation of this entities was somewhat superficial and inefficient what allows us to state that a comprehensive legal framework for investment funds and factual development of such institutions started only after adoption of the refered piece of legislation (*author's note*).

[5] A legal entity licensed by the country's central bank, which is authorized to attract deposits and use them to issue credits or to carry out other banking activities permitted by law (*author's note*).

[6] Compare: Danz Coleen., Students Give Small Loans to Make a Difference, *Insights on Law and Society*, Vol. 10, Issue 1 (Fall 2009), pp. 18-29.

[7] Compare: Chowdhury Anis, Microfinance as a Poverty Reduction Tool— A Critical Assessment, *DESA Working Paper No. 89, United Nations, Department of Economics and Social Affairs*, ST/ESA/2009/DWP/89, December 2009, p. 2.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Caixa which in 2007-2012 granted microcredits of more than one billion Euros for entrepreneurial and social projects.[8] If initially the purpose of microfinance organizations was more focused not on making a profit, but on creating sources of financing for specific low-income segments of the population (for example, for the population living in rural areas, for micro-entrepreneurs, families living below the poverty line, in some cases women, etc.), today the world tendance towards profit-focused microfinance, so called for-profit Micro Finanance Institutions, is evident.[9] In this regard, the perception of microbanks essentially goes beyond the approach established by Georgian legislation, which we will discuss in the subsequent parts of the paper. Therefore, it would not be an exaggeration to say that Georgian law establishes a new concept of microbanks, the effectiveness of which has yet to pass the test of time.

As for the investment funds, such entities based in Georgia are divided into two categories:

- Authorized Investment Fund - an investment fund authorized by the National Bank (Undertakings for the Collective Investment in Transferable Securities (UCITS) or Retail Investment Fund), which has the right to make a public offering and to have more than 20 retail investors;
- Registered Investment Fund - An investment fund registered by the National Bank that has the right to make only a private offering and to have no more than 20 retail investors.[10]

Similar to microbanks, a unified cross-border concept for these entities seems to be absent. The scholars refer to investment funds established by the insurance companies, banking institutions, sovereign investment funds operated by states, cross-border investment funds, many of which are incorporated in the offshore zones etc.[11] Thus, we may say that Georgian approach to the investment funds is also to some extent peculiar and unique.

2. Main Activities of New Entities in Financial Sector and their Compliance with EU-Georgia Association Agreement

It must be emphasized that Georgian legislation considers microbanks as entities whose main purpose is lending to entrepreneurial entities.[12] It is significant that entrepreneurial activity is understood in a broad context and includes agricultural activity as well. In my opinion, it is clear that by establishing microbanks on the financial market, the state is trying to mobilize additional financial resources, primarily for small and medium-sized enterprises i.e. SME Sector, which, in many cases, has difficulty accessing the necessary financial resources for its activities.[13]

The focus of microbanks on lending to entrepreneurial activities is not only a declaratory provision, but also contains a specific legislative reservation - at least 70 percent of microbank's credit portfolio shall consist of loans granted for entrepreneurial purposes and/or those loans, the source of payment of which is the income received from entrepreneurial activity.[14] In this regard, it is significant that in recent years the regulations of the National Bank of Georgia precisely define the types of bank credits/loans what establishes more legal clarity and significantly reduces the

[8] Compare: Pellegrini Federico., Economic and Social Development, *International Scientific Conference on Economic and Social Development*, Vol. 9, 2015, p. 329.
[9] Compare: Downey Kenneth., Conroy Steven J., Microfinance: The Impact of Nonprofit and For-Profit Status on Financial Performance and Outreach, See: *https://www.econ-jobs.com/research/35795-Microfinance--The-Impact-of-Nonprofit-and-For-Profit-Status-on-Financial-Performance-and-Outreach.pdf*, 2010, 1, Accessed 30.10.2024.
[10] https://nbg.gov.ge/en/page/investment-funds, Accessed 30.10.2024.
[11] Compare: Fridman, Anton I, *Concepts of Investment Fund and Investment Legal Entity, Law:* Journal of the Higher School of Economics, Vol. 2017, Issue 2 (2017), pp. 68-79.
[12] Paragraph 1 of Article 3 of the Law of Georgia "On Activities of Microbanks", 23/02/2023.
[13] Compare: Gotua Levan., Some Legal Aspects of Factoring Regulation in Georgia, *Journal of Law*, TSU, Faculty of Law, 2/2018, p. 20.
[14] Paragraph 1 of Article 3 of the Law of Georgia "On the Activities of Microbanks", 23/02/2023.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

possibility of confusing different types of this banking product and consequentional disputes. In particular, according to the order of the President of the National Bank of Georgia dated 24 December 2018, No. 281/04 "On Approval of Regulations Regarding Lending to Individuals", credit granted for business purposes is defined as: "a loan the purpose of which is business activity, including trade financing, startup, agriculture and covering of current business expenses. In order for a loan to be classified as a business loan, it is necessary for the lending organization to conduct an appropriate financial analysis in accordance with internal policies/procedures."[15]

I also consider it a noteworthy circumstance that according to the imperative provision of the Law "On Activities of Microbanks", financial organizations of this type have the right to issue loans only in the national currency.[16] It is probable that in this way the state is trying to make microbanks an important tool of so-called "de-dollarization" policy which started back in 2017.[17]

The mentioned prohibition is even more striking in light of the currency restrictions introduced in the same period to commercial banks in respect of lending to consumers: "Unless otherwise established by the legislation of Georgia, bank credit of up to GEL 200,000 (two hundred thousand) must be granted only in GEL, except for the case when the total liabilities of the borrower to the issuer of the same bank credit, as a result of issuing the bank credit, exceed GEL 200,000 (two hundred thousand) GEL. For the purposes of this section, a bank credit issued in GEL is not considered to be linked or indexed[18] to a foreign currency in any way."[19] Therefore, the microbanks should be considered as one of the main instruments of so-called "larization" policy. This means that in respect of issuing credits in foreign currency, the priority will be given to a special norm on the ban on granting loans in foreign currency established by the law "On Activities of Microbanks" and the above quoted more general provisions of the Civil Code cannot be applied. Just like a "microfinance organization", the term "microbank" in its very name implies a kind of financial threshold, monetary upper limit, which the relevant entity has no right to exceed. The concept of a "microcredit" applies to microfinance organizations, by virtue of which "microcredit is a monetary amount provided by a microfinance organization through a credit agreement to a borrower or a group of borrowers in accordance with the conditions of maturity, repayment, cost and purpose. The maximum total amount of a microcredit issued by a microfinance organization to one borrower should not exceed GEL 100,000 (one hundred thousand).[20] As soon as one familiarizes itself with the law "On Activities of Microbanks", it becomes clear that the mentioned definition of "microcredit" does not apply to microbanks. The law establishes for them a much higher monetary upper limit: "...the maximum total amount of credits and other obligations issued to one borrower or a group of interconnected borrowers. It should not exceed GEL 1,000,000 (one million)."[21]

When covering the field of activity of microbanks, it is worth noting the fact that these types of financial institutions have the right to open[22] correspondent bank accounts.[23] Until now, only

[15] Order No. 281/04 of the President of the National Bank of Georgia dated December 24, 2018 "On Approval of Regulations regarding Lending to Individuals", Article 2.
[16] Paragraph 4 of Article 3 of the Law of Georgia "On Activities of Microbanks", 23/02/2023.
[17] Compare: Gotua Levan., Commentary on Article 868 of the Civil Code of Georgia, 2020, p. 9, http://gccc.tsu.ge, Accesed: 30.10.2024.
[18] "Indexed interest rate is an interest rate that is related to a public index in a certain manner and whose change is caused by the change of the said index." - Civil Code of Georgia, Article 868, Part 3, 06/27/1997.
[19] Ibid., Section 8 of Article 868.
[20] Paragraph 2 of Article 5 of the Law of Georgia "On Microfinance Organizations", 18/07/2006.
[21] Article 26 of the Law of Georgia "On Activities of Microbanks", Clause "C", 23/02/2023.
[22] Ibid., Article 3, Clause "C".
[23] "Correspondent account - an account which one bank or a person authorized to open a correspondent account opens in another and which is used for settlements between the bank that opened the account and the account holder" - Order No. 24/04 of the President of the National Bank of Georgia dated April 7, 2011 "On Approval of Instructions on Opening Accounts in Banking Institutions", Article 2, subparagraph "p".

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

commercial banks used this kind of accounts locally while other entities issuing monetary funds in the form of a bank credit, i.e. microfinance organizations and non-bank depository institutions - credit unions, are not entitled to open correspondent bank accounts. Moreover, before the adoption of the Law of Georgia "On Activities of Microbanks", correspondent bank accounts were opened only by the head offices of commercial banks in the head offices of other commercial banks or with the National Bank of Georgia.[24] Correspondent bank account is one of the main tools of interbank settlement, which allows clients of different banks to quickly and efficiently transfer money to each other, which mainly moves through this type of account.[25] Granting the right to open correspondent accounts brings microbanks significantly closer to commercial banks and separates them from microfinance organizations and non-bank depository institutions - credit unions who do not have the right to maintain not only a correspondent but also any other type of bank account.

The similarity of the activities of commercial banks with the activities allowed for microbanks is even more striking if we consider that this new entity of the Georgian financial sector has full rights to attract deposits, that is, to open deposit-type accounts, both term and demand.[26] This circumstance is further noteworthy due to the fact that Georgian legislation directly prohibits microfinance organizations from attracting both deposits and other returnable funds.[27] So by what criteria does the microbank have such right when a microfinance organization is restricted to attract deposits by an imperative rule? The answer to this question, among others, should be sought in the differences of supervision regime by the National Bank of Georgia - unlike microbanks, microfinance organizations are not subject to licensing and the regulator only registers them.[28] To make it more understandable for the reader, we would to explain that today the National Bank of Georgia successfully uses both of these forms of activity authorization, although licensing is a more complex and long-term form of supervision[29] than registration. In compare to the latter, licensing involves a more thorough control and monitoring of responsibilities, document turnover, financial indicators and other essential parameters of a financial organization by the regulatory body.[30] Therefore, we should not be surprised that, compared to microbanks, the list of types of activities permitted for microfinance organizations is limited by the restriction to provide one of the most important financial services, the placement of deposits.

Unlike microfinance organizations, there are quite strict regulatory requirements towards microbanks - for example, for the purposes of their supervisory capital[31] the applicable legislation obliges them to allocate at least GEL 10,000,000.[32] In addition, the legislator is likely to be careful with the issue of attracting deposits by microbanks and seems to be trying not to make the clientele of depositors particularly broad. This is primarily expressed in the fact that a although a microbank may receive deposits from individuals, this seems to be limited by a large clientele: "in case of raising returnable funds by the microbank from individuals (including individual entrepreneurs), the amount

[24] Compare: Order No. 24/04 of the President of the National Bank of Georgia dated April 7, 2011 "On Approval of Instructions on Opening Accounts in Banking Institutions", Article 3, paragraph 7.
[25] Compare: Gabisonia Zviad, *Banking Law, 2nd revised and expanded edition*, Tbilisi, 2017, "World of Lawyers" publishing house, p. 173.
[26] Article 3 of the Law of Georgia "On Activities of Microbanks", 23/02/2023.
[27] Paragraph 3 of Article 4 of the Law of Georgia "On Microfinance Organizations", 18/07/2006.
[28] Ibid., paragraph 2 of Article 4.
[29] Compare: Gotua Levan, *Legal problems of financial leasing development in Georgia*, Georgian-German Journal of Comparative Law, 3/2021, 85.
[30] Ibid.
[31] "Supervisory capital - a type of capital that is created to carry out microbanks' activities, to neutralize expected or unexpected financial losses/damages and to protect against various types of risks"- Article 2 of the Law of Georgia "On Activities of Microbanks", Clause "q", 23/02/2023.
[32] Order of the President of the National Bank of Georgia N 111/04 "On Determination of the Minimum Amount of Supervisory Capital for Microbanks", Article 1, 21/6/2023.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

raised from each individual (including individual entrepreneurs) should not be less than GEL 100,000 (one hundred thousand) or its equivalent in foreign currency."[33] In addition, according to the same norm, it is established that "returnable funds in the amount of more than GEL 100,000 (one hundred thousand) can be raised only in relation to the supervisory capital, within the relevant limit which is determined by the normative act of the National Bank of Georgia."

Among the types of activities allowed for microbanks, we may emphasize the right of: "issuing loans, guarantees, letters of credit and leasing, implementation of factoring operations within the limits established by this law",[34] what allows a microbank, similar to a commercial bank, to fully use such financial instruments. According to the law "On Activities of Microbanks",[35] these entities have the right to open the most common form of a bank account, a current bank account,[36] which is very important for the purposes of attracting clients. Like commercial banks, microbanks can also carry out cash and non-cash settlement operations and provide cash-collection services; issue payment cards and organize their circulation; provide payment services, operate the payment system, perform the functions of a settlement agent, etc.[37]

As a general summary in respect of forms of activities allowed for microbanks, I would like to add that the relevant list is clearly based on Article 20 of the Law of Georgia "On Activities of Commercial Banks", with the difference, that commercial banks, can additionally carry out trust (trust) operations at the request of clients, raise and place funds, provide credit reference services, both store and account securities, as well as perform the function of a specialized depository in relation to such securities.

Investment funds that have the right to make a public offering in Georgia are divided into two categories: an Authorized Investment Fund and a foreign investment fund that is recognized by the National Bank of Georgia.[38]

Pursuant to Article 116 of EU-Georgia Association Agreement, the parties thereto "shall make available to interested persons its requirements for completing applications relating to the supply of financial services…" and "shall make its best endeavours to ensure that internationally agreed standards for regulation and supervision in the financial services sector and for the fight against tax evasion and avoidance are implemented and applied in its territory."[39] At the same time, "each Party shall permit a financial service supplier of the other Party to provide any new financial service of a type similar to those services that the Party would permit its own financial service suppliers to provide under its domestic law in like circumstances."[40]

As we were able to identify from the above, the international treaty in question does not go into details in repect of the scope of Georgia's financial sector. Having examined the relevant provisions of EU-Georgia Association Agreement, we may further state that the establishment of new entities which did not exist at the moment of signing of this document, such as microbanks and investment funds, fully complies with this international treaty. Moreover, respective norms of local

[33] Ibid., paragraph 6 of Article 3.
[34] Ibid., Article 3, Clause 3, Sub-Clause "a".
[35] Ibid., Article 3, Clause 3, Sub-Clause "b".
[36] "Current account - a bank account on which a person's funds are recorded and which the client disposes for making payments or for other purposes. This type of account includes card accounts and reporting accounts opened by apartment owners"- Order No. 24/04 of the President of the National Bank of Georgia dated April 7, 2011 "On Approval of Instructions on Opening Accounts in Banking Institutions", paragraph "o" of Article 3.
[37] Paragraph 3 of Article 3 of the Law of Georgia "On Activities of Microbanks", 23/02/2023.
[38] https://nbg.gov.ge/en/page/investment-funds, Accessed 30.10.2024.
[39] 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, Article 116, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22014A0830%2802%29, Accessed 30.10.2024.
[40] Ibid., Article 117.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

legislation seem to duly govern the availability of requirements for completing applications relating to the supply of financial services, implementation of internationally agreed standards for regulation and supervision in the financial services sector and for the fight against tax evasion. The topic related to provision of new services by the financial institutions from EU countries is more complex, nevertheless, to the best of my knowledge the reciprocal approach of EU-Georgia Association Agreement applies without widely known complications or barriers.

3. LICENSING REQUIREMENTS FOR NEW ENTITIES OF FINANCIAL SECTOR AND THEIR INTERACTION WITH EU-GEORGIA ASSOCIATION AGREEMENT

A microbank carries out its activities only on the basis of relevant authorization from the state, in particular, the license. The central act of Georgian legislation in this field is the law "On Licenses and Permits" which establishes an exhaustive directory of all licenses and permits applied in the country and from 2023 such list naturally also contains the microbank activity license.[41] Like the banking activity license, the microbank activity license is issued for an indefinite period and its transfer to others is prohibited. This feature, i.e. the limitation of the civil turnover capacity of the license, applies not only to the mentioned license but is universal with respect to all state authorisations to the right to activity. This restriction of "activity licences" essentially distinguishes them from the so-called "usage" licenses, most of which are fixed-term and transferable.

As we mentioned above, microfinance organizations do not require licensing and operate only on the basis of registration with the National Bank of Georgia. Therefore, in this respect, microbanks have much more in common with commercial banks than with any other type of financial institutions. Along with the identity of the general license requirements, there are not many differences in the procedures for processing the license application by the regulator. It is interesting that licensing of a subsidiary of a foreign bank, which, by virtue of Article 8 of the Law "On the Activities of Microbanks", can be implemented in a simplified manner. The prerequisite for this is that the applicant for a microbank activity license must be a subsidiary of an exceptionally reliable bank as provided by the Law of Georgia "On Activities of Commercial Banks",[42] which has a high level of recognition, a good reputation, a high credit rating, many years of experience in the financial sector, sustainable financial indicators and a high level of transparency.

In this regard, the category of a "particularly reliable bank" can be the basis for a little ambiguity, which is not defined by the Law "On Activities of Commercial Banks", nor does any normative act regulating microbanks specify the difference between a "foreign reliable bank" and an "especially reliable bank". I deem, in order to avoid potential misunderstandings, such concepts require special precision and unambiguity. According to the current record, theoretically, only the National Bank of Georgia can additionally consider a foreign bank already recognized as reliable, as "especially reliable", whereby the criteria for being "especially reliable" are not defined separately. The competence of the regulator in relation to this type of entities is particularly wide: "The National Bank of Georgia, in order to facilitate the entry of a reliable foreign bank into the Georgian market... shall individually determine the list of information/documentation to be submitted by a subsidiary company of a foreign bank for obtaining a microbank activity license."[43]

[41] Clause 34[1] of Article 6 of the Law of Georgia "On Licenses and Permits", 25/06/2005.
[42] "Foreign reliable bank - a bank from a developed country that has a rating of a certain level or higher, given by a competent international rating organization. The National Bank establishes a competent international rating according to the list of organizations and each competent international rating organization determines the level of rating" – paragraph "o" of the first article of the Law of Georgia "On Activities of Commercial Banks", 23/02/1996.
[43] Paragraph 2 of Article 8 of the Law of Georgia "On Activities of Microbanks", 23/02/2023.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

In this context, it should be also noted that none of the laws on the activities of banks or microbanks and, considering the available information, neither the byelaws of the National Bank of Georgia, define the exact procedures, deadlines and list of documents to be submitted for the simplified licensing process. Thus, in this direction, the National Bank of Georgia has a particularly high degree of general discretion and interpretation of relevant legal norms.

According to article 5 of the Law of Georgia "on Investment Funds", such entity may be established in Georgia in the form of an investment company or a common fund whereby an investment company may exist in the form of a joint stock company and a closed-end registered investment company may be established as a limited liability company or a limited partnership. Due to a broader definition of the types of entities permitted to operate in capacity of investment funds and the scope of their activities, the detailed review of peculiarites of authorisation, licensing and registration (all forms of such state approvals are envisaged in the referred piece of legislation) of each of applicable forms of investment funds would be beyond the scope of this paper. Hence, let us limit ourselves with a statement that, in general, the activities of investment funds are subject to regulation from the side of the National Bank of Georgia.

Now let us evaluate the above licensing standards from perspective of EU-Georgia Association Agreement. As determined through article 117 of such international treaty, "a Party may determine the juridical form through which the service may be provided and may require authorisation for the provision of the service." Hence, this primary legal act governing the relations between the European Union and Georgia provides for a rather unrestricted approach in respect of type of enterprise authorised to deliver the new financial services. For the purposes of this paper the above should mean that the National Bank of Georgia, if duly entitled by means of respective legislation, may freely establish additional licensing requirements.

The last sentence of article 117 of EU-Georgia Association Agreement, in my opinion, contains a more restrictive wording: "where such authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons." Hence, Georgia, being free to establish additional licensing requirements, shall, nevertheless, issue an applicable license within specific timeframes, obviously, to be envisaged under local statutory regulations. Another topic for consideration is a rather broad essence of "prudential reasons." This is especially noteworthy from perspective of Georgian version of this international treaty where the terms "reasonable" and "prudential" do not vary and factually the word "reasonable" is used in respect of both timing and refusal. I believe this can be regarded as a certain flaw of Georgian translation since, the term "prudential" seems to have a more specific meaning in the field of finance and especially from perspective of EU law. Such supranational organisation defines the aim of "prudential requirements": "to make the financial sector more stable, while ensuring that it is able to support households, firms, and other end-users of financial services."[44] Accordingly, due to the fact that both Georgian and English versions are considered authentic[45] and obviously have the same legal power, there is a certain risk of different interpretation of the term "prudential" by the local and EU parties what clearly should not be a desireable outcome.

[44] An official website of the European Union, https://finance.ec.europa.eu/banking/banking-regulation/prudential-requirements_en, Accessed 30.10.2024.

[45] 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, Article 432, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22014A0830%2802%29, Accessed 30.10.2024.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

4. IMPLEMENTATION OF NON-BANKING AND RESTRICTED ACTIVITIES

Among the issues surrounding the competence of commercial banks, the implementation of non-banking activities by these entities has always been particularly relevant. More precisely, this relates to the normative provisions established in Georgia based on international practice which impose significant restrictions on ownership of banks' shares and shares in other legal entities. Although the format of the present work does not allow us to talk about this topic in detail, for the general information of the reader, I would like to add that commercial banks are subject to the limits of their equity participation in other companies, which is why these entities must always maintain specific ratios between their own share capital[46] and the values of share in a respective legal entity.[47] It is logical that the purpose of such restrictions is to prevent commercial banks from using their own, rather large financial resources to establish financial control over other sectors of the economy, which will naturally harm entrepreneurs (especially small and medium-sized businesses) and will not promote healthy and honest competition in this or that market. To some extent, the legislator extended the restriction to non-banking activities to microbanks as well: a microbank has the right to "invest (including create or acquire a subsidiary) in a legal entity that is a financial institution or whose activities are related to the activities of the microbank or the social projects of the microbank. The share in each enterprise provided for by this subsection shall not exceed 20 percent of the microbank's share capital, and the total value of investments shall not exceed 30 percent of the microbank's share capital. The National Bank of Georgia is authorized to exempt the microbank from compliance with the percentage limits determined by this subsection for a period not exceeding 1 year.[48] Thus, microbanks, unlike commercial banks, are not permitted to acquire shares/shares in enterprises that do not engage in financial activities. If the amount of total investments of a commercial bank in other enterprises is limited to the value of 50% of its share capital, for microbanks, this number does not exceed 30% of the share capital.

A microbank can also acquire or create a subsidiary outside of Georgia.[49] The supervisory norms established in the regulated sectors of the economy, which require the necessary notification of the regulator regarding such transactions and the development of effective instruments against money laundering and terrorist financing, also apply to microbanks.[50]

It should be also emphasized that Georgian legislation creates favorable conditions for those microbanks that wish to expand and therefore intend to transform a microbank into a commercial bank. Until the National Bank of Georgia makes a decision on issuing a banking activity license, a microbank continuously carries out its permitted activities.[51] Along with the decision on issuing a banking activity license, the regulator makes a decision on the cancellation of a microbank's activity license, after which a commercial bank becomes the successor of a respective microbank.[52]

Since the definition of investment funds and the scope of their activities imply a broad meaning and is not focused on one particular type of entity as in case of microbanks, the legal framework regulating the investment funds makes separate references to this topic: an investment company shall not carry out activities other than those related to the management of its own portfolio,[53] a registered

[46] "Share capital - the capital of the shareholders of a commercial bank, which is defined as the difference between the bank's total assets and total liabilities" - - Paragraph "w" of Article 1 of the Law of Georgia "On Activities of Commercial Banks", 23/02/1996.
[47] Ibid., Article 10.
[48] Paragraph 1 of Article 16 of the Law of Georgia "On Activities of Microbanks", 23/02/2023.
[49] Ibid., Article 17.
[50] Ibid.
[51] Ibid., Article 18, clause 2.
[52] Ibid., Article 18, clause 3.
[53] Paragraph 1 of Article 8 of the Law of Georgia "On Ivestment Funds", 15/07/2020.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

as well as a licensed asset management company shall not engage in activities other than the main activities and additional activities contemplated, save for the exceptions envisaged under the respective laws. Therefore, unlike the normative acts applicable for microbanks and commercial banks, the statutory regulations in respect of investment funds provide for more general restriction on performing the activities beyond the scope established by the law and do not contemplate specific thereholds and limits.

EU-Georgia Associaition Agreement seems to be silent in regards to the scope of activities of financial institutions, ownership of shares in other legal entities etc. meaning that this topic is deregulated for the purposes of such international treaty and Georgia may establish respective rules at its own discretion.

5. Other Important Provisions on Microbanks and Investment Funds, Conclusion

Above, we tried to focus on the legislative norms that establish certain innovations in Georgian law regarding new entities in the local financial sector and contain provisions that are characteristic for these entities, in some cases, only for them. I believe the reader will not be surprised that in most cases the provisions of the law "On Activities of Microbanks" are based on the existing regulations for other entities operating in the financial sector, primarily commercial banks. Accordingly, I consider it expedient not to leave the most basic issues related to our topic without attention, even though they may not contain any legal innovations.

Microbanks are joint-stock companies, whose management system includes a general meeting of shareholders, a supervisory board, a directorate, and another body typical for financial institutions, an audit committee.[54] The responsible individuals of the microbanks are the administrators, for whom the requirements of education, experience, honesty and professionalism are established, expressed in the criteria of the suitability of the administrators.[55] Ownership of more than 10% of the microbank's capital gives the relevant shareholder the status of a significant shareholder and entails certain restrictions, mainly the absence of convictions for serious, especially serious and economic crimes. Such requirements apply not only to the direct owners of a significant share, but also to the indirect and beneficial owners of such shares.

Microbanks are subject to an annual obligation of external audit,[56] all supervisory tools (sanctions) of the National Bank of Georgia,[57] which are established in the financial sector. As in case of commercial banks, decisions on solvency, bankruptcy, temporary administration and liquidation of microbanks are made exclusively by the National Bank of Georgia.

The topics reflected in this chapter are rather specific and fall out of the scope of EU-Georgia Assiciation Agreement. As we were able to see, the referred international treaty has a very liberal approach in regards to the entities which comprise Georgian financial sector and we could not establish any significant incompliances between local statutory regulations and the sdandards established by the EU-Georgia Assiciation Agreement. Respectively, further conclusion of this paper would be that the expansion of Georgian financial sector seems to be fully in line with with the provisions of EU-Georgia Assiciation Agreement.

[54] Compare: Articles 20-23 of the Law of Georgia "On Activities of Microbanks", 23/02/2023.
[55] Compare: Ibid., Article 7.
[56] Compare: Ibid., Article 31.
[57] Compare: Ibid., Chapter VII.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

BIBLIOGRAPHY:

1. Organic Law of Georgia "On the National Bank of Georgia", 24/09/2009;
2. Law of Georgia "On Activities of Microbanks", 23/02/2023;
3. Civil Code of Georgia, 26/06/1997;
4. Law of Georgia "On Microfinance Organizations", 18/07/2006;
5. Law of Georgia "On Activities of Commercial Banks", 23/02/1996;
6. Law of Georgia "On Licenses and Permits", 25/06/2005.
7. Law of Georgia "On Ivestment Funds", 15/07/2020.
8. Order of the President of the National Bank of Georgia No. 113/04 "On Approval of Rules for Mandatory Audit of Consolidated Financial Statements of Microbanks and Disclosure of Information in Explanatory Notes", 06/22/2023;
9. Order of the President of the National Bank of Georgia No. 108/04 "On Approval of General Program of Risk Assessment of Microbanks", 22/06/2023;
10. Order of the President of the National Bank of Georgia No. 118/04 "On Approving Real Estate Appraisal Instructions for Microbanks", 06/22/2023;
11. Order of the President of the National Bank of Georgia No. 110/04 "On Approval of Rules of Disclosure of Information by Microbanks within the Framework of Pillar 3", 06/22/2023;
12. Order of the President of the National Bank of Georgia No. 121/04 "On Approval of Rules on Liquidation, Insolvency and Bankruptcy of a Microbank", 06/22/2023;
13. Order of the President of the National Bank of Georgia No. 119/04 "On Approval of Regulation on Suitability Criteria of Microbanks' Administrators", 22/06/2023;
14. Order of the President of the National Bank of Georgia No. 106/04 "On Approval of Regulation on Acquisition of a Significant Share of a Microbank", 06/22/2023;
15. Order of the President of the National Bank of Georgia No. 116/04 "On Establishment of Countercyclical Buffer Rate for Microbanks", 06/22/2023;
16. Order of the President of the National Bank of Georgia No. 114/04 "On Determination of the Minimum Amount of Supervisory Capital for Microbanks", 06/22/2023;
17. Order of the President of the National Bank of Georgia No. 115/04 "On Approval of Rules for Creation of Branches, Representative Offices and Other Similar Subdivisions by Microbanks", 22/06/2023;
18. Order of the President of the National Bank of Georgia No. 109/04 "On Approval of Regulation on Leverage Ratio Requirements for Microbanks", 06/22/2023;
19. Order of the President of the National Bank of Georgia No. 105/04 "On Approval of Licensing Rules for Microbanks", 06/22/2023;
20. Order of the President of the National Bank of Georgia No. 117/04 "On Approval of Regulation on Concentration of Risk Positions and Large Risks in Microbanks", 22/06/2023;
21. Order of the President of the National Bank of Georgia No. 122/04 "On Introduction of Temporary Administration Regime in a Microbank and Approval of the Operating Procedure", 06/22/2023;
22. Order of the President of the National Bank of Georgia No. 120/04 "On Approval of Rules for Determining Risk Categories of Financial Instruments and Expected Credit Losses for Microbanks", 06/22/2023;
23. Order of the President of the National Bank of Georgia No. 107/04 "On Approval of Conflict of Interest Management Regulation for Microbanks", 22/06/2023;
24. Order of the President of the National Bank of Georgia No. 123/04 "On Approval of Rules for Determining and Imposing Monetary Fines against Microbanks and their Administrators", 06/22/2023;
25. Order of the President of the National Bank of Georgia No. 112/04 "On Approval of Corporate Management Code of Microbanks";
26. Order of the President of the National Bank of Georgia No. 132/04 "On Approval of Instruction on Requirements for Microbank Pricing Models", 27/06/2023;
27. Order of the President of the National Bank of Georgia No. 138/04 "On Approval of Regulation of Microbank's Liquidity Coverage Ratio", 27/06/2023;
28. Order of the President of the National Bank of Georgia No. 140/04 "On Approval of Regulations on Operational Risk Management by Microbanks", 27/06/2023;

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

29. Order of the President of the National Bank of Georgia No. 136/04 "On Approval of the Regulation on Interest Risk Management of the Banking Book of Microbanks", 27/06/2023;
30. Order of the President of the National Bank of Georgia No. 134/04 "On Approving the Regulation on Net Stable Funding Ratio for Microbanks", 06/27/2023;
31. Order of the President of the National Bank of Georgia No. 137/04 "On Approving the Regulation on Management of Dealing Operations for Microbanks", 27/06/2023;
32. Order of the President of the National Bank of Georgia No. 133/04 "On Establishing, Calculating and Protecting the Limit of Common Open Currency Position for microbanks", 27/06/2023;
33. Order of the President of the National Bank of Georgia No. 159/04 "On Approval of Procedure for Issuing and Revoking Permitted Activities by the National Bank of Georgia to a Brokerage Company for a Microbank", 06/28/2023;
34. Order of the President of the National Bank of Georgia No. 165/04 "On Approval of Cyber Security Management Framework of Microbanks", 01/07/2023;
35. Order of the President of the National Bank of Georgia No. 169/04 "On Establishment of Additional Requirements for Microbanks Based on the Law of Georgia "On Activities of Microbanks", 06/07/2023;
36. Order of the President of the National Bank of Georgia No. 312/04 "On Approval of Rules for Completion and Submitting Reports for Monitoring the Risk of Money Laundering and Terrorism Financing of Microbanks", 11/11/2023;
37. Order of the President of the National Bank of Georgia No. 281/04 "On Approval of Provisions on Lending to Individuals", 24/12/2018;
38. Order of the President of the National Bank of Georgia No. 24/04 "On Approval of Instructions on Opening Accounts in Banking Institutions", 07/04/2011;
39. Chowdhury Anis, *Microfinance as a Poverty Reduction Tool— A Critical Assessment*, DESA Working Paper No. 89, United Nations, Department of Economics and Social Affairs, ST/ESA/2009/DWP/89, December 2009;
40. Danz Coleen, *Students Give Small Loans to Make a Difference*, Insights on Law and Society, Vol. 10, Issue 1 (Fall 2009);
41. Downey Kenneth, Conroy Steven J., *Microfinance: The Impact of Nonprofit and For-Profit Status on Financial Performance and Outreach*, http://www.econ-jobs.com/research/35795-Microfinance--The-Impact-of-Nonprofit-and-For-Profit-Status-on-Financial-Performance-and-Outreach.pdf, 2010, Accessed: 31.10.2024;
42. Fridman Anton I, *Concepts of Investment Fund and Investment Legal Entity*, Law: Journal of the Higher School of Economics, Vol. 2017, Issue 2 (2017), pp. 68-79.
43. Gabisonia Zviad, *Banking Law, 2nd revised and expanded edition*, Tbilisi, "World of Lawyers", 2017;
44. Gotua Levan, *Commentary on Article 868 of the Civil Code of Georgia*, http://gccc.tsu.ge, 2020, Accessed: 31.10.2024;
45. Gotua Levan, *Some Legal Aspects of Factoring Regulation in Georgia*, Journal of Law, TSU, Faculty of Law, 2/2018;
46. Gotua Levan, *Legal Problems of the Development of Financial Leasing in Georgia*, Georgian-German Journal of Comparative Law, 3/2021;
47. Pellegrini Federico, *Economic and Social Development, International Scientific Conference on Economic and Social Development*, Vol. 9, 2015.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Section 4
EU Enlargement: Competition, Consumer Protection, and Energy Law. Focus on Georgia

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Compatibility of Standardization Agreements with EU Competition Law: Legal Insights

DR GIVI ADAMIA
PHD, AFFILIATE ASSISTANT PROFESSOR OF CAUCASUS UNIVERSITY, SCHOOL OF LAW (GEORGIA)

Abstract: *Standardization involves imposing a particular standard or norm on goods or services, playing a crucial role in the modern economy across various sectors. It is closely linked to essential public goods and offers multiple benefits, including fostering innovation, enhancing product quality, increasing safety, ensuring interoperability, and reducing transaction costs.*

However, despite these positive effects, the coordination established between undertakings through standardization can sometimes negatively impact competition in the relevant market. Participants may exploit standardization agreements to restrict competition, drive out competitors, create entry barriers, or reduce market access for other undertakings. As a result, such agreements can sometimes breach competition law requirements. This paper aims to explore these potential conflicts and propose solutions to mitigate the risks, relying on the latest jurisprudence of the European Court of Justice (ECJ) and the evolving practice of the European Commission.

Kewords: *Anti-competitive agreements; Standardization Agreements; Competition Law; Restriction by effect;*

INTRODUCTION

Standardization is imposing a particular standard or norm on individual goods or services. It is a crucial driver of innovation. Standardization (or the establishment of standards) plays an increasingly important role in various areas of the economy in the modern world. There are essential common public goods associated with standardization. It promotes innovation, improvement of product quality, increased security, product interoperability, reduction of transaction implementation costs, etc.[1]

Despite the mentioned positive effects, the coordination established between Undertakings regarding standardization is expected to reduce competition in the relevant market in some cases. This is because Undertakings participating in standardization agreements can use this coordination to restrict the existing competition, exclude competing undertakings from the market, establish entry barriers for potential competitors, etc. Thus, standardization agreements may give rise to compatibility problems with the requirements of competition law. The present paper aims to identify and find ways to solve such problematic issues.

Considering this, the first chapter of this work examines the various dimensions of standardization, highlighting the diverse methodologies employed to establish standards for specific products and services in particular contexts.The second chapter explores economic activity as a fundamental prerequisite for the application of competition law to the standardization process, emphasizing its critical role in shaping regulatory interventions.

The third and fourth chapters analyze the forms of coordination and restrictions on competition that are pertinent to standardization agreements, detailing their implications for market dynamics.

The fifth and sixth chapters focus on the key criteria for evaluating the pro-competitive and anti-competitive effects of standardization agreements, offering a framework for assessing their compliance with competition law principles. Finally, the seventh chapter delves into the application of exemption clauses to standardization agreements, providing a nuanced understanding of when and how such agreements may be justified under the law.

[1] Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 352.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

I. FORMS OF STANDARDIZATION

Establishing a certain standard for individual homogeneous products is usually done using different forms and means.[2] One of the common cases is the establishment of mandatory standards for specific goods or services by public authorities.[3] The mentioned case of standardization may be referred to as public standardization to the extent that the standards are determined unilaterally within the powers of public bodies. To comply with these standards is mandatory for the addressees. Norms of individual goods or services established via public standardization are also called "legal standards" in the literature.[4] A clear example of public standardization is the various standards established by the bodies of the European Union in many areas of the economy. For example, the existing food safety and quality standards, which establish mandatory grocery requirements, can be named. Accordingly, all undertakings operating in the grocery trade must meet the mentioned requirements.

State authorities and specially created national or international organizations may set the standard for individual goods or services.[5] Such an organization may be founded by one or more states, international organizations, or Undertakings. Such organizations, generally, are referred to as standard-setting organizations ("standard-setting organizations—SSO"), which elaborate and develop various procedures or policies according to which the standardization process is carried out in particular cases.[6]

One widespread practice of standardization is when a specific product or a separate feature of this product automatically establishes a de facto standard in the market. For many other market participants, such a standard is a benchmark or an example of the quality of their manufactured product in the production process. It means that Market dynamics naturally create a standard for a particular product or its characteristics in such circumstances.[7]

Standards can also be set by Undertakings operating in various markets. This usually occurs when Undertakings unite within a particular organization or cooperate to agree on common binding standards for a specific product or service. Undertakings agree on certain standards and technical or quality requirements with which current or future products, production processes, services, or methods must comply. Such agreements between undertakings may sometimes raise concerns regarding their potential anti-competitive effects. This is the case when the issue of compatibility of standardization agreements concluded by undertakings with competition law arises.

II. ECONOMIC ACTIVITY AS A PREREQUISITE FOR COMPETITION LAW INTERVENTION IN THE STANDARDIZATION PROCESS

The assessment of the compatibility of standardization agreements with the competition law raises questions about what prerequisites or indicators are necessary to qualify such an agreement as anti-competitive coordination. It is difficult to give an explicit and straightforward answer to this question as long as the European competition legislation contains no direct prohibition regarding the standardization agreement. Therefore, the criteria for assessing the compatibility of standardization

---

[2] Imelda Maber, The New Horizontal Guidelines: *In Revista de Concorrência e Regulação (C&R), Vol. IV, No. 13, pp. 19–34,* 20; 11. ECLI:EU:T:2010:189, Case T-432/05, "EMC Development AB v European Commission", Rec. 7.

[3] Maritzen Lars*, Kölner Kommentar zum Kartellrecht*, Band 1, Cologne, 2017, § 1 GWB, Rn. 527.

[4] Bonadio Enrico, "Standardization Agreements, Intellectual Property Rights and Anti-Competitive Concerns," *in 3 Queen Mary J. Intell. Prop. 22, 2013,* 24.

[5] ECLI:EU:T:2010:189, Case T-432/05, "EMC Development AB v European Commission", Rec. 7.

[6] Several such organizations operate at both the European and international levels. Notable examples include the International Organization for Standardization (ISO), the International Electrotechnical Commission (IEC), and the European Telecommunications Standards Institute (ETSI), among others.

[7] Bonadio Enrico, "Standardization Agreements, Intellectual Property Rights and Anti-Competitive Concerns," *in 3 Queen Mary J. Intell. Prop. 22, 2013,* 24.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

agreements with competition law can be determined based on and following the approaches established by the European Commission and the European Court of Justice. Considering those mentioned above, it can be said that economic activity is the main prerequisite for applying the cartel prohibition provision to the standardization agreement.[8] In particular, according to the ECJ case law, setting certain standards or norms by one specific entity in exercising public authority does not fall within the scope of the competition legislation.[9]

Accordingly, when applying competition law to set specific standards for goods or services, undertakings involved in standardization agreements should define them within the framework of their economic activity. In other words, this action must be part of their economic activity, and they must not act as subjects exercising public authority in this process. Accordingly, the entity or entities establishing a particular standard must be qualified as undertakings in the standardization process.

It should be noted that anti-competitive standardization may also occur in the case of de facto standardization. In such instances, it is also necessary for an undertaking to act within the framework of their economic activity. [10]

This requirement related to economic activity also applies to standard-setting organizations if they meet the criteria of an association of undertakings. In such cases, if the exercise of public authority does not influence their decisions, they may be considered anti-competitive decisions, which fall under the scope of the prohibition of anti-competitive agreements. [11]

III. TYPES OF COORDINATION IN THE STANDARDIZATION PROCESS

Article 101 of the TFEU distinguishes between the various forms of anti-competitive coordination: an agreement, a concerted practice and a decision of an association of undertakings. Accordingly, coordination between undertakings related to the setting of a particular standard will fall within the scope of the prohibition envisaged by Art. 101 TFEU only if it is set using any form of coordination mentioned above. To determine which form of coordination is possible to achieve coordination relevant to 101 TFEU, it is necessary to consider the characteristics of each form of coordination and its content.

According to the ECJ case law and the practice of the European Commission, for the existence of an anti-competitive agreement, it is necessary to have the jointly expressed intention of undertakings to engage in a specific type of market behaviour. [12] In this context, standard setting is a particular market behaviour agreed by the undertakings. In other words, Undertakings directly express their intentions to use the agreed standards concerning the goods or services they provide to the market. Thus, the subject of the agreement is to set a certain standard for certain goods or services and act following this standard in the market. Such an agreement may cover a wide range of product-related matters.[13] In particular, Undertakings may determine the quality, size, and technical characteristics of the product they produce, safety rules for using such a product, specifications related to health protection in the process, etc., by mutual agreement. It should be noted that such an agreement may also refer to the compliance of the individual product or the production process of

[8] Füller Jens Thomas, *in Kölner Kommentar zum Kartellrecht,* Band 3,Cologne, 2017, Rn. 349.
[9] ECLI:EU:C:2009:191, In Case C-113/07 P, *„SELEX Sistemi Integrati SpA"*, §§ 91-93.
[10] Füller Jens Thomas, *in Kölner Kommentar zum Kartellrecht,* Band 3,Cologne, 2017, Rn. 349.
[11] Füller Jens Thomas, *in Kölner Kommentar zum Kartellrecht,* Band 3,Cologne, 2017, Rn. 349.
[12] ECLI:EU:C:1999:356, "Anic Partecipazioni," Case C-49/92 P, 08.07.1999, § 130; ECLI:EU:T:1991:75, "SA Hercules Chemicals NV," Case T-7/89, 17.12.1991, § 256; ECLI:EU:T:2000:242, "Bayer AG," Case T-41/96, 26.10.2000, § 69; OJ L 152/24, CD 07.06.2001, § 185.
[13] Moritz Lorenz, *An Introduction to EU Competition Law,* 2013, 155.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

this product with environmental protection requirements.[14] Hence, if undertakings express a mutual intention to establish specific standards for goods or services, such coordination may qualify as an agreement under Article 101 of the TFEU.

However, in practice, coordination related to standardization between Undertakings may be established through practical cooperation or harmonized market behaviours, regardless of whether there is any expressed mutual will or convergence of wills between the undertakings participating. Considering the above, it is theoretically quite possible that the coordination between undertakings related to the establishment of a certain standard can be established in the form of such a concerted action, which did not take the form of an agreement reached as a result of the mutual expression of intention or will of the parties. [15] Therefore, if undertakings enter into practical cooperation without any expressed mutual intention to establish specific standards for goods or services, such coordination may qualify as concerted practice under Article 101 of the TFEU.

An example of an anti-competitive standardization in the form of a concerted practice can be identified when separate undertakings engage in practical coordination with one another, even without a direct agreement or a mutual explicit declaration of mutual intent. Such a situation constitutes a concerted action if this practical coordination is facilitated by exchanging commercially sensitive information related to standards used or established by the particular undertaking. This information may pertain to specific product specifications, technological approaches, market strategies, and similar subjects. In such cases, coordination can be considered a de facto standardization. However, it is essential to note that de facto standardization only sometimes exhibits the characteristics of concerted action under Article 101 TFEU.[16] It is also possible that de facto standardization is achieved via mere parallel conduct without exchanging commercially sensitive information.

Anti-competitive standardization among market participants can also arise from decisions made by associations of undertakings. Setting a particular standard through such a decision represents one of the simplest forms of coordination under Article 101 of the TFEU. This simplicity stems from the fact that the standard is not established through mutual agreement between undertakings or through de facto coordination but rather through the unilateral decision of the association of undertakings. Such a scenario may occur, for example, when individual producers of a specific product are members of an association that establishes certain standards or specifications for the product. These standards, in turn, coordinate the market behaviour of the undertakings. However, for such a decision to fall within the scope of Article 101 of the TFEU, the association mustn't act as a public authority when making the decision.

IV. STANDARDIZATION IMPOSING RESTRICTIONS BY OBJECT OR EFFECT

Considering the European case law, a standardization agreement may constitute an agreement with restriction by object or effect, depending on the specific circumstances. Standardization agreements, which contain clauses that restrict competition as their object, are considered a violation of competition law from the outset. It should be noted that, in European legal literature and practice, numerous standardization cases qualify as agreements with the restriction by object.[17]

[14] Bonadio Enrico, "Standardization Agreements, Intellectual Property Rights and Anti-Competitive Concerns," *in 3 Queen Mary J. Intell. Prop. 22, 2013,* 23-24.

[15] Beckmann K., Müller U., Hoeren/Sieber/Holznagel, Multimedia-Recht, 2020, Rn. 76; Paschke M., MüKo zum Europäischen und Deutschen Wettbewerbsrecht, Bd. 1, 2007, Art. 81, Rn. 58.

[16] For more on de facto standardization, refer to the first chapter of this paper.

[17] Füller Jens Thomas, *in Kölner Kommentar zum Kartellrecht,* Band 3,Cologne, 2017, Rn. 351; Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 354.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Standardization agreement, which has as its object the restriction of competition, may arise in cases where the establishment of a standard directly or indirectly leads to the fixing of prices for a particular product or service.[18] Additionally, a standardization agreement between undertakings may establish a standard for a specific product that renders it incompatible with products produced by other undertakings. In such cases, the standardization agreement may have the market sharing effect or foreclose some undertakings from the market, thereby restricting competition. The European guidelines highlight that agreements using standards to exclude actual or potential competitors from the relevant market exhibit the characteristics of agreements that have the restriction of competition as their object.[19]

If the standardization agreement is not an agreement with the objective of restricting competition, then its compatibility with competition law should be assessed based on the restrictive effects of competition derived from it.[20] In such a case, we are talking about standardization with the impact of restricting competition. Determining a standardization agreement with the effect of restricting competition is done in practice by comparing hypothetical situations. According to this method, in the qualification process of undertakings' coordination as a restrictive agreement of competition, the degree of competition generated in the relevant market as a result of the establishment of a separate standard by undertakings should be compared with the situation before the establishment of the said standard. In this process, various parameters or indicators should also be considered, which will be discussed in detail in the following parts of this paper.

Suppose a standardization agreement does not qualify as an agreement with a restriction by object. In that case, its compatibility with competition law should be assessed based on its potential restrictive effects on competition. In such cases, standardization may constitute an agreement with a restriction by effect.[21] Assessment of the possible anti-competitive effects of a particular standardization agreement should be based on comparing different hypothetical scenarios. In particular, the degree of competition in the relevant market resulting from establishing a specific standard by undertakings should be compared to the degree of competition before setting a certain standard. Additionally, various parameters or indicators should be considered, which will be discussed in detail in the subsequent sections of this paper.

[18] Imelda Maber, The New Horizontal Guidelines: Standardisation. *In Revista de Concorrência e Regulação (C&R), Vol. IV, No. 13, pp. 19–34*, 21; Maritzen Lars*, Kölner Kommentar zum Kartellrecht*, Band 1, Cologne, 2017, § 1 GWB, Rn. 530; Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 355.

[19] Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 354; Commission Decision in Case AT.39985, Motorola - Enforcement of GPRS standard essential patents, recitals 221-270; Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01) recital 447.

[20] Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 440; Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), recital 448; Füller Jens Thomas, *in Kölner Kommentar zum Kartellrecht,* Band 3,Cologne, 2017, Rn. 352.

[21] Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 356.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

V. RELEVANT MARKETS WHERE STANDARDIZATION AGREEMENTS MAY RESTRICT COMPETITION AND ITS ANTI-COMPETITIVE EFFECTS

1. Commencing Remarks

To properly assess the negative impact of a standardization agreement on competition, it is necessary to identify the relevant product or service markets affected by such an agreement. Determining such market segments creates a clearer idea of both the content of the actual standardization agreement and the potential risks of restriction of the dynamic process of competition that may arise from such an agreement. With this in mind, it is possible to identify four potential relevant markets where standardization agreements can restrict competition.[22] Accordingly, when evaluating the effects deriving from the standardization agreement, the degree of competition in the mentioned markets and the impact of establishing a separate standard on the competition in these markets should be considered.

2. Relevant Market for Goods and Services

The relevant product or service market is one of those market segments where competition can be artificially restricted due to the standardization agreement. In this case, it means the market of goods or services about which a specific standardization agreement establishes certain standards.

In circumstances where standardization agreements impose mandatory standards for individual goods or services, these standards may impose entry barriers into the relevant market. This is possible when the standards established as a result of the agreement reached between undertakings are set in an unobjective and biased manner, as a result of which a limited number of undertakings can meet these standards. Consequently, in such a situation, a particular group of undertakings cannot meet the conditions set by the standardization agreement, which forces the existing undertakings to leave the market and restricts the possibility of potential undertakings entering the market. All this ultimately limits the competition in the relevant market.

A clear example of these effects can be seen when, for instance, smartphone manufacturers agree on the type, quality, and other specifications of batteries to be used in their devices. In other words, manufacturers establish standards for battery use in smartphones. Such an agreement may threaten certain smartphone manufacturers if they cannot purchase batteries with these standards or can only obtain them in limited quantities. Furthermore, this agreement may restrict competition in the battery production market, as some manufacturers may not be able to produce products that comply with the established standards. This, in turn, could lead to the foreclosure of these manufacturers from the market for supplying batteries required for smartphones.

3. Relevant Technology Market

Along with the market for relevant goods and services, standardization may also harm the market for the relevant technology. In this case, we are talking about a market where different types of technologies compete with each other so that they are used in relation to a particular product or service. Accordingly, such a market includes any technology suitable for a specific product or service, considering its functionality, purpose and technical capabilities. For example, competing technologies in the commodity market for solar panels for renewable energy production include Crystalline silicon panels and thin-film solar cells.[23] The situation is similar regarding wind turbine manufacturing technologies, where Horizontal-axis technology competes with vertical-axis turbine

[22] Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 353; Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01) recital 438.

[23] https://solarsme.com/thin-film-vs-crystalline-solar-panels/ (30.11.2024).

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

technology.[24] In such a case, the market for producing solar panels, on the one hand, and the market for wind turbines, on the other hand, should be considered the relevant commodity market.[25] And the relevant technological market encompasses the technological standards used in the production process of these products.

It should be noted that standardization agreements may negatively affect competition in the relevant market for these technologies. In particular, such an agreement may have the effect of foreclosing existing technologies from the market. Such a case will occur if the relevant undertakings in the standardization agreement choose one particular technology and drive out another existing one from the market. Furthermore, such an agreement also impedes the development of other potential technologies. For example, in the cases discussed above, if the choice is made for the horizontal-axis technology, then the vertical-axis turbine technology can be driven out of the relevant market, eliminating the competition between these two technologies and reducing the incentives to develop other potential new technologies.

In addition, the entity holding the copyright on the selected technology gains significant market power through such an agreement to the extent that the technology in his hands will be the essential prerequisite for the production of a product conforming to this standard. Accordingly, the entity owning such technology can impose conditions for licensing that are not fair, rational, and non-discriminatory and abuse its market power.[26] For example, setting unfairly high prices for the use of technology at such a time will automatically lead to a corresponding increase in the prices of products produced with this technology. Based on all of the above, agreements related to standardization create risks of driving out competitors, imposing unjustified barriers or abusing market power in the relevant technology market.

4. Relevant Standardization Market

The next market where standardization agreements may have restrictive effects on competition is the corresponding standardization market. In this case, we are discussing a market where different standard-setting organizations or groups compete to set various standards for different industries, technologies or products. For example, organizations such as the International Organization for Standardization (ISO),[27] the European Telecommunications Standards Institute (ETSI)[28], the Institute of Electrical and Electronics Engineers (IEEE)[29] etc. Such organizations compete with each other to the extent that they compete for dominance in the standardization market. Consequently, there is a situation where there are different standards in the same industry, and organizations setting these standards compete with each other to spread their standards and gain additional market share. In this case, the main line of competition is to gain market influence, get economic benefits, and raise the company's reputation. This process facilitates the development of new standards and refine existing ones. Therefore, if these organizations or other entities agree on a specific standard, the competition between these standards will be artificially limited. In this case, such an agreement may also impose entry barriers and exclusion from the market.

5. Relevant Certification Market

The relevant certification market refers to that segment of the standard-setting process that includes services to assess whether a particular product, service or process conforms to specific standards. Accordingly, such entities, as a result of individual research, testing, or other types of

[24] https://www.windustry.com/horizontal-axis-vs-vertical-axis.htm (30.11.2024).
[25] For more on reelevant market for Goods and Services, refer to the previous chapter of this paper
[26] Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rec 440.
[27] https://www.iso.org/home.html (30.11.2024).
[28] https://www.etsi.org/ (30.11.2024).
[29] https://www.ieee.org/ (30.11.2024).

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

study of relevant circumstances, conclude the compliance of a particular product or service with a specific standard. Therefore, the change of a specific standard directly and immediately impacts the corresponding certification market.

First, it should be noted that setting a new standard always requires research and study of compliance of individual goods or services with this standard. Therefore, the demand for research, testing, and certification processes related to the new standard is increasing. This proportionally reduces the demand for assessing the conformity of individual goods or services with other standards.

It is also necessary to consider that assessing compliance with a separate standard requires special knowledge and qualifications. Individual professionals or organizations may not specialize in assessing conformity to a standard established by a standardization agreement in question. Therefore, the standardization agreement with these entities has the effect of driving them out of the market. In addition, the standardization agreement can also envisage the assessment of compliance with the agreed standard only by a specific organization or organization. Such an agreement directly grants additional market power to particular entities, creating additional risks and limiting competition.

VI. Main Criteria for Assessing the Pro- and Anti-Competitive Effects of Standardization

1. Introductory remarks

In examining the effects of standardization-related agreements in the four relevant markets discussed above, it was found that agreements of such content could cause significant damage to a healthy competitive environment in several relevant markets. Despite those mentioned above, in addition to the anti-competitive effects, standardization agreements, in many cases, have a significant positive impact on promoting competition and increasing consumer welfare. Therefore, assessing the compatibility of standardization agreements with competition law requires carefully analyzing various factors and circumstances. This need for 'cautiousness' arises from the necessity to strike a delicate balance—a 'golden standard'—where the restrictive effects on competition stemming from standardization agreements are addressed through prohibition or sanctioning, but only to the extent that such measures do not disproportionately undermine or negate the positive effects that these agreements may generate.

2. Market Shares

Taking into account the European practice, if the coordination established between undertakings does not have as its object the restriction of competition, the qualification of it as an anti-competitive agreement requires a significant intensity of the restriction of competition, which cannot be outweighed by the pro-competitive effects deriving from the same agreement. [30] This principle also applies to standardization agreements, which do not have the restriction of competition as their object. Therefore, to extend the prohibition envisaged by Article 101 of the TFEU to such an agreement, the restrictive effects of such coordination must have significant intensity. One of the first and most important parameters for measuring the mentioned intensity of the restriction is the market shares of undertakings participating in the agreement.[31]

[30] ECLI:EU:C:2009:215, "Pedro IV Servicios SL," Case C-260/07, 02.04.2009, § 83; ECLI:EU:C:1991:91, "Stergios Delimitis," Case C-234/89, 28.02.1991, §§ 10-13; ECLI:EU:C:2000:679, "Neste Markkinointi", Case C-214/99, 07.12.2000, § 25; ECLI:EU:T:2002:84, "Colin Joynson," Case T-231/99, 21.03.2002, § 48.

[31] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), recital 472.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

This is because the market shares of the Undertakings participating in the standardization agreement constitute the exact indicator of their market power and the scope of the market covered by this agreement. The higher the market shares of the Undertakings, the greater will be the restrictive effects of the standardization agreement concluded between them. For example, suppose a specific standardization agreement has foreclosure effects, and the market share of Undertakings participating in this agreement is collectively more than 60 percent. In that case, more than half of the market is foreclosed for other undertakings outside the agreement. Therefore, the restrictive effects of competition arising from this agreement are directly proportional to the total market shares of the undertakings participating in the standardization agreement.

In addition, market shares give rise to certain presumptions when assessing the compatibility of an individual agreement with competition law. In particular, low market shares create a presumption that there is no significant restriction of competition. In contrast, high market shares, on the contrary, indicate a high probability of significant restriction of competition.

It should be noted that European competition law envisages certain limits on market shares. Suppose the joint market share of undertakings participating in a particular agreement does not exceed these limits. In that case, the European Commission considers individual coordination of Undertakings to be an agreement that slightly restricts competition. On this basis, it no longer falls within the scope of the prohibition established by Article 101 of the TFEU ("De Minimis Notice"[32]). According to the De Minimis Notice, the prohibition provided for in Article 101 of the TFEU does not apply to such horizontal coordination established between Undertakings in which the joint market share of the participating Undertakings does not exceed 10 percent. In the case of vertical coordination, the prohibition provided for in Article 101 of the TFEU does not apply if the market share of each party to such coordination does not exceed 15 percent. In this case, the share of the undertaking participating in the vertical agreement should be determined individually in the relevant market in which they operate. However, for an agreement that includes the characteristics of both a horizontal and a vertical agreement, which makes it difficult to classify it as a horizontal or vertical agreement, the prohibition established by Article 101 TFEU does not apply if the market share of each party to the agreement in the relevant market does not exceed 10 percent. Accordingly, the mentioned provisions create a certain minimum threshold; if the market shares of the undertakings to the particular standardization agreement do not exceed this threshold, it is assumed that the agreement only slightly restricts competition and does not fall under the prohibition established by Article 101 of the TFEU.

Considering the above, when assessing the compatibility of standardization agreements that do not constitute an agreement with the restriction by object, one of the first and most important parameters or indicators should be the market shares of the undertakings participating.

3. Non-binding character of the standard

The binding or optional character of the agreed standard is the following parameter to evaluate the compatibility of standardization agreements with the competition law. If compliance with the approved and established standard is optional and not mandatory, then there remains a significant space for competition in the relevant market.[33] In particular, Undertakings are then free to develop alternative standards or products. Therefore, despite establishing a separate standard, the competition process continues to develop dynamically. On the contrary, if compliance with the agreed standard

[32] Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014/C 291/01, OJ C 291, 30.8.2014, p. 1–4, recitals 8-9.

[33] ECLI:EU:T:2010:189, Case T-432/05, "EMC Development AB v European Commission", Rec. 105; Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 357.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

is mandatory, it creates entry barriers into the relevant market affected by the agreement. [34] It drives undertakings out of that market and leaves no space for developing alternative standards.

In addition, when the standard is not binding and its implementation is optional, the standardization agreement is less likely to develop into an agreement that restricts competition by its object, such as price fixing or market sharing. This is also emphasized in the Commission's guidelines, where it is indicated that if the standardization agreement binds and forces the undertakings involved in it to use a specific standard in the production of a separate product, the risks of significantly limiting competition increase, and it may turn into a restriction of competition by object. Considering the above, the mandatory or optional nature of the implementation or use of the standard prompted by the agreement is the first indicator of determining the presence or absence of significant effects restricting competition.

Therefore, in determining the standardization agreement's compatibility with competition legislation, it is also essential to consider its binding or non-binding character.

4. Availability and Accessibility of the standard

Evaluation of the restrictive effects of a standardization agreement also requires considering the availability and accessibility of the agreed standard to third parties. If third parties are prevented from using or complying with the agreed standard, a market situation is created in which these entities may be forced to exit the relevant market. Such standardization practices can lead to the exclusion of competitors from the market, creating barriers to entry that effectively make it impossible for third parties to meet the standard. This, in turn, results in their exclusion from the market.

The ability to meet the standard includes having access to the intellectual property or other necessary resources required to comply with it. However, such access can be restricted in several ways. For example, an outright refusal to transfer the means needed to meet the standard or unfairly high prices for transferring these means can make compliance prohibitively expensive.

If a standardization agreement includes provisions that effectively prevent others from freely accessing the standard, this constitutes a significant indicator of restrictive effects on competition. Conversely, suppose the standard and the means to comply with it are available to everyone.[35] In that case, the likelihood of the agreement being deemed restrictive under Article 101 of the TFEU and subject to sanctions is significantly reduced.

5. Contribution to standard development

The following essential aspect of assessing the compatibility of a standardization agreement with competition law is the extent to which the standard-setting process was open to all interested parties.[36] This is because the freedom to participate in the standardization process determines the fairness, non-discrimination, legitimacy, transparency, availability, and other characteristics of the established standard, which are necessary to minimize the risks of restriction of competition to an appreciable extent via the standardization agreement.[37]

The fact that all interested entities are allowed to participate in setting the standard helps prevent the established standard from driving out the undertakings from the market. It precludes a small group of undertakings from getting an unfair benefit from the standardization. In addition, the participation of the broadest possible circle of interested entities in the standardization process

[34] Imelda Maber, The New Horizontal Guidelines: *In Revista de Concorrência e Regulação (C&R), Vol. IV, No. 13, pp. 19–34, 22;* For more on relevant markets related to the standardization agreement, refer to the previous chapter of this paper.
[35] Füller Jens Thomas, *in Kölner Kommentar zum Kartellrecht,* Band 3,Cologne, 2017, Rn. 355.
[36] Maritzen Lars*, Kölner Kommentar zum Kartellrecht*, Band 1, Cologne, 2017, § 1 GWB, Rn. 530; Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 356.
[37] ECLI:EU:T:2010:189, Case T-432/05, "EMC Development AB v European Commission", Rec. 101; Imelda Maber, The New Horizontal Guidelines: *In Revista de Concorrência e Regulação (C&R), Vol. IV, No. 13, pp. 19–34,* 25.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

guarantees the promotion of progress and innovation. This is ensured by the participation of the knowledge and professional experience of as many professionals as possible in the standardization process. It guarantees that the established standard reflects the best possible technologies or approaches among the existing ones. In addition, this also adds additional legitimacy to the established standards. Accordingly, all these points show that the standard-setting process's openness could indicate the compatibility of standardization agreements with competition legislation.

6. Interim Conclusions

Having discussed the main criteria for assessing the pro- and anti-competitive Effects of Standardization, it is to be noted that these criteria are applicable if the standardization agreement concerned does not have the restriction, prevention or distortion of competition as its object. In conclusion, it can be said that in such a case, the pro- and anti-competitive effects of the standardization agreement are evaluated based on the following parameters or indicators, such as Market Shares, Non-binding character of the Standard, Availability and Accessibility of the Standard, and openness of the participation in the standard development. Given the above, if the market share requirements established by the De Minimis Notice are not met, the standardization agreement may still not fall within the scope of the prohibition envisaged by Article 101 of the TFEU if The opportunity to participate in the standard-setting process is open and unrestricted for all interested entities and the agreed and established standard does not create any barrier to enter the relevant market and shall not exclude market participants from the relevant market.[38] To protect the interests of effective and free competition, it is necessary to guarantee the equal opportunity of participation of all interested parties in establishing a particular standard. In addition, it is also essential to ensure that all interested third parties can freely, under non-discriminatory and fair conditions, join this agreement and use or implement the agreed standard in their activities. Furthermore, the standards obtained and established due to such a process should not be binding for participating entities. If the mentioned requirements are met, there is a high probability that the standardization agreement will not be considered anti-competitive, and the prohibition established by Article 101 of the TFEU will not apply to it.

VII. EXEMPTION FROM PROHIBITION

1. Preliminary observations

If the coordination between undertakings related to the establishment of a standard does not constitute the by object restriction but still formally meets the prerequisites provided by the first paragraph of Article 101 of the TFEU, it can still be justified if the efficiency gains deriving from it outweigh the adverse effects on competition arising from this agreement. In particular, Article 101, section 3 of the TFEU, establishes exceptions in which a separate agreement can be compatible with a healthy competitive environment. Hence, for the standardization agreement to be compatible with the competition legislation, it must simultaneously meet the following four prerequisites: efficiency increase, indispensability, pass-on to consumers and no elimination of competition.[39]

2. Efficiency improvements

Thus, the first prerequisite for the spread of the exception to the ban is the increase in efficiency. In other words, this agreement must increase efficiency to extend the exemption to the anti-competitive standardization. As mentioned above, the standardization agreement provides, in

[38] Maritzen Lars*, Kölner Kommentar zum Kartellrecht*, Band 1, Cologne, 2017, § 1 GWB, Rn. 530.

[39] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), recitals 475-486.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

particular cases, different positive effects on the relevant markets.[40] One of the most significant efficiencies is the establishment of common approaches and technical standards for individual goods or services, significantly improving product compatibility and interoperability.[41] This, in turn, means improved production processes, cost savings, improved productivity, and easier interoperability across industries or regions. Standardization minimizes the complexities associated with diverse systems and procedures, allowing for the optimization of resources and faster implementation of processes. In addition, it facilitates compliance with regulatory frameworks, reducing administrative burdens and related costs. Harmonization of standards also promotes innovation by providing a common platform for developing and integrating new technologies. In addition, the standards also ensure the creation of various guarantees in the direction of quality, safety, and environmental protection. In addition, it should be noted that according to the practice firmly established by the European Commission, to extend the exemption to the standardization, the information related to the particular standard and its establishment must be widely available to those entities who want to enter the relevant market of the goods or services.

3. Pass-on to Consumers

To extend the exemptions to the particular standardization agreement, the positive effects arising from it must be equally reflected in consumer welfare. In a specific case, a particular anti-competitive standardization agreement, which can achieve one or more of the above-mentioned positive effects, should also be capable of proportionally reflecting these positive effects not only on the welfare of the entities participating in it but also on consumers. For example, reducing production costs for undertakings can be transformed into a decrease in the purchase prices of relevant goods or services for consumers, technological progress - into an increase in quality, etc. According to European practice, 'pass-on to consumers' refers to the distribution of benefits to consumers on a scale sufficient to at least compensate for the actual or potential adverse effects caused by an individual agreement restricting competition.[42] Moreover, if the agreed standard promotes interoperability and compatibility or competition between existing and new products or services, then it is assumed that the benefits caused by this standardization agreement will automatically positively affect the welfare of consumers. In this case, consumer welfare does not mean purely commercial profit, which the consumer should become a sharer of. The term in question includes any economic benefit from a specific anti-competitive standardization agreement. This does not mean only reducing prices for individual goods or services or preventing price increases. Customer welfare and benefits within the framework of the standardization agreement may be expressed in the offer of new, more sophisticated and higher-quality goods or services.[43]

4. Causation, Necessity of Restriction, and the Principle of Proportionality

The following prerequisite for the exemption is a direct causal link between the relevant standardization agreement and consumer welfare. In particular, the increase in consumer welfare

[40] Füller Jens Thomas, *in Kölner Kommentar zum Kartellrecht,* Band 3,Cologne, 2017, Rn. 350; Imelda Maber, The New Horizontal Guidelines: *In Revista de Concorrência e Regulação (C&R), Vol. IV, No. 13, pp. 19–34, 29;* Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 358.

[41] Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 352

[42] Ellger Reinhard, Andreas Fuchs, *in Immenga/Mestmäcker, Wettbewerbsrecht, Band 2, Kommentar Zum deutschen Kartelrecht, 6. Auflage., 2020,* § 2. Rn. 96; CC – G. on the application of Article 81(3) of the Treaty, OJ C 101, 27.4.2004, p. 97–118, § 85.

[43] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01), recitals 485; Ellger Reinhard, Andreas Fuchs, *in Immenga/Mestmäcker, Wettbewerbsrecht, Band 2, Kommentar Zum deutschen Kartelrecht, 6. Auflage., 2020,*, § 2. Rn. 95.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

should not be due to other factors; its direct cause should be the standardization agreement. In addition, along with the causation, the necessity and proportionality of competition restriction are also the exemption scheme's main elements.

The necessity test must determine to what extent the agreement and the individual restrictions imposed by the agreement provide a more suitable opportunity to achieve positive effects than would be possible without those restrictions.[44] In this case, it should be determined to what extent the restriction of competition caused by standardization is the only appropriate way to achieve the positive effects. For this, it is necessary to exclude the presence of other less harmful means to achieve positive effects of the same scale.

Once the necessity test is met, the proportionality of the restriction imposed by the individual coordination is assessed. According to the ECJ, the restrictive effects of competition resulting from individual coordination established between undertakings must be proportional to the positive impact provided by the first two conditions of the exclusive scheme, which resulted from this agreement. Accordingly, if there is no proportional relationship between the positive effects and the degree of restriction of competition, then the standardization agreement cannot satisfy the requirements of exemption and cannot escape the prohibition envisaged by Article 101 of TFEU.

5. No Elimination of Competition

Finally, anti-competitive standardization must not eliminate competition in the relevant markets. The elimination of competition is usually determined in each particular case. Although standardization agreements often aim to harmonize practices, improve efficiency and provide consumer benefits, they should not lead to the suppression of competitive forces in the relevant market.

This requirement ensures that the standardization agreement does not give undue market power to particular participants or create barriers to entry for others. In this case, an important parameter and prerequisite that should be considered is the market shares of the undertakings participating in the standardization.

CONCLUSION

Considering the discussions developed within the presented research, at the end of the paper, it is possible to formulate the main findings related to the qualification process of standardization agreements as anti-competitive coordination.

First of all, it should be noted that standardization or standard setting may occur in different forms and via various means in practice. Specific standards may be established by undertakings themselves, as well as by other entities or organizations. In this regard, the paper developed a discussion regarding the fact that to evaluate the compliance of the actions related to establishing the Standard with Article 101 of the TFEU, these actions must be carried out within the framework of economic activity. In other words, at such times, it is necessary to refer to the standards established by undertakings. In addition, Article 101 of the TFEU also applies when the standard-setting entity is an association of undertakings, which by its own decision sets specific standards.

The presented paper also discussed that coordination related to standardization may bear the signs of both agreements with the restriction of competition by object and by effect.

In addition, the paper also provides the means and forms by which standardization agreements can be used to limit competition. Moreover, based on existing practice, potential markets were identified where a particular standardization agreement could restrict competition. In particular, such

[44] Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV, Rn. 360.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

a case concerns the relevant market for goods and services, the appropriate technology market, the relevant standardization market, and the relevant certification market.

The 6-th chapter of the paper discusses the main parameters by which the anti-competitive and pro-competitive effects of the standardization agreement are evaluated in individual cases. In particular, the market shares of undertakings involved in the standardization agreement, binding or non-binding character of the standard, availability and accessibility of the standard and contribution to standard development should be considered as the main parameters in this regard. In addition, it should be noted that the analysis of the mentioned parameters is necessary only in cases where the case does not refer to the standardization agreement with the restriction by object.

In the last part of the paper, the necessary preconditions for the applicability of the exemption clauses on standardization agreements were discussed. In this regard, it was noted that one of the main prerequisites for its application is efficiency improvements. It was also pointed out that for exemptions to be granted, these positive effects must also have a positive impact on increasing consumer welfare, and the restriction of competition must be proportionate and necessary to achieve these benefits or positive effects. However, it is also essential that the standardization agreement does not eliminate competition in any of the relevant markets mentioned above.

BIBLIOGRAPHY:

1. Maritzen Lars*, in Kölner Kommentar zum Kartellrecht*, Band 1, Cologne, 2017.
2. Füller Jens Thomas, *in Kölner Kommentar zum Kartellrecht,* Band 3,Cologne, 2017.
3. Florian Wagner-von Papp, *in Münchener Kommentar zum Wettbewerbsrecht,* 4. Auflage, Munich, 2022, Art. 101 AEUV.
4. Immenga/Mestmäcker, Wettbewerbsrecht, Band 2, Kommentar Zum deutschen Kartelrecht, 6. Auflage., 2020.
5. Moritz Lorenz, *An Introduction to EU Competition Law,* 2013.
6. Imelda Maber, The New Horizontal Guidelines: Standardisation. *In Revista de Concorrência e Regulação* (C&R), Vol. IV, No. 13, pp. 19–34.
7. Enrico Bonadio, "Standardization Agreements, Intellectual Property Rights and Anti-Competitive Concerns," *in 3 Queen Mary J. Intell. Prop. 22,* 2013.
8. Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2023/C 259/01).
9. Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), 2014/C 291/01, OJ C 291, 30.8.2014.
10. ECLI:EU:C:2009:191, In Case C-113/07 P, "SELEX Sistemi Integrati SpA".
11. ECLI:EU:T:2010:189, Case T-432/05, "EMC Development AB v European Commission".

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Consumer information Standard according to EU and Georgian Laws

PROFESSOR DR. MAKA KARTOZIA
AFFILIATE PROFESSOR AT THE UNIVERSITY OF EASTERN EUROPE, PROFESSOR AT CAUCASUS UNIVERSITY
SANDRO ALAPHISHVILI
MASTER'S STUDENT AT CAUCASUS UNIVERSITY

Abstract: *The protection of consumer rights is one of the most pressing issues in modern law. The law on consumer rights protection originates[1] from contractual law, which itself is based on the principles of equality and freedom of contract. The principle of freedom of contract means that each party in civil transactions, including the consumer and the entrepreneur, has an equal opportunity within its private autonomy, to enter into any contract with content that is not prohibited by law,[2] to freely choose a contracting party[3], and to freely bargain and create the terms of the contract. However, due to the specifics of civil relations, the parties are not always absolutely equal and free.*

This situation becomes evident when the contracting parties are an entrepreneur and an individual, a consumer who requires the contract subject or service to meet personal needs, rather than for business, professional, or craft purposes. Consumer doesn't have field-specific knowledge and experience (nor should they have) thus they are easily influenced by the proposals offered by the entrepreneurial entity. In such cases, entrepreneurs have a greater responsibility to demonstrate good faith and honesty.

Keywords*: consumer; trader; EU directive; awareness; Court of Justice of the European Union.*

1. INTRODUCTION

> *"Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision."*
> (John F. Kennedy, March 15, 1962)

Based on the Association Agreement with the European Union[4], the Parliament of Georgia adopted the law "On the Protection of Consumer Rights[5]" on March 29, 2022, which aims to define the concept of a consumer and establish a culture of behavior where consumers are respected. The Association Agreement between Georgia and the European Union[6] outlines the importance of ensuring a high level of consumer protection and cooperation in terms of ensuring compatibility between their consumer protection systems.

One of the key rights of the consumer is the right to be informed. The European Parliament and Council Directive 2011/83/EU[7] of October 25, 2011, as well as Georgian legislation, includes a

[1] Norbert Reich , „Protection of Consumers' Economic Interests by EC Contract – Some Follow-up Remarks." In *Sydney Law Review*, *Vol., 28: 37*, 2006, გვ. 54.

[2] Lado Chanturia, General Part of Civil Law, Law, Tbilisi, 2011, pages 90-94

[3] Besarion Zoidze, Reception of European Private Law in Georgia, Publishing Training Center, Tbilisi, 2005, page 4

[4] Association Agreement between Georgia, of the one part, and the European Union and the European Atomic Energy Community and their Member States, of the other part. 27.06.2014, https://matsne.gov.ge/ka/document/view/2496959?publication=0 accessed: 20.11.2024

[5] Parliament of Georgia, Law of Georgia "On Protection of Consumer Rights". Article 1, 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 19.11.2024

[6] Association Agreement between Georgia, of the one part, and the European Union and the European Atomic Energy Community and their Member States, of the other part. 27.06.2014, https://matsne.gov.ge/ka/document/view/2496959?publication=0 accessed: 20.11.2024

[7] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

list of information that the trader is obligated to provide to the consumer before concluding the contract.

The imperative provisions regarding the obligation to provide information ensure the consumer's right to make an "informed decision" before acquiring goods or services.

This thesis aims to determine the compliance of Georgian and European Union laws in terms of provision of information in consumer relations.

2. PARTIES TO A CONSUMER CONTRACT

For a contract to become a Consumer-based contract, it must meet certain preconditions. Article 2, Paragraph 1 of the Georgian Law "On Consumer Rights Protection'' states the following: ''This Law determines general principles for the protection of the rights of consumers who establish legal relations with a trader with a view to consuming the trader's goods or services for personal purpose[8]. From this definition, the preconditions that transform a contract into a consumer contract are evident. There must be a trader, on one side, and a consumer, on the other side.

2.1. consumer

Defining the concept of a consumer is extremely important in consumer relations[9]. It is around the concept of the consumer that the legislation regulating consumer relations is created[10]. According to Subparagraph (i) of Article 4 of the law, a consumer can only be a natural person. The law does not recognize a legal entity or an unregistered community of individuals as a consumer. For a person to be considered a consumer, it is not enough for him/her to be a natural person. The concept of a consumer includes two cumulative conditions: I) the person must be a natural person; II) the person must be acting outside his/her professional activity. This is how the concept of a consumer is defined in Paragraph 17[11] of the Preamble of the European Parliament and Council Directive 2011/83/EU of October 25, 2011.

When discussing the concept of a consumer, it is interesting to look at the decision of the Court of Justice of the European Union (CJEU) in the case C-329/19, Condominio di Milano (Milan Association)[12]. In this decision, the court clarified that under case law of national courts, the concept of "consumer" may be extended in a way that does not refer solely to natural persons. This interpretation, however, is less applicable to the Georgian context, as the law imperatively defines a consumer as a natural person[13]. The aforementioned court decision can serve as a guideline when

Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0083-20220528 accessed: 20.11.2024

[8] Parliament of Georgia, Law of Georgia "On the Protection of Consumer Rights". Article 1, 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 20.11.2024

[9] Zurab Gvelesiani,*The Necessity of Consumer Law For Effective Competition and a More Robust Enforcement of Competition Law: A Comparative Analysis of the EU and Georgian Legal Systems.* budapest.2017. pp. 177.

[10] Parliament of Georgia, Law of Georgia "On the Protection of Consumer Rights". Article 1, 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 20.11.2024

[11] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0083-20220528 accessed: 20.11.2024

[12] EUROPEAN COMMISSION, *Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights*, Official Journal of the European Union 2021. pp. 6.

[13] According to the article 4 subparagraph i) of Law of Georgia "On the Protection of Consumer Rights" consumer is any natural person who is offered goods or services, or who purchases or further consumes goods or services exclusively for private purposes and not for performing any commercial practice or industrial activity, crafting or other occupational activities.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

determining whether the consumer has a personal interest or commercial interest to the contract. According to Paragraph 2 of the Article 2 of the Georgian Law "On Protection of Consumer Rights," the law applies to situations where the consumer's personal interest takes precedence over the commercial interest. Furthermore, according to the second sentence of this paragraph, if it is unclear which interest takes precedence, the matter should be resolved in favor of the consumer, and it shall be deemed that the personal interest is predominant.[14] In the same decision by the Court of Justice of the European Union, the issue is further clarified regarding how this matter should be decided. According to the ruling, when a consumer is driven by both personal and professional (commercial) interests, for the person to be considered a consumer, taking into account the overall context of the contract, the commercial interest shall be limited and shall not take precedence[15] over the personal interest. Pursuant to the European Parliament and Council Directive 2011/83/EU on the Protection of Consumer Rights, the assessment of a consumer's contractual interest shall be carried out on an individual basis in each specific case.[16]

2.2. Trader

In the European Union, the regulatory acts governing the provision of information are the European Parliament and Council Directive 2011/83/EU of October 25, 2011, as well as the European Parliament and Council Directive 2005/29/EC of May 11, 2005, which regulates unfair commercial practices in business-to-consumer relations. Unfair commercial practices are significantly related to the obligation to provide information, which will be discussed in more detail below. In this case, these acts are referenced to illustrate that both independently define the concept of a trader. Article 2 of the European Parliament and Council Directive 2011/83/EU of October 25, 2011, lists the definitions of the terms used in the directive. According to paragraph 2 of this article of this Directive, a 'trader' means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive''[17]. Concerning the Directive 2005/29/EC of May 11, 2005, article 2 of this legal act also provides the definitions of the terms used in the directive,[18] according to which, a 'trader' means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft, or profession and anyone acting in the name of or on behalf of a trader''. The aforementioned provisions clearly show that these definitions are not significantly different from each other, and both directives essentially define the concept of a trader in the same way. Therefore, even though the concept of a trader is independently defined in two normative acts, they are not distinct. The Georgian normative definition directly mirrors the definition of a trader as outlined in the above directives. In

[14] Parliament of Georgia, Law of Georgia "On the Protection of Consumer Rights". Article 2 paragraph 2 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 20.11.2024

[15] EUROPEAN COMMISSION, *Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights*, Official Journal of the European Union 2021. pp. 6.

[16] Ibid.

[17] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, Article 2, 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0083-20220528 accessed: 20.11.2024

[18] 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') (Text with EEA relevance), 2005. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0029-20220528 accessed: 20.11.2024

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

terms of normative content, according to the EU directives, the trader is qualified not only by the purpose of their activity but also by the object of their activity.[19] [20] In Georgia, the legal definition of a commercial activity refers to any action, inaction, behavior, explanation, or commercial communication by the trader, including advertising and marketing, that is directly related to the sale or provision of goods or services to the consumer or the promotion of such sales.[21] Furthermore, goods are defined as any movable thing, as well as any material goods placed therein and/or disseminated in a digital form[22]. Therefore, even though the concept of a trader is defined similarly in both Georgian and European legislations, it cannot be considered synonymous. The Georgian definition of a trader matches the definition provided in Directive 2011/83/EU, but it does not align with the definition in Directive 2005/29/EC. The latter includes immovable property as part of the subject of consumer relations. This discrepancy can be seen as a shortcoming of Georgian legislation, as the law regulates unfair commercial practices but excludes relationships involving immovable property outside its scope. In contrast, EU legislation extends the norms regulating unfair commercial practices to include immovable property too.

It is worth to mention the decision C-105/17 of CJEU. The court shared the opinion of the Advocate Generale.[23]

whether the sale was carried out in an organised manner; whether that sale was intended to generate profit; whether the seller had technical information and expertise relating to the products which they offered for sale which the consumer did not necessarily have, with the result that the seller was placed in a more advantageous position than the consumer; whether the seller had a legal status which enabled them to engage in commercial activities; to what extent the sale was connected to the seller's commercial or professional activity; whether the seller was subject to VAT; whether the seller, acting on behalf of a particular trader or on his/her own behalf or through another person acting in his/her name and on his/her behalf, received remuneration or an incentive; whether the seller purchased new or second-hand goods in order to resell them, thus making that a regular, frequent and/or simultaneous activity in comparison with their usual commercial or business activity; whether the goods for sale were all of the same type or of the same value; and whether the offer was concentrated on a small number of goods.

The court mentioned that these criteria are neither exhaustive nor exclusive.[24] Additionally court defined that compliance with one or more of the criteria is not sufficient,

[19] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, Article 2, paragraph (3), 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0083-20220528 accessed: 20.11.2024

[20] 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') (Text with EEA relevance), Article 2, Subparagraph (c), 2005. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0029-20220528 accessed: 20.11.2024

[21] Parliament of Georgia, Law of Georgia "On the Protection of Consumer Rights". Article 4, subparagraph z) 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 20.11.2024

[22] Ibid.

[23] Komisia za zashtita na potrebitelite v Evelina Kamenova (C-105/17) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0105 accessed: 29.11.2024

[24] Ibid.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

by itself, to classify that person as a 'trader[25]. The court mentioned that circumstance in which natural person publishes advertisements by which he/she offers consumers goods, isn't enough to classify that person as a "trader".[26] In the end court mentioned that national court should determine wether or not person is a trader if he is acting for purposes relating to his trade, business, craft or profession.[27]

3. CERTAIN ASPECTS OF THE OBLIGATION TO PROVIDE INFORMATION UNDER EU AND GEORGIAN LAWS

The list of information to be provided by the trader to the consumer is quite extensive under both the European Union and Georgian laws. This article will focus on a few of them.

The guidance of the European Parliament and the Council's Directive 2011/83/EU of October 25, 2011, explains what is meant by information that is '' ***already apparent from the context'***. According to the definition, such information may include the trader's shop address when the consumer purchases goods at the trader's premises rather than remotely[28]. This type of information is already apparent and does not require explicit indication by the trader.

The decision of the Court of Justice of the European Union of July 10, 2019, in case C-649/17, is worth mentioning. In this case, the Court made an interpretation of Article 6(1)(c) of Directive 2011/83/EC of the European Parliament and the Council of October 25, 2011, according to which, a trader has an obligation to provide its contact information (telephone and fax number) to the consumer only when the trader has such means of communication.[29] The Court explained the essence of Article 6 of the Directive, stating that the provision serves to the protection of consumer rights. The consumer, based on the information received in advance, has the ability to decide whether to restrain himself from entering into a contractual relationship with a particular trader through an agreement or not[30]. The Court explained that direct and effective communication is important for protecting consumer rights. Additionally, the Court pointed out that there must be a balance between the obligation to provide information and the protection of consumer rights, on the one hand, and the competitiveness[31] of undertakings, on the other. Obliging each and every trader to provide a telephone number to consumers would be disproportionate, especially for small undertakings who may be trying to reduce operational costs, including, by conducting business at a distance or off-premises [32]. The current provision of the Directive does not require traders to have separate communication methods for consumers[33]. According to the Court's interpretation, the entry in the Directive does not prevent traders from having a means of communication other than a telephone, fax, or email. The fact that a consumer has to perform more than one action (such as clicking the appropriate button) on the trader's website

[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] EUROPEAN COMMISSION, *Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights*, Official Journal of the European Union 2021. pp. 23
[29] Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl.(C-649/17) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0649 accessed: 24.11.2024.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl.(C-649/17) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0649 accessed: 24.11.2024.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

does not, in itself, imply that the information is provided in a vague or unclear manner.[34] The provision of the current Directive should be interpreted in such a way that, when a trader sells remotely, the national legislation shall not oblige him to provide a telephone number[35] to the customer. Furthermore, the trader is not required to have a separate communication method for trading purposes to contact consumers.[36]

It is important to note the decision of the Court of Justice of the European Union from June 28, 2007, in case C-73/06. In this decision, the Court explained what is meant under ''the place of the business'', which is mandatory information to be provided to the consumer. According to the Court, the determination of a company's place of business requires a series of factors to be taken into consideration, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account[37]. Pursuant to Georgian legislation, in distance contracts, the consumer shall be provided with information about the factual address if it is different from the legal address.[38]

Like the European Union Directive, Georgian law separately outlines the information that a trader must clearly and understandably provide to the consumer for contracts concluded at a distance or off-premises, including information about the right of withdrawal from the contract or any limitations or prohibitions on this right. Georgian and EU legislation align in terms of mandatory information requirements. It is worth noting, however, that the provisions of Georgian law are more conditional in nature than those of the EU, and only under certain conditions it obliges the trader to provide this information to the consumer. For instance, the sub-paragraph ''b'' of Article 5 of Georgian Law concerns provision of information to the consumer about the communication means, identity and the address of the trader. The first sentence of this paragraph – ''the identity (name) and address (legal address) of the trader'' is imparative in nature. The identity and address of the trader are essential pieces of information that a consumer needs in order to know with whom they are entering into a contract and, if necessary, where to contact the trader. Regarding the second sentence of this provision, it is conditional in nature, as the trader is only required to provide contact information when they have such means of communication available. According to Article 5(b) of Directive 2011/83/EC, the trader's telephone number is considered mandatory information to be provided. The availability of a telephone number ensures efficient and fast communication between the trader and the consumer. Based on the above, it is likely that the trader could indicate not only a telephone number but any other effective and fast communication method; in any case, having an efficient means of communication is essential for the trader. Georgian legislation treats the provision of any contact information as non-mandatory, requiring the trader to provide such information only if it exists. From the perspective of effectively protecting consumer rights, this could be seen as a shortcoming. If

[34] Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl.(C-649/17) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0649 accessed: 24.11.2024.
[35] Ibid.
[36] Ibid.
[37] Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern (C-73/06) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62006CJ0073 accessed: 25.11.2024
[38] Parliament of Georgia, Law of Georgia "On the Protection of Consumer Rights". 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 26.11.2024

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

consumers have to visit the trader's premises every time to clarify any issue or even file a complaint, it will be an obstacle to exercising their rights.

4. RELEVANCE OF THE OBLIGATION OF INFORMATION PROVISION TO MISLEADING OMISSION

''Informed Consumer'' is the foundation of consumer relations. Given that the consumer and the trader have different capabilities, considering their social, economic, or sectoral knowledge, the law on the protection of consumer rights aims to balance the inequality between the parties by granting certain rights to the consumer. On the one hand, some rights are granted to the consumer, while on the other hand, the trader is loaded with obligations with an idea to show consideration for the consumer. The consumer is the weaker party in the transaction with the trader, considering their bargaining power and level of knowledge.[39] Therefore, according to the consumer rights law, the trader must perform some practical actions. Based on this, consumer protection legislation imposes a certain practical obligation on the trader. In one case, the obligation to provide information may be considered a breach by the trader, while on the other hand, it may be seen as a misleading omission. According to article 26(5) of the Georgian Law on Protection of Consumer Rights: ''the non-fulfillment of the obligation to deliver information provided for by Articles 5, 6 and Articles 9 to 12 of this Law shall be also deemed a misleading commercial practice resulting from omission.'' The aforementioned articles, in turn, impose the obligation on the trader to provide certain information. Thus, the question arises: if the trader does not provide information about his identity to the consumer, should the relevant agency consider this only as a violation of the obligation to provide information or as misleading commercial activity resulting from omission? Under EU Law, Provision of information to the consumer at the pre-contractual stage is regulated by the European Parliament and Council Directive 2011/83/EU of October 25, 2011.[40] On the other hand, unfair commercial practices in business-to-consumer relations are regulated by the European Parliament and Council Directive 2005/29/EC of May 11, 2005[41]. These directives address various issues, but in the case under consideration, attention should be given to the relation between Articles 5 and 6 of Directive 2011/83/EU and Article 7 of Directive 2011/83/EU. The mentioned articles of Directive 2011/83/EU list the information to be provided to the consumer at the pre-contract stage, while according to Directive 2011/83/EU, it is a misleading omission if the average consumer is not provided with all essential information needed to make an informed decision, and as a result of the absence of this information, the consumer makes a decision they would not have made otherwise. According to the directive, all relevant circumstances should be taken into account when addressing this issue."

It is clear that there is an overlapping connection between Directive 2011/83/EU and Directive 2005/29/EC. Articles 5 and 6 of Directive 2011/83/EU outline and list the information that must be provided to the consumer at the pre-contractual stage, when no contractual binding has yet occurred

[39] Horaţiu Ovidiu Costea v SC Volksbank România SA. (C-110/14) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0110 accessed: 25.11.2024
Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0083-20220528 accessed: 17.11.2024

[41] 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') (Text with EEA relevance. 2005. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0029-20220528 accessed: 17.11.2024

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

between the parties.[42] This is explicitly stated in the first paragraphs of the relevant articles, both of which begin with the following sentence: ''Before the consumer is bound by...''.[43] Based on the content of Article 7, paragraph 1 of Directive 2005/29/EC, an action that influences the consumer's ability to make an informed decision is classified as a legal violation.[44] The decision of the Court of Justice of 19 December 2013, C-281/12, where the Court explains that ''transactional decision'' must be interpreted broadly[45]. According to the same decision, the Court clarifies that 'transactional decision'' may include, among other things, the entry of the consumer into a transaction.[46] Therefore, the provisions regulating unfair commercial practices have a much broader scope of application than the mandatory norms on the provision of information. The pre-contractual stage is the phase of the relationship between the consumer and the trader during which these two regulatory norms overlap.[47] However, it should be noted that the regulatory norms on unfair commercial practices are generally of a broad nature in terms of their content. The regulatory norms governing pre-contractual relationships regulate the pre-contractual stage in a more specific and detailed manner. Therefore, at a first glance, it could be said that if the trader has provided the consumer with all the information required under the norms regulating the pre-contractual relationship, this action would also fulfill the requirements[48] for misleading omission. So where is the line between the failure to provide information and misleading commercial practices? This question becomes even more relevant when we consider the provisions governing the obligation to provide information in both the European Union and Georgian contexts. Specifically, Articles 5 and 6 of Directive 2011/83/EU include the phrase ...in a clear and comprehensible manner... . In Georgia's Law on the Protection of Consumer Rights, two key Artciles regulating the obligation to provide information can be highlighted: Articles 5 and 10. The first paragraph of Article 5 ends with the following statement: ..''provide the following reliable and complete information to a consumer in a clear and understandable manner.'' As for the first paragraph of Article 10, it also has a similar formulation: ….''provide a consumer with the following additional information, in a clear and comprehensible manner.''[49] According to Article 26(2) of the law, ''a commercial practice resulting from the omission of a trader shall be deemed misleading when the material information referred to in paragraph 1 of this article is delivered by the trader to a consumer in a vague, uncertain or untimely manner or where commercial intent can be identified in the commercial practice, or be proven by circumstances, and based on which the consumer concludes or may conclude a transaction which he/she would not have concluded

[42] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0083-20220528 accessed: 17.11.2024

[43] Ibid. First pharagraphs of Articles 5 and 6.

[44] 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') (Text with EEA relevance). 2005. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0029-20220528 accessed: 17.11.2024

[45] Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato (C-281/12) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0281 accessed: 17.11.2024

[46] Ibid.

[47] EUROPEAN COMMISSION, *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*, Official Journal of the European Union 2021. pp. 12.

[48] EUROPEAN COMMISSION, *Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights*, Official Journal of the European Union 2021. pp. 22.

[49] Parliament of Georgia, Law of Georgia "On the Protection of Consumer Rights". 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 17.11.2024

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

otherwise.[50] Paragraph 2 of the Article 7 of EU Directive 2005/29/EC has the same content.[51] Therefore, the issue of differentiation is relevant both in the European Union and in Georgia. In the 2005/29/EC guidelines, it is stated that although the present directive and Directive 2011/83/EU overlap, the 2005/29/EC directive will still be relevant for assessing misleading or aggressive commercial practices, including, in terms of the information provided and the form[52] in which it is delivered. In this context, it is important to note that the failure to provide information *per se* is a legal violation, whereas misleading omission is a result-oriented violation, because one of the following results must occur: the consumer should take a transactional decision that he would not have taken otherwise.[53] [54]However, it is important to note that, according to both EU and Georgian legislation, it is not necessary for the consumer to actually make a decision in order for the action to be assessed as an unfair commercial practice. Instead, if the action gives rise to the presumption that the consumer would have take a transactional decision (*in abstracto*), the action is considered unfair[55]. Therefore, although the existence of an action is required for an unfair commercial practice, it still appears to be subject to evaluation.

Ultimately, it can be said that the relevant authority will have to decide on a case-by-case basis whether the trader has violated the obligation to provide information or engaged in misleading omission. For this purpose, the authority should apply the "transactional decision test".[56] If the authority determines that the action could have misled the consumer, then the trader should be classified as having engaged in unfair commercial practices. However, if such an outcome could not have occurred by non-provision or insufficient provision of information, then it can be deemed only a violation of the obligation to provide information.

5. CONCLUSION

Parties of consumer relationships need to earn trust, which can be developed by many factors, but information and its clarity are among the most important. According to Georgian legislation, the obligation may give rise to the party of the specific deal to obtain information[57]. The obligation to

[50] Ibid.

[51] 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') (Text with EEA relevance), 2005. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0029-20220528 accessed: 17.11.2024

[52] EUROPEAN COMMISSION, *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*, Official Journal of the European Union 2021. pp. 12.

[53] 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') (Text with EEA relevance). 2005. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0029-20220528 accessed: 17.11.2024

[54] Parliament of Georgia, Law of Georgia "On the Protection of Consumer Rights". 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 17.11.2024

[55] EUROPEAN COMMISSION, *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*, Official Journal of the European Union 2021. 83. 32.

[56] Ibid. pp. 30.

[57] Parliament of Georgia, Law of Georgia " Civil Code of Georgia". 1997, Article 318. [https://matsne.gov.ge/ka/document/view/31702?publication=132] accessed: 25.11.2024

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

actively seek information lies with the party that wishes to obtain it, which may be a legitimate provision in certain cases. However, when there is an obvious imbalance between the parties' capabilities and bargain power, placing a burden on the weaker party to act and obtain information would be unreasonable. For this reason, both European and Georgian laws impose an obligation ''to act'' on the trader—the stronger party in the transaction—and require them to provide the information necessary for the consumer to make an ''informed decision'', regardless of whether the consumer explicitly requests it or not.

BIBLIOGRAPHY:

Lado Chanturia, General Part of Civil Law, Law, Tbilisi, 2011

Besarion Zoidze, Reception of European Private Law in Georgia, Publishing Training Center, Tbilisi, 2005

Zurab Gvelesiani,*The Necessity of Consumer Law For Effective Competition and a More Robust Enforcement of Competition Law: A Comparative Analysis of the EU and Georgian Legal Systems.* budapest. 2017

Norbert Reich , „Protection of Consumers' Economic Interests by EC Contract – Some Follow-up Remarks." In *Sydney Law Review*, *Vol., 28: 37*, 2006

EUROPEAN COMMISSION, *Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights*, Official Journal of the European Union 2021

EUROPEAN COMMISSION, *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*, Official Journal of the European Union 2021

Association Agreement between Georgia, of the one part, and the European Union and the European Atomic Energy Community and their Member States, of the other part. 27.06.2014, https://matsne.gov.ge/ka/document/view/2496959?publication=0 accessed: 20.11.2024

Parliament of Georgia, Law of Georgia "On the Protection of Consumer Rights". 29.03.2022, https://matsne.gov.ge/ka/document/view/5420598?publication=3 accessed: 19.11.2024

Parliament of Georgia, Law of Georgia " Civil Code of Georgia". 1997. [https://matsne.gov.ge/ka/document/view/31702?publication=132] accessed: 25.11.2024

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0083-20220528 accessed: 20.11.2024

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') (Text with EEA relevance), 2005. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005L0029-20220528 accessed: 20.11.2024

Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl.(C-649/17) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0649 accessed: 24.11.2024.

Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern (C-73/06) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62006CJ0073 accessed: 25.11.2024

Horaţiu Ovidiu Costea v SC Volksbank România SA. (C-110/14) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62014CJ0110 accessed: 25.11.2024

Trento Sviluppo srl and Centrale Adriatica Soc. coop. arl v Autorità Garante della Concorrenza e del Mercato (C-281/12) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0281 accessed: 17.11.2024

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Europeanization of Georgian Energy Legislation: Approximating Legal Frameworks with EU Energy Policy

DR. LEVAN MOSAKHLISHVILI
PROFESSOR OF THE CAUCASUS UNIVERSITY (GEORGIA)

Abstract: *This article analyzes the process of Europeanization in Georgian energy legislation through the approximation (harmonization) of national legal frameworks with the European Union's energy acquis. It examines Georgia's alignment with EU standards in market liberalization, regulatory reforms, sustainability, and energy security, as mandated by the EU-Georgia Association Agreement and the Energy Community Treaty. The study emphasizes the role of legal approximation as a mechanism for achieving regulatory coherence and fostering regional energy cooperation. It evaluates the challenges and legal implications of transposing EU directives into Georgian law, focusing on institutional reforms, enforcement mechanisms, and infrastructure modernization. The article concludes by assessing these reforms' broader legal and strategic significance for Georgia's integration into the European energy market and its alignment with EU governance principles, contributing to the discourse on external legal influence in transitional economies.*
Keywords: *Energy legislation; Europeanization; Georgian law; legal approximation; Harmonization; sustainability.*

INTRODUCTION

The Europeanization of Georgia's energy legislation represents a crucial step in the country's integration with European structures, emphasizing its commitment to aligning with the EU's transparency, competition, and sustainability principles. This process aims to harmonize Georgia's legal and regulatory framework with European standards, paving the way for a competitive and efficient energy market. By leveraging existing frameworks, Georgia seeks to adopt European norms and adapt them to its legal and market conditions. This effort is designed to create a stable investment environment, foster energy trade with EU member states, promote renewable energy development, and enhance energy efficiency—all vital for sustainable economic growth and environmental protection. This comprehensive approach ensures that Georgia's transformation process is robust, context-sensitive, and fully aligned with its strategic goals.[1].

Approximating the legal environment in line with European values is the key aspect of the Georgian Energy Strategy document, which spells out key policy directions in the field. Georgia's strive to approximate its legislation to the EU core requirements would be possible with the proper codification to ensure a solid and not-fragmented transformation process. It is interesting to learn what legal instruments the EU has in its machinery to facilitate such a transformation process.[2]

Georgia's integration of European energy regulations relies on two main legal pathways: bilateral and multilateral treaty frameworks. The EU-Georgia Association Agreement, finalized in 2014 and ratified in 2016, alongside the Energy Community Treaty, which Georgia joined in 2017, represents foundational agreements in this process. Unlike political instruments, these treaties are distinguished by their legally binding nature and play a critical role in driving Georgia's energy sector

[1] Energy Strategy of Georgia, Resolution of the Parliament of Georgia of June 27, 2024 (In Georgian).
[2] Samkharadze I, The Impact of EU Energy Law External Action on Georgian Legislation Journal "Journal of Law," № 1, 2018, 198 (In Georgian).

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

alignment with Europe. Together, they operate as mutually reinforcing tools, defining a structured approach to the approximation.[3] Process.

An essential component of the Association Agreement is cooperation in the field of energy (Section VI). This includes strengthening energy security, convergence with the EU Energy Acquis, and development of cooperation in areas such as electricity, natural gas and oil exploration, production and transportation, renewable energy, and energy efficiency. The agreement also allows Georgia to join the European Energy Community.[4]

Georgia's participation in the Energy Community aligns with U.S. energy policy in Europe and supports the objectives outlined in the U.S.-Georgia Strategic Partnership Charter.[5]. Additionally, it complements NATO's priorities regarding energy security. By joining the Energy Community, Georgia increases the European Union's responsibility to address Russia's activities in the occupied territories.

This process requires even more political leverage. Mirror "repetition" and formal implementation of the European norms are insufficient to develop the energy legislation further. Effective enforcement measures are inevitable. It is also noteworthy to cooperate closely with the Energy Community Secretariat and adopt the action plan, putting forward interim and final results in light of accountability principles.[6]Implementing regulations is critical to the EU's impact on Georgia's energy sector. Rather than just transposing them into national law, this process might necessitate the creation of formal institutions and procedures designed according to EU standards to facilitate effective and smooth enforcement.

It is essential to distinguish this process from the idea of replacing national laws. Domestic legislation and local stakeholders play a crucial role in managing and regulating international energy markets. The method of norm transmission is inherently a legislative task, and it should not be seen merely as a direct translation of foreign rules. Instead, it involves adapting and applying these norms within the local context. In this context, the "legal translator" supplements and extends where necessary, reduces and shortens where appropriate, and, most importantly, translates with analytical precision rather than literal interpretation.[7].

For the proper implementation of EU regulations and directives into the Georgian legal system, it is crucial to establish competent authorities with effective, independent, and transparent regulatory bodies that balance the rights and interests of different stakeholders in the market. Thus, the final "product" of the harmonized national energy regulatory framework should be consistent legislation with transparent national energy markets and advanced mechanisms for regulating energy matters. This is why the modern energy regulatory framework should be based on an organizational structure ensuring high competition standards that are mutually beneficial and reflect an international character. Such a framework would support Georgia's strategic goals of improving the investment environment, uncovering its transit potential, and implementing vital energy projects.

---

[3] 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, Official Journal of the European Union, L 261, 30.8, 2014, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A0830%2802%29

[4] Margvelashvili M, Georgia's Integration with the EU in Energy Sector, Georgian Energy Sector In The Context Of EU Association, World Experience for Georgia (WEG), Tbilisi, 2015, 10
https://weg.ge/sites/default/files/weg-book-with-cover-page-eng.pdf

[5] Georgia-United States Charter on Strategic Partnership. https://georgiaembassyusa.org/wp-content/uploads/2017/08/STRATEGIC-PARTNERSHIP.pdf

[6] Janelidze S., A Year Assessment of Georgia's Membership in Energy Community. See European Energy Union and Reforms in Georgian Energy Sector, World Experience for Georgia (WEG), Tbilisi, 2017, 92.
https://weg.ge/sites/default/files/weg-book-with-cover-page-eng.pdf

[7] Zoidze B., Repetition of European Private Law in Georgia, Tbilisi, 2005, 21 (In Georgian).

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

By embedding EU energy principles into its legislative framework, Georgia is advancing its domestic energy sector and positioning itself as a crucial regional partner in energy cooperation. This transformation, driven by robust enforcement and institutional capacity-building, underscores Georgia's readiness to address complex regional challenges while securing its role in European energy architecture.

1. EUROPEANIZATION OF ENERGY LAW: A CONCEPTUAL FRAMEWORK

Energy law within the European Union is a comprehensive framework encompassing a broad range of legal norms designed to regulate energy-related issues across the Union. This framework has been pivotal in shaping the energy landscape, addressing critical challenges such as market liberalization, environmental protection, climate change mitigation, and overseeing competition and state aid policies. Together, these objectives form the cornerstone of EU energy law, reflecting its commitment to fostering sustainable energy development within and beyond its borders.

The legal basis for the EU's energy policies significantly evolved with the adoption the Lisbon Treaty in 2009, which marked a turning point in how energy matters were addressed at the European level. Article 194 of the Treaty on the Functioning of the European Union (TFEU)[8] Articulated the Union's primary energy objectives, highlighting three key principles: competitiveness, energy security, and sustainability. These principles influence both member and neighboring states. As non-EU countries adapt their frameworks to align with EU standards, the closer the third country, the state, to the European Union, the more demands it makes regarding the legal approximation of this state. This dynamic applies strongly to Georgia, which seeks integration into EU energy markets by modernizing its governance in alignment with these principles.

The European Commission, in its 2014 report on enlargement achievements and challenges, emphasized the importance of expanding the EU's energy acquis to neighboring countries through the Energy Community framework. It highlighted that modernizing energy systems, promoting sustainability, and integrating regional energy markets are critical for countries like Georgia. Participation in the Energy Community introduces transparency, reduces corruption, ensures sustainability against internal and external factors, and aligns national energy laws with EU environmental standards. Moreover, such alignment attracts European investments, particularly in renewable and energy-efficient systems, contributing to economic growth and integration into the EU energy regulatory framework.[9]

This framework has profound implications for member states, influencing their domestic policies and institutional structures. Beyond its internal application, the EU's energy law has also become a tool for external use.[10] Influence and shape the energy policies of neighboring countries through legal harmonization and integration efforts.

Historically, "Europeanization" was confined to analyzing the internal effects.[11] Of EU law within member states. Within this context, Europeanization referred to the process whereby EU legislation and principles were transposed into national legal systems, often as part of the accession requirements for new members. It was viewed as a one-directional influence, with the EU acting as a source of authority and the member states adapting their laws to align with its requirements.

[8] Treaty on the Functioning of the European Union (TFEU), Official Journal of the European Union, C 326, 26 October 2012, [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT;

[9] European Commission. Enlargement Strategy and Main Challenges 2014-15, COM (2014) 700 final, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52014DC0700

[10] Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union, Chapter 12: The EU External Energy Policy and the Law: Does the EU Really Matter?, Nicolas Pradel, p.245

[11] Sedelmeier U, Europeanization, The Oxford Handbook of the European Union, 2013, p. 825–839

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

However, as the EU's sphere of influence has expanded, the concept of Europeanization has taken on a broader meaning. Today, it also encapsulates how non-EU countries adapt their legal, institutional, and policy frameworks to align with EU standards, even without formal membership. This broader perspective positions Europeanization as a dynamic process that extends the EU's regulatory reach to countries within its geopolitical neighborhood, such as Georgia.

For Georgia, Europeanizing its energy laws is a strategic priority and a complex challenge. The process involves adapting its governance and regulatory systems to reflect the principles of EU energy law, particularly the objectives of competitiveness, energy security, and sustainability. By doing so, Georgia seeks to modernize its energy sector, enhance its integration into the European energy market, and align itself with EU values.

The degree of approximation demanded by the EU often correlates with the third country's proximity to the Union. In Georgia's case, its geopolitical significance as a transit country for energy resources between Europe and Asia intensifies the EU's expectations for legal and regulatory harmonization. This proximity creates opportunities for deeper collaboration but also imposes significant obligations on Georgia to implement reforms.

The structured approximation of Georgian energy laws to EU standards can be seen as a deliberate and phased process driven by the EU's role as a catalyst for reform. The EU actively promotes the adoption of institutional and legal mechanisms in line with its internal standards, encouraging countries like Georgia to modernize their regulatory frameworks. This alignment enhances policy coherence and strengthens institutional capacity, creating a foundation for sustainable governance and economic development.

The EU employs various instruments, such as association agreements, partnership frameworks, and the Energy Community Treaty, to drive legal harmonization in its neighborhood. These agreements often include binding commitments to adopt EU directives and regulations, particularly in the energy sector. For Georgia, such agreements serve as both a roadmap for reform and a benchmark for measuring progress.

By fostering compatibility between Georgian and EU energy regulations, the EU facilitates Georgia's gradual integration into broader regional frameworks. This process also gives Georgia access to technical and financial assistance, enabling it to address challenges such as outdated infrastructure, limited market competitiveness, and the need for sustainable energy development.

While aligning with EU standards offers significant benefits, it also presents challenges. The process requires Georgia to balance its national interests with the demands of legal approximation. For instance, adopting EU energy regulations often necessitates substantial institutional and administrative reforms, which can be resource-intensive. Moreover, integrating EU standards into Georgian law must account for local economic conditions and stakeholder interests to ensure a smooth transition.

The Europeanization of Georgian energy laws exemplifies how external influence can drive domestic reform. By aligning its energy policies with EU principles, Georgia enhances its integration into the European energy market, strengthens its governance structures, and promotes sustainable development. This alignment reflects a broader trend in which the EU acts as a global standard-setter, using its legal and regulatory frameworks to shape the policies of its neighbors.

In conclusion, the Europeanization of energy laws represents a transformative process for Georgia. It offers opportunities to modernize its energy sector, enhance regional integration, and align with European values. By embracing this process, Georgia is committed to fostering a competitive, secure, and sustainable energy future.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

2. THE IMPACT OF LEGAL APPROXIMATION ON GEORGIA'S ENERGY SECTOR TRANSFORMATION

Legal approximation serves as a key pathway for Europeanization, facilitating the alignment of third countries' legal systems with EU norms without requiring a complete overhaul of their legislative frameworks. This process ensures regulatory coherence while respecting each nation's unique legal traditions. Rather than demanding wholesale changes, it focuses on harmonizing specific legislative sectors to achieve international standards, thus maintaining a balance between national sovereignty and external alignment.[12]

Aligning energy legislation with EU directives is strategic and essential for Georgia. This approach reduces regulatory gaps and integrates Georgia's energy market within the broader European framework. Such alignment is pivotal in fostering transparency, enhancing competitiveness, and attracting foreign investment while ensuring energy security in the long term. For further insights into how legal approximation impacts energy policies in transitional economies, see resources like the Carnegie Endowment's analysis on EU accession and legal reforms.

In Georgia, approximating energy legislation is both a strategic and essential initiative. The country's alignment with EU directives reduces regulatory discrepancies and integrates its energy market into the broader European energy framework. This alignment is critical for fostering a competitive, transparent, and sustainable energy market capable of attracting foreign investment and ensuring long-term energy security.

Georgia's energy sector operates under a well-defined legislative framework centered on the Law of Georgia on Energy and Water Supply.[13]. This foundational law is complemented by secondary normative acts and regulations issued by the Georgian National Energy and Water Supply Regulatory Commission (GNERC). GNERC is pivotal in managing licenses, issuing permits, and overseeing energy and water supply governance.

The country's obligations under the EU Association Agreement (AA) and its membership in the Energy Community Treaty have been instrumental in driving reforms. These commitments necessitate a comprehensive restructuring of Georgia's energy sector, focusing on market liberalization, transparency, and efficiency. The reform process, however, must balance the need for operational stability with the imperative to minimize disruptions for market participants, the broader economy, and end-users.

A cornerstone of Georgia's approximation efforts is the implementation of the EU's Third Energy Package.[14], which underpins the liberalization of energy markets across Europe. The package seeks to foster competition, enhance consumer protections, and establish open and competitive retail energy markets.[15]. In Georgia, this entails creating a marketplace where consumers can freely choose their energy suppliers, encouraging competition and reducing reliance on monopolistic entities.

The Law of Georgia on Energy and Water Supply, enacted in December 2019, introduced significant structural changes to meet these requirements. Among the key mandates is the unbundling of Transmission System Operators (TSOs) and Distribution System Operators (DSOs). TSOs must adopt one of two models—ownership Unbundling (OU) or the Independent System Operator (ISO) model—while DSOs must separate distribution activities from supply and generation

[12] Khvorostiankian A, Europeanization Through EU External Agreements and the "Constitutional Identity": The Case of the EU-Armenia CEPA. Kyiv-Mohyla Law and Politics Journal, № 4, p. 15–52, 2018

[13] *Law of Georgia on Energy and Water Supply*, Legislative Herald of Georgia, https://matsne.gov.ge/ru/document/download/4747785/4/en/pdf

[14] Machavariani M, Formation of the electric energy market of Georgia by the standards of the European Union, dissertation, GTU, 2021, p. 38

[15] *European Energy Community and Reforms in the Georgian Energy Sector,* a collection of publications prepared by the World Experience for Georgia (WEG) Tbilisi, 2017, p.12

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

operations. These measures aim to enhance market transparency, reduce conflicts of interest, and promote fair competition.

The natural gas sector has also been subject to similar unbundling requirements. The government is empowered to impose public service obligations on energy enterprises, ensuring that energy supply responsibilities align with national priorities and international commitments. GNERC, in consultation with the Energy Community Secretariat, plays a key role in monitoring compliance with these obligations. Furthermore, the law mandates the appointment of a universal service provider to safeguard energy access for vulnerable consumers, reflecting a commitment to social equity in energy governance.

In addition to market liberalization, Georgia has made substantial progress in promoting renewable energy. The Law of Georgia on Promoting the Production and Use of Energy from Renewable Sources, adopted in December 2019, aligns with the Renewable Energy Directive 2009/28/EC. Under this law, Georgia has committed to ensuring that by 2030, at least 35% of its total energy consumption will come from renewable sources.

This ambitious target is part of a broader effort to transition toward a sustainable energy system. Georgia's abundant hydroelectric resources provide a strong foundation for renewable energy development. However, the practical implementation of the directive's requirements, including investment in renewable energy infrastructure and the development of new technologies, remains a significant challenge.

Integrating renewable energy sources into the national grid is also crucial for reducing fossil fuel dependency and mitigating energy production's environmental impact. By aligning its energy policies with EU standards, Georgia aims to position itself as a regional leader in sustainable energy development.

Despite significant progress, Georgia has been granted temporary exemptions from implementing specific EU regulations. Notably, Regulation (EC) No 714/2009, which governs access conditions for cross-border electricity exchanges, and Regulation (EC) No 715/2009, which addresses natural gas transmission networks, do not currently apply to Georgia. These exemptions will remain in place until the country establishes physical interconnections with the energy networks of EU or Energy Community member states.

As a result, implementing the Third Energy Package remains partially complete, with ongoing efforts to operationalize its provisions. This phased approach allows Georgia to build the necessary infrastructure and institutional capacity to integrate fully into the European energy market.

The approximation process also presents several challenges. Implementing EU energy directives requires substantial financial, technical, and administrative resources. Securing these resources while managing competing national priorities can take time for a transitioning economy like Georgia. Moreover, the need for institutional reforms, such as enhancing regulatory independence and transparency, adds complexity.

Achieving complete approximation requires a multifaceted approach. Codifying EU directives into national law is the first step; effective enforcement mechanisms are equally essential. This includes establishing independent regulatory authorities, strengthening institutional capacity, and fostering a culture of compliance among stakeholders.

Public awareness and stakeholder engagement are also critical for the success of approximation efforts. Educating consumers about their rights and the benefits of a liberalized energy market can help build support for reforms. Similarly, involving industry stakeholders in the policymaking process can ensure that the reforms address practical challenges and reflect the realities of the Georgian energy market.

By adopting a holistic approach to approximation, Georgia can create a regulatory framework that is compliant with EU standards and tailored to its unique context. This will enable the country

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

to fully integrate into the European energy market, attract foreign investment, and enhance its energy security.

3. FOUNDATIONS OF ENERGY APPROXIMATION: THE ROLE OF THE EU-GEORGIA ASSOCIATION AGREEMENT

Foundations of Energy Approximation: The Role of the EU-Georgia Association Agreement The EU-Georgia Association Agreement (AA) is a cornerstone of Georgia's European integration process. Signed in 2014 and ratified in 2016, the agreement provides a comprehensive framework for political, economic, and social cooperation. It establishes a robust legal basis for aligning Georgia's domestic laws with EU standards, particularly in the energy sector.[16]

The EU's external energy policy is characterized by conditionality, a strategic mechanism that combines political influence and technical assistance to promote regulatory alignment.[17]. Conditionality creates a framework of legal, political, and administrative obligations that partner countries must fulfill to access the benefits of closer integration with the EU.[18]. This principle underpins agreements like the AA and the Energy Community Treaty, which provide Georgia with a structured pathway for approximating its energy policies with EU standards.[19]

Energy cooperation occupies a pivotal role in the AA. Article 297 outlines the fundamental principles of energy collaboration, emphasizing partnership, transparency, and mutual interest. Annex XXV specifies the legislative acts Georgia must implement for regulatory alignment, including:

Electricity Directive 2009/72/EC: Establishes rules for the internal electricity market, promoting fair competition and transparency.

Gas Directive 2009/73/EC: Focuses on market liberalization, ensuring competition and security of supply.

Renewable Energy Directive 2009/28/EC: Promotes the adoption of renewable energy sources and emphasizes environmental sustainability.

Energy Efficiency Directive 2012/27/EU: Encourages energy efficiency improvements in end-use sectors, including building performance standards.

Significant progress has been noted in aligning Georgia's legal framework with these directives, particularly in implementing electricity market liberalization reforms.[20]. The harmonization process is also supported by the Protocol of the Accession of Georgia to the Energy Community Treaty, which requires Georgia to incorporate EU energy legislation into its domestic legal framework. This includes adopting directives such as Directive 2005/89/EC concerning electricity supply security and infrastructure investment. Adopting the Law of Georgia on Energy and Water Supply and related legal acts exemplifies Georgia's commitment to fulfilling these obligations.

Implementing these directives requires significant institutional reforms. Key among them is the establishment of independent energy regulatory authorities to ensure compliance with EU standards.[21] In Georgia, GNERC (Georgian National Energy and Water Supply Regulatory

[16] Energy Community Secretariat. (2018). *Annual Implementation Report: Georgia's Progress in Energy Approximation*. p. 45

[17] Schimmelfennig, F., & Sedelmeier, U. (2005). *The Europeanization of Central and Eastern Europe*. Cornell University Press, p. 10

[18] Lavenex, S. (2004). EU External Governance in Wider Europe. *Journal of European Public Policy*, 11(4), pp. 684–686

[19] European Commission. (2016). Energy Union Package., pp. 12–18.

[20] Energy Community Secretariat. (2023). *Annual Implementation Report: Georgia*., p. 12

[21] Energy Community Secretariat. (2018). *Annual Implementation Report: Georgia's Progress in Energy Approximation*., p. 30.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Commission) plays a central role in overseeing energy market reforms and aligning regulatory practices with European norms.[22].

Additionally, the AA mandates the unbundling of energy networks to promote competition. This separates transmission and distribution operations from supply and generation activities, creating a level playing field for all market participants. For example, unbundling transmission system operators (TSOs) and distribution system operators (DSOs) is a critical reform that will increase market transparency and protect consumer rights.[23]

Georgia has made progress in aligning its energy legislation with EU directives. However, the approximation process remains a work in progress. Transposing EU energy regulations requires substantial financial, technical, and administrative resources, which present challenges for a transitioning economy.[24].

Georgia has also enacted key legislation such as the Law of Georgia on Encouraging Generation and Use of Energy from Renewable Sources and the Law of Georgia on Energy Efficiency. These laws aim to establish a competitive and sustainable energy market aligned with EU directives. For instance, renewable energy development is emphasized by adopting action plans to integrate these projects into the national grid.[25]

The EU provides technical and financial support to help Georgia overcome these challenges. For instance, the European Neighborhood Instrument (ENI) has supported Georgia's energy reforms and infrastructure modernization. By adhering to the AA's timelines and obligations, Georgia can create a harmonized and modernized energy sector that aligns with EU standards.

In particular, Georgia's action plans for renewable energy and energy efficiency, developed with international support, are essential for ensuring compliance with sustainability goals. These plans aim to integrate renewable energy projects into the national grid and improve energy efficiency.[26].

The AA also offers significant strategic opportunities. Aligning Georgia's energy policies with EU directives enhances its energy security, attracts foreign investment, and strengthens its position as a regional partner in energy cooperation (Energy Community Secretariat, 2018).

Through continued implementation of the AA's provisions, Georgia is positioning itself as a key player in the European energy market. This transformation underscores Georgia's commitment to European integration and its readiness to tackle complex regional challenges while fostering sustainable development (European Union External Action, 2014; Energy Community Secretariat, 2020).

4. THE ENERGY COMMUNITY TREATY: A CATALYST FOR GEORGIA'S ENERGY SECTOR MODERNIZATION

The Energy Community Treaty (EnC) represents a cornerstone in Georgia's journey toward energy sector modernization and integration into the European energy framework. Established in 2005 to extend the EU's internal energy market principles to its neighbors, the EnC stands out as an innovative model of sector-specific normative multilateralism.[27]. Unlike bilateral agreements, the

[22] GNERC. (2021). *Annual Report on Georgia's Energy Market*., pp. 15–16
[23] World Bank. (2020). *Supporting Energy Market Reforms in Transition Economies*., p. 7
[24] International Energy Agency. (2021). *Energy Policy Review: Georgia*. pp. 45–46.
[25] *Law of Georgia on Encouraging Generation and Use of Energy from Renewable Sources*, Legislative Herald of Georgia, [Online]. Available at: https://matsne.gov.ge/ka/document/view/4694608?publication=0
[26] Energy Community Secretariat. (2023). *Annual Implementation Report: Georgia*., pp. 20-22
[27] Energy Community Secretariat. (2005). Energy Community Treaty. https://www.energy-community.org/legal/treaty.html

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Treaty creates a legally binding framework for its contracting parties, compelling them to adopt and implement the EU energy acquis across various domains.[28].

Georgia's accession to the EnC in 2017 underscores its strategic commitment to aligning its energy policies with EU standards. This membership complements the obligations outlined in the EU-Georgia Association Agreement (AA) while expanding the scope of approximation to include energy security, environmental sustainability, and infrastructure development. By joining the EnC, Georgia has formally committed to a structured legal and institutional reform process to foster regulatory uniformity with the EU and neighboring countries.

Article 10 of the Treaty requires contracting parties to incorporate the EU's energy acquis into national legislation. This includes adopting regulatory measures in electricity and natural gas markets, energy efficiency standards, renewable energy promotion, and environmental safeguards. Additionally, the Treaty extends into competition policy and data transparency, further strengthening the regulatory framework and operational independence necessary for market functionality.

Georgia has made tangible progress in aligning its electricity and natural gas legislation with EU standards, mainly through reforms that enhance market transparency and regulatory independence. Despite this, additional steps are required to ensure the operational unbundling of key energy operators and the alignment of market mechanisms with competitive principles.[29].

Aligning with the EnC framework has profound implications for Georgia's energy market. A critical component of this transformation involves establishing competitive market structures that enable independent energy suppliers to thrive. While Georgia has made progress in liberalizing its electricity market, monopolistic practices and legacy issues from the Soviet era continue to hinder full market competitiveness. Addressing these challenges requires robust legislative reforms and institutional restructuring. [30]

Infrastructure modernization is another vital aspect of Georgia's compliance with the EnC. Much of Georgia's energy infrastructure, particularly in transmission and distribution systems, remains outdated, limiting the efficiency and reliability of energy supply. Investments in smart grids, cross-border interconnections, and renewable energy technologies are essential for bringing Georgia's energy sector to ENC standards and fostering sustainable growth.

Key efforts have been initiated to modernize infrastructure, including upgrades to the electricity transmission system and developing cross-border energy interconnections. These initiatives aim to reduce system losses and improve supply reliability nationwide.[31] (1, pp. 15–17).

The EnC also places significant emphasis on renewable energy and energy efficiency. Georgia's renewable energy potential, particularly in hydropower, positions it as a key player in the regional energy market. However, harnessing this potential requires adopting comprehensive policies to incentivize renewable energy projects and integrate them into the national grid. Similarly, energy efficiency measures, such as upgrading building standards and introducing modern energy-saving technologies, are critical for reducing consumption and improving overall energy security.

In this context, additional policy instruments have been developed to encourage private sector investment in renewable energy projects, alongside efforts to enhance energy efficiency in public and private buildings. These measures are critical for meeting the country's energy and environmental goals.[32].

[28] Energy Community Secretariat. (2020). *Annual Implementation Report:* Georgia. p. 45
[29] Energy Community Secretariat. (2023). *Annual Implementation Report: Georgia*., p. 12-14
[30] International Energy Agency. (2020). *Energy Policy Review:* Georgia., pp. 45–46
[31] Energy Community Secretariat. (2023). *Annual Implementation Report: Georgia*., pp. 15–17.
[32] Energy Community Secretariat. (2023). *Annual Implementation Report: Georgia*., pp. 18–20.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Georgia's path to full compliance with the EnC is challenging. Transitioning from a system rooted in centralized, state-controlled energy practices to a liberalized, competitive market model requires significant financial, technical, and administrative resources. The remnants of its Soviet-era regulatory framework present additional hurdles, particularly in fostering a competitive environment for private energy providers.

Recognizing these complexities, the EnC offers flexibility through temporary derogations and phased implementation schedules. These mechanisms allow Georgia to prioritize reforms while maintaining the stability of its energy sector. For instance, Georgia can stagger the unbundling of energy operators or delay specific regulatory requirements until sufficient institutional capacity is developed. This approach helps balance the need for compliance with the economic realities and stakeholder concerns in a transitioning energy market.

Beyond its domestic implications, the EnC positions Georgia as a critical player in regional energy cooperation. By adopting EU-aligned standards, Georgia enhances its credibility as a reliable energy partner and strengthens its role in facilitating energy transit between Europe and the Caspian region. The country's strategic location and potential for renewable energy development make it a valuable contributor to Europe's energy diversification and sustainability goals.

In conclusion, the Energy Community Treaty serves as both a roadmap and a catalyst for Georgia's energy sector transformation. While the journey to complete approximation is complex and resource-intensive, the Treaty provides a structured framework to guide Georgia through this transition. By leveraging the Treaty's support mechanisms and fostering stakeholder collaboration, Georgia can create a modern, competitive, and sustainable energy sector that aligns with European standards and contributes to regional energy security.

CONCLUSION

This article has explored the transformative impact of the EU's energy governance framework on Georgia's energy sector. It has highlighted the pivotal role of the EU-Georgia Association Agreement (AA) and the Energy Community Treaty (EnC) as mutually reinforcing instruments requiring Georgia to establish a more transparent, competitive, and liberalized energy market. These agreements reflect Georgia's strategic orientation toward Europe and its commitment to harmonizing national legislation with the Energy Community acquis.

A critical milestone in this process has been enacting the Law of Georgia on Energy and Water Supply, which marks a significant step toward implementing the EU's Third Energy Package. Developed with the support of the Energy Community Secretariat, this law provides the foundation for modernizing the energy sector by fostering market liberalization, enhancing regulatory oversight, and promoting fair competition. As seen in Georgia, legal approximation involves adopting EU norms, tailoring these standards to fit domestic institutional capacities, and ensuring their effective enforcement—a task that Georgia continues to refine.

The AA's harmonization process outlined in Annex XXV has also played a vital role in defining Georgia's path. By mandating alignment with EU directives, such as the Renewable Energy Directive 2009/28/EC and Energy Efficiency Directive 2012/27/EU, the AA has created opportunities for renewable energy development and market liberalization while emphasizing compliance with European sustainability standards.

Despite these achievements, the path to full Europeanization of Georgia's energy sector remains challenging. The successful integration of EU energy norms requires continuous efforts to build administrative capacity, strengthen institutional frameworks, and improve regulatory enforcement mechanisms. The dynamics of external governance depend heavily on the local

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

capacity to absorb and implement foreign norms, which is particularly relevant for transitional economies like Georgia.[33].

Another critical challenge lies in addressing legacy issues from Georgia's Soviet-era regulatory framework, which often impedes market development and competition. While significant progress has been made in unbundling energy markets and creating conditions for private sector participation, targeted reforms are still needed to strengthen local governance, enhance the independence of regulatory bodies like GNERC, and attract investment in renewable energy and infrastructure. The successful adoption of the Law of Georgia on Encouraging Generation and Use of Energy from Renewable Sources illustrates the potential for aligning Georgian regulations with EU standards. However, its full implementation remains an ongoing challenge requiring significant institutional commitment.

Experts have noted that Georgia's integration into the European energy market requires not just the adoption of EU norms but also the development of a proactive strategy for sustainable energy governance. The International Energy Agency underscores the importance of aligning energy reforms with global trends in renewable energy and efficiency, particularly given Georgia's hydropower potential. Effective stakeholder collaboration and public engagement are vital for achieving long-term energy security and market stability.[34].

Comparative studies in other Eastern Partnership countries show that full compliance with EU energy regulations often involves trade-offs between rapid legal adoption and gradual institutional reform. Georgia's phased approach, supported by temporary derogations under the EnC, illustrates a practical balance between meeting EU standards and addressing local economic realities.

In summary, Georgia has made notable strides in aligning its energy sector with EU standards, but substantial work remains. Practical implementation of the Law of Georgia on Energy and Water Supply, the unbundling of energy market participants, and continued collaboration with the EU and EnC are essential to achieving a fully integrated, secure, and sustainable energy market.

With sustained commitment, Georgia can leverage its strategic location as an energy transit hub between Europe and Asia. The Europeanization process extends beyond legal approximation, encompassing broader goals of economic modernization and regional energy cooperation.[35]. Georgia can solidify its role as a reliable energy partner within the broader European energy landscape by addressing remaining challenges through strategic reforms and leveraging international support. The continued focus on regulatory harmonization, infrastructure modernization, and renewable energy initiatives will ensure the country's long-term energy security and economic stability.

BIBLIOGRAPHY/REFERENCES:

Schimmelfennig, F., & Sedelmeier, U. *The Europeanization of Central and Eastern Europe.* Cornell University Press, 2005;

Margvelashvili, M., *Georgia's Integration with the EU in Energy Sector, Georgian Energy Sector In The Context Of EU Association*, World Experience for Georgia (WEG), Tbilisi, 2015;

Samkharadze, I., *The Impact of EU Energy Law External Action on Georgian Legislation*, Journal of Law, № 1, 2018 (in Georgian);

Zoidze, B., *Repetition of European Private Law in Georgia*, Tbilisi, 2005, (in Georgian).

Studies Published in Journals;

Lavenex, S., "EU External Governance in Wider Europe," *Journal of European Public Policy,* 11(4), 2004;

[33] Lavenex, S. (2004). EU External Governance in Wider Europe. *Journal of European Public Policy*, 11(4), 680–700, p. 695

[34] Lang, K., et al. (2020). Energy Security and Governance in Transitioning Economies. *Palgrave Macmillan*, p. 20.

[35] Schimmelfennig, F., & Sedelmeier, U. (2005). *The Europeanization of Central and Eastern Europe*. Cornell University Press, p. 88.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Sedelmeier, U., "Europeanization," *The Oxford Handbook of the European Union*, 2013;
Khvorostiankian, A., "Europeanization Through EU External Agreements and the Issue of 'Constitutional Identity': The Case of the EU-Armenia CEPA," *Kyiv-Mohyla Law and Politics Journal*, № 4, 2018;
Pradel N, "The EU External Energy Policy and the Law: Does the EU Really Matter?" in *Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union;*
European Energy Community and Reforms in the Georgian Energy Sector, a collection of publications prepared by the World Experience for Georgia (WEG) Tbilisi, 2017;
Machavariani, M., *Formation of the Electric Energy Market of Georgia by the Standards of the European Union*, dissertation, GTU, 2021;
Surmava, L., *The Issue of Compliance of Georgian Legislation with EU Legislation in the Field of State Aid*, dissertation, TSU, 2012;
Lang, K., et al., "Energy Security and Governance in Transitioning Economies," *Palgrave Macmillan*, 2020;
Energy Community Secretariat, *Annual Implementation Report: Georgia's Progress in Energy Approximation*, 2018;
Energy Community Secretariat, *Annual Implementation Report: Georgia,* 2023;
European Commission, *Impact of Energy Community Membership on Georgia's Energy Market*, 2017;
Energy Community Secretariat, *Annual Implementation Report: Georgia*, 2020;
GNERC, *Annual Report on Georgia's Energy Market*, 2021;
World Bank, *Supporting Energy Market Reforms in Transition Economies*, 2020;
International Energy Agency, *Energy Policy Review: Georgia*, 2021;
Treaty on the Functioning of the European Union (TFEU), Official Journal of the European Union, C 326, 26 October 2012, [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT;
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, *Official Journal of the European Union,* L 261, 30.8, 2014, [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A0830%2802%29.
Energy Community Secretariat. (2005). Energy Community Treaty.
[Online] Available at: https://www.energy-community.org/legal/treaty.html
Georgia-United States Charter on Strategic Partnership, https://georgiaembassyusa.org/wp-content/uploads/2017/08/STRATEGIC-PARTNERSHIP.pdf.
European Commission. Enlargement Strategy and Main Challenges 2014-15, COM (2014) 700 final, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52014DC0700
Law of Georgia on Energy and Water Supply, Legislative Herald of Georgia, [Online] Available at: https://matsne.gov.ge/ru/document/download/4747785/4/en/pdf
Law of Georgia on Encouraging Generation and Use of Energy from Renewable Sources, Legislative Herald of Georgia, [Online]. Available at: https://matsne.gov.ge/ka/document/view/4694608?publication=0
Energy Strategy of Georgia, Resolution of the Parliament of Georgia of June 27, 2024 (In Georgian);
Kvirkvaia, M., & Sumbadze, N., *Analysis of the State of Fulfillment of Obligations Taken in the Field of Energy Under the Association Agreement*, 2020, (in Georgian); [Online] Available at chrome-xtension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.asocireba.ge/files/Kvirkvaia-Sumbadze-Energetika-2020.pdf.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Section 5
Gender, Human Rights, and Socio-Cultural Perspectives

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Rape as socio-cultural phenomenon – a key to tackle gender-based violence

DR. IRINE KHERKHEULIDZE
CAUCASUS SCHOOL OF LAW
CAUCASUS UNIVERSITY
PAATA SAAKADZE 1, TBILISI 0102, GEORGIA
IKHERKHEULIDZE@CU.EDU.GE

Abstract: *Significant changes have been made in last decade in terms of empowering women – both on individual and a class level. The Council of Europe Convention on preventing and combating violence against women and domestic violence with its all-encompassing and groundbreaking nature safeguards women rights through diverse means. Nonetheless, gender-based violence against women, including rape is still pervasive in our societies, undermining universal clause on gender equality. This article approaches rape, as one of the forms of gender-based violence. It disassembles the phenomenon of rape into pieces with a view of examining its socio-cultural genesis.*
Keywords: *Gender stereotypes; gender-based violence; socio-cultural; the Istanbul Convention; rape.*

INTRODUCTION

For the last decade the Council of Europe Convention on preventing and combating violence against women and domestic violence[1] has become by far the most magnificent regional legal instrument to tackle gender-based violence against women. In line with such international developments, Georgia has made a step forward and signed the Convention in June 2014, yet ratified it only in 2017.

Apart from naming and framing the concept and essence of gender-based violence, Which CEDAW[2] failed to accomplish until elaboration of General Recommendation N19,[3] the Istanbul Convention has also drawn states' attention to something being underestimated before as trigger of such violence. This trigger, in a whole can be named as socio-cultural aspect of the issue, whilst owing to differentiated approach this phenomenon is possible to be dismantled into cultural (including believes, prejudices, customs and traditions) and social (including gender) components.

Proposed construction and interrelatedness of above referred aspects, as of being underpinning gender-based violence is explicitly seen in the rape cases. Hence the article aspires to explain the rape from the socio-cultural dimension with a view to elucidating the main common causes for gender-based violence, which are not limited to rape or even other forms of sexual violence. Nevertheless, diversity of cultures, as well as of the social practices, inclined to each corresponding culture, still contributes to divergent peculiarities and resilience of indigenous roots entrenched in a society of particular culture. Ultimately, this is to say, that for comprehending and tackling gender-based violence against women on the instance of rape, it is utmost to relate the sexual violence to the socio-cultural background of the issue, considering similarities and discrepancies in their features.

[1] Council of Europe Treaty Series - No. 210, Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. Available at: https://rm.coe.int/168008482e
[2] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted December 18, 1979, entered into force September 3, 1981, U.N. Doc. A/34/46 (1979). Available at: https://www.ohchr.org/en/treaty-bodies/cedaw
[3] Dubravka Šimonović, "Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Convention", *36 Hum. Rts. Q. 590,* 2014, p. 601-602.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Only in this way it will become possible to see how and why the definition of sexual assault, including rape, should be composed according to a certain construction, why should we approach this issue, both theoretically and politically with special gender sensitivity and why to foresee possible socio-cultural barriers on the way of the implementation of these normative and political changes. Therefore, the main findings of this article are applicable across the cultures of different countries, in their attempt to bring national legislation to the compliance with international women human right standards.

It has been widely agreed that the concept of rape as well as its perception by humans has never fallen under blanket approach. Rather, multi-layer contributor factors to the rape should be approached not only in legal, but also in socio-cultural (including gendered) understanding of the issue, which are tightly intertwined to each other.

Whilst the mere legal interpterion of the issue limits its assessment to the criminal law scope, the socio-cultural observation of the phenomenon opens the doors to the detection of an ally to defeat this pervasive phenomenon. It is in this discourse, when becomes necessary to develop theories, tested against evidence, as to what causes rape in order to help the evaluation of what is effective in preventing such type of sexual violence against women.[4] From this stance, socio-cultural dimension is the main point to started with, as pursued in the article below.

1. CONCISE DESCRIPTION OF A RAPE PHENOMENON FROM SOCIO-CULTURAL PERSPECTIVE

In contemporary European sexual politics the intersection of categories – such as race, gender and sexuality - are closely related to the political discourse.[5] In turn, such complex interrelatedness is built upon social and cultural factors, which, sadly, not quite seldom create the safe haven for the perpetrators of sexual violence.

Gagnon's and *Aker's* attitudes and theories on learned behavior, implicating crime of rape too in their analysis, support an idea of placing rape under the umbrella of societal phenomena. This perspective complements the general sociological recognition that rape – like all other behavior-should be understood in terms of its socio-cultural context.[6] Due to various feminist campaigns, during the last four decades, the issue of rape has turned into a matter for sociological interpretation, where the reasons are sought in gender relations, power dynamics, and sexuality constructs.[7] In this relation the preamble of the Istanbul Convention emphasizes the fact that, violence against women is a manifestation of "historically unequal power relations between women and men", which have led to "domination over, and discrimination against, women by men", and that it acknowledges the "structural" nature of violence, which means that it is rooted in society and as such must be eradicated.[8]

In turn, anthropological research on the genesis of gender inequality suggests that cultural support for violence is inimical to the status of women. [9] This is a cornerstone statement, that proves

[4] Sylvia Walby et al., *Stopping Rape, Towards a comprehensive policy*, University of Bristol, Policy Press, 2015, p.4.
[5] Sharron A. FitzGerald & May-Len Skilbrei, *Sexual Politics in Contemporary Europe: Moving Targets, Sitting Ducks.* Cham: Palgrave Macmillan, 2022. p. 11.
[6] Vickie McNickle Rose, "Rape as a Social Problem: A Byproduct of the Feminist Movement", *Oxford Journal: Social Problems,* Oct., 1977, Vol. 25, No. 1, p.79.
[7] May-Len Skilbrei et al. in *Rape in the Nordic Countries, Continuity and Change*, Routledge Research in Gender and Society, edited by Marie Bruvik Heinskou, May-Len Skilbrei and Kari Stefansen, Routledge, 2020, p.12.
[8] Sara de Vido, "The ratification of the council of Europe Istanbul Convention by the EU: A step forward in the protection of women from violence in the European legal system", *9 Eur. J. Legal Stud. 69,* 2016-2017, p.75.
[9] Larry Baron & Murray A. Straus, "Four Theories of Rape, A Macro-sociological analysis", *Social Problems,* Vol. 34, No. 5, 1987, p. 470.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

why irrefutable connectivity of the decisive elements, such as – legal and socio-cultural components – plays a crucial role in understanding and punishing rape.

In this discourse, gender as a social construct[10] is to be evaluated under the lens of gender-based discrimination due to direct linkage between gender-based violence and discrimination against women.[11] Simultaneously, socially constructed roles of women and men are culturally determined. Such an overlap of social and cultural components regarding the conceptualizing and elucidating the phenomenon of gender, makes it a cultural and social construction.

The Istanbul Convention recognizes "that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men in addition to the recognition of the "structural nature of violence against women as gender-based violence.[12] However, gender-based violence can be fueled not only with social, but cultural mechanisms too. Quite often cultural factors[13] bond to particular environment, ethnicity or even to a history can serve as the impetus to the suppression of women.

The undeniable fact, that cultural support for violence renders gender inequality, is supported in legal literature too.[14] Eventually, rape survivor women face in their social life a path, difficult to walked owing to the abundancy of social and cultural norms of degrading nature. This are such norms that emboldens gender inequality and condone gender-based violence – even and at some instances – rape.

Implication of cultural factors

In the latest studies the concept of culture is defined in a broad and narrow terms.[15] Such a division enables on its unbounded engagement in this article – from social activities to societal movements, which overall forms the mentality and values of a society at large.

Against this background it's predicable to assume, that culture poses an important place in envisaging on how particular populations and societies view, perceive, and process sexual acts as well as sexual violence.[16] The study on general cultural factors, conducted by anthropologists have identified three common characteristics of societies, which seemingly affect the frequency of rape. These features are: interpersonal violence, male dominance, and negative attitudes toward females.[17]

Violence, that is being legitimate culturally, plays a huge pole in rape cases as it creates both - culturally legitimized crime and culturally legitimate victim. In such a society gender role stipulates forming typology of a perpetrator and its victim. Various cultures describe certain forms of sexual violence that are condemned and other forms that may be tolerated to a degree, the

[10] The Istanbul Convention, Article 3, para (c): "gender shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men".

[11] Irine Kherkheulidze, "Re-conceptualizing Sexual Harassment—Premises and Challenges", in *Reconsidering Gender Based Violence and Other Forms of Violence Against Women, Comparative Research/Analysis in the Light of the Istanbul Convention*, edited by G. Piccinelli, I. Kherkheulidze & A. Borroni, LibellulaEdizioni, pp. 87-88.

[12] The Istanbul Convention, preamble.

[13] FGM is one of the examples. The practice of FGM is a violation of the human rights of girls and women. See: Irine Kherkheulidze, "Gendered aspects in the crimes threatening human's life and health - forced sterilization and FGM" in *Actual Matters of Criminal law*, edited by N. Todua & M. Ivanidze, Tbilisi, 2020, p. 201-303.

[14] Janet Saltzman Chafetz, *Sex and Advantage: A Comparative Macro-Structural Theory of Sex Stratification,* 1984; Naomi Quinn, "Anthropological studies on women's status," *Annual Review of Anthropology,* 1977, 6:181-225.

[15] Sylvia Walby et al., *Stopping Rape, Towards a comprehensive policy,* University of Bristol, Policy Press, 2015, p.191.

[16] Kalra Gurvinder & Bhugra Dinesh, "Sexual violence against women: Understanding cross-cultural intersections", *Indian Journal of Psychiatry,* 2013 July-September, 55(3): 244–249.

[17] William L. Marshall & Howard E. Barbaree," An integrated theory of the etiology of sexual offending"*, in Handbook of Sexual Assault, Issues, Theories, and Treatment of the Offender,* edited by W. L. Marshall, D.R. Laws & H. E. Barbaree," (NSSB), Plenum Press, 1990, p. 265.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

culturally legitimized forms of violence.[18] Victimization risk for women to be raped can increase because of cultural (structural) proneness to such behavior. In Criminology, a positive correlation is found between powerlessness, deprivation and the frequency of criminal victimization. Cultural stigmatization and marginalization also enhance the risks of criminal victimization by designating certain groups as "fair game" or as culturally legitimate victims.[19] Hence, it is obvious why in the society of male dominance and women powerlessness, the women in general are deemed to be "legitimate" victims of sexual desires to men. That is why the equal power relations as a guarantor of gender equality at the same time safeguards the reduction of the sexual violence against women.

Examination of current situation shows that together with growing consciousness about the significance of crime of rape, on its cultural background and on its interdependence with women's position in society, the crucial aspect is a progressive trend around the globe toward reshaping rape laws.[20]

Moreover, an undeniable nexus can be found not only between culture and sexual violence as an act, but also to some extent, between the violence-prone culture and pornography, for "pornography expresses a hostile and contemptuous attitude toward women".[21] Such a misogynist regards towards women once again underlines the gendered paradigm of the issue as well as related discrimination against women. Thus, the feminists' allegations, expressed by *Dworkin*[22] and *MacKinnon,*[23] that pornography is a direct cause of gender inequality in needed to be taken under consideration.

Similar argument comes from *Zillmann* and *Bryant's* study on the effects of massive exposure to non-violent pornography on attitudes toward women. This study showed an inverse relationship between long-term exposure to sexually explicit films and endorsement of sexual equality. Therefore, if pornography fosters the belief that the women do not deserve the equal rights, it is possible that the widespread availability of sexually might lead to discriminatory practices,[24]as it happens in reality and as it works with the cases of sexual assault.

Beyond the legal definition of rape, which is not the subject for discussion in this article,[25] its societal perception plays a tremendous role in the protection of women's rights, including the protection of rights to sexual autonomy and gender equality in a particular culture. It is in this context gains importance an observation on the implication of social factors for conceptualizing rape from a woman's perspective as it had been done by the outstanding feminist authors.

- Implication of social factors

Understanding the driving force and root causes of a rape is an initial step for its prevention. As *Susan Brownmiller*[26] believed, rape was primarily about power rather than sex. Despite recent

[18] Larry Baron & Murray A. Straus, "Clinical Criminology, Rape and its relation to social disorganization, pornography and inequality in the USA", *Med Law,* 1989;8(3):209-32.

[19] Ezzat A. Fattah, "Victimology: Past, Present and Future" in *Criminologie,* Printemps, 2000, Vol. 33, No. 1, *LA VICTIMOLOGIE: QUELQUES ENJEUX*, Université de Montréal, p. 30.

[20] Wojciech Jasiński, "Defining Rape. In Quest of the Optimal Solution", in *Consent and Sexual Offenses, Comparative Perspectives*, edited by Elisa Hoven & Thomas Weigend, first addition, 2022, p.12.

[21] Larry Baron & Murray A. Straus, "Four Theories of Rape, A Macro-sociological analysis", *Social Problems*, Vol. 34, No. 5, 1987, p. 470.

[22] Andrea Dworkin, "Against the male flood: censorship, pornography and equality" *Harvard Women's Law Journal, 1985,* 8:1-29.

[23] Catherine MacKinnon, "Not a moral issue"*, Yale Law and Policy Review",* 1984, 2:321-45.

[24] Larry Baron & Murray A. Straus. "Four Theories of Rape, A Macro-sociological analysis", *Social Problems,* Vol. 34, No. 5, 1987, p .472.

[25] It is presumable that the reader is already familiar with the acknowledged definition of rape, which is based on the lack of consent as given in International Convections. See: The Istanbul Convention, Article 36.

[26] See: Susan Brownmiller, *Against Our Will: Men, Women and Rape*, 1975.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

criticism, expressed in contemporary literature towards such an attitude,[27] it is one of the first exposure of feminist thoughts upon the history and nature of rape. Feminist movement from its onset has viewed rape as a "power trip", as a means of political oppression and social control to keep women in their place.[28] *Catharine MacKinnon* in her theory,[29] in difference from her predecessor, argued that rape was the logical extension of a phallocentric, patriarchal system of sexual inequality.[30] Accordingly, in line with the feminist theory, rape functions as a mechanism of social control in patriarchal societies.[31]

Instead of involuntary sex, rape was defined not just as a crime but as an exercise of gendered power.[32] Thus, in a broader way, it can be asserted that "rape is a social concern with patriarchal, misogynist, and gender-shaming undertones."[33]

If observed carefully, quite logical as well as empirical connection can be drawn between the legal and social understanding of the rape from women perspective. A closer look to the phenomenon from the modern perspective elucidates how does disguised power and control (power and control theory, *Brownmiller*), as well as unequal power relations between the sexes (gender inequality theory, *Mackinnon*) create the basis for conceptualizing sexual assault, including rape.

For instance, contemporary wording of rape definition in German Criminal Code[34] with the phrase "against the discernible will" of the person, - a core idea of the offence,[35] - albeit stresses on protection of sexual autonomy, is clearly aligned to mentioned theories.

Also, viewed under the lens of feminism, "a female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape."[36] Although such a definition of the rape is presumably equally acknowledged from women's perspective, it is not always the case for the society with diverse cultural background. Unfortunately, in Georgia too, both at legal and socio-cultural level rape is understood as something exclusively forceful and coercive;[37] whilst it is the absence of the consent of the victim to intercourse what is to be qualified as rape.

2. SHOULD EVER CULTURAL VALUES ENCOURAGE RAPE?

Regretfully, there are certain forms of violence against women that are embedded in specific cultural values and beliefs.[38] Paradoxically, there are particular provisions in the legislations of some

[27] Beverly A. McPhail, "Feminist Framework Plus", *Trauma, Violence & Abuse*, Vol. 17, No. 3, Sage, 2016, p.317.
[28] Vickie McNickle Rose, "Rape as a Social Problem: A Byproduct of the Feminist Movement", *Oxford Journal: Social Problems,* Oct., 1977, Vol. 25, No. 1, p.78.
[29] See: Catharine A. MacKinnon, *Toward a Feminist Theory of the State, 1991.*
[30] Information available at: https://philpapers.org/browse/feminism-rape-and-sexual-violence
[31] Larry Baron & Murray A. Straus. "Four Theories of Rape, A Macro-sociological analysis", *Social Problems*, Vol. 34, No. 5, 1987, p. 467.
[32] Riikka Kotanen, "From the protection of marriage to the defence of equality, The Finnish debate over the sexual autonomy of wives" in *Rape in the Nordic Countries, Continuity and Change*, Routledge Research in Gender and Society, edited by Marie Bruvik Heinskou, May-Len Skilbrei and Kari Stefansen, Routledge, 2020, p. 92.
[33] Kalra Gurvinder & Bhugra Dinesh, "Sexual violence against women: Understanding cross-cultural intersections", *Indian Journal of Psychiatry,* 2013 July-September, 55(3): 244–249.
[34] See: Criminal Code of Germany, Section 177(1). Available at: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html
[35] Tatjana Hörnle, "The New German Law on Sexual Assault" in *Sexual Assault: Law Reform in a Comparative Perspective,* edited by: Tatjana Hörnle, Oxford University, 2023, p. 145.
[36] Susan Brownmiller, *Against Our Will: Men, Women and Rape*, 1975, p.18.
[37] Irine Kherkheulidze, "Sexual Violence: Comparative Overview of German and Georgian Legal Perspectives", *TalTech Journal of European Studies*, Tallinn University of Technology, Vol. 14, No. 1 (39), p.185.
[38] Aruna Papp, "Conspiracy of Silence: "Honour-Based Violence in North America", *22 Buff. J. Gender L. & Soc. Policy,* 105, 2013, p.115.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

countries, driven by cultural norms and thus fostering and at some instances even justifying rape. The abhorrent example of such an approach is marital rape, which takes place in domestic environment, whilst ideally, the home must be by far the most secure place for a woman and not the place of misery and torture.

CEDAW Committee clearly explains that: "gender-based violence against women occurs in all spaces and spheres of human interaction, whether public or private, including in the contexts of the family".[39] Unfortunately, sexual violence (including rape) as a form of gender-based violence is the painful reality, that the considerable part of our globe's female population faces with and which constitutes the subject of examination in a quest of the efficient approaches for its eradication. Whilst, ideally, cultural values and practices should have fostered to the empowerment of women and to the protection of their fundamental human rights, a reversed reality is observed, ironically. On the contrary of what is wished upon, quite frequently and, in many communities, some cultural norms, practices, customs, traditions and religious values are used directly or indirectly to justify violence against women.[40] "It is culture that provides the script for gender roles and the repercussion for any deviation from these ascribed roles".[41]

Marital rape is the very example where a dovetail of culture and gender, as a social factor, builds an unjustified ground for suppression of women, discarding their choices and thus infringing their sexual autonomy. Therefore, interrelatedness of cultural and social factors, their interaction on rape – as on a form of gender -based violence - makes the tremendous influence on the perception, evaluation and punishment of this offence.

It is in this relation must be noticed that such a composite has created obstacles to the elimination of violence against women. Grounding their stance and approaches on such social and cultural norms, the legal systems of many countries have considered violence between women and men not a crime, but a family dispute that should be resolved without the intervention of the state.[42] One priority of 1970s feminism was to bring violations that occurred in domestic environment to the attention of politicians and to make sure that such crimes were recognized illegal, so that they to tantamount with physical and sexual crimes that take place between strangers.[43] It is widely agreed, that the intimate relationships are the most common context for rape and thus physical and sexual violence overlaps very often makes victims vulnerable to both - intimate partner violence and rape.

Globally, wider societal awareness of rape in marriage rose step by step alongside the second-wave feminism, the enhancing criticism of violence against women and the lack of state intervention in both the private sphere and in intimate relations.[44] Finally it has led to the criminalization of marital rape in the different parts of the globe and notably, in the US. By the end of 1990-ies marital rape exemption rule finally declared to be void in the United States.[45] Nor

[39] CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 2017, para. 20. Available at: https://www.ohchr.org/en/documents/general-comments-and-recommendations/ general-recommendation-no-35-2017-gender-based

[40] Bharat H. Desai & Moumita Mandal, *Sexual and Gender-Based Violence in International Law: Making International Institutions Work***,** Springer, 2022, p.157.

[41] Aruna Papp, "Conspiracy of Silence: Honour-Based Violence in North America", *22 Buff. J. Gender L. & Soc. Policy,* 105, 2013, p.115.

[42] Mari Kurtanidze, Nino AbramiSvili, Baia Pataraia, *Femicide - Femicide – Hate Crime and the State's Obligation to Combat It*, "SAPARI", Tbilisi, 2016, p. 24.

[43] May-Len Skilbrei, Kari Stefansen & Marie Bruvik Heinskou, "A Nordic research agenda on rape and sexual violence", in *Rape in the Nordic Countries, Continuity and Change,* Routledge Research in Gender and Society, edited by Marie Bruvik Heinskou, May-Len Skilbrei and Kari Stefansen, Routledge, 2020, p.10.

[44] Riikka Kotanen "From the protection of marriage to the defence of equality. The Finnish debate over the sexual autonomy of wives", in *Rape in the Nordic Countries, Continuity and Change,* Routledge Research in Gender and Society, edited by Marie Bruvik Heinskou, May-Len Skilbrei and Kari Stefansen, Routledge, 2020, p. 83

[45] PEOPLE v. LIBERTA 64 N.Y.2d 152,474 N.E.2d 567,485 N.Y.S.2d 207(1984).

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Germany has been the exception from the legislation that justified marital rape, a phenomenon, which has been indorsed in Germany until 1979.[46] The historical acceptability of marital rape can be explained by a combination of socio-legal ideologies and attitudes to marriage, sexuality and gender inequality.[47]

Ironically, although marital rape as a phenomenon has never been articulated in national legislation of Georgia as a justification for the removal of criminal charges from the perpetrator, - rape in marriage, as an offence has never been put forward in practice owing to its misleading social perception. Not only in Georgia, but worldwide, traditionally, "rape in marriage was perceived to be as impossible as a husband robbing himself."[48] The Istanbul Convention with a view of changing such perceptions both from the side of the society and a lawmaker, has mandated the ratifying countries substantive revision of the related legislation. Namely, it required the states to make the specific efforts to "ensure that the criminal offences of sexual violence and rape established in accordance with this Convention are applicable to all non-consensual sexual acts, irrespective of the relationship between the perpetrator and the victim… It is crucial to ensure that there are no exceptions to the criminalization and prosecution of such acts when committed against a current or former spouse or partner as recognized by internal law."[49] Albeit, corresponding acts of rape had been criminalized since long ago in Georgian Criminal Code,[50] the absence of related judgements points out to its practical non-execution. Relevant data from police on reporting of such crime or data from prosecution office on prosecuting it - indicated that such a behavior is perceived as socially condoned owing to its acceptance as a norm by the community. This biter reality demonstrates once again how devastating can be cultural views and traditions for the development of the equal rights in the country, where women at large are thought to be subjected and submitted to their husband's sexual gratifications and desires.

3. SCRUTINIZING GENDER STEREOTYPES

Gender stereotyping is one the root-causes hampering the adequate protection of women from sexual violence and proliferating the injustice in the court room. Its role played in the victimization and discreditation of the women victims of the sexual violence is tremendous. Hence, it is a task of this chapter, to explain how this social phenomenon has been outlined in sexual violence case instances, as well as in the CEDAW jurisdiction and practice.

In depth private-public dichotomy analysis for the exposure of gender stereotypes

Even Division into public and private sphere, albeit in normative frame, at some point, can be evaluated as culturally stipulated. This is especially true in connection with duties, activities, responsibilities, availabilities, permissions or banns for the persons of particular gender.

Such dualism between public and private spheres of activity has been a central concern of liberal feminism as they tried to show what a devastating effect it could have had for the interests of

[46] Tatjana Hörnle, "The New German Law on Sexual Assault" in *Sexual Assault: Law Reform in a Comparative Perspective*, edited by: Tatjana Hörnle, Oxford University, 2023, p.142.

[47] Riikka Kotanen "From the protection of marriage to the defence of equality. The Finnish debate over the sexual autonomy of wives", in *Rape in the Nordic Countries, Continuity and Change,* Routledge Research in Gender and Society, edited by Marie Bruvik Heinskou, May-Len Skilbrei and Kari Stefansen, Routledge, 2020, p. 85.

[48] Catharine A. MacKinnon, "Substantive equality revisited: A reply to Sandra Fredman*", International Journal of Constitutional Law*, Oxford University Press, Vol. 14, No. 3 (2016-07), p. 746.

[49] Explanatory Report to the Istanbul Convention, para. 194. Available at: https://rm.coe.int/ic-and-explanatory-report/16808d24c6

[50] Criminal Code of Georgia, Article 137.
Available at: https://matsne.gov.ge/en/document/download/16426/157/en/pdf

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

women. The differentiation of public and private has normative as well as descriptive dimension, as far as greater legal and social significance is ascribed to the public world than to the private. Described distinction made between the public and the private to some extent justifies and makes natural the division of labor and distribution of resources between the male and female members of the society. The endorsement and acceptance of such division in all areas of knowledge have supported the primacy and domination of the male world over women.[51] Such a pattern, in its turn, has served as a favorable basement for the reinforcement of traditional gender and social norms related to male superiority, which is most prevalent factor, that is linked to high rates of sexual offences committed by men. "Because of such perceptions on gender roles, in many societies it has been normalized to recognize sexual intercourse as a man's right in marriage, and to assume, that women and girls are responsible for keeping men's sexual urges at bay or that rape is a sign of masculinity." [52] Respectively, the focus on the curve of the private-public dichotomy has been criticized for a number of reasons, especially in a view of the fact that, concepts of the public and private are not fixed but complex, culturally determined, and shifting.[53] Thus feminism has made significant explorations in problematizing what considers as the private and the political by reasoning that certain problems are not essentially personal but societal too and therefore something, which law and policy should address.[54]Whilst the language of the Istanbul Convention did even more through shifting a focus from legally defined actions to culturally defined traditions, as to an obstacle to the achievements of gender equality.

For showing interrelatedness between society's perception and sustainability of gender-based violence, in a broader context, the Istanbul Convention also clearly defined "gender" as the "socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for men and women".[55] The progressive language in these definitions urges ratifying parties to acknowledge gender inequities and the role of social constructs in applying the Istanbul Convention provisions to their domestic legislation.[56] Such an articulated approach on gender component and its importance turns the Istanbul Convention into promising mean to end up with detrimental effect of gender-based violence to the women as a class – the issue steadily highly prioritized in the political agenda of international and regional organizations.

Furthermore, not only the women right specific treaties, but the agenda 2030 on sustainable development has included among its goals the achievement of gender equality and the empowerment of all women and girls.[57]

Feminist writers have argued that public-private dichotomy has both supported and obscured the structural subordination of women. The role of law in the public sphere is protection from harm, while its role in the private domain is about preserving and thus perpetuating male autonomy. The focus of legal regulation on the public sphere has enabled the private to remain relatively free from

[51] Christine Chinkin, *Feminism: Approach to International Law*, Max Planck encyclopedias of international law, Oxford Public International Law (http://opil.ouplaw.com), Oxford University Press, 2023, p. 2, para. 7.

[52]https://apps.who.int/iris/bitstream/handle/10665/77434/WHO_RHR_12.37_eng.pdf;jsessionid=EDC6BB6952951560DB11C30157EFC51B?sequence=1 p.6.

[53] Christine Chinkin, *Feminism: Approach to International Law*, Max Planck encyclopedias of international law, Oxford Public International Law (http://opil.ouplaw.com), Oxford University Press, 2023, p. 4, para. 8.

[54] Sharron A. FitzGerald & May-Len Skilbrei, *Sexual Politics in Contemporary Europe: Moving Targets, Sitting Ducks.* Cham: Palgrave Macmillan, 2022. p.11.

[55] The Istanbul Convention, Article 3 (c).

[56] Meredith Kimelblatt, "Reducing harmful effects of machismo culture on Latin American domestic violence laws: amending the convention of "Belem Do Para" to resemble The Istanbul Convention", *49 Geo. Wash. Int'l L. Rev. 405*, 2016-2017, p.427.

[57] Sara de Vido, "The ratification of the council of Europe Istanbul Convention by the EU: A step forward in the protection of women from violence in the European legal system", *9 Eur. J. Legal Stud. 69,* 2016-2017, p.74.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

State intervention so that abuses committed there, for instance - domestic violence - can be relatively easily disregarded.[58] Again, it was the Istanbul Convention, that assured states to draw attention at the structural subordination,[59] as to detrimental to women - as a class. Such subordination fosters different forms of violence against women, which emanates from specific cultural values and beliefs.[60] Some of the noticeable examples for such kind of violence can be bride burning[61] or female genital mutilation[62], whilst each of them are being strongly fought against by the means of international law.

Human Rights Committee in its General Comment No 28 (2000) on Equality of Rights between Men and Women, required States to "report on measures to protect women from practices, that violate their right to life, such as female infanticide, the burning of widows and dowry killings".[63] Sexual offences too, including rape do not constitute an exception in this relation for a particular type of society, whose legal settings although covertly, but still boldly reinforces the ground for preservation of the cultural norms supporting outdated interpretation on sexual offences.

There are cultural ideologies that support and sustain social structures, which permit and condone specific forms of violence against women.[64]Reparational marriage, which have been removed from Italy's criminal code only in 80-es[65] and the United States' "marital rape exemption law" which have been abolished only in 90-es[66] are the clear examples of the unfavorable cultural of particular states on the issue.

Dismissive effects of cultural beliefs and stereotypes elucidated by CEDAW

The clearest example of negative effects of cultural believes and stereotypes on the final assessment of rape cases can be seen in CEDAW committee judgment regarding *Vertido case*.[67]It was the first CEDAW communication in which wrongful gender stereotyping and States Parties' obligations to eliminate that practice have been a central focus.[68] Committee evaluated *Judge Europa's* reasoning as stereotypical belief as if women should physically resist rape and other forms of sexual assault at every possibility.[69] In any relation, it must be always considered that gender stereotypes influence legislation on the formulation of norms as well as on actions of the

[58] Christine Chinkin, *Feminism: Approach to International Law*, Max Planck encyclopedias of international law, Oxford Public International Law (http://opil.ouplaw.com), Oxford University Press, 2023, p. 4, para. 8.
[59] Explanatory Report to the Istanbul Convention, preamble, para. 25.
[60] Aruna Papp, "Conspiracy of Silence: Honour-Based Violence in North America", *22 Buff. J. Gender L. & Soc. Policy,* 105 (2013), 115.
[61] It is a form of domestic violence spread in India and practiced in countries located on or around Indian subcontinent.
[62] Irine Kherkheulidze, "Gendered aspects in the crimes threatening human's life and health - forced sterilization and FGM" in *Actual Matters of Criminal law*, edited by N. Todua & M. Ivanidze, Tbilisi, 2020, pp. 145-304.
[63] Christine Chinkin, *Feminism: Approach to International Law*, Max Planck encyclopedias of international law, Oxford Public International Law (http://opil.ouplaw.com), Oxford University Press, 2023, p. 7, para. 20.
[64] Aruna Papp, "Conspiracy of Silence: Honour-Based Violence in North America*", 22 Buff. J. Gender L. & Soc. Policy,* 105, 2013, p. 115.
[65] Valentina Rita Scotti, "Protecting women from rape" in *Reconsidering Gender Based-Violence and Other Forms of Violence Against Women, Comparative Research/Analysis in the Light of The Istanbul Convention* edited by G. Piccinelli, I. Kherkheulidze, A. Borroni, LibellulaEdizioni, 2017, p. 132.
[66] Jill Laurie Goodman, updated by Lynn Hecht Schafran & Eliana Theodorou, "Intimate Partner Sexual Assault: An Overlooked Reality of Domestic Violence" in *Lawyer's Manual on Domestic Violence Representing the Victim*, 6th ed., edited by Mary Rothwell Davis, Dorchen A. Leidholdt & Charlotte A. Watson, 2015, pp. 68-69.
[67] *Karen Tayag Vertido v. The Philippines* (18/08), Available at: https://juris.ohchr.org/casedetails/1700/en-US; CEDAW/C/46/D/18/2008 (2010), at: https://documents.un.org/doc/undoc/gen/n10/545/58/pdf/n1054558.pdf
[68] Simone Cusack and Alexandra S. H. Timmer, "Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v. The Philippines", *Human Rights Law Review* 11:2(2011), p. 336.
[69] Simone Cusack and Alexandra S. H. Timmer, "Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v. The Philippines", *Human Rights Law Review* 11:2(2011), p. 332.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

representatives of government branches or of an individuals.[70] Such an assumption should be taken into consideration while assessing any practical or theoretical side of the sexual offenses or for the further policy-making process on respective issue in Georgia.

Inter-American Protocol, also explains that existence of imperfect legal regulations on domestic violence and issues of gender-based violence is a result of gender stereotypes, which affects legislation in a negative way.[71] Accordingly, it is relevant to consider the concern that CEDAW Committee has expressed on relation between gender-based violence and societal norms, carving and perpetuating stereotypes. As stated in the latest General Recommendation 35 of CEDAW:[72]"The Committee regards gender-based violence against women as being rooted in gender related factors, such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behavior. Those factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered a private matter, and to the widespread impunity in that regard."

4. FROM UNDERSTANDING TO PREVENTION

Socio-cultural factors often raise up as barriers on the way of elaboration of powerful framework for women's protection against sexual violence as well as impedes it implementation. In short, they create the bases for normative and political crisis in the sphere of women human rights' protection. From the feminist perspective, rape is the direct result of our culture's deferential sex role socialization and sexual stratification. Traditional notions about sex roles are viewed as the basis of stereotyped attitudes about rape. For example, the association of dominance with the male sex role and submission with the female sex role is viewed as a significant factor in the persistence of rape as a serious social issue. Hence it is reasonably argued that "until patterns of socialization into traditional sex roles are altered, societal processes will continue to prepare women to be "legitimate" victims and men to be potential offenders.[73] Thus, in a quest of change "we need to see and deal with the social roots that generate and nurture the social problems that are reflected in the behavior of individuals."[74]

On the way of reevaluation of the patterns of habits and behaviors, both on individual and society level, the extant of harm steaming from stereotypes must be kept in mind. It should be recalled that many of the gendered experiences and responses to them are fashioned by stereotyping and prejudice that attributes certain behaviors to men and women.[75] For this very reason the Istanbul Convention, with its explicit gender sensitive nature,[76] considers eradication of traditions and frisky cultural beliefs as the best means of preventing gender-based violence. Convention's effort to prevent violence against women through the re-shaping social and cultural norms with a view to eradicating stereotypes, is of great importance. The treaty calls to the parties "to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs,

[70] Tamar Dekanosidze, *Judgments on femicide cases*, GYLA, Tbilisi, 2016, p. 17.
[71] Tamar Dekanosidze Judgments on femicide cases, GYLA, Tbilisi, 2016, p. 17.
[72] CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 2017, para. 19.
[73] Vickie McNickle Rose, "Rape as a Social Problem: A Byproduct of the Feminist Movement", *Oxford Journal: Social Problems,* Oct., 1977, Vol. 25, No. 1, p. 78.
[74] Allan G. Jonson, *The Gender Knot: Unraveling our Patriarchal Legacy*, Temple University Press, 1997. p. 77.
[75] Christine Chinkin, *Feminism: Approach to International Law*, Max Planck encyclopedias of international law, Oxford Public International Law (http://opil.ouplaw.com), Oxford University Press, 2023, p. 2, para. 4.
[76] Irine Kherkheulidze, "Sexual Violence: Comparative Overview of German and Georgian Legal Perspectives", *TalTech Journal of European Studies*, Tallinn University of Technology, Vol. 14, No. 1 (39), p. 184.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."[77] Such a contemplation must be boldly embraced both in understanding the rape and in elaboration of the contemporary approach to this crime.

CONCLUSION

In conclusion, it must be said that socio-cultural factors can be decisive components in identification of the ways for the prevention of sexual violence before it happens, since society and culture may support and perpetuate beliefs that condone violence.[78] Violence against women in Western societies differs from the violence perpetuated in communities where the ideology of family honor is deemed as sacred and inviolable norm.[79] Hence, it is not by accident, that the Istanbul Convention makes specific reference to the socio-cultural norms, as to a factor, potentially influencing the results of case and in some cases even justifying[80] or at least mitigating convictions and minimizing charges against the perpetrator.

It is in this context that the countries are being urged to "ensure that interpretations of rape legislation and the prosecution of rape cases are not influenced by gender stereotypes."[81]

Extensive analysis made in the article, enables to support assertion that rape as the form of gender-based violence is a socially and culturally constructed phenomena. Consequently, its conceptualization and regulation, except of doctrinal and normative framework means of the legislation of a particular country, vastly rests on the broader socio-cultural context.

Society's stereotyping attitude on the issue of sexual violence and to its meaning is the proper factor, that needs to be taken into account for the analysis of rape laws. Therefore, consistent implementation of the related provisions of the Istanbul Convention that are focused on making changes to the social and cultural norms with a view of eradicating prejudices, customs, traditions and practices, which perpetuate the idea of the inferiority of women, are essential.

BIBLIOGRAPHY:

Books and Journal articles:

BARON, Larry & STRAUS, Murray A., "Four Theories of Rape, A Macro-sociological analysis", in *Social Problems,* Vol. 34, No. 5, 1987.

BARON, Larry & STRAUS, Murray A., "Clinical Criminology, Rape and its relation to social disorganization, pornography and inequality in the USA, in *Med Law,* 1989;8(3):209-32.

BROWNMILLER, Susan, *Against Our Will: Men, Women and Rape*, 1975.

CHAFETZ, Janet Saltzman, *Sex and Advantage: A Comparative Macro-Structural Theory of Sex Stratification,* 1984;

CHINKIN, Christine, *Feminism: Approach to International Law,* Max Planck encyclopedias of international law, Oxford Public International Law (http://opil.ouplaw.com), Oxford University Press, 2023.

CUSACK, Simone & TIMMER, Alexandra S. H., "Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v. The Philippines" in *Human Rights Law Review* 11:2(2011), pp. 329-34.

[77] Working paper prepared by the Council of Europe Secretariat, The Istanbul Convention and the CEDAW framework: A comparison of measures to prevent and combat violence against women, Council of Europe, 2011. Available at: https://rm.coe.int/168059aa28

[78]https://apps.who.int/iris/bitstream/handle/10665/77434/WHO_RHR_12.37_eng.pdf;jsessionid=EDC6BB6952951560DB11C30157EFC51B?sequence=1 p. 6.

[79] Aruna Papp, Conspiracy of Silence: "Honour-Based Violence in North America"*, 22 Buff. J. Gender L. & Soc. Policy,* 105 (2013), p. 115.

[80] "Parties shall ensure that culture, custom, religion, tradition or so-called "honour" shall not be considered as justification for any acts of violence covered by the scope of this Convention", The Istanbul Convention, Article 12, para 5.

[81] The Explanatory Report to the Istanbul Convention, para. 192.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

DEKANOSIDZE, Tamar, *Judgments on femicide cases,* GYLA, Tbilisi, 2016.
DESAI, Bharat H. & MANDAL, Moumita, *Sexual and Gender-Based Violence in International Law: Making International Institutions Work,* Springer, 2022.
DE VIDO, Sara, "The ratification of the council of Europe Istanbul Convention by the EU: A step forward in the protection of women from violence in the European legal system" in *9 Eur. J. Legal Stud. 69*, 2016-2017.
DWORKIN Andrea, "Against the male flood: censorship, pornography and equality*"* in *Harvard Women's Law Journal,* 1985, 8:1-29.
EZZAT, A. Fattah, "Victimology: Past, Present and Future" in *Criminologie,* Printemps, 2000, Vol. 33, No. 1, LA VICTIMOLOGIE: QUELQUES ENJEUX, Université de Montréal.
FITSGERALD, Sharron A. & SKILBREI, May-Len, *Sexual Politics in Contemporary Europe: Moving Targets, Sitting Ducks*. Cham: Palgrave Macmillan, 2022.
GOODMAN, Jill Laurie, updated by Lynn Hecht Schafran & Eliana Theodorou, "Intimate Partner Sexual Assault: An Overlooked Reality of Domestic Violence" in *Lawyer's Manual on Domestic Violence Representing the Victim,* 6th edition, edited by Mary Rothwell Davis, Dorchen A. Leidholdt & Charlotte A. Watson, 2015, pp. 68-69.
GURVINDER, Kalra & DINESH, Bhugra, "Sexual violence against women: Understanding cross-cultural intersections", in *Indian J Psychiatry*, 2013 Jul-Sep; 55(3): 244–249.
HORNLE, Tatjana, "The New German Law on Sexual Assault" in *Sexual Assault: Law Reform in a Comparative Perspective,* edited by: Tatjana Hörnle, Oxford University, 2023.
JASINSKI, Wojciech, "Defining Rape. In Quest of the Optimal Solution", in *Consent and Sexual Offenses, Comparative Perspectives,* edited by Elisa Hoven & Thomas Weigend, first addition, 2022.
JONSON, Allan G., *The Gender Knot: Unraveling our Patriarchal Legacy*, Temple University Press, 1997.
KHERKHEULIDZE, Irine, "Re-conceptualizing Sexual Harassment—Premises and Challenges", in *Reconsidering Gender Based Violence and Other Forms of Violence Against Women, Comparative Research/Analysis in the Light of the Istanbul Convention*, edited by G. Piccinelli, I. Kherkheulidze & A. Borroni, Libellula Edizioni, Tricase, 2017, pp.17-124.
KHERKHEULIDZE, Irine, "Gendered aspects in the crimes threatening human's life and health - forced sterilization and FGM" in *Actual Matters of Criminal law,* edited by N. Todua & M. Ivanidze, Tbilisi, 2020, p. 201-303.
KHERKHEULIDZE, Irine, "Sexual Violence: Comparative Overview of German and Georgian Legal Perspectives", *TalTech Journal of European Studies*, Tallinn University of Technology, Vol. 14, No. 1 (39), pp.182-195.
KIMELBLATT, Meredith, "Reducing harmful effects of machismo culture on Latin American domestic violence laws: amending the convention of "Belem Do Para" to resemble The Istanbul Convention", *49 Geo. Wash. Int'l L. Rev. 405,* 2016-2017.
KOTANEN, Riikka, "From the protection of marriage to the defence of equality, The Finnish debate over the sexual autonomy of wives" in *Rape in the Nordic Countries, Continuity and Change*, Routledge Research in Gender and Society, edited by Marie Bruvik Heinskou, May-Len Skilbrei and Kari Stefansen, Routledge, 2020.
KURTANIDZE, Mari, ABRAMISHBILI, Nino, PATARAIA, Baia, *Femicide – Hate Crime and the State's Obligation to Combat It,* "SAPARI", Tbilisi, 2016.
MACKINNON, Catherine A., "Not a moral issue", *Yale Law and Policy Review,* 1984, 2:321-45.
MACKINNON, Catherine A., *Toward a Feminist Theory of the State,* Harvard University Press, 1991.
MACKINNON, Catherine A., "Substantive equality revisited: A reply to Sandra Fredman", *International Journal of Constitutional Law*, Oxford University Press, Vol. 14, No. 3 (2016-07).
MCPHAIL, Beverly A., "Feminist Framework Plus" in *Trauma, Violence & Abuse,* Vol. 17, No. 3, Sage, 2016, pp. 314-329.
MARSHALL, William L., & BARBAREE, Howard E., "An integrated theory of the etiology of sexual offending", in *Handbook of Sexual Assault, Issues, Theories, and Treatment of the Offender*, edited by W. L. Marshall, D.R. Laws & H. E. Barbaree," (NSSB), Plenum Press, 1990.
MCNICKLE ROSE, Vickie, "Rape as a Social Problem: A Byproduct of the Feminist Movement", *Oxford Journal: Social Problems,* Oct., 1977, Vol. 25, No. 1, pp. 75-89.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

PAPP, Aruna, "Conspiracy of Silence: "Honour-Based Violence in North America", in *22 Buff. J. Gender L. & Soc. Policy,* 105, 2013.
QUINN, Naomi, "Anthropological studies on women's status" in *Annual Review of Anthropology,* 1977, 6:181-225.
SCOTTI, Valentina Rita, "Protecting women from rape" in *Reconsidering Gender Based-Violence and Other Forms of Violence Against Women, Comparative Research/Analysis in the Light of The Istanbul Convention* edited by G. Piccinelli, I. Kherkheulidze, A. Borroni, Libellula Edizioni, Tricase, 2017, pp. 124- 151.
ŠIMONOVIC, Dubravka, "Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Convention", *36 Hum. Rts. Q. 590,* 2014.
SKILBREI, May-Len et al., *Rape in the Nordic Countries, Continuity and Change,* Routledge Research in Gender and Society, edited by Marie Bruvik Heinskou, May-Len Skilbrei and Kari Stefansen, Routledge, 2020.
SKILBREI, May-Len, STEFANSEN, Kari & BRUVIK HEINSKOU, Marie, "A Nordic research agenda on rape and sexual violence", in *Rape in the Nordic Countries, Continuity and Change,* Routledge Research in Gender and Society, edited by Marie Bruvik Heinskou, May-Len Skilbrei and Kari Stefansen, Routledge, 2020.
WABLY, Sylvia et al., *Stopping Rape, Towards a comprehensive policy*, University of Bristol, Policy Press, 2015.

Online sources:

See:https://apps.who.int/iris/bitstream/handle/10665/77434/WHO_RHR_12.37_eng.pdf;jsessionid=EDC6BB6952951560DB11C30157EFC51B?sequence=1 Accessed: 07.12.2024.
See:https://philpapers.org/browse/feminism-rape-and-sexual-violence Accessed: 07.12.2024.

Law and cases (footnotes and bibliography):

1. Council of Europe Treaty Series - No. 210, Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11.V.2011. https://rm.coe.int/168008482e Accessed: 07.12.2024.
2. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted December 18, 1979, entered into force September 3, 1981, U.N. Doc. A/34/46 (1979). https://www.ohchr.org/en/treaty-bodies/cedaw Accessed: 07.12.2024.
3. CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 2017. https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based Accessed: 07.12.2024.
4. Explanatory Report to the Istanbul Convention. https://rm.coe.int/ic-and-explanatory-report/16808d24c6 Accessed: 07.12.2024.
5. Criminal Code of Georgia. https://matsne.gov.ge/en/document/download/16426/157/en/pdf Accessed: 07.12.2024.
6. Criminal Code of Germany. https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html Accessed: 07.12.2024.
7. Working paper prepared by the Council of Europe Secretariat, The Istanbul Convention and the CEDAW framework: A comparison of measures to prevent and combat violence against women, Council of Europe, 2011. Available at: https://rm.coe.int/168059aa28 Accessed: 07.12.2024.
8. PEOPLE v. LIBERTA 64 N.Y.2d 152,474 N.E.2d 567,485 N.Y.S.2d 207(1984). https://case-law.vlex.com/vid/people-v-liberta-886445278 Accessed: 07.12.2024.
9. Karen Tayag Vertido v. The Philippines (18/08). https://juris.ohchr.org/casedetails/1700/en-US Accessed: 07.12.2024.
10.CEDAW/C/46/D/18/2008(2010) https://documents.un.org/doc/undoc/gen/n10/545/58/pdf/n1054558.pdf Accessed: 07.12.2024.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Legal and Practical Challenges in Safeguarding the Rights of Juvenile Witnesses

DR. LEVAN DARBAIDZE
JUDGE OF THE GORI DISTRICT COURT, PROFESSOR OF CAUCASUS UNIVERSITY, DOCTOR OF LAW
E-MAIL: LDARBAIDZE@CU.EDU.GE

This article is funded under the Shota Rustaveli National Science Foundation of Georgia's Research Grant Project No. FR-23-13616.

Abstract: *The right to a fair trial is the cornerstone of the rule of law, without which the democratic development of the country is impossible. The mentioned fundamental right is instrumental in equipping persons in conflict with the law with various important opportunities to protect themselves from unjustified interference in their rights by the state. A minor, as a legal subject, has the right to a fair trial and enjoys exactly the same legal guarantees as any other person in conflict with the law. However, a minor, in accordance with his development, needs special protection, so he cannot be treated in the same way as an adult. When children come into the justice system, the authorities must be guided by the "principle of the best/true interest of the juvenile". This article will address the legal and practical challenges in the field of realizing the right to protection of minors.*
Keywords: *Human rights; Fair trail; Rule of Law; Criminal justice; Juveniles justice standards.*

The right to a fair trial constitutes a fundamental element of the rule of law. Without it, a country's democratic progress can be stifled. This essential right is instrumental in protecting individuals in conflict with the law. It empowers them to safeguard themselves against unwarranted state interference in their rights and freedoms.

Juveniles, as full-fledged subjects of legal relations, have the right to a fair trial and are guaranteed the same legal protections as any other individual in conflict with the law. However, because juveniles are still developing, they need special protection, meaning we cannot treat them the same way as adults. When children enter the justice system, those in authority must recognise that they differ from adults, whether as victims, witnesses, or accused individuals. Protecting the child's rights should be the top priority throughout the entire process of participating in the justice system. To ensure this, the justice system must urgently prioritize the "principle of the best/true interest of the juvenile," as outlined in Article 3(1) of the Convention on the Rights of the Child. This principle mandates that the child's best interests be considered at all stages of the justice process in which the child participates. This means that, in many cases, we should consider the issue beyond the essential legal norms. Taking into account the child's best interest also implies the involvement of not only legal representatives but also lawyers and professional psychologists or social workers, if necessary, working with children. The guarantees of the right to a fair trial begin with the child's first contact with the justice system, continue throughout the trial process, and extend beyond it.

European institutions have established specific requirements to guarantee that member states adequately meet the needs of children within their jurisdiction. The Charter of Fundamental Rights of the European Union contains provisions that define the core rights of access to justice and strengthen the guarantees of the right to a fair trial for juveniles. Article 47 establishes effective legal protection mechanisms for children, including a fair and public trial within a reasonable period, rights to protection, representation and consultation, and other guarantees of legal protection and support. It is worth noting that the EU directives establish unique guarantees of a fair trial in criminal

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

proceedings, including the Directive of the Right of Access to a Lawyer in Criminal Proceedings[1]. Under section 11.2.2 of the Directive, Member States must comply with the Charter of Fundamental Rights of the European Union to implement the directives, even without special child-friendly norms. When considering cases where children are subject to the scope of the said directive and fall within its jurisdiction, the observance of the child's best interest principle should be given special attention. The proposal of the European Commission regarding developing a directive containing procedural protection mechanisms for charged or potentially charged juveniles is also essential. The recommendation aims to provide children with mandatory access to a lawyer at any stage of the criminal justice process.[2] According to the recommendation, children should have the right to receive information about their rights immediately, with the help of parents or legal representatives, and the right to testify in a child-friendly environment, among other things.

The Council of Europe Guidelines on Child-Friendly Justice address children's rights to effective participation in the criminal justice process and access to a lawyer.[3] Though these guidelines are not legally binding, it is vital to ensure that the criminal justice system considers the specific needs of children. The guidelines are based on the European Court of Human Rights case law and other internationally recognised principles and norms. This document is a helpful resource for professionals involved in juvenile justice. According to the guidelines, information on any charges against the child must be given promptly and directly after the charges are brought. This information should be given to both the child and the parents in such a way that they understand the exact charge and the possible consequences (Section IV. A.1.5). The child also has the right to be questioned in the presence of a parent, attorney, or guardian (Section C(30)), the right to speedy justice (Section D(4)), and the right to interview and trial in an environment that meets the child's needs (Section D(5)). Additionally, in June 2014, the Parliamentary Assembly of the Council of Europe adopted a resolution on child-friendly justice, emphasising the importance of treating children in conflict with the law in a manner that is friendly and based on their rights.[4] The Parliamentary Assembly of the Council of Europe calls on the Member States to implement international mechanisms to protect human rights in the juvenile justice system and to ensure the harmonisation of national legislation and practice with international standards.

In the UN Convention on the Rights of the Child, Article 40(1) and (2)(b)(III), (2)(b)(IV) state that State parties recognise the rights of every child (every individual under the age of 18 (Article 1)) who is alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. To this end, the State shall ensure that every child alleged as or accused of having infringed the penal law, on the one hand, is informed of the charge against him and, on the other hand, has at least the guarantees to access legal or other appropriate assistance for the defence and the guarantee not to be compelled to give testimony or to confess guilt.

According to Article 7 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), essential procedural safeguards such as the presumption of

[1] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1.

[2] European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822 final, Brussels, 27 November 2013.

[3] Council of Europe, Committee of Ministers (2010), Guidelines on child friendly justice, 17 November 2010.

[4] Parliamentary Assembly of the Council of Europe, Resolution 2010 (2014), "Child-friendly juvenile justice: from rhetoric to reality."

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. The right to have a guardian present, the right to confront and cross-examine witnesses, and the right to appeal to a higher court. According to Article 15.1 of the same Rules, throughout the proceedings, the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such assistance in the country.[5]

According to the UN CRC General Comment No. 24 on children's rights in the child justice system, many children lack legal assistance, which is a minimum law guarantee that all children shall have access to. The Committee recommends that States provide adequate legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities. Child justice systems should not permit children to waive legal representation unless the decision to waive is made voluntarily and under impartial judicial supervision (paragraph 51).[6]

To comprehensively review contemporary international child protection standards, it is essential to examine the European Court of Human Rights precedent judgment on the Panovits v. Cyprus case (Application 4268/04, 11/12/2008)[7]. The case involved a 17-year-old boy who was accused of robbery and murder. The juvenile was taken to the police station with his father and questioned without legal representation. The applicant argued that the court convicted him based on his testimony obtained without a lawyer or guardian present, thereby violating his right to a fair trial.

In the mentioned decision, the European Court of Human Rights explained the following:

"66. Regarding the applicant's complaints about the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of a lawyer's assistance already at the initial stages of police interrogation. The lack of legal aid during an applicant's interrogation would constitute a restriction of his defence rights without compelling reasons that do not prejudice the overall fairness of the proceedings."

"67. The Court notes that the applicant was 17 years old at the material time. In its case law on Article 6, the Court has held that when criminal charges are brought against a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings..."

"68. The Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any substantial public interest, must be established unequivocally and must be attended by minimum safeguards commensurate to the waiver's importance… Moreover, before an accused can be said to have impliedly, through his conduct, waived an essential right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be. The Court considers that given the vulnerability of an accused minor and the imbalance of power to which the very nature of criminal proceedings subjects him, a waiver by him or on his behalf of an essential right under Article 6 can only be accepted where it is expressed unequivocally after the authorities have taken all reasonable steps to ensure that they are fully aware of his rights of defence and can appreciate, as far as possible, the

[5] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 29 November 1985, Supreme Court of Georgia, website: https://www.supremecourt.ge/files/upload-file/pdf/arasrw.martl5.pdf

[6] General Comment No. 24 of the UN Committee on the Rights of the Child, 2019, Supreme Court of Georgia, website: https://www.supremecourt.ge/files/upload-file/pdf/arasrw.martl4.pdf

[7] Panovits v. Cyprus, No. 4268/04, 2008, European Court of Human Rights search engine https://hudoc.echr.coe.int/

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

consequence of his conduct. The applicant (the juvenile) was not advised that he was allowed to see a lawyer before saying anything to the police and before he had his written statement taken."

"73. Accordingly, the Court finds that the lack of provision of sufficient information on the applicant's right to consult a lawyer before his questioning by the police, especially given the fact that he was a minor at the time and not assisted by his guardian during the questioning, constituted a breach of the applicant's defence rights. The Court, moreover, finds that neither the applicant nor his father acting on behalf of the applicant had waived the applicant's right to receive legal representation before his interrogation explicitly and unequivocally."

In this particular case, the European Court of Human Rights found that although the applicant had the benefit of adversarial proceedings in which he was represented by the lawyer of his choice, the nature of the detriment he suffered because of the breach of due process at the pre-trial stage of the proceedings was not remedied by the subsequent proceedings, in which his confession was treated as voluntary and was therefore held to be admissible as evidence. When considering the merits of the case in national courts, the applicant's conviction was based on several pieces of evidence, including a statement he made shortly after being arrested. Although the applicant challenged the voluntary nature of this statement, it played a significant role in his conviction. Based on the above, the European Court found that the lack of legal assistance during the police interrogation led to the violation of Article 6(3)(c) and Article 6(1).

The national legislation governing the protection of juvenile witnesses (potential accused) is noteworthy.

Article 31(3) of the Constitution of Georgia guarantees the right to a defence.

Article 15(1) of the Juvenile Justice Code, as a general provision, states that at any stage of criminal proceedings, if a juvenile is being questioned or is a witness in a case and their hired lawyer doesn't participate (known as a defence by agreement), they have the right to free legal assistance if they cannot afford it or if they are being questioned for crimes outlined in Chapters XIX, XX, and XXII and Articles 144^1-144^3 of the Criminal Code of Georgia.

It is worth mentioning that the national laws related to juvenile justice define various methods and clearly distinguish between the responsibility of safeguarding the right to defence of a juvenile witness during the procedural action and the investigation/interrogation. In particular:

As per Article 23(1) and Article 52(9) of the Juvenile Justice Code of Georgia, a juvenile *being interrogated or being a witness* has the right to have a lawyer present during the proceedings. If a juvenile cannot afford a lawyer, they have the right to free legal assistance as per Article 15(1) of the Code. Furthermore, according to Article 52(3) of the same Code, the juvenile's questioning or interrogation must be conducted in the presence of their legal representative and lawyer. In the case provided by Article 15(1) of the Code, i.e. if a juvenile being interrogated or being a witness cannot afford a lawyer or is being questioned for crimes mentioned in Chapters XIX, XX, and XXII and Articles 144^1-144^3 of the Criminal Code of Georgia, they are entitled to free legal assistance during the questioning or interrogation.

The above legal provision regarding the questioning/interrogation of a juvenile witness is imperative and does not allow for any exceptions. Article 52(3) of the Juvenile Justice Code is a particular norm that specifically addresses the procedure for questioning or interrogating a juvenile. Through grammatical, logical and teleological interpretation methods, it is clear that no other interpretation of the provision is possible. The provision mandates that a juvenile witness must be questioned or interrogated in the presence of their legal representative and lawyer. If the witness cannot afford a lawyer or is being questioned for a crime under Chapters XIX, XX, and XXII and Articles 144^1-144^3 of the Criminal Code of Georgia, they have the right to free legal assistance during questioning or interrogation. However, Article 52(3) of the Juvenile Justice Code also allows a juvenile witness to refuse the services of a defence attorney appointed at the state's expense and invite

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

a lawyer of their own free will (defence by agreement). This article also doesn't limit the right of the legal representative (procedural representative) to independently select and invite a lawyer, ensuring the best interests of the juvenile witness are considered (Article 28(1) of the Juvenile Justice Code).

Realising the right to defence becomes a critical issue when a child is exposed to the commission of a crime and is in the custody of the investigative body, who has personally appeared or is presented to the investigative body with voluntary consent; however, initially, the child is considered a witness, and their status as "an accused person" largely depends on their questioning. In the current investigative practice, juveniles with the status of a witness (but may potentially be accused) are questioned without a lawyer present after formally declining legal representation. However, a legal or procedural representative may still be present during the questioning if a lawyer by agreement is not present. In most cases, before questioning, the juvenile is provided with a printed text outlining their rights as a witness, which includes their right to free legal assistance if they cannot afford but wish to have a lawyer. After obtaining the juvenile's refusal to a lawyer, the interrogation protocols will note in the "Information provided by the person to be questioned" column that the juvenile does not require the assistance of a lawyer during the questioning. However, as a juvenile, their legal representative will attend the questioning. Suppose the investigation leads to the juvenile's arrest as an accused. In that case, a lawyer will be assigned to them at the state's expense, and their further questioning will take place with the participation of a treasury lawyer upon the investigator's request. Thus, with this kind of practice, the right of defence of a juvenile in the custody of the investigative body (as a potential accused) depends solely on their status and whether they have formally refused a lawyer at the questioning. This approach goes against the values outlined in the Convention on the Rights of the Child, does not meet international standards for children's rights, and goes against the fundamental principle of protecting the child's best interests. Besides, it is unclear what the investigative body should do if a juvenile requests the presence of a lawyer during interrogation but cannot afford one by agreement. According to existing practice, juveniles are entitled to free legal assistance during the interrogation/questioning only if they are insolvent or being questioned for specific crimes listed in Chapters XIX, XX and XXII and Articles 144^1-144^3 of the Criminal Code of Georgia.

According to the criminal procedure laws of Georgia and the international standards for juvenile justice, the right to have a legal or procedural representative is not a substitute for receiving legal assistance. In the above cases involving a juvenile witness (who may also be a potential accused), it is vital to consider their vulnerability and power imbalance in the criminal justice system. Refusing to have a lawyer present during their interrogation as a witness could have serious consequences, which the juvenile may not understand or foresee. Therefore, it is crucial to ensure they are provided with proper legal representation and assistance. A juvenile's decision to waive their fundamental right to defence can only be considered acceptable if the investigator takes all necessary steps to ensure that the juvenile fully comprehends the importance of this right and understands the potential consequences of their actions. However, due to the physical and mental development of children caught in the justice system, this is often difficult to achieve. Failing to provide adequate information about the right to defence during questioning, mainly when dealing with a juvenile witness (who may also be a potential accused), constitutes a substantial violation of the minimum safeguards of the right to defence outlined in Article 6 (3) (b, c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In such a case, the imperative requirement of Article 52(3) of the Juvenile Justice Code is materially violated, which requires the presence of a lawyer during the questioning or interrogation of a juvenile, regardless of their status as an accused (charged, acquitted), victim, or witness. Suppose a juvenile is questioned as a witness without a lawyer present, especially when it is evident from the initial evidence gathering that they are a

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

"potential accused". In that case, they are essentially deprived of their fundamental right to defence. This goes against the values established by the Convention on the Rights of the Child.

CONCLUSION

After analysing national and international legal regulations, European Court decisions, and international guidelines, recommendations and directives, we formulate the following opinions to prevent shortcomings in investigative and judicial practices:

The right to legal defence constitutes a fundamental aspect of the right to a fair trial, empowering a juvenile within the justice system to safeguard their rights against unwarranted state interference. As fully recognized legal entities, juveniles possess the right to a fair trial and are entitled to the same legal safeguards as any other individual in conflict with the law.

When children are involved in legal proceedings, those in authority must understand that juveniles differ from adults, regardless of their role as victims, witnesses, or accused.

The juvenile justice system should prioritise the protection of a child's rights rather than determining winners and losers.

To achieve this, the justice system must be guided by the "principle of the best/true interest of the juvenile," which means that the child's best interests should be considered at all stages of the justice process. This ensures that the child's rights are protected and respected throughout their participation in the justice system.

It is vital to protect the child's best interests in legal proceedings. Legal representatives and lawyers must be involved in investigative or procedural actions during the trial to achieve this. This safeguard of the right to a fair trial must begin once the child first interacts with the justice system and continue throughout and after the trial.

The Juvenile Justice Code must define unambiguous, stringent, and predictable standards to safeguard the fundamental right to a fair trial and protect a child's legal interests. These standards should grant a juvenile, especially a potential accused, the right to receive free legal assistance during questioning and interrogation.

Children who become involved in the justice system require the support of a lawyer not because of their status as victims, witnesses, or accused, as is often interpreted under the provisions of the Juvenile Justice Code of Georgia, but simply because they are children.

It is not justifiable that a juvenile witness being questioned or interrogated is entitled to legal assistance based on the category and severity of the crime they have witnessed. This approach can be considered a violation of Article 2 of the Convention on the Rights of the Child, which prohibits discrimination. To avoid this violation, the above changes to the legislation are necessary.

Until clear and foreseeable national legal provisions are introduced, existing norms should be interpreted under international standards, with a firm commitment to the child's best interests. All children involved in the justice system, whether as victims, witnesses, or accused, should be allowed to exercise their fundamental right to protection during questioning and interrogation.

BIBLIOGRAPHY/REFERENCES:

1. Unicef Guidance Note for CEE/CIS on responses to children who have infringed the law but are under the minimum age of prosecution as a juvenile offenders (2010) http://www.slideshare.net/unicefceecis/unicef-cm-jj-responses-web
2. The Role of Social Work in Juvenile Justice, the United Nations Children's Fund, 2013 http://www.unicef.org/ceecis/UNICEF_report_on_the_role_of_social_work_in_juvenile_justice.pdf
3. Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (2005) https://www.un.org/en/pseataskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

4. International Human Rights of Children (1st ed. 2018 Edition) - Ursula Kilkelly (Editor), Ton Liefaard (Editor);
5. Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child (Stockholm Studies in Child Law and Children's Rights) - Said Mahmoudi (Editor), Pernilla Leviner (Editor), Anna Kaldal , Katrin Lainpelto (2015)
6. Juvenile Justice Today – Gennaro F.Vito & Julie C. Kunselman (March 2011);
7. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010);
8. UNODC, UNICEF - Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary (2009);
9. International Handbook of Juvenile Justice – Josine Junger –Tas & Scott H. Decker – editors (2008);
10. Ton Liefaard, Deprivation of Liberty of Children in Light of International Human Rights Law and Standards, 2008;
11. UNODC/UNICEF – Handbook on restorative Justice Programmes (2006);
12. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1.
13. European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822 final, Brussels, 27 November 2013.
13. Council of Europe, Committee of Ministers (2010), Guidelines on child friendly justice, 17 November 2010.
14. Parliamentary Assembly of the Council of Europe, Resolution 2010 (2014), "Child-friendly juvenile justice: from rhetoric to reality."
15. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 29 November 1985, Supreme Court of Georgia, website: https://www.supremecourt.ge/files/upload-file/pdf/arasrw.martl5.pdf
16. General Comment No. 24 of the UN Committee on the Rights of the Child, 2019, Supreme Court of Georgia, website: https://www.supremecourt.ge/files/upload-file/pdf/arasrw.martl4.pdf
17. Panovits v. Cyprus, No. 4268/04, 2008, European Court of Human Rights search engine https://hudoc.echr.coe.int/

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Évolution de la politique muséale en Tunisie: à travers les musées archéologiques de la ville de Sousse

DR. SOFIEN BEN MOUSSA
MAITRE-ASSISTANT A LA FACULTE DES LETTRES ET SCIENCES HUMAINES DE L'UNIVERSITE DE SOUSSE, TUNISIE

DR. BILEL SAOUDI
MAITRE-ASSISTANT A L'INSTITUT SUPERIEURE D'HISTOIRE DE LA TUNISIE CONTEMPORAINE, UNIVERSITE DE LA MANOUBA, TUNISIE

Abstract: Evolution of the Museum Policy in Tunisia. *The many archaeological discoveries around Sousse and its region have shown the need to collect and preserve the archaeological objects collected by the soldiers of the topographical brigade, the amateurs of antiquities and the archaeologists on mission in the regency of Tunis. On April 24, 1899, and under the instigation of the European communities and the city council, the first archaeological museum of Sousse was opened to the general public. Since then, the various archaeological museums established in the city have experienced a checkered evolution dictated by the various museum policies conducted in the country.*
Keywords: *EU; Museum; Archaeology; Museology; policy; Tunisia; Sousse.*

Résumé: *Les nombreuses découvertes archéologiques aux environs de Sousse et sa région ont montré la nécessité de collecter et de conserver les objets archéologiques récoltés par les militaires de la brigade topographique de l'armée française, les amateurs des antiquités et les archéologues en mission dans la régence de Tunis. Le 24 avril 1899, et sous l'instigation des communautés européennes et du conseil municipal de la ville, fut ouvert au grand public le premier musée archéologique de Sousse. Depuis, les différents musées archéologiques établis dans la ville, vont connaître une évolution en dents de scie dictée par les différentes politiques muséales menées dans le pays.*
Mots clés*: UE, Musée, archéologie, Muséologie, politique, Tunisie, Sousse.*

INTRODUCTION:

La Tunisie est intégrée dans la Politique Européenne de Voisinage (PEV/ENP) de l'UE et son histoire et ses traditions multiculturelles ont été toujours liée aux évolutions de l'histoire de l'Europe.[1] Le dernier quart du XIX^{ème} siècle était marqué en Tunisie par la naissance de l'idée de création des musées archéologiques par suite de l'importance des découvertes et des fouilles archéologiques entreprises dans le pays. C'est ainsi que fut créé le musée archéologique de Carthage en 1875 par le père Delattre[2], suivit de l'annonce du premier ministre Kheireddine Pâcha[3] en 1876 de la création d'un musée archéologique à Tunis qui ne verra le jour qu'en 1884 sous la dénomination du musée Alaoui[4]. Dans les régions, Sousse, après Tunis, apparait comme étant la première ville de

[1] Natea, Daciana Mihaela, Costea, Maria, Costea, Simion, EU Security and Multicultural Societies, Paris, L'Harmattan, 2024. Costea, Simion (coord.), *Culture, Elites and European Integration, Volume IV – International Relations and European Union Interdisciplinary Studies*, Paris, Editions Prodifmultimedia, 2011.

[2] Envoyé en 1875 par le Cardinal De Lavigerie à Carthage, Delattre avait pour mission de diriger le musée archéologique de Carthage et de conduire des fouilles à la recherche de vestiges du christianisme dans la colline de Byrsa. Parmi ses découvertes, on peut citer les catacombes dites d'El-Karita en 1878. Delattre était également à l'origine de la découverte de plusieurs inscriptions latines qu'il publia d'ailleurs dans « la Revue tunisienne ».

[3] Kheireddine Pâcha (1822-1890), Grand Vizir de Mohamed Sadok Bey et porteur d'un grand projet de modernisation de la Tunisie avant l'installation du protectorat français. On doit à Kheireddine Pacha entre autres la modernisation de l'armée, création du collège Sadiki. Kheiredine Pâcha était également à l'origine de la confiscation de la collection archéologique à la disposition de Mustapha Khaznadar.

[4] Le Musée Alaoui: L'idée de la création d'un musée archéologique est due au Premier ministre Kheireddine Pâcha, qui décida en février 1876 de créer un musée archéologique à Tunis. La mise en exécution en 1885 est, toutefois, l'œuvre des

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

la régence à avoir bénéficié d'une institution muséale issue cette fois-ci d'initiative citoyenne locale. Nous allons tenter à travers cet article de retracer l'évolution de la politique muséale en Tunisie à travers les musées archéologiques établis à Sousse entre la fin du XIXème siècle jusqu'à l'ouverture du nouveau musée archéologique de Sousse le 09/06/2012.

I. DE COLLECTIONS PRIVEES A LA NAISSANCE DES PREMIERS MUSEES ARCHEOLOGIQUES:

1. Les collections privées:

Bien avant l'établissement du Protectorat, des missions archéologiques ont été entreprises par des étrangers en Tunisie avec l'accord du Bey et soutenues par les consulats et des institutions de renommée internationale[5]. Le Bey de Tunisie, n'exigeait alors qu'on lui remettait l'or inventorié lors de ces fouilles[6].

La prise d'Alger par les Français en 1830, instaura un nouveau rapport de force entre la France et la régence de Tunis et qui a ouvert la porte aux missions archéologiques dans les pays. Ainsi fut signé le 08 août 1830 un nouveau traité, entre le Bey Hussein et le résident général Mathieu De Lesseps « dans le but de renforcer les liens privilégiés entre les deux parties ». Aux huit articles du traité s'ajoutait une clause secrète faisant état d'un acte de cession d'un terrain à Carthage[7] à Charles X, roi de France. Le terrain est situé à l'endroit même de décès de Saint Louis, en 1270, et pour lequel la France comptait érigée un monument à l'auteur de la huitième croisade.[8] Quelques années après la signature de ce traité, voit le jour à Paris, en 1837, la Société pour l'Exploitation de Carthage et sur les lieux commença, en 1840, la construction d'une chapelle.

Parmi les grands collectionneurs de l'époque on trouve aussi bien des Tunisiens comme des étrangers. Les étrangers la Tunisie a vu passer plusieurs missions dont la plus importante est celle du Père Alfred Louis Delattre (en1875) et qui était envoyé par le cardinal Lavigerie, archevêque d'Alger pour exhumer à Carthage les vestiges du christianisme. La création du premier musée en Tunisie, qui avait un statut de musée privé et qui fut baptisé « Musée Lavigerie de Saint-Louis de Carthage ».[9]

- Les Tunisiens: Parmi, les grands collectionneurs tunisiens nous citons Mohamed Sadok Bey[10], Mohamed Khaznadar[11], le général Rachid[12], le général Osman[13], et le grand ministre Keireddine Bacha dont la collection fut à l'origine de l'idée de création du musée Alaoui en 1876.

2. les collections des militaires: le cas de la ville de Sousse

Parmi les acteurs en matière de la recherche archéologique et de la collection des « antiquités », on trouve les militaires. Ces derniers sont parvenus à collecter d'importants objets

autorités coloniales. JAÏDI H., 2001 « Kheireddine Pacha et son projet de musée archéologique à Tunis », *Pallas*, 56, 2001, p. 96-117.

[5] JAÏDI, Houcine. *La création du Service des Antiquités de Tunisie: contexte et particularités In: Autour du fonds Poinssot: Lumières sur l'archéologie tunisienne (1870-1980)* [en ligne]. Paris: Publications de l'Institut national d'histoire de l'art, 2017 (généré le 27 juillet 2023). ISBN: 9782917902608. DOI: https://doi.org/10.4000/books.inha. 7157.

[6] JAÏDI, Houcine. La création du Service des Antiquités de Tunisie: contexte et particularité …

[7] Il s'agit ici de la colline de Byrsa

[8] Clémentine Gutron, « *L'abbé Bourgade (1806-1866), Carthage et l'Orient: de l'antiquaire au publiciste* », Anabases [En ligne], 2 | 2005, mis en ligne le 01 juillet 2011, consulté le 20 octobre 2019.

[9] Question de la propriété de la colline de Byrsa

[10] Mohamed Sadok Bey: de la dynastie Husseinites né le 7 février 1813 au palais du Bardo ou il est mort le 28 octobre 1882 est bey de Tunis de 1859 à 1882.

[11] Mohamed Kassandra: né vers 1810 sur l'ile de Kos et mort le 22 juin 1889 à la Marsa est un homme politique tunisien. Chef du gouvernement de Tunisie a deux reprises: (1881-1882) et pubis (1877-1878)

[12] Le Général Rachid: a dirigé le corps militaire tunisien à la guerre de Crimée entre 1855-1856

[13] Le Général Osman: né en 1810 en Grèce et mort à Monastir en 1867. Il a dirigé le corps militaire tunisien participant à la guerre de Crimée, en alternance avec le général Rachid et le général Mohamed Chaouch

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

archéologiques lors de leurs missions. Deux organismes de l'armée française ont particulièrement contribué à cet effort:

-La brigade topographique: En l'absence des cartes précises du pays, la réalisation des cartes topographiques furent indispensables pour une armée qui connait mal l'intérieur du pays. Ce qui avait identifié lors de la réalisation de la carte topographique de Sousse[14] près d'une cinquantaine des sites archéologiques de l'époque romaine (R.R.). Cependant on ne trouve pas sur la carte aucune mention des vestiges de la période punique et de la période arabo-musulmane.

C'est un important travail d'inventaire archéologique qui sera complété par la suite par la parution de l'Atlas archéologique de la Tunisie[15] (1893) qui avait employé le même support de travail à savoir la carte topographique au 1/50000.[16]

- Le IV -ème régiment des tirailleurs tunisiens: Il vit le jour le 13 juillet 1885 à Sousse. Ce régiment est connu pour son rôle dans la campagne militaire française au Maroc (1908-1913) ainsi que par sa participation à la première guerre mondiale. Au sein du Camp Sabatier de Sousse, les militaires du 4ème régiment des tirailleurs tunisiens ont aménagé un espace dit « Salle d'honneur »[17] dans laquelle sont exposés d'importants objets archéologiques en provenance de la ville de Sousse et de sa région.

3. Un cadre légal pour la détention et la gestion des antiquités

Depuis son établissement en Tunisie, le protectorat français cherchait à imposer une nouvelle législation applicable à tous les habitants de la régence dans tous les domaines. C'est ainsi qu'un nouveau cadre juridique fut promulgué en matière d'antiquités. Ce nouveau cadre juridique se manifestait particulièrement à travers deux décrets importants. Le premier est daté du 12 janvier 1886 qui crée et précise les attributions du Service des Antiquités et alors que celui du 7 mars 1886 fixait les conditions de la détention et de la conservation des antiquités et objets d'art.

- La création du Service des Antiquités de Tunisie est due à Xavier Charmes (1849-1919). Ce dernier chercha depuis son intégration au sein du ministère des travaux publics, en tant que chef cabinet du ministre ; de réorganiser l'Archéologie française en Afrique du Nord et en Egypte. René De La Blanchère fut le premier directeur de ce service (1885-1890). C'est un acte fort pour la conservation des antiquités, le développement de la recherche archéologique et la mise de ses résultats à la disposition des chercheurs et du grand public.

- le décret de 7 mars 1886: il a donné au Service des Antiquités et des Arts la mission de la gestion et de la protection des biens archéologiques, qui était jadis sous tutelle de résident général. Ce décret impose également des autorisations pour tous les travaux ou les fouilles touchant les sites et les monuments historiques et archéologiques (Art. 26).

- le décret de 10 Mars 1887 grâce aux efforts de R. De La Blachère vit le jour le premier classement des monuments antiques et historiques. L'incapacité du Service des Antiquités et des arts à contrôler les atteintes au patrimoine archéologique particulièrement celle en relation avec l'action de la famille et la cour beylicale, semble à l'origine de l'article 2 de ce décret qui accorde au Résidant général la responsabilité de prendre toutes les mesures nécessaires pour protéger les biens archéologiques.

[14] *Carte topographique de Sousse, 1892, feuille n° LVII*

[15] E. Babelon, R. Cagnat et S. Reinach 1893, *Atlas archéologique de la Tunisie*, édition E. Leroux, Paris, 152 p. selon P.A. Février: *Approches du Maghreb romain*, p. 58, R. Cagnat qui dirigea la rédaction de l'AAT était accompagné dans sa compagne archéologique par la brigade topographique.

[16] L'équipe des topographes, dirigée par le Général Derrecagaix, avait pour mission de noter brièvement leurs observations sur les vestiges archéologiques. Des notes qui serviront plus tard aux archéologues de l'Atlas archéologique de la Tunisie. Février Paul -Albert: Approches du Maghreb romain Pouvoirs, différences et conflits, Publisher, Edisud, 1989., p. 60

[17] *Bulletin de la SAS*

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

- Le décret de 8 janvier 1920: il a mis fin à la commercialisation des Antiquités (Art. 14) comme il instaura des lourdes amandes et la peine de prison (Art. 17) contre tous ceux qui portent atteintes aux biens archéologiques.

Tableau 1. Les directeurs du Service des Antiquités et leurs périodes d'exercice

	Directeur du Service des Antiquités et des Arts	Période d'exercice
1	René De La Blachère	1885-1890
2	Georges Doublet	1890-
3	Paul Gauckler	1890-1905
4	Alfred Merlin	1906-1920
5	Louis Poinssot	1921-1942
6	Gilbert-Charles Picard	1942-1956

II. LES MUSEES ARCHEOLOGIQUES A SOUSSE: DE LA DECENTRALISATION A LA CENTRALISATION

1. Le musée municipal de 1899

En 1884, la création de la municipalité de Sousse[18] et l'implication des communautés européennes dans la gestion municipale amena à la création du premier musée à caractère civil dans la ville. Le 24 avril 1899, ce musée est ouvert au public. Il occupait l'ancien marché aux poissons se trouvant à proximité du port et dans la place connue aujourd'hui sous le nom de « place de la Douane ».

2. Difficultés de gestion des antiquités à l'échelle locale:

En dépit de la promulgation du décret du 7 mars 1886 fixant les conditions de la détention et de la conservation des antiquités et objets d'art, des difficultés de gestion des collections archéologique commencent à apparaitre particulièrement avec l'arrivée en Tunisie de Paul Gauckler[19], désigné à la tête du service des Antiquités et d'Arts qui décida de mettre fin aux monopoles de certains sites archéologiques détenus par les ecclésiastiques[20] et certaines sociétés savantes dans le pays[21]. Ces dernières présentaient des gros soucis pour le nouveau directeur du service des Antiquités et d'Arts, A. Merlin qui chercha à délimiter l'action en matière de collecte et détention d'objets archéologiques[22].

A' Sousse, l'une des sociétés savantes la plus active a été fondée en 1902 par Louis Carton . C'est la Société archéologique de Sousse (S.A.S). La plupart des membres de cette société savante sont des notables européens qui s'estimaient supérieurs et qui entendait civiliser un pays dont l'héritage romain rappelle sa dépendance à l'Occident. Le Bulletin de la SAS.

[18] La municipalité de Sousse a été instituée le 16 juillet 1884.

[19] P. Gauckler (1866-1911), agrégé en Histoire et géographie en 1889, il était nommé en 1892 à la tête du Service des Antiquités et d'Arts de la régence de Tunis. P. Gauckler était l'initiateur en Tunisie d'une politique cherchant à impliquer l'Etat dans la recherche archéologique et limiter l'initiative des missionnaires et des amateurs en ce domaine.

[20] Note signée par Alfred Merlin en 1909 sur l'histoire de la fondation des amis de Lavigerie et le statut du musée de Carthage, Source: Série M6, Carton 1, Dossier 551, (1942 1961)

[21] Lettre de Paul Gauckler justifiant son opposition à accorder certaines faveurs à la société archéologique de Sousse, 1903, Source: Série E , Carton 299, Dossier 2, (1903-1904)

[22] Bacha M., *Le patrimoine monumental en Tunisie pendant le protectorat 1881-1914,* Etudier, Sauvegarder et Faire connaître, thèse de doctorat en Histoire, Université Paris IV, Sorbonne, 2004-2005.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

Ce qui poussa A. Merlin, directeur des antiquités et d'Arts, qui craignait le rôle excessif de ces sociétés savantes et des municipalités, adressa une lettre le 30 mars 1908 au secrétaire général du gouvernement tunisien dans laquelle il demande de « définir et régler la situation » des musées municipaux à Sousse, à Sfax et à Kairouan…

Suite à cette correspondance un décret beylical voit le jour le 15 juillet 1908 .Ce décret fait de l'Etat le propriétaire de toutes les collections de ces musées « *soit que les objets proviennent de fouilles exécutées par des services publics ou des sociétés savantes, soit qu'ils aient été donnés par des particuliers* ».

Cette restriction légale n'a pas empêché, toutefois, l'essor de l'archéologie et le développement des fouilles qui fournissent d'avantage des objets archéologiques aux musées, dont la capacité de stockage et d'exposition s'est réduite. D'où une recherche de création des nouveaux musées plus spacieux (projet d'un nouveau musée municipal à Sousse en 1915)

3. La centralisation muséale après la Seconde Guerre mondiale:

En 1943 les dommages qui ont touché le musée municipal et le musée du IVème régiment des tirailleurs à la suite des bombardements du port de la ville (Fig. xx) vont précipiter l'idée de réunir toutes les collections archéologiques dans un endroit sûr et sous la tutelle d'une administration unique[23].

- Conscient des difficultés financières de la municipalité et du pays, L. Foucher[24], chercha à créer un nouveau musée archéologique, une annexe du musée Alaoui.

- le 5 septembre 1950, une suite favorable a été accordée à la création d'une annexe du musée Alaoui à Sousse qui ouvrait ses portes en 1951.

- La fin de la deuxième guerre mondiale marque le début d'une centralisation aussi bien au niveau de la politique muséale qu'au niveau de la conservation et de l'exposition des objets archéologiques.

III. DECOLONISATION ET POLITIQUE MUSEALE:

1. Rupture et politique identitaire de l'après indépendance:

Conscient du message de colonisateur, le nouveau gouvernement tunisien et jusqu'aux années 1970 n'accorda que très peu d'intérêt à l'héritage de l' « Occident colonisateur ».

La décision de la rupture est alors prise: On va garder SAA et on va exclure les agents et chercheurs français. Service sous tutelle du ministère des travaux publics jusqu'à l'année 1963 transférer au ministère de la culture. C'est ainsi que des actions sont menées en faveur de l'héritage orientale du pays (arabo-musulman en particulier). Des nouveaux musées sont fondés pour promouvoir cet héritage comme le musée d'art islamique « Ali Bourguiba » à Monastir (8/8/1958) et le musée « Assad Iben Al Fourat » à Sousse dans la même période. Ce dernier musée présentait une nouvelle attractivité pour les visiteurs du Ribat (voir Pl. xx). Il était installé dans la salle des prières au premier étage du Ribat. Dans son livre, *Waraqat, H.-H. Abedlwahab* déclare qu'il a été à l'origine de sa fondation. L'exposition comprend surtout des stèles funéraires après les restaurations du Ribat, le musée et sa collection ont disparu à la fin des années 1980.

Quant au musée archéologique du Sousse, le gouvernement s'est contenté de fournir, et à la suite de la demande de L. Foucher, quelques locaux situés dans la Kasba pour servir des réserves et des bureaux pour l'administration du musée.

[23] Une grande partie de la collection a été déplacée avant le bombardement de 1942

[24] Louis Foucher: (1918-2003): professeur des Lettres classiques au Lycée des garçons de Sousse, il a réalisé des multiples travaux archéologiques dans la région du Sahel tunisien et en particulier à Sousse et à El-Djem. Il a fini sa carrière en tant que professeur à l'université de Tours, en France.

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

2. Des musées à l'image de leurs visiteurs européens (les années 1970)

La politique identitaire de l'après indépendance, va très vite laisser sa place à un retour de l'intérêt pour l'héritage romain. Ce retour a été motivée par:

- la nouvelle politique d'ouverture économique depuis 1970 lancement d'une politique du capitalisme contrôlé par l'Etat (naissance de la Société hôtelière et touristique de Tunisie).
- La signature de la Tunisie de la Convention du patrimoine mondial (16/11/1972) et son engagement pour la proposition d'inscription de biens culturels situés sur son territoire sur la « Liste du patrimoine mondial ».
- La création de l'A.N.E.P. en 1988 (l'actuelle ANMVPC). C'est un organisme responsable de la gestion et de la promotion des sites et monuments archéologiques.
- la déclaration de la Médina de Sousse (En 1989) en tant que « patrimoine mondial de l'Unesco » va donner un nouvel élan au tourisme archéologique à Sousse et particulièrement à trois de ces monuments archéologiques (le Ribat, la grande mosquée, les catacombes,) ainsi qu'à son musée archéologique.

3. Réaménagement des grands musées tunisiens:

En 2002 et dans le cadre de l'application de la stratégie de l'Etat tunisien pour moderniser le secteur culturel, patrimonial et la promotion du tourisme culturel, un prêt a été accordé par la Banque mondiale à la Tunisie dont le montant s'élève à 19,2 millions d'euros destiné à la gestion et à la valorisation du patrimoine culturel. Ce projet dont la durée a été fixé à qui cinq ans, devait couvrir le réaménagement de six sites et musées archéologiques.

A. Objectifs de réaménagement du musée archéologique de Sousse:

En ce qui concerne le musée archéologique de Sousse, le réaménagement était imposé par une volonté de:

- réhabiliter de la Kasba et la rendre visitable
- décloisonner le musée et le rendre accessible à travers la Médina via la porte Ottomane
- créer une salle dédiée aux expositions temporaires
- création de deux structures l'un pour la restauration de la mosaïque et l'autre pour la conservation préventive des objets stockés dans les réserves du musée.
- création de deux nouveaux circuits de visites.
- application des normes internationales en matière de muséologie et muséographie pour la préservation des objets et des visiteurs.

B. Un Bilan mitigé:

L'emplacement du projet dans une Médina portant le label « Patrimoine mondial », va limiter les choix des architectes et muséographes. En effet les restrictions vont conduire à l'idée de l'implantation sous-terraine du nouveau musée. Un sous-sol qui recèle des vestiges archéologiques.

- la construction de nouveau musée dans la Kasba n'a pas mis fin aux problèmes de conservation de la collection archéologique (proximité de la Mer)
- un problème d'ordre sécuritaire. Entouré par des établissements à vocation militaire et sécuritaire: garnison de Sousse, messe d'officiers, Direction Générale de la Conscription et de la Mobilisation, école de sous-officiers... Alors une cible facile pour les terroristes (Bardo 2015)
- la structure de l'exposition muséale et le choix des œuvres pour l'exposition sont dus à des sociétés étrangères (le personnel du musée n'a pas été consulté).
- Un retard important dans les délais de l'achèvement des travaux de réaménagement (4 ans au moins avec fermeture du musée). Une perte d'au moins de 4 millions de dinars (dont près de 3 millions de dinars de frais supplémentaires et un manque à gagner d' 1 million de dinars relatif aux entrées payantes).

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6

En dépit des nombreux problèmes auxquels se heurter l'établissement du nouveau musée, son ouverture, le 9 juin 2012 va donner un nouvel élan au tourisme culturel dans la ville de Sousse et va s'imposer comme l'attraction archéologique la plus importante dans la ville

CONCLUSION:

En dépit de l'évolution de la politique muséale en Tunisie, il semble que la conservation et la présentation des objets archéologiques l'ont toujours emporté sur le message que doit véhiculer un musée et transmettre aux générations futures. Ce message qui doit être authentique et exprimant une certaine identité propre, reste le point faible de nos musées qui continuent d'ailleurs à transmettre, consciemment ou inconsciemment, un message hérité de la période coloniale et qui nous croyons correspondre aux attentes aux visiteurs étrangers.

Nous avons mené en 2019 une enquête auprès des visiteurs du musée archéologique de Sousse[25] pour en identifier les profils:

- Une femme âgée du plus de 60 souvent de nationalité européenne (souvent française)
- Un Tunisien adulte (40-45 ans), actif installé dans la région du Sahel ou celle de Sfax
- Un Maghrébin adulte (+ 30 ans) actif et de nationalité algérienne
- Une étudiante de 20 à 25 ans

→ Un constat qui doit nous inviter à travailler davantage sur plusieurs catégories de la population tunisienne pour lesquelles le musée reste un endroit inaccessible, hautain et qui ne concerne que des catégories sociales ayant un certain niveau intellectuel. La démocratisation de la culture a encore un bon chemin à parcourir.

BIBLIOGRAPHIE:

- Anabases [En ligne], 2 | 2005, mis en ligne le 01 juillet 2011, consulté le 20 octobre 2019.
- Bacha, M, *Le patrimoine monumental en Tunisie pendant le protectorat 1881-1914, Etudier, Sauvegarder et Faire connaître*, thèse de doctorat en Histoire, Université Paris IV, Sorbonne, 2004-2005.
- Ben Moussa S., *Profils des visiteurs du musée archéologique de Sousse.*(à paraître)
- Carte topographique de Sousse, 1892, feuille n° LVII
- Babelon, E., R. Cagnat et S. Reinach 1893, *Atlas archéologique de la Tunisie*, édition Leroux, Paris, 152 p.
- Février, Paul -Albert, *Approches du Maghreb romain Pouvoirs, différences et conflits*, Edisud Publisher, 1989.
- JAÏDI, Houcine*. La création du Service des Antiquités de Tunisie: contexte et particularités* In: Autour du fonds Poinssot: Lumières sur l'archéologie tunisienne (1870-1980) [en ligne]. Paris: Publications de l'Institut national d'histoire de l'art, 2017 (généré le 27 juillet 2023). ISBN: 9782917902608. https://doi.org/10.4000/books.inha. 7157.
- Musée de Carthage, Source: Série M6, Carton 1, Dossier 551 (1942 1961)
- Société archéologique de Sousse, 1903, Source: Série E, Carton 299, Dossier 2, (1903-1904)
- Tessier, Georges, *Notice sur la vie et les travaux de M. Alfred Merlin*, Comptes rendus des séances de l'Académie des inscriptions et Belles –Lettres,109 année, N.2, 1965

[25] Ben Moussa S., *Profils des visiteurs du musée archéologique de Sousse.*(à paraître)

Conclusions: Vers une Europe résiliente et inclusive *(French)*

L'Union européenne est aujourd'hui confrontée à de multiples défis, allant des menaces hybrides et de la migration aux exigences d'alignement législatif des pays candidats. L'élargissement de l'UE reste un enjeu stratégique majeur, nécessitant non seulement des réformes économiques et juridiques mais aussi une intégration socioculturelle approfondie.

Les contributions de ce volume mettent en lumière les efforts déployés par la Géorgie pour aligner son cadre législatif et institutionnel sur les normes européennes. Elles illustrent également comment la protection des droits fondamentaux, la lutte contre les inégalités de genre et l'harmonisation des politiques économiques et énergétiques sont essentielles pour garantir une adhésion réussie et durable.

Une Union européenne résiliente ne peut se construire sans une coopération renforcée entre les États membres et les pays candidats. Il est impératif de conjuguer sécurité, gouvernance démocratique et développement durable pour préserver les valeurs fondamentales de l'Union. Ce volume contribue ainsi à la réflexion sur l'avenir de l'intégration européenne et les conditions d'un élargissement réussi et inclusif.

Conclusions: Towards a Resilient and Inclusive Europe *(English)*

The European Union today faces multiple challenges, ranging from hybrid threats and migration to the legislative alignment requirements of candidate countries. EU enlargement remains a major strategic issue, requiring not only economic and legal reforms but also deeper socio-cultural integration.

The contributions in this volume highlight Georgia's efforts to align its legislative and institutional framework with European standards. They also illustrate how protecting fundamental rights, addressing gender inequalities, and harmonizing economic and energy policies are essential for ensuring a successful and sustainable accession process.

A resilient European Union cannot be built without strengthened cooperation between member states and candidate countries. It is crucial to combine security, democratic governance, and sustainable development to uphold the Union's core values. This volume thus contributes to the ongoing reflection on the future of European integration and the conditions for successful and inclusive enlargement.

DR. MIHAELA NATEA, DR. SIMION COSTEA[1]

[1] UMFST, Romania

Print ISSN 0248-2851 • On-line/Linking ISSN 2743-4052 • ISBN 978-630-354-001-6