

The Tbilisi City Court Decision of May 31, 2016, Case No.2/3710-16

Subject: Transaction Made by Mistake,
Contract of sale,
Unjustified enrichment

Defined norms:

Articles 72, 73, 976 of the Civil Code (CC)³

Important Facts of the Case:

R.B. has addressed to currency exchange office owned by “J-a” LLC, located in Tbilisi to exchange 500 US dollars where the dollar was purchased “at first sight with the highest”⁴ exchange rate. He handed 500 USD to a woman, that worked at the currency exchange office who, in turn, gave him 1020 GEL. R.B.'s expectation was to receive 1200 GEL. He protested instantly there, but he was answered that the currency exchange office was purchasing dollar for this price and since the operator had already drawn a cheque, the money (500 USD) could not be returned.

Neither R.B. agreed to take 1020 GEL, nor the operator was willing to return the exchanged amount. To prevent provocation and conflict, R.B. called Patrol Police, who confirmed that the "less" money was still on the spot and R.B. only after this took it. The Patrol Police claimed that they had many analogous calls for similar cases.

R.B. demanded compensation of 180 GEL for material damages before the Court, because the transaction was made by deceit.

Court Interpretations:

According to the Court's explanation, a contract of sale was concluded between the parties under Article 477 of CC. In addition, according to Article 72 of the CC, the transaction may become voidable if the declaration of intent has been made based on a substantial mistake. The Court clarifies that the content of the declared intent is as such as it would be understood by an addressee considering the principle of good faith and market circulation. While discussing the mistake, the judge points out that it exists when "the person's real and expressed intent do not coincide with each other" and it is substantial when considering the objective circumstances, such expression of the intent will not be made (or it will be declared otherwise) knowing the real circumstances of the case.

The Court indicates to the established factual circumstances according to which, on the one hand, the rate set by the National Bank on that day (published on the official website) amounted to 2.4067 GEL for 1 USD and, on the other hand, on witness testimony, who confirmed that R.B. demanded transfer of 1200 GEL from the cashier-operator, after which the patrol was called; The latter

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³ Georgian Law form 1997 No.786, Civil Code. Available at <<https://matsne.gov.ge/document/view/31702?publication=103>>.

⁴ It is assumed that the current rate was written at the entrance of the currency exchange office on the signboard, by which the exchanger operated. In the court decision, the term "at first sight" tends to be used for the purpose that, as the context outlines, 2.04 GEL for 1 USD was indicated as the price of the currency purchase by the currency exchange office, which is visually quite similar to 2.40 GEL. The latter was ultimately the desired price for R.B.

explained that a similar case was observed several times at that day. Consequently, the judge states that knowing this circumstance, the claimant R.B. would not declare the intent at all.

In the Court's opinion, taking into account the principle of good faith and market circulation, the cashier had to return 1200 GEL to R.B.

The Court reasons claimant's claim of 180 GEL based on Article 976 of CC and considers that the defendant was enriched by this amount of money since enrichment as the result is illegal, i.e. the situation is such in respect to the defendant that "the defendant must not have a legitimate opportunity to misappropriate property without compensation."

Commentary:

First of all, it should be noted that taking into consideration the widespread practices pursued by the currency exchange offices, the situation is such that it can be regarded as unfavorable in terms of consumer protection. Occasionally, relying on the principle of freedom of the contract entrepreneurial entities who follow such activities are abusing the general mechanism of the formation of a contract established by the Civil Code, which is intended to regulate the relationship between substantially equal subjects; Use such marketing visual methods that can easily mislead potential contracting parties, especially the inexperienced individuals. This often happens, the clear example of which we have in this case. Consequently, the pathos of Court's decision is completely acceptable, although the legal structures and arguments through which the Court has come to the result may be questioned by the following remarks:

1. Voidable transaction made by mistake or unconcluded contract?

The actions taken to conclude a contract by the plaintiff and defendant provide an opportunity for an alternative qualification. If we follow the logic of the CC, which derives from the regulation of conclusion of the contract through the standard mechanism - the offer and the acceptance, we will get the following picture: the assumption mentioned above was that the currency exchange office had written exchange rate 2.04 GEL for 1 USD - on the signboard. According to Article 329, II of the CC a proposal addressed to an unspecified circle of persons (*invitatio ad offerendum*) is not binding and is distinguished from the offer at the legislative level.⁵ Two things are considered to be differentiating criteria: a) specification of the addressee(s) and b) intent to be bound. It is clear that the exchange rate usually demonstrated by currency exchange offices on the signboard outside or inside are intended for all potential clients and this part is difficult to interpret otherwise. As for intent to be bound, which the law and also doctrine⁶ indicate to, there may be different opinions about it. The content of the signboard is mostly limited to the rate of a particular currency at a given moment and thus, there is no reference to the "direct" binding in the offer. There is another question whether from the accompanying circumstances, the conclusion can be made that by demonstrating the rate currency exchanger undertakes an unconditional obligation to conclude a transaction with any person who wishes it. Argumentation can be made in both directions. In favor of the obligatory nature of the demonstrated rate by the offeror it can be said that the value of the transactions made in such currency exchange offices is not so high that arises assumption from the consumer's point that the offeror of the rate is ready to make transaction virtually with anyone, however there are opposite arguments that condemn this conclusion; In particular, the rate is dynamic and the offeror

⁵ Obviously, it is about the invitation from the content of which the unambiguous intent to be bound does not derive - "... unless otherwise is expressly indicated in this proposal" (the condition given in section 2 of the mentioned norm).

⁶ see. *Baghishvili, E.*, Commentary to Article 329 of the CC, part III, 19th and following fields, joint project of German Corporation for International Cooperation (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH) and United States Agency for International Development's Judicial Independence and Legal Empowerment Project and Promoting Rule of Law in Georgia project, 6 and following.

also depends on the market price; In practice the last often changes several times a day, and this is caused by fluctuations in the market, which accompanies an unstable financial market that is still at the stage of development. In addition, the argument on the willingness to make a transaction with anyone because of at a lower price is fragile itself and does not exclude the expiry of the financial resources of the particular exchanger at the specified time. Consequently, it is more logical to conclude that the rate shown on the signboard is an invitation on offer and not a binding offering.

Abovementioned analysis lead to state that, in the given situation, handing 500 USD to the operator by R.B. shall be qualified as offer in accordance with Article 329 I, and addressee's acceptance which was necessary to conclude a contract according to Article 330, I. Before moving itself to the issue of acceptance, it is important to determine if there is any obstacle to make qualification of the claimant's action as offer. We are taking into consideration its content, since the offer is such declaration of will that includes all the essential terms of the contract to be concluded (*essentialia negotii*) in accordance with Article 327, I of the CC and responding on which can be made by a simple consent.⁷ Handing over the amount of money to the operator as a concludent form of expression of will, in itself includes one essential condition for the sale agreement, namely the thing which the offeror wants to sell, however, according to Article 477, I, II of CC, there must be second essential condition – the price. It is likely assumable that about price component R.B's inner will was formulated according to the content shown on the signboard and logically for the exchanger the fact of handing money shall mean that the client has considered the offer indicated on the signboard, otherwise at least some communication on different price should exist between the parties. Hence, deriving from the accompanying circumstances objectively understood content regarding price component for the operator is exactly the rate shown on the signboard.

Operator's action, which was expressed in returning of 1020 GEL, in turn, is an acceptance made before a present person and thus the contract is deemed to be concluded under the terms of 500 USD for 1020 GEL.

Nevertheless, other objective circumstances in the context can lead us to a different legal assessment of the development of events. Videlicet, if we deem that it is an established factual circumstance, that the currency exchange office as a person acting in the field of currency operations, should have known that the rate offered on the signboard by him (2.04 GEL) was significantly different from the rate announced by the National Bank (2.4 GEL). The latter is usually lower in practice than the one offered to the consumers by private exchangers, the respondent shall have known that it was highly probable the offeror would not agree on the price proposed on the signboard, because the source of the formation of the content of his inner intent envisaged better conditions. That was why the exchange office could only be in good faith if it assumed that the consumer had considered the price offered on the signboard, unless there was another alternative and the offer was made, regardless of the price indicated on the signboard.

All of this prompts us to consider that giving back 1020 GEL is more acceptance with changed terms under Article 333, II of the CC (which, in turn, is a new offer that requires further acceptance from R.B.) than the final consent by which the contract was concluded. Consequently, according to this logic, the agreement did not take place because the plaintiff counted the amount supplied, finding that the proposal was unacceptable to him and denied the offer. Many factual circumstances prove this. Hence, it is a fact of paying 500 USD without an obligation that is subject to be returned based on Articles 385 and 976 of CC.⁸

⁷ "Completeness criterion" – compare *ibid*, 2; also, *Markesinis, B., Unberath H., Johnston A.*, German Law of Contracts, A Comparative Treatise, 2nd ed., Hart Publishing, 2006, 59.

⁸ However, property law aspect should be considered here as the notion of unjustified enrichment shall include the enrichment component that in our case means the increase of the property of the currency exchange office should have taken place that was to be expressed in acquiring ownership on paid 500 US dollars. According to the Article 186 of CC, (see different context on this problem Kereselidze D., Using unjustified enrichment norms, Georgian Law Review (journal), 6/2003-4, Tbilisi, 600 and following (in Georgian)) Delivery of the thing shall be grounded on "valid right", that is absent in our case, so correctness of using Article 976 of CC is questionable, however, money is itself peculiar movable property (considering its consumable nature) and Article 385 of CC as special norm specifically indicates to possibility of

The possibility of the first presented alternative is based on the condition that the exchange office had declared its proposal through the signboard, that can only be assumed, and in the direct form, as it was mentioned, is not provided in the text of the decision. While there is no such assumption, it is clear that there was no talking about any kind of information from the exchange office, which could be able to establish an inner intent of R.B. in advance regarding the content of the contract to be concluded with the particular exchanger. In this case, logically, the reasonable person may rely on the official exchange rate of the National Bank, but it should also be taken into consideration that (as already mentioned above) the price in the currency exchange offices is almost always more beneficial than the National Bank's and this nuance should not have been unknown for R.B. However, only handing money without any word can hardly automatically mean the "offer" meets the criteria of "completeness". It is very difficult to prove that the owner of the currency exchange office should have assumed that the source of the formation of inner intent of the consumer was the rate set by the National Bank and without any word this content was part of the offer. Even if the giving money is an offer, returning 1020 GEL will be an acceptance with the changed terms. From the different point of interpretation, the money transfer is simply an action which cannot be qualified as an offer and returning 1020 GEL is the first offer which was refused by R.B.

2. Mistake or deceit?

The Court argued that the claimant had made a voidable transaction by a substantial mistake according to Articles 72 and 73 of the CC. This opinion should mean automatically that the consensus is finalised in the form of offer and acceptance as unilateral transactions are already entered into force that is needed for the formation of the contract. Practically in this example, according to the judge's opinion, the last act (acceptance), by which the obligation-legal relationship was formed (Conclusion of sale contract) was handing 1020 GEL to R.B. by the operator through which the buyer of the US Dollar (or the seller of Lari, in case of qualification the contract as "Barter" in accordance with Article 521, I, of CC) agreed on offer and at the same time also performed undertaken obligation on transfer of the thing (made the thing available to the contracting party). Besides that we should consider supposition as necessary precondition that currency exchange office should have made accessible its desirable rate - 2.04 GEL for 1 USD - to make it logical to prove that handing amount of money by R.B. contained this content in itself; Otherwise, the operator could not suppose that the transfer of money by R.B. was in accordance with the office's desired rate (the content of the expression of the intent from the objective view of the recipient⁹). Consequently, we should come out of this combination when discussing of the existence of the mistake. Otherwise, we will get a picture that rate announced by the National Bank on which the judge indicates, is mandatory for all currency exchangers regardless of the accompanying circumstances and the willingness of the parties;¹⁰ This conclusion will be contradictory to the freedom of the determining contents of the contract and that is completely inadmissible.

launching unjustified enrichment regime and ignorance of the enrichment component may be justifiable in such cases. This argument still leaves doubts about its correctness, since the consumable nature of the item is relevant when there is possibility of its use by the owner/detentor that causes its destruction and creates the actual situation substantially close to the owner's position (at least in the third parties to whom disposing actions are related). This view is less appropriate for a particular case and we should think about whether for recovering of the amount of money using property law regime is more correct – implying vindication claim based on Article 172, I of CC. Note the legal ground of this claim's concurrent nature with the unjustified enrichment norms see: Schnitger H., Unjustified enrichment, document is prepared within the scope of EU project: „Promotion of development of private and administrative systems in Georgia“, 6, (in Georgian) Available at: <<http://eulegalreform.ge/wp-content/uploads/5-Heinrich-Schnitger-Vortrag-Unjust-enrichment-ge.pdf>>.

⁹ Method of interpretation of unilateral intent that needs to be received – expressed content; derive from Article 52 of CC. Compare *Chanturia L.*, Commentary to the Article 52 of the CC, 13th and 14th fields, supra note 6, 4, 5.

¹⁰ This assumption is strengthened by the current practice of currency exchange offices' activity, mostly the glowing list of different currencies on the outside of the trading window (on the façade, signboard) to attract customers. At the same time, such form of providing of information should be partly determined by the regulations of the President of the National Bank of Georgia at the moment of the rendering the decision we are analysing. We mean order №27/04 of February 7, 2012 on approval of Registration and Regulating Rules for Currency Exchange Offices (Available at: <<https://matsne.gov.ge/ka/document/view/1580942>>); According to Article 5, II, i) of this document, it is currency exchanger's obligation to „...provide consumers with full information about the currency exchange rate and service commission fee (if any)“. Also, attention is paid to providing information on the existence of commission fee. At the moment of hearing the dispute demand for placing the information on the visible place concerned only the amount of commission. This situation was cardinally changed in a few months (by October 5, 2016) by adopted amendments and

In general, the person is mistaken, if his inner desire is different from the expression in terms of the meaning¹¹ which is determined by the interpretation. In this case, the content of R.B.'s action - handing money to the operator - from the subjective viewpoint (1 USD = 2,4 GEL), was divergent from objectively perceptible content (1 USD = 2,04 GEL).

It is necessary to emphasize that we are talking about the sale contract where the US dollar is an object of the transaction; The mistake of R.B. was related to the price of this object, which is not considered to be a feature of the object because this is not its constituent feature.¹² The legal reasoning of the mistake was not made based on Article 74, II of the CC. The Court explains that there has been a substantial mistake, but no further specifies which case regulated by Article 73 of the CC it implies (since the summary of the norm is completely and exactly cited in the decision). Probably due to the circumstances of the case, the Court had considered it to be a mistake envisaged in subparagraph a) (declaration mistake); According to the doctrinal opinion, by the broad interpretation of the norm, it should include so-called "mismatch"¹³, when the expressor of intent does not know what he/she expresses and in case of knowing it, he/she will not have expressed it.¹⁴ That is different from mistake in content (Article 73, b)), when the expressor of intent knows and wants what he/she expresses, however, makes a mistake in externalizing (word, action) of intent's content.

obligation to demonstrate the information with commission on the visible place was added amount of rate and the so called "notable rate" (more than 3% of the difference between selling and buying (Article 1¹¹)) (the amendment order is available at: <<https://matsne.gov.ge/ka/document/view/3406902>>). The subject of a separate discussion is the subparagraph f) of paragraph 2 of the same Article, which again (but uselessly) refers to the protecting of III¹ chapter requirements of repealed Law on the Protection of Consumers' Rights (Available at: <<https://matsne.gov.ge/en/document/view/32974>> III¹ for the Protection of its. According its provisions (Article 34³), the consumer was authorized before leaving the place of execution of currency exchange operations (in case of not fully being informed by the contracting party before concluding contract), and repudiate a contract within 30 minutes in case of failure to provide information and return the amount, as well as the commission. The Order №27/04 of the President of the National Bank of Georgia of February 7, 2012 on approval of Registration and Regulating Rules for Currency Exchange Offices was repealed by the order №37/04 of the President of the National Bank of Georgia of February 28, 2018 on approval of Registration and Regulating Rules for Currency Exchange Offices (available at <https://matsne.gov.ge/ka/document/view/4081097>) and by the same Order Registration and Regulating Rules for Currency Exchange Office was approved that came into force immediately from the moment of its publication, as it is stated in Article 3 of the order, "due to necessity to establish rule for informing consumers during providing services and for canceling currency exchange operation the obligation to determine it is envisaged in the Organic Law of Georgia on the National Bank of Georgia." Particularly, according to paragraph 1 of Article 50¹ of the Organic Law of Georgia on the National Bank of Georgia (available at <<https://matsne.gov.ge/document/view/101044>>) "while providing service a currency exchanger is obliged to give full information to consumer about currency exchange rate and amount of commission fee (if any) for service." Paragraph 2 of 50¹ Article indicates that "cancellation of currency exchange operation and returning of exchanged currency may be conducted in accordance with the rule envisaged in paragraph 3 of this Article", while according to paragraph 3 itself, "the National Bank determines rules for for informing consumers during providing services by currency exchange offices and for canceling currency exchange operation". The last norm was implemented by the order №37/04 of the President of the National Bank of Georgia of February 28, 2018. According to Article 7, VI of Registration and Regulating Rules for Currency Exchange Offices that is approved by this order, "office/branch is obliged to orally give full information to consumer about currency exchange notable rate and amount of commission fee (if any) for service." Subparagraphs I b.d) and VI g) establish obligation to demonstrate the following information at the cash desk or in the receipt: "Transaction can be cancelled within 30 minutes after you receive the receipt!" The abovementioned subparagraphs I b.d) and VI g) were amended by the order №60/04 of the President of the National Bank of Georgia of April 5, 2018 (available at <<https://matsne.gov.ge/ka/document/view/4131065>>) and the maximum limit of the transaction value for unconditional cancellation of the transaction within 30 minutes after receiving the receipt was determined, in particular, aforementioned subparagraphs are formed as follows: "Transaction can be canceled within 30 minutes after receiving of the receipt if the transaction value does not exceed 5000 GEL or its equivalent in foreign currency!"

¹¹ That is completely fairly noted in the decision text. Compare *Darjania, T.*, Commentary to Article 72 of the CC, 1st field, supra note 6, 1.

¹² Referring to German practice see *Darjania, T.*, Commentary to Article 74 of the CC, 15th field, supra note 6, 7; also, *Kropholler, J.*, Commentary to the Paragraph 119, 13th field, German Civil Code, Teaching Commentary, *Chechelashvili, Z.*, (transl.), 13th revised edition, published by GYLA's Foundation for the support of Legal Education with the mandate of GIZ, Tbilisi, 2014, 43.

¹³ *Kereselidze, D.*, General Systemic Concept of Private Paw, Institute of European and Comparative Law, Tbilisi, 2009, 325.

¹⁴ The text in the decision also confirms this: "The party's erroneous assumption about the composition of the case".

This composition allows to rescind and make the transaction void, but according to Article 72 of the CC, at least it is thinkable that the contracting party would have right to have damage compensated that is caused by disappointing trust due to the negligence of the person having the right to rescind. Consequently, hypothetically an entrepreneur, who thought that the transaction was irreversibly valid, and paid for example the income tax, suffers damages and it may become a basis for lodging a counterclaim at the trial. Establishing such practice should be less desirable, since mostly transactions of given content have consumer nature and initially there is an experienced entrepreneur in a particular sphere that is perfectly informed and experienced in the activities and characteristics of the market, on the one hand; and on the other hand, the consumer who makes a transaction for his/her own needs.

Due to the specificity of the situation, there arises another question: it is a transaction made by mistake or deceit, since the specifics of the circumstances may outline a mistake that is intentionally caused by currency exchanger to encourage the potential client in declaring intent.

Before defining these details it is necessary to note that the composition, which takes place in the decision, is not obviously a relationship between two equal subjects. It is a consumer transaction because, on the one hand, the currency exchange office is an entrepreneur, who operating within its professional activities has more market power,¹⁵ while the consumer is the one who makes a transaction for his/her personal needs. This situation creates a necessity of a special "weak" party-oriented regulation and, therefore, the present background in terms of legislative vacuum,¹⁶ is granted a special meaning in applying the existing norms. One of the main components of the weakness of the consumer is the lack of information, which enables him to make an informed decision that is carried out through comparing alternatives.¹⁷ The context of the consumer transaction, where there is a special obligation to provide information, is shown in the abovementioned normative acts on the activities of the currency exchange offices. The obligation to provide information to the customer is distinguished from the general obligation of diligence provided in Article 318 of the CC at the pre-contractual stage. In fact, by this article, the obligation to provide information to the contracting party is not envisaged at all,¹⁸ as it may be that the parties

¹⁵ See Constitutional Court's №1/3/136 decision of December 30, 2002 in which a consumer is distinguished as weak party and related the special normative regulation regime is underlined. Available at: <<http://constcourt.ge/ge/legal-acts/judgments/saqartvelos-moqalaqe-shalva-natelashvili-saqartvelos-parlamentis-saqartvelos-prezidentisa-da-saqartvelos-energetikis-maregulirebeli-erovnuli-komisiis-semekis-winaagmdeg-103.page>>. For the European concept of "weak party" see case C-137/08 - VB Pénzügyi Lizing of 2010 of European Court of Justice of (ECJ) in which less powerful position and the lack of information in the negotiation are named as factors causing unequal position of the consumer.

¹⁶ The term "consumer" (e.g. Article 336 of the CC), "final consumer" (№6157-1b Law of Georgia - Product Safety and Free Movement Code of 2012 Available at: <<https://matsne.gov.ge/ka/document/view/1659419>>) is still used for separate purposes, "Final User" by the legislator after the Law on the Protection of Consumers' Rights (see supra note 7) was repealed and there is no uniform term of consumer. Definition of a consumer corresponding to modern European standards was given in №35/04 Order of 2011 of the President of the National Bank of Georgia on Approval of the Rules of Providing Information to the Customers by Commercial Banks while providing Banking Services: "Receiver of banking services or natural person with such intent except one pursuant to the purposes of trade, entrepreneurial and professional activities" (Available at: <<https://matsne.gov.ge/ka/document/view/1326445>>). Evidently, the list of terms is not exhaustive. The last normative act is invalid; It was replaced by Order №151/04 of the same body of 2016 on the approval of the Rules of Protection of Consumer's Rights while providing service by Financial Organizations, in which the notion of the consumer is expanded and in addition to natural person making transaction due to personal needs, the legal entity is also considered to be included in it, which indicates a higher standard of protection. It is necessary to note that this normative act was not effective at the time of rendering the reviewed decision, and therefore the Court was not able to use its requirements.

¹⁷ About European Union concept of "informed consumer" see. *Reich, N. Micklitz, H. W., Rott, P., Tonner, K.*, European Consumer Law, 2nd Edition, Itersentia 2014, 45. The concept provides for the opportunity of free decision making.

¹⁸ Compare *Kereselidze, D.*, supra note 13, 342.

are motivated by antagonistic interests.¹⁹ It is notable that for the purposes of justice, even considering minimum regulatory nature of the general regulation, the circumstances of the reviewed case may be subsumed into the composition of Article 318 of the CC. In particular, the obligation of the currency exchange office was to disclose to the contracting party the information having “significance for determining the content of the obligation”; indeed, it is information about the purchase price, however, in this case, the special rules - the rule for “...obligation providing full information” about currency exchange rate defined by the order No.27/04 of 2012.

Whether there is the fact of non-disclosure of information may be matter of debate in this case. Specifically, showing the information on the currency rate signboard *per se* if it is evident from the circumstances that the currency exchange office’s rate is final for the purpose of making transaction (in accordance with Article 329, I of CC), leads us to make a conclusion that the obligation of information disclosure is nominally performed. The rate 1 USD = 2,44 lari is unambiguous, but it is another issue if it is “full” (according to the requirements of order No.27/04). Whether the currency exchange office had an obligation to inform the customer about the difference between this rate and the rate declared by the National Bank should be made as another question. Positive answer would have resulted in the conclusion that the entrepreneur violated a pre-contractual obligation that deprived consumer opportunity to make a free choice. This opinion can be challenged by the fact that the unambiguousness reflected in numbers can hardly create misunderstanding for the normal market participant and someone who cannot make easy multiplication is not able to impose his/her negligence to another party.

Although, it should be taken into consideration that the rate shown on the signboard is *invitatio ad offerendum* and from the another perspective, on the one hand, it is advertising according to the applicable legislation.²⁰ Advertising is subject to the specific requirements, namely its content must not “intentionally” mislead the recipient (advertising customer”).²¹ Misleading advertising is a type of improper advertising and its dissemination is prohibited by paragraph 8 of Article 4 of the Law. The first thing that is necessary in this case is that advertising should be able to objectively cause misleading; It must be done using such a method that causes the inadequate subjective perception of reality in the recipient. Consequently, the analysis of the circumstances in connection with this thesis should be made in such way to determine whether the combination of numerals denoting the rate could have visually created an incorrect impression for the consumers regarding the price. It is easily possible that the combination of numbers - 2,04, as a way, could make a false association in consumer, who considering the circumstances had expectations to concluding transaction with price of minimum of 2,4 GEL.²² The component of visual perception can be decisive in such cases as the

¹⁹ Compare *Kropholler, I.*, Commentary to the Paragraph 123, 4th field, *supra* note 12, 47.

²⁰ Law of Georgia No.1228 on Advertising of 1998, Article 3, I. Available at: <<https://matsne.gov.ge/ka/document/view/31840>>.

²¹ Paragraph 6 of Article 3 of the Law: “Misleading advertising – advertisement by which an advertising customer (a producer and/or a disseminator of advertisement) intentionally misleads consumers of advertisement and which may harm a competitor”. This provision is sort of reflection of concept given in European Parliament and the Council’s Directive 2006/114/EC of December 12, 2006 concerning misleading and comparative advertising (text is available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0021:0027:EN:PDF>>). Georgia has undertaken the duty to fully implement this Directive by the Association Agreement. Available at: <<https://matsne.gov.ge/ka/document/view/2496959>>. It is noteworthy that, alongside this Directive, which although at the time of adopting Law of Georgia on Advertising (implying its predecessor, Directive 84/450/EEC containing the same provisions), was applicable to transactions between consumers and business, now only regulates the relations between entrepreneurs. Regarding consumer transactions is applicable significantly detailed Directive 2005/29/EC (Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF>>) which also shall be transposed in Georgian legislation.

²² When talking about deceit the location of the currency exchange office and absence of other offices and similar signboards can be influencing. If the other traders had signboards with a similar visibility and were making transactions with rate approximated to and different from the rate announced by the National Bank, the difference only by thousandths, e.g. “2.401” (which is a frequent practice), then a person can easily be deceived in a real course that visually looked like others’; And on the contrary, if the currency exchange office was situated separately, without any other signboards around it, then the currency trader may be more likely to justify its action by the motive that the diligent

possibility of misleading generally indicates that the person who publishes such information can act *bona fide* only if offeror additionally explains the recipient about his/her actual desire. Adhering this as already mentioned above, the given composition cannot even satisfy the requirement of Article 318 of the CC, which, again goes to the indetermination of transaction's content. Obviously, if a potential contracting party violates the statutory obligation of information disclosure by intentionally neglecting to emphasize the significant difference between rates by the offeror, necessary composition for qualifying it as misleading advertising exists.

According to Law of Georgia on Advertising, to qualify the rate shown on the signboard as a "misleading" advertising two pre-conditions remain in the assessment of the entrepreneur's action: "intention" and the ability to harm the competitor. Among them, the fault is decisive for qualifying deception.

The subjective component, the intent may have two degrees: direct (*dolus directus*) and eventual/indirect (*dolus eventualis*).^{23/24} In both cases the understanding of the action and the consequence are evident. In the first case, the subject is acting with the desire of occurrence of the consequence or foresees the inevitability of the consequence, while in the second case, the result is permitted by indifferent attitude. One of the high degrees of negligence (*luxuria*) is very similar to the content of eventual intention, because the consequences are consciously permitted, but at this time it lacks the tortfeasor's indifference.

In the discussed example, it is less controversial that the currency exchange office had published the rate on signboard unconsciously; It is also probable that it wanted to make a transaction with this content, this is evident not only due to refusal to return the money to the client when the latter protested but also the patrol's testimony that they had to respond many times to such cases. Rate's visual similarity with the official exchange rate as a method of misleading was also used consciously. When the client performs voluntary actions the silence on the difference between the rates additionally indicates that, the operator's action was directed towards the outcome to lead the recipient to declare appropriate intent.

The analysis given above suggests in favor of a transaction made by deceit. Thus, the Court's conclusions about the transaction made by mistake appear to be less convincing.

consumer should be more attentive when looking at the offer because there was only one signboard in his/her vision area and could not cause misunderstanding.

²³ *Markesinis, B. S., Unberath, U.*, supra note 7, 84.

²⁴ Distinguishing is made in accordance with the Article 9 of the Law No. 2287 of 1999, the Criminal Code of Georgia. Available at: <<https://matsne.gov.ge/ka/document/view/16426>>.