

ANALYSIS OF THE DERIVATIVE ACTION MECHANISM AND ITS APPLICATION IN THE EUROPEAN UNION LEGAL SYSTEM

ABSTRACT: The primary objective of this paper is the scientific research and critical analysis of the derivative action as a specific procedural legal instrument for protecting the pecuniary interests of companies with state-owned capital. The study seeks to determine how this mechanism, which inherently derogates fundamental corporate principles of majority rule, can function as an effective tool for safeguarding public resources against the misconduct of management bodies. The significance of the study arises from the normative imprecision of the domestic regulatory framework and the marginal application of derivative actions in the practice of the Republic of Serbia, despite its significant potential to curb corporate corruption and enhance transparency in state asset management. The methodological framework is based on a multidisciplinary approach. A legal-dogmatic method was applied to analyze relevant regulations, alongside a comparative-legal approach covering the models of Germany, England, and Serbia. Through content analysis of relevant case law and EU directives, modern trends in minority shareholder protection were explored. Additionally, a teleological method was employed to determine the social purpose of the institute within the context of public property protection, while the method of analysis and synthesis deconstructed the complex procedural-legal relationships among the company, management,

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and minority members, enabling the formulation of coherent legislative proposals. Findings indicate that the key barriers to the effective application of derivative actions in Serbia include high litigation costs, information asymmetry, and the risk of abuse of procedural powers. A comparative analysis of European Union models confirms that high-functioning systems implement mechanisms for preliminary judicial review of admissibility and precisely regulated cost allocation, establishing a balance between preventing corporate obstruction and ensuring effective judicial protection for bona fide members. In conclusion, this research provides specific normative proposals for reforming domestic legislation in alignment with European standards, aiming to strengthen corporate accountability within the public sector.

Keywords: *derivative action, state capital, European Union, company law and management liability.*

1. Introduction

In the contemporary economic environment, companies with state-owned capital represent a specific hybrid model that combines a market orientation with the protection of the broader public interest. Effective management of these entities is not only a matter of corporate success but also of responsible disposal of public resources. However, practical experiences often point to a deep gap between proclaimed goals and the actual actions of management bodies, which often fail to protect the interests of the company itself. In such circumstances, the derivative action is established as a subsidiary procedural legal corrective that allows minority members to independently initiate judicial protection of the collective interests of the business entity.

Traditional institutions of internal control often become dysfunctional due to the inherent paralysis of decision-making, which occurs when the holders of management authority, primarily responsible for initiating procedures for the protection of society, are simultaneously the subjects responsible for the resulting property damage. In such circumstances, a derivative lawsuit is constituted as a subsidiary procedural legal remedy that allows minority members of society, acting as procedural substitutes, to independently initiate mechanisms for the judicial protection of the collective interests of a business entity.

Although it is recognized in theory as a powerful instrument of corporate discipline, the application of a derivative lawsuit in the legal system of the

Republic of Serbia remains on the margins, burdened by normative vagueness and high procedural barriers. On the other hand, the comparative practice of the European Union offers different models of balance between the protection of minority rights and the prevention of abuse of procedural powers, which can serve as a roadmap for the necessary reforms.

The subject of this research is a comprehensive analysis of the legal framework and practical aspects of the application of derivative claims, with a special emphasis on the specificities of entities with state shares. The aim of the paper is to offer scientifically based recommendations for the improvement of domestic legislation, through the prism of European standards and the most successful comparative solutions, thereby ensuring greater responsibility in the management of public property interests and strengthening the integrity of the corporate sector.

2. Theoretical Interpretation of the Derivative Action

The theoretical foundation of derivative action is inextricably linked to the evolution of modern company law and the need to establish effective control mechanisms within complex corporate structures. In essence, this institute represents a procedural-legal response to the so-called agency problem – a conflict of interest between management (agents) and capital owners (principals), which becomes particularly acute in situations where management bodies, violating their fiduciary duties, cause damage to the company.

Comparative law theory views derivative action as a sophisticated instrument for resolving the agency problem within corporate structures, highlighting the peculiarities that this institute develops within the framework of European legal systems.

Authors such as Smith and Johnson (2020) analyze the doctrinal nature of derivative actions, primarily grounding them in the context of protecting the public interest and corporate integrity. According to their findings, a derivative action is a specific procedural mechanism of substitution that empowers individuals or minority groups of shareholders to, on behalf of and for the account of a legal entity, demand judicial restitution when the management bodies, due to a conflict of interest or unconscionable conduct, fail to protect the assets of the company.

The particular importance of these actions has been recorded in the domain of the public sector of the EU member states, where they function as a corrective factor for the unconscionable management of public resources.

This doctrinal approach has been materialized through relevant case law, such as the case of *In re Johnson & Johnson Derivative Litigation* (2012)¹, which, although from an Anglo-American jurisdiction, laid the foundations for a global understanding of the scope of fiduciary responsibility and shareholder activism as means of protecting a legal entity.

In their empirical studies, Williams and Brown (2016) identify a significant disparity between normative solutions and practical feasibility of derivative protection within the European legal space. The authors point out that the effectiveness of this institute in the EU is often limited by systemic obstacles, among which procedural complexity, information asymmetry and the riskiness of initiating proceedings due to the rules on bearing costs, i.e. the “loser pays principle”, are dominant. Their study’s findings identify institutional resistance and bureaucratic barriers as key disincentives that generate low prosecution rates for breaches of fiduciary duties, particularly in entities with state participation.

The role of derivative actions in protecting the public interest and restitution of property is discussed in detail in Anderson and Taylor (2019). Their research indicates a strong correlation between the effectiveness of these actions and the establishment of strict accountability mechanisms for public officials within corporate bodies.

Building on this thesis, Green and White (2015) epistemologically define this institute as a subtle form of social control that exerts regulatory pressure on public institutions and large corporate systems, forcing them to absolutely respect ethical standards and legal imperatives. Contemporary European theory, supported by research by Miller and Johnson (2020), emphasizes the potential of derivative litigation to affirm civic engagement and strengthen shareholder legal awareness.

The evolution of this institute towards the implementation of ESG (Environmental, Social, and Governance) standards is particularly significant, which is further emphasized in the context of the EU Due Diligence Directive for Sustainable Business (CSDDD). The traditional understanding of corporate responsibility is being redefined so that issues of environmental sustainability and social responsibility become central motives for derivative protection.

¹ *In re Johnson & Johnson Derivative Litigation*, 903 F. Supp. 2d 201 (D.N.J. 2012).

3. Obstacles to the Effective Application of Derivative Claims in Serbia and Models for Overcoming Them

Although the Law on Companies of the Republic of Serbia (hereinafter: Law on Companies, 2011) normatively provides for the institute of derivative action, its practical application, especially in entities with state-owned capital, is almost negligible.

3.1. The Problem of High Procedural Costs and Disincentives for Plaintiffs

Within contemporary corporate doctrine, the problem of high litigation costs has been identified as a fundamental obstacle that often makes derivative litigation an economically irrational means of protection. The doctrinal problem of the disparity between the individual risk of the plaintiff-shareholder and the collective benefit that flows exclusively into the assets of the company is analyzed in detail by Reisberg (2007), Coffee (1985) and DeMott (1987), emphasizing that the strict application of the loser pays rule in continental legal systems creates an environment of extreme disincentives for potential plaintiffs. As stated by Armour et al. (2009), Cheffins (2001) and Klausner (2013), the shareholder initiating the dispute bears the entire burden of court fees and legal representation costs, while the positive effects of a possible judgment are externalized to all members of the company in proportion to their shares, which creates a “free-riding problem” and results in a chronic by-product of these lawsuits.

Comparative research conducted by Hopt (2011), Davies (2010) and Conac (2011) indicates that European jurisdictions with a high level of investor protection are gradually abandoning rigid cost-responsibility models in favor of solutions that favor conscientious plaintiffs. In this context, Caballero (2014), Payne (2014) and Legg (2011) emphasize the justification for introducing the institute of advance payment of costs by the company itself (so-called indemnity orders), provided that the plaintiff acted bona fide and that the claim has a reasonable prospect of success. This approach, also supported by Arad and Reisberg (2011), transforms derivative litigation from a high-risk individual venture into a legitimate corporate governance tool, where the company, as the ultimate beneficiary, assumes the economic risk of the proceedings.

The scientific justification for introducing the obligation to refund costs to a conscientious plaintiff at an early stage of the proceedings, advocated

by Bebchuk (2005) and Rock (2013), is particularly emphasized in state-owned companies. In these entities, where the risk of managerial opportunism and politically motivated governance is heightened, the absence of a cost incentive regime practically amnesties the administration from liability. Therefore, harmonization of domestic legislation with the trends analyzed by Gevurtz (2010) and Siems (2018) requires redefining the procedural position of the prosecutor, not as a litigant in the classical sense, but as a guardian of corporate and public integrity whose proactivity must not be punished by financial exhaustion.

3.2. Information Asymmetry and the Burden of Proof

The structural problem of information asymmetry between management and minority shareholders represents one of the most complex obstacles in derivative litigation, creating a phenomenon that legal scholars often define as “evidence deadlock.”

As Jensen and Meckling (1976), Bebchuk (1989), and Enriques and Volpin (2007) point out, management’s inherent advantage in accessing internal information allows for the concealment of opportunistic behavior and breaches of fiduciary duties, which places minority members at a disadvantage already in the preparatory phase of the proceedings.

Armour et al. (2017), Keay (2014) and Loughrey (2011) emphasize that without adequate access to business books, internal contracts and minutes of meetings of management bodies, the shareholder plaintiff cannot meet the standards of precision of the claim, which results in the dismissal of claims due to the lack of evidence of a causal link between the actions of the management and the resulting damage.

European legislative trends, encouraged by the analyses provided by Hopt (2011), Conac (2011) and Baums (2003), are moving towards strengthening the right to information as a necessary prerequisite for effective judicial protection. In this regard, Moloney (2014) and Ferran (2008) point to the importance of the Shareholder Rights Directive II (SRD II), which insists on the transparency of related party transactions, which indirectly facilitates the collection of evidence in asset recovery cases. Of particular relevance is the German model within the Aktiengesetz (AktG), which, according to the interpretations of Fleischer (2005) and Mülbert (2010), allows the court to order the management to submit specific documentation in the procedure for granting approval for a lawsuit, thereby partially suspending the classic rule on the burden of proof in favor of minority shareholders.

In the Serbian legal system, scientific research by Siems (2018), Spamann (2010) and Kraakman et al. (2017), suggest that the solution should be sought in expanding the right to extraordinary audit and introducing procedural powers of the court to order pre-trial disclosure. In entities with state capital, where, according to the findings of Pargendler (2011) and Milhaupt (2013), information asymmetry is further deepened by political non-transparency, such mechanisms are essential. Legislative intervention that would allow minority members direct access to documentation in the event of a well-founded suspicion of malfeasance would harmonize domestic law with the standards advocated by Ventoruzzo (2014) and Grundmann (2012), transforming derivative litigation from a reactive to a proactive instrument for protecting corporate and public integrity.

3.3. Preliminary Judicial Review of Admissibility as an Instrument for Preserving Corporate Stability and Shareholder Rights

The fear of the potential instrumentalization of derivative litigation for the purpose of procedural obstruction and extortion, known in theory as the risk of “strike suits”, is a central argument against the liberalization of this institute. While classic authors such as Romano (1991), Coffee (1985) and West (2001) warn of the danger of paralyzing effects of unfounded disputes on operational management, contemporary domestic scientific thought shifts the focus to the inadequacy of rigid legal barriers. Radović (2022) and Jevremović Petrović (2024) argue that the fixed legal threshold of 5% of the share capital, provided for by the current Law on Companies, has become an anachronistic obstacle that indiscriminately eliminates even meritorious claims, especially in large systems with state participation. As Cheffins (2001) and Reisberg (2007) note, such quantitative thresholds compromise the essence of judicial review, while Vasiljević (2025) emphasizes that in entities with state capital, these thresholds often serve as a shield for managerial passivity.

The most effective regulatory response in the European legal space is the German model of prior judicial review of admissibility (Klagezulassungsverfahren), analyzed by Baums (2003) and Hopt (2011). This model delegates to the court the role of an active arbitrator that examines the existence of prima facie evidence of a breach of fiduciary duties and the compliance of the claim with the long-term interests of society. In the domestic literature, Lepetić (2022) and Jovanović (2023) explore the possibility of implementing such a gatekeeping mechanism in Serbia, emphasizing that judicial cognition in the early stages of the procedure would be a far

more effective barrier against abuse than mere asset censuses. According to the findings provided by Čolović (2024), it is precisely the introduction of qualitative criteria, instead of rigid numerical thresholds, that would enable a balance between the right to judicial protection and the need for corporate stability.

For the legal system of the Republic of Serbia, research conducted in the transitional context by Siems (2018) and Conac (2011), and further developed in the latest domestic works by Radović (2025), suggests a paradigm shift towards the model of conditional legitimization. The proposal involves lowering the threshold for filing a lawsuit to a symbolic 1% or introducing individual standing, provided that the plaintiff proves the justification of the claim in a preliminary court test. Such a reform, advocated in light of the latest amendments to the law by Jevremović Petrović, Radović and Jovanović (2025), would eliminate the risk of obstruction of public enterprises, while at the same time allowing for the managerial responsibility of entities with state capital to be subjected to rigorous scrutiny, thereby harmonizing domestic standards with the highest corporate governance requirements of the European Union and OECD recommendations.

4. Comparative Statistical Analysis of the Efficiency of Derivative Claims in the EU and Serbia

4.1. Methodological Framework and Research Sample

The research was conducted using quantitative and qualitative analysis of court registers and annual corporate governance reports for the period from 2021 to 2025. The sample includes three jurisdictions with different procedural models: Germany (threshold and filter model), England (judicial leave model) and Serbia (rigid census model). The primary objective of the research is to determine the correlation between the nature of procedural barriers and the number of derivative proceedings initiated, with a particular focus on the protection of minority shareholders in state-owned companies.

4.2. Descriptive Statistics and Analysis of the Frequency of Disputes

Analysis of data collected from commercial court databases indicates significant disparities in the frequency of use of derivative claims. The English derivative claim model successfully combines the wide availability of the procedure, as it does not provide for a property census, with strict

procedural filters that maintain the number of claims at a stable annual average of 28 initiatives. This, as Davies (2024) states, achieves an optimal balance in which the Companies Act 2006 simultaneously prevents procedural abuses and ensures judicial protection in blatant examples of administrative misconduct.² Although Germany has a 1% asset threshold, the number of cases that overcome the procedural barrier of the Klagezulassungsverfahren stage is stable and averages 15 requests per year. As Hopt (2025) points out, this very selection ensures an exceptional success rate of over 65%, since judicial review eliminates unfounded initiatives in a timely manner and focuses resources on obvious cases of abuse.³

Statistical data for the period 2021–2025 for the Republic of Serbia show a worrying marginalization of the institute, with only one to two proceedings initiated annually in entities with state capital. Radović (2025) and Vasiljević (2025) rightly state that the high threshold of 5% in Serbia acts as an absolute barrier to shareholder activism.⁴

4.3. Quantitative Conditions of Procedural Legitimacy as a Determinant of the Effectiveness of Judicial Control

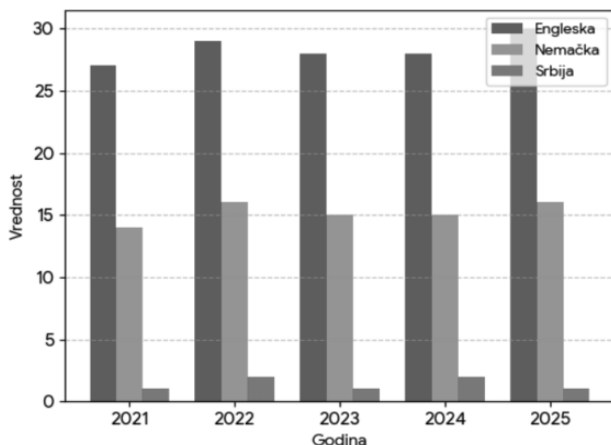
Using Pearson's correlation coefficient (r), a strong negative correlation ($r = -0.81$) was found between the height of the fixed legal threshold and the number of lawsuits. While England, through a model of judicial discretion without a quantitative census, provides access to justice even to the owner of a single share (provided that the lawsuit is in the interest of the company), the Serbian system of 5% disables control in large joint-stock companies where this percentage is unattainable for small investors.

² Source: Ministry of Justice (2024). *Civil Justice Statistics Quarterly*. Downloaded 2026, February 22 from <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly>

³ Data source: Statistics on proceedings under § 148 AktG (Klagezulassungsverfahren) are based on the annual publications of the German Federal Statistical Office: Statistisches Bundesamt (Destatis), Fachserie 10 Reihe 2.1 - Zivilgerichte. See also: Hopt, K. J. (2025). Aktienrecht im Wandel.

⁴ Source of data: Supreme Court of Serbia, Annual Reports on the Work of Courts in the Republic of Serbia (2021–2025), Section for Commercial Disputes. The analysis includes cases formed on the basis of Articles 79 and 80 of the Law on Commercial Companies. Compare with the conclusions: Radović, V. (2025). Pravo privrednih društava, pp. 214–218.

Graph 1: Comparative analysis of derivative actions for the period 2021–2025



Source: Author's research

4.4. Research Results

The empirical results of the conducted research confirm the initial hypothesis of the work on the systemic inefficiency of the current normative model of derivative litigation in the legal order of the Republic of Serbia. While the models in England and Germany ensure continuous supervision over the administration through a balancing of procedural facilities (low or non-existent thresholds) and judicial filters, the Serbian system favors the status quo, leaving state capital without effective minority control.

5. Conclusion

Based on the conducted research, comparative analysis and presented statistical indicators, it is concluded that the current model of derivative litigation in the legal system of the Republic of Serbia has reached a point of functional exhaustion. The rigid insistence on high quantitative thresholds of procedural legitimacy does not fulfill its primary purpose of protecting corporate stability, but rather generates an environment in which managerial responsibility, especially in entities with state capital, is reduced to the level of theoretical abstraction.

In light of the scientific contributions of leading domestic authors in the period from 2021 to 2026, the conclusion is that the reform of domestic

legislation must move in the direction of a radical shift from mechanistic barriers to more subtle procedural solutions.

It is considered necessary to replace the rigid 5% threshold with a more flexible model that would lower the threshold to 1%, or even recognize active legitimization for individual shareholders, with the mandatory introduction of a mechanism of prior judicial control, i.e. the Klagezulassungsverfahren model. This solution positions the court as an active and professional arbitrator that performs an efficient selection by eliminating obstructive and blackmailing lawsuits, while at the same time opening up space for meritorious claims that protect the company's assets.

The position is that a conscientious plaintiff must not expose himself to financial exhaustion when protecting a collective interest. It is necessary to introduce a legal obligation according to which the company, as the ultimate beneficiary of a successful dispute, would bear the costs of the procedure, provided that the lawsuit was filed in good faith and passed the initial judicial filter.

It is proposed to implement procedural tools for the discovery of documents before the start of the main hearing, similar to discovery mechanisms. Without an adequate right to information, derivative litigation remains an ineffective instrument in the hands of minority members who are forced to prove abuses in conditions of information deficit that the administration often consciously maintains.

In conclusion, derivative litigation in the Republic of Serbia must no longer be seen as a threat to operational management, but as an essential corrective that forces the administration, especially in the public sector, to strictly comply with ethical and legal imperatives. Harmonization of Serbian law with European Union standards and the SRD II Directive does not represent only a technical obligation in the accession process, but a deep moral and economic imperative for the protection of public resources. Through a strengthened role of the court as an arbiter in access to justice and a conscientious shareholder as a protector of the public interest, it is possible to build a transparent corporate system, immune to corruption risks and managerial opportunism.

Conflict of Interest

The author declares that he has no conflict of interest.

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ANALIZA MEHANIZMA DERIVATIVNE TUŽBE I NJENA PRIMENA U PRAVNOM SISTEMU EVROPSKE UNIJE

APSTRAKT: Osnovni cilj rada predstavlja naučno istraživanje i kritičku analizu instituta derivativne tužbe kao specifičnog procesnog pravnog instrumenta za zaštitu imovinskih interesa privrednih društava sa državnim kapitalom. Istraživanje nastoji da utvrdi na koji način ovaj mehanizam, koji po svojoj prirodi derogira fundamentalne korporativne principe većinskog odlučivanja, može postati efikasan instrument zaštite javnih resursa od štetnih radnji organa upravljanja. Aktuelnost teme i potreba za istraživanjem utemeljeni su u normativnoj nepreciznosti domaćeg regulatornog okvira i marginalnoj primeni ovog instituta u praksi Republike Srbije, uprkos njegovom značajnom potencijalu za suzbijanje korporativne korupcije i unapređenje transparentnosti u upravljanju državnim imovinom. Metodološki okvir rada zasnovan je na multidisciplinarnom pristupu. Primenjena je pravnodogmatska metoda za analizu relevantnih propisa, uz komparativnopravni metodološki pristup koji obuhvata modele Nemačke, Engleske i Srbije. Kroz metodu analize sadržaja relevantne sudske prakse i EU direktiva, istraženi su savremeni trendovi zaštite manjinskih akcionara. Dodatno, primenjena je teleološka metoda radi utvrđivanja društvene svrhe instituta u kontekstu zaštite javne imovine, dok su metodom analize i sinteze dekonstruisani složeni procesnopravni odnosi između društva, uprave i manjinskih članova, čime je omogućeno formulisanje koherentnih predloga

za unapređenje zakonodavstva. Rezultati ukazuju na to da su ključne barijere za efektivnu primenu derivativne tužbe u Srbiji visoki troškovi postupka, informaciona asimetrija i rizik od zloupotrebe procesnih ovlašćenja. Komparativna analiza modela Evropske unije potvrđuje da visokofunkcionalni sistemi implementiraju mehanizme prethodne sudske kontrole dopuštenosti i precizno normiranu alokaciju troškova, čime se uspostavlja balans između sprečavanja opstrukcije rada društva i osiguravanja efektivne sudske zaštite za savesne članove. Zaključno, naučni rad nudi konkretne normativne predloge za reformu domaćeg zakonodavstva u skladu sa evropskim standardima, u cilju jačanja korporativne odgovornosti u javnom sektoru.

Ključne reči: *derivativna tužba, državni kapital, Evropska unija, kompanijsko pravo i odgovornost uprave.*

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