Towards a European Law of Unjustified Enrichment

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Abstract. Though historically recent, a European law of unjustified enrichment is already existing and embraces both contractual and extra-contractual restitution, which however are governed by different rules and shall not therefore lose their own specificity. In contractual restitution, the remedy is based on the general principle of unjustified enrichment (both in civil and in common law by now) and has a very large field of application: unlike the German model followed by the DCFR, distinguishing between avoided and terminated contracts is not necessary from the point of view of restitution of performances rendered by the parties (as demonstrated by the CESL), nor is convenient elaborating further sets of rules for the case of contractual voidness or withdrawal. In extra-contractual restitution, the Directive 2004/48/EC relating to the protection of intellectual and industrial property has provided for two different remedies (against infringement). The first, i.e. the payment of a lump sum equal to reasonable royalties or fees, is but a restitution of unjustified enrichment according to the general principle of law (though English courts have regarded it as relating to damages). The second, i.e. account and disgorgement of profits gained by the wrongdoer, however, is not properly based on the same general principle of law, because such profits can by definition exceed the claimant’s expenses: nevertheless, this restitutionary remedy, which is definitely established in English common law, can be granted by civil law as well, since it is but the action against the negotiorum gestor which has been foreseen by Roman tradition.

Keywords: unjustified enrichment, disgorgement of profits, restitutionary damages.

1. The quest for a European law of unjustified enrichment

Unlike contract law, the field of unjustified enrichment seems not to have been harmonized by the European Union yet. It is therefore legitimate to wonder whether a European law of unjustified enrichment may be said to be actually existing.
In a first sense, a European law of unjustified enrichment could belong to the core of general principles and rules which are common to the national laws of Europe. If so, it would take part in the so-called modern *ius commune*, which is true (European) law, despite some skepticism by scholarship, and not a mere academic or theoretical exercise. There is evidence that such European law of unjustified enrichment is actually existing\(^1\), as the most authoritative literature of comparative law has widely elucidated\(^2\).

First of all, the Court of Justice of European Union has several times stated that (restitution of) unjust enrichment is a general principle which is common to the legal systems of the Member States\(^3\). Indeed, the doctrine of unjustified enrichment as a general principle of law and as the underpinning of a whole body of rules has by now established itself in national legal cultures, both in continental civil law and in Anglo-American common law. From a historical point of view it is however a recent achievement.

Although clearly derived from the sources of Roman law, and particularly from Pomponius’ famous sentence according to which *aequum est nemen cum alterius detrimento fieri locupletiorem*\(^4\), the general principle of unjustified enrichment has been enounced only by the scholarship of the

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\(^3\) ECJ, Grand Chambre, 16 december 2008, C-47/07 P, Masdar (UK) Ltd v. Commission of the European Communities: «44. According to the principles common to the laws of the Member States, a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss; […] 47. Given that unjust enrichment, as defined above, is a source of non-contractual obligation common to the legal system of the Member States, the Community cannot be dispensed from the application to itself of the same principles where a natural or legal person alleges that the Community has been unjustly enriched to the detriment of that person».

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usus modernus Pandectarum, which flourished in Germany in the late 19th century.

Particularly, it has been one of Friedrich von Savigny’s many historical merits that of pointing out that the principle of unjustified enrichment was the underpinning of the very complicated system of condictiones which had been handed down by the ius commune of the Middle Ages. Thus arguing, he created the bridge which could link the area of restitution of an undue transfer of property (generally, an undue performance) to that of liability of someone who encroaches on someone else’s property. In that moment, started the history of the law of unjustified enrichment in the modern sense, as divided into two branches: contractual and extra-contractual restitution.

The main case of contractual restitution regards undue performances, especially related to a non-existing obligation (as when the parties execute a contract which is void, or has been avoided or terminated): it corresponds to the ancient condictio indebiti of Roman law. But contractual restitution embraces also cases of voluntary giving which was not intended to fulfill a debt, as when a sum of money is given in order to conclude a contract of loan (without succeeding): it corresponds then to the ancient condictio causa data causa non secuta of Roman law (and to the secondary condictio ob turpem vel inius-tam causam). From a terminological point of view, therefore, the expression of contractual restitution is not very accurate, though definitely well-established. First of all, it is said to be contractual any restitution of an undue performance, even if rendered outside a contract whatever (as an instance, if compensation for a damage is paid twice, the second payment is undue and shall be returned: this restitution is called contractual). Secondly, it is said to be contractual the restitution (not of a performance, but) of any voluntary transfer of property, although it was not intended to fulfill a debt and therefore may not be said to be a payment (as in the above mentioned loan example).

The other side of unjustified enrichment is represented by extra-contractual restitution, which historically had nothing to do with the system of the condictiones, but is the result of the developments of the actio de in rem verso (utilis) in the ius commune of the Middle Ages. This field of unjustified enrichment is therefore much younger than contractual restitution and unlike condictiones not properly foreseen by the sources of Roman law, particularly not by Justinian’s compilation.

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6 Kupish, op. cit., p. 442.
This explains why the oldest European civil codes provide for contractual restitution in all the broad sense above elucidated, but not for extra-contractual restitution: because they reflect the Roman law which has been handed down by the Justinian’s compilation and therefore implemented only condictiones, or better a general condictio of undue payment instead of a number of many single condictiones. No trace of extra-contractual restitution is instead evident, at least as a general rule.

That is the case of the French civil code, where unjustified enrichment is basically the payement de l’indu of art. 1376 ff., at least as a general rule. That is also the case of the Spanish civil code of 1889, which provides for el cobro de lo indebito by its articles 1895 ff.

2. The general principle of unjustified enrichment as the underpinning of contractual restitution

The Roman condictio indebiti was marked by the requirement that the solvens had paid by mistake, particularly because he had mistakenly thought he was obliged to pay to the accipiens. And the same rule is literally remained both in the French and in the Spanish civil code.

It is to be said, however, that already the ius commune of the late Middle Ages had drawn the condictio indebiti in the model of the condictio sine causa, which had been therefore defined as generalis, precisely because it had become the general rule of contractual restitution\(^7\). The requirement of the payer’s mistake had been therefore abandoned.

This is reflected in the way the French and the Spanish civil codes have been understood by judges (and scholars), who generally got rid of the requirement of the payer’s mistake by means of a bold interpretation of the relevant provisions\(^8\). On the one hand, this interpretation is more compliant with a system of transferring property which is causal, notwithstanding if the transfer is an effect of the simple contract (like in France) or it requires also the delivery of the transferred good or the conveyance of the transferred land (like in Spain)\(^9\): if a cause is necessary in order to transfer property, it is obvious

\(^7\) Kupish, op. cit., p. 433 ss.

\(^8\) The Italian codice civile of 1942, being much later than the French Code and the Spanish Codigo, from the beginning has done without any mistake of the payer as a requirement for contractual restitution (art. 2033).

\(^9\) In classical Roman law, the delivery of a good (traditio) could not transfer its property if the obligation which the giver (solvens) intended to fulfill was in reality not existing, as when the contract of sale (emptio-venditio) was void, and therefore lacked a legal basis (iusta causa) of the transfer itself – given that the point has been fiercely disputed from ever, that opinion
that without that cause the payment is undue and shall be returned, whether or not the payer is aware of the fact. On the other hand, it has been therefore self-evident that the rational of such a remedy was not any longer a mistake by the payer, but the bare fact that the recipient has enriched himself without a legal basis, and therefore his enrichment is unjustified and shall be returned. This may be called the lack of legal basis approach to (contractual) restitution.

As it is known, the approach of English law has been traditionally quite different, since a claim against the recipient has been granted only if there was a specific unjust factor which affected the payment, the most typical of is at least the most reliable one, as elucidated by Pugliese, Compravendita e trasferimento della proprietà in diritto romano, in Vacca (ed.), Vendita e trasferimento della proprietà nella prospettiva storico-comparatistica, Milano, 1991, p. 54. Such rule has been kept by the national laws of continental Europe (like the Austrian one) which have proved themselves more faithful to the tradition of the ius commune: there, the transfer of goods is still produced by the delivery (modus acquirendi) based on an existing obligation of giving, typically created by a contract (titulus acquirendi), or at least on a social or moral duty (naturalis obligatio); but the same rule is also existing, and even a fortiori, in the national laws of Europe where (like in France and in Italy) the transfer of goods is an effect of the simple contract, notwithstanding with their delivery (par le seul consentement des parties contractantes: art. 1138, paragraph 1, code civil; in virtù del solo consenso delle parti legittimamente manifestato: art. 1376 codice civile). Both the Austrian and the French-Italian systems of transferring property require in fact the objective existence of a iusta causa and, as far as it is here concerned, this feature of theirs drives to the following consequences: 1) if the giver under a terminated or avoided contract was the owner of the good, he can claim not only for restitution of performance (personal action), but also for his property (real action); 2) in the latter case, the giver can also sue the third, to whom the recipient has eventually delivered the good in the meanwhile, because its property has not been transferred to either of them (except a purchase a non domino takes place in favor of the third); 3) the claim for restitution of an undue performance (payement de l’indue of art. 1376 ff. code civil; pagamento dell’indebito of art. 2033 ff. codice civile; Zahlung einer Nichtschuld of § 1431 ff. ABGB) is not aimed to transfer the property from the recipient back to the giver, but just to oblige the latter to hand over the good back to the former, whether or not he is the owner. Quite different is what happens in German law, where the BGB has accepted Savigny’s theoretical reconstruction of the Roman mancipatio, which culminates in the doctrine of the so-called Abstraktionsprinzip: the delivery of the good agreed by both parties (Einigung und Übergabe) or the entry of the conveyance in the land registry (Auflassung und Eintragung in das Grundbuch) is generally able to transfer property, although the obligation of giving (or the social or moral duty) which the giver intended to fulfill is not existing. As far as it is here concerned, this system of transferring property drives to the following consequences: 1) the giver can claim only for restitution of performance, but not for his (transferred) property; 2) because he has not an action in rem, the giver cannot generally sue the third, to whom the recipient has eventually transferred the good in the meanwhile, except that the third has acquired it not for value (unentgeltlich): in this case, he is liable in the measure of his actual unjustified enrichment (§ 822 BGB); 3) the claim for restitution of an undue performance (Leistungskondiktion of § 812, paragraph 1, sentence 1, case 1, BGB) is aimed to transfer the property from the recipient back to the giver. See Sacco, Introduzione al diritto comparato, 5th ed., in Sacco (ed.), Trattato di diritto comparato, Torino, 1992, p. 106 ff.
such unjust factors being a mistake of the payer on his liability to pay\textsuperscript{10}. The difference with the lack of legal basis approach has had little practical relevance when a valid contract has been executed, because under both points of view the payment was obviously not to be given back\textsuperscript{11}. But when the contract was void and has been executed by both parties, the two approaches have been radically diverging: if in the civil law there is generally no good reason to deny each giver’s claim\textsuperscript{12}, the doctrine of consideration has lead the traditional common law of England to the opposite rule (no restitution when a void contract has been performed by both parties), unless some specific unjust factor of the enrichment were existing, like duress or fraud. This traditional view of the common law has been however recently upset by the so-called swap litigation\textsuperscript{13}.

Given that a contract of swap was void (because concluded by a local authority \textit{ultra vires})\textsuperscript{14}, the House of Lords has in fact decided that performances should be reciprocally given back by the parties\textsuperscript{15}. It is to be given

\textsuperscript{10} In this regard see Meier, \textit{Irrtum und Zweckverfehlung: Die Rolle der unjust-Gründe bei rechtsgrundlosen Leistungen im englischen Recht}, Tübingen, 1999.

\textsuperscript{11} According to Schlechtriem, Cohen, Hornung, \textit{op. cit.}, p. 384 ff., the difference between both legal traditions tends then to evaporate, and at the end to reduce itself to a question of the onus of proof: see already Schlechtriem, \textit{Restitution and Unjustified Enrichment in Europe}, I, cit., p. 135, footnote 390. For a strong criticism, compare however Zimmermann, \textit{Bereicherungsrecht in Europa: eine Einführung}, cit., p. 32 ff., footnote 96, who points out that in the 19th century the English approach has logically lead to the consequence that only the existence of an obligation can be pleaded by the recipient as a defense. On the contrary, the civilian approach has ever admitted that restitutionary claim is to be denied whenever the defendant invokes a legal ground of its enrichment, and particularly a moral duty (the \textit{naturalis obligatio} of the Roman tradition). In his opinion, the difference remains therefore relevant.

\textsuperscript{12} Exceptions are however existing. The most important case is when performance is immoral (\textit{contra bonos mores}) both for the giver and for the recipient: restitution is then barred (\textit{in pari causa turpitudinem melior est condicio possidentis}). See as an instance art. 2035 \textit{codice civile}. A similar role in generally played in the common law of restitution by illegality: see Swadling, \textit{The Role of Illegality in the English Law of Unjust Enrichment}, in Johnston, Zimmermann (eds.), \textit{Unjustified Enrichment. Key Issues in Comparative Perspective}, Cambridge, 2001, p. 289 ff.; Dannemann, \textit{Illegality as Defence against Unjust Enrichment Claims}, in \textit{op. ult. cit.}, p. 310 ff.


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that, thus deciding, their Lordships intended to maintain that restitution needs a mistake by the payer, and identified the rational of their decision in the abrogation of the old rule according to which a mistake of law is not relevant (error iuris non excusat)\(^{16}\). But even beyond their Lordships’ intention the decision put an end to the peacemeal recognition of unjust factors in English law of restitution and marks the indisputable reception of the genuine civil law approach, based on the lack of legal basis, as has been boldly stated by authoritative scholars\(^{17}\).

English swap litigation marks therefore the definitive birth of a European law of unjustified enrichment.

3. Restitution law between «actions in personam» and «actions in rem»

In 2009, when its definitive version was published, the Draft Common Frame of Reference (DCFR, for short), finally offered a definitive crosscheck of the existence of a European law of unjustified enrichment, by dedicating its whole seventh book to the matter\(^{18}\). All in all, the fact is not surprising, because the DCFR has been shaped on the model of national civil codes of 19\(^{th}\) century, first of all on German one, and therefore focuses on the law of obligations: the reference to unjustified enrichment was then almost unavoidable, since from Roman law on unjustified enrichment is regarded as


\(^{16}\) This rule of the ius commune was for the first time followed by Bilby v. Lumley (1802) 2 East 469, 102 ER 448. See Zimmermann, Hellwege, Error iuris non excusat und das law of restitution: Zur Karriere einer gemeinrechtlichen Maxime in der Welt des common law, in Hübner, Ebke (eds.), Festschrift für Bernhard Großfeld zum 65. Geburtstag, Heidelberg, 1999, p. 1371 ff.


one of the sources of obligations, eventually by means of the somewhat odd concept of quasi-contracts\(^{19}\).

A most challenging issue in the consolidation of a European law of unjustified enrichment is however related to the nature of the remedy which it provides. In civil law, unjustified enrichment is but a source of obligations and therefore it gives always and only rise to a personal right (or action \textit{in personam}) to restitution. In common law, unjustified enrichment is a source of obligations, too – and very eloquent to this respect is the famous decision by the House of Lords in the case \textit{Fibrosa Spolka Alkcyina v. Fairbairn Lawson Combe Barbour Ltd.} (1943), where their Lordships for the first time clearly stated that unjustified enrichment is the third branch of the law of obligations, besides contract and tort. But it is to be pointed out that this is only a part of the common law of unjustified enrichment, because another part of it instead consists of real rights (actions \textit{in rem})\(^{20}\). It is a fascinating territory, which not only does not have any precise correspondence in civil law, but seems to openly challenge some of its crucial features.

In this context, the most characteristic tools of English law are definitely constructive trusts and equitable liens, both of them belonging to equity. A constructive trust gives the plaintiff the full equitable proprietary interest, so that he becomes the owner in equity; on the contrary, an equitable lien gives him only a security interest, without ownership or possession. In any case, remedies provided by in both cases are \textit{in rem} and can therefore be exercised against third parties, i.e. the creditors and the purchasers from the defendant (even though it is to be remembered that purchasers in good faith and for value are generally protected). It is also known that constructive trust and equitable lien can be used to trace the benefit that the defendant has received, when it has been transformed in another good or exchanged\(^{21}\).

But also in this respect the so-called swap litigation has however given the impulse to a radical change: in the leading case decided in 1994\(^ {22}\), in fact, the House of Lords clearly held that a successful claimant had not any proprietary right, thus overruling one of the most important precedents about proprietary rights as restitutionary remedies\(^{23}\). Although the relationship between property and restitution law is still highly controversial in English

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It should therefore be admitted that also in the common law the execution of performances under a contract which has been avoided or terminated triggers a personal right, or action in personam, of the recipient’s (against the giver), and not a real right, or action in rem, of his.

Also in this respect it may therefore said that civil law and common law have finally converged.

4. The division between contractual and extra-contractual restitution

In the field of extra-contractual restitution, both the French and the Spanish civil codes, instead, do not explicitly provide for a general remedy. Only later such a general remedy has been introduced in French and in Spanish law by professors and especially by judges with a bold work of creative legal interpretation, adding it to the rules provided by the legislator.

In French law very important for the creation of the new remedy was a handbook of French law originally written in German by a professor at the University of Heidelberg, Zachariä, who from many single rules scattered in the Code Civil forged a vindicatio rerum singularium, relating not to single goods in themselves, but to their owner’s patrimony as a whole. The translation of this handbook in French by Aubry and Rau, to which was given the title of Cours de droit civil, in the first edition reported the doctrine of the vindicatio rerum singularium, but in the following editions depicted the remedy more and more as based on restitution of unjustified enrichment in a modern sense. At the end, the Cour de Cassation acknowledged in the famous arrêt Boudier of 1892 that an action de in rem verso was granted by French law, as the ius commune in the Middle Ages already had done.


27 Vecchi, L’azione diretta, Padova, 1990, p. 208, footnote 117, p. 213; Kupisch, Die Versionsklage, Heidelberg, 1965, p. 117 f. Such remedy had therefore nothing properly to do with the action de in rem verso of the Middle Ages, because differently from this it did not imply a versio whatever (Kupisch, Arricchimento nel diritto romano, medioevale e moderno, cit., p. 442).

28 The first edition was published between 1839 and 1844.

29 Kupisch, Die Versionsklage, cit., p. 120 f.; Grauer, Die ungerechtfertigte Bereicherung im französischen Privatrecht, Heidelberg, 1930, p. 10 f.

The Italian *codice civile* of 1942, being much later than the French *Code* and the Spanish *Codigo*, from the beginning has provided for a general action of unjustified enrichment (*azione generale di arricchimento senza causa*, artt. 2041-2042), which is foreseen immediately after the specific action for contractual restitution in broader sense (*pagamento dell’indebito*, artt. 2033-2040)\(^{31}\). It is noteworthy that the *Avant-projet* of massive reform of the French law of obligations and of prescription which goes under the name of Prof. Catala proposes to introduce explicitly in the *Code* the *enrichissement sans cause* as a third quasi-contract, thus fixing in written law the judge-made rules.

Unlike the binary system of the laws we have till now considered, the provisions of the German BGB on unjustified enrichment (§ 812 ff.) consider both cases together: when unjustified enrichment has been originated from an undue performance (*durch die Leistung eines anderen*) and when it has otherwise arisen (*in sonstiger Weise*)\(^{32}\).

Despite this unitary model, the distinction between contractual restitution at one side (*indebido* in Spanish, *undue* in French, or *indebito* in Italian) and extra-contractual restitution at the other side (*enrequisimiento sin causa*, *enrichissement sans cause*, *arricchimento senza causa*, respectively) is widely preferred in European legal culture, although not undisputed. However, this has not been the choice made by the DCFR, which in this respect has been deeply influenced by the German model and has therefore provided a single set of rules on unjustified enrichment, thus unifying contractual and extra-contractual restitution.

But this choice is not convincing and anyway not actually compliant with European law, as may be argued also by making reference to the proposal of a *Common European Sales Law* (CESL, for short)\(^{33}\), which devotes its part VII to restitution, particularly in case of avoidance or termination of contract\(^{34}\).


\(^{32}\) It is therefore strongly controversial in scholarship whether the legislator has provided two different legal remedies (so-called *Trennungslehre*) or just a single one, even though with manifold diversifications (so-called *Einheitslehre*): see Reuter, Martinek, *Ungerechtfer-tigte Bereicherung*, Tübingen, 1983, p. 22 ff.; Zweigert, Kötz, *op. cit.*, p. 538 ff.


Although the CESL deals with contract of sales only, it is hardly to be denied that it provides for a general set of rules on contractual restitution, drafted in terms which resemble the provisions of the Spanish, or the French, or the Italian civil code about *indebito, undue* and *répétition de l’indu* respectively, even though German influences are evident, too.

It will therefore be clearly necessary to distinguish such field of law from that of extra-contractual restitution. The distinction between contractual and extra-contractual restitution does not mean that both of them do not rely on the same general principle: that of unjustified enrichment.  

5. Binary vs. unitary model of contractual restitution: the «Common European Sales Law» (C.E.S.L.)

One of the main features (and merits) of the CESL restitutionary regime is that it takes into account the avoided and the terminated contract jointly. On the contrary, the DCFR has in this respect adopted the German model of separating termination (*Rücktritt*) and avoidance (*Anfechtbarkeit*) of contract, thus splitting the area of contractual restitution into two parts, which bear respectively the name of «Restitution» (book III, chapter 3, section 5) and that of «Unjustified Enrichment» (book VII).

According to the binary model of the BGB, the DCFR assumes that, when a contract is terminated, its effects are not cancelled or removed, but counterbalanced by further, inverted or symmetrical ones: the parties are therefore obliged by contract to return the benefits received by performance, so that very revealing is the image of a «contrat synallagmatique renversé» or «contrat à l’enverse», which has been created by French scholarship. This is what the DCFR has labeled as «Restitution» (book III, chapter 3, section 5).

On the other side, the DCFR has ruled under unjustified enrichment the obligations of returning the benefits received by performance of a contract which is void or avoided, considering it as if it had never existed. And this is what (as far as it is here concerned, i.e. not considering the extra-contractual area) the DCFR has labeled as «Unjustified Enrichment» (book VII).

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35 See also supra, n.2.

36 This conception was originally elaborated by Heinrich Stoll in his doctorate thesis of the ’20 about «Die Wirkungen des verträgsmäßigen Rücktritts».

This split of contractual restitution is largely due to the need of conveniently governing the problem of impossibility of specific restitution, particularly when the recipient has acquired a good which has been later destroyed or transferred to another. It is however particularly eloquent that this binary model has been severely criticized by German scholarship for its inconsistencies. Much more convincing is therefore the choice of the CESL to put on the same level termination and avoidance of contract from the point of view of restitution of performances rendered by the parties. Given that the CESL has not taken voidness (or nullity) of contract into account at all, however, it remains uncertain whether the same rules on restitution are applicable to performances under a void contract, too.

An indication to the negative answer can be found in the Catala reform project of the French code civil, which, as far as it is here concerned, has drafted a set of rules on restitution (articles from 1161 to 1164-7) both for the case of avoidance (annulation) of contract and for that of its termination (résolution). From the point of view of restitution law, both of them have been therefore considered jointly under the concept of «removal» of contract (anéantissement du contrat).

In the same sense, there is however no convincing reason to treat nullity of contract in a different way. The rationale of a specific regime of contractual restitution shall be seen in the fact that performances to be returned are mutual and therefore, given that a bilateral contract is at stake, the same regime should concern not only termination and avoidance of contract, but its nullity as well.

Furthermore, it is questionable that is really needed or convenient to shutter a specific set of rules on restitution because of withdrawal from


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contract, referred to in art. 44 of the CESL: from the here relevant point of view, after all, withdrawal is not different from termination of contract and could be therefore ruled in the same way, eventually introducing some (minor) specific differentiations.


In the field of extra-contractual restitution, the most important measure taken by the European Union regards the protection of intellectual property rights and is particularly provided by art. 13 («Damages») of the Directive 2004/48/EC.43

Regards the assessment of damages, art. 13, paragraph 1, of the aforementioned Directive gives the Member States an alternative: 1. they may take into account «all appropriate damages, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringer»; or 2. they may, «in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorization to use the intellectual right in question». Furthermore art. 13, paragraph 2, adds that: «Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payments of damages, which may be pre-established».

Although the European legislator has made reference only to damages and to their compensation, such provisions of the Directive 2004/48/EC move themselves to the field (not of compensation for damages, but) of restitution, and particularly consider that jagged phenomenology of it which has been described through the concept of «restitution for wrongs»44.

When a wrong does not cause an effective loss, the victim cannot really claim for compensation. This happens particularly in certain areas of law like competition or intellectual property: take as an instance the case of an author


who was willing not to publish his intellectual work and cannot therefore complain that the infringement has caused him an economic loss, particularly of profits. Though in such cases there is basically no damage to be compensated (except non economic damage, if the case), a self-evident need of justice requires that «tort must not pay», according to the sentence stated by Justice Lord Devlin as a ground of his opinion in a famous English precedent.45

It seems then evident that the term of damages is here justified only because to be concerned is an obligation to pay a sum of money by a wrongdoer – and this language agrees with a well-established terminological tradition of the common law. But nonetheless the term of damages is inappropriate in relationship to the function of the remedy, which is definitely represented by the restitution of an unjustified enrichment: the event which triggers the action is here not a loss suffered by the victim, but the unjust enrichment which the wrongdoer has gained.46

As the Directive 2004/48/EC clearly demonstrates, the European private law has lead to the creation of two different restitutionary remedies: the payment of a fixed sum of money, which shall be equal to the reasonable price or the reasonable royalty which the rightholder could have obtained by allowing a licence; and the disgorgement of the profits obtained by the wrongdoer or the infringer (deducted expenses, if the case).47

The first remedy is basically corresponding to the so-called restitutionary damages, which have been widely assessed by English judges in proprietary torts, particularly in trespass, and also in wrongful detention of

48 I allow myself to make reference to Sirena, La restituzione dell’arricchimento e il risarcimento del danno, in Riv. dir. civ., 2009, I, p. 65 ff. About the different function of compensation for damages and of restitution respectively see especially Di Majo, La tutela civile dei diritti, Milano, 2003, p. 319 ff.; Birks, op. cit., p. 3.
49 The connection between the two remedies is clear in Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. and Others [1974] 1 W.L.R. 798, where the judge has assessed the profits made by the wrongdoer as equal to the sum that he should have reasonably paid for relaxing the restrictive covenant which he had violated.
50 Restitutionary damages are assessed according to the use value of the good which has been exploited by the defendant without the plaintiff’s permission (so-called user principle), as elucidated by Nicholls L.J. in Stoke-on-Trent City Council v. W. & J. Wass [1998] 1 W.L.R. 1406, 1416.
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good\textsuperscript{52}. More recently, such compensation has been allowed also in a case of breach of contract (although strictly related to the infringement of intellectual property)\textsuperscript{53}.

As English scholarship has pointed out, the quantum of restitutionary damages is assessed in relationship to the use value of the goods which have been abusively exploited by means of the tort\textsuperscript{54} – and in this respect, particularly instructive, even if dated, appear the cases on the so-called wayleave for unauthorised exploitation of someone else’s mine\textsuperscript{55}.

But this means that despite the adopted terminology the concerned remedy is not aiming at compensation of damages, but at restitution of unjustified enrichment\textsuperscript{56}.

It shall not however be allowed to claim both for compensation for damages and for restitution of unjustified enrichment. In English law the plaintiff may well waive the tort and claim for restitution of unjustified enrichment\textsuperscript{57}, but of course not in addition to compensation for damages: he has to choose between the two remedies\textsuperscript{58}.

The same rule has been settled by the German Federal Court (\textit{Bundesgerichtshof}) in the so-called \textit{Flugreiseentscheidung}\textsuperscript{59}.

\textsuperscript{53} Experience Hendrix v. PPX Enterprise Inc. [2003] EWCA Civ. 323.
\textsuperscript{54} Edelman, \textit{op. cit.}, p. 65 ff., who separates restitutionary damages from disgorgement of profits and understands the former remedy as a restitution of an unjustified transfer of value between the parties. For a strong criticism, see Rotherham, \textit{The Conceptual Structure of Restitution for Wrongs}, in \textit{Cambridge Law Journal}, 2007, p. 172 ff., according to whom such a conceptual framework is merely fictional and anyway not adequate to explain cases of exploitation of someone else’s property, because it is not necessarily true that the correspondent value is lost by the owner.
\textsuperscript{55} The oldest case seems to have been Martin v. Porter (1839) 5 M. & W. 351.
\textsuperscript{57} Lamine v. Dorrell (1705) 2 Ld. Raym. 1216.
\textsuperscript{58} As decided by Lord Mansfield in Humbly v. Trott (1776) 1 Cowp. 375. The rule has been afterwards confirmed and even enhanced by the House of Lords, as in United Australia Ltd. v. Barclays Bank Ltd. [1941] A.C. 1. On the point see Clerk, Lindsell, \textit{On Torts}, London, 2006, p. 1951 ff.
\textsuperscript{59} \textit{BGHZ} 55,128. Immediately after landing, an under aged passenger of a flight from München to Hamburg had stowed away from Hamburg to New York. As he was legally in-
In French and Italian law the alternative between compensation for damages and restitution of unjustified enrichment seems to be barred by the so-called principle of subsidiary, according to which, when the claimant is allowed to exercise another remedy whatever (as compensation of damages)\textsuperscript{60}, he might definitely not claim for restitution of unjustified enrichment, also not in an alternative way. This would close the door to whatever restitution for wrong in those laws, given that the remedy of compensation for damages is there always possible \textit{(in abstracto, at least)}\textsuperscript{61}. But the principle of subsidiarity is instead to be interpreted in the sense that it prevents the plaintiff from claiming both for compensation for damages and for restitution of unjustified enrichment, but not from choosing between the two\textsuperscript{62}.

Therefore it may be said that European law of unjustified enrichment generally allows the claim for restitution of unjustified enrichment as an alternative to compensation for damages.

7. The account and disgorgement of profits

The other restitutionary remedy for wrong is represented by account and disgorgement of profits, which oblige the wrongdoer to give back what he has gained by encroaching on someone else’s rights.

Such a remedy has been traditionally allowed by the English equity for the protection of intellectual and industrial property\textsuperscript{63}, and furthermore in cases where the wrongdoer has violated a duty of confidence or a fiduciary duty by which he was tied to the rightholder\textsuperscript{64}. But English courts have

\textsuperscript{60} For an overall account see Smith, \textit{Property, subsidiarity and unjust enrichment}, in Johnston, Zimmermann (eds.), \textit{Unjustified Enrichment. Key Issues in Comparative Perspective}, cit., p. 588 ff.

\textsuperscript{61} \textit{In concreto}, the victim could have suffered no loss at all, or could not be able to give a concrete proof of it.


\textsuperscript{63} Hogg v. Kirby, 8 Ves. 215; Lever v. Goodwin (1887) 36 Ch.D. 1.

\textsuperscript{64} For a general account, see Goff, Jones, \textit{The Law of Restitution}, London, 2002, p. 707 ff.
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clearly showed from time the tendency to expand more and more the area of account and disgorgement of profits, first of all by increasingly admitting the existence of new equitable duties, which at the end converge in a general obligation of good faith and loyalty. If one goes beyond appearance, the trend is therefore to allow the remedy even outside the requirement of a pre-existing confidence or fiduciary duty between the wrongdoer and the rightholder.

On the contrary, account and disgorgement of profits have not been traditionally known in the civilian tradition, nor can they be easily allowed by the laws belonging to it.

German scholarship has tried to derive such remedies from the general principle of unjustified enrichment, but this proposal is definitely not compliant with the requirement «at the expenses of another», which is essential of that general principle.

In a seminal book of 1959, which is to be regarded as a true masterpiece of Italian literature on private law, Rodolfo Sacco has definitely demonstrated that the surplus value gained by the wrongdoer (what the lawyers of the Middle Ages called commodum) cannot be regarded as an unjustified enrichment: in fact the requirement «at the expenses of another» does not allow

A leading case has been Attorney-General v. Blake, Jonathan Cape Ltd. [Third Party] [2000] E.M.L.R. 949. A former agent of the Secret Intelligence Service, who had been bribed by the Russian counter-intelligence and had fled to Russia after escaping from British prison, wrote an autobiographical book, based on confidential information which he had got during his service. The House of Lords since decided Mr Blake was obliged to give back the Crown the profits he has gained through his infidelity, adding «as a footnote» that a similar conclusion had already been drawn by the Supreme Court of the United States in Snepp v. United States (1980) 444 U.S. 507. In this American case, the profits an employee of the C.I.A. had gained by publishing confidential information (regarding the activities of the Agency in Vietnam) were considered as fallen in a constructive trust, in order to deprive him of the benefits of his infidelity.

65 The remedy has been allowed also in cases of violation of a restrictive covenant (Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. and Others [1974] 1 W.L.R. 798), though opposite decisions are to be found (Surrey County Council and Another v. Bredero Homes Ltd. [1993] 1 W.L.R. 361).

66 Worthington, Reconsidering Disgorgement for Wrongs, in Modern Law Rev., 1999, p. 238, who points out that differently from continental law such general obligation of good faith and loyalty does not impose to safeguard the other party’s interests, but only to avoid acting with cynical disregard of them.

67 See especially König, Gewinnhaftung, in Festschrift für Ernst von Caemmerer, Tübingen, 1978, Sonderdruck. It is now to the be regarded as a point of reference the Habilitations-schrift von Helms, Gewinnherausgabe als haftungsrechtliches Problem, Tübingen, 2007.

68 See the pioneering essay by Fritz Schulz, System der Rechte auf den Eingriffserwerb, in AeP, 1999, p. 1 ff., who compared the Anglo-American decisions on profits by a wrong with the rules on Ungerechtfertigte Bereicherung provided by § 812 ff. BGB.

that the restitution of unjustified enrichment may include what exceed the objective value of the benefit that the wrongdoer has unlawfully subtracted to the victim.

Although the question is extremely controversial in German law, it seems to be prevailing the opinion according to which the obligation of giving back the substitute (Ersatz) of the benefit obtained without a legal basis, which is provided by § 818, Abs. 1, BGB, does not include the commodum, i.e. the profit gained by the enriched party by exploitation of that benefit\(^70\). And also art. 2041, 1° comma, c.c. is to be interpreted in the same sense\(^71\).

As Friedrich von Savigny could already clearly explain, the restitution of unjust enrichment is but a Vindikationsersatz, i.e. it represents the substitute of a property right, which its holder cannot or will not exercise. Therefore such restitution shall at the end give the plaintiff the same benefit which was attributed to him by his own property right, or its objective value (Rechtsfortwirkung)\(^72\), but not more, and especially not the profit which has been created by the wrongdoer.

In fact, the profit cannot be regarded as a substitute of what has been subtracted to the rightholder, because even when it is obtained by the exploitation of another’s goods, it depends essentially on the enterprise, the skills, etc. of who has gained it – and in this sense it does not matter whether he has acted lawfully or not.

Peter Birks argued that restitution for wrong cannot be therefore understood as a question of unjustified enrichment and proposed to use for it the alternative concept of wrongful enrichment: he noted furthermore that the restitutionary remedy is here «parasitic», because it is not triggered by the autonomous fact of the subtraction of something to the rightholder (i.e. unjustified enrichment), but by the wrong in itself\(^73\).

\(^70\) For an overall account see Larenz, Canaris, *Lehrbuch des Schuldrechts*, II, Besonderer Teil, 2\(^{\text{nd}}\), München, 1994, p. 266 f.


\(^72\) Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung*, Graz, 1934, p. 35.

In order to oblige the wrongdoer to disgorge the profits he has obtained by the wrong, it is then necessary to exercise a further restitutionary remedy which is different from that based on unjustified enrichment. This further remedy can be found in the rules of negotiorum gestio (or benevolent intervention in another’s Affairs, according to the terminology of the DCFR), at least if a radical change in their conceptual understanding is accepted74.

It can be proved that the negotiorum gestio is not based on a typical scheme of social behaviour, but it has the proper nature of a set of remedies, by which anyone who interferes in another’s interest is obliged to give back the profits thus obtained: it is to believe that the related rules apply not only when the intervener acts as a good Samaritan, i.e. in another’s interest75, but also, and all the more so, when he acts like a robber, i.e. in his own interest.

The civilian negotiorum gestio shows that the interference in another’s affairs makes the intervener become by law an agent of the rightholder, so that the situation resembles what occurs when the English remedy of account of profits is concerned: the negotiorum gestor submits himself to a legal obligation which perfectly matches with the above mentioned duties of confidence and fiduciary duties.

As far as it is here concerned, the wrongdoer’s obligation to give back the profits he has gained arises only if the wrong takes place by an intervention in another’s affairs: not every wrong does therefore oblige in that way. In other words, the cause of action is not the wrong itself, but the unsolicited intervention in another’s affairs, irrespective of the fact that this has been either benevolent or malevolent.

From the rules of the negotiorum gestio can be deduced as well that the wrongdoer is obliged to give back his profits only when he acted in bad faith: from the ancient Roman law on the negotiorum gestor is in fact obliged by law only if he has intervened «knowingly» in another’s affairs. This rule is widely corroborated by a comparative analysis and therefore is likely to belong to the common core of European private law.

A mark in this sense can be seen in German law regarding non-economic loss caused by an infringement of the right of privacy: a famous decision of the Bundesgerichtshof has particularly stated that damages may then encompass the profits obtained by the infringer, but under the condition that


74 I allow myself to make reference to Sirena, La gestione di affari altrui. Ingerenze altruistiche, ingerenze egoistiche e restituzione del profitto, Torino, 1999.

he has acted dishonestly or cynically (c.d. Caroline-von-Monaco-Urteil I)\textsuperscript{76}. The most influential German scholars have pointed out that the case should have been decided according to the rules on unjustified enrichment (ungerechtfertigte Bereicherung), and not to those on damages and tort\textsuperscript{77}, but a point remains still: that a wrongdoer is obliged to give back the profit only when he has acted in bad faith (and in any case only if the wrong has the form of an intervention in another’s affairs)\textsuperscript{78}.

On the other hand, English law has from time stated that, beside the very specific case of «an oppressive, arbitrary or unconstitutional action by servants of the Government»\textsuperscript{79}, the remedy for account and disgorgement of profits gained by the wrongdoer is allowed only when his «conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff»\textsuperscript{80}, i.e. when he has acted knowingly, or in bad faith.

\textsuperscript{76} BGHZ, 128, 1.


\textsuperscript{78} According to §§ 819, Abs. 1, 818, Abs. 4, BGB, who obtains an unjustified enrichment in bad faith is liable «according to general rules», and not according to the milder rules which are provided by § 818, Abs. 3, BGB for unjustified enrichment: his liability is therefore understood as aggravated (verschäfte Haftung). It is then admitted that § 285 (former § 281) BGB is applicable, according to which, when execution has become impossible in the meanwhile, the enriched shall give the claimant what he has obtained as a substitute (Ersatz) or eventually the action against the third who caused such impossibility (Ersatzanspruch). According to the decisions rendered by the Bundesgerichtshof, a possible commodum is then included as a substitute and therefore due by the enriched to the claimant. In «Caroline von Monaco I» case, however, it shall be taken into account that the impossibility of restitution has not occurred in the meanwhile, but derives from the very nature of the unjustified enrichment and is therefore exiting from the beginning: if so, German courts have generally denied that former § 281 BGB is applicable and decided that §§ 306 ff. BGB are applicable instead. Regards the above mentioned case, on the other side, it has been argued that §§ 306 ff. BGB regard only contractual obligation, whereas to obligations ex lege (as that of restitution) the former § 281 BGB is applicable instead (Canaris, Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts, cit., p. 94). It has been added that the rule established in «Caroline von Monaco I» case shall not be extended to any violation of the general right of personality, since § 285 (former § 281) BGB obliges to the disgorgement of profits only at the extent that they may be regarded as a substitute (Ersatz) of what should be given back at the beginning. In another relevant German case (so-called Herrenreiterfall), a picture was published which portrayed also the claimant (among other people) without his permission, but the Court held that the defendant had not pursued the aim of advertising by publishing the picture of that single person (the claimant): the profits gained by the defendant were therefore not considered as a possible remuneration for the use of the claimant’s image (Canaris, op. ult. cit., p. 95 f.).


\textsuperscript{80} Rookes v. Barnard and Others [1964] A.C. 1129. Some later decisions have attempted
It is so settled a general principle of European private law, according to which who undertakes an illegal enterprise is obliged to give back the profits he has obtained through encroaching of someone else’s right only if he was in bad faith; if he was in good faith, on the contrary, he is definitely allowed to retain such profits.\(^8\)

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\(^8\) Regards Italian law, see Trimarchi, *L'arricchimento derivante da atto illecito*, in *Scritti in onore di Sacco*, II, Milano, 1994, p. 1149 ff. Though general, the principle is however not without exceptions, because in particular cases disgorgement of profits is allowed even if the wrongdoer was not in bad faith – and the most relevant case is that of infringement of intellectual or industrial property, as may be deduced from art. 13 of the above mentioned Directive 2004/48/EC.