RESTITUTION AFTER TERMINATION FOR BREACH OF A CONTRACT FOR THE SUPPLY OF DIGITAL CONTENT AND SERVICES: A TOUGH ROW TO HOE

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While European contract law is traditionally based on a monetary economy, the recently adopted Digital Content and Services Directive has introduced certain novelties in this regard. It establishes a set of rules whereby a consumer obtains digital goods and services in exchange for their personal data. While this concept brought some new challenges throughout the contract lifecycle, this paper focuses on the restitutionary consequences of the terminating such contracts. Where money serves as the counter-performance, the Directive's restitution rules are relatively clear and align closely with established EU private law. However, the situation is markedly different when restitution involves data. By examining the evolving trends in European private law, this paper seeks to conceptualise the restitution rules introduced by the Digital Content and Services Directive and to provide guidelines for their application and interpretation in practice.

Key words: restitution; termination for breach; digital content and services; data as counter-performance; unwinding failed contracts

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1. INTRODUCTION[1]

It is a well-established general rule in European legal systems that, if a contract is terminated, it must be unwound, meaning that both parties must return what they received under the contract. This winding-up process aims to restore both parties, as far as possible, to the position they were in when the contract was concluded (*status quo ante contractum*). Where money is the counter-performance, the restitution rules of the Digital Content and Services Directive (DCSD)[2] are relatively clear and align closely with those already established in European contract law. However, the situation is markedly different when it comes to the restitution of data.

The adoption of the DCSD in 2019 and its transposition into the national laws of the Member States has introduced several new dimensions and challenges to the process of unwinding failed contracts. Since contracts for the supply of digital content and services are typically long-term agreements performed continuously over time, there is a need for an adequate adjustment of restitution rules, which are usually tailored for contracts that are performed at once. Additionally, the introduction of a new model of contracts – contracts where data serves as the counter-performance – has brought an entirely new logic to the law of restitution, which has traditionally been driven by principles of a monetary economy.

The aim of this paper is to provide an overview of the system for unwinding terminated contracts under the DCSD. By examining developing trends in European private law, it strives to conceptualise the restitution rules introduced by the DCSD and to offer guidelines for their application and interpretation in practice. Following some general observations on the unwinding of failed contracts in EU private law and the DCSD (Section 2.), the paper analyses the main features of the DCSD's restitution regime (Section 3.). Finally, it examines three specific issues related to the law of restitution (Section 4.): (i) payment for use and interest; (ii) disgorgement of profits; and (iii) proportionate payment in the event of the termination of a long-term contract.

[1] The author's research for this paper was supported by the Slovenian Research Agency (ARIS) under the research programme P5-0337, "Legal challenges of the information society".

[2] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, Official Journal, L 136, 22 May 2019.

2. THE UNWINDING OF FAILED CONTRACTS UNDER EU PRIVATE LAW AND THE DIGITAL CONTENT AND SERVICES DIRECTIVE: GENERAL OBSERVATIONS

2.1. The lack of a comprehensive regime regarding the unwinding of failed contracts

First, it should be noted that EU private law rarely contains provisions on restitution following the failure of a contract.[3] It appears that the EU legislature is somewhat reluctant to engage with the law of restitution, despite its significance within private law. However, there are certain exceptions, such as the consequences of withdrawal as outlined in the Consumer Rights Directive (CRD)[4] and the consequences of termination for breach as set out in the DCSD.[5] Nonetheless, these rules do not comprehensively address the issue of restitution. Generally, they only cover the primary effects of termination or withdrawal, such as the restitution of purchased goods and received money (or data), while the so-called secondary claims arising from such contracts – such as claims on the usage, interest, expenditure, and fruits (including profits) – are seldom addressed by EU legislation. Similarly, the DCSD does not offer a comprehensive framework for the unwinding of contracts following termination. Instead, national rules of Member States are applied, which results in varying restitution regimes across Europe.

Nonetheless, with respect to contracts for the supply of digital content and services where data serves as the counter-performance, it is encouraging that the EU legislature has introduced similar rules for the unwinding of such contracts due to termination for breach under the DCSD and withdrawal under the CRD.[6]

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[3] The notion of "failed" contracts, as used in this paper, refers to void and avoided contracts, contracts terminated for breach, or those ended by the exercise of a consumer's right of withdrawal.

[4] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Official Journal, L 304, 22 November 2011. See Articles 13 and 14 of the Directive.

[5] Articles 16, 17, and 18 DCSD.

[6] See Article 4 of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the

This approach shows promise as a step towards establishing a uniform regime for unwinding failed contracts in EU private law.

2.2. A uniform set of restitution rules for all types of contract failure?

Recent developments in private law in Europe indicate a trend towards establishing uniform restitution rules for failed contracts, regardless of whether they are void, avoided, or terminated for breach.[7] For instance, two recent European reform projects – the 2016 revision of the French *Code Civil* and the proposed draft for a new Swiss Code of Obligations (OR 2020) – include specific chapters on the unwinding of failed contracts. These reforms are based on the idea that restitution rules should be consistent whenever a contract has failed. A similar approach has been adopted in model rules for European private law, such as the Feasibility Study, the Principles of European Contract Law, and the Common European Sales Law.

In light of this trend, it seems somewhat illogical that the EU legislature chose to address only the unwinding of contracts terminated for breach within the DCSD. For instance, the DCSD does not explicitly regulate the consequences if a consumer, after years of using a particular social platform in exchange for their data, decides to terminate the contract.[8] Such scenarios are not uncommon in practice. The CRD, modernised in 2019, includes provisions on the unwinding of failed contracts involving data as counter-performance only in cases of withdrawal within a cooling-off period (Articles 13 and 14), which are very similar to the provisions for termination in the DCSD. It has been suggested that in cases where a contract fails on grounds established by Member States' national laws (e.g., avoidance for mistake or duress), the unwinding process should be

Council as regards the better enforcement and modernisation of Union consumer protection rules, Official Journal, L 328, 18 December 2019.

7 See, e.g., Meier, S., *Unwinding Failed Contracts: New European Developments*, Edinburgh Law Review, *vol.* 21, no. 1, 2017, pp. 1–29; Zimmermann, R., *The Unwinding of Failed Contracts in the UNIDROIT Principles 2010*, Uniform Law Review, *vol.* 16, no. 3, 2011, pp. 563–587; Hellwege, P., *Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem: Deutsches, englisches und schottisches Recht in historisch-vergleichender Perspektive*, Mohr Siebeck, Tübingen, 2004.

8 For a detailed and critical evaluation of the (lack of) right to terminate long-term contracts, see: Beale, H., *Digital Content Directive and Rules for Contracts on Continuous Supply*, JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law, *vol.* 12, no. 2, 2021, pp. 105–106, paras. 52–54.

governed by national restitution rules.[9] The author concurs with this view, but believes that Member States should consider the current trend towards establishing uniform restitution rules when unwinding failed contracts for the supply of digital goods and services on grounds other than termination for breach (e.g., voidness and avoidance), following the Directive's rules on unwinding contracts after termination wherever applicable.

Furthermore, it has traditionally been regarded as beneficial to apply a single set of rules based on the same logic to both contracting parties. For instance, in many Germanic legal systems, particularly Swiss law – which has historically had a significant influence on Slovenian law of obligations – it is considered inappropriate to apply property law restitution rules to one party's claim for the return of goods, while simultaneously applying contract law restitution rules to the other party's claim for money within the same contractual relationship.[10]

However, the General Data Protection Regulation (GDPR)[11] rules governing the restitution of personal data as counter-performance according to the DCSD are undoubtedly based on a fundamentally different logic than the contract law rules applicable to the restitution of digital content. While the initial 2015 proposal of the DCSD[12] contained some guidance on the restitution of data after the termination of a contract with data as counter-performance (Recital 37), the final version of the DCSD merely refers to the GDPR (Article 16(2)). This raises the question of whether GDPR rules can serve as a model for unwinding failed contracts involving data as counter-performance. Academics caution against this approach, suggesting that the reference to GDPR rules in Article 16(2) DCSD (and Article 13(4) CRD) is merely a stopgap solution.[13] *Inter alia*, they

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9 Loosen, M., *Die Rückabwicklung des Vertrages Daten gegen Leistung*, Tectum, Baden-Baden, 2022, p. 187.

10 For Swiss law, see, e.g., Huguenin, C.; Hilty, R. M.; Purtschert, T., *Vorbemerkungen zu Art. 79-84*, in: Huguenin, C.; Hilty, R. M., *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil*, Schulthess, Zürich, 2013, paras. 59 *et seq*. See also: Meier, *op. cit*. (fn. 7), p. 27.

11 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal, L 119, 4 May 2016.

12 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM(2015) 634 final, 9 December 2015.

13 Schmidt-Kessel, M., *Right to Withdraw Consent to Data Processing – The Effect on the Contract*, in: Lohsse, S.; Schulze, R.; Staudenmayer, D. (eds.), *Data as Counter-Performance – Contract Law 2.0?*, Nomos, Baden-Baden, 2020, p. 145.

argue that it remains unclear whether the obligations imposed by the GDPR are comprehensive enough to preclude additional rights from being derived from the Directives or from Member States' national laws.[14]

2.3. Prospective and/or retrospective effects of termination?

Another general observation is closely related to the fact that, in some scenarios involving failed contracts for the supply of digital content and services, the national restitution regimes of Member States apply (i.e., when a contract has failed on grounds other than termination for breach or withdrawal). It should be noted that national rules on restitution – similar to rules governing contract law in general – are predominantly based on contracts that are performed at once, rather than on long-term contracts, which are very common in the supply of digital goods and services. Slovenian law of restitution primarily relies on a strict distinction between the *ex tunc* and *ex nunc* effects of contract failure. However, this approach might not always be best suited to long-term contracts. To address this issue, in Swiss law it has been suggested not to limit unwinding of a contractual relationship strictly to *ex tunc* or *ex nunc* effect, but rather to allow the relevant liquidation point to be set flexibly (where justified).[15] Given the growing significance of long-term contracts in modern contract law (even beyond the DCSD), it would be beneficial to introduce a more adaptable approach for setting the relevant liquidation point in Slovenian law as well.

Termination is generally understood to operate prospectively (i.e., *ex nunc*).[16] However, in contracts performed at once, both parties are typically required to return what they received under the contract, resulting in consequences that closely resemble an *ex tunc* effect. The situation differs significantly, though, when dealing with the termination of long-term contracts. In such cases, it is traditionally understood that restitution can only be claimed for the period following the termination's effective date[17] (*ex nunc* effect). Consequently, the unwinding process in these cases does not seek to achieve the *status quo ante contractum*. Since many types of digital content and services are supplied contin-

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[14] *Ibid.*

[15] See: Huguenin, C.; Hilty, R. M.; Purtschert, T., *Art. 80*, in: Huguenin, C.; Hilty, R. M., *Schweizer Obligationenrecht 2020: Entwurf für einen neuen allgemeinen Teil*, Schulthess, Zürich, 2013, p. 262, para. 8.

[16] Zimmermann, *op. cit.* (fn. 7), p. 565.

[17] See, e.g., Article 7.3.7 of the UNIDROIT Principles of International Commercial Contracts; Zimmermann, *op. cit.* (fn. 7), p. 584.

uously over time, the DCSD provides some guidance on unwinding long-term contracts. While the 2015 proposal of the DCSD used the term "long-term contracts" (Article 16), the adopted version refers instead to "contracts that provide for continuous supply over a period of time".

Interestingly, the DCSD appears to depart from the strict *ex tunc/ex nunc* dichotomy, instead setting the point of relevance for restitution at the time of the defect's occurrence.[18] This approach is a welcome solution, aligning with modern trends in the unwinding of failed contracts. Nonetheless, the process of unwinding failed long-term contracts presents significant challenges, especially when data is provided as counter-performance, a topic explored in Section 4.3. Perhaps the most problematic scenario in this regard involves proportionate restitution, which poses numerous complexities when data serves as counter-performance (see Section 4.3.).

3. UNWINDING TERMINATED CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT AND SERVICES: THE MAIN FEATURES

Until the adoption of the DCSD in 2019, EU private law had not addressed the unwinding of failed contracts involving data as counter-performance. Interestingly, the model rules in the Common European Sales Law (CESL)[19] include a relatively comprehensive and uniform regime for unwinding failed contracts (Articles 172–177), which covers contracts for the supply of digital content. However, it explicitly excludes cases where digital content is not supplied in exchange for monetary payment (Article 173(6)). Consequently, the DCSD and the modernised version of the CRD have introduced an entirely new restitution model applicable to contracts involving data as counter-performance. Generally, this model combines the contractual rules of the DCSD (and the CRD) with the data protection rules of the GDPR.

Unsurprisingly, the restitution model for contracts for the supply of digital content with data as counter-performance differs considerably from "traditional" models applied to contracts for non-digital assets with monetary counter-performance. In cases where personal data was provided in exchange for digital content, restitution – i.e., re-establishing the *status quo ante contractum* – is not based on *giving back* what was received under the contract. Since consumers may have made several copies of the digital content, simple return would not

[18] Article 16(1) DCSD.

[19] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, 11 October 2011.

necessarily achieve restitution. Instead, the consumer is obliged to cease using the digital content or service and to refrain from making it available to third parties. In practice, providers of digital content and services often implement systems that automatically disable the use of such content or services upon contract termination (or in other cessation scenarios). Similarly, the trader must erase the consumer's data and prevent third-party access to it, unless a legal basis for data processing exists.

Where digital content or services are supplied in exchange for monetary payment, the restitution rules are relatively clear and do not deviate from those already established in EU private law. Thus, following termination, the trader must reimburse the amount paid by the consumer. However, if the digital service is provided over time and the digital content or service was in conformity for a portion of that time, the consumer is entitled only to a proportionate amount.[20] This situation should be distinguished from one where goods or services are to be delivered in parts over time, and a defect arises mid-delivery. In such cases, the overall benefit of the parts supplied without the remaining parts should be evaluated. If such performance has no value for the consumer (or a disproportionately low value), they are entitled to a full reimbursement.

Regarding the restitution of data other than personal data (e.g., content provided or created by the consumer while using the digital content or service), the DCSD sets forth relatively straightforward rules (Articles 16(3) and (4)). Generally, the trader must refrain from using such content (with some exceptions listed in Article 16(3)) and must make it available to the consumer at no charge. However, it has been argued that, given the broad definition of personal data in the GDPR, these rules may rarely apply in practice.[21]

More controversially, the application of rules for the restitution of personal data raises additional issues. For unwinding counter-performance involving personal data, the DCSD merely refers to the GDPR (Article 16(2)). In cases where the consumer terminates a contract for the supply of digital content due to a breach, it has been suggested in theory that such termination should be treated as an implied withdrawal of consent for data processing under the

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[20] For details, see Article 16(1) DCSD.

[21] Spindler, G.; Sein, K., *Die Richtlinie über Verträge über digitale Inhalte: Gewährleistung, Haftung und Änderungen*, Multimedia und Recht, *vol.* 22, no. 8, 2019, p. 492; Staudenmayer, D., *Auf dem Weg zum digitalen Privatrecht – Verträge über digitale Inhalte*, NJW – Neue Juristische Wochenschrift, *vol.* 72, no. 35, p. 2500; Loosen, *op. cit.* (fn. 9), p. 203; Twigg-Flessner, C., *Article 16*, in: Schulze, R.; Staudenmayer, D. (eds.), *EU Digital Law: Article-by-Article Commentary*, C. H. Beck – Hart – Nomos, Baden-Baden, 2020, p. 285.

GDPR.[22] This approach appears reasonable. A consumer's claim has a human rights dimension and primarily encompasses the following rights: the right to be informed whether their personal data has been processed and who had access thereto (Article 15 GDPR), the right to erasure (i.e. "the right to be forgotten", Article 17 GDPR), the right to the restriction of processing (Article 18 GDPR), the right to be notified of the rectification or erasure of personal data or the restriction of processing (Article 19 GDPR), and the right to data portability (Article 20 GDPR).[23] These rights, however, do not have a restitution character (in the private law sense) and exist independently of contract termination.

It is still too early to assess whether applying these rules in the unwinding process will differ in practice from their application outside contract law. Given that the DCSD merely refers to the GDPR, without further guidance on its application or interpretation, the answer is likely negative.

The scope of a trader's duties depends on whether they qualify as a controller or processor under the GDPR. A trader who only receives the data and transfers it to a third party for processing is considered a controller.[24] However, if they also process the data, they are deemed a processor.[25] Notably, regardless of the trader's position and role, the consumer may direct their data-related claims against third parties according to the provisions of the GDPR. Namely, data-related claims extend beyond *inter partes* contractual relationships with a trader and have *erga omnes* effect.

One of the most important data protection rights following contract termination is the right to erasure ("the right to be forgotten") envisaged in Article 17 GDPR. The CJEU's leading case on the application of this right is *Google v Spain*[26] of 2014, and since then the CJEU has carved out the scope and main features thereof.[27] Since the termination of a contract is treated as a withdrawal of consent for data processing, the consumer (i.e. the "data subject" under the GDPR) has the right to obtain from the controller the erasure of their personal

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22 Loosen, *op. cit.* (fn. 9), p. 210.

23 The full set of rights consists of Articles 12–23 and 77–84 GDPR. See Schmidt-Kessel, *op. cit.* (fn. 13), p. 145.

24 Twigg-Flessner, *op. cit.* (fn. 21), p. 286.

25 *Ibid.*

26 CJEU, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, Case C-131/12, ECLI:EU:C:2014:317.

27 For more, see: Kraneborg, H., *Article 17*, in: Kuner, C.; Bygrave, L. A.; Docksey, C.; Drechsler, L. (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary*, Oxford University Press, Oxford, 2020, pp. 478–479.

data without undue delay. Moreover, if the trader has made the consumer's personal data public, they are obliged to inform other controllers processing this data of the data subject's request to erase any links to, or copies or replications of, such personal data. Given that consumer's personal data may be processed by multiple controllers who are not necessarily known to the trader, this notification duty is limited by principles of reasonableness and availability (see Article 17(2) GDPR). Generally, the trader is required to notify at least those controllers to whom they directly transmitted consumer's personal data.[28] However, the above-mentioned obligations concerning the right to erasure do not follow the termination of a contract *ipso facto*; they presuppose an explicit request from the consumer.[29] In some cases, the consumer might not be interested (only) in erasing their personal data but in transmitting such to another controller. In such cases, the consumer can exercise the right to data portability as envisaged in Article 20 GDPR.

4. CHOSEN ISSUES

4.1. Payment for use and interest

As previously noted, the DCSD provides limited rules on so-called secondary claims arising from terminated contracts. However, it does address the obligation to pay for the use of digital content and services. EU private law has traditionally not remained silent regarding the obligation to pay for the use of goods. In the case of withdrawal under the CRD, a consumer who exercises their right of withdrawal is generally not required to compensate the seller for the use of goods. The CJEU emphasised in *Pia Messner v Firma Stefan Krüger*[30] that "the efficiency and effectiveness of the right of withdrawal would be impaired if the consumer were obliged to pay compensation simply because he had examined and tested the goods acquired under a distance contract."[31] Nevertheless, the consumer is liable for any decrease in the value of the goods resulting from handling them beyond what is necessary for examination and testing.[32]

It nevertheless seems that withdrawal and termination cannot follow identical concepts regarding use. Goods are generally not intended for use by the

[28] Loosen, *op. cit.* (fn. 9), p. 224.

[29] *Ibid*.

[30] CJEU, *Pia Messner v Firma Stefan Krüger,* Case C-489/07, ECLI:EU:C:2009:502.

[31] *Ibid*., para. 24.

[32] Article 14(2) CRD.

consumer during the cooling-off period, except for what is necessary to establish their nature, characteristics, and functioning. This is not necessarily the case for contracts terminated due to breach. For this reason, the DCSD establishes an obligation to pay for the use of digital content and services for the period in which they were in conformity (with the user fee based on the proportional purchase price).[33] However, the consumer is not required to pay for any period prior to termination during which the digital content or service was non-conforming.[34]

The synallagmatic nature of contracts generally requires balancing the restitution duties of both parties. Imposing a use payment obligation on one party returning goods, while relieving the party returning counter-performance in money (or personal data) of a similar obligation, is usually deemed inappropriate. In Slovenian law, the restitution consequences of termination for breach are detailed in the Obligations Code[35], specifically Article 111 on the effects of termination. Under this provision, the contracting parties are required to make restitution of benefits derived from performance (Article 111(4) of the Obligations Code). This includes reimbursement of fruits and the payment of usage. Conversely, a party returning money is obliged to pay interest from the date it was received (Article 111(5) of the Obligations Code), irrespective of the actual interest accrued.[36] Similar to Slovenian law, mutual claims for usage and interest are provided for in German law, the Vienna Sales Law, the Draft Common Frame of Reference, the Common European Sales Law, and the proposed draft for a new Swiss Code of Obligations. The French Civil Code differs, as it does not foresee claims for interest or usage, supported by the argument that the benefits derived from both parties' use of either the money or counter-performance balance each other out.[37]

However, the DCSD remains silent as to the payment for the use of consumers' personal data (where data served as counter-performance) or interest (where money served as counter-performance). It is questionable whether this legal gap should be filled by referring to national laws of Member States. As

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33 Article 16(1) DCSD.

34 Article 17(3) DCSD.

35 Obligacijski zakonik, Uradni list RS, no. 97/2007 – OZ-UPB1 (with further amendments).

36 See also: Možina, D., *Obresti in plodovi pri neupravičeni obogatitvi*, Pravni letopis, 2019, pp. 168–170; Tot, I., *Restitucijske kamate i restitucijski odnos između strana raskinutog ugovora*, in: Tot, I.; Slakoper, Z. (eds.), *Hrvatsko obvezno pravo u poredbenopravnom kontekstu: Petnaest godina Zakona o obveznim odnosima*, Ekonomski fakultet Sveučilišta u Zagrebu, Zagreb, 2022, p. 268.

37 Meier, *op. cit.* (fn. 7), p. 25.

explained above, the secondary claims of both contracting parties are typically interconnected and ideally would be offset against each other. This implies that a party returning money is only obligated to pay interest if the party returning goods is required to pay for their use, barring instances where one party acted unfairly and does not merit protection. This principle is also enshrined in Article 174(2) of the Common European Sales Law, which states that a recipient returning money must pay interest if the other party must pay for use (or if the recipient's actions justified contract avoidance due to fraud, threats, or unfair exploitation). Since claims for usage and interest are mutually connected, the absence of specific provisions on interest or payment for the use of data) should not, in author's view, be resolved by referring to such rules in Member States' domestic laws.

4.2. Disgorgement of profits

Data is the new gold. It is therefore not surprising that a trader gains profit from consumers' personal data. However, the DCSD does not address the restitution (or allocation) of profits gained by the parties from the contractual performance of the other party in the event of the termination of a contract. To resolve this issue, one could refer to the applicable national laws of the Member States. This is a question of the disgorgement of profits, which is addressed by the institution of *negotiorum gestio* in some legal systems, and by the law of unjustified enrichment in others.[38] In the process of unwinding failed contracts, the disgorgement of profits may also be addressed through rules on the reimbursement of fruits.

Under Slovenian law, each party is required to restore the benefits obtained from the contractual performance of the other party when a contract is terminated (Article 111(4) of the Obligations Code). While there is no established case law on this issue, this provision could be interpreted to encompass profits as well. In this context, the law of unjustified enrichment might be a useful tool for delineating the boundaries of such restitution, although it is not always well-suited to synallagmatic relationships. According to the general doctrine of unjustified enrichment, profits must be returned if they stem from the thing itself and would have accrued to the consumer under ordinary circumstances.[39]

[38] For a comparative overview of the disgorgement of profits, see: Hondius, E.; Janssen, A. (eds.), *Disgorgement of Profits: Gain-Based Remedies throughout the World*, Springer, Cham – Heidelberg – New York – Dordrecht – London, 2015.

[39] Lutman, K., *Neupravičena obogatitev*, Lexpera, Ljubljana, 2020, p. 173.

However, if the profits are the result of a trader's specific skills, the trader may be allowed to retain them.[40] This rule is relativised to a certain extent when profits stem from an unjustified interference with privacy and personal rights. In some instances, it has been suggested that profits should be shared between both parties.[41]

It remains unclear, however, how a recipient's good or bad faith affects the scope of restitution with respect to the disgorgement of profits. Under the general doctrine of unjust enrichment, a recipient in good faith may invoke the defence of change of position, which allows them to limit restitution to the enrichment that still exists. This principle should also apply to profits. However, it is uncertain whether a recipient in bad faith should be permitted to retain profits resulting from their specific skills. It is questionable whether the law of unjustified enrichment alone can provide satisfactory answers to these questions. For these reasons, it would be beneficial to establish further guidance on the disgorgement of profits at the EU level, to prevent excessive divergence in the application of the DCSD by Member States.

4.3. The termination of long-term contracts and proportionate payment

Another issue worthy of attention involves long-term contracts with data as counter-performance, in which a defect occurs after a period of conformity of the digital content or services. In such cases, the consumer is obliged to pay for the use of the digital content during the period it was in conformity, but this obligation ceases from the moment the defect arises. This is outlined in Article 17(3) DCSD. As noted above, it appears that in these cases, the decisive moment for unwinding the contract is when the defect caused the non-compliance of the contract. However, applying this rule to contracts where data serves as the counter-performance is challenging, as the GDPR rules were not designed with an *ex tunc* or *ex nunc* logic of restitution in mind – let alone scenarios where the decisive moment for unwinding lies somewhere between the conclusion and the termination of the contract.

It has been suggested to assess the value of the use of digital content in monetary terms in such cases[42], but this approach could interfere with the

40 *Ibid.*

41 *Ibid.*

42 Twigg-Flessner, C., *Article 17*, in: Schulze, R.; Staudenmayer, D. (eds.), *EU Digital Law: Article-by-Article Commentary*, C. H. Beck – Hart – Nomos, Baden-Baden, 2020, p. 306.

principle of private autonomy. Nevertheless, as the DCSD does not address such scenarios explicitly, it is left to the Member States to provide answers based on their domestic laws.

5. CONCLUSION

This analysis has shown that the DCSD does not follow the current trend of establishing uniform rules for all types of contract failure, addressing only the consequences of contracts terminated for breach. Additionally, the CRD offers guidance on unwinding contracts for the supply of digital content and services in cases of consumer withdrawal. However, it lacks provisions on the consequences of unwinding contracts that fail on grounds other than termination for breach or withdrawal (e.g., voidness and avoidance). In such cases, the restitution rules of the Member States apply. To foster a more uniform system for unwinding failed contracts and to minimise fragmentation in EU private law, Member States should consider the Directive's provisions on unwinding contracts after termination when interpreting and applying their domestic rules for contracts that fail on other grounds.

Furthermore, the DCSD does not provide a comprehensive framework for unwinding terminated contracts. Instead, it addresses only the primary effects of termination, with so-called secondary claims – except for provisions on payment for use – almost entirely omitted. This raises the question of whether national rules on secondary claims should fill these legal gaps in the DCSD. There is no uniform answer to this question. Due to the traditionally reciprocal relationship between claims for usage and claims for interest, it is challenging to argue that the absence of a specific provision on interest (or payment for the use of data as counter-performance) should be resolved by applying the restitution rules of the Member States. On the contrary, given the significant connection between claims for usage and claims for interest, it seems unlikely that the EU legislator would include the former in the Directive's provisions while deliberately leaving the latter to national laws. It appears more reasonable that no duty to pay interest should be imposed on the trader. However, a different conclusion should be drawn concerning profits gained by a trader from consumer's personal data, in which case the national rules on the disgorgement of profits should apply.

Perhaps the most challenging issue in unwinding terminated contracts under the DCSD is the restitution of personal data. Particularly difficult is the task of adapting the logic of the GDPR to the process of unwinding failed contracts (assuming this is even feasible). Since contracts for the supply of digital content and services are typically long-term and performed over an extended period, a

primary challenge lies in finding a suitable approach for cases where a defect arises after a period of conformity of the purchased goods, requiring only a proportionate payment. Despite the challenges that the restitution of data as counter-performance may present, the coming years of GDPR application will likely reveal its deficiencies in the process of unwinding failed contracts. These insights may ultimately inform improvements in the restitution rules of EU private law in the future.

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Sažetak

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RESTITUCIJA NAKON RASKIDA ZBOG POVREDE UGOVORA O ISPORUCI DIGITALNOG SADRŽAJA I USLUGA: TVRD ORAH ZA RAZBIJANJE

Iako se europsko ugovorno pravo tradicionalno temelji na monetarnoj ekonomiji, nedavno usvojena Direktiva o digitalnom sadržaju i uslugama uvela je određene novosti u tom pogledu. Direktiva uspostavlja skup pravila prema kojima potrošač dobiva digitalnu robu i usluge u zamjenu za svoje osobne podatke. Iako je taj koncept donio nove izazove tijekom cijelog životnog ciklusa ugovora, ovaj se rad usredotočuje na restituciju kao posljedicu raskida takvih ugovora. Kada novac služi kao protučinidba, pravila o restituciji prema Direktivi su relativno jasna i u velikoj mjeri usklađena s postojećim privatnim pravom EU-a. Međutim, situacija se znatno razlikuje kada restitucija uključuje podatke. Ispitivanjem novih trendova u europskome privatnom pravu, ovaj rad nastoji konceptualizirati pravila restitucije koja uvodi Direktiva o digitalnom sadržaju i uslugama te pružiti smjernice za njihovu primjenu i tumačenje u praksi.

Ključne riječi: restitucija, raskid zbog povrede ugovora, digitalni sadržaj i usluge, podatci kao protučinidba, razvrgavanje neuspjelih ugovora

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