Chapter 21
Disgorgement of Profits in Slovenian Law

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Abstract In Slovenian law, complete disgorgement of profits is possible only in criminal and administrative law (via public enforcement, to the benefit of the state budget), but generally not in private law (via private enforcement, to the benefit of the plaintiff). The scarce case law indicates that seizure of benefits gained by criminal act or minor offense rarely occurs in practice. An easier to apply functional equivalent of the disgorgement of profits is monetary penalty (when prescribed). In tort law, wrongfully gained profit may be disgorged by way of a damages claim only to the extent that it represents legally relevant damage (lost profit) of the wronged person. It would seem that tort law is more concerned with preventing the wronged party from getting more in damages than its damage (loss) amounts to, than it is with preventing the wrongdoer from keeping profit gained by wrongful infliction of damage (and exceeding the "loss" of the wronged party). An exception applies to infringements of copyright where damages may be multiplied to up to three times the actual damage. In contract law, the damages are generally limited by foreseeability, but this limitation does not apply in cases of intentional or reckless breaches, which can be seen as a way of preventing (profitable) breaches and achieving some extent of disgorgement of profits.

Keywords Wrongfully gained profit • Disgorgement of profit • Confiscation of benefits • Damages • Loss

Introduction

Everyone agrees that unlawful conduct should not pay. A wrongdoer is not allowed to profit from his own wrong[1] – a timeless statement of natural justice that Slovenian judges, as well as presumably the judges of other countries, would have no problem

[1]See, e.g., American Law Institute (2011), § 3 of Restatement (Third) of Restitution and Unjust Enrichment.

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signing on to. One would expect that this principle of both private and public law is reflected in the legal remedies in both areas of law. Criminal and administrative law explicitly prescribe that no one is allowed to keep benefits gained by a criminal offense or minor offense and the state can seize any benefits gained in this way.

In private law, there is no general remedy aimed at the disgorgement of ill-gotten gains. Tort law[2] – the area of private law primarily concerned with the consequences of wrongs between individuals – aims at restitution for wrongfully caused damage (loss) to the wronged person, rather than at the disgorgement of profits from the wrongdoer. Damages should compensate for but also not exceed the loss (damage) of the wronged person. There is some discussion in the legal literature as to whether in cases of violations of personality rights by the media damages for immaterial loss (pain and suffering) should be higher than the actual loss in order to provide an incentive to the publisher not to (systematically) infringe the rights of individuals. This discussion is not reflected in the case law. Copyright law contains a damage multiplier that also functions as a means of disgorgement of profits: in the event of infringements, the amount of damages can be up to three times the amount of the loss or three times the amount of "the usual fee". There are some possibilities regarding the disgorgement of profits in the law of unjustified enrichment, but they have rarely been used in this respect thus far. According to a basic principle of contract law, damages in the event of a breach of contract are limited to the damage that was foreseen or foreseeable by the debtor. However, if the breach is intentional or fraudulent, the creditor may demand restitution for the entire damage caused by the breach. This "growth" of liability can also be seen as a means of disgorging profits, but it is not used in this manner by the courts.

Most Slovenian lawyers would translate the "disgorgement of profits" or the "skimming-off of profits" as the "seizure" or "confiscation of benefits" ("*odvzem premoženjske koristi*"), which is an institute of criminal law and administrative law. In private law, the term "disgorgement of profit" is unknown. However, Slovenian private law knows the duty to forfeit profit gained by (some type) of wrongful conduct in the following two situations:

(a) if someone (a "*gestor*") intervenes into another man's affairs not with the intention to help him but rather to keep the benefits (so called false *negotiorum gestio*), he is obliged to hand over to the principal all the benefits gained, in addition to damages, if the principal so demands.[3]
(b) Corporate law knows a similar provision in relation to the non-competition clause: If a person violates the prohibition of competition, the company may, in addition to damages, demand that all benefit gained thereby be handed over

[2]The expression "tort law" is used in the sense of non-contractual liability for damage and covers delicts (fault liability) as well as quasi-delicts (strict liability).

[3]See Art. 205 of the Obligations Code.

to the principal.[4] In both of the mentioned cases, the duty to hand over any benefits so gained applies only if the wrongdoer had intentionally violated the rights and interests of the wronged person.

Tort Law

The basic principle of Slovenian tort law is found in Art. 131 (1) of the Obligations Code: if someone has wrongfully caused damage to another by his own fault, he has to make good the damage.[5] Fault (negligence) is presumed until proven otherwise; however, intention and recklessness have to be proven by the plaintiff. The focus of tort law is on the damage (loss) of the wronged party and not on the profit the wrongdoer might have gained. The primary aim of tort law is the reparation of (material and immaterial) damage. The wronged party is to be put as much as possible into the position in which it would have been if the damage had not occurred.[6] It follows that, in principle, the wronged party may not be awarded more in damages than its loss (material and immaterial) amounts to – in other words, the wronged party may not "profit" or become "enriched" by damages. For this reason, any benefits the wronged party may have received from the event giving rise to the damage should be deducted from the damage (*compensatio lucri cum damno*).[7]

Damage refers to either material or immaterial damage. Material damage is calculated in two ways: either as the cost of restitution (e.g. repair) or as a reduction in the value of property (assets), including the prevention of an increase in value, i.e. lost profit.[8] If, due to his wrongful conduct, the wrongdoer has gained profit that the wronged person was reasonably expecting, the wronged person may demand damages for lost profit. However, the case law has not expressly discussed this effect

[4]Art. 42 of the Companies Act (ZGD-1, Official Gazette 42/2006, most recent amendment 82/2013). However, this claim must be filed within 3 months after the company discovered the violation and the liable person, or within 5 years from the occurrence of damage, at the latest.

[5]See Art. 131(1) of the Obligations Code. The fault (negligence) is presumed until proven otherwise. The general clause of Art. 131 of the Obligations Code does not mention wrongfulness. However, it is undisputable that "wrongful conduct" is one of the elements of fault liability; see, e.g., Supreme Court Case No. VIII Ips 314/2004, dated 24 May 2005. In addition to the fault principle, the loss has to be made good by the person carrying out the "dangerous activity" or the holder of the "dangerous thing", regardless of their fault (strict liability) if the loss is attributable to the increased risk of inflicting damage arising out of the "dangerous" activity or thing, see Art. 131(2) of the Obligations Code. Strict liability also applies to some other cases defined by the law, see Art. 131(3) of the Obligations Code.

[6]See Art. 169 of the Obligations Code.

[7]However, if the wronged party receives sympathetic help or gifts from volunteers, this is not deducted from the damages, as the purpose is to help (and, in this sense, to enrich) the wronged person. An exception to the principle also applies in cases where social support is given to the wronged party, see Supreme Court Case No. II Ips 50/1994, dated 15 September 1994.

[8]See Arts. 132, 164, and 169 of the Obligations Code.

as it is only concerned with the loss of the wronged party. Immaterial damage relates to physical or emotional suffering or fear; here a monetary claim for damages is not seen as the "reparation" of damage, but rather as the "equitable satisfaction" of the wronged person.[9]

With regard to material damage, an exception applies to cases where a "thing" was destroyed or damaged intentionally; here the damages do not cover only the "objective" loss (calculated either as the cost of reparation or the reduction in value, both in market terms), but also the special (subjective) value the thing had to the wronged party (*pretium affectionios*).[10] These damages contain a certain punitive element as the extent of the sanction depends on the degree of fault. On the other hand, a certain immaterial element (the emotional connection of the wronged party to the "thing") is taken into account when calculating material damage. Even though it is difficult to imagine that the wrongdoer would profit by destroying or damaging a thing, the focus is still on the loss of the wronged party and not on the profit of the wrongdoer, even if the damages are higher than the objective "loss".

In the legal literature there is some discussion as to whether damages may exceed (material and non-material) loss where the latter is the result of a media company violating the personality rights of individuals. If the media company profits by violating personality rights, disgorgement of profit cannot be claimed by a damages claim for lost profit, since, in most cases, it was not the intention of the wronged person to commercialize his or her personality in such manner. Thus, damages for non-material loss remain the only option. Neither the case law nor the legal literature approach these situations from the viewpoint of disgorging profit, the discussion rather focuses on the "punitive" element of damages. The prevailing view seems to very much oppose the idea of punitive damages; they are seen as being inconsistent with principles of private law; penalization is reserved exclusively for criminal law.[11] The latter, *inter alia*, guarantees the defendant the constitutional procedural rights that, if tort law included punishment, the defendant could be deprived of in a civil procedure.[12] However, some younger authors underline that damages in the amount of the actual (immaterial) loss do not protect personality rights effectively against media corporations.[13] One of the reasons is that the wrongdoer – the media company – gets to keep the profit exceeding the immaterial loss of the wronged person, which is clearly unacceptable. The prevailing case law rejects the idea of punitive damages. However, a recent judgment of the Supreme Court shows that a change of attitude is not impossible: the Court discussed the question of from whom punitive damages may be sought – the liability of the public hospital and

[9] See Arts. 178–181 of the Obligations Code.

[10] Art. 168 (3) Obligations Code.

[11] See, e.g., Polajnar-Pavčnik (2011), 1284.

[12] See, e.g., Vuksanović (2010) Kaznovalna funkcija odškodnin in Ustava, 11.

[13] See, e.g., Mežnar (2006), 77; Mežnar (2008), 1284.

state health insurance fund [at issue in the case] would "punish" all the beneficiaries and was rejected. It would seem that such a claim could be upheld under different circumstances.

The conflict between these contradictory principles, i.e. the unacceptability of the wrongdoer being allowed to keep the profit gained by a wrong (and exceeding the damage), on the one hand, and the principle that the wronged party should not "profit" from damages, together with a negative attitude towards punitive measures in civil law, on the other, is resolved in favour of the latter.

Intellectual Property Law

In principle, infringements of intellectual property rights give rise to liability in tort according to the general rules of the Obligations Code. There are, however, two important exceptions that only apply to infringements under intellectual property law.

The first one is the possibility of an alternative calculation of damages in addition to the general rules: an amount that corresponds to the usual royalty or license fee for legitimate use. This is applicable to infringements of copyrights,[14] patents, trademarks, industrial designs, and topographies of integrated circuits.[15] According to the case law, this not as a special case of calculating (abstract) damages, but a case of restitution due to unjust enrichment as a result of the expenses that the wrongdoer has "saved".[16] An analogy can be drawn by using another person's property that is regulated as a case of unjust enrichment in Art. 198 of the Obligations Code; "property" is understood in a broad sense, including rights, such as intellectual property rights.[17] This can also be seen as a case of the disgorgement of profits in the sense of the disgorgement of the expenses the wrongdoer has saved.

The second exception only applies to copyright infringements. In addition to damages calculated either on the basis of general rules or as the usual fee, the wronged person may demand from the wrongdoer a "civil penalty". According to Art. 168 (3) of the Copyright and Related Rights Act, the wronged party may, irrespective of any damage, claim up to three times the amount of the usual fee for legitimate use of such rights, if the infringement was intentional or reckless. The punitive character of the provision stems from the fact that damages representing a multiplied loss (*triplum*) is available only in cases involving intent or recklessness

[14] See Art. 168(2) of the Copyright and Related Rights Act ("Zakon o avtorski in sorodnih pravicah", Official Gazette 21/1994, with subsequent changes, most recently 110/2013).

[15] See Art. 121a (2) of the Industrial Property Act ("Zakon o industrijski lastnin" – ZIL-1, Gazette – 51/06, consolidated version 100/13). See also Art. 17 of the Act on the Protection of Topographies of Integrated Circuits (Official Gazette 81/2006).

[16] See Supreme Court Case No. III Ips 126/2007, dated 16 June 2009.

[17] Cigoj (1984), 848.

and also from the fact that such may be claimed regardless of actual damage. It is the wronged party and not the state who receives the "penalty". The damages multiplier is an important exception to the principle that the wronged party may not gain more in damages than its damage (loss). The effect of the "civil penalty" is also that the wrongdoer is disgorged of the profit to the extent that it exceeds "normal" damages (up to three times this amount). In the literature and case law, the disgorgement viewpoint is not discussed. It seems somewhat odd that the Industrial Property Act, which was adopted subsequently, does not contain a similar provision regarding the infringement of patents, trademarks, and industrial designs. Although such situation is comparable with copyright infringement, the application of a "civil penalty" for the infringement of industrial property rights is neither discussed in the literature nor applied by analogy by the courts.

Law of Unjustified Enrichment

It would seem that the law of unjust enrichment provides more possibilities for the disgorgement of unlawfully gained profit than tort law, as it is based on the principle of natural law according to which no one may be enriched at the expense of another without a legal basis.[18] Thus, the aim of restitution is to abolish the unjustified enrichment, i.e. enrichment without a legal basis. It follows that the wrongdoer should not be allowed to keep the profit gained without a legal basis.

The basic principle of Slovenian law of unjustified enrichment is found in Art. 190(1) of the Obligations Code: if someone is unjustly enriched at the expense of another, he must return what he had received, if possible, or pay restitution for the benefits gained. Thus, the duty of restitution only arises where there has been a "shift" of property from one person to another without legal justification.[19] In order words: the enrichment of one party must be related to the deprivation of another. Therefore, the wrongdoer can be disgorged of the profit only if this profit is a result of the deprivation of the wronged person, which significantly narrows the range of application of the law of unjustified enrichment as a way of disgorging the profit. In fact, the situation is comparable to tort law (lost profit).

Two further points should also be stressed. Firstly, the legal foundations of different claims in the Slovenian law of obligations may overlap. The *non-cumul* principle is not in force. On the contrary, the Code explicitly provides for a plaintiff's choice between a claim for damages and a claim for restitution (due to unjustified enrichment), if the conditions of both are met. Therefore restitution is, in principle, a remedy available for a wrong. It is often more advantageous

[18] "*Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*", Pomp. D. 12,6,14.

[19] See Art. 190 of the Obligations Code ("Obligacijski zakonik", Official Gazette 83/2001, 32/2004, 40/2007).

for the claimant to base the claim on unjustified enrichment since the period of prescription for claims for damages may be shorter.[20] And secondly, the boundaries between claims for damages and claims for unjustified enrichment are blurred. The courts sometimes consider the same (or similar) facts as giving rise to a claim for unjustified enrichment in one instance, and in others as giving rise to a damages claim.[21]

Contract Law

In contract law, if a debtor breaches a contract, the creditor may demand specific performance. Thus, the debtor may, in principle, not simply choose to breach the contract if the breach is more profitable to him than performance. However, this only holds true for obligations that, by their nature, are executable (excluding, e.g., obligations which only the debtor can perform). It could be argued that the claim for specific performance also has the function of preventing profitable breaches.

The creditor is also entitled to damages for breach of contract. The debtor is liable for damages in the amount of loss foreseeable to him.[22] If, however, the breach of contract was intentional or fraudulent, the foreseeability limitation falls away: the damages then must cover the "entire" loss arising from breach, i.e. also the loss due to particular circumstances not foreseeable to the debtor.[23] This is an instance of damages with a punitive character in contract law. Although this still entails the recovery of the loss of the creditor rather than the disgorgement of the gains of the debtor in breach, it may enable disgorgement of some or all of the profit if any was gained and it also provides an incentive for the debtor not to (intentionally or fraudulently) breach the contract. Unfortunately, the case law with regard to intentional and fraudulent breaches is rare and the question of the disgorgement of profits is never discussed.

[20] Art. 189 of the Obligations Code makes it clear that the wronged person may, after the prescribed period for filing a claim for damages (within 3 years following the discovery of the damage and the liable person, or within 5 years from the occurrence of the damage), still demand restitution amounting to what the wrongdoer has received by the act giving rise to the damage. See, e.g., Higher Court in Ljubljana Case No. III Cp 1164/2009, dated 3 June 2009, and Case No. II Cp 1219/1994, dated 5 April 1995.

[21] See, e.g., Supreme Court Case No. II Ips 444/2004, dated 16 March 2006 (the defendant had rented out an apartment of which he was only co-owner; the Court upheld the claim of the other co-owner for damages), Supreme Court Case No. II Ips 364/2000, dated 1 March 2001; here, the plaintiff was co-owner of the house, too. She claimed that the defendant hindered her use of the house, although he himself was only using his part of the house. The court upheld a claim for unjustified enrichment.

[22] See art. 243(1) of the Obligations Code. Oddly, the moment of reference is not the time of the conclusion but the time of the breach of contract.

[23] See Art. 243(2) of the Obligations Code.

Competition Law

A violation of competition law is also a tort. The general rules on damage and liability apply.[24] Although the gaining of profit is the primary aim of any anticompetitive practices, the profit can only be disgorged by way of damages claimed to the extent that they represent the loss of the wronged party (i.e. lost profit). No special tort law rules exist for competition law. The possibility of the disgorgement of profit as one of the methods of remedying damage is discussed by the legal literature, but has not yet found any reflection in the case law.[25] Furthermore, it should be noted that the courts apply high standards for proving lost profit in claims for damages due to anticompetitive practices.[26] Judgements granting claims for damages due to such in the last two decades cannot be found. Any debate as to whether private enforcement of competition law should include the element of disgorging the wrongdoer of the profit is therefore purely academic.

Administrative Law

Infringements of competition law[27] and copyright law[28] as well as violations of numerous other laws or rights (but not patents, trademarks, and industrial designs) are not just torts giving rise to claims for damages, but also minor offenses ("*prekršek*"). This means, on one hand, that they are punishable by monetary fines imposed by different government agencies. Fines can also be seen as a method of disgorgement of wrongfully gained profits to the benefit of the state budget.

The fines in cases of anticompetitive practices may amount to up to 10 % of the annual turnover of the company.[29] They may be imposed by the Slovenian Competition Protection Agency, which also assesses restrictive agreements and abuses of a dominant position, and as well examines concentrations. Unfortunately, the extremely small number of imposed fines in the last two decades does not allow the conclusion that Slovenian companies respect the rules. Rather, it shows an underdeveloped anti-competition culture and non-efficient public enforcement of competition law.

[24] See Art. 62(1) of the Competition Act ("Zakon o preprečevanju omejevanja konkurence" – ZPOmK-1, Official Gazette 36/2008, most recent amendment 63/2013).

[25] See, e.g., Vlahek and Ahtik (2011), 1344; and Bernard (2011), 503.

[26] See, e.g., Higher Court in Ljubljana Case No. I Cpg 1473/2010, dated 18 May 2011.

[27] See Arts. 73 and 74 of the Competition Act.

[28] See Arts. 184 and 185 of the Copyright Act.

[29] See Arts. 73 and 74 of the Competition Act.

On the other hand, minor offenses are also subject to rules on the seizure of benefits gained by minor offenses. Art. 28 of the Minor Offenses Act[30] clearly states that "*No one is allowed to keep any material benefits gained by or for a minor offense*". The agency that imposes a fine issues an order by which the benefits are confiscated from the perpetrator or from another recipient of benefits. As with fines, confiscated benefits go into the state budget. However, the case law on the seizure of benefits is very scarce.

Criminal Law

Violations of competition law by which "great"[31] damage is caused to the wronged company or by which the perpetrator gains "great" material benefit, are not just minor offenses, but also criminal offenses.[32] The same is true if someone uses foreign trademarks, industrial designs, patents, and other industrial property rights "in the course of his business".[33] The infringement of copyrights and related rights can also represent a criminal offense,[34] as well as the violation of personality rights[35] and numerous other types of violations. It is quite possible that the same conduct represents a minor as well a criminal offense: in such a case, criminal procedure takes precedence.[36] Not only natural persons, but also legal entitles are punishable.[37]

The perpetrator (wrongdoer) is not just liable for any damage he has caused, but he is also not allowed to keep any benefits he might have gained which exceed the damages (if they are claimed at all). As is the case with the Minor Offenses Act, the "confiscation of benefits" gained by criminal act is based on a very clearly formulated principle according to which no one is allowed to keep benefits gained by a criminal offense.[38] Of course, seizure is possible only if the defendant is found guilty of a criminal offense. Confiscation is imposed by a criminal court *ex officio*, together with sentence for the criminal offense. The benefits may be seized from the

[30]The Minor Offenses Act ("Zakon o prekrških" – ZP-1, Official Gazette 7/2003, with subsequent amendments, most recently 111/2013).

[31]Both "greater" damage and "greater" material benefit are defined in Art. 99(9) of the Penal Code as exceeding EUR 50,000.

[32]See Art. 225 of the Penal Code ("Kazenski zakonik", Official Gazette 55/2008, 39/2009).

[33]See Art. 233 (trademarks, industrial designs) and Art. 234 (patents, topographies) of the Penal Code.

[34]See Arts. 147–149 of the Penal Code.

[35]See Arts. 158–160 of the Penal Code.

[36]See Art. 11 of the Minor Offenses Act.

[37]See The Liability of Legal Persons for Criminal Offences Act ("Zakon o odgovornosti pravnih oseb za kazniva dejanja", Official Gazette 59/1999, last amended 57-2402/2012).

[38]See Art. 74(1) of the Penal Code.

perpetrator or from a person who has received the benefit. The Penal Code regulates the relation between a seizure and a claim for damages, which may also be filed in a criminal court: if the court has upheld the wronged person's claim for damages, then only the benefits exceeding the damages are seized. In this sense, the confiscation (to the benefit of the state budget) is of a secondary nature, the damages of the wronged person are primary.[39]

However, confiscation of benefits in practice may cause significant difficulties. In a simple and straightforward criminal case, e.g. if the defendant has sold drugs in exchange for money, it is easy to seize the benefits, i.e. the money received. However, in more complex cases, e.g. violations of competition law, it may be very difficult for a criminal court to ascertain the benefits to be seized and to exclude other factors that may also have influenced the economic position of the defendant. If the wronged person claims damages under criminal procedure, the court will decide on the claim only if the case is relatively simple. If the case is more complicated, the criminal court will direct the plaintiff to a civil or commercial court. This is a possibility that a Criminal court does not have with regard to the seizure of benefits. There is scarce case law on the confiscation of benefits under criminal law in general and none on the confiscation of benefits in cases of violations of competition and intellectual property law, as well as on violations of personality rights.

The goal of the disgorgement of profits can also be achieved by means of monetary penalties (fines) and, when legal entitles are defendants, also by the seizure of property as a criminal sanction (not property gained by the offense, but pre-existing property).[40] As is the case with the seizure of benefits, monetary penalties go into the state budget. They are determined on the basis of a range of (extenuating or aggravating) circumstances, one of which is the profit expected from or gained by the criminal offense.[41] Still, such a monetary fine is abstract in the sense that the actual profit does not need to be ascertained. In this respect, it is much easier to set a penalty that to determine the benefits to be seized.

The Act on the Liability of Legal Entities for Criminal Offences prescribes an extremely wide range of monetary penalties: for criminal offenses that are punishable by a prison sentence of less than 3 years, the monetary penalty may be as much as € 500,000 or one hundred times the amount of the damage caused or the benefits gained by the criminal offense. For criminal offenses punishable by a prison sentence of more than 3 years, the minimum monetary penalty is € 50,000 and may reach up to two hundred times the amount of damage caused or the wrongfully gained benefit.[42] Whether such a manner of prescribing monetary penalties is an example of sensible regulation is a different question. The disgorgement of profits

[39] See also Supreme Court Case No. I Ips 34619/2011-416, dated 12 September 2013.

[40] See Art. 14 of the Liability of Legal Entities for Criminal Offences Act ("Zakon o odgovornosti pravnih oseb za kazniva dejanja", Official Gazette 59/1999, most recent amendment 57-2402/2012).

[41] See Art. 49 of the Penal Code.

[42] See Art. 26 of the Liability of Legal Entities for Criminal Offences Act.

is surely only a "by-product" of such a penalty. It has to be noted, however, that since 1999 there has not been a single (!) judgement imposing a monetary penalty on a legal entity in Slovenia.

Recently, the Forfeiture of Assets of Illegal Origin Act was adopted in Slovenia[43] – a measure that should supplement the Penal Code in the fight against "commercial" crime. If there exist reasons for suspicion that a person has committed one of the listed criminal offenses, and this person's income is not proportional to his or her expenditures, the act sets the presumption that its assets (property) have been acquired illegally. The burden of proof is reversed: the suspect must prove that he or she has acquired the assets in a legal way or the assets are confiscated to the benefit of the state budget. Assets can be seized even without a criminal conviction. The confiscation procedure is a civil procedure; it commences when a state prosecutor files a claim. With regard to this Act, too, it has to be noted that there has not been a single (!) successful seizure of assets since its coming into force in 2012.

Conclusions

In Slovenian law, complete disgorgement of profits is possible only in criminal and administrative law (via public enforcement), but generally not in private law (via private enforcement). In public law, it is the state budget that receives the wrongfully gained "benefits". However, the scarce case law indicates that such seizure rarely occurs in practice. This creates some doubt with regard to the effectiveness of the public enforcement of the principle that no one may keep profit gained by his own wrong. Furthermore, in more complex cases, such as violations of competition law, it may be very difficult for a criminal court or government agency to ascertain the exact amount of profit resulting from the violation. An easier to apply functional equivalent of the disgorgement of profits is monetary penalties or fines (to the extent that they are prescribed).

In private law, there is no general remedy aimed at the disgorgement of profits. In tort law, such profit may be disgorged by way of a damages claim only to the extent that it represents the legally relevant damage (lost profit) of the wronged person. It would seem that tort law is more concerned with preventing the wronged party from getting more in damages than its damage (loss) amounts to, than it is with preventing the wrongdoer from keeping profit gained by wrongful infliction of damage (and exceeding the "loss" of the wronged party).

There are some exceptions in intellectual property law: on one hand, the damage may be calculated either according to general rules or on the basis of the usual fee for legitimate use. The latter may be seen as a way to prevent the enrichment of the wrongdoer, as he must pay restitution amounting to the expenses he saved due to his wrong. On the other hand, damages for infringement of copyright (but not

[43] "Zakon o odvzemu premoženja nezakonitega izvora", Official Gazette 81/2011.

patents, trademarks, and industrial designs) may be multiplied and may amount to up to three times the actual damage. This so-called "civil penalty" also functions as a manner of disgorgement of profits. In contract law, the damages are generally limited by foreseeability, but this limitation does not apply in cases of intentional or reckless breaches. This also serves as a way of preventing (profitable) breaches and achieving the disgorgement of profits (to some extent).

Having in mind that private law does not allow for complete disgorgement of profits via private enforcement and considering the scarce number of cases where "benefits" gained by criminal or minor offenses have been seized via public enforcement, one must wonder whether in Slovenia tort actually does pay.

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