3 The General Principle

The general principle might be to the effect that a person who has been enriched at the expense of another person is bound, if the enrichment is unjustified, to redress the enrichment. This principle could, with some justification, be regarded as part of the common European legal heritage.

There are various possible ways of expressing the general principle. The formula currently under consideration by the Study Group on a European Civil Code does not talk of an unjustified enrichment "at the expense of" another. Instead it talks of an unjustified enrichment which is "attributable to another's disadvantage". The advantage of using "attributable to another's disadvantage" rather than "at the expense of" is that its separates out more clearly two quite different elements. The element of "disadvantage" or detriment is concerned with a practical state of affairs - the mirror image of enrichment. The element of "attributability" is concerned with abstract notions of causation or connection. Keeping these two elements separate has certain drafting advantages over the more compact "at the expense of" formula.¹⁷

One common situation which is covered more clearly under the approach adopted by the Study Group than under an "at the expense of" approach is enrichment by lawful competition. A new business moves into an area where there is an existing business and does well. It takes customers from the existing business. In a popular sense it could be said that the new business is enriched at the expense of the old. This impression has to be negated in the text, or at least in the comments. However, no one would even be tempted to say that the enrichment of the new business was attributable to the disadvantage or detriment suffered by the old. It is attributable to its own qualities and competitive advantages.

The general principle method above, however drafted on points of detail, may appear at first sight to be an alarmingly broad one. It must be remembered, however, that it is limited, not only by the requirements built into it (enrichment on the one side; disadvantage on the other; a sufficient connection between the two; lack of justification) but also by the subsequent provisions in the Book on unjustified enrichment.¹⁸ It must also be remembered that, in accordance with the normal principle, it would be for the claimant to establish the ingredients of the claim.

4 Enrichment

A fundamental choice has to be made between an "economic" or "net worth" approach to the concept of enrichment and a more "itemised" or "discrete" approach. On the "economic" approach a person would not be enriched unless there was some increase in the net value of that person's patrimony. The receipt of some valueless or or burdensome property would not be an enrichment. The receipt or an unwanted service would not be an enrichment. The receipt of a wanted service which had the effect of saving expenditure on an equivalent service would be an enrichment. On the more
"itemised" or "discrete" approach the receipt of any property which increased the recipient's assets, even if it was economically valueless or burdensome, would count as an enrichment, as would the receipt of any service, even one which was unwanted and which did not involve any saving of expenditure.

I am on record as preferring an economic approach. The topic was thoroughly discussed within the Advisory Council on Unjustified Enrichment and Negotiorum Gestio of the Study Group on a European Civil Code. There was support for both views. In the end the itemised approach was preferred. That decision was subsequently approved by the Co-ordinating Committee. This way of proceeding has certain advantages. It leads to a simpler definition of enrichment and a more straightforward solution to the problem of corporeal property which ends up in the wrong hands. It also leads to a more obvious solution to the problem of enrichment coupled with a countervailing disadvantage. It is easier to see on this approach that there can be enrichment on both sides in such situations. It does mean that the problem of unwanted services has to be dealt with at a later stage. That is not necessarily a bad thing. Such situations are unusual and there is something to be said for leaving them until the end rather than complicating the initial provisions by trying to deal with them at the beginning.

So there are reasons for the itemised approach adopted by the Study Group. At the same time it has to be said that this approach immediately distances the law from ordinary thinking, which is not a good thing in a new code. People who have paid a fair price for a product or service do not normally think of themselves as enriched by the receipt of what they have paid for. People who have unwanted graffiti painted on their walls do not normally think of themselves as enriched by the accretion of paint or the receipt of an artistic service. However, the decision having been made, the important thing now is to make the itemised approach work. That places a considerable burden on the provisions on justification considered below. It has to be made very clear that the millions of "enrichments" obtained daily in Europe under fair contracts are legally justified and do not even begin to give rise to problems of unjustified enrichment.

The definition of enrichment currently under consideration by the Study Group on a European Civil Code is as follows:

(1) A person is enriched by:
(a) an increase in assets or a decrease in liabilities;
(b) receiving a service or having work done;
(c) making use of another's assets; or
(d) being spared a decrease in assets or an increase in liabilities.

(2) In determining whether and to what extent a person obtains an enrichment, no regard is to be had to any disadvantage which that person sustains in exchange or subsequently.

It will be noted that, consistently with the general approach adopted, the first paragraph does not regard a mere increase in the value of a person's property as an enrichment in itself. It is thought, however, that in all, or practically all, cases where the increase in value is attributable to another person's disadvantage there would be an actual increase in assets or a receipt of services. For example, if X's property has increased in value because Y has, in error, built something on it, X would in fact have received property, in the form of building materials, and services in the form of building work.

The second paragraph makes it clear that, for example, a person can be treated as being enriched under a void transaction even if consideration was given, and that accordingly in such circumstances each party to the transaction may be regarded as being enriched.
the “economic” approach, this problem can be solved by a specific provision.

Referring Principles:

IX.1 - Basic rule