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BRIEF CONSIDERATIONS ON THE NOTION OF INTEREST IN THE CONTEXT OF THE GOVERNMENT ORDINANCE NR.13/2011 ON THE LEGAL REMUNERATIVE AND PENALTY INTEREST ON PECUNIARY OBLIGATIONS

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BRIEF CONSIDERATIONS ON THE NOTION OF *INTEREST* IN THE CONTEXT OF THE GOVERNMENT ORDINANCE NR.13/2011 ON THE LEGAL REMUNERATIVE AND PENALTY INTEREST ON PECUNIARY OBLIGATIONS

Maria DUMITRU-NICA[1]

Abstract:

Legislation on interest can be characterized, for the recent times, by exaggerated dynamism. Of all the news generated by the recent adoption of legislation with significative impact on the legal regime of interest, we analyze in this paper only those on moratory, cominatory and remunerative interest.

Keywords:

remunerative interest, moratory interest, cominatory interest

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1. Preliminaries

In the recent years, two acts with impact on the legal regime of the interest were adopted. Namely, the Government Ordinance no. 13/2011 on the legal remunerative and penalty interest for pecuniary obligations[2] - which repealed the Government Ordinance no. 9/2000 on the level of interest in pecuniary obligations[3]- and Law no. 72/2013 on measures to combat late payment of the pecuniary obligations resulting from contracts concluded entered into between professionals and between them and the contracting authority[4] -replacing the Government Emergency Ordinance no. 119/2007, on measures to combat the late execution of the payment obligations resulting from commercial contracts[5].

2. Notion of "interest"

The Romanian legislator from 2011, like the 1864 Civil Code, did not define the interest corresponding to sums of money.

However, in the specialised literature it is stated that there once was a legal definition of the interest contained in the Art. 3 paragraph 1 of the Decree-Law of 05.05.1938 for setting interest rates and eliminating

[2] Governmental Ordinance No. 13/2011 on the legal remunerative and penalty interest for monetary obligations as well as for the regulation of certain financial-fiscal measures in the banking sector, published in the Official Gazette of Romania, Part I, no. 607 of 29.08.2011, as amended by the Law no. 72/2013 published in the Official Gazette of Romania, Part I, No. 182 of 02.04.2013. In this paper we will consider the latter under the title of "Government Ordinance no. 13/2011".

[3] Government Ordinance no. 9/2000 on the legal interest for pecuniary obligations, published in the Official Gazette of Romania, Part I, no. 26 of 25.01.2000 as amended and approved by Law no. 356/2002 approving the Government Ordinance no. 9/2000 on the legal interest for pecuniary obligations, published in the Official Gazette of Romania, Part I, no. 425 of 18.06.2002.

[4] Law no. 72/2013 on measures to combat late payment execution of the pecuniary obligations resulting from contracts entered between professionals and between them and the contracting authority published in the Official Gazette of Romania, Part I, no. 182 of 02.04.2013, law indicated in this paper as the Law nr.72/2013.

[5] Government Emergency Ordinance no. 119/2007 on measures to combat late payment obligations resulting from comercial contracts, published in the Official Gazette of Romania, Part I, no. 738 of 31.10.2007, repealed by Law no. 76/2012 on 02.15.2013. In this paper, this act is described under the name "Emergency Ordinance no. 119/2007". The Emergency Ordinance no. 119/2007 transposed the Directive 2000/35/EC of the European Parliament and of the Council on combating late payment in commercial transactions.

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usury[6], which could then be retrieved in the Art. 6 of the Government Ordinance no. 9/2000[7] which, in turn, was taken exactly to the Art. 1 paragraph 5 of the Government Ordinance no. 13/2011: "*The interest refers to not only cash amounts considered under this title, but also other peformance obligations under any title or name, to which the debtor is bound as equivalent to the use of capital.*"

We believe that the above provision does not lay down a definition of interest but only the forms the interest can take: it consists either of money - as it most often happens - or of any other benefits - monetary or non-monetary - to which the debtor is obliged to for using a capital.

In art. 2168 of the Civil Code regarding the loan agreement, we can find a similar text under an indicative title that supports the statement above -"*Interest modalities*"- "*the interest rate may be fixed in money or other performance obligations under any title or designation to which the borrower is pledged as equivalent to the use of capital.*"

Chosing a broad and general definition, we can consider the interest as the amount of money owed to the creditor for depriving them of using a capital, and this sum is calculated as a percentage for the capital owed[8].

3. Interest picture

The current Civil Code follows the line of its 1864 predecessor and does not systematise the concept of interest according to both its sources and all functions or nature.

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[6] The Decree- Law establishing interest rates and eliminating usury, published in the Official Gazette on 05.05.1938, whose Art. 3 reads as follows: *(1) Interest means not only sums of money but any other performance obligations under any title or designation to which the borrower is pledged as equivalent to the use of capital in cash. (2) If the interest rate is not fixed in money, the performance obligations will be settled at the prices in force at the loan effective date. Moreover, interest may include accessory obligations, such as: unnecessary expenses or disproportionate compared to the services rendered, commissions for opening, handling or extending the credit, and attorneys' fees, except for those of execution, calculated according to the minimal rate. (3) The calculation of interest does not take into account: operation stamp and registration duties, the cost of bill of exchange stamps, expenses incurred in providing or preserving collaterals as well as the fees that are not disproportionate to the services rendered.*

[7] Art. 6 of the Government Ordinance No. 9/2000 provides that "the interest means not only the amounts of cash under this title, but any other benefits, under any title or name, the debtor is pledged as equivalent to the use of capital.

[8] Maria Dumitru, *Legal regime of moratory interest*, Law Publishing House, Bucharest, 2010, p. 48.

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To obtain a useful taxonomy of the interest, it seems helpful to systematize interest, taking into account both the cause of the interest due obligation and its function, considering as less important the source of interest or the interest rate[9].

According to these criteria, the definitive picture of the interest would include: remunerative interest - when its purpose is to remunerate the lender; moratory interest - it is intended to repair damage caused by the delay in the execution of pecuniary obligations; penalty interest (comminatory) - increased moratory interest that aims to accelerate the execution of the monetary obligations, further punishing the recalcitrant debtor; restitution interest – it is designed to prevent unjust enrichment independently of any notion of guilt or non-execution; compensatory interest (legal)[10] - interest granted by courts in addition to the reparation itself, for the time period between the occurrence of the generating fact and the date of delivery of the final court decision, and whose role is to compensate for the "delay" caused by the legal proceedings.

Our present analysis will only address the remunerative and moratory interest, other types of interest being relegated to another study.

4. Remunerative interest.

The remunerative interest is the amount of money the debtor must pay to the creditor because the former temporarily used the capital of the latter. It has a legal definition contained in Art. 1, paragraph 2, of the Government Ordinance no. 13/2011: "*The interest owed by the debtor who finds himself bound to give a sum of money at a certain date, calculated for the period before the time the obligation is due, is called remunerative interest.*"

[9] The qualification of the interest is not determined by the legal or conventional origin of its rate. In the usual legal language and the cuasi majority of the law provisions, the term used is "conventional interest" instead of "conventional rate of the interest", and "legal interest" instead of "legal rate of interest". Interest may be conventional and the interest rate may be legal, as in the case of the loan agreement in which the parties have not provided the amount of the interest; in turn, the interest may be legal and the interest rate may be conventional, for example, the moratory interest owed, according to the art. 1535 of the Civil Code, for the delay in the execution of the obligation whose rate is determined by the parties. As required by art. 1 and art. 2 of the Government Ordinance No. 13/2011, the legal rate of interest is a suppletive tool, by common law, which is used only when there is no or insufficient stipulation of the conventional value.

[10] Vincent David, *Les intérêts de sommes d'argent*, these, L.G.D.J., Paris, 2005, p. 49; Genevieve.Viney, Patrice Jourdain, *Traité de droit civil. Les effets de la responsabilité*, ed. a 2-a, L.G.D.J., Paris, 2001, p. 559 et seq.

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References to remunerative interest are found in the Civil Code, in the Section 3, paragraph 2, under the name of "Loan interest", in Chapter XIII, "Loan Agreement", art. 2167 to 2170 of the Civil Code.

The remunerative interest is a payment, remuneration for the use of the lender's capital, independently of any idea of delay. The debtor has the right to use the capital, the creditor is the one who voluntarily and temporarily entrusted it to them; the remunerative interest is precisely the payment for this service.

In the lapse of time for which the amount of money was made available to them, the debtor has no obligation to return it, only the right to use it but, when the time is due, the debtor has the obligation to repay both capital and the remunerative interest. The classical case is the loan agreement.

The remunerative interest has the nature of civil fruit, according to art. 548, paragraph 4 of the Civil Code, that is, the product of money that comes to add the assets of the creditor, thus increasing his fortune. As a result, the remunerative interest is known under the name of "civil fruit interest".

The remunerative interest is part of a payment of the debt, since, when signing the contract, the debtor engages himself to reemburse the capital and also to pay remuneration to the creditor for the service that was provided to them. Although distinct from the capital that the creditor voluntarily and temporarily entrusted to the debtor in order to use it, the remunerative interest payment is to be incorporated into the debt incumbent upon the debtor for the use of the money[11].

5. Moratory interest

The moratory interest is the amount of money deserved by the creditor in order to cover the damage caused by the delay in the execution of some pecuniary obligations. It is why this interest may be found under the name of "damage - interest".

It is settled by the art. 1535 of the Civil Code which, under the indicative title of "Moratory damages in case of pecuniary obligations", provides that: *"(1) Where a sum of money is not paid at due date, the creditor is entitled to moratory interest, from the date of payment until payment in the amount agreed upon by the parties or, in its absence, in that provided by law, without having to prove any damages. In this case, the debtor is not entitled to prove that the injury*

[11] Maria Dumitru, *op. cit.*, p. 84

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suffered by the creditor as a result of late payment would be lower. (2) If, prior to the due date, the debtor owed higher interest rates than the legal interest rate, the moratory interest shall be due in the amount settled before the due date. (3) If the moratory interest owed is no greater than the legal rate interest, the creditor is entitled to damages for full compensation for the damage suffered, apart from the legal interest."

In the old Civil Code, the legal regime of the moratory interest was outlined by the provisions set in the art. 1088.

This interest is inextricably linked to the idea of delay in the performance of an eligible obligation and, therefore, it is called moratory interest or delay interest. The use of capital by the debtor is made without the consent of the creditor, without right; using the money, the debtor is in fact causing prejudice to the rights of the creditor.

The moratory interest has a reparatory function and the nature of damages is intended to reduce the patrimonial liability of the creditor, thus holding constant and reunifying the creditor's property.

Art. 1535 of the Civil Code is not intended to apply unless unfulfilled performance by the debtor is encountered.

The interest debt is added to the generated debt it but cannot be incorporated into it; it maintains its individuality and does not become a part of the payment. The remunerative interest is considered within the debt, while the moratory interest is exterior to the debt and is added to it, without being confused with it, mainly because of the different legal nature of the debt interest compared to the obligation that should have been performed[12].

6. Comminatory interest (penalty interest) – a species of the moratory interest

Art. 1, paragraph 3, of the Government Ordinance no. 13/2011 defines the penalty interest as "the interest owed by the debtor of the pecuniary obligation for failing to meet the due date".

The legal penalty interest rate shall be fixed according to the interest rate of the National Bank of Romania plus 4 percentage points, according to art. 3 paragraph 2 of the Government Ordinance no. 13/2011, and within the relationships between professionals and between them and the contracting authorities, the legal penalty interest is set at the

[12] *Ibidem*, p. 85

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reference rate plus 8 percentage points as required by paragraph 2 of the same article, paragraph introduced by Art. 20 of Law no. 72/2013[13].

This increased interest is, at least apparently, an interest of moratory delay, based on the fault of the debtor. Its main purpose is to compel the debtor to pay the amount of money, and reveals an increased price of time.

In addition to its reparatory funtion for the prejudice caused by the delay in the execution of the obligation -which reflects the reparative purpose of the interest- the value of the interest rate extremely increased allows us to consider that it also has a comminatory role, that of determining the debtor to perform its contractual obligation. Thus, in our opinion, the penalty interest has a double function: comminatory and reparatory, and a dual legal nature: private punishment - indemnification. Actually, the very preamble and the title of the Directive -"on combating late payment"- suggest that it is intended to coerce the debtor to perform the payment obligation. However, if we consider that the Directive applies only to matters related to professionals, where the time (of the professionals) is more expensive, due to the presumed lucrative purpose of the relationships involving professional traders and to the importance and amplitude of the delay effects, the purpose of the penalty interest would only be reparatory.

Conclusions

Apparently, the interest, regardless of its cause, has the same function: to cover the loss of creditor deprived by the use of its capital. Whether we speak about the lender that, transferring to the borrower a sum of money, voluntarily waives its use, or it is about the debtor of an amount not paid at due date, thus depriving the creditor of its use, or it is the owner or accipiens unrightfully holding an amount of money,

[13] Art. 3 of the Government Ordinance Nr.13/2011 reads: *"(1) the legal remuneration interest rate is fixed according to the interest rate of the National Bank of Romania, which is the interest rate of the monetary policy established by decision of the Board of Directors of the National Bank of Romania. (2) The legal penalty interest rate shall be set at the reference rate plus 4 percentage points. (2[1]) For the relationship between professionals and between them and the contracting authorities, the legal interest penalty is set at the reference rate plus 8 percentage points. (3) For legal relationships not arising from business profit operations, within the meaning of art. 3, paragraph (3) of Law no. 287/2009 on the Civil Code, republished, the legal rate is determined according to paragraph (1) and paragraph (2) decreased by 20 %. (4) The interest rate of the National Bank of Romania shall be published in the Official Gazette of Romania, Part I, under the care of the National Bank of Romania, whenever the monetary policy rate will change*."

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depriving the true owner of its use, the interest always comes in counterparty and proportion to the length of the withdrawal of capital, whether intentional or not.

There is the tendency to do a mix of all these circumstances, considering that are close concepts, even similar. As shown, however, from the perspective of the law of obligations, the interest presents a great variety: the interest may be remunerative, moratory, compensatory, restitution or comminatory (penalty).

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