On the consequences of the increase of the legal rate of interest

1. – The recent increase of the legal interest to ten percent introduces a considerable factor of clarity in how the damage from default should be indemnified in pecuniary obligations and in particular what should be understood by « greater damage » pursuant to article 1224, section 2, Civil Code, This increase is also destined to make a decisive contribution to the critical revision of some current opinions, such as that which classifies the debt of compensation as a debt of value and thus ends up by accumulating the monetary revaluation and the legal interest, magnifying the result.

The best compass for orientation on this subject is represented by the border between mere indemnity and the profit of the creditor, with respect to the interest, based on the *quod plerumque accidit.* Any solution that turns into profit for the damaged party, instead of obtaining only compensation, can only appear erroneous (1).

The increase in legal interest that acquired, on the practical level, the importance of an invaluable test bench of the correctness of the current opinions and of the results of calculation they reach. Here, the motivation at the base of the orientation of case law which (when the legal rate was still at 5%) excluded the accumulation of revaluation and legal interest in

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From « Il Foro italiano », 1991, I, p. 873 and ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

This annotates the following decision:

COURT OF CASSATION, section I, 12.3.1990, no. 2013, President Vela, Reporting Judge Lipari, Public Prosecutor Donnarumma: Oratorio Salesiano v. ANAS: « *The damage from devaluation does not follow on automatically and immediately from the inflation invoked in the proceedings as a known fact, but must be examined, case by case, in the prejudice concretely suffered by that specific creditor for not having been able to promptly have the sum at the time of fulfilment* ».

(1) G. VALCAVI, *Indennizzo e lucro del creditore nella stima del danno*, in *Quadrimestre*, 1986, pp. 681 ff.; and also, by the same author, *L'indennizzo del mero lucro cessante come criterio generale di risarcimento del danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1990, I, p. 2220; *Le obbligazioni in divisa straniera, il corso di cambio ed il maggiore danno da mora*, id., 1989, I, p. 1210; *In tema di indennizzo a lucro del creditore: a proposito di interessi e di rivalutazione monetaria*, id., 1988, I, p. 2318.

the compensation of the damage from default in pecuniary obligations, must be recalled (2).

We can begin by saying that, today, the « greater damage from default » cannot be identified in the differential between the legal rate and the rate of inflation. Indeed, legal interest is now equal to 10% and therefore exceeds the percentage of monetary devaluation, which is only equal to 6.5%, so that reference cannot be made to this to identify the « greater damage » with respect to legal interest. From this point of view, the division of creditors into different economic categories also appears excessive and amongst these that of the mere consumer appears superseded, which would allow making a reference to the rate of inflation.

In the final analysis, the increase in the rate of interest confirms the correctness of that orientation which – as stated – excludes the accumulation of monetary revaluation and legal interest. This accumulation would lead to a total yield equal to 16.5% (summing the rate of inflation, equal to 6.5% and legal interest at 10%), far above the normal yield of money. The latter is not equal to 12.5% gross for the Treasury Bonds (10.75% net) whilst that of bank certificates is equal to 10.625% (net 7.97%) and the average of bank deposits is 6.7% gross (4.7% net).

The percentage of 16.5% which would derive fro the accumulation of revaluation and the legal interest would even be greater than the normal price of bank loans, which is equal to 13% for the prime rate and 14.69% for loans with a greater risk. Without forgetting that these rates on bank loans are also reduced by the impact of taxes.

The decision, adopted when the legal rate was at 5%, shows all its limits and does not appear acceptable where it deems that the greater damage is to be identified case by case, according to the categories to which the creditors belong (3). To say the least, it does appear that a distinction can be made, for example, between consumer or occasional creditor and saver. Each creditor, moreover, will legitimately claim benefiting from the legal interest of 10%. which acts as an indemnity, presumed *iuris et de iure*, save the greater damage.

2. – The increase in the legal rate of interest also represents – in my opinion – the confirmation of how well-grounded the opinion is that identifies the greater damage under article 1224, section 2, in the differential be-

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(2) Cf. Court of Cassation, all Divisions sitting together, 1st December 1989, no. 7299, Foro it., 1990, I, p. 427, with a note by PARDOLESI and comment by DI MAJO, *Interessi e svalutazione tra risparmiatori e pensionati.*

(3) Cf. amongst others, Court of Cassation, all Divisions sitting together, 5th April 1986, no. 2368, Foro it., 1986, I, p. 1265. with observations by PARDOLESI, *Le Sezioni Unite su debiti di valuta e inflazione: orgoglio (teorico) e pregiudizio (economico).*

tween it and the greater one current on the market. The overall default damage must be identified here in the normal loss of profit that the creditor would obtain from a liquid investment (and that he want to keep liquid): the interest, according to the *quod plerumque accidit* (4).

From this point of view, the importance cannot be defined of the fact that the increase of legal interest from 5% to 10% has reduced the previous extent of the greater damage. By taking the legal interest to an amount closer to that of the market, the legislator has decided to decrease the differential mentioned and that had given rise to such serious disputes. The difference existing now is equal to 2.50%, rather than the previous 7.50%, comparing the new legal rate with the gross yield of Treasury bonds, equal to 12.5%.

The decision under review excludes, in *obiter*, a reference of this kind because it would entail a « normative operation » of increase of the legal rate, in order to balance it with that of the market. Such a statement does not appear acceptable because the reference to the current rate on the market is made, as it must be, by way of simple presumption (and therefore not *iuris et de iure*). It will obviously be up to the debtor to offer evidence to the contrary that the creditor would not have invested in Treasury Bonds but differently, for example in bank deposits or certificates which present a lower return. The « greater damage » can, on the other hand, be calculated on the basis of the cost of replacement of the money, i.e. from the point of view of the actual damage (prime rate or greater interest paid) where recourse to bank loans is proven. Moreover, it will be reduced by the impact on the income, as a tax deductible cost.

3. – Let us now go on to see the consequences that can be surmised, following the increase of the legal interest rate, for the case in which the debtor is in default, in giving foreign currency.

This debt can be classified, according to the dominant opinion in legal literature, as « value rate » or « effective rate ».

Let us start with the obligation in a value currency foreign currency, regulated by article 1278 Civil Code. In this case the debtor in default will have to pay or choose to do so in national currency – the corresponding amount at the exchange rate on the due date of the debt. To this, he must add any differential of the exchange rate, with respect to the exchange rate at the time of payment, between the foreign currency on the upswing, in

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(4) See the notes by VALCAVI, *L'indennizzo del mero lucro cessante, come criterio generale*, cit., *Ancora sul risarcimento del maggior danno da mora nelle obbligazioni pecuniarie; interessi di mercato o rivalutazione monetaria*, in *Foro it.*, 1986, I, p. 1540; *Rivalutazione monetaria od interesse di mercato?* id., 1980, I, p. 118; *La stima del danno nel tempo, con riguardo all'inflazione, alla variazione dei prezzi e all'interesse monetario*, in *Riv. dir. civ.*, 1981, II, p. 332.

which the creditor proves that he would have changed the amount, and the normal yield of the latter (5).

As far as the obligation in a foreign currency effective rate is concerned, there is reason to ask whether the new legal interest, equal to 10% should be applied.

To the writer it does not seem that this can be maintained, because out legal rate of interest concerns exclusively the national currency and not foreign currencies. for the latter reference must be made – as stated – top the normal loss of profit of the latter. The application of our rate of interest, to foreign currencies as well, would obtain evident profit for the creditor of the currency on the upswing, because the current rate of exchange already takes into account the differential of the monetary interests.

The addition of our interest of 10% to the foreign currency, instead of its own, possibly less, could be excessive and also cause distortional effects with regard to the ratio of exchange rate considered.

4. – Let us now examine the consequences of the increase of the legal rate of interest on credits from work.

The current opinion deems that these currents are indexed to the cost of living and legal interest should also be added, to be calculated on the revalued capital, with an overall result equal to 16.5% or even 17.5%, considerably above the normal yield or cost of replacement of the money. It has recently been maintained that this treatment would not imply the default of the debtor and this, if it were to recur, would also give rise to further compensation of the damage from default (6).

These opinions must be subjected to critical revision on the basis of the test bench represented by the border between the indemnity and the profit, regarding the economic consequences. In the first place, it must be noted that art. 429, section 3, Code of Civil Procedure and 150 provision of enactment Code of Civil Procedure, considered jointly, arose in an economic climate (completely different from the present one), with double-digit inflation, whilst legal interest was still at 5%, i.e. at a much lower rate than the rate of inflation. The precept as per art. 429, section 3, was therefore finalized at guaranteeing the greater rate of inflation with respect to the legal interest for the creditor.

At the time, the writer noted that the dominant orientation, which accumulated the revaluation and the legal interest, could not be deemed correct and that the credit could be revalued only for the part that exceeded

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(5) Cf. again by the same author, *Il corso di cambio e il danno da mora nelle obbligazioni in moneta straniera*, in *Riv. dir. civ.*, 1985, II, p. 251; *Le obbligazioni in divisa straniera*, cit., *In materia di liquidazione del danno di uno straniero*, in Foro it., 1989, I, p. 1619.

(6) Cf. MASSETANI, *Sui rapporti tra art. 1224 c.c. e art. 429, 3° comma, c.p.c.* in *Foro it.*, 1990, I, p. 3434.

the height of the legal interest. In the event in which the rule had prescribed an accumulation of this kind, it would have contemplated the addition, to the nominal capital, of the legal interest and of the « damage » (not of the greater damage) for the loss of the value of credit (7).

The calculation of the legal interest on the revalued capital must a fortiori be excluded, because the rule, in this case, would have provided, in the first place, for the compensation of the damage for the loss of the value of the credit and only subsequently the calculation of the legal interest. On the contrary, article 429, section 3, contemplates the addition of the legal interest as the first thing, and only subsequently the liquidation of any « greater damage » for the loss of the value of the credit.

We cannot agree with the opinion that this is an indexed credit and even released from the default, the restoration of which would even be added. It is a fact that the accumulation of legal interest and revaluation would clearly show the unconstitutionality of article 429, section 3. Indeed, there would be an unjustified disparity of treatment of the creditor of back wages to the detriment of the current one, for which the trend to progressively eliminate the indexing to the cost of living scale. This treatment could lead to an inequality between workers and between pensioners, and in general every other creditor.

The same considerations obviously also apply for similar rules that contemplate a similar accumulation of revaluation and interest; this is the case of credits of professionals and, more in general, of the self-employed (8).

5. – Lastly, let us go on to see the conclusions that can be drawn for the aforementioned increase of the legal interest with regard to the compensation of damage in general.

The current opinion revalues the credit and also adds the legal interest, calculated on the revalued capital. This leads to the annual percentage of 17.15% (with today's figures), which gives the damaged party a visible profit and not the mere restoration. From this point of view, the increase of the legal rate of interest represents the best confirmation of the erroneousness of the commonly accepted method and its justifications.

With regard to these, the classification of the credit of compensation as credit of value and not of currency, does not appear acceptable on the dogmatic level, for the reasons that the author of these lines stated in the contributions to which he refers the reader (9) and for the reservations on this regard by the Supreme Court itself.

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(7) Cf. VALCAVI, *La stima del danno nel tempo, con riguardo all'inflazione*, cit., p. 349 ff.

(8) Such as, amongst others, the common provision for the fees of lawyer and barrister, as per Ministerial decree no. 392 of 24th November 1990.

(9) Cf. VALCAVI, *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, II,

The latter, in its decision no. 6209 of 20th June 1990 (Foro it., 1990, I, p. 2808) literally wrote, in this regard: « no-one wants to deny the empirical and casuistic origin of the category of the credit of value which, although opposed from the conceptual point of view, continues to show a considerable expansive capacity », for its practical convenience as an instrument of calculation. Here, the fact that the Supreme Court was careful to take the defences of this category appears significant, on the dogmatic level, only to suggest a very complicated method of calculation, considering that the indemnity is revalued year by year and the interest has to be calculated on the capital as it is revalued (10).

Equally unacceptable is the other justification offered by the accumulation, which starts from the correct distinction between damage from unlawful action and from non-fulfilment (to be evaluated with reference to the time of its occurrence, excluding that at the decision) and the subsequent one for the diseconomy caused by the delay (with which the indemnity is offered) and nevertheless admits monetary revaluation because it would restore the situation of the capital prior to the damaging event, with the addition of the interest, which would indemnify the diseconomy due to the delay.

These propositions are vitiated by the fundamental error of not seeing that the two remedies, in the final analysis, are required to indemnify the same damage, which comes from the delay. Indeed, once the specific indemnity has been correctly fixed at the time the damage occurred, the subsequent revaluation and the interest both tend to eliminate the subsequent diseconomy due to the delay with which the basic indemnity is offered.

In this subject, reference has to be made to the fundamental rule of *quod interest* according to the *quod plerumque accidit*. In this regard, it does not appear that we can usually presume that the damaged party would have once acquired or kept in his capital the commodity not given or taken away (such as to justify the discount of its value) and also maintained the availability of the pecuniary equivalent (such as to enjoy its yield) during the delay.

In our system, an indexed credit cannot be conjectured, because indexation is not contemplated by any rule. Even les so can the accumulation of the revaluation and the legal interest be justified, on the basis of a general recourse to « equity », as the quoted decision 6209/90 did, because on

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p. 31; *In materia di criteri di liquidazione del danno in genere e di interessi monetari*, in *Foro it.*, 1990, I, p. 933; *Ancora sul risarcimento del maggior danno da mora*; cit., *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi di interesse*, id., 1981, I, 2112; *Indennizzo e lucro del creditore nella stima del danno*, in *Quadrimestre* 1986.

(10) On the contrary, the reference to the normal yield of money is far easier as the judge can refer to the data of the inter-bank agreements in force, always by way of presumption, and with the faculty of having recourse to equitable criteria, under article 1226, Civil Code and 2056. section 2, Civil Code.

the contrary the percentage of 17.5% a year provides a profit for the damaged party and shows a disparity of treatment with regard to any other creditor.

The solution of the fundamental problem, on compensation of damage in general, passes through the correct distinction of the two different types of damage; the damage from unlawful action or from non-fulfilment and the later one, depending on the delay with which the indemnity is given, The first damage must be evaluated with reference to the value of the commodity not given or removed, at the time when the damaging event occurs and not at the *tempus rei iudicandae*, as many maintained in the past. The different damage from delay in giving the indemnity has been correctly identified « in the loss of the *utilitas* that the creditor would have had from the sum of money originally due ». The compensation of this particular damage recalls the application of article 1224, sections 1 and 2, which is to be applied to every pecuniary obligation, whether liquid or illiquid, such as that under examination. The indemnity of an illiquid obligation also concerns « the loss of the *utilitas* that the creditor would have had from the sum originally due », i.e. the loss of profit of a pecuniary credit, such as is, in conclusion, the illiquid one.

To conclude, the erroneousness of the accumulation of revaluation and legal interest appears evident (all the more so, if calculated on the revalued credit). Rather the legal interest of 10% should be integrated with the greater damage as per section 2 of article 1224, to be identified in the differential with respect to the normal yield or cost of money.

Reference is made to the above by:

R. PARDOLESI, *Crediti previdenziali, tutela differenziale e punitive damage*, *Foro it.*, 1991, I, p. 1324; A. TODARO, *La rivalutazione delle prestazioni di previdenza sociale*, *Giust. civ.*, 1991, I, p. 2887, note 13; R. CARANTA, *La rivalutazione automatica dei crediti previdenziali: un arrêt de règlement della Corte Costituzionale*, in *Resp. civ. e previdenza*, 1991, p. 444, notes 3 and 15; G. D'AJETTI, R. FRASCA, E. MANZI, C. MIELE, *La riforma del processo civile, il giudice di primo grado*, Milan, 1991, I, p. 7, 9; P. TARTAGLIA, *Il modesto consumatore va in pensione*, *Foro it.*, 1991, I, 1331, note 16; B. INZITARI, *Le riforme della giustizia civile*, Turin, 1993, p. 21, note 26.