The problem of credits of currency, credits of value and monetary interest, on the arrival of the Euro

1. – The recent entry of our country into the European monetary system with the consequences, in the very near future, of the replacement of our old « Lira » (1) by the single currency, called the Euro, places the problems dealt with to date on pecuniary obligations in a new light with regard to the rates of interest and monetary inflation.

It induces a radical revision of many ideas which to date were current, such as that currently dominant of the distinction between credits of currency and credits of value and compensatory interest, alongside equivalent and default interest.

The arrival of the Euro means seeing in totally different terms from the current ones the problem of the default damage of our money, especially with regard to the other currencies of the countries belonging to the European monetary system, eliminating the difference of exchange rate and respective interests, as default damage.

The author of these lines, ever since 1980 (2), through a long series of essays, published periodically in juridical journals, is of the opinion, which to date has remained isolated, that the category of credits of value has no grounds on the dogmatic level and has no justification on the economic level.

In short, it is reduced to a normal credit of currency, which includes any obligation that is expressed and must be discharged in money, as such fungible and versatile for every use.

The means through which the payment of a quantity of money is adjusted in time, according to the economists, is monetary interest, which covers the lesser utility of a payment of money deferred in time with respect to the same in cash, due to our preference for an immediate payment rather than deferred (*utilitas temporis*, time preference) (3).

From « Rivista di Diritto Civile », 1999, II, p. 469 and ff.

(1) In addition to Italy, the other countries that signed the Treaty of Maastricht are Germay, France, Belgium, the Netherlands, Luxemburg, Spain, Portugal, Finland, Austria and Eire.

(2) G. VALCAVI, *Rivalutazione monetaria o interessi di mercato*, in *Foro it.*, 1980, I, section 118.

(3) BOHM-BAWERK, *The positive theory of capital*, London, 1891, p. 249 ff.; I. FISHER, *La*

Monetary interest is divided into a composite series, such as legal interest, standard interest, equivalent and default interest, omitting the marginal hypothesis of compensatory interest (4).

Interest rates and their amount, as is well known, are similarly different, as is the legal rate, the discount rate, the market rate, the rate on savings and loans (which include the Lombard rate, the prime rate, the top rate and so on).

The legal rate is that fixed by the law (article 1284, section 1, Civil Code) in the relations of private law, and is presumptively from the debtor with regard to the creditor.

The market rate is the cost or the normal yield of money which is that habitually established by the market, through its intermediaries and instruments and corresponds to the *id quod interest* according to the *quod plerumque accidit* of the ancient Romans (the so-called market rate).

It is not determined by law but by the market, on the basis of the different volumes and factors that influence the demand and supply and also the greater or lesser liquidity and the rate of monetary inflation.

In a market characterized by high liquidity, the market interest will obviously be less the greater the quantity of money that the savers offer the investors.

On the contrary, in a market characterized by poor liquidity, as occurs in phases of recession, the interest will be higher, because the demand of the investors is greater than the supply of the savers. Similarly, the interest will normally be higher in periods of accentuated inflation and the consequent inclination of the operators to request greater loans of money, to be converted in real commodities, trying to protect savings from the erosion of inflation.

Depending on the fact of whether the legal rate is lower than that of the market or the rate of inflation, the problem arises of the respective differentials.

The coverage of this differential, in the case of default, comes under the « greater damage from default » contemplated and disciplined by the legislator with article 1284 Civil Code.

A matter which deserves close attention in that of the relations between rate of devaluation of the money and market interest, on which we will dwell below.

It has to be said that the legal rate of interest, for over eighty years, from 1905 to 1990, was fixed by our legal system at 5% and this was moti-

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teoria dell'intresse determinata dalla impazienza di spendere il reddito e dalla opportunità di investirlo, in *Opere*, Turin, 1974, p. 799 ff., p. 814 ff., p. 836 ff., p. 854 ff.

(4) G. VALCAVI, Il problema degli interessi monetari nel risarcimento del danno, in Resp. civ. prev., 1987, I, p. 3 ff.

vated by the fact that the ancient legislator justified it with the fact that it corresponded to the rate of interest on credits practised for 50 years, from the Napoleonic period onwards, on the main European financial marketplaces (5).

Subsequently, from the end of 1990 to the end of 1996, it was raised to 10% (6), to then return to 5%, from early 1997 to the end of 1998 (7).

From 1st January 1999, it was reduced to 2.50% per annum.

2. – The century in which we are living has had at its epicentre the economic and juridical consequences on our money from inflation, which has been creeping or galloping, until it became hyperinflation (8).

Two different types of inflationist phenomena can be distinguished.

The first was that characterized by a drop in the purchasing power of money, such as occurred in the 1930s (9), and during the last World War (10), counter-balanced by a considerable increase in the market interest which in the medium term ended up by becoming equal to the rates of inflation.

The second was that which occurred in Italy in the period from 1979 to 1983, when there was the unusual combination of a high inflation at over 17% and significant liquidity due to the inclination of operators not to invest in real commodities and to keep their assets in liquid form, despite the loss due to inflation (stagflation, slumpflation), which was translated into interest rates on bank savings, below the rate of inflation, at 10% (11).

In this last period, the devaluation rates remained above the market interest, which did not recover the loss, due to the continuation of liquidity.

Afterwards, in the years from 1986 to 1992, inflation stabilized at levels between 5% and 6%.

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(5) The ministerial report on the Civil Code motivated maintaining the legal rate at 5% with the fact that it corresponded to the official rate of discount which had not changed from that figure since 1905. There had been extensive discussion on the legal rate at the French Council of State on articles 1153 and 1907 of the Napoleonic Code at the sitting on 11th Brumaire and 7th Pluviose in year 12. On the 1865 code, the Pisanelli Report to the Senate on Book III.

(6) See art. 11, 26th November 1990, no. 353.

(7) See art. 185,1, 23rd December 1996, no. 662.

(8) Amongst the others, TREVITHICK, Inflazione, Milan, 1979, pp. 17-23; RUOZI, *Inflazione, risparmio e aziende di credito*, Milan, 1973, p. 439 ff.; KEYNES, *Teoria generale dell'occupazione, dell'interesse della moneta*, Turin, 1978, p. 477 ff. See also G. VALCAVI, *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 ff.

(9) Inflation grew by 80% between 1936 and 1940.

(10) The purchasing power of the Lira during the last war, between 1941 and 1945, dropped from 1038 to 44.80.

(11) On the so-called Harrod effect, see RUOZI, *op. cit.*, p. 538 ff.; see G. VALCAVI, *La stima del danno nel tempo con riguardo all'inflazione, alla variazione dei patti e all'interesse monetario*, in *Riv. dir. civ.*, 1981, II, p. 332 ff.

In those years, due also to the growing indebtedness of the State with its issues of public securities, the interest rates on bank savings remained considerably above the rates of inflation.

In the period 1986-1992, with an official discount rate which remained at around 13%, the rates of bank deposits oscillated between 9.5% and 7.5%, those of ordinary Treasury Bonds at 12 months between 13% and 14% and those on investments between 15% and 12% against a rate of inflation which in the period was stable at between 5% and 6%, as stated.

In the last three years, 1996-1998, against inflation which dropped from 3.9% to 1.5%, the rates of interest also remained far above it, although the official discount rate had dropped from 8% to 3%, the yields on ordinary Treasury Bonds at 12 months from 7% to 3.2% and prime rates on bank investments dropped from 10.5% to 7.5%.

The above leads to identifying in the normal market interest the only certain element at the economic level, due to the relative inadequacy of all the other rates, to which the damage from default in pecuniary obligations must be linked, the concept of which must not be reduced to the limited category of liquid obligations from the start but must also be extended to those which must be liquidated by a judge.

Such is the obligation of compensation of damage, which cannot be distorted by classifying it as a credit of value, the concept of which – as we will say – has no grounds in legal literature.

Pecuniary obligation means all the obligations that have money as their object, whether liquid from the origin or they become liquid following a decision.

The only damage from default that can be hypothesized for any pecuniary obligation, whether liquid or illiquid, and that has money as its object, which is regulated by the principle of its nominal value, is loss of profit (12).

Loss of profit of a pecuniary obligation corresponds to the monetary interest that compensates, according to criteria of normality, the lesser value of a payment of money deferred in time with respect to one inc ash, as we have previously written.

Pecuniary obligations are disciplined in each legal system by a consolidated and age-old discipline, which contemplates the compensation of the damage from default.

Both Italian law and the law in other countries have, as well as legal interest, the « compensation of the greater damage from default » (article 1224, section 2, Civil Code).

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(12) G. VALCAVI, *L'indennizzo del mero lucro cessante come criterio generale del danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1990, I, section 2220.

In the years from the end of the 1970s to the early 1980s, when the rate of inflation exceeded monetary interest, a far-off decision, which has remained isolated, assumed the damage from inflation as actual damage of the obligation of money (13).

This theory was, however, deeply erroneous because it infringed the nominalistic principle, codified by article 1277 Civil Code, of the currency, whilst loss of profit is the only one compatible with it.

Only the indemnity for loss of profit, as well as corresponding to general principles of an economic nature (as has been seen earlier), has been corroborated by the evolution of rates of interest, well above inflation.

It is the leading criterion adopted by the exemplary and accurate decisions of 4th July, 1979, no. 3776 of our civil courts, all divisions sitting together (14) and subsequently confirmed, again by all the divisions sitting together of the Supreme Court of 5th July 1986, no. 8368 (15).

They correctly excluded that the damage from default should be identified in the phenomenon of inflation, but « in the presumable monetary gain which each economic man draws from the systematic and repetitive way of using money, typical of his economic category », and in particular, savers.

Even where the greater damage from default were considered from the point of view of the actual damage, our case law has correctly identified, given its replaceability and its versatility for every use, in the cost of replacement of the benefit that was not given, i.e. bank loans.

This represents a correct application of the burden of avoiding the greater damage with diligent behaviour, pursuant to article 1227, section 2, Civil Code (16).

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(13) Court of Cassation, 30th November 1978, no. 5678, in *Foro it.*, 1979, I, section 15 ff.

(14) Court of Cassation, all divisions sitting together, 4th July 1979, no. 3776, in *Foro it.*, 1980 I, section 118.

(15) See G. VALCAVI, *Le sezioni unite precisano i criteri da applicare nelle obbligazioni pecuniarie per il risarcimento dei danni da svalutazione*, in *Riv. dir. civ.*, 1986, II, p. 195.

(16) R. PARDOLESI, *Interessi moratori e maggior danno da svalutazione: appunti di analisi economica del diritto*, in Foro it., 1979, I, section 2622; A. AMATUCCI, *Certezza acquisita e dubbi residui in materia di incidenza della svalutazione monetaria sulla responsabilità del debitore*, in *Foro it.*, 1978, I, section 337. The two decisions of the Supreme Court, with all divisions sitting together, indicated above, differ due to the greater or lesser extent of the presumptive criteria which can be adopted as evidence. Since 1980 to date, the author of these lines has moved in the same direction through a long series of essays in the main journals which have annotated the various decisions. See G. VALCAVI, *Inflazione monetaria o interessi di mercato?* in *Foro it.*, 1980, I, section 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. 392 ff.; *Ancora sul risarcimento del maggior danno da mora nelle obbligazioni pecuniarie: interessi di mercato o rivalutazione monetaria*, in *Foro it.*, 1986, I, section 15540 ff.; *L'indennizzo del mero lucro cessante come criterio generale del danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1990, I, section 2220 ff.*; Sulle conseguenze dell'aumento del tasso legale di interesse*, in *Foro it.*, 1991, I, section 873 ff.; now collected in *L'espressione monetaria nella responsabilità civile*, with a preface by A. Trabucchi, Padua, 1994, p. 41 ff., p. 53 ff.,

The comparative evolution of the rates of interest and inflation as described earlier, has confirmed with the indefeasibility of the facts that occurred, the opinions stated above, which coincided with the conclusions of the economists.

The greater damage from default as per article 1224, section 2, Civil Code, will be identified at least in the differential between the legal interest and the greater bank interest for savings or as the cost of loans the entrepreneur must bear.

It also absorbs and makes up for the damage of inflation, because bank interest, as the famous economist Wicksell (17) said, is the supreme regulator of the prices of commodities, on any market whatsoever.

In recent years, our legislator has made these ideas his own, with perspicacity, through the new formulation of article 1284. section 1, Civil Code, with regard to the legal rate of interest (which is the least) where he had it depend on a measure by the Minister of the Treasury who, each year, establishes it « on the basis of the average annual gross yield of state securities with a duration of not more than twelve months and taking into account the rate of inflation recorded in the year » (18).

However, he leaves to be indemnified the greater damage from default that the creditor can prove, including with presumptive arguments, with the only limit of not infringing the prohibition of usurious interest, established by law no. 108 of 17th March 1996, which fixed it at 50% above the periodically recorded market rates.

In the past we have dealt with the damage from default in obligations in a foreign currency, in which article 1278, Civil Code, allows the debtor to pay in national currency at the rate of exchange on the due date; on that occasion the damage from default was identified in the case of the choice of the national currency that was going down with respect to the foreign currency, in the differential of the exchange rate with the latter and the monetary interest (19).

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p. 91 ff., p. 111., p. 121 ff. The accurate and insightful writings by R. Pardolesi and A. Amatucci who were amongst the first advocates of this order of ideas are also recalled here.

(17) WICKSELL, *Interesse monetario e prezzi dei beni*, Turin, 1977, p. 370 ff.

(18) Law no. 662 of 23rd December 1996 has modified the wording of article 1284, section 1, Civil Code, as well as reducing the rate from 10% to 5%.

(19) Previously the opinion that in obligations in foreign currency the exchange rate on payment rather than on the due date was to be assumed was the current opinion; Court of Cassation, 16th March 1978, no. 2691 in Foro it, m 1989, I, section 1210; CAMPEIS-DE PAOLI, *La responsabilità civile dello straniero*, Milan, 1982, p. 421 ff. ASCARELLI, *Obbligazioni pecuniarie in Commentario del cod. civ.* edited by Scialoja and Branca, Bologna, 1959, p. 441 ff., p. 457 ff., p. 508 ff., on the other hand, was inclined towards a revaluation of the damage as well as legal interest, in the event that the debtor chose to pay in our currency pursuant to article 1278 Civil Code. In this sense, G. VALCAVI, *Il corso di cambio ed il danno da mora nelle obbligazioni in moneta straniera* in *Riv. dir. civ.*, 1985, II, p. 251 f.; *Le obbligazioni in divisa straniera, il corse di cam-*

After the « Euro » comes into force in Italy, its legal rate of 2.5% will obviously be valid for the obligations that have as their object the new currency and the ductility of the new wording of article 1284, section 1, Civil Code, allows constant updating in the future as well.

Moreover, article 1224, section 2, Civil Code, will apply which establishes the indemnifiability « of the greater damage from default » and the prohibition of usurious rates, approved by the legislator with law no. 108 of 7th March 1996, which in Italy is therefore a law of public order.

The basic principle of the freedom of the parties to determine the standard rates of interest in the new currency will obviously remain intangible, as the classification of the rates in the default interest and equivalent rates on savings and loans will also remain.

By way of information, at the end of 1998 the rate obtainable by clients of leading banks on international markets showed a great convergence with those of the Lora with the other currencies in the European monetary system, because the ECU was as 2.80%, the Lira at 2.91%, the Mark and the French Franc at 2.80%, the Belgian Franc at 2.88% and the Peseta at 2.91%, i.e. approximately they were fundamentally equivalent (20).

The discount rate of the currencies of the countries belonging to this system varied around 3%.

As for the interest rates of the new « Euro » currency, the one practised to calculate the discount of bills of exchange by the main international banks oscillated between 2.75% and 3.25% and approximately were the Lombard rate, on securities that could be stood in lien at the clients' bank and the prime rate for loans to the best clients.

Also on the same date, the interbank rate in Euro (Euribor) oscillated between 3.22% and 3.05% and the one practised by London banks (Libor) oscillated between 3.20% and 3.084% (21).

Obviously the difference both of the exchange rate and of interest between our currency and that of the other countries belonging to the European system is destined to lose any value, whilst the indemnifiability of the difference between the Euro and the currencies outside our system, such as the dollar, the pound, the yen, the Swiss franc and the national currencies of the individual countries will remain.

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bio ed il maggior danno da mora, in Foro it., 1989, I, section 1210; In materia di liquidazione del danno subito dallo straniero, in *Foro it.*, 1989, I, section 1619; *Il danno da mora nelle obbligazioni in moneta straniera, nella attuale disciplina di liberalizzazione valutaria*, in this *Rivista*, 1992, II, p. 861 ff. and now in *L'espressione monetaria*, cit., p. 131 ff., p. 151 ff., p. 159 ff., p. 165 ff and p. 183 ff.

(20) See data from *Il Sole 24 Ore* of 5th January 1999.

(21) The Euribor rate at one week was quoted 3.294 and that at one year 3.259, the Libor rate from 3.25 to 3.19: again from Il Sole 24 Ore of 5th January 1999.

The Euro – as we are writing – one month from its introduction, has lost points of the exchange market with respect to the quotation of the dollar, due to the different expectations of economic growth and the different monetary interest.

Moreover, here the rules of international conventions will take on increasing importance.

3. – We have written above that the category of the so-called credits of value as well as that of the so-called compensatory interest are destined to be radically reviewed and no longer have any following in our country.

We have to start saying that the distinction between credits of currency and credits of value is not justified by any legislative rile and is exclusively from case law.

Credit of currency currently means only the pecuniary obligations that are liquid from the origin whilst the term « credit of value » usually refers to those other obligations which have to be liquidated by a judge, such as, for example, that of the compensation of damage (22).

I have written elsewhere that the concept of credit of value is in itself arbitrary, because it aims to indicate a pecuniary credit in an imaginary currency, which would not be supported by the principle of nominal value and would have, on the contrary, a stable purchasing power in time.

More precisely, it is a credit in an imaginary currency of which the purchasing power is considered stable, with the adjustment of the monetary yardstick according to the index numbers of its purchasing power for the families of blue – and white – collar workers, in the period of time considered (23).

The principal advocate of this category (24) distinguishes the *aestimatio* or evaluation of the commodity at the time the damage occurred from the *taxatio*, or the evaluation updated to the payment, recalculated on the basis of the index numbers of loss of purchasing power of the currency, as if it had kept the original one and this distinguishes the *mensura* from the *mensuratum*.

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(22) T. ASCARELLI, *Delle obbligazioni pecuniarie*, in *Commentario del cod. civ.*, edited by Scialoja and Branca 1979, Bologna, under article 1277, p. 94 ff., pp. 173-180 ff., p. 241 ff., p. 41 ff. The reason why the concept of pecuniary obligations is limited to those that are liquid in origin, whilst those to be liquidated in money are considered credits of value cannot be understood.

(23) ASCARELLI, op. cit., p. 444.

(24) ASCARELI, op. cit., p. 173, p. 180, p. 241 ff. The aforementioned construction which is based on the *aestimatio* on the occurrence of the damage and the *taxatio* on the decision is connected with those attempts by historians of economy who, like Wiebe, used a non-monetary yardstick (such as gold and Silver) to compare monetary values, prices and wages in different places and at different times. The artificiality of this method has been shown by L. EINAUDI, *Teoria della moneta immaginaria da Carlo Magno alla Rivoluzione francese*, in *Riv. storia econ.*, 1936.

The concept in itself of the credit of value made its first appearance for a brief period in 1923, in the Germany of the period that crossed an economic phase of flight from the Mark which the German jurists of the period tried to equitably remedy with fixing the value in time of a non-pecuniary payment with the theoretical justifications of the « preservation of the basis of the contractual payment » « of the presupposition », « of good faith », thus removing the indemnity from the principle of nominal value (25).

The extreme fragility of this distinction and of the attempt to give theoretical dignity appeared shortly afterwards with the extension of the revaluation of the pecuniary credits that were liquid in origin and was superseded by the subsequent phase of economic stabilization (26).

This category was imported to Italy, at the end of the last World War from far-off Brazil by the late Ascarelli who knew the hyperinflation of that country, which moreover is being repeated in times close to us (27).

He wanted to specify that the credit of value is not equivalent to the indexed credit, although it is not contemplated by any legislative rule, because the adjustment of the monetary yardstick had to be done, both in the case of the increase or decrease of the purchasing power of the currency.

We have tenaciously opposed this concept or category of credit of value, as moreover that of compensatory interest in a long series of articles (28).

The totally abstract nature of the concept of the category of credit of value and its incompatibility with fundamental principles, such as those concerning default, have been criticized in particular.

The monetary revaluation of damage is granted to the creditor, even in the case in which he is in default, as well as that in which he has refused the real offer from the damaging party of a sum which appears to be adequate at a later date (29).

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(25) This is the opinion of OERTMANN-BABEL-KRUCKMANN-NIPPER-DEY quoted by G. SCADUTO in *I debiti pecuniari e il deprezzamento monetario*, Milan, 1924, p. 147; in case law; Supreme Court of the Reich, 21st September 1920, in G.L. HOLTFRERICH, *L'inflazione tedesca 1914-1923*, Bari, 1989, p. 301 ff.

(26) Supreme Court of the Reich, 28th November 1923, in G.L. HOLTFRERICH, op. cit., p. 318.

(27) The transactions if goods and money in Brazil, even in recent times, took place in obligations of the national treasury, indexed to the cost of living.

(28) G. VALCAVI, *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi di interesse*, in *Foro it.*, 1981, I, section 2112; *Indennizzo e lucro del creditore nella stima del danno*, in *Quadrimestre*, 1986, p. 681 ff.; *Sul risarcimento del danno da illecito o da inadempienza e di quello per il ritardo con cui è prestato l'indennizzo* in *Giur. it.*, 1991, I, i, section 1227 ff., and now in *L'Espressione monetaria*, cit., p. 191 ff., p. 249 ff. and p. 279 ff.

(29) G. VALCAVI, *L'espressione monetaria nella responsabilità civile ed altri saggi*, Padua, 1994, p. 53 ff., p. 91 ff., p. 279 ff., p. 321 ff., p. 341 ff., p. 349 ff.

These criticisms have been accepted, although at a distance in time, by the important pronouncement of the Supreme Court of 20th June 1990, no. 6209, at the point in which it recognised *funditus* that « no-one wants to deny the empirical and casuistic origin of the category of the debt of value, which although opposed from the conceptual point of view, continues to show a considerable expansive capacity, becoming legitimate on the level of case law effectiveness (sic!) » (30).

This is tantamount to recognizing that the category of the credit of value has no dogmatic foundation and only has the nature of an empirical and equitable stratagem.

In another part of the grounds of this pronouncement, it states that « monetary revaluation represents only the discounting back of the debt of value so that the money is significant only as an expression of the purchasing power and not as the object of the service (sic!) ».

The adoption of the revaluation to discount back the damage is profoundly wrong because it confuses two different problems, that of the quantification of the entity of the damage and that of the time of reference of the evaluation.

It moves the time of reference from its occurrence to the *tempus rei iudicandae*, although the same pronouncement of the Supreme Bench indicated above peremptorily stated in another part that the « damage from non-fulfilment is to be liquidated with reference to the time in which it occurred and not to that of liquidation » (31).

This method also appears erroneous because it does not even assume the effective prices of the commodities at the time of the decision or of the payment, but only the comparison of the abstract statistical indexes of the prices (the so-called value of money).

This is a solution – as I have written elsewhere – only on the increase of prices, to the decision that also preserve from the drop that of the individual commodity that has not been supplied or has been destroyed or stolen (32).

The nodal point of the crisis of the equitable nature of this method is where its advocates add the legal interest to the revaluation or the revalued capital, as if in the presence of a debt in the common money supported by the nominalistic principle.

In this regard, the aforementioned enlightening decision of the Supreme Court has added that, having to add to the damage from unlawful action or form non-fulfilment, to be evaluated with regard to the time of its

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(30) In Riv. dir. civ., 1991, II, p. 67 ff.

(31) Court of Cassation, 18th July 1989, no. 3352, in *Foro it.*, 1990, I, section 933 ff.

(32) G. VALCAVI, *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi d'interesse*, in *Foro it.*, 1981, I, section 2112.

occurrence, that from the delay « for the loss of that *utilitas* that the creditor would have drawn from the sum originally due instead of the lost commodity, more closely linked to the concept of default », the latter ought to be indemnified in a proportion corresponding to the legal interest.

In this way, the decision contradictorily ended up by identifying the credit of value with that of currency as is represented « by the sum originally due instead of the lost commodity ».

The concept of compensatory interest has been erroneously extended from the marginal hypothesis of article 1499 Civil Code to each credit that has to be liquidated by the judge and has ended up by procuring for the damaged part, against all equity, a disproportionate profit, instead of the mere indemnity (33).

The author has observed that this sum of revaluation and interest represented an unjust duplication of the compensation of the damage from default although in different forms, for the same period of time in which the payment of the monetary compensation is deferred in time (34).

The legal interest has the function of discounting back in time all the values calculated in the currency and if the legal interest is inadequate with respect to the normal one, it should be integrated with the indemnity of the greater damage contemplated by article 1224, section 2, Civil Code, i.e. by the differential with respect to the normal market interest and not adding it to a different and greater purchasing power.

Dominant case law, with a long series of pronouncements, in the period until 1994, has ended up by calculating the legal interest, called compensatory, on the revalued capital.

The Supreme Court was aware of the disproportion of this profit with its pronouncement of 9th September 1994, no. 7943 (35) which corrected it, stating that the interest should take effect only from the judicial pronouncement, with which before it the creditor should have been satisfied by the last revaluation alone.

As, in the meantime, the latter had dropped to 5% or 6% and the legal interest had increased under the law to 10%, this solution could only be inadequate to compensate the damage from default.

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(33) G. VALCAVI, *Indennizzo e lucro del creditore nella stima del danno*, in *Quadrimestre*, 1986, p. 681 ff.

(34) G. VALCAVI, *Il problema degli interessi monetari nei risarcimenti del danno*, in *Resp. civ.*, 1987, I, p. 3; *In tema di d'indennizzo e lucro del creditore: a proposito di interessi e rivalutazione monetaria*, in *Foro it.*, 1988, I, section 2318 ff.; *A proposito del lucro del credito nel risarcimento del danno in genere*, in *Foro it.*, 1989, I, section 1988; *Sul carattere moratorio degli interessi nel risarcimento del danno*, in *Resp. civ.*, 1990, II, p. 97 ff. and, lastly, *Risarcimento del danno, interessi e rivalutazione*, in *Il danno*, 1996, p. 3, p.4, p.5 ff. and now in *L'espressione monetaria*, cit. p. 321 ff., p. 341 ff. and p. 349 ff.

(35) In *Foro it*, 1995, I, section 842.

All the Divisions of the Supreme Court sitting together, with the decision of 17th February 1995, no. 1712 (36) further adjusted their aim, establishing that the legal interest should not have been calculated on the last revalued capital but on that gradually revalued year by year and in addition, at a rate that was not necessarily the same as the egal rate (at that time still 10%) but also lower according to the evidence that the damaged party had produced for the loss of profit from the commodity in kind.

The Supreme Court again, with its subsequent decision of 19th May 1995, no. 5595 (37), finally approved that « alternative behaviour cannot be attributed to the creditor, such as, for example, that he would simultaneously have invested the sun in a commodity other than money (such as to claim its revaluation) and on the other hand he would have kept it liquid (such as to enjoy the monetary interest) ».

The decision came to the correct conclusion: « if the interest can be presumed, the preservation of the purchasing power cannot also be presumed, the legal interest is in no case due on the credit of value ».

The revaluation alone, which in the meantime had dropped to the rate of 5% whilst the legal interest for the whole of 1996 had remained at the level of 10% to then drop to 5%, therefore did not appear an adequate instrument.

Lastly, the legislator finally intervened to do justice to these categories.

With Law no. 662 of 23rd December, the legislator radically amended the wording of article 1284, section 1, Civil Code, concerning the formulation of the rate of legal interest (38).

It has abandoned the previous fixity of the legal rate, destined to be superseded or to remain behind with respect to the yield of money and the rate of inflation.

The new wording of article 1284, section 1, Civil Code, establishes that the legal rate is the flexible one which each year is adopted by a decree of the Ministry of the Treasury.

The measure, it is added, will be determined « on the basis of the annual gross yield of state securities with a duration of not more than twelve months and taking into consideration the rate of inflation recorded in the year ».

With these words, the legislator has acknowledged that the interest has the function of covering all aspects of the loss of the *utlitas temporis* of a deferred payment of money with respect to the same payment in cash.

The reference to the average gross yield of State securities highlights its essential nature of loss of profit.

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(36) In *Foro it.*, 1995, I, section 1470 ff., and in *Con. giur.*, 1995, 4, p. 462.

(37) In *Riv. dir. civ.*, 1996, p. 417.

(38) See art. 185 of Law no. 662 of 23rd December 1996.

With reference to the « rate of inflation recorded in the year », the legislator, in harmony with the conclusions of economists, has intended to say that the interest is the only instrument that remedies inflation.

The formula adopted therefore indicates that it is not allowed to sum the interest to the revaluation, under pain of duplicating the compensation of the same damage.

The so-called damage from inflation in therefore included in the greater damage which is indemnified by interest, pursuant to article 1284, section 1, Civil Code, because the legal rate is determined, taking into account the rate of inflation recorded in the previous year, as well as by the average of the gross yield of State securities.

With this reference to the rate of inflation, there is no more room for the credit of value. let alone for an additional calculation of compensatory interest.

The ministerial determination of the legal rate already takes into account – as has been seen – the rate of inflation which assumes the characteristics of an event included in the loss of *the utilitas temporis.*

Obviously the legal rate can be integrated – as has been seen – by the differential between it and the greater interest practised on the savings or loans market.

Following the introduction of the Euro, which has replaced our old « Lira », there is no longer any perspective for the continuation of these juridical constructions.

The category of credit of value is an exclusively Italian concept and unknown to the other countries in the European Monetary System (39).

With the arrival of the Euro, a credit of value in Euro cannot be surmised, on the basis of unknown statistical indexes of inflation of the whole area of the European Monetary System and in any case, inapplicable for the different countries.

How can there be recourse to the indexes of inflation in our country for a supranational currency such as the Euro?

The negative answer has now come from the facts, with their indefeasibility of reality and not only from the legislator through the new wording of article 1284, section 1, Civil Code.

4. – The disappearance of the categories of credit of compensatory interest must not lead our law experts to take an even more unreasonable step backwards, as would be the case in which they took the price or value of the individual commodity, existing at the time of the final decision, as

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(39) Only one current in Spanish legal literature (I.- DIEZ-PICAZO y ANTONIMO GILLON, Sistema de derecho civil, II, Madrid, 1978, p. 157) has defended the theory of credits of value, moreover without being greatly followed.

that to which to refer the evaluation of the damage, as an isolated decision of our Supreme Court has surmised as an alternative.

This erroneous conclusion cannot be justified with the attempt to be in harmony with the backward opinions that still today prevail in the systems of some important countries in the European Monetary System.

In this regard, it has to be said that in Germany (40), in France (41) and in Belgium (42) the value and the price of the individual commodity, which the debtor has not supplied or has destroyed or has stolen, at the time of the final decision or on payment, are habitually adopted by the legal literature and case law.

In Spain, on the other hand, the time of the claim is taken as the reference time (*el tiempo de ejercicio de la accion*) (43).

In other countries outside our monetary system, such as Great Britain and Switzerland, that of the occurrence of the damage is correctly taken (44).

This conclusion is the only one that complies with reason and has been advocated by ourselves with ample motivations (45).

This is also the criterion that was adopted by the important pronouncement of the Italian Supreme Court on 20t June 1990, no. 6209 and by those that followed it with the same orientation and now form consolidated case law that « the damage from non-fulfilment or from unlawful action with reference to the time at which it occurs and not to that of liquidation ».

This is the currently dominant opinion in our legal system.

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(40) In Germany, the calculation is made on the basis of the prices at the time when the damage is indemnified; GRUNSKY in PALANDT, *Münchener-Kommentar*, Munich, 1985, under article 249 BGB, 1985, no. 9 inter alia.

(41) In France, see H.L. MAZEAUD, in *Traité théorique et pratique de la responsabilité civile*, Paris, 1950, no. 2420-8 and the case law quoted on p. 544.

(42) Belgian Court of Cassation, 7th February 1946, in MAZEAUD, *op. cit.*, no. 2480-8, note 21.

(43) Supreme Court, 30th October 1956 and case law in J. SANTOS BRIZ, La responsabilidad civil in el derecho sustantivo y processal, Madrid, 1981, p. 289.

(44) F. BOLLA, *Repertorio di giurisprudenza patria*, 1936, p. 472.

(45) Cf. G. VALCAVI, *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, p. 31 ff; for the sake of completeness, please also refer to: *Ancora sul tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1991, II, p. 267; *Sul risarcimento del danno da illecito o da inadempienza e di quello per il ritardo con cui è prestato l'indennizzo*, in *Giur. it.*, 1991, I, 1, section 1227 ff.; *Intorno al concetto di* perpetuatio obligationis *e al tempo di riferimento del danno da inadempienza contrattuale*, in *Riv. dir. civ.*, 1992, II, p. 385 ff. and now in *L'espressione monetaria*, cit., p. 207 ff., p. 273 ff., p. 2790 ff., p. 293 ff., p. 309 ff.