The indemnity of mere loss of profits as a general criterion of compensation of damage from default in pecuniary obligations

1. – The decision reviewed is in line with the orientation that has now justly become dominant and which has been authoritatively confirmed by the recent decision no. 5299/89 of the civil court, all divisions sitting together. It concludes correctly that legal interest and the whole rate of revaluation can be accumulated to compensate the damage from default in pecuniary obligations.

The pronouncement of the civil court, all divisions sitting together, deserves particular attention because it has concerned the emblematic case of a modest consumer (in the particular case, of a pensioner) who would probably have spent the payments of his pension (if he had received them punctually) on consumer goods. The reasoning of the court, from a certain point of view, is flawless. We cannot hypothesize that the pensioner would have spent that money on consumer goods, in order to benefit from the revaluation, and on the other hand he would also have saved it, to benefit from the interest. If we assume that he would have saved that money, in order to obtain compensation for the savings (i.e. interest), we must also hypothesize that he would normally have spent it on consumer goods, but at the level of new and higher prices of the deferred time of consumption.

Obviously, if this is valid for the pensioner, it is also generally valid for all. Indeed, it obeys elementary and inescapable criteria of economic logic, which remains – on close examination – the only instrument to rely on to identify the situation in which the creditor would have been, if the obligation had been promptly fulfilled (*Differenztheorie*).

The *quod plerumque accidit* does not allow us to consider that the creditor, in general, would have spent and saved the amount due at the same time if he had received it in time. This is the same as saying that the *quod*

This essay annotates the following decision:

COURT OF CASSATION, Labour section, 15.2.1990 no. 1133, President Menichino, Reporting Judge De Rosa, Public Prosecutor La Valva; Marcon vs. INPS (Italian Social Security): « *The claim of the pensioner who complains of the non-payment of legal interest on the amounts liquidated by way of revaluation for the late payment of the pension payments is to be dismissed.* »

interest cannot be identified together in the revaluation of the amount and in the monetary interest (1): the actual damage cannot be accumulated here with the loss of profits (2).

The possibility of surmising actual damage (for the loss of the purchasing power of the money) is excluded by the nominalistic principle contemplated by article 1277 Civil Code, which is too often ignored, for no reason. The hypothesis that can normally be configured of damage from non-fulfilment of an obligation which has as its object a sum of money, that is legal tender (both liquid since the origin or to be liquidated subsequently) is that of loss of profits, It coincides, according to the *quod plerumque accidit*, with the normal yield that the creditor would have drawn from a homogeneous use, i.e. financial without a character of risk.

The aforementioned « normal yield of the money » corresponds to the *quod interest* according to the *quod plerumque accidit*, that restores, in compliance with general economic rules, the situation that there would have been of the obligation had been promptly fulfilled, and is also in line with articles 1223, 1225, 1227 section 2 and 2056, section 2 Civil Code (3).

Monetary interest, in the varied range of rates, also allows personalizing the compensation. In general, it will correspond to the highest rate of fixed income (Treasury bonds or bank savings formulas), excluding the uses entailing risk in shares (4).

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(1) In the same sense, Court of Cassation, 14th January 1988, no. 260, *Foro it.*, 1988, I, 384 and with note by G. VALCAVI, ibid., 2318. The actual damage could be hypothesized only where it is proved by the creditor that he had to borrow the money, i.e. as a cost of replacement. In this case, however, the loss of profits is not indemnified. The accumulation of the actual damage and of the loss of profits, on the other hand, appears possible to hypothesize only with regard to a foreigner who also complains of the lowering of the exchange rate of our currency under article 1278 Civil Code, with respect to his currency, On this point, see VALCAVI. id., 1989, I, p. 1210.

(2) On art. 1224, section 2, Civil Code and the remedies for devaluation: Court of Cassation 4th July 1979, no. 3776, *Foro it.*, 1979, I, p. 2622, with note by PARDOLESI; 5th April 1986, no. 2368, id., 1986, I, p. 1265, with notes by PARDLESI and AMATUCCI, 1540, with note by VALCAVI and, 3034, with note by QUADRI, in legal literature: NICOLÒ, id., 1944-1946, id, pp. 41 ff.; PARDOLESI id., 1986, id., 1986, I, p. 1265; AMATUCCI, id., 1979, I, p. 1987, BIANCA, in *Giur. it.*, 1979, IV, p. 129; BERNARDI, in *Riv. dir. civ.*, 1984, II, p. 445; CAFFÈ in Foro it., 1979, I, p. 1985; DI MAJO, in *Giur. it.*, 1979, I, 1, p. 193; INZITARI, id., 1986, I, 1, p. 1161; TRABUCCHI, in *Riv. dir. civ.*, 1980, II, p. 195; TRIMARCHI, *Svalutazione monetaria e ritardo nell'adempimento delle obbligazioni pecuniarie*, Milan, 1983.

(3) For recourse to the indemnity of loss of profits in the case of the saver, see Court of Cassation, all sections sitting together, 5th April 1986, no. 2368, cit. On the other hand, as a general criterion of indemnity: VALCAVI, in Foro it., 1980, I, p. 129; Id., id., 1981, I, p. 2112; Id., id., in *Riv. dir. civ.*, 1981, II, p. 332; Id., in *Foro it.*, 1986, I, p. 1540; Id., in *Riv. dir. civ.*, 1987, II, pp. 31 ff.; Id. in *Quadrimestre*, 1986, pp. 681; Id., in Foro it., 1988, I, pp. 2318 ff.; Id., id., 1989, I, pp. 1988 ff. In the same sense, more recently in the USA, there has been recourse to market monetary interest as opportunity cost, KEIR and KEIR Business Lawyer, 1983, p. 129.

(4) This concerns fixed income and not variable income such as, for example, share investments due to their nature of risk. There is a mention in the opposite direction in AMATUCCI, in

2. – The logic of indemnities, based exclusively on the loss of profits, satisfied inalienable requirements of juridical and economic logic.

In the first place, it postulates a negligent delay and it is coherent with this, whilst the « value » logic does not take the « default » into consideration, placing itself, in the final analysis, outside the general principles of the system (5), and it also appears deeply contradictory where, on the one hand, it does not take the default into consideration and, on the other, it argues by analogy from the default *ex re*, on the illicit, to then generalize it, releasing it from this supposition. It also retraces the interest back to its function as compensation for the loss of profits, caused by the default, avoiding recourse to anomalous figures, such as, for example, the so-called compensatory interest, which obeys a logic of the type that is refused by today's case law.

In this regard, we record an unjustified extension from residual hypotheses, relative to liquid and non collectable credits (under article 1499 Civil Code) to illiquid credits which are however collectable (such as compensation of damage from non-fulfilment). This practice leads to duplicating the revaluation and the interest, to try and compensate the specific damage for the delay with which the indemnity « equivalent » to the damage is paid.

The recent decision no. 3352/89 of the Supreme Court has correctly recognized the default character of this interest. Legal interest, as per articles 1224, section 1 and 1284, Civil Code, considered jointly, far from exhausting the loss of profit deriving from the negligent delay – represents a fixed and presumed, not exhaustive, measure of the « loss of profits » which in its entirety must be integrated by the differential, with respect to the normal yield of the damage. This differential represents the »greater damage » under article 1224, section 2, Civil Code.

Moreover, the whole history of the legislative discussions that preceded fixing the legal rate of interest, from the Napoleonic Code onwards, is in this sense (6).

3. – From another point of view, recourse to the indemnity of the mere loss of profit (i.e. in terms of normal yield of money) also represents the only measure in line with the laws of economy. It is absolutely vain to

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Foro it., 1986, I, pp. 1273 ff. The normal use of savings today is in Treasury bonds or in public debt securities, due to the high return, and this also concerns asset management by banks for their clients.

(5) All the Divisions sitting together, whilst they exclude the automatic revaluation and the accumulation with interest, in the case of the pensioner, confirm it in favour of damaged parties in general (credits of value). They do not consider, however, that this leads to a profit and in any case to unjustified and generalized disparities of treatment.

(6) On the discussions on article 1153 of the Napoleonic Code before the French Council of State of the time,. VALCAVI in *Riv. dir. civ.*, 1981, II, p. 332, note 45.

search for the default damage in a decreased « value of money » because the latter, due to the unlimited options that accompany it and its nominal value, is an absolutely abstract yardstick. Illustrious economists have written in their time that the reserve of purchasing power is made up of the money itself (7) and that it is unthinkable to measure it differently (8). It therefore appears illusory to identify the « value » of the money in the index of a purchasing power, by its variable nature, fixing it in time (9). The default damage, on the contrary, consists more properly of the loss of profits and therefore – as mentioned – of that compensation which the creditor would normally have drawn from the saving of the sum considered, although having postponed the present expenditure to the future (here we speak of *utilitas temporis*, of time preference).

In our case, it is the normal compensation for that particular form of saving which is forcibly induced by the non-performance of the debtor.

Market interest (Treasury bonds, Treasury Credit Certificates, bank interest in the various forms) is established – as shown by economic studies – at the point where the demand for credit is balanced with the supply of the market and indemnifies the loss of profit, according to the *quod plerumque accidit* (10). It compensates, by absorption, every different depreciation consequent to the temporal deferment, it takes into account the most differing factors and i.e. the volume of liquidity, the expected inflation, the measures to cool down the economy, the exchange rates and so on (11). The solution based on the loss of profits, i.e. on the normal monetary interest, is the only one to have a real justification because it has its roots in economic reality, whilst the solution based on revaluation has an artificial and arbitrary character.

The importance attributed to the loss of profit, to the detriment of revaluation, has been concretely confirmed in the economic phenomena of our time and in the reciprocal connatural variability of the levels of prices of goods and monetary interest.

The most recent inflation has been characterized, for a lengthy period of the decade considered (1979-1983) by the absolutely new phenomenon of the drop in the demand for goods (stagflation, slumpflation) and, as a consequence, by a high tendency to keep savings in liquid form, despite the reduction in the money's purchasing power (the so-called « Harrod ef-

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(7) EINAUDI, in *Riv. storia economica*, 1939, pp. 133 ff.

(8) MARSHALL, *Opere*, Turin, 1972, pp. 136, 137, 227, 356-359.

(9) For a superseded historical precedent: L. EINAUDI, *La moneta immaginaria da Carlo Magno alla rivoluzione francese*, in *Riv. storia economica*, 1936; L. EINAUDI, R. BAHREL, A, V, JUDGES, *I prezzi in Europa dal XIII secolo ad oggi*, Turin, 1980, pp. 531 ff.

(10) The economists mentioned in VALCAVI, in *Foro it.*, 1980, I, p. 120, notes 13, 14, 17, 18, 19 and 20.

(11) VALCAVI in *Foro it.*, 1986, I, pp. 1540 ff.

fect») (12). Monetary interest, in this period, remained constantly below the rate of inflation.

On the other hand, in the period of time closer to us (1984-1989), following the stabilization of the purchasing power of the money, there has been the opposite phenomenon of an increase in the demand for commodities and a decrease in liquidity, with significant effects on monetary interest, which rose to levels considerably above the rate of inflation. This is represented by the following data:

Years	Normal yield of money (Treasury Bonds)	Rate of inflation	Prime rate
1979-83	17.09%	17.58%	19.66%
1984-85	14.15%	9.60%	17.11%
1986-88	11.08%	5.23%	13.22%
1989	12.58%	6.60%	13.83%

At the time of writing, the indemnity for the loss of profit, i.e. compensation for saving, is far above the measure of revaluation that should compensate the consumer. It must be added here that the solution based exclusively on the loss of profit allows a more homogenous and generalized indemnity too creditors and a more rational and convincing use of the assumptions. This also avoids those disparities of treatment, one of which was mentioned the ruling of 7th February 1990 of the Supreme Court, with the consequent problems of normative constitutionality.

4. – Let us now return to the case of default indemnity of our pensioner and the disparity of his treatment with respect to the other categories of creditors, which keeps up with the prohibition of the accumulation and legal interest, as the divisions sitting together correctly ruled.

The pensioner should therefore make do with the monetary revaluation only, i.e. a nominal increase of the sum due of 17.58% for the period 1979-83, of 9.60% for 1989-85, of 5.23% for 1986-88 and 6.60% for 1989.

The penalizing and discriminatory character of such a treatment to the detriment of such a vast category cannot fail to be seen.

Let us now consider the opposite conclusion, which was previously in favour and which allowed the accumulation of monetary revaluation and legal interest. Preliminarily, the fact that the sense in summing the monetary

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(12) The most recent studies on the importance and role of «reserves» and «monetary balances» in the period of recent inflation have shown how, far from hypothesizing a flight of money, as occurred in the 1920s, this has maintained, on the contrary, the function of a reserve of values. See DON PATINKIN, *Moneta, interessi e prezzi*, Padua, 1977, pp. 36-30, 45 ff., pp. 128, 222, 253 ff,, pp.. 40 ff.

revaluation to a share of the loss of profit equal to 5% cannot be seen must be recorded.

The accumulation of the revaluation and legal interest, compared for the periods considered with the parallel return of the public debt securities (especially the Treasury bonds), highlights however the following data:

Years	Normal yield of money (Treasury Bonds)	Accumulation of revaluation and legal interest	Prime rate
1979-83	17.09%	22.58%	19.66%
1984-85	14.15%	14.60%	17.11%
1986-88	11.08%	10.23%	13.22%
1989	12.58%	11.60%	13.83%

The accumulation here leads to a disproportionate profit of more than five points above the normal return on money for the period from 1979-83, whilst it is established below for the other periods. This leads to the conclusion that after the drop of the rate of inflation at today's levels, the accumulation in the last period remains under or at the limit of the normal return of money.

Let us now go on to compare the case of our pensioner with that in which there is automatic revaluation, with the addition of the legal interest calculated on the revalued capital (such as the credits from employment and those of value).

The first comparison to be made, for belonging to the same social sphere, concerns the pensioner and the employed worker who is protected by articles 429, section 3, Code of Civil Procedure considered jointly with 150 provisions of enactment Code of Civil Procedure. In the past, the author of these lines pointed out that the textual content of article 429, section 3, would not strictly speaking authorize an interpretation other than that laid down by article 1224, section 2, with the exclusion of the variant that here the default would operate *ex re*. And he also observed that revaluation, laid down by article 150 provisions of enactment, should be restricted only to the possibility that the rate of inflation were greater than legal interest and therefore that part of inflation that exceeds 5%.

This opinion had no follow-up. On the contrary, the opinion that proceeds with monetary revaluation in its entirety and legal interest is also added. calculated on the revalued capital, is dominant. This conclusion encounters the same remark of illogicality that underlies the prohibition of accumulation, stressed by case law today. In any case, a special anomalous character should be attributed to the regulation. The disparity of treatment between the pensioner and the employed worker has recently led, as mentioned, the labour section of the Supreme Court, with ruling of 7th February 19909, to raise a problem of constitutionality. However, it is foreseeable

that before long, employed workers will be complaining of the inadequacy of the treatment based on revaluation, instead of on the higher monetary interest, and to raise the same problems of disparity of treatment, for opposite reasons.

The same discourse, relative to the disparity of treatment, is to be made between the pensioner and whoever belongs to the category of creditors of value, on the one hand, and the damaged party, or those who belong in general to the evanescent category of credits of value, on the other.

In this case too, the legal interest on the revalued capital is added to the automatic revaluation, in its entirety. The inequalities end here to be dilated beyond all description, and take on dimensions of enormous bearing.

It is now time – in my opinion – to proceed with a critical review *ab imis* of these distinctions and dogmatic constructions which have no basis in the law and are based on some abused cryptotypes. The author of these lined refers the reader to what he wrote elsewhere (13).

Despite this, it is however fitting to compare the normal yield of money, for the periods considered, with the accumulation of revaluation and the interest on the revalued capital.

The resulting picture is as follows:

Years	Normal yield of money (Treasury Bonds)	Revaluation + legal interest on revalued capital	Prime rate
1979-83	17.09%	26.93%	19.66%
1984-85	14.15%	15.50%	17.11%
1986-88	11.08%	11.01%	13.22%
1989	12.58%	11.60%	13.83%

This comparison shows how the difference is magnified (almost ten percent) for the period 1979-83 and, on the other hand, for the later years, the accumulation is established on values at the limit or below the normal yield of money: this confirms the arbitrary nature of the solutions based on monetary revaluation and on the interest calculated on the revalued capital, and how the safe and reasonable point of reference for the default indemnity is made up only on the compensation of loss of profit, in terms of normal return of money.

This was recently noticed by article 1 of the bill of amendments to the Code of Civil procedure, approved by the Senate on 28th February 1990, which increases legal interest from 5% to 10%. Any solution based on fixedness is destined in time to be excessive or lacking with respect to market interest, due to its variable nature.

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(13) VALCAVI in *Riv. dir. civ.*, 1987, II, 56; Id., in *Quadrimestre*, 1986, II, pp. 681 ff.

The compensation of the greater damage from default, laid down by article 1224, section 2, Civil Code, would end up by losing any meaning insofar as the legal interest exceeds the market interest, whilst on the contrary the role of instrument of liaison of this rule has to be acknowledged with the *quod interest* according to the *quod plerumque accidit.*

5. – To conclude, we will say that the treatment of the pensioner, limited to revaluation alone, therefore appears very unjust.

The solution does not consist, however, of adding the legal interest to the revaluation, but of assuring for the pensioner the normal return of money, which in recent years is far greater even that the accumulation mentioned. To obtain this, it is sufficient for the pensioner to infer that he would not have spent, by saved the sum which was not received in due time, in order to appear as a saver or occasional creditor rather than as a consumer. Indeed, the sections sitting together recognize this treatment for the pensioner for the (larger) sums represented by the arrears, for which it appeared better to hypothesize that they were destined for saving, rather than the purchase of consumer goods. It is like saying that the same pensioner should have received an unequal treatment for the same sums of pension that he expects to receive, depending on their amount.

The case of the pensioner is also significant to verify the validity of the more general conclusion, according to which the *quod interest* of article 1224 should be identified in the normal return of money (or in its replacement cost if this has been borne).

It also represents the coherent remedy to indemnify the specific damage for the delay with which the indemnity is paid; this damage must absolutely be kept separate from the compensation of the other basic prejudice which arises from unlawful behaviour or non-fulfilment. The latter must be evaluated according to the current values of the time when it occurs.

Monetary interest also fulfils the function of linking the different values, expressed in money, existing at different times (the so-called discount rate).

This further shows how economic phenomena cannot be reduced to rigid patterns of pre-constituted dogmatic formulas; on the contrary, their validity must be tested on the test bench of economic reality. In conclusion, it is necessary to have great concern for the economic analysis of law, which cannot be ignored, especially on this subject.

Reference has been made to the above by:

A. LUMINOSO, *Risoluzione per inadempimento*, Commentario Scialoja and Branca, Bologna, 1990, p. 325, note 33; U. BRECCIA, *Le obbligazioni*, Milan, 1991, 340; P.

TARTAGLIA, *Il modesto consumatore va in pensione*, in *Foro it.*, CFTR, 1991, I, 1331.

Also by the author on the same subject:

– «*Sul risarcimento del maggior danno da mora*» in Foro italiano, 1986, I, 1540 and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994, p. 91 and ff.