

JURIDICAL REGIME OF THE INTEREST IN THE ROMANIAN LAW. PARTICULAR CASE. COMPARISON BETWEEN THE REGULATIONS OF THE REMUNERATORY INTEREST VERSUS THE PENALIZING INTEREST, IN THE ROMANIAN BANKING LAW

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Abstract

The analysis of a case where the rate of the conventional interest is not specified made me investigate what is the maximal limit that can be obtained in this case, under the regulation in force, in the Romanian law (sect.1)! To formulate a solution, I considered as necessary to analyze : the provision on the moratory damages (according to the Roman Civil Code) and the putting of the debtor in default, in order to know what is the date starting from which the moratory damages are calculated (according to the Roman Civil Code)-sect.2; the juridical regime of the interest (according to the Roman Bankin Law)-sect.3; comparison between the remuneratory interest and the penalizing interest (according to the Roman Banking Law)-sect.4; solution for the case and conclusions-sect. 5.

Keywords: legal interest, remuneratory interest, penalizing interest, banking law

JEL Classification: K12, K22

1. Practical case

In a loan agreement between a professional lender and a non-professional physical person in capacity of borrower, it has been stipulated that an interest shall be due for the amount borrowed, but the rate of the interest has not been stipulated! Does it make a difference when we establish the rate of the conventional interest whether the debtor-borrower is professional or not? Will the solution take into account the provision of the Roman law in force, or the rules of the banking law? Why?

2. Moratory damages and putting the debtor in default

2.1. Moratory damages

According to art. 1535 in the Civil Code, “When an amount of money is not paid on due date, the creditor shall have the obligation of moratory damages, starting with the due date until the moment of payment, in the amount agreed upon by the parties or, in the absence of this, in the amount stipulated by the law, with no need to prove a prejudice. In this case, the debtor shall not be entitled to prove that the prejudice suffered by the creditor as a result of the delay of payment is smaller” (alin. 1).

Corollary: “If, before the due date, the debtor had owed interests that were bigger than the legal interest, the moratory damages owed shall have the rate applicable before the due date (para. 2)”

Compensation: “If the moratory interests owed do not exceed the legal interest, the creditor shall be entitled, apart from the legal interest, to damages – interests for full recovery of the prejudice suffered”(para. 3)².

Analysis of the definition of the moratory damages (art. 1535 Romanian Civil Code-para. 1)

When?: “when an amount of money is not paid by the due date”,

What is owed: “the creditor is entitled to moratory damages”,

Starting with what moment?: „starting with the due date, until the moment of payment”,

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² According to Law no 287/2009 on the Civil Code republished in the Official Gazette no 505 of 15 July 2011.

What amount: “the amount agreed upon by the parties, or in its absence, the amount stipulated by the law”,

In what hypothesis (case)?: “without proving a prejudice”,

How to prove?: “In this case, the debtor shall not be entitled to prove that the prejudice suffered by the creditor as a result of the delay of payment is smaller” + corollary (para. 2) + corollary la corollary (para. 3).

To conclude, art. 1535 in the new Civil Code introduces new rules regarding the money obligations and the moratory damages (penalizing interests)³:

a) the creditor does not need to prove the existence and the extent of the prejudice caused by the delay in executing the obligation;

b) the moratory damages are owed, in principle, starting with the payment due date (the putting in default operates under the rules analyzed in section 2 of this paper);

c) in principle, the amount of the moratory damages-interests shall be standard (the provisions of the Governmental Ordinance 13/2011 shall apply when it comes to enforcement of the law, and in other cases, the amount established conventionally shall apply). According to art. 1535 para. 2 in the new Civil Code, the debtor cannot prove that the prejudice suffered by the creditor is smaller than the legal interest or the rate conventionally established. The new Civil Code accepts 2 exceptions from this rule:

- when the contracting parties have established a remuneratory interest, and have not stipulated a clause regarding the penalizing legal interest, and the amount of the legal penalizing interest, applicable in the silence of the contracting parties, is smaller, then the same quota valid for the remuneratory interest shall apply after the due date too⁴ (according to art. 1535 para. 2).

- when the conventional penalizing interest (contractual moratory damages interests) is smaller than the legal penalizing interest, according to art. 1535 para. 3, the creditor shall be entitled obtain the amount of the legal interest and additional damages – interests to fully recover the prejudice suffered.

2.2. Putting the debtor in default

We are conducting this analysis from the perspective of analyze the moment when the legal interest is owed. In a reductionist interpretation, the reply to this question is differentiated according to whether we have to do with juridical relations that arise from the exploitation of an enterprise with lucrative purpose (in this case, the due date is the date starting which the interest is owed, and in this case, the due date is the date starting with which the interest is owed, by applying the principle: the interest shall be run ipso jure) and juridical relations that arise from the exploitation of an enterprise (that the new Civil Code separates into 3 categories corresponding to letters a – c below).

The putting in default of the debtor can be done by the creditor (either through written notification – a, or request of legal action – b, according to art. 1522 the new Civil Code) or it can operate ipso jure – c – (according art. 1523 n. C. civ.).

a) Written notification by which the creditor requests the debtor the execute the obligation has the effect of putting the debtor in delay on condition that the debtor should be given time to execute, whose duration the law-maker does not specify expressly, but indicates two cumulative criteria that must be taken into account to calculate this time: the nature of the obligation and the circumstances. The notification shall be sent to the debtor through the judicial executor or any other means that ensure the proof of communication (i.e: letters, telegrams, fax).

b) The request of legal action of the debtor shall have the value of his putting in default. In order to protect the interests of the debtor, the law-maker of the new Civil Code stipulates that if the

³ See B. Oglindă „Dreptul afacerilor – teoria generală, contractul”, Universul Juridic Publishing House, 2012, p. 480.

⁴ See M. Dumitru „Regimul juridic al dobânzii moratorii”, Universul Juridic Publishing House, Bucharest, 2010, p. 346, 347.

request of legal action was done and the debtor was not notified about the putting in default, he shall have the right to execute the obligation in a reasonable time, calculated from the date when the request was communicated to him, and in this case the court expenses shall be paid by the creditor (considering that the execution of the obligation pays the debt, and the trial has no sense).

c) **The debtor is put in default ipso jure** in the following cases:

- when the contract stipulated that the debtor is in default ipso jure simply because the deadline for execution has come; this hypothesis takes over the consecrated solution in the commercial law according to which, to ensure the celerity of the transactions and the security of the creditor, the debtor shall be considered in default ipso jure starting with the date of the exigibility of the debt, without a need of putting in default or any other prior formality (thus violating a classical principle of the civil law formulated in the Latin adaggio *dies non interpellat pro hominem* = the deadline does not urge the debtor).

- when the obligation could have been executed only in a certain period of time, that the debtor let go, or he did not execute it immediately, although there was an emergency;

- through his action, the debtor made impossible the execution in nature of the obligation or violated an obligation not to do so; thus the debtor put himself in default by doing what he had refrained himself from doing;

- the debtor undoubtedly manifested his intention to the creditor not to execute the obligation or when we have an obligation with successive execution and the debtor repeatedly refuses or neglects to execute his obligation;

- **the obligation, assumed during the activity of an enterprise, to pay an amount of money has not been executed.**

The effects of putting in default are:

- the moratory damages are owed starting with the date when the putting in default takes place (according to the principle *qui in mora est culpa non vocat* = he who is in delay is not related to the guilt);

- Starting with this date, if the debtor refuses to execute obligations, the creditor may ask for compensatory damages;

- When the object of the obligation is to give a determined individual asset, the risk shall be no longer taken by the debtor obliged to give over, but by the creditor who has not taken over the asset (according to art. 1274 n. C. civ.);

If the asset that has not been given over at time has become useless for the creditor, the creditor may ask for judicial resolution of the contract.

3. Interest: definition, forms, rate Anatocism.

According to art. 1 para. 5 in the Governmental Ordinance 13/2011, the interest shall be not only the amounts in money identified under this reference but also other services, under various references or denominations, to which the debtor is obliged as equivalent of the use of the capital⁵.

3.1. Forms of interest

According to art. 1 para. 2 and 3 in the same article of the Governmental Ordinance no 13/2011, both a remuneratory interest (interest owed by the debtor to the obligation to give an amount of money by a certain deadline, calculated for the **period prior to the due date of the obligation**) and a penalizing interest (the interest owed for **default to execute the respective obligation by the due date**). There are two forms of the interest, one applies before, one applies after the due date.

⁵ To compare this definition with the one proposed by art. 7 in the Romanian Fiscal Code, see S. Cristea „Cumulul dobânzilor cu penalitățile de întârziere” in R.D.C. no 6/2004, p. 86-88.

There are two significant aspects:

- the first starts from the question regarding the applicability of the two forms of interest;
- the second regards the question: will they apply even if there is no clarification regarding the interest : that is in the silence of the contracting parties, shall be assume the application of the two forms?

For the first question, the law-maker gives a clear answer: according to art. 1 para. 1 in the Governmental Ordinance no 13/2011, the two forms of interest shall apply both to the money loan contract, and to the delay in paying a money **obligation**. **Our law-maker in 2011** is more open than in the case of the Fiscal Code when, according to art. 7 para. 1 no 13, the interest was defined with restricted applicability, expressly to the: deposit contract, financial leasing contract, installment payment sale and any postponed-payment sale.

We consider the extension of the application of the two forms of interest corresponding to its character of civil fruit owed as equivalent of the use of money: as long as the creditor is deprived of the use of the money, he shall be reimbursed.

The answer is different for the 2nd question:

- for the **remuneratory interest**, the lack of any contractual provision (neither the amount of the interest, nor the word „interest” are included in the contract) leads to non-application of the interest (in juridical terms, the remuneratory interest shall not be applied ipso jure)

- for the **penalizing interest**, on the contrary, even despite the fact that there is no contractual clause regarding the amount of interest and even the word interest lacks, the interest is owed! The reason? Because it sanctions the delay of the debtor, it is a civil punishment! (in juridical terms, it runs ipso jure, automatically). Regarding the amount to apply, two cases shall be taken into account: when the debtor performs one's activity as enterprise/professional, the interest to apply shall be the reference interest, plus 4 %; when the debtor is not professional (in the sense of the Civil Code – does not perform activities as enterprise) the reference interest rate shall be applied minus 20% (the rate cannot be more than 80% of the reference rate of the Romanian National Bank!).

3.2. Interest rate

Regarding the cases where it applies, the law-maker makes different rules for the interest rate. According to art. 3 para. 1 in the Governmental Ordinance no 13/2011 the rate of the legal remuneratory interest shall be established (when the contracting parties have mentioned that an interest is owed for the borrowed money, but have not mentioned the amount) at the reference rate of the Romanian National Bank; starting with 1 Sept 2015 its rate is 1.75% per year, according to the Circular Note no 17/2015 on the reference interest rate, Official Gazette 316 of 8 May 2015, and the rate of the penalizing interest (when the parties have not mentioned the amount owed for each day of default) shall be established at the level of the reference interest rate plus 4 %, that is $1.75\% + 4\% = 5.75\%$ per year.

3.3. Reductions

According to art. 3 para. 4 in the Governmental Ordinance no 13/2011, in relations that do not arise from exploitation of an enterprise with lucrative intent, the legal interest rate shall be established by reducing the amount with u 20% whether it is remuneratory or penalizing⁶.

⁶ Reference interest rate of the Romanian National Bank, as rate of the interest of the monetary policy established by decision of the Board of the Romanian National Bank shall be published in the Official Gazette whenever the interest rate of the monetary policy changes (according to art. 3 para. 1 corroborated with art. 3 para. 4 in the Governmental Ordinance no 13/2011). These rates do not apply to interests charged or paid by the Romanian National Bank, by loan institutions, non-banking financial institutions and by the Ministry of Public Finance, that are subject to special legal provisions, according to art. 9 in the Governmental Ordinance no. 13/2011.

In other words, **the legal interest**, when the debtor is not professional (in the sense of the civil code- does not perform activities as enterprise) shall be computed as follows:

- for the remuneratory interest, 20% shall be deducted from the amount of reference interest (the amount cannot exceed 80% of the reference interest rate of the Romanian National Bank);
- for the penalizing interest, 20% shall be deducted from the reference interest rate + 4%;

Regarding the **contractual interest rate** (conventional interest), in juridical relations that do not arise from the exploitation of an enterprise with lucrative intent, according to art. 5 para. 1 in the Governmental Ordinance no 13/2011, it cannot exceed the legal interest with more than 50% per year. Any contractual clause that exceeds this threshold shall be null and void, and the creditor shall lose the right to claim the legal interest (according to art. 5 para. 2 in the Governmental Ordinance no 13/2011); to establish the legal or illegal character of the conventional interest, we start from the legal interest rate in force on the day when the contractual clause is formulated (according to art. 5 para. 3 in the Governmental Ordinance no 13/2011).

In other words, the maximal limit of the conventional interest shall be established as follows:

-in relations where the debtor is not professional, the maximal limit of the conventional interest is, for the remuneratory interest, 80% of the reference interest +50%;for the penalizing interest , 80% of (reference interest+4%)+50%;

-in relations where the debtor is professional, the maximal limit of the conventional interest is, for the remuneratory interest, the sum of the reference interest+50%; and for the penalizing interest, the maximal rate shall be computed with the following formula: (reference interest+4%)+50%;

Regarding the juridical relations of private international law, in cases where the Romanian law applies, the legal interest shall be 6% per year (according to art. 4 in the Governmental Ordinance no 13/2011).

3.4. Anatocism

Anatocism – or „interest to interest” – is the agreement by which the contracting parties agree that the interest shall capitalize, that is shall add to the amount owed and the interest shall be computed again⁷.

According to the Governmental Ordinance no 13/2011, the exception accepted from the rule that the interest can be computed only for the amount borrowed is anatocism, only if the following 2 requirements are fulfilled (according to art. 8 para. 1 and 2):

- the convention regarding the „interest to interest” shall apply only after the due date;
- and capitalization shall be possible only for interests owed for at least 1 year⁸.

These provisions shall apply to the penalizing interest, although according to art. 8 para. 3 in the Governmental Ordinance no 13/2011, remuneratory interests can capitalize too in order to generate interest, but the restrictive requirements mentioned above are no longer stipulated.

⁷ Regarding the history of the enforcement of the anatocism rule in Romania, see S. Cristea „Dreptul afacerilor” – 3rd edition, reviewed and completed, University Publishing House, Bucharest, 2012, p. 338.

⁸ For the possibility to stipulate a clause of flat and variable interest indexation in relation to the imprevisibility theory; according to art. 1271 the new Civil Code, see R. Postolache „Drept bancar”, C.H. Beck Publishing House, Bucharest, 2012, p. 275, 276.

4. Remuneratory versus penalizing interests according to the Governmental Ordinance 13/2011⁹

Definition: “Interest shall be not only **the amount computed in money under this title, but also other benefits**, under any title or denomination, that the debtor undertakes as equivalent of the use of capital” (art. 1 para. 5 in the Governmental Ordinance 13/2011)

-the interest shall be worded in **writing**; if the conventional interest is not stipulated in a written document, the sanction shall be that only the legal interest shall apply!

-the interests in **special fields shall have special regulations**, such as: interests paid by the Romanian National Bank, by the Ministry of Finance (see the fiscal code/code of fiscal procedure).

4.1. Similarities:

Both can be:

- conventional

- or legal.

- when the word interest is used, without mentioning which one, the Governmental Ordinance 13/2011 refers to both!;

- the definition given by the Governmental Ordinance 13/2011 to the interest, in addition to the Romanian Civil Code, includes also other benefits, under any title or denomination, not only money! In our opinion, the phrase “which the debtor undertakes as equivalent of the use of capital” is not appropriate, as it refers only to the remuneratory character, not to the penalizing character (sanctionatory);

- where there is no agreement of the parties the cases shall be differentiated as follows:

- for the **remuneratory** interest, the lack of contractual provisions (neither the amount of the interest, nor the word „ interest” are included in the contract) leads to non-application of the interest (in juridical terms, the remuneratory interest shall not apply ipso jure)

-for the **penalizing** interest, despite the fact that there is no contractual clause regarding the amount of the interest and even the word interest lacks, the interest shall be owed! The reason? Because it sanctions the delay of the debtor, it is a civil punishment! (in juridical terms it runs ipso jure, automatically).

4.2. Differences

-the **remuneratory** interest shall be calculated for the period prior to the obligation of the due date (remuneratory character);

-the **penalizing** interest shall be the interest owed for non-fulfillment of the obligation of due date and is valid therefore for the period after the due date and until the full payment of the debt is effected (penalizing character = sanctionatory); it runs ipso jure;

-**rate** for the remuneratory interest = the rate of the reference interest of the Romanian National Bank. = interest of the monetary policy;

-**rate** of the penalizing interest = rate of the reference interest + 4%;

-reductions of the legal rate shall apply when the debtor is not professional (in the sense of the Civil Code – does not perform activity as enterprise) as follows:

- for the remuneratory interest, from the amount of the reference interest, 20% shall be deducted (the rate cannot exceed 80% of the reference rate of the Romanian National Bank), according to . art.3 para 3;

⁹ Governmental Ordinance 13/2011 on the remuneratory and penalizing legal interest for money obligations, and regulations for financial – fiscal measures, in the banking sector, published in the Official Gazette no 607 of 29 august 2011, approved by Law no 43/2012 Official Gazette no 694 of 30 Sept. 2011

-and for the penalizing interest, from the amount of the reference rate + 4%, 20% shall be deducted;

- **the maximal threshold of the conventional interest** shall be established as follows:

-in relations where the debtor is not professional, the maximal threshold of the conventional interest, for the remuneratory interest of 80% of the reference interest +50%; for the penalizing interest of 80% of (reference interest+4%)+50%(according to art.5 para 1); sanction for the lender for non-compliance with this limit shall be to lose the right of claim of legal interest (according to art. 5 para.2 of the Governmental Ordinance OG13/2011);

-in relations where the debtor is professional, the maximal threshold of the conventional interest, for the remuneratory interest is the sum of the reference interest +50%; for the penalizing interest, the maximal rate is given by the formula: (reference interest+4%)+50%;

-where there is an **element of extraneity**, legal interest = 6%;

- **the advance payment of the interest** shall be possible only for the remuneratory interest; and only for 6 months, the most (risk of fluctuation shall be borne by the debtor, the amount paid extra shall not be returned);

-**anatocism** shall be accepted only as exception; only through convention that is concluded later than the due date and only for interests owed for at least 1 year [not valid for current account contracts];

5. Solutions for the case and conclusions

After interpreting the provisions in force in the Roman law, the solution for this case shall be the following:

-in the silence of the contracting parties, the rate of the legal interest shall apply, as stipulated in the banking legislation, for the maximal threshold of the conventional interest, that is, by applying the provisions of the remuneratory interest, the mathematical computation leads to the formula : 80% of the reference interest+50%, of, in other words, not more than 130% of the reference interest of the Romanian National Bank; the solution results from corroboration of art 3 para 3 with art 5 para 1 in the Governmental Ordinance 13/2011!

- it is indeed important that the debtor does not perform activity as a professional, because in this way, he enjoys a double reduction: of the legal interest rate applicable, and of the maximal threshold accepted by the law for the conventional interest;

- the fact that the Civil Code does not specify anything in this respect, but according to art 3 para 3 in the Governmental Ordinance 13/2011 and art 5 para 1 in the Governmental Ordinance 13/2011, the provisions of the banking law shall apply in the civil law, too, regarding the reductions for non-professionals, lead us to the conclusion that the general law is completed by the special law; we can only appreciate that such harmonization of the regulation is welcomed!

Regarding the importance of the juridical regime applicable to the legal interest (proved by the bug number of jurisprudential solutions), we consider as useful the following remarks:

- the determination of the applicable rate requires special regime of use of evidence: the interest shall be concluded in writing; the lack of the written document leads to application of the legal interest (according to art. 6 in the Governmental Ordinance 13/2011);

- even in case of a written form of the interest loan contract, the effects shall be different in terms of the two types of interest! The lack of the word, interest results in non-application of the remuneratory interest, but not in non-application of the penalizing interest!

- compared to the previous legislation (both the 1864 Civil Code, and the Governmental Ordinance no 9/2000, abrogated after the entering into force of the Governmental Ordinance no 13/2011) which included provisions about moratory damages only (penalizing interest) the new regulations (the Governmental Ordinance no 13/2011) includes express provisions regarding the interest before the due date as well, which is called remuneratory interest – after the remuneratory

character of the interest¹⁰, as against the sanction character – which explains the name of penalizing interest (it punished the delay in executing the obligation);

- when the juridical regime of the juridical relation has a mixed character (one party has a character of enterprise with lucrative intent, the other party does not) the solution corresponds to the case of mixed acts of trade regulated by the Romanian Commercial Code abrogated when the new Civil Code entered into force, the appropriate solution requires the application of the rules of the juridical relations that arise from the exploitation of an enterprise with lucrative intent¹¹; in our opinion, the correct solution should be to apply reductions stipulated by the law only in juridical relations in which the debtor is non-professional (they do not arise from the exploitation of an enterprise with lucrative intent), even if it would narrow the range of cases to which it may apply! A justification may be art.1446 in the Civil Code, according to which the solidarity among the debtors of an obligation contracted during the activity of an enterprise was presumed; therefore, only for the debtors considered as exercising their profession (for creditors, according to art. 1434 the new Civil Code, solidarity shall be expressly stipulated);

- regarding the veridicity of the situations that appear in practice and the complexity of the interpretation of the legal provisions, we consider that it is desirable that the lawyer who provide counseling to the parties should draw their attention upon the importance of stipulating in advance both the types of interest, and their rates, thus complying with the legal limits of the Governmental Ordinance no 13/2011.

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¹⁰ On the characters of the interest see S. Cristea „*Cumulul dobânzii cu penalitățile de întârziere*”, in R.D.C. no 6/2004, p. 88.

¹¹ For a similar opinion, but based on the application of art. 56 C. com. (abrogated after the entering into force of the new Civil Code). see M. Dumitru „*Regimul juridic al dobânzii legale*”, Hamangiu Publishing House, Bucharest, 2008, p. 74 – 78.