DEFAULT INTEREST PROCEDURE. THE PARTICULARS OF THE DEFAULT INTEREST RATE

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Abstract
The focus of this article is to bring to light what exactly is the technique of the default interest. What precisely does this entails to, can we have a conventional default interest rate, as well as a legal one? What is the distinction between the two rates, and moreover, can we talk about an abuse of power when it comes to establishing the rate? The heart of the article lies in the analysis of the legal provisions in the matter which will help us answer the above mentioned questions.

Keywords:
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1. THE LEGAL GUIDELINES

Usually interest represents the amount of money owed to the creditor if he suffers any damages. Most often, the amount is set in the form of an annual percentage called interest rate. Depending on how it is set we will have a legal rate (established under the law) and a conventional rate (determined by the will of the party). Because it is desirable to maintain an "equality of arms" between the debtor and the creditor, the legislator imposes certain limits on how the conventional interest rate should be set so that the lender does not abuse its contractual position. However, the legislator does not perceive the interest rate as something distinct from the interest itself. Precisely for this reason it must be judged according to the nature of the legal relationship under which it is born. Because of this aspect, there is some confusion in the matter. Since the interest at the statutory rate is the default interest, it will be qualified as legal interest. But this optic is somewhat inaccurate because as we will see, penalty interest can have both a statutory interest rate and a conventional rate.

The documents containing the regulations referring to the interest rate are the provisions of the civil code art. 1535 supplemented with the provisions of Ordinance 13/2011 on statutory interest payment and penalties for money obligations, as well as the regulation on financial-fiscal measures in the banking field.

Prior to the entry into force of the New Civil Code, respectively of the Ordinance, 13/2011, interest rate matters were governed by Ordinance 9/2000 corroborated with art. 1088 of the Old Civil Code. The novelty elements introduced by Ordinance 13/2011 represent a step towards a better understanding of this institution. Whereas the art. 1 of O.G 9/2000 provided for the freedom of the parties to set the interest rate for late payment of a monetary obligation; the new regulation extended the sphere even for loans. Currently, the interest is determined by reference to the monetary policy rate, but according to the previous regulations the reference interest was calculated as a weighted average of the volume of transactions between interest rates on deposits attracted by the NBR and reverse sales of government securities issued by the NBR in the month prior to the one for which the ad is made. Moreover, currently there is a clear legal definition of pay and penalty interest, which was not previously present. As of 2011 there is a delimitation of the rate level for each interest rate. Perhaps one of the most interesting elements of novelty is that it eliminates the distinction between civil relations and relationships between professionals, but...
stillmdifferent rates of interest will be maintained depending on the nature of the legal relationships.

From the economy of the provisions of the present ordinance, the scope of the regulation concerns the civil-interest rate - namely the remuneration interest, but also the interest-penalty interest for the delay in executing the monetary obligations in the field of civil and commercial obligations, but is not applicable to other types of contracts, like administrative (Pascariu L.). Article 9 states that the interest collected or paid by the NBR, non-bank financial and financial institutions, and by the Ministry of Public Finance, will be regulated differently according to the provisions of the respective materials. With regard to conventional interest rate setting, the legislator states that: "The parties are free to set interest rates in the conventions, both for a loan of a sum of money and for delaying the payment of a cash obligation." Also, the level of the conventional interest rate, will have to be set at the statutory interest rate. Any provision according to which the interest rate is higher will be considered null. In addition, the legislator establishes the rule that "interest must be established by written act. In the absence of this act, the statutory interest is due."

Hence, from the economy of the legal provisions in order for the conventional interest rate to be valid it must be stipulated in a written act, both parties should have consented to it, and the established rate must not exceed the legal interest rate.

2. THE METHOD OF CALCULATING THE INTEREST

2.1. Ordinance 13/2011 on statutory interest payment and penalties for money obligations, as well as the regulation on financial-fiscal measures in the banking field

From the provisions of Ordinance 13/2011 regarding the legal interest payable and penalizing for money obligations, as well as the regulation on fiscal financial measures, it is obvious that the interest regardless of its nature penalty or remuneration will be calculated based on the reference rate of the NBR. The aforementioned ordinance puts an end to the disputes that have arisen because of the deficient expression of the lawmaker in O.G. 9/2000. As such, it was difficult to determine how the interest was calculated. Although interest was set on the first day of the month, publication in the Official Gazette was made after a few days. As a result, the old interest rate was still applied at the beginning of the month due to the fact that the
advertising means have not yet been met. Even if the National Bank's Bulletin stated that the rate was applicable starting with the first day of the month, it would be irrelevant because at that time the interest from the previous month was still valid.

Currently, the NBR benchmark interest rate is related to operations in national currency and its levels are displayed on the institution's website. Monetary policy interest rate will be displayed on the NBR's website as monetary policy indices in the table of monetary policy, lending facility, deposit facility. As of September 1, the benchmark interest rate is the monetary policy interest rate set by decision of the NBR Board of Directors. The monetary policy rate is the interest rate used for the main money market operations. Currently they are the one-week carry forward operations at a fixed interest rate. As of September 7, 2011, the interest rates on the permanent facilities granted by the NBR are in a symmetrical corridor of +/- 8 percentage points compared to the monetary policy rate.

Given that the present ordinance applies even to legal relationships arising from the operation of a business enterprise, we find that it is necessary to make a number of distinctions when it comes to the calculation of the interest. We see that the legislator returned to the monist concept of civil law, thus encompassing in the civil code the provisions of commercial law. As a result what is understood now as the commercial legal relationship as well as the concept of enterprise bears some nuances. Technically, the obligation assumed in the course of business is an obligation arising from a legal relationship based on the operation of an enterprise. Moreover, Article 1480 line 2 of the Civil Code talks about obligations inherent in a professional activity, which should be equivalent to the exploitation of an enterprise. Article 1446 Civil Code states that solidarity is presumed to be between debtors of an obligation contracted in the course of business. Due to the fact that the legislator does not have a linear say in this matter, confusions arise, and these lead to distinct interpretations. According to the ordinance, the legislature distinguishes it according to the nature of the interest which the lucrative enterprise is required to pay. As a result the interest rate will be set at the NBR reference rate, whereas the penalty interest rate will be punitive and will be calculated at the reference interest rate plus 8 percentage points.

The legislator states in article 3 line 3 that enterprises that have no commercial purpose will have a different regime of calculating their interest. Because the new civil code leaves room for interpretation when it comes to non-profit enterprises as well as profit-making enterprises, the question that

arises is how exactly will we be able to tell if we find ourselves in the presence of a commercial law binding? Is it necessary that the debtor be a professional as seen in the eyes of the law? In the doctrine this is considered to be an important aspect in determining which provisions will apply. The obligation to pay a sum of money must arise from the systematic pursuit of an organized activity consisting in the production, administration or disposal of goods or in the provisions of services for profit. However, according to art. 3 par. 2 Civil Code, only the professional is the one who exploits the enterprise. In addition to this, article 5 line 1 from O.G. 13/2011 states that legal relationships that do not result from the exploitation of a profit-making business are established by reference to Article 3 line 3 Civil Code., which legislates the meaning of the phrase "exploitation of an enterprise".

By keeping in mind the above stated facts it is understood that the penalty interest will be equal to the NBR reference interest plus 8 percent, and the interest rate will be equal to the NBR benchmark interest rate. If the obligation does not have its source in a legal relationship between professionals pursuing a lucrative activity, the same type of calculation will be used to determine the applicable interest rate, but the rate will decrease by 20%. The setting of the legal penalty interest at the reference level plus eight percentage points was determined by the need to avoid the unwanted effects that could result from the application of penalties too high to the Romanian debtors.

2.2. Law 72/2013 on measures to combat delays in the execution of payment obligations of sums of money resulting from contracts concluded between professionals and between them and contracting authorities

Due to the fact that the legal relationship between professionals has particularities and is not subject to general law, Law 72/2013 on measures to combat delays in the execution of payment obligations of sums of money resulting from contracts concluded between professionals and between them and contracting authorities, represents the guiding rules in this area. With regards to the moment when the penalty interest runs, the text of the law refers to the article in the Civil Code governing this institution. Article 3 of Law 72/2013: "the penalty interest flows from the due date until the moment of payment under the conditions of art. 1535 Civil Code. "The payment term in the relationship between professionals cannot be longer than 60 days. Default damages will only run from this date. If the parties choose to make the payment in staggered terms, the penalty interest and the indemnities will be calculated by reference to the due
amount. By mean of exception, if no payment term is stipulated in the contract the penalty interest will flow: after 30 calendar days from the date of receiving the receipt of the invoice by the debtor or of any equivalent payment claim; If the date is uncertain or prior to the receipt of the goods, the interest will run after 30 calendar days from the receipt of the goods or the provision of the services. If the procedure for receipt or verification of the goods is not specified legally or by contract, and the debtor receives the invoice or payment equivalent from the date of receipt or verification prior to this date, the interest will run 30 calendar days from this date. The amount of the penalty interest will be calculated in accordance with Article 3 of O.G.13/2011 on statutory interest payable for monetary obligations as well as for the regulation of fiscal financial measures in the banking field.

The default interest rate for contracts between professionals and contracting authorities has about the same peculiarities as contracts between professionals. Consequently, contracting authorities are required to execute the payment obligation within 30 calendar days of receipt of the invoice or any equivalent request, 30 calendar days from the date of receipt of the goods, and also 30 days after completion of the verification proceedings. Exceeding the 30-day deadline will trigger the run of the default interest from that time until the payment is made. The parties may also set a legal payment term but it may not exceed 60 days. By means of exception in the case of public health institutions the statutory payment period is 60 days. The penalty interest shall run from the due date of the obligation, under the conditions of art. 6 of the law, corroborated with art. 1535 Civil Code.

The legislator institutes this as an additional means of protection for the debtor, giving him the opportunity to recover his expenses incurred for the recovery of the claim. And besides this, he is entitled to minimal interest, only if: "the conditions for late payment are fulfilled, the creditor may require the debtor to pay the amount in RON from the date of payment of the amount of 40 euros, representing minimum additional damages."

One question that arises is to know whether minimal damage will accumulate with default damages. At first glance, one might say that we were in the presence of unjust enrichment or even would argue that this minimal interest would be a double repair of the damage suffered by delay, which is unacceptable. From the analysis of the legal provisions one might say that it is not right for the debtor to pay this amount to the lender because he should choose between the payment of default interest and the payment of minimum interest. It would be convenient for the creditor to demand the penalty damages and it is obvious that the 40 euros cannot cover the damage

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caused by the delay. It is precisely for this reason that it could be said that the very nature of the minimum interest damage would be a compensation, or rather a legal assessment of the damage suffered. From the analysis of the legal provisions outlined above it can be stated that default damages in the matter of the professionals will be granted from the due date date, and they will be equal to the legal interest rate outlined through O.G. 13/2011. What differs from the general law regulations is the period from which the damages run, i.e. from 30 days after perfecting the obligation.

3. CONVENTIONAL RATE OF INTEREST

3.1 The Terms of validity of the conventional rate of interest

Since it is common knowledge that the provisions of Ordinance 13/2011 have already been established as not being the general law regulations in the matter of interest, rather they are to be used at substitutes, and so these provisions will come into force if the interest has not been established conventionally. The legislator offers the parties the opportunity to set the interest rate by agreement and unless there is a stipulation in this respect the NBR reference interest rate will apply. Even if the interest rate can be established by agreement of the parties, it does not mean that the legislator must be passive and not limit the amount of interest to a certain extent. These provisions are necessary, precisely to protect the debtor against the possible abuses of the creditor.

Therefore, we will find in Articles 5 and 6 of the Ordinance the guidelines on the determination of the penalty interest rate by the means of inserting a criminal clause. As such, for legal relationships that do not result from the exploitation of a profit-making enterprise within the meaning of Art. 3 par. 3 of the Civil Code, the interest cannot exceed the legal interest rate by more than 50% per year. In case of non-observance of this provision, the legislator also establishes a sanction in the next paragraph, whereby if such interest is stipulated, the clause is null and void and as a result the creditor is deprived of the right to demand legal interest. And as a last resort in order for interest to be valid it is necessary for it to be established by means of an written act and. And so we will have two conditions underlying the validity of the penalty interest, namely: the interest rate should not exceed by more than 50% the NBR interest rate, and the second one, that states that the interest must be established by written act.

With regards to the first condition of validity of the clause namely according to art. 5 par. 1 of the Ordinance, "interest may not exceed legal interest by more than 50% per year". In the doctrine, it has been strongly disputed whether this provision applies to both types of interest, but since the ordinance concerns both remuneration and penalty payment, it is logical that this provision should concern them both. The legislator establishes this limitation to stop any possible abuse by the creditor. Default interest is a penalty and for this reason the parties are recognized as the prerogative of evaluating the damage conventionally by introducing a criminal clause. If the interest rate is above the threshold set in ordinance the clause will be null and the creditor will be deprived of the right to demand legal interest.

The second condition, namely that it must be prescribed in writing is used as evidence. In the sense that the court cannot award interest that was not provided, except for the legal one. Again this is a mean of protection for the debtor established by the legislator. As such, the court will not be able to give a ruling on something that it was not invested with.

### 3.2 Penalty for non-observance the determination of the conventional interest rate

As already outlined, the penalty interest must be subject to certain conditions when established on the basis of the will of the parties. As such, it should not damage the debtor. For this reason, the legislator sets some maximum permissible limit in this area. According to O.G. 13/2011 in the field of legal relations that do not result from the exploitation of a business enterprise, conventional interest is admitted as long as it does not exceed the legal interest rate by more than 50% per year. As a sanction of this non-compliance, the clause will be considered null and, moreover the creditor will no longer have the right to receive legal interest if the clause inserted in the contract is truly excessive. In this case the court has the permission to intervene, but only in some limitative cases of law such as in the matter of the default interest on the penalty clause. So the text of Article 1541 Civil Code line 1 lit. B, provides that the court may intervene only when: "the penalty is indeed excessive in relation to the prejudice that could have been foreseen by the parties before the conclusion of the contract". However, the legislator establishes the rule that "if such a penalty were to be reduced it should remain superior to the principal obligation." Therefore, even if the criminal clause is reduced, it will still be able to profit the creditor and make good the damage. This balances the "power ratio" between creditor and debtor.
CONCLUSION

The research carried out, outlined the fact that there is a clear distinction when it comes to the rate of the interest and the interest itself. We also must acknowledge the fact that the way by which the rate will be calculated weather it will be according to legal provisions or by the law of the parties(criminal clause) have some nuances. These guidelines are set by the legislator so that there will be no abuse of power coming from one of the parties. It is obvious that the new regulations tried to meet the new “legal frame” when it comes to certain institutions such as the enterprise as well as the entire bunch of commercial relationships.

REFERENCES

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