The problem of monetary interest in compensation of the damage

1. – In recent years, the need for an in-depth analysis of the subject concerning monetary interest in general and the theoretical and practical correctness of their distinction into compensatory, equivalent interest and default interest, from the point of view of the identity or diversity of function has been underlined from several sides (1).

In particular, this need has been felt with regard to the compensation of the damage where, not only here (but also for example in the legal literature and case law of France, Spain and goodness knows how many other countries), legal interest justified as compensatory interest continues to be added.

This addition, on a theoretical level, does not allow fully verifying the adequacy or inadequacy, both by exaggeration and by default (2), of the criteria of evaluation of the damage, such as that based on the prices at the time of the decision or that based on automatic revaluation or devaluation, in correlation with the rate of inflation or deflation (the so-called credits of value).

On a practical level it often leads to magnifying the amount of compensation, with exasperations such as those of summing the compensatory and default interest (3), or calculating the interest on the revalued capital (4) or,

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From « Responsabilità civile e previdenza », 1987, I, p. 3 ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

(1) For example, PASANISI in the preface to the issue of the Lombardy section of AIDA dedicated to the Conference of 24th March 1982 on Devaluation and Insurance, speaks correctly of the « difficult march along the uncertain borders which divide default interest from equivalent and compensatory interest ». The existence of these borders is recalled into question by GIORGIANNI in *L'inadempimento*, Milan, 1975, p. 159 and by the decision of 22nd April 1980, no. 60 in *Foro it.*, 1980, I, section 1249 of the Constitutional Court where he mentioned an identical function seen from two different points of view.

(2) The sum of the interest and revaluation can be excessive or, on the contrary, lacking, in the case of deflation. The same can be said if the interest is added to the indemnity evaluated according to the prices at the time of the decision, depending on whether they are on the upswing or downturn.

(3) Court of Civil Cassation, 22nd September 1979, no. 4914, in *Rep. Giust. civ.*, 1979, see *Lavoro* p. 484.

(4) Court of Civil Cassation, 13th July, 1983, no. 4759, in *Mass. Giust. civ.*, 1983, no. 1677, amongst the many.

lastly, revaluing these (5). Now however, the drop of inflation to rates equal to or below legal interest (6), or even negative, as is happening in Germany and the perspective of a possible calculation in reverse of capital and interest, calculated on that, leads to reconsider the problem in new and wider terms.

In the end, many current propositions will have to be reviewed: this is via a better understanding of the economic phenomenon, in its various aspects, as the presupposition for an in-depth examination of the juridical phenomenon.

In my humble opinion, the road to follow and which we will strive to outline here, is still very long.

2. – It is opportune to say immediately that the analyses made by jurists on monetary interest are mainly of a descriptive nature and therefore underline the pecuniary, accessory, homogeneous, proportional and periodical nature of it (7).

The essence of monetary interest does not however seem to have been understood by them in its extent as when it is understood only as the profit for the use of capital and therefore assimilated to the natural profits of commodities depending on the current axiom on the normal profitability of money (8).

There is no reason to be surprised that this opinion ends up by leading to the consideration of the calculation of interest as always compulsory and, what is more, net of the rate of inflation.

This has a magnifying role in the compensatory interest and leads to consider legal interest, as real interest, i.e. above the rate of inflation (9).

This vision is however erroneous only if we consider that hoarded money does not produce a profit and, in a phase of inflation, undergoes the inexorable erosion of the purchasing power (10).

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(5) Court of Civil Cassation, 17th November 1979, no. 6004, in *Rep. Giust. civ.*, 1979, see *Lavoro*, p. 475.

(6) At present the rate of inflation is below the legal rate of interest. That relative to wholesale prices is nil (Corriere della Sera, 15th May, 1986).

(7) Including; MESSA, *L'obbligazione degli interessi e le sue fonti*, Milan, 1932, pp. 6, 19, 21, 23; LIBERTINI, in *Enciclopedia del diritto*, XXII, see *Interessi*, pp. 95 ff.; QUADRI, see *Interessi* in Trattato di dir. priv., Turin, 1984, vol, IX, p. 528.

(8) See for all the jurists linked to the axiom of the normal profitability of money: MESSINEO, *Manuale di diritto civile e commerciale*, Milan, 1954, II, §115, 345.

(9) Until some time ago, due to the so-called effect of exuberance of liquidity and the poor decade for credit, real interest was negative. Now, however, it is mainly positive. On the subject: a conference was held on 14th-15th September 1983 on real and nominal interest by the Society of Economists.

(10) It can therefore be said that *pecunia dum in usu vertitur; consumitur et deterioratur*.

The essence of interest has however been understood with great insight by modern economists, including Bohm-Bawerk in its nature of a phenomenon linked to credit and to pecuniary credit in particular and therefore to the lesser percentage use of a deferred payment of money compared to cash payment (11).

This includes the other characteristic concerning the premium of liquidity (12).

It is fairly obvious that interest (whether conventional or legal, compensatory or default) has its explanation in this lesser preference for available money on credit compared to that in cash and therefore represents the rate of discount.

This function of discounting the value performed by monetary interest is mainly understood by those who attribute to article 1499 Civil Code the significance of a general rule, aimed at rebalancing a deferred payment with respect to a cash payment.

A large factor of misunderstanding is represented by the difference between the legal rate and the market rate so that the legal rate seems something different compared to the ordinary rate.

The history of the relations between the legal rate and the normal rate shows how the height of the legal rate has its origin in that of the market rate, current at a time close to its codification (13).

That the legal rate, due to its fixedness, is destined to remain behind or exceed the normal rate, in a period of variation of the rates, is fairly obvious.

However, we now have to look at market interest, as the only normal rate of discount which ahs been mentioned (14).

Everybody knows that the legal rate has an exclusively supplementary effect.

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(11) BOHM-BAWERK, *The positive theory of capital*, London, 1891, p. 249.

(12) J.M. KEYNES, *Opere*, Turin, 1978.

(13) The legal rate of 5% was codified by article 1153 of the Napoleonic Code on the basis of that of the previously current market one; it was maintained by article 1231 of the 1865 Civil Code because it corresponded to that on short term credits in the 19th century and lastly by article 1284 in the present Civil Code with the motivation that it corresponded t the official discount rate in force from 1905. G. VALCAVI, *La stima del danno nel tempo con riguardo all'inflazione alla variazione dei prezzi ed ai tassi di mercato* in Riv. dir. civ., 1981, II, pp. 342 ff. and note 45. For the German experience: ROLL, *Die hohe der verzugszinsen DRK oktober 1973*, which contains wide proof of the correspondence of legal interest at 4% with the market interest in the last decades of the 19thc century until 1895, with particular attention to mortgage interests in Prussia and the average return of the German kingdom.

(14) This is the common opinion among economists. On the contrary, jurists seem to consider as the discount rate the legal interest, giving rise to discrepancies of value. thus LIBERTINI, *op. cit.*, p. 118.

What appears absolutely underestimated is the reference by our system to market interest and thus its normative value (15).

This is particularly transparent in the case in which the legal rate is less than the market rate.

Article 1224, section 2, Civil Code, in the case of default interest, and article 1207, section 2, Civil Code, in that of equivalent interest, allow recovering the difference between the legal rate and the market rate, identifying thus in the amount of the latter, that correctly due according to the *quod plerumque accidit*.

Indeed, the greater damage from default as per article 1224, section 2, Civil Code, is increasingly identified by case law, without other evidence that the use of presumptions, in the difference with interest on bank deposits, or with the return of public debt securities which the creditor would probably have drawn from the financial use of money, if received in time (16).

Similarly, as article 1207, section 2, Civil Code, establishes the rule that the debtor, although he were not in default, owes the creditor, even in default, the profit he has enjoyed, *medio-tempore*, and this can be presumed in the amount of that shown above, concern will have to be practically shown to the market rate, especially if higher than the legal rate (17).

It is now opportune to put forward one notion.

Market interest, as has been recently felt, including by case law (18), incorporates the inflationist expectations, in the context of the contingent conditions of the credit and savings market.

The usual remedy to obviate the inadequacy of legal interest, summing to it the rate of monetary devaluation, is equivalent to procuring a profit for the creditor, in that this operation exceeds the market interest.

Vice versa, insofar as it remains at a lower level, it will appear an inadequate indemnity.

In both hypotheses, as will be seen below, this is a proposal for an inexact remedy.

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(15) The valorization of normative references to the current yield of money is fairly recent, Thus, in addition to my work *Rivalutazione monetaria od interessi di mercato?* in *Foro it.*, 1980, I, p. 118; *Riflessioni sui crediti di valore sui crediti di valuta e sui tassi di interessi*, in *Foro it.*, 1981m I, p. 2112; *La stima del danno nel tempo, cit. loc. cit.; Ancora sul risarcimento del maggior danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1986, I, p. 1540, also AMATUCCI in *Foro it.*, 1986, I, p. 1273, R. PARDOLESI, *ibidem*, p. 1265.

(16) Thus, recently, Court of Civil Cassation, 5th April 1986, no. 2368, in *Foro it.*, 1986, I, p. 1265.

(17) The reference to the normal rate is the current one in German case law, as the greater damage from default: INZITARI, *Profili in tema di interessi, credito e moneta*, Milan, 1982, pp. 599 ff.

(18) Thus the Constitutional Court, 22nd April 1980, no. 60, in *Foro it.*, 1980, I, section 1249.

3. – Interest is usually classified into default and non-default, depending on whether the deferment of the pecuniary performance takes place or not *iniure* by the debtor, for the same to be placed in default (under the law, according to art. 1219, section 2, nos. 1 and 3 or on the request of the creditor under article 1219, section 1, Civil Code). They are regulated by article 1224 of our Code.

Default interest concerns a liquid or illiquid pecuniary credit that is already collectable (19).

Non-default interest is in turn distinguished, not without conflicting terminology, in equivalent and compensatory (20).

The former is regulated by article 1282 Civil Code and concerns the simple delay in the case of a liquid and collectable debt (21).

Compensatory interest is codified by article 1499 Civil Code and concerns a liquid credit that is not yet collectable (22).

Both therefore have as their object pecuniary liquid credits.

Legal literature and case law, through a straining of article 1499 Civil Code, have created a general category of compensatory interest extending the rule by analogy to illiquid credits, such as for example that of compensation of damage.

However, here there is no point of contact which justifies the analogy except a general reference to equity, in the case in which the debtor is in possession of sums owed to the creditor.

This appears frankly excessive.

At this stage, it is opportune to make a digression on the relationship between liquidity and collectability of the credit.

The opinion that a credit, to be collectable, must already have been liquidated is fairly common (23).

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(19) This is coherent with the abandonment of the principle of *illiquidis non fit mora*, by our legal system; Court of Civil Cassation, 20th May 1976, no. 1813 in *Rep. giur. it.*, 1976, p. 2968. no. 282 amongst the many.

(20) The terms of counterposition are considered old by GIORGIANNI, *op. cit.*, p. 146.

(21) In general, the requisite of the liquidità of the credit tends to be devalued for the non-default interest. This is wrong in the light of the abandonment by the orientation expressed by article 17 of the preliminary draft on the final draft of the code. See *Relazione al c.c.* no. 34.

(22) Compensatory interest for GIORGIANNI, *op. cit.*, p. 147, should be distinguished only by the non-collectabilty of the credit. GIORGIANNI, *op. cit., loc. cit.*, LIBERTINI, op. cit., p. 110, QUADRI, op. cit., p. 545 express the opinion that « the irrelevance of the liquidity of the credit tends to be obtained from the *ratio* ». This statement is in contrast with the reference to the « price » as per article 1499, Civil Code, synonymous with liquid credit.

(23) The motivation is inspired by the *favor debitoris* assimilated since the period of VENUELIUS, 1, 99, d. 50, 17, « non potest improbus videri qui ignorat sol vere debeat »: for wider references, E. ALBERTARIO, *Della decorrenza degli interessi sulle somme liquidate per danno aquiliano*, in *Monitore dei Trib.*, 1910, p. 22.

It is resolved by placing at the creditor's liability the time necessary for liquidation, during which the interest does not mature. This opinion is assimilated by the legislator for non-default interest.

Once this also concerned the default interest and the principle of *illiquidis non fit mora* was based on this foundation (24).

In more recent times, the legislator, not to undeservedly favour the debtor, to the detriment of the creditor, anticipated the collectability, so that the time necessary for the liquidation of the credit is placed at the liability of the debtor, by legislative choice (article 1219, section 23, no. 1, Civil Code).

This derogation however concerns default interest only and is justified by the negligent default of the debtor.

The hypothesis as per article 1499 Civil Code, and compensatory interest, lies outside this sphere, because it concerns a credit that is not only liquid but also, by definition of the law, not yet collectable (25).

We have said above that default interest postulates the placing in default by the creditor, where this does not come about by law.

From this time, the default interest succeeds the equivalent interest, in the case of a liquid credit, which is absorbed by the same.

However, with regard to this case, between equivalent and default interest, there is this significant difference, i.e. that the recovery of the difference between the legal rate and the market rate corresponds to a right of indemnity, in the case of default, whilst, with regard to the equivalent interest, it is interest, protected only by the return action from enrichment without cause under article 1207, section 2, Civil Code.

And lastly, a note on discipline must be allowed here.

It s is common to any type of interest, whether equivalent, compensatory or default.

Art. 1283 Civil Code thus applies to it, which concerns the prohibition of capitalization of interest and article 2948 Civil Code, which concerns the five-year limitation. The interest is also subject to ordinary income tax.

4. – Let us now go on to discuss the interest with regard to the indemnity.

The basic problem of compensation of the damage is the discount of the equivalent at the time of its concrete fulfilment, which occurs late with respect to the occurrence of the damage. Thus the temporal difference has to be covered.

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(24) It is however understandable that where there is default, the modern legislator has changed his mind by inaugurating the opposite principle codified by article 1219, section 2, no. 1, Civil Code, and thus indulging the *favor creditoris*. On the significance of this aspect, GIORGIANNI, *op. cit.*, p. 167.

(25) LIBERTINI, *op. cit.*, p. 100.

It ahs been said above that monetary interest generally has this function and that the normal discount rate is the current one of the market.

This should lead to the determination of the indemnity on the basis of the prices and values on the occurrence of the damage and therefore the subsequent addition of the interest correlated to the delay with which it is made.

Mention is also made above that the recovery of the difference between the legal rate and the market rate is possible, through the use of presumptions, under article 1224, section 2, Civil Code, in the case of default interest, under article 1207, section 3, Civil Code in the case of equivalent interest.

At this point, the subsequent discussion ought to take its cue from the analysis of this situation and the nature of these interests to go further ahead.

This opinion, sustained by the author of these lines, corresponds to the situation in which the damaged party would have been if he had collected in due time the indemnity and if he had invested in the forms of normal savings.

The picture of the dominant opinions in legal literature and in case law, not only Italian but also foreign, is however completely different.

In general, the indemnity is determined on the bases of the prices and values at the time of the second degree decision (*tempus res judicandae*) (26) or, when it is also evaluated with regard to the occurrence of the damage, it is then revalued at the time of the second degree decision (credit of value) (27).

Interest, which is described as compensatory, is then added to the amount thus determined, according to one or other of these criteria both in Italy (28) and elsewhere (29), by analogy under article 1499 Civil Code so

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(26) In case law, amongst the many: Court of Civil Cassation, 5th August, 1982, no. 4397, in *Rep. giur. it.*, 1982, p. 815, no. 55. In legal literature: TEDESCHI, *Il danno e il momento della sua determinazione*, in *Riv. dir. priv.*, 1933, I, pp. 263 ff.; Id., in *Riv. dir. comm.*, 1934, I, pp. 234-244. For tort damage: ASCARELLI, *Obbligazioni pecuniarie*, in *Comm. Scialoja and Branca*. no. 179; NICOLÒ, in Foro it., 1946, IV, p. 50, DE CUPIS, Il danno, Milan, 1970, p. 269 amongst the many, In French legal literature, amongst the many, H. and L. MAZEAUD, *Traité théorique et pratique de la responsabilité civile*, Paris, 1950, nos. 2420-6, 2420-8 and *ivi giuris, cit.*, pp. 2421, 2423.

(27) In case law, amongst the many: Court of Civil Cassation, 6th February 1984, no. 890, in Mass. Giust. civ., 1984, no. 296; in legal literature, P. ASCARELLI, *op. cit., loc. cit.*; P: GRECO, *Debito pecuniario, debito di valore e svalutazione monetaria*, in *Riv. dir. comm.*, 1947, II, pp. 112 ff.; R, NICOLÒ, *op. cit., loc. cit.*, DE CUPIS, loc. cit. In favour of this concession in Spain: Spanish Supreme Court, 28th February 1975, in SANTOS BRIZ, *La responsabilidad civil*, p. 343; l. DIEZ PICAZO, *Fundamentos de derecho civil patrimonial*, Madrid 1983, pp. 464, 477.

(28) Court of Civil Cassation, 14th December 1985, no. 6336, in *Rep. Giust. civ.*, 1985, see *Danni*, no. 28 amongst the many.

(29) In France, H. LALOU, Traité pratique de la responsabilité civile, Paris, 1962, no. 111, p. 66; in Spain: J. SANTOS BRIZ, *op. cit.*, p. 315.

that they would compensate the damaged party for the use that the damaging party would have made in the meantime of the capital owed to him.

This opinion ends up, however, by compensating the deferment of the payment of the indemnity twice and thus duplicates the discount of the damage in terms of prices and simultaneously of interest, as one of the two is superfluous.

It does not appear reasonable to suppose that the creditor would have, in the meantime, invested his capital, such as to obtain capital gain, and at the same time, would have kept it liquid, such as to produce interest.

Or by analogy by those who assimilate the theory of the credits of value, that the damaged party would probably have spent the capital in the basket of consumer goods at the time, on the prices of which the statistical index is based, such as to justify the hypothesis of the replacement consumption today at the current prices, and at the same time he would also have save, such as to produce interest.

This interest would on the contrary correspond to the financial cost of the supposed investment rather than to its profit.

Everyone feels thee that the functional justification of the monetary interest is questioned here. This makes sense – as was said – only as compensation for the delay with which that amount of money was paid, in which the indemnity is concretized, but determined on the basis of the prices and values on the occurrence of the damage.

Stating otherwise leads to excluding the calculation of the interest, as a mere surplus.

Thus becomes evident again for those who consider admissible the reference to the normal market interest and the difference between the legal rate and the market rate recoverable under article 1224, section 2, and 1207, section 2, Civil Code.

5. – Let us now examine how the problem of interest is raised with regard to the dominant opinion in Italy which considers the credit of compensation, as a credit of value and therefore revalues it.

Here a brief digression on this dogmatic construction based on the so-called credit of value is opportune, This does not appear in any way acceptable and founded to the author of these lines.

The credit of any damaged party is indexed to the prices relative to essential commodities for a working family and by reflection, the standard of living it has conquered, in a period of great social change, without such a use being indistinctly presumed by anybody (30).

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(30) Against a generalization of this kind, for pecuniary obligations: Court of Civil Cassation, 5th April 1986, no. 2368 cit.

As this concerned goods for instantaneous consumption, it does even seem possible to hypothesize, as we end up by imagining their perennial replacement, on the fixed basis of the prices of the past (31).

This investment, unlike every other, would take place furthermore without the financial charges and costs of maintenance required by any transfer of goods in time (32).

That this is a construction inspired by criminal logic is given by the fact that the damage is evaluated in an imaginary currency, with a stable purchasing power, instead of a currency with a legal settlement power (33).

This – as L. Einaudi wrote (34) – is the only « reservoir of the purchasing power », since, as Marshall notes in his time (35), it is not only unenforceable but unthinkable to measure the purchasing power otherwise. This is shown by new studies on the persistence and on the range of monetary reserves and balances in a period of inflation (36).

Revaluation ends up by operating automatically, independently of the default and even if it is the creditor that is in default, as in the case in which he has refused an offer of a sum of money which in the end appeared to be congruous, so that the principles of default would not be applicable to the credits of value (37).

This does not appear reconcilable with the basic rules of our legal system.

This construction is revealed from a certain point of view as strained and inadequate from another point of view, where it leads to revaluating the damage by a person residing abroad according to the domestic cost of living indexes where it is forbidden to hold currencies of an internal account (38).

The drop of inflation to values equal to the legal rate of interest and the perspective that it may even take on a negative dimension with the con-

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(31) The goods that make up the basket on which the ISTAT [Italian Institute for Statistics] index is based, are those for the consumption of a blue-collar and white-collar family and therefore perishable and which cannot be kept.

(32) In general the indemnity is liquidated on the basis of the prices on the decision, gross and not net of the costs, attributing an unreasonable profit.

(33) G. VALCAVI, *Riflessioni sui c.d. crediti di lavoro*, cit., loc. cit.

(34) L. EINAUDI, *Della moneta serbatoio di valori e di altri problemi monetari*, in *Riv. di storia economica*, 1939, p. 133.

(35) MARSHALL, *Opere*, Turin, 1972, pp. 136, 177, 227 and 356.

(36) DON PATINKIN, *Moneta, interessi e prezzi*, Padua, 1957, pp. 17, 26-30, 45 ff., 128, 222 ff., 407 ff.

(37) The credit of value is revalued from the time it arises to liquidation, independently of the default, Default interest does not follow as deemed by case law, but only equivalent interest.

(38) Law no. 476 of 6th June 1956; G. VALCAVI, Il corso di cambio ed il danno da mora nelle obbligazioni in moneta straneiera, in *Riv. dir. civ.*, 1985, II, pp. 253 ff.

sequence of a reverse calculation, shows the limits of the theoretical basis of such a criterion.

Monetary interest which is described, as stated, as « compensatory » as the « form part and parcel of the damage itself » is then commonly added to this automatic revaluation (39). The corollary is derived from this statement that, unlike default interest, compensatory interest can be automatically liquidated, even without a claim by the damaged party (40), and in this case they can even form the object of subsequent complaint, without meeting the preclusion regarding the new claims under article 345 Code of Civil Procedure (41).

They are calculated on the revalued capital on the presupposition that « from revaluation it represents a different cash expression of the same original damage » (42).

This calculation is not deemed as contrasting with the prohibition of capitalization of interest, because the latter would have an exceptional bearing and is limited to pecuniary credits so that it would not apply to credits of value (43).

Lastly, unlike default interest, compensatory interest has not been deemed as subject to income tax (44).

These propositions of the dominant case law essentially repeat those current in judgements at the time of the Civil Code of 1865, which in its time derived them from those formed in the Napoleonic Code.

The compensatory character of this interest is also thus deemed by French legal literature and case law.

Our legal literature does not agree with the evaluation on the compensatory and default character of the above interest.

First of all it is to be asked whether the credit of value generates interest and if that with the characteristics outlined by our case law is to be considered real interest. It seems correct to have to give a negative answer to this question.

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(39) Amongst the many: Court of Civil Cassatioin, 13th October 1979, no. 5352, in *Mass. Giust. civ.*, 1979, p. 2357; Court of Civil Cassation, 6th January 1984, no. 80 in *Mass. Giust. civ.*, 1984, no. 33, infers them from article 2056, section 2, Civil Code.

(40) Amongst the many: Court of Civil Cassation, 20th December 1976, no. 4694, in *Arch. civ.*, 1977, p. 251.

(41) Court of Civil Cassation, 18th September 1978, no. 4180 in Mass. Giust. civ., 1978, p. 1742.

(42) Court of Civil Cassation, all divisions sitting togetherm 19th July 1977, no. 3416 in Mass. Giust. civ., 1977, p. 1269; Court of Civil Cassation, 13th July 1983, no. 4759, in Mass. Giust, civ., 1983, p. 1677.

(43) Court of Civil Cassation, 12th September 1978, no. 4123, in Mass. Giust. civ., 1978, p. 1719 amongst the many.

(44) Court of Civil Cassation, 6th February 1970, no. 264, in Mass. Giust. civ., 1970, p. 151.

Indeed, a fundamental characteristic of the interest – as Messa noted in his time (45) – is that it is inherent to a pecuniary obligation and it is itself pecuniary.

It is recalled here that what is stated above with regard to its essential function aimed at expressing and obviating the lesser value of a deferred payment of money with respect to payment in cash and the premium of liquidity which is intrinsic to it.

The credit of value, as it is an absolutely different and alternative credit to the pecuniary one, therefore cannot generate monetary interest (46).

It will be observed how, in this regard, the further distinctive requisite of the homogeneity between the debt of value and the debt for interest is absent, such as to justify the latter.

The greatest elements of contrast are however offered by the anomalous discipline of this interest, on compensation of damage, as deemed by our case law with respect to ordinary interest.

This concerns the dominant statement that interest would be part and parcel of the damage, such as to justify its automatic liquidation and without the damaged party even having put forward a complaint against the decision that omitted or negated it.

The same must be said of the further current statement that, unlike ordinary interest, would not encounter the limits of the prohibition on capitalization of interest, nor would it be subject to income tax, because it would be inherent to credits of value rather than of currency, and therefore would represent a corollary of the previous statement on their nature as part and parcel of the compensation of the damage.

The other basic characteristic of the debt for interest is negated here, i.e. its autonomy with respect to interest for capital (47).

The additional character of interest with respect to the indemnity is also negated with this.

However, it must be deemed that the dominant assertion that this interest is part and parcel of the damage, and not addition, leads to negate, in short, that it is actual interest.

This is what those authors, who deem that legal interest is not in actual fact such, but corresponds to a lump-sum criterion of experience, to liquidate the damage, understand (48).

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(45) MESSA, *op. cit.*, p. 435.

(46) Thus MESSA, *op. cit., loc. cit.*; DE MARTINI, R*ivalutazione del danno da fatto illecito e danno per ritardato pagamento*, in *Giur. compl. Cass. Civ.*, 19651, pp. 1269 ff.; LIBERTINI, *op. cit.*, p. 120.

(47) Thus also QUADRI, *op. cit.*, p. 548.

(48) LIBERTINI *op. cit.*, p. 119, DE MARTINI, *op. cit., loc. cit.*

This opinion, significantly equivocal and general, cannot however be accepted because it leads to duplicating the indemnity, without being authorized and indeed, in contrast with article 21056 Civil Code (49).

The duplication of the compensation has been understood by those authors that have included it in the accumulation of the interest and the monetary revaluation (50).

It is fairly transparent, for what was said above, that adding the legal interest to revaluation leads to duplicating the indemnity for the delay, with which the equivalent has been paid.

In the final analysis, this is translated by arbitrarily considering due *ex post* real interest (51), equal to legal interest, differing from *the quod plerumque accidit*.

This is equivalent to procuring for the damaged party an unjustified profit. In these proportions, it really does not appear, in the light of logic, that this can be agreed with.

6. – It has been stated above that the sum of the interest on the indemnity is generally justified from the point of view that it would be « compensatory interest ».

That this dogmatic description is a compulsory path for those who consider the credit of the damaged party a credit of value, derives from the remark mentioned above that the institution of default is considered extraneous to this type of credit and therefore it is without consequences.

Once the default character of the interest relative to a credit of value has been excluded, their justification only remains on the basis of the general equitable consideration of compensation due for the use of others' capital, i.e. as compensatory interest (52).

But this capital under discussion, as it is not of a default nature, does not seem to justify from this point of view either, the identification of the profits of its investment, with the pecuniary profits.

It seems rather that this is made up of the sole monetary revaluation, for those who accept this category of credits of value.

The compensatory nature of this interest is to be excluded for another series of reasons.

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(49) I use here the argument used by LIBERTINI, *op. cit., loc. cit.*, to exclude the applicability of article 1224, section 2, Civil Code, on compensation of damage.

(50) LIBERTINI, *op. cit.*, p. 119; QUADRI, *op. cit.*, p. 551; MICCIO in *Giur. compl. Cass. civ.*, p. 1951, I, p. 438 ff.: in this sense the current case law is disagreed with (for all, Court of Civil Cassation, 13th october 1979, no. 5352, in *Mass. Giust. civ.*, 1979, p. 2357) according to which revaluation is not accumulated with intrest because they are for different functions.

(51) This is the interest calculated afterwards above the rate of inflation.

(52) For a reference, amongst the many: QUADRI, *op. cit.*, p. 548; Court of Civil Cassation, 13th June 1972, no. 1853, in *Rep. Foro it.*, 1972, see Danni, p. 121.

It is generally justified by the reference by analogy with article 1499 Civil Code, the legitimacy of which has been currently questions in the past by Messa and others (53), considering the mandatory nature of in this particular instance and therefore not possible to be generalized.

However, we must exclude that there are the same details as the analogy.

Compensatory interest, for what has been stated above, is relative to a « liquid and uncollectible credit » as is that as per article 1499 Civil Code.

This does not appear in the credit of compensation which is by its very nature « illiquid and nevertheless collectable » under article 1219, section 2, no. 1 Civil Code.

Therefore a hypothesis of compensatory interest by analogy cannot be made for the illiquid and uncollectible credit of compensation for damage.

This credit, due to its characteristics of illiquidity and collectability, it cannot have any other interest but default interest, which is the only type that can be conjectured for this type of credit.

Many authors, from Messa to Ascarelli, from Bianca to Giorgianni and De Cupis agree on the default qualification of the interest relative to the credit of compensation for damage (54).

The default nature is moreover understood by the dominant case law, where it justifies the interest which it qualifies as compensatory as « compensation for the delay with which the equivalent is paid ».

This acknowledges it default quality and grounds.

The recourse to the compensatory point of view, moreover, finds its raison d'être in the time of the 1865 Code and the Napoleonic Code in the need to elude the *in illiquidis non fit mora* prohibition, which represented a theoretical obstacle to the recognition of its default nature.

Today, however, after the abandonment of this principle with article 1219, section 2, no. 1, Civil Code, no obstacle of the kind exists any longer.

This interest represents the indemnity of the specific damage from delay (mainly negligent) in paying the equivalent and not in the original damage, which derives from the unlawful conduct or from non-fulfilment (wilful or negligent).

The opinion that considers them making up part and parcel of the damage is the result of equivocation because it erroneously considers the damage from its occurrence to its liquidation as one.

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(53) MESSA, *op. cit.*, pp. 431 ff.

(54) MESSA, *op. cit.*, p. 246; ASCARELLI, *op. cit.*, pp. 536, 566 ff.; DIANCA, *Dell'inadempimento delle obbligazioni*, in *Comm. Scialoja e Branca*, Bologna, 1979, pp. 340 ff.; GIORGIANNI, *op. cit.*, pp. 163 ff.; DE CUPIS, op. cit., p. 487. However, it is not easy to understand how ASCARELLI and the other advocates of the credits of value quality the interest as default, considering the insignificance of the default for this type of credit.

It is fairly clear that there are two types of damage that are absolutely different by quality, nature and content: one – we repeat – is that deriving from the unlawful conduct or from non-fulfilment (wilful or negligent) and must be evaluated on the basis of the current values on its occurrence whereas the other concerned the damage dependent on the delay with which the equivalent was paid and concerns: the subsequent period (55).

The latter is therefore the default interest in the fulfilment of that pecuniary obligation which has as its project the sum of money in which the equivalent is concretized.

This type of obligation is not reduced to the liquid one, but also includes that being liquidated: what is important is that its object is made up of a sum of money.

The compensation for this default damage follows the rules of article 1224, Civil Code (56).

Only in this way can the addition of the interest, i.e. a pecuniary, homogeneous and additional benefit, with respect to the deferred one of the amount of money, which represents the capital due, be justified.

It has been stated above that article 1224, section 2, Civil Code, allows recovering the difference between the legal rate and the normal rate in the case of the default interest and article 1207, section, Civil Code, for the equivalent interest and by analogy the compensatory interest.

However, with this difference: this corresponds to a right of the damaged party, in the case of the default interest, whilst for the other type it is possible only in the sphere of the lesser protection to avoid the enrichment of the debtor. From this point of view as well, the default qualification of this interests protects the damaged party very differently.

The most important practical conclusion must be drawn at this point; this default interest is subject to the ordinary discipline that concerns every type of interest.

Therefore it must be claimed and it cannot be automatically liquidated and it is subject to the common preclusions, including that under article 345 Code of Civil Procedure. Similarly, it meets the limit of the prohibition of capitalization of interest as per article 1283 Civil Code; it is subject to limitation as per article 2948 no. 4, Civil Code, and the ordinary income taxes.

It is not accumulated with the monetary revaluation as it is additional to a pecuniary obligation, such as that of paying the indemnity, and not to the so-called debt of value.

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(55) The distinction is generally made in legal literature and in case law where the interest is motivated with the need to « avoid the prejudice deriving from the delayed achievement of the pecuniary equivalent » (Court of Civil Cassation, 20th December 1976, no. 4694, in *Arch. civ.*, 1977, p. 251, amongst the many). In legal literature, for all, GIORGIANNI, op. cit., p. 164.

(56) In the sense of the applicability of article 1224, Civil Code, GIORGIANNI, op. cit., p. 164.

7. – Let us now go on to another topic that concerns the time from when the interest begins to take effect.

The problem has had a different and conflicting solutions in the history of law and this is still the case. In Roman and common law, depending on the principle of *in liquidandis non fit mora*, the interest was not calculated until the decision.

Under the domain of the abrogated 1865 Code, whilst for contractual damage the interest took effect from the claim, for tort damage the interest gave rise to serious dispute.

The predominant opinion, especially in case law, deemed it compensatory and had it take effect from the unlawful conduct (57), another from the claim (58) and lastly a third, moreover authoritative, from the liquidation (59).

The new legislator, with article 1219, section 2, no. 1 Civil Code, codified the first criterion which was tantamount to deeming the damaging party in default ex re from the unlawful action.

This is also accepted by the dominant legal literature and case law today, according to which the interest has a retroactive effect from the unlawful action unlike the interest concerning the contractual damage which takes effect from the claim (60).

This interest is however calculated on the revalued amount or even on the estimated amount, based on the current values at the time of the decision.

This item undoubtedly gives rise to an excess indemnity in that it accumulates for the same period of time that reaches the decision, the revaluation or the intervening rise of the price of the commodity and the monetary interest.

This has induced an authoritative opinion to propose once again the theory that it would take effect only from the pronouncement (61).

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(57) CHIRONI, *La colpa nel diritto civile*, 1906, II, *Colpa extracontrattuale*, p. 342; MESSA, *op. cit.*, pp. 241-432: Court of Cassation of Rome, 16th April 1903; Court of Cassation of Milan, 6th December 1990; Court of Cassation, Turin, 20th December 1900; in *Rep. Monit. dei. Trib.*, 1898-1907. see *Interessi*, nos. 15, 19.

(58) Court of Cassation of Naples, 19th July 1907,, in *Monit. dei Trib.*, 1908, p. 87; Court of Cassation of Turin, 14th September 1986, in *Giur. torinese*, 1986, p. 772. In a critical sense, MESSA, *op. cit.*, p. 250.

(59) Amongst the many, Court of Cassation of Florence, 30th December 1911; Court of Cassation of Palermo, 31st December 1918, in *Rep. Monit. dei Trib.*, 1908-1923, p. 252, nos. 66, 68; in legal literature E. ALBERTARIO, op. cit., pp. 21.25. In a critical sense, MESSA, op. cit., p. 249.

(60) The different time of effect is justified by the remark that the default in the tort damage arises from the unlawful action, whereas in the contractual damage, from the claim. Thus for all, Court of Civil Cassation, 22nd January 1976, no. 185 in *Arch. civ.*, 1976, p. 466.

(61) Court of Civil Cassation, 12th July 1979, no. 4053, in *Rep. Foro it.*, 1979, see *Interessi*, no. 18 and incidentally Constitutional Court, 22nd April 1980, no. 60, in *Foro it.*, 1980, I, p. 1249.

The correct solution to the problem appears to me to be implicit in the default quality recognized in this interest and inferable from it.

It is very clear that the interest matures after and not before the time when the equivalent should have been paid and has not been.

This is in line with the accessory, proportional and periodic nature of interest.

This postulates that the time of determination of the indemnity is therefore prior and not posterior to that when the interest starts to take effect.

It will thus appear obvious how there cannot be the hypothesis that the interest – as is deemed – take effect from the unlawful action or from the claim. whilst the indemnity is evaluated on the subsequent decision or revalued on it.

Conversely, it will appear completely reasonable that the damage, on the other hand, is evaluated with reference to the values on its occurrence and the interest will take effect after it and that is, from the time when the damaged party is in default in giving the equivalent.

It is the opinion of the author of these lines that the problem of when the interest takes effect depends on the time when the equivalent should have been offered.

In conclusion, it should be coordinated with the problem that concerns the time of reference in the evaluation of the damage and harmonized with the controversial solution s, i.e. its occurrence (*quanti ea res fuit*), or the claim (*quanti ea res est*), or the decision (*quanti ea res erit*).

This causation has been understood with great insight under the domain of the abrogated 1865 Code by Albertario (62), by Giorgi (63), by Messa (64) and others, as well as by the abundant case law with regard to tort damage.

The correct solution for a complex series of reasons is – as stated – that of evaluating the damage on its occurrence, and having the interest take effect from the time the default arises.

As the damaging party is obliged to immediately indemnify, pursuant to article 1219, section 2, no. 1, Civil ode, there appears no doubt that the default interest must start to take effect from the unlawful action.

The problem must be posed in different but similar terms as far as contractual damage is concerned.

The current opinion – as has been seen – is that the interest takes effect from the judicial claim (65).

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(62) E. Albertario, *op. cit., loc. cit.*

(63) Giorgi, *Obbligazioni*, Florence, 1906, V, p. 346.

(64) Messa, op. cit., p. 435.

(65) Court of Cassation 12th April 1983, in *Mass. Giust. civ.*, 1983, p. 907 amongst the many.

It is not understood the logic behind this criterion.

It does not coincide with the start of the default which is of significance for the default interest nor with that in which the pecuniary benefit should have been fulfilled for the equivalent interest.

It has no normative grounds in our legal system.

This criterion has probably come down to us from the cultural tradition which formed around the wording of article 1153 of the Napoleonic Code which stated: « ils ne sont dûs que du jour de la demande ».

It is however even less comprehensible in our day, given that the same wording has been modified by « ils ne sont duûs que du jour de la summation de payer », thus replacing the judicial claim by the injunction of payment (66).

The correct criterion for the contractual damage is that of having the interest take effect from the time when the damaging party is in default.

The identification of this time is a *quaestio facti.*

The proposal put forward to consider the obligation of compensation as always « portable » under article 1182, section 3, Civil Code, and therefore responsible for this contractual damage in default until its start under article 1219, section 2, no. 3, Civil Code, appears seductive and yet schematic (67).

8. – It remains to be see how the interest is calculated.

It will be calculated on the pecuniary capital in which the equivalent amount due is concretized, in the same way as any default interest,

The obligation of indemnity is pecuniary and therefore subject to the nominalistic principle even if the exact amount will emerge from the judicial determination, as every illiquid pecuniary obligation.

The damaged party is entitled – as stated – to recover, pursuant to article 1224, section 2, Civil Code, the difference between the legal rate and the greater current market rate, which is the normal yield of any non-risky financial investment of savings in which it can be presumed that the damaged party would have invested his assets or, in the case of evidence, at the normal cost of bank loans. All this concretizes the situation in which the damaged party would have been according to the *quod plerumque accidit*, if he had received in time the equivalent to which he is entitled.

It also represents the correct compensation for the greater damage from defaule under article 1224, section 2, Civil Code, according to the more recent orientation of case law (68).

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(66) Thus modified by ordinance 59.148 of 7th January 1959, In the sense of the wording, QUADRI, op. cit., p. 541.

(67) QUADRI, op. cit., p. 540

(68) Court of Civil Cassation, 5th April, 1986, no. 2368, cit.

The dominant opinion that considers, on the other hand, the obligation as a debt of value, calculates the interest on the revalued amount.

The excessive indemnity to which this gives rise is before the eyes of all. It is concretized in supposing due the revalued amount from the unlawful action or from the claim, rather than as the result of the final quantification which takes place with the second degree decision.

This appears to be against every logic and no different from those who calculate the interest on the evaluated damage according to the current values at the time of the decision which is also equivalent to supposing such an indemnity due from the placing in default of this amount.

In principle, it must be added that adding the interest on the revaluation – as observed – is translated into calculating ex post real interest equal to 5%, not even real interest *ex antea* in this proportion, as it would be more justified by article 1225 Civil Code, for which the rate of inflation should be compensated within the limit of its foreseeability. This is justified through the unacceptable straining that the default non-fulfilment is always wilful and not negligent (69).

These calculations based on real interest have no normative grounds because the height of the legal rate concerns only the nominal interest which is thus magnified, subverting the rate established by article 1284 Civil Code (70).

For the same reasons, the more moderate opinion that calculates the interest on the capital as it is revalued rather than on that which is the object of the last revaluation does not appear acceptable. This criterion unlike the previous one preserves the periodic nature of the obligation of the interest, whilst the previous one was limited to respecting only the proportional nature.

However, this method also infringes the prohibition of capitalization of interest, which is the fundamental principle of our legal system.

All the more so, we cannot agree with the opinion that revalues the monetary inetrest.

Mention is made of this by:

DE LORENZI, *Obbligazioni, parte generale, sintesi di informazione, Riv. dir. civ.*, 1990, p. 262, note to Court of Civil Cassation, 10th September 1990, no. 9311, in *Giust. civ.*, 1991, p. 1528; P. CENDON, *Indice bibliografico e commento al codice civile*, Turin 1991, p. 2320.

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(69) Recently, M: EROLI, *Nominalismo e risarcimento nei debiti di valuta*, in *Giur. it.*, 1986, I, section 1394.

(70) In this way a normative operation is carried out in conflict with the wording.

Also by the author on the same subject:

– «*In tema di indennizzo e lucro del creditore; a proposito di interessi e rivalutazione monetaria*» in Foro italiano, 1988, I, 2318 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 341.
– «*A proposito del lucro del creditore nel risarcimento del danno in genere, sul tema degli interessi e della rivalutazione monetaria*», in Foro italiano, 1989, I, p. 1988 and ff. and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994, p. 349.
– «*Sul carattere moratorio degli interessi nel risarcimento del danno*» in Responsabilità Civile e Previdenza, 1990, II, p. 97 and ff., and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 353.