THE LATE PAYMENT LEGISLATION AND THE FINANCIAL INTERMEDIARIES

A legislação do inadimplemento e os intermediários financeiros
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Resumo: A análise econômica do direito e da atual regulamentação do setor de crédito chama a atenção para as performances não só em termos econômicos, isto é, como uma relação entre dois valores que conduzem as partes a um acordo, mas também no sentido legal de acordos contratuais alocativos que implicam em obrigações, direitos, responsabilidades, encargos e riscos. Nessa perspectiva, e desconsiderando que no setor bancário o equilíbrio econômico, entendido como a relação entre utilidades, pode ter alguma importância para o credor, a única conclusão a que se pode chegar é que as regras concernentes ao inadimplemento não se aplicam aos contratos de empréstimos, já que o tipo de mercado que abordam é diferente do mercado que o Dec. 203/2002 e a regulação antiusura pretendem regular.

Palavras-chave: Inadimplemento - Setor de crédito - Empréstimo.
Abstract: The economic analysis of law and the current regulation concerning the credit sector direct the attention on the correspondence of performances not only in economic terms, i.e. as a relationship between two values leading the parties to an agreement, but also in the legal sense of allocative contractual arrangements implying obligations, rights, responsibilities, liabilities and risks. In this perspective, and excluding that in the banking sector the economic balance, understood as a relation between utilities, may be of any significance for the lender, the only conclusion which can be drawn is that the rules on late payment do not apply to loan contracts as the type of market they address is different with respect to the type of market which Decree 203/2002 and the anti usury regulation mean to regulate.

Keywords: Late payment - Credit sector - Loan contracts.
Sumário:

1. Late payment in commercial transactions is regulated by Legislative Decree 9 October 2002 231,[1] through which the Italian legislator has implemented Directive 2000/35/EC, subsequently amended by Legislative Decree 9 November 2012, N. 192[2] as an implementation of Directive 2011/7/EU and of the Law of 30 October 2014, N. 161 laying down the rules for the fulfillment of the obligations arising from Italy's membership to the European Union (the so-called 'European Law 2013-bis').

Pursuant to art. 2 of the current regulatory text 'commercial transactions' include contracts of any nature between enterprises or between enterprises and public administrations, involving, exclusively or mainly, the delivery of goods or the provision of services against payment of a price (letter a); 'entrepreneur' means any person practicing an organized economic activity or a liberal profession (letter c); 'default interests' mean statutory interests for late payment i.e. interests at a rate agreed between the enterprises (letter d); 'statutory interests for late payment' mean simple interests for late payment on a daily basis at a rate which is equal to the reference rate increased by eight percentage points[3] (letter e), 'reference rate' means the interest rate applied by the European Central Bank to its latest important refinancing operations (letter f); and 'amount due' means the amount that should have been paid within the

contractual or statutory payment period, including levies, duties, taxes or applicable fees specified in the invoice or in the equivalent request for payment.

The interest rate is governed by subsequent art. 5, according to which the default interests are set to the extent of the statutory interests for late payment. In commercial transactions between enterprises the parties are allowed to agree on a different interest rate to the extent permitted by art. 7 (paragraph 1). The latter provision further states that the clauses regarding the payment term, the rate of default interests or the compensation for recovery costs, planned or introduced in the contract for whatever reason, are null and void if they are grossly unfair to the detriment of the creditor, applying, in this case, articles 1339 and 1419, second paragraph, of the Italian Civil Code (paragraph 1); that the judge declares, even 'ex officio', the nullity of the clause having taken into account all relevant circumstances, including a gross deviation from commercial practice contrary to the principle of good faith and fair dealing, the nature of the goods or service which are object of the contract, the existence of objective reasons to deviate from the statutory rate of interest for late payment, from the terms of payment or from the lump sum due as compensation for the recovery costs (paragraph 2); and that the clause which excludes the use of interests for late payment is considered grossly unfair as it doesn't admit evidence to the contrary (paragraph 3).

The present work is inspired by the need to determine whether the mentioned rules should apply to loan agreements, in general, and to leasing, in particular, by virtue of the fact that some lending companies refer to late payment rules in the forms they use for their finance lease transactions of immovable property.[4]

For such purpose the late payment rules in commercial transactions and the more recent rule on the statutory rate of late payment interests for litigious loans will have to be analyzed.

If the result of the analysis argues for a reconciliation of loan agreements under the late payment regulation in commercial transactions, we will have to assess the relationship with the current anti-usury rules[5] and with their respective areas of application, in particular, with the so-called presumed usury as of art. 644, paragraph 1, of the Civil Code, in which the 'ceiling price set by the maximum level of interest is exceeded'.[6]

In the so-called alleged or objective usury, the mechanism introduced by the Law of 7 March 1996, N. 108, provides for a procedure under which the Ministry of Economy and Finance, after consulting the Bank of Italy, measures – on a quarterly basis – the yearly average global effective rate practiced in the previous quarter by banks and financial intermediaries, including commissions, remunerations and expenses of any kind, excluding levies and taxes.

The average values, which are determined on the basis of the Bank of Italy's survey of the rates practiced by financial operators, and are corrected as a consequence of possible variations in the statutory discount rate following the quarter in which the survey took place, concern operations which are annually classified into homogeneous categories by the Ministry of Economy and Finance after hearing the Bank of Italy, and which are published in the Official Journal.

This classification, published in the Official Journal as well, implies that different average global effective rates, and thus different threshold rates[7] apply to the different loan transactions.

Since exceeding the statutory limit set by the law for loan transactions – increasing by a quarter the average global effective rate and adding an extra margin of four points – determines in itself the criminal liability of the conduct, 'the purely quantitative nature of the difference imposes a precise and mandatory definition, which cannot be left to the apparent case by case logic, nor to arbitrary elements which are difficult to control'.[8]

Before addressing the issues set out above, it seems appropriate to briefly mention the

debate, which came up in the literature after the introduction of late payment rules, concerning the real effectiveness of the legislation to combat this phenomenon and the criterion behind it.

2. When Legislative Decree 231/2002 was issued, the literature considered it with interest and curiosity, because it introduced, at least in theory, a regulation with a strong impact on private autonomy. It seemed, in fact, that this decree derogated in part to the principles of general contract law and even diverged from the protection instruments of the new right of consumers.

What made the greatest impression was the power assigned to the judge to rewrite the clause on the term of payment, applying the terms established by the law and creating new ones on the basis of criteria which were, however, difficult to identify.

Some commentators expressed doubts on the effectiveness of the new rules, which risked becoming 'yet another example of declamatory and symbolic legislation destined to remain law in the books without being able to be effective incisive law in action.[9]

This risk is still present and may be inevitable as regards the protection regulations which are to be applied in asymmetric relations between enterprises (or between enterprises and public administrations): the creditor-entrepreneur, who accepts very long payment terms imposed by an economically and commercially stronger debtor, rarely chooses to invoke the application of the protective legislation, neither at the time of conclusion of the contract, nor later during its execution.

From his point of view, waiting is preferable to losing the client: in fact, in case of asymmetrical relationships between entrepreneurs, the protection system, especially when it implies rewriting the contract, almost always applies after the successful termination of the business relationship, as is often seen, for example, when applying art. 9, Law N. 192/1998 on the prohibition of economic dependence abuse. Otherwise the invoked protection would almost certainly imply the interruption of the business relationship and a damage to the creditor which would be more important than the damage resulting from the dilatory effects of the clause on the term of payment, consequence, in any case, of contractual power misuse.

Therefore, the question which has arisen is that excessive protection would, in some way, de facto result in no protection.[10]

However, beyond evaluations on the effectiveness of the regulation, for which future case law will inevitably have to be taken into account, what attracted the attention was the aim it pursues.

In this perspective, it was considered sufficient to analyze the Recitals to the first and second directive to clearly understand the terms of the issue, especially as both Community actions aim to protect the creditor, who is too often affected by contractual clauses which are unreasonably biased in favor of the debtor, in particular as regards the payment terms.

At a first reading of the regulatory text, the rationale for the legislation on commercial payments seems to be the protection of small and medium enterprises against large enterprises.

In other words, the EU would have tried to pragmatically solve a specifically economic problem determined by the practice, which has emerged in many countries, to include in contracts between enterprises and between enterprises and public administrations rather long payment terms. The effect is to weaken the enterprises (especially the SMEs) which, by reason of their size, need to receive payment within a reasonable time from performance.

However, it can easily be objected to this reconstruction that there are cases in which

precisely the small enterprises do not meet the deadlines for payments established for the transactions agreed with the large enterprises.

In a different perspective, the objective pursued by the Community directive is not so much and not exclusively to ensure the protection of a category of creditors who, on account of their size, can be qualified as 'weak', typically small and medium-sized enterprises, but rather to affect the smooth running of the market – 'in the knowledge that a balanced and competitive market system can only be achieved by protecting and securing (and even affecting the negotiation content of) the basic balance of the contracting parties' positions'.[11]

In this way, art. 7 of Legislative Decree 231/2002 has been used, together with art. 9 of Law 192/1998 on subcontracting and art. 3 of Law 129/2004 on franchising, as a support for the elaboration of the doctrine of the 'third contract',[12] i.e. between strong entrepreneur and weak entrepreneur (B2b), characterized by an asymmetry of economic nature between the parties,[13] unlike what happens in the 'second contract', in which the asymmetry of the consumer is of information nature.

In particular, the consumer sees his negotiation power limited by a lack of information which makes him price conscious but terms unconscious, while the entrepreneur's weakness lies in a lack of alternatives on the market, rather than in a lack of information or inability to negotiate.[14]

It has further been noticed how the entrepreneur's weakness, contrary to what happens to the consumer's weakness, appears both at the beginning and during the development of the relationship, as the consumer's contracts, at least in general, are momentary (exchange) contracts, while those of the entrepreneur are weak long-term (management) contracts.

In other words the asymmetrical contract between entrepreneurs would regulate the relationship – and, thus, the execution phase in which the abuse is revealed – more than the act; while the opposite would occur to the consumer contract.

Furthermore as concerns legal transactions falling within the so-called third contract, the asymmetry must be concretely assessed and cannot be assumed as happens in the case of contracts concluded by the consumer.

Thus, according to what has been outlined above, the objective pursued by the EU directives would be to ensure the proper functioning of the market, regardless of the size, in economic terms, of those who, individually or collectively practice an organized economic activity.

This reconstruction, however, is not based on the existence of a single 'market', as we rather have to consider the regularity of the 'markets' and, consequently, of the relevant market in each concrete case; besides, as there is more than one market, it should be assessed whether there are areas for which late payment laws in commercial transactions do not apply and the reasons thereof.

In dealing with the issue whether loan agreements can fall within the regulation as provided by Legislative Decrees 231/2002 and 192/2012, the doctrine has always felt the need to draw from the cited rules, as if the interpretation key to all questions and doubts that such regulation arises were in these rules and only in them.

What is needed, instead, is a trend reversal; in other words, it is necessary to proceed as well with an economic analysis of the legislation on loan activities and, thus, with the identification of the market model envisaged for the loan.

In our view, this will be the only possible way to understand if the regulations represent two systems which can be superimposed on one another even in part, or if they can co-exist not only among themselves but also with the law on usury and on the statutory

rate for late payment in case of litigious loans.

The results to which this will lead may be different from those so far achieved.

3. In order to better define the operational scope of Decree 231/2002, the literature has, therefore, considered to solve the issue whether loan agreements can fall within the scope of late payment legislation in commercial transactions exclusively from the interpretation of art. 1 and 2, paragraph 1, letter a), b) and c) – in the text which is currently in force following the amendment of Legislative Decree 192/2012 – in which the legislator identifies the objective and subjective profile of the new regulation.

It has thus been considered that an adequate response could be found in the definitions of 'entrepreneur' and 'commercial transaction, as well as in the definitions related to the object of the latter, namely the meaning attributed to the terms 'delivery of goods' and 'provision of services'.

A uniformity of views has more or less been reached in the literature as concerns the meaning of 'commercial transaction', which does not represent a particular type of contract but a broad and generic model covering any typical or atypical contract format concerning the delivery of goods or the provision of services, not only exclusively but also prevalently;[15] the definition of its object, however, has been more problematic.

Moreover, as regards the issue whether loan contracts can fall within the regulations on late payment, the doctrine has strangely directed its attention to the notion of 'delivery of goods', completely omitting the 'provision of services'.

So while some consider that loan contracts can be seen as commercial transactions, 'insofar as it seems possible to assimilate the money, subject of the loan, to goods and as the price is represented by the interests',[16] others, who keep to the literary meaning of the law, support the de quo exclusion from the application field of the regulation of all management and lease contracts,[17] rental contracts, loan contracts[18] and contracts of guaranty, envisaging for finance leases a distinction between the so-called 'leasing di godimento' equivalent to lease and which for that reason would fall outside of the law in question, and the so-called 'leasing traslativo' which, however, would fall within.

As a matter of fact, the latter negotiation model should be considered a sale activity as the fees paid by the user actually represent, at least in part, the compensation paid to the lender for the transfer of the asset.[19]

Although it is difficult to adopt the method followed by the literature, which seems to be excessively focused on the definition of concepts, it is, however, necessary to share the work done by some authors who, in an attempt to define more accurately the notions of 'delivery of goods' and 'supply of services', have interpreted these terms in the light of Community law.

And so, in accordance with the criteria adopted by the Court of Justice on the occasions in which it has identified the goods to which art. 23 ff. of the EU Treaty on the free movement of goods should be applied (article according to which the term 'goods', subject of the delivery service, 'shall mean the products which are valuable in money, and as such suitable to be object of commercial transactions',)[20] it has been pointed out that the legislator should have used the term 'movable property' rather than the term 'goods', as already happens in the English text of the first and second Directive.[21]

According to a particular interpretation, 'delivery of goods' and 'performance of services' are terms which are to be interpreted in relation to the subjective element, i.e. the business activity. As a consequence, the legislation would cover any utility, even money, or any performance, including the non facere[22] and, therefore, Legislative Decree 231/2002 would regulate the delays in the provision of payments arising from loan agreements, guaranty, lease and leasing agreements as well.

At worst, a practical difficulty (rather than a conceptual one) could arise for these contracts, as the legislation on late payment in commercial transactions would be aimed at exclusively protecting the weak creditor party.

For this practical reason, financial transactions would not fall under the late payment rules: in such contracts, in fact, 'the creditor is not the weak party who could be concerned by the issue of protection against exploitation, which underlies the new regulation'.[23]

In particular, all forms of leasing could theoretically constitute commercial transactions, in case the conditions of subjective character prescribed by Decree N. 231/2002[24] are fulfilled, although the theoretical configurability of such a broad scope would actually conflict with the practical difficulty that 'in leasing the creditor's position is taken by the strong party who dictates the terms of payment, and who is not concerned by the issue of protection against exploitation'.[25]

Even the term 'services' should be interpreted in the light of Community law, in particular art. 50 of the EU Treaty, which defines 'services' as performances normally provided against remuneration, as far as they are not governed by the provisions relating to the free movement of goods, capital and people.

So commercial and industrial activities as well as those performed by craftsmen and professionals would fall under this concept, as they are 'provision of services', 'a definition of essentially residual nature', which includes what does not fit into the concept of goods and capital.[26]

The literature has not considered, however, whether loan contracts can be included as well into this concept.

According to the Court of Justice of the European Communities[27] the activity of granting loans can theoretically fall both under the free movement of capital as per art. 56 of the Treaty establishing the European Community (currently governed by art. 63 of the Treaty on the Functioning of the European Union, introduced by the Lisbon Treaty of 13 December 2007) and under the free provision of services governed by art. 49 TEC (now Art. 56 TFEU).

Determining which of the two principles the financial activity must be referred to is not irrelevant, as the principles of free movement of goods and of freedom to provide services cover different situations: the latter, in particular, contrarily to the principle of free movement of capital, is intended solely for the benefit of nationals of the Member States.

According to the judges of the Court of Justice, it can be deduced from the wording of art. 49 ICE and 56 TEC, from the collocation of said articles in two different headings of Title III of the Treaty, from art. 51, N. 2, TEC (now art. 58, N. 2, TFEU) distinguishing the services of banks and insurers which are 'connected' to the movements of capital, and from the free movement of capital, that 'these provisions are intended to regulate different situations and each have a different scope' (paragraph 28).

In particular, as the Community Courts note in paragraph 39 of the cited judgment of 3 October 2002, Case C-452/04, according to settled case-law,[28] the activity of granting loans is intended as a service within the meaning of art. 49 EC Treaty (now art. 56 TFEU).

Thus differently from the doctrine, which considers that the regulation on late commercial payments is applicable even to loan agreements, the loan activity would be attributable to said legislation, at least abstractly, not because the money would be akin to an 'asset', but as it would constitute a 'provision of services'.

Although the argument is not diriment, if only for the peculiarities of the VAT legislation

introduced by the Italian Republic Presidential Decree of 26 October 1972 N. 633, it should be noted that even for said legislation loan activities fall under the provision of services, as provided by art. 3 of the Decree.

In particular, according to the tax authorities,[29] the term 'service provision' has a residual nature, as to be relevant for VAT purposes, 'the 'performance' does not have to fall 'under a works contract or under a contract expressly governed by the Civil Code, but only needs to be performed in compliance with 'an obligation, from whatever source, to perform, not to perform and to allow', as explicitly provided by art. 3, first paragraph, of Presidential Decree 26 October 1972, N. 633, and subsequent amendments.'

The relevance for VAT purposes does not apply to the mere transfer of money, which constitutes a transaction outside the scope of VAT, in accordance with art. 2, paragraph 3, letter a) of Presidential Decree N. 633/1972, but it applies to the corresponding compensation, i.e. as far as loans are concerned, to the interest rates applied, even in exemption scheme pursuant to ex art. 10, N. 1) of Presidential Decree 633/1972.

The leasing contract,[30] defined as 'an 'atypical' contract model which can be characterized by many variations whose legal ground is identified in the interaction between different contractual arrangements (with exchange or supply and financing functions), falls under the scope of the provision of services under Presidential Decree N. 633/1972.[31]

Even the judges of the European Union Court of Justice[32] have stated that the leasing of vehicles must be qualified, in principle, as a service, in accordance with art. 24, paragraph 1, of Directive 2006/112.

4. The conventional determination of the rate of default interests to an extent equal or above the statutory rate of interest for late payment as provided by the rules on commercial payments involves the necessity to assess whether the latter is compatible with the legislation on usury.

According to a first approach, the two regulations would not be incompatible as the legislation on late payment only covers statutory interests while the legislation on usury concerns 'promised or otherwise agreed interests, i.e. conventional interests.

The different scope would result from the text of the two regulations, and in particular from the text of art. 1 of the Law of 28 February 2001 N. 24, according to which, for the purposes of application of the regulation on usury, the interests will be deemed usurious in case they exceed the limit set by law at the time when they are promised or otherwise agreed, for any reason, regardless of the time of payment.[33]

Moreover, it would not be possible to consider as usurious default interests agreed at a rate above the statutory interest rate, since commercial transactions are not part of the homogeneous categories of classified operations pursuant to art. 2, paragraph 2, of Law 108 of 1996 on usury.[34]

This means, however, that the notion of commercial transaction is identified with an independent type of negotiation, while it is not: any negotiation model, at least theoretically, can be qualified as commercial transaction, 'provided that it took place between the qualified persons mentioned in the law, in 'the practice of their economic activity'.[35]

As the qualification of commercial transaction is added to that of the contract specifically used by the parties, the latter will have to be taken into consideration for the purposes of whether it can fall within one of the categories provided by the legislation on usury.

Further, an analogical interpretation of the threshold rates would not be conceivable, applying them outside of the uniform categories of classified operations.

As this is both criminal law and exceptional sanction law, the use of analogy, in fact, is not acceptable, in accordance with art. 14 of the Civil Code.

Since the average global effective rates for default interests have never been recorded, creating a gap with respect to the intentions of the legislator, it was decided to apply the transitional provision as provided by art. 3 of Law N. 108 of 1996, thus ruling out an incompatibility between the different regulations.[36]

According to a different approach, in this case, there would be a 'hypothesis of repeal for incompatibility between the new provisions and the previous ones' ex art. 15 of the prelaws of the Civil Code, limited to the scope of the Decree 231/2002, as the 'old legislation on usury could not affect the 'new' regulation' on late payment for commercial transactions.[37]

As a consequence, the default interests conventionally established at a rate above the statutory rate referred to in Legislative Decree N. 231/2002 'can be considered usurious, iuris et de iure, in case they are above the threshold rate set for the homogeneous category to which the contract classifiable as commercial transaction belongs'.[38]

Moreover, the conditions of usury in practice ('usura in concreto') as of art. 644, paragraph 3 of the Criminal Code, are met, when the default interests, even in case they are below the threshold rate, having regard to the practical modalities of the fact and to the average rate charged for similar transactions, nonetheless result disproportionate to the provision of money or other benefits, when the party who gave or promised them is in a state of economic and financial difficulty.

The 'disproportion' referenced in art. 644, paragraph 3 of the Criminal Code should be assessed in the same way as the circumstances set out in art. 7 of Decree 231/2002'.

As a matter of fact, the latter reconstruction assumes that the statutory default interest rate, as provided by Legislative Decree 231/2002, is below the anti-usury threshold rate, as has repeatedly occurred in the last years.

In this situation, three scenarios can be envisaged: a) the case in which the interests on late payment have been agreed at a lower rate than the statutory rate as provided by art. 5 of Legislative Decree 231/2002, which for that reason alone will be below the threshold rate, and which, in virtue of the circumstances as per art. 7 of said Decree, may be declared ineffective by the judge, because grossly unfair to the disadvantage of the creditor, the statutory rate of default interests being thus applied; b) the case in which the default interests conventionally established in excess of the statutory rate as provided by art. 5 of the late payment legislation, are set out above the threshold rate calculated for the respective homogeneous category, and will be considered usurious; c) finally, the case in which the default interests, although agreed below the threshold rate, given the disproportion with respect to the average rates charged for similar operations when the party who has given or promised them is in economic and financial difficulties, result however, in practice usurious, and will thus not be due (art. 1815, paragraph 2, Civil Code).

Nothing is said, however, in case the agreed default interests are below or equal to a statutory default interest rate which is above the threshold rate.

This case would fall within the circumstances referred to in subparagraph a). However, it seems hardly plausible unless one considers, as do those who implicitly support the above reconstruction, that if the threshold rate is below the statutory default interest rate, the rules as provided in Legislative Decree 231/2002 do not apply to loan agreements except during the periods in which the threshold rate is above what is predicted by law as regards late payment interests in commercial transactions.

According to this perspective, it would be convenient for the creditor not to agree on the default interests for late payment, in order to take advantage of the laws, which are

more advantageous to him if the threshold rate turns out to be below the statutory rate for late payment.

To benefit from the statutory rate (assumed above the threshold rate) set forth in Legislative Decree 231/2002 for default interests it is therefore necessary to assess whether the creditor can actually omit, in loan operations, any indication as regards the extent of the interests due to delay in performance.

Should this not be possible, rather than repealing the legislation on usury because of its incompatibility with the 'new rules' introduced by Legislative Decree 231/2002, as suggested, we will have to talk about the 'non-application' of the 'new rules' when the threshold rate is below the rate set forth in the law for the default interests of late payment in commercial transactions. The latter solution may not appear immediately unconvincing, if one considers that Directives 2000/35/EC of 29 June 2000 and 2011/7/EU of 16 February 2011 make no reference to the relationship between statutory rate and threshold rate as a condition for the effectiveness of the legislation.

5. Legislative Decree of 12 September 2014, N. 132, converted with amendments by Law 10 November 2014, N. 162, in its art. 17, has amended art. 1284 of the Civil Code, introducing in the fourth paragraph the new statutory interest rate for late payment in case of 'litigious loans'.

Art. 1284, paragraph 4, of the Civil Code provides that if the parties have not determined its extent, from the time when legal proceedings are instituted the statutory interest rate is equal to the rate provided by the special legislation governing late payment in commercial transactions; and in paragraph 5, that the provision of the fourth paragraph also applies to the act instituting the arbitration proceedings.

The above regulation does not apply to already ongoing proceedings, but only to the proceedings to be entered into from 11 December 2014, i.e. from the thirtieth day after the entry into force of the conversion law.

The rationale for the introduction of an interest rate above the rate set forth in the first two paragraphs of art. 1284 of the Civil Code, as regards loans subject to legal controversy, is 'to encourage alternative extrajudicial dispute resolution or, in any case, a quick settlement of the pending dispute, which shall not constitute a pathological mode of loaning at a rate below the rate charged by financial institutions'.[39]

Asymmetry in the evaluation of the disputing parties and uncertainty as regards the outcome of the trial,[40] on the one hand, and differences between the need for market protection and the need to penalize who resists in court without plausible reason to do so,[41] on the other hand, practically limit the effectiveness of the rule, so as to doubt of its unconstitutionality.[42]

According to a certain approach, with the reform of art. 1284 of the Civil Code, the legislator would have introduced a regulation without considering the issue of a coordination with the regulation on usury, as the compensatory nature of the default interests would justify their exclusion from the scope of usury.[43]

Otherwise an unresolvable paradox would arise, as 'the default interests cannot be subject to a twofold evaluation, depending on whether the legislator intends to consider the creditor in his 'weak' position', as occurs with the regulation on late payment for commercial transactions, or in his 'strong' position, as occurs with the legislation on usury.[44]

According to this reconstruction, the irrelevance of the default interest for the purposes of the anti-usury legislation would result from the analysis of the current thresholds at the entry into force of Law N. 162/2014, which confirms that as regards four categories of transactions,[45] the statutory rate for late payment[46] is above the threshold rate[47] according to the regulation on usury.

In contrast, it would not be adequately justified to assimilate to usury cases contracts, such as factoring contracts, with default interests above the threshold rate; and where the creditor, not having agreed to the delay can, however, achieve in a lawful way, usurious interests pursuant to art. 1284, paragraph 4, of the Civil Code.[48]

The irrelevance of the default interests for the purposes of the anti-usury legislation would further confirm the possibility for the creditor who has not agreed to their extent to take action in order to obtain compensation for greater damage by virtue of the provisions of art. 1224, paragraph 2 of the Civil Code.

The authors who put forward this reconstruction assume therefore that the parties may in any case not establish the delay in their respective contracts involving monetary obligations, thus failing to agree to the extent of the default interests.

Before verifying whether this assumption is immune to possible objections, it must be stated that the issue of a coordination between regulations does neither concern the professional services nor the real estate market.

Respect for professional freedom and market freedom, in fact, are such to exclude that the activities carried out by liberal professionals, i.e. the transactions concluded through lease contracts or purchase of properties, can be included into the so-called alleged usury as provided by art. 644, paragraph 1, of the Civil Code, as the term 'other utility' used by the legislator in this rule has the merely instrumental purpose to hit the types of usury lying behind apparently lawful contracts.[49]

It has correctly been noted that the repression system of the so-called objective usury is based 'on the assumption that, in a competitive, transparent and regulated market, the average rates charged are based on balanced criteria and, thus, that the usurious imbalance can arise by enhancing the excessive deviations from the average rates and in cases of excess of the so-called threshold rate'.[50]

In other words, with the legislation on usury, an offense is pursued which is detrimental to the proper exercise of the loan and, consequently, to the national economy itself. Hence, the increasingly widespread view that what is protected by the usury regulation is the proper functioning of the loan and capital market.

6. The economic perspective, which is the purpose of the UE's legislative intervention, leads the investigation in the search for the correspondence of a certain interpretation to the parameter of choice suggested by the economic analysis of law.[51] And this occurs in the belief that although the overall welfare maximization is not the only tool to be used in the interpretation of the current laws – an activity which is always more 'oriented to the consequences'[52] – the market efficiency, intended as the ability to produce prices that fully reflect all available information, certainly concerns the loan market as well.

Despite all the weaknesses and limitations of the theoretical foundations of EAL, such as the separation between the distribution and allocation profiles, the immutability of the measurement unit represented by money, the arbitrary combinations of welfare and, above all, the alleged supremacy of efficiency over equity, the economic analysis of law 'reveals itself as a refined elaboration, at microeconomic and legal level, of the neoliberal ideology, and as such provides a useful key to understanding the recent trends of substantial parts of the law.[53]

The suggested interpretation will thus have to take into account not only the rules of law but also the rules which govern the loan field and outline a specific type of market: in other words, an interpretation according to the law and to the economic analysis of law.

In this perspective, it should be noted that the law on late payment in commercial transactions tends to ensure that the value of two assets, money and goods or services, is not altered by a non- concurrent performance; in other words, the intention is to protect the correspondence not only in economic terms, namely as a relation between

two values which lead the parties to the agreement, in the context of the economic transaction they enter into, but also in the regulatory sense, as an allocative contractual balance of obligations, rights, responsibilities, costs and risks.

The regulatory balance, however, depends on the economic balance, as the regulation aims to the fairness of the contract, i.e. the adherence of the contract to the market.[54] Incidentally this purpose is already pursued by other rules of the Italian legislation.

Consider, for example, art. 1498 of the Civil Code, pursuant to which payment must take place at the time of delivery and where delivery is performed.

With this general prediction without any reference to the time of the right transfer, there is 'a clear tendency to establish a synergy between payment and the achievement of the utilities provided by the material availability of the asset. In other words, simultaneity in the performance of payment and delivery is not determined in reference to formal entities (translation effect), but in reference to real entities (thing and price), and therefore in relation to the utilities provided by the relationship between these.[55]

The relationship between utilities which can be drawn from things, i.e. between goods subject to corresponding obligations, is also found in the regulation concerning the international sale of movable property, which expressly provides that the buyer is required to make payment when the seller provides the goods, i.e. the documents which place the goods at the buyer's disposal.[56]

In the absence of any agreement on late payment, i.e. in presence of grossly unfair clauses subject to payment of default interests to the extent provided by Legislative Decree 231/2002, the rules on commercial payments reduce the gap between the time of payment and the delivery, thanks to the provision of specific payment terms and heavy default interests, precisely in order to maintain the 'economic' balance of the exchange through the opportunity for both parties to get the utilities which can be drawn from things.

Any intervention of the court in this framework only aims to bring the contract to fair conditions again, i.e. to a mere adherence to the aim pursued by the parties in the agreed regulation.[57]

In this perspective, the rules on commercial payments do not allow to find signs of an ethical stance of the legislator, and the commercial transaction cannot be seen as the instrument to achieve substantial justice: the aim is only to prevent that the advantages obtained by one of the parties, as regards the methods of payment, are not justified by the scheme and broad logic of the contract, and consequently by the market, without deducing that the system tends towards the moralization of trade.

The so-called coercive and sanctioning function, performed, as mentioned, by the default interests as provided by Legislative Decree 231/2002, is not found either as concerns the interests due to the delay in the recovery of a sum of borrowed money.

In fact, the approach according to which the debtor who does not reimburse the loan installment to the creditor in the agreed terms, may legitimately be forced to pay default interests at a rate above the threshold rate established for the corresponding loan operation due to the fact that he is defaulting and therefore not worthy of protection, does not take into account the economic and legal 'purpose' pursued with loan agreements.

If the price of money – and more generally of things – depends on the need we have of them,[58] and on when we need them,[59] and if, in consideration of the 'cost' indicated as adequate by the market, the law determines the maximum value that one can get from that price in a long-term loan relationship, it seems strange to consider that it is possible to derogate from this maximum price at the very moment in which the debtor, failing to fulfill the terms, proves to have a greater need within said loan relationship, which,

despite the delay, is still ongoing.

It is not clear why, in order to mainly protect the regularity of the loan sector, the regulation on usury has put a stop to the price to charge in order to meet the need for money, by subjecting the agreement to disproportionate interests with respect to certain parameters deductible from the market, except to subsequently consider that there is no risk for correct transactions when the need for money is greater.

In addition, the effects of the cost of the delay are to be charged to those who are able to protect themselves against them.[60]

As a consequence, in the loan market the risk of non performance must be ascribed to credit institutions as well, which, on the one hand, may insure against such risk i.e. be self-insured through the provision of a special fund, and on the other hand, have the instruments to verify whether or not to grant the loan through proper assessment of the applicant's creditworthiness.

In commercial transactions, however, the creditor company is not willing to insure, i.e. does not have the possibility to protect itself against the delay in payments at the same economic conditions as those offered to the banks and, unlike the latter, it usually does not have the necessary information to properly assess the risk of contracting with the enterprises it intends working with.

7. According to our system the financial activities mentioned in art. 106 of the Consolidated Law on Banking are considered confidential, if they are performed towards the public (pursuant to the criteria recently laid down in the Ministry of Treasury Decree N. 53/2015 and in the Circular of the Bank of Italy N. 288/2015) , to the advantage of financial intermediaries, whose business objective is the practice of exclusively such activities, and who have enrolled in a register (single Register introduced by the regulatory reform of financial intermediaries referred to in Legislative Decree N. 141/2010 which has abolished the general register referred to in art. 106 of the Consolidated Law on Banking and the special register referred to in art. 107 of the Consolidated Law on Banking) initially kept by the Italian Exchange Office and now, after the suppression of this Institution, by the Bank of Italy, which performs supervisory activities, even of prudential nature.

It follows from the regulatory framework that the financial activity may be performed by companies (definable as real 'financial intermediaries') performing, exclusively towards the general public, the activities listed in art. 106 of the Consolidated Law on Banking and are subject to the specific rules laid down in Title V of the Consolidated Law on Banking; by subjects ('private' financial companies) not serving the public, able to perform the activity even 'prevalently' and for which the rules as provided for in art. 117 ff. of the Banking Act apply; and further, by any commercial enterprise, if such activities do not serve the public and are not predominant, as long as they are included in the institution's incorporation act among the instrumental activities.

In particular, leasing operations, which fall under the 'financing activities in any form' as provided by art. 2 of the Ministry of Treasury Decree of 6 July 1994, as specified by said legislation, may be performed, in the capacity of lessor, exclusively by banks registered in the list under art. 13 of the Consolidated Law on Banking; by financial intermediaries registered in the single Register under art. 106 of the Consolidated Law on Banking; and by financial companies subject to mutual recognition as provided by art. 18 of the Consolidated Law on Banking.

Leasing, falling within the activities subject to mutual recognition, can freely be practiced in another EU country by any Community bank, after making the requested notification, by virtue of the authorization obtained in the State of origin.

Moreover, as the financial transactions are concluded with customers, the lending company, even if based in another EU country, is responsible for meeting the

requirements of form, publicity and content of the contract established by Chapter I of Title VI of the Consolidated Law on Banking, specified by resolution of the ICRC on 4 March 2003 and by the supervisory instructions of the Bank of Italy of 25 July, 2003.

Therefore, the regulation of the Civil Code and the specific regulation on the transparency of the operations and services provided by banking and financial (non banking) intermediaries of Title VI of the Consolidated Law on Banking apply to leasing.

Under art. 115 of the Consolidated Law on Banking, the provisions of Chapter I of Title VI on the transparency of contractual conditions and of customer relationships apply to the activities practiced in the territory of the Republic (of Italy) by banks and financial intermediaries, and thus also apply 'to Italian branches of foreign banks but not to the foreign branches of Italian banks'.[61]

Subsequent art. 117, paragraph 4, of the Consolidated Law on Banking, provides that contracts shall indicate the interest rate and any other price and applied condition, including, for loan contracts, any additional costs incurred in the event of late payment; [62] and paragraph 6, that contractual clauses not providing for rates, prices and conditions are deemed to be considered void in case they are less advantageous for the customers than those advertized.

It follows from the connection between the two provisions, 'that the clauses to report in the agreement are those which have been made public in accordance with art. 116, or those, which with respect to the latter, shall give the customer a more advantageous treatment'.[63]

As nothing prevents the parties to expressly exclude (in writing) the application of (rates and) interests, even if they are regularly made public ex art. 116 of the Consolidated Law on Banking, the provision on the unfailing minimum content constitutes an 'obligation' for intermediaries, who – should they not comply with the requirements specified therein – will be subject to the substitution mechanisms referred to in paragraph 7, which represents an hypothesis of automatic integration of the contract.[64]

Thus as a result of art. 117, a closing mechanism of sanctioning nature has been established, the aim of which is to ensure compliance with the rules relating to the form – which must be written or else the contract will be void – and to the content of the rule, applying, only in the absence of these requirements, the aforementioned integration mechanisms.

Therefore, for contracts concerning the provision of services and for banking or 'financial' transactions, no extratextual reference can be made as regards the ruling, the object, the configuration of the causal relationship, while there is no reason to deny it in the determination of the services and/or operations' 'price'.[65]

The provisions on publicity (art. 116) and on the minimum content requirements (art. 117) of contracts concluded on the Italian territory by banks and financial intermediaries, 'assume – and are instrumental to – a system of free competition in the determination of prices and, more generally, of the relationship fees, which in principle should be left to the parties' autonomy, and therefore ultimately to the banks' contractual offer'.[66]

As regards freedom of competition in the loan field, of utmost importance is the judgment of the Court of Justice July 14, 1981, Züchner,[67] establishing the inapplicability for banks of the exceptions to the antitrust rules contained in the EC Treaty, and the consequent nullity of interbank agreements on economic conditions. Said judgment is even more important than the second EU Directive N. 89/646 of 15 December 1989, implemented by the Italian legislator with Legislative Decree N. 14 December 1992, N. 481 – in which freedom of establishment and provision of services for the banking system is finally confirmed.

Following the entry into force of the Banking Law, the banking sector has been concerned by regulatory actions which have greatly affected its freedom to structure offers, so that questions have been raised about the effects of this process, on the risks this process may have for the market mechanisms, and on whether those limitations are adequately justified.

However, the issue of whether 'a 'forced' transparency system in the banking sector is adequate cannot seriously be questioned' if one considers that, in its communication of 31 January 2007, the European Commission, following a thorough investigation of the banking market, has highlighted the need to improve the transparency in the banking market 'characterized by a very atypical compartmentalization of national markets, namely: on the one hand, by the uniformity of prices and relevant contract conditions within each national market; and on the other hand, by the great diversity of similar parameters in the various national states'.[68]

Among the different often fragmentary and sector-based restrictions to the autonomy of banks, which are thus of 'strictly exceptional nature',[69] and in particular among those concerning the determination of the ceilings of the amounts due, the law on usury of 7 March 1996, N. 108 mainly concerns the loan system, although in theory applicable even outside of it, thus introducing 'a regulation aimed at monitoring the bank interest rates and at rationalizing the loan system'.[70]

It follows from art. 116 and 117 of the Consolidated Banking Law, as concerns the efficiency of the credit market understood as the capacity to produce prices reflecting both the available information and able to maximize the overall welfare, that there is no limit to the credit institutes intending to apply rates, including minimum late payment rates, provided they are justified by an adequate provision in terms of risk, as this constitutes a private banking activity performed in an oligopoly; conversely, the correct exercise of free competition in a sector in which the offer is restricted to a few authorized persons, only requires the provision of maximum limits for the purpose of controlling the credit market using evaluation parameters allowing to recognize a disproportion between capital contributions which cannot legally be exceeded.

The legislation on usury – according to which the use of interest rates exceeding the so-called threshold rate (art. 2, paragraph 4, Notary Law N. 108 of 1996) are not permitted in loan agreements, otherwise the relevant clause ex art. 1815, paragraph 2, of the Civil Code is deemed void – doesn't aim at ensuring the economic balance between two utilities with different natures;[71] it rather aims at preventing that the need for money, in particular and in general, because cyclical, forces the debtor to an obligation deemed excessive as disproportionate, at a given time, for a specific market. This legal framework concerns, therefore, the default interests as well.

Under art. 5, paragraph 1, of Legislative Decree N. 231 of 9 October 2002, as replaced by art. 1, paragraph 1, letter e) of Legislative Decree N. 192 of 2012, the interests for late payment are determined to the extent of the 'statutory interests for late payment' if the parties, in the limits prescribed in following art. 7, have not expressly agreed to them.

In loan agreements, however, under the provisions of art. 117, paragraph 4 of the Banking Law, the parties cannot leave out the determination of the default interest rate, otherwise the integrative mechanism referred to in paragraph 7 will be applied; thus the statutory rate for late payment in commercial transactions, equal to the reference rate applied by the European Central Bank to its most recent refinancing operations increased by eight percentage points, will never be applied.[72]

It might theoretically be thought that the clause on the default interest rate, to which the parties of the loan relationship have to agree in writing, could be considered void, ex art. 7 of Legislative Decree N. 231 of 2002, as grossly unfair to the creditor's disadvantage.[73]

However, even without taking into consideration that for the exegetical difficulties deriving from the too general wording of art. 7, paragraph 2, of the rules on late payment,[74] the literature is still far from a common solution, it must be noted that the fact that domestic courts can control the extent of the interests, even those for late payment, is in conflict with the system of free competition in pricing used in the loan sector, according to which banks and financial intermediaries can even conventionally exclude, provided in writing, the application of rates, fees and interests regularly advertised under art. 116 of the Banking Law,[75] i.e. agree in writing on conditions which are more advantageous for the client than the advertised ones.

Thus once excluded that in the 'banking' field the 'economic' balance, understood as a relationship between utilities, may have some importance for the lending creditor, the only possible conclusion is that the legislation on late payment does not apply to loan agreements, although the latter can, at least in principle, fall under the concept of commercial transactions.

There is, therefore, no need to coordinate the regulation on usury with the legislation referred to in Legislative Decree N. 231 of 2002, as the markets which they are meant to regulate are of different 'type'.

In conclusion, the clause used by leasing companies ('DEFAULT RATE: rate as of art. 5, paragraph 1 of Legislative Decree 231 of 09.10.2002'), far from recalling an interest rate set by law for payments in commercial transactions, introduces a pactional provision which, as such, in the event it determines that the threshold rate has been objectively exceeded, will expose the lending company to the consequences under the law.

1 Please note the following monographs on late payment: VARIOUS AUTHORS, I ritardi di pagamento nelle transazioni commerciali. Profili sostanziali e processuali, edited by BENEDETTI, Turin, 2003;VARIOUS AUTHORS, La disciplina dei pagamenti commerciali, edited by CUFFARO, Milan, 2004; CONTI and DE MARZO, I ritardi nei pagamenti nella pubblica amministrazione dopo il d. lgs. n. 231/2002, Padua, 2004; DE NOVA and DE NOVA, I ritardi di pagamento nei contratti commerciali, Milan, 2003; MENGOZZI, I ritardi di pagamento nelle transazioni commerciali. L'interpretazione delle norme nazionali di attuazione delle direttive comunitarie, Padua, 2007; PANDOLFINI, La nuova normativa sui ritardi di pagamento nelle transazioni commerciali, Milan, 2003; STEVANATO and VENCHIARUTTI I ritardi nei pagamenti. La tutela de creditori nelle 'transazioni commerciali'. Aspetti civili, processuali, fiscali, contabili, Milan, 2004; RUSSO, Le transazioni commerciali. Commento teorico-pratico al d. lgs. 231/2002 sulla repressione dei ritardi nei pagamenti, Padua, 2005.

2 2 Regarding Legislative Decree 192/2012, see VARIOUS AUTHORS, La nuova disciplina dei ritardi di pagamento nelle transazioni commerciali, edited by BENEDETTI and PAGLIANTINI, Turin, 2013; PANDOLFINI, I ritardi di pagamento nelle transazioni commerciali dopo il D. Lgs 9 novembre 2012, N. 192, Turin, 2013.

3 The amended discipline is to be applied only to 'commercial transactions concluded from 1 January 2013' (art. 3, Legislative Decree 192 of November 9, 2012).

4 The clause, which is used, reads as follows: 'DEFAULT RATE: Rate referred to in art. 5, paragraph I, Legislative Decree 231 of 9.10.2002'.

5 Under Art. 644, paragraph 1, of the Penal Code, whoever, except where provided for in art. 643, asks to receive or to be promised in any form, for himself or for others, payment for a service in money or other utility, interests or other usurious advantages, shallbe punished with imprisonment from two to ten years and a fine of 5,000 Euro to 30,000 Euro.

Art. 644, paragraph 3, first part, further states that the law defines the limit beyond which the interests are always usurious.

Thus in the so called alleged or objective usury, exceeding that limit or threshold determines the criminal relevance of the fact.

The usurious rate, currently determined by increasing by a quarter the average global effective rate of the operation taken into account, to which an extra margin of four points is added, was determined before May 2011, i.e. before the entry into force of Legislative Decree 70 of May 13, 2011, by increasing by half the average operation rate under which the legal transaction between the parts fell.

6 PADOVANI, Prefazione a MANZIONE, Usura e mediazione creditizia, aspetti sostanziali e processuali,Milan, 1998, XIII; GARGANI, Usura semplice e usura qualificata , Rivista italiana di diritto e procedure penali, 2000, p.79.

7 However, the so called usury in practice (usura in concreto) pursuant to art. 644, paragraph 3, last part, is without any reference to objective parameters. According to this article interest are usurious, even if they are below the established limit, and the other benefits or payments, whichhaving regard to the practical modalities of the fact and to the average amount charged for similar transactions, are still disproportionate to the provision of money or other utility, i.e. to the mediation, if whoever has given or promised them is in economic or financial difficulty.

8 MUCCIARELLI, Commento alla L. 7/3/1996, n. 108, Disposizioni in materia di usura, in Legislazione Penale, 1997, p. 514.

9 ROPPO, in the preface to the volume by VARIOUS AUTHORS, I ritardi di pagamento nelle transazioni commerciali. Profili sostanziali e processuali, cit., XI.

10 BENEDETTI and PAGLIANTINI: Introduzione: un patchwork normativo in cerca d'autore?, in VARIOUS AUTHORS La nuova disciplina dei ritardi di pagamento nelle transazioni commerciali, cit., p. 2 according to whom this is perhaps 'a conclusion proving too much, but, certainly deserving some reflection in a period, which has lasted for over two decades, during which we have witnessed the spread of protective regulations', doubting that it can really serve the purpose for which these rules are designed.

11 PANDOLFINI, La nullità degli accordi 'gravemente iniqui' nelle transazioni commerciali , cit., p. 502, cit., p. 502, according to whom this ratio 'corresponds to a macroeconomic logic, aiming to ensure the proper functioning and the orderly development of the market, through the repression of potential distortions of competition caused by the situation of contractual disparity of the creditor towards the debtor'.

So even FAUCEGLIA, Direttiva 2000/35/CE in materia di lotta contro i ritardi di pagamento nelle transazioni commerciali (Directive 2000/35/EC on combating late payment in commercial transactions), in Contratti, 2001, p.313; ALESSI, Diritto europeo dei contratti e regole dello scambio, in Europa e diritto privato, 2000, p. 981.

12 For this conceptual creature initially theorized by PARDOLESI in the preface to Joseph Colangelo L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti. Un'analisi economica e comparata, Turin, 2004, p. XII-XIV – see GITTI and VILLA (edited by), Il terzo contratto, Bologna, 2008, passim; VETTORI Il diritto dei contratti fra Costituzione, codice civile e codici di settore, in said magazine, 2008, p. 751 ff; GIANOLA, Terzo contratto, in Digesto civile, Updates, Turin, 2009, p. 570 ff; MINERVINI, Il 'terzo contratto', in Contratti, 2009, p. 493; FRANCO, Il terzo contratto: da ipotesi di studio a formula problematica. Profili ermeneutici e prospettive assiologiche, Padua, 2010;ROPPO, Il contratto del duemila,Turin, 2011, p. 230;MAZZAMUTO, Il

contratto di diritto europeo,Turin, 2012, p. 166 ff.

13 On the asymmetric contract, see ROPPO, Prospettive del diritto contrattuale europeo. Dal contratto del consumatore al contratto asimmetrico?Corriere giuridico, 2009, p. 267; also see ID. Contratto di diritto comune, contratto del consumatore, contratto con asimmetria di potere contrattuale: genesi e sviluppi di un nuovo paradigma. Rivista di diritto privato, 2001, p. 769 ff. and ID. Parte generale del contratto, contratti del consumatore e contratti asimmetrici (with a note on the 'third contract') , in Rivista di diritto privato, 2007, p. 683 ff, in which the autor highlights the purposes for which obligations are entered into since in asymmetric contracts professionals exclusively negotiate as concerns performances relating to their business (ivi, p. 697); ZOPPINI, Il contratto asimmetrico tra parte generale, contratti di impresa e disciplina della concorrenza, in Rivista di diritto civile, 2008,I, p. 529 ff; PAGLIANTINI, Per una lettura dell'abuso contrattuale: contratti del consumatore, dell'imprenditore debole e della microimpresa,Rivista del diritto commerciale e del diritto generale delle obbligazioni, 2010, I, p. 409 ff.

14 NAVARRETTA, Luci ed ombre nell'immagine del terzo contratto, GITTI and VILLA (edited by), op. cit., p. 319.

15 See, for all, BOLOGNINI, Art. 1-2. In VARIOUS AUTHORS, La nuova disciplina dei ritardi di pagamento nelle transazioni commerciali, edited by DE CRISTOFARO, cit., p. 473-474, who states that even mixed contracts, for which the 'prevalence' within the contractual regulation must be understood in the functional sense rather than in the economic one, are subject to the discipline pursuant to Legislative Decree 231/2002.

16 PANDOLFINI,I ritardi di pagamento nelle transazioni commerciali dopo il D. Lgs. 9 novembre 2012, n. 192, cit., p. 31, who has changed opinion with respect to the opinion expressed in the previous monograph on Legislative Decree of October 9, 2002, N. 231 (La nuova normativa sui ritardi di pagamento nelle transazioni commerciali, cit., p. 19 and 20), where he set out his views for the exclusion from the scope of the Decree of all payments made under credit agreements, i.e. made, more generally, for financing purposes.

Even RUSSO is of the opinion that loan agreements can be defined as commercial transactions, Le transazioni commerciali. Commento teorico-pratico al D.lgs. 231/2002 sulla repressione dei ritardi nei pagamenti, cit., p. 405.

17 Insofar as with the term 'delivery', the legislator would only refer, in the definition of the term 'commercial transaction', to those contracts in which the ownership of a commodity and not only the material availability of said commodity is transferred; DE CRISTOFARO, Obbligazioni pecuniarie e contratti d'impresa: i nuovi strumenti di 'lotta' contro i ritardi nel pagamento dei corrispettivi di beni e servizi,in Studium Iuris,2003, p. 4, note 13; DE NOVA and DE NOVA, op. cit., p. 6; FRIGNANI and CAGNASSO, L'attuazione della direttiva sui ritardi di pagamento nelle transazioni commerciali, in Contratti, 2003, p. 311.

18 MENGONI, La direttiva 2000/35/CE in tema di mora debendi nelle obbligazioni pecuniarie,in Europa e diritto privato, 2001, 74; MENGOZZI, op. cit., p. 44.

19 CHINÉ, I confini oggettivi e soggettivi di applicazione della disciplina sui pagamenti nelle transazioni commerciali, in CUFFARO, op. cit., p. 68; PANDOLFINI, I ritardi di pagamento nelle transazioni commerciali, cit., p. 29 and 30.

20 EEC Court Justice, 10 December 1968, N. 7/68, in Raccolta della Giurisprudenza della Corte, 1968, XIV-1, p. 570. As to the meaning of 'commodity' in Community law, see BALLARINO, Manuale breve di diritto dell'Unione Europea, Padua, 2004, p. 242; ID. Diritto dell'Unione Europea, Padua, 2010, p. 260-262.

21 PANDOLFINI, I ritardi di pagamento nelle transazioni commerciali, cit., p. 31, according to whom immovable property 'traditionally excluded from Community rules' (p. 29) would not fall within the scope of late payment legislation in commercial transactions. According to the author collateral arrangements such as guarantees would fall within the scope of the legislation on late payments.

Contra, CONTI and DE MARCHI, op. cit., p. 111, on the grounds that in guaranties, which abstractly fall within onerous contracts, would lack the requirement of mutual interdependence of the performance.

22 RUSSO, Le transazioni commerciali. Commento teorico-pratico al D. lgs. n. 231/2002 sulla repressione dei ritardi nei pagamenti, cit., p. 63-73. According to the author, 'commodity' is a non-technical term indicating the object of the contract, and consequently the point of reference of the negotiation (p.66), and the expression 'provision of services' refers to 'any provision of doing (and of not doing) against payment'. Therefore their meaning, and thus the object of commercial transactions, can only be identified 'using the ratio of the legislation of the micro system constituted by the law', where 'the object of the commercial transaction is characterized by its classification under a business activity rather than the performance type deducible from the contract' (p. 67).

23 RUSSO, Le transazioni commerciali. Commento teorico-pratico al D.lgs. 231/2002 sulla repressione dei ritardi nei pagamenti, cit., p. 405.

24 According to this interpretation, the late payment legislation would therefore not only concern the so-called 'leasing traslativo' but also the 'leasing di godimento'.

25 RUSSO, Le transazioni commerciali. Commento teorico-pratico al D.lgs. 231/2002 sulla repressione dei ritardi nei pagamenti, cit., p. 406.

26 PANDOLFINI, I ritardi di pagamento nelle transazioni commerciali dopo il D. Lgs. 9 novembre 2012, n. 192,cit. p. 30. note 51, according to whom, in the light of the Treaty provision mentioned above, any 'provision of service', the object of which is a doing which is subject to economic evaluation provided outside an employment relationship such as for example the provision of services arising from a work contract, a trustee contract, a mediation contract or a professional work contract, would fall within the scope of the concept of 'provision of services'.

On this concept at Community level, see TESAURO, Diritto comunitario, 4 ed., Padua, 2005, p. 544 ff.

27 See Judgment of 3 October 2006 concerning Case C-452/04, Fidium Finanz AG against the Bundesanstalt für Finanzdienstleistungsaufsicht, Raccolta della Giurisprudenza della Corte, 2006, I, p. 9521 and ff., in which the ECJ ruled that 'National rules whereby a Member State makes the granting of credit on a commercial basis, on national territory, by a company established in a non-member country, subject to prior authorization, and which provided that such authorization must be refused, in particular, if the company does not have its central administration or a branch in that territory, thereby hindering access to the financial market of a Member State for companies established in non-member States, affect primarily the exercise of the freedom to provide services within the meaning of Articles 49 EC et seq. A company established in a non-member State cannot rely on Article 49 EC et seq. The controversy, which has arisen with respect to the German jurisdiction, has opposed the Federal Financial Supervisory Authority in Germany (the Bundesanstalt) and a Swiss company (Fidium Finanz AG) which did not have a seat in Germany – as required by German law for issuing the authorization of financial assets – and however granted loans to companies and/or persons domiciled or habitually resident in Germany. According to the Community

judge, the obstacles imposed by German law to the freedom to provide services is justified by the purpose for which the same rule was adopted, and that is, 'in order to control the provision of such services and to authorize the latter only to companies ensuring the smooth execution of the operations'.

28 See judgment of 14 November 1995, Case C-484/93, Svensson and Gustavsson, Raccolta della Giurisprudenza della Corte, I, p. 3955, paragraph 11, and judgment of 9 July 1997, Case C-222/95 Parodi, Raccolta della Giurisprudenza della Corte, I, p. 3899, paragraph 17.

29 Ministerial resolution 332663 of 24 February 1982, in Banca dati Big, Ipsoa.

30 See ministerial resolution N. 57/E of 7 April 1997, in Il Fisco, 1997, p. 4720.

31 Revenue Agency (Agenzia delle Entrate), resolution 278/E of 4 July 2008. [http://www.agenziaentrate.gov.it/wps/filensilib/nsi/documentazione].

32 See Judgment of 16 February 2012, Case C-118/2011, in PORTALE, IVA – Imposta sul Valore Aggiunto 2015, Milano, 2015, p. 38.

33 See, RICCIO, Gli interessi moratori previsti dalla disciplina sui ritardi di pagamento nelle transazioni commerciali e le norme sull'usura, in this Magazine, 2004, p. 557, according to whom 'the rules on usury, indeed, do not regulate the statutory interests but rather the interests exceeding the legal rate agreed between the parties to a higher extent than the extent set by the law 108 of 1996. It follows that the new statutory rate of default interests provided for by art. 5 Legislative Decree 231 of 2002, manifestly falls outside the scope of the legislation on usury.' So A.G.S. – Opinion of 20 September 2010, protocol 301334, in Rassegna mensile dell'Avvocatura dello Stato, 2010, p. 167-168.

34 RICCIO, Gli interessi moratori previsti dalla disciplina sui ritardi di pagamento nelle transazioni commerciali e le norme sull'usura, cit., p. 559 e 560.

35 RUSSO Le transazioni commerciali, cit, p. 294, who rightly considers that 'the introduced discipline is a discipline concerning an obligation rather than a contract'.

36 VASCELLARI, Interessi di mora e usura: la normativa attuale alla luce della nuova disciplina contro i ritardi di pagamento nelle transazioni commerciali, in Studium Iuris, 2004, p. 166 ff., spec. p. 174.

37 RUSSO, Le transazioni commerciali, cit., p. 289.

38 RUSSO, Le transazioni commerciali, cit., p. 296.

39 Opinion of the Supreme Judicial Council of 18 September 2014, protocol 46733/2014, available on: [http://www.csm.it/PDFDinamici/141009_6.pdf], par. 3.16, in which, however,'the Supreme Judicial Council raises serious doubts as to whether the law is really useful in order to change the conduct of public administrations, too often sued because of their financial difficulties, which, presumably, will accrue due to the higher rate of interest'.

40 PARDOLESI and SASSANI, Il decollo del tasso di interesse: processo e castigo, in Degiurisdizionalizzazione e altri interventi per la definizione dell'arretrato (Legisl. Decree of 12 September 2014, N. 132, converted with amendments into the Law of 10 November 2014, n. 162), in Foro italiano, 2015, V, par. 67, for whom 'the logic of the loser does not help, because ex ante, i.e. when essential decisions are taken, the parties ignore whether they will be on the good side of victory or on the side of defeat. In this context, discouraging the recourse to the courts, in an initial approximation, does not

send anyrelevant signal to the parties' (c. 68).

41 PAGLIANTINI, I ritardi di pagamento nel prisma (novellato) delle fonti: (nuovi) profile generali, in Le nuove leggi civili e commerciali, 2015, 4, p. 843, and in VARIOUS AUTHORS, I ritardi nei pagamenti, edited by BENEDETTI & PAGLIANTINI, Milan, 2015, p. 76, according to whom 'in terms of remedial figures, the abusive procedural delays and the exploitations which are grossly unfair to the detriment of the supplying creditor do not designate at all symmetrical situations'.

42 PROTO PISANI Premesse generali (e una proposta), in Degiurisdizionalizzazione e altri interventi per la definizione dell'arretrato (Legislative Decree of 12 September 2014, N. 132, converted with amendments, into the Law of 10 November 2014, N. 162), in Foro italiano, 2015, V, par. 3.

43 DE SIMONE and IENCO, Disciplina antiusura e nuovi tassi legali di mora: usura 'legale'?, in Gazzetta Forense, 6, 2014, p. 48.

44 DE SIMONE and IENCO, cit., p. 49.

45 The categories are factoring (over 50,000 Euro), variable rate property leasing, fixed rate and variable mortgages.

46 equal to 10.15%.

47 Threshold rate which, for the 4 categories mentioned in note 45 turns out to be, respectively, 9.7750%, 9.7875%, 10.0625% and 8,5750%.

48 DE SIMONE and IENCO, cit., p. 48.

49 Regarding this approach, according to which the so-called alleged or objective usury would only concern the lending of money or other fungible things accompanied by the obligation assumed by the accipiens to return the tantundem plus interests or disproportionate benefits see FIANDACA and MUSCO, Diritto penale. Parte speciale, II, 6th ed., Bologna, 2014, p. 236; PROSDOCIMI La nuova disciplina del fenomeno usurario, in Studium Juris, 1996, p. 775; MELCHIONDA, Le nuove fattispecie di usura, in the trimestrial Rivista di diritto economico, 1997, p. 511.

50 CEVALE, Il contenzioso bancario e finanziario, Roma, 2014, pp, 35 and 36, according to whom 'in a competitive, transparent and regulated market both the lenders (banks and financial intermediaries) and the debtors (borrowers), although they have different negotiating powers, determine, with their choices, the average rates charged and, thus, the threshold rates'.

51 On the thought movement called Economic Analysis of Law – better known as EAL – or Low and Economics, observation instrument of economic phenomena (in Italian usually 'analisi economica del diritto') see Various Authors, Diritti, regole, mercato. Economia pubblica ed analisi economica del diritto, edited by Bernasconi And Marrelli, Milano, 2004; Cooter, Mattei, Monateri, Pardolesi And Ulen, Il mercato delle regole. Analisi economica del diritto civile,i, Fondamenti, 2nd ed., bologna, 2006; various authors, Analisi Economica Del Diritto Privato, edited by Alpa, chiassoni, pericu, Pulitini, rodotà and Romani, Analisi Economica Del Diritto Privato, Milano, 1998; denozza, norme efficienti. L'analisi economica delle regole giuridiche, Milano, 2002; polinsky, Una Introduzione All'analisi Economica Del Diritto, 2nd ed., with a postface by pardolesi, roma, 1992; shavell, analisi Economica Del Diritto, Turin, 2004; Chiancone and porrini, Lezioni Di Analisi Economica Del Diritto, 3. ed. Turin, 1998; Napolitano And Abrescia, Analisi economica del diritto pubblico, Bologna, 2009; SHAVELL, Fondamenti dell'analisi economica del diritto, Italian ed. edited by Porrini, Turin, 2004; COASE, Impresa, mercato e diritto, Italian ed. by GRILLO, Bologna, 2006.

52 Expression coming from the title of the famous essay by MENGONI, L'argomentazione orientata alle conseguenze. Rivista trimestrale di diritto e procedura civile, 1994, p. 1 ff.

53 DENOZZA, Il modello dell'analisi economica del diritto: come si spiega il tanto successo di una tanto debole teoria?, Ars interpretandi, 2013, p. 52 and 53.

54 SACCO-DE NOVA, Il contratto, I, 3rd ed. Turin, reprinted 2005, p. 26, according to whom contractual justice is the 'suitability' of the contract to the market.

55 BOCCHINI, La vendita di cose mobili, Art. 1510-1536, op. cit., p. 103.

56 Art. 58. 1st and 2nd par. of the Law of 11 December 1985 n. 765, Ratifica ed esecuzione della convenzione delle Nazioni Unite sui contratti di compravendita internazionale di merci, adopted in Vienna on 11 April 1980.

57 G.B. FERRI, L'invisibile' presenza della causa del contratto in Europa e diritto privato, 2002, p. 897.

58 In the sixteenth century the famous Jesuit Ludovico Molina already said that 'wherever money is most abundant, there will it be least valuable for the purpose of buying goods and comparing things other than money', adding that its exchange value is not determined by its usefulness, but rather by its scarcity: see De iustitia et de iure, Madrid, 1981, disp. 406, col. 704-705.

59 As the purchasing power of money in order to be up-to-date requires the actual availability of a 'thing' called currency, the time factor is always inherent in the determination of money: s. FERRO-LUZZI, Lezioni di diritto bancario, I, Turin, 2012, p. 264.

60 TRIMARCHI's observations on this issue are always up-to-date, Sul significato economico dei criteri di responsabilità contrattuale. Rivista trimestrale di diritto processuale e civile 1970, p. 512 ff.

61 DE POLI, La trasparenza delle operazioni bancarie secondo il testo unico: primi appunti. Rivista di diritto civile, 1994, II, 525.

62 Art. 117 of the Banking Law, which in the first paragraph provides for the requirement for written form in the 'banking' field (contracts are drawn up in writing and clients are provided with a copy), contains 'two conceptually different types of prescriptions, though inter-related, concerning the formal requirements of the contract and its minimum mandatory content'. In: MIRONE, sub. Art. 117, in VARIOUS AUTHORS, Commento al Testo unico delle leggi in material bancaria e creditizia, edited by COSTA, Turin, 2013, p. 1309.

63 SPENA, sub Art. 117, in VARIOUS AUTHORS, Testo unico bancario. Commentario, edited by Porzio, Belli, Losappio, Rispoli Farina And Santoro, Milan, 2010, p. 976.

64 Art. 117, paragraph 7, of the Banking Law as amended by Legislative Decree 141 of 2010, provides that, in case of failure to comply with paragraph 4 and in the cases of nullity mentioned in paragraph 6 – and, thus, in case of contractual clauses considered as not included – because with regard to the use in establishing the rates and to the agreed economic conditions they provide rates which are less favorable for the clients than those advertised – the following shall apply: a) the minimum and the maximum nominal rate, respectively, as concerns the active and passive operations of the annual ordinary treasury bills or other similar securities that may be indicated by the Minister for Economy and Finance, issued in the twelve months preceding the conclusion of the contract or, if more favorable for the client, issued in the twelve months preceding the

operation; b) the other prices and conditions advertised for the corresponding categories of operations and services at the time of conclusion of the contract or, if more favorable for the client, at the time when the operation or the service is performed ; in the absence of advertising nothing is due.

65 FAUCEGLIA, La forma dei contratti relative ad operazioni e servizi bancari e finanziari, in Rivista del diritto commerciale e del diritto generale delle obbligazioni, 1994, I, 427 and 428.

66 MIRONE, sub Art. 117, cit, 1317.

67 In Collection, 1981.1, p. 2021.

68 MIRONE, 'Le fonti private' del diritto bancario: concorrenza, trasparenza e autonomia private nella (nuova) regolamentazione dei contratti bancari. Banca e borsa e Titoli di Credito, 2009, p. 298-299.

69 MIRONE, sub Art. 117, cit., p. 1318.

70 MORERA, in BRESCIA, MORRA, MORERA, L'impresa bancaria. L'organizzazione e il contratto. Tratto di diritto civile del Consiglio Nazionale del Notariato (Civil Law Treaty of the National Council of Notaries), directed by PERLINGIERI, Naples, 2006, p. 361.

71 Unlike, however, what happens in the field of finance, where the 'correspondence' of the asset with respect to the cash flow is evaluated when the asset is requested and is guaranteed for the entire duration of the relationship: as a matter of fact, should the collateral be inadequate, there would be a margin call, i.e. a reintegration request in order to guarantee the initial 'correspondence'.

72 Art. 2, comma e) and f) of the Legislative Decree 231 of 2002.

73 Please note that, under Art. 7, paragraph 3, of Legislative Decree, 9 of October 2002, the clause excluding the use of interests for late payment is considered grossly unfair without admitting evidence to the contrary.

74 That the court declares, ex officio, the nullity of a clause having regard to all relevant circumstances, including the large deviation from commercial practice contrary to the principle of good faith and fair dealing, the nature of the goods or the object of the contract, the existence of objective reasons to deviate from the statutory interest rate for late payment, payment terms or to the lump sum due as compensation for recovery costs.

75 DE POLI, Sub art. 117, in Commentario breve al diritto dei consumatori, edited by DE CRISTOFARO and ZACCARIA, Padua, 2010, p. 1419.