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LEGAL AND ECONOMIC PERSPECTIVES ON THE LEGAL PENALTY INTEREST

Theoretical article

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Abstract

The legal evaluation of the penalty interest, meaning the ex lege determination of its level is applicable only in the case of non-fulfillment of a monetary payment obligation. The applicability of the system of legal evaluation of the interest is generally determined by the absence of a document that ascertains the agreement of the parties, such as a contract, through which the parties, following this agreement, evaluate the prejudice caused by the non-fulfillment of a monetary payment obligation, before the prejudice has occurred. The legal evaluation of the penalty interest, as a component of the regulation in the field of legal interest has the purpose to ensure creditor's protection. Regardless of the prejudice caused to the creditor, the legal penalty interest shall be determined by relating it to a variable benchmark that is the level of the reference interest rate of the National Bank of Romania, which is the monetary policy interest rate of the National Bank of Romania.

Introduction

We pinpoint the present undertaking on the realm of the default on the monetary payment obligation, seen from the point of view of what we will hereinafter call *pecuniary, financial obligations*, according to Turcu, 2011 (p.265), taking into consideration their frequency in the relations between professionals, in their definition given by art. 3 of the Civil Code, Law 287/2009 (hereinafter called NCC). In Turcu, 2011 (p.265), we can discriminate between the obligations engaged through a contract, the monetary obligations and the obligations for benefits in kind. The monetary obligations are those which are "expressed through the transfer of property of a certain amount of money, for example the obligation to pay a certain price", obligations which can always be fulfilld in kind.

We will attempt to figure out, from a judicial point of view but at the same time considering the economic perspectives, which are the regulations applicable to the professional as an active subject (debtor) of the payment of money obligations, in the situation of the failure to fulfill this obligation timely.

In the analysis we set out to make we will start from the legacy of Commercial Law, namely from the regulations incident to this theme, art. 43,44 of the Commercial Code of 1886 adopted through the law decree no.1.233/1987, published in the Official Gazette no.31/10 May 1887, that raised interest for the study of Commercial Law, up to 1945 as well as from 1990 and up to its abrogation in 2011 once the New Civil Code entered into force.

Hence, art.44 of the Civil Code on the interdicting the law court to grant a grace period provided that "In the case of commercial obligations the judge cannot grant the grace period stipulated by art, 1021 of the Civil Code" and art. 43 on the automatic calculation of interest provided that "The liquid trade monetary debts start producing the legal interest from the day they become due" (principle reflected in Decision 2177/29 March 2005 of the High Court of Cassation and Justice, Commercial Section.

The premises of the analysis are grounded on art. 1350, 1480, 1516, 1518 of the NCC, which mark out the contractual liability, expatiated in Pop, Popa si Vidu (2012 p.251-253) and in Vasilescu (2012, p.257-535) in the meaning that: - any person shall fulfill the obligations contracted as the contract is bounding; when the person, without reasonable justification, does not fulfill its obligations, is liable for the prejudice caused to the other party and it is bound to repair that prejudice; - the creditor's right to the full, exact and timely fulfillment of the obligation, correlated with the debtor's personal liability in fulfilling its obligations as creditor; - the execution of obligations with the diligence that a good faith owner proves in administrating its goods, while in the case of obligations inherent to a professional activity, the criterion for assessing the diligence shall be referred to the nature of the activity.

Putting in default; The debtor is automatically in default when "the monetary obligation, assumed by the professional in carrying the economic activity of an enterprise; the interdiction to grant the period of grace.

The dualism of putting the debtor in default is provided by art. 1.521 of the NCC that stipulates that " it can operate according to the law or on the creditor's demand". The principle of putting the debtor in default on the creditor's demand, provided by art. 1522 of the NCC and expanded in Pop, Popa si Vidu (2012, p.154-267) governs restrictively the matter of the remedies for non-execution of the contract, as it must be applied in order to appeal to remedies. This principle generally softens the *status quo* of the debtor that did not fulfill the contractually due obligation, after the communication of the legal notice leading to an additional due date or to a reasonable deadline for the debtor to fulfill the obligations.

In setting the additional deadline for execution, the creditor is constrained by the nature of its obligation and by the circumstances, and in the absence of setting this additional deadline, the debtor shall fulfill the obligation in a reasonable deadline starting from the date the legal notice was received – art. 1522 (3) thesis 2 of the NCC, or starting from the date the summons was communicated –art.1522 (5) of the NCC. In the latter case the debtor's right to fulfill the obligation in a reasonable deadline starting from the date the summons was received, without the debtor being previously put in default and who will consequently be obliged to bear the trial expenses, if the obligation was fulfilled by the debtor inside this deadline.

The court may grant the debtor a reasonable deadline for the execution of the obligation, as assimilated in Pop, Popa si Vidu (2012, p.260, footnote 1) with the "period of grace" provided by art. 102 of the 1864 old Civil Code according to which the court had the possibility to grant the debtor, considering the circumstances, a period of grace for the timely fulfillment of the obligation, this deadline not being allowed in commercial matter.

Moreover, up to the expiry of the additional deadline and/or the reasonable deadline for the debtor to fulfill the obligations, the creditor has the right to suspend the execution of his own obligation, according the provisions of art.1522 (4) of the NCC.

As exception from the principle of the creditor putting in default the debtor, the creditor cannot turn to the remedies provided by the NCC, identified *ut supra*, in the situation where the debtor is automatically in default. The restrictive situations are provided by art. 1523 of the NCC, one of them being that in paragraph 1 (d) namely "it was not fulfilled the monetary obligation, assumed by the professional in carrying the economic activity of an enterprise".

Ab initio we determine that the principle of putting in default and its components, the additional deadline and/or the reasonable deadline for fulfilling the obligation by the debtor are not applicable in the situation of non-fulfillment of a monetary obligation, basically in the case of a pecuniary obligation assumed by the professional in carrying the economic activity of an enterprise".

The unifying system of the Private, Civil and Commercial Roman Law instituted through the NCC in the case of a monetary obligation that was not fulfilled on maturity, assumed by a professional in exercising the activity of a company provides the same time the professional is amputated of the additional deadline remedy and/or of the reasonable deadline for fulfilling the obligations, whether it is granted by the provided legal mechanism or by the judicial one.

This latter debtor can access the other remedies provided in the situation of non-fulfillment of contract which are: forced execution in kind; the non-execution exception, termination by breach; rescission, expanded in Pop , Popa si Vidu (2012, p.267-293), but in this case the prevalence of contract safeguarding is narrowed compared to other categories of debtors that can be put in default, the law-maker intending again to ensure creditor and credit protection by maintaining the traditional regime provided by art. 44 of the Commercial Code on the interdiction of the period of grace, although this interdiction is not express but it depends on the arguments indicated *ut supra.*

The burden of proof of the fact that the debtor is automatically in default falls on the creditor and any relating contraire declaration or stipulation shall be considered unwritten, in accordance with the provisions of art. 1523(4) of the NCC. From the perspective of provisions of art. 1523 (1) (d) of the NCC, the burden of the assumed obligation "in carrying the economic activity of an enterprise"." was to be applicable irrespective of whether the enterprise is operated for profit or not,

according to Pop, Popa and Vidu (2012, p.266, footnote 3).

The principle of the automatic calculation of moratory damages for any monetary obligation unfulfilled before maturity.

Continuing the analysis on the theme of the pecuniary obligations we will make the next stop on the provisions of art. 1535 of the NCC in order to find out what are the consequences "in case an amount of money is not paid before maturity" by the professional, passive subject of the obligational relation, keeping in mind the provisions of art. 1548 of the NCC according to which the fault of debtor on a contractual obligation is presumed through the simple fact of non-fulfillment and starting from the premise that the analyzed obligation is a monetary obligation and it is interest-bearing.

Art. 1535 of the NCC regulates "Moratory damages for monetary obligations" instituting in paragraph 1 the principle according to which *the non-fulfillment on maturity of a pecuniary/monetary obligation generates the creditor's right to moratory damages,* calculated from the maturity of the obligation up to the moment of payment, in the amount agreed by the parties, or in their absence, in the amount provided by the law, without having to prove any prejudice.

The unifying system of the Roman Private, Civil and Commercial Law instituted through the NCC anchors in the content of the provisions of art. 1535 (1) for all pecuniary obligations, thus also for the obligations assumed by the professional in carrying the economic activity of an enterprise"., the automatically calculation, *ope legis,* of the moratory damages, from maturity of the payment obligation and not starting from the putting in default, respectively from the date of the summons. This principle was also reflected in case-law Decision 1013/2008 of the High Court of Cassation and Justice, Commercial Section, for the case in which the moratory damages are composed of the default penalties.

"From the examination of the documents submitted in this case the court determines that the appellant – respondent's arguments are not grounded. Otherwise, both contracts concluded between the parties in 2002 and 2004 stipulate at art.10(1) that the maturity date shall be the 20th day from the day the invoice was issued, respectively the "bank transfer shall be made by the beneficiary's bank into the transporter's account within 20 days from the day the invoice was issued.

The argument exposed by the appellant-respondent, in the meaning that the maturity of the invoices would be the 50th day from the day the invoices were issued, considering the provisions of art.20 (2) of the two contracts above mentioned, cannot be accepted as:

According to this article the parties agreed that "in case the beneficiary fails to fulfill within 30 days from the date provided by art.10(1), the obligation of paying the price of transport of natural gases of if the obligation is improperly fulfilled, the beneficiary binds to pay the transporter penalties of 0,07% (0,06%- in the 2004 contract) of the price of the unpaid service, for each day of delay.

By corroborating the dispositions of art. 10(1) and art. 20(2), it results without a doubt that the 30 days term was granted by the creditor(the transporter) to the debtor (the beneficiary) as a period of grace, in the sense that if the debtor would have fulfilled the payment obligation within the 30 days, the creditor would not have calculated late payment penalties or as the appellant-respondent did not make the payment within this deadline, the appellee-claimant proceeded to the calculation of the penalties for late payment from the maturity date, respectively from the 20th day of the issue of the invoice."

Hence, it is extrapolated here on all pecuniary obligations the solution

traditionally demonstrated by art.43 of the Commercial Code, on the calculation of interest from the date the payment obligation becomes enforceable, as explained in Carpenaru (2007, p.420-421). Here, as reason for applying this principle, it is indicated the productive character of money, he fact that interest must be claimed by the creditor and it is not automatically granted, as well as the doctrinary opinions according to which the rule of automatically calculating the interest is applied only to the case in which the obligation of payment is commercial for the debtor.

The automatic calculation of moratory interest from the maturity date of the payment obligation signals the existence of a certain, fixed amount and enforceable debt, in the view of the Code of Civil Procedure, (Law 134/2010, republished in the Official Gazette no. 545/3 August 2012, in force since 1st February 2013), according to art. 622.

In the case of delay in fulfilling the monetary obligations, the prejudice is presumed and it results from not being able to use the amount of money, an aspect revealed in Carpenaru (2007,p.420-421). Hence the creditor does not have the burder of proof of any prejudice and the correlatively the debtor does not have the right to prove that the prejudice suffered by the creditor as a result of the late payment would be smaller than the percentage of the interest in relation to the capital, according to the provisions of art. 1535 (1), final thesis of the NCC.

The interest; remunerative interest and penalty interest; Special provisions regarding interest in the judicial relations resulted from the operation of an enterprise for profit.

The name "interest" given to moratory damages is consecrated by art. 1489 of the NCC "Interest on money" which in (1) provides that "Interest shall be agreed by the parties or else the interest shall be the legal interest".

Putting *ex lege* the debtor automatically in default, as exception, if there is an unfulfilled monetary obligation, assumed by the professional in carrying the economic activity of an enterprise, is complemented by the principle of calculating *ex lege* the moratory damages starting from the maturity of the obligation.

The free will of parties regarding the interest as moratory damages begins here and can be included in the expression of will through which they determine, by agreement, the interest rate, while in the absence of the agreement of the parties it shall be applied interest rate provided by the law, the legal interest.

Given the extremely large number of pecuniary obligations assumed by the professionals in the financial exercise of the company and at the same time the massive delays of debtors in performing the payment obligations, especially when "the cost of commercial time is not the same as the price of civil time" as mentioned by Dumitru (2010, p.17; also here the partnership between interest-delay and the relation interest-time), out of the category damages, the institution of the moratory damages requires a special insight in extenso intercepted in Dumitru (2010) and Pop, Popa si Vidu (2012, p.254-271 and p.313-319).

Moratory damages are subject to legal, conventional evaluation as well as to judicial evaluation, the tripartite means of evaluation being developed in Pop, Popa si Vidu (2012, p.313-319).

The duality of the interest is instituted by the provisions of the GEO 13/2011 on the legal remunerative and penalty interest for monetary obligations as well as for regulating fiscal-financial measures in the banking field (published in the Official Gazette no. 607 of 30 August 2011, approved through Law 43/2012, amended by Law 72/2013, published in the Official Gazette no.182 of 2 April 2013, hereinafter called GO 13/2011) and lays in the remunerative interest and in the

penalty-compensatory interest, each with its own legal regime, but as we are about to show, the classification of interests does not stop here. *In extenso* on the legal interest in the regulation of the GO 9/2000, repealed by GO 13/2011 see Dumitru (2008); *in extenso* on the legal interest regulated by GO 13/2011 see Mateescu (2012).

In accordance with the provisions of art.1 (2) of the GEO 13/2011, the remunerative interest is the interest owed by the debtor of the obligation, calculated for the period of time previous to the maturity of the obligation. Thus, the remunerative interest represents "the price for using the money", a meaning that the term "interest" has in view within the loan contract, and indicated in Apan (2007 p.122) currently regulated by the provisions of art. 2167-2170 of the NCC.

Pursuant to the provisions of art. 1(2) of the GO 13/2011 the interest owed by the debtor of the monetary obligation, for non-fulfillment of the respective obligation on maturity is called penalty interest, hence this is the interest that represents the moratory damages -"the moratory interest", on which we focus in the present study.

The provisions of art. 1535 of the NCC which regulate the "moratory damages in the case of monetary obligations" already developed, are applicable to the penalty interest, pursuant to art. 10 of the GO 13/2011. Consequently this reaffirms from a regulational point of view and through the provisions of GO 11.2013, that the non-fulfillment of a due monetary obligation generates the creditor's right to moratory damages, a right that is restricted by certain other elements that we will determine as follows.

The legal interest; the legal remunerative interest and the legal penalty interest.

The system of the legal evaluation of the moratory interest, meaning the *ex lege* determination of the moratory interest level to the level of the legal interest is applicable only in the case of the late performance of the monetary obligation, correlated with the absence of a written document through which the parties to have agreed on the evaluation of the prejudice caused by the delay in performing the payment obligation.

The legal interest is defined in Dumitru (2008, p.68) as being "a percentage established by the law, the amount of which depends on a variable parameter and is applied to a given capital, either as the price for its usage, either as damage for the delay in performing the obligation."

The moratory interest, has a real compensatory function, if it is pre-established in an annual percentage of the capital and consists of a rate of the legal interest, meaning a flat rate amount, with certain exceptions out of which those in the matter of payment instruments: cheque, letter, promissory note, irrespective of the prejudice caused to the creditor, represents legal penalty interest, as indicated in Dumitru (2010, p.205 and the following pages that elaborate the justification of the choice of the flat-rate system for the compensation of the prejudice).

The legal interest rate of the remunerative as well as of the legal penalty has as variable benchmark the level of the reference interest rate of the National Bank of Romania, which is the monetary policy interest rate established set by the decision of the National Bank of Romania Board of Directors. Determining these two categories of interest rates in relation to the mentioned benchmark represents the *legal evaluation* of the moratory damages in the case of monetary payment obligations.

The legal remunerative interest rate is set at the level of the reference interest rate of the National Bank of Romania, and the level of the legal penalty interest rate is set at the level of the reference interest rate of the National Bank of Romania plus 4

percentage points, pursuant to art. 3 (1) (2) of the GO 13/2011.

The level of the reference interest rate of the National Bank of Romania shall be published in the Official Gazette, Part I, whenever the monetary policy interest rate is amended by the NBR.

In compliance with the provisions of art. 3(3) of the GO 13/2011, the legal remunerative and penalty interest rates, set under the conditions stipulated by art. 3(1) (2) exposed above, shall be decreased with 20% for the obligations resulting from legal relations that do not arise from the operation of an enterprise for profit, in the sense of art. 3 (3) of the NCC, meaning that the relations in which the professional does not have the capacity of a passive subject of the obligational relation, as the debtor of an amount of money, resulting from the operation of an enterprise for profit.

Moreover, in the legal relations that result for the operation of an enterprise for profit, in the sense of art. 3(3) NCC, in which the professional has the capacity of passive subject of the obligational relation, as debtor of the monetary payment obligation, the legal remunerative and penalty interest rates, set under the conditions stipulated by art. 3(1) , respectively art.3 (2^1):

- the level of the legal remunerative interest rate is set at the level of the reference interest rate of the National Bank of Romania.

- the level of the legal penalty interest rate is set at the level of the reference interest rate of the National Bank of Romania plus 8 percentage points.

We observe that the unifying system of the Roman Private, Civil and Commercial Law instituted through the NCC maintains the act of setting a different level of the legal penalty interest, in the relations between professionals and in the relations between professionals and contracting authorities, at the level of the legal reference interest rate plus 8 percentage points, pursuant to paragraph (2^1), which level is different from that of the legal penalty interest rate set for other categories of obligations at the level of the reference interest rate of the NBR plus 4 percentage points and decreased with 20%.

The prevalence and pre-eminence of the remunerative and penalty interest rates set conventionally in relation to the legal remunerative and penalty interests is covered in Bacanu (2000,p.33) and Dumitru (2008, p.61), the latter interest "functioning" only optionally, supplementary in the absence of an express stipulation on the conventional interest rate, in which case "the corresponding legal interest shall be paid" according to art. 2 of the GO 13/2011, as well as to art. 1017 of the New Code of Civil Procedure.

We indicated *ut supra* that the free will of the parties regarding the penalty interest depends on the free will through which the parties determine by agreement the interest rate, a freedom established by art. 1(1) of the GO 13/2011 that equally regards the remunerative interest.

The limitations of the parties' free will in conventionally determining the interest rate are set by the provisions of art.5 (1) GO 13.2011 in the legal relations that do not result from the operation of an enterprise for profit, in the meaning of art. 3(3) NCC, the interest cannot be more than 50 % per year higher than the legal interest. Any stipulation that would breach these provisions shall be automatically void and the stipulation of a clause in which the legal interest exceeds 50% per year, is sanctioned with the loss of the creditor's right to claim for legal interest.

Consequently, the parties of the legal relation that does not result from the operation of an enterprise for money cannot determine by agreement neither for the level of the penalty interest rate for the possibility of the non-fulfillment of a monetary payment obligation on its maturity, nor for the level of the remunerative interest to exceed the legal penalty interest rate by more than 50% per

year, as provided in art. 3(1) (2) GO 13/2011.

The unifying system of the Roman Private, Civil and Commercial Law instituted through the NCC offers the professional that is a potential debtor of a monetary payment obligation resulting from the operation of an enterprise for profit, the freedom to conventionally set the level of the penalty interest rate for the possibility of the non-fulfillment of a monetary payment obligation on its maturity, as well as the level of the remunerative interest, freedom that is not limited to exceed, like in the case of other obligations, with more than 50% per year the level of the legal penalty and remunerative interest rates.

The "express stipulation" with reference to the level of the remunerative and penalty conventional interest, stipulated in art. 2 (1) GO 13/2011 undoubtfully indicates the conclusion of a written agreement, interpretation confirmed also by art.6, thesis I of the GO 13/2011 according to which "The interest shall be set through a written agreement"

Only if it is stipulated in the contract, the conventional penalty interest rate for the situation of the non-fulfillment of a monetary payment obligation on maturity shall eliminate the enforcement of the legal penalty interest rate for the situation of the late payment of a monetary payment obligation. *Per a contrario,* in the absence of the parties 'agreement for the situation of the non-fulfillment of a monetary payment obligation on maturity, it shall be applied *ex lege* the legal penalty interest rate.

A first economic perspective on the consequences of the legal evaluation system of the moratory interest is revealed in Dumitru (2010, p.233-234) who considers that the system favours the debtor and is in the disadvantage of the creditor because of the ration between the value of the legal interest and the full compensation of the prejudice caused by the delay, the legal interest being smaller, derisory compared to the actual value of the prejudice, the debtors are thus encouraged not to fulfill their payment obligations and they channel these amount towards investments, a very common practice during the high inflation period 1990-2000.

The creditor's right to additional damages, as well as the total value of the interest and the additional damages together, provided by art. 1535 (2) (3) analyzed by Dumitru (2010, p.346-347), Baias (2013, p.1632) and Mateescu (2012, p.64), are related to the level of the legal interest rate, with the purpose of the full compensation of the prejudice suffered following the non-fulfillment, as stipulated by art. 1531 NCC.

The doctrine, in Dumitru (2010, p.346 footnote 6, for the clauses of indexation of the debts resulting from the contract as well as for the clauses of review of the hardship contracts, both also developed in Vasilescu, 2012, p. 148-149) established the compatibility of the moratory interest with the debt indexation, as well as the incompatibility of the moratory interest indexation (Vasilescu, 2012, p.148-149, footnote 6 – see the indexing clause for debts resulting from contracts; clause for review of the hardship-contracts).

Debt indexation is defined in Dumitru (2010, p.346) as "the procedure of the lawful automatic reevaluation of the amount that represents the object of the pecuniary obligation, in relation to the variability of a benchmark (such as the daily exchange rate of a foreign currency in order to cover for the depreciation of the national currency value). The compatibility of the moratory interest with the indexation of the debt is mirrored in Decision 722/23.02.2010 of the High Court of Cassation and Justice, Commercial Section:

"*The legal nature of the two institutions is different. While the interest represents the cost of not using the money, the update with the inflation rate seeks to*

maintain the real value of the monetary obligations. Granting the interest does not exclude the update of the debt, as these have legal grounds based on which the owed interest is given by art. 34 of the Commercial Code, and the update is reasoned by the compliance with the full prejudice compensation principle.

Also, granting the interest has the purpose of sanctioning the debtor for the late performance of its obligation, while the update of the debt aims at covering an actual prejudice caused by the monetary fluctuations registered between the maturity date and the actual payment date of the owed amount.

Therefore, the appeal court reasonedly granted the claimant's claim regarding the cumulation of the interest with the update, retaining the update shall take the form of mans of compensation for the loss suffered by the creditor, while the interest aims at covering the unattained benefit."

The proof of payment shall be made in accordance with the regulations imposed by the NCC in the matter of proof of payment. The interest is regulated by different provisions within the cross-border judicial relations, where the is set a 6% per year flat rate when the Romanian Law is applicable and when the payment was stipulated in foreign currency.

The penalty moratory clause

Moratory damages may be agreed by the parties by a contract, through a penalty moratory clause, usually called also "late payment penalties", as a percentage of the owed principal for each day of delay, which is a mechanism conceived as a means of conventional evaluation of the damages and having a different legal regime from that of the conventional moratory interest, highlighted in Dumitru (2010, p.113-132) and reflected in Decision 8/17.01.2012 of the High Court of Cassation and Justice, Commercial Section:

"From this point of view, in considering the compensatory character of the penalty clause, given by art. 1087 of the Civil Code that is part of the provisions on damages owed by the debtor for the non-fulfillment of the contract, and art. 1066 of the Civil Code that specifies the sanctioning character of this clause, results that the execution of the penalty clause is not conditioned by the proof of the existence and extent of the prejudice.

In this case, such evaluation of the prejudice was carried by the parties when they concluded the contract and established that in the case of the early termination of the contract, the defendant in her capacity of lodger owes compensation equal to the 3 month rent".

The penalty clause is defined by art. 1538 (1) of the NCC as being the clause by which the parties stipulate that the debtor undertakes to give benefit in the case of non-fulfillment of the main payment obligation, the given definition having a widely applied meaning that also comprises the conventional evaluation of the late performance of the monetary payment obligation, a definition reflected in Decision 1105/15.03.2011 of the High Court of Cassation and Justice, Commercial Section:

"This is because what was regulated by art. 1082 of the Civil Code through a operative regulation that is forcing the debtor to pay damages for non-fulfillment of its obligation, was practically conventionally established by the parties through the penalty clause in art. 10 of the construction contract, the anticipated evaluation of the compensations for the non-fulfillment of the contractual obligation to timely deliver the house to the beneficiary.

In such situation, since based on the evidence submitted, which exceeds the present lawfulness check, it was acknowledged the non-fulfillment of the contractual obligation undertaken by the appellant, the courts righteously granted effectiveness to the penalty clause which in

accordance with art. 1069 (1) of the Civil Code "is a compensation for the damages suffered by the creditor resulted from the non-fulfillment of the main obligation" and forced the appellant to pay penalties for the period preceding the transfer of the works contract."

The contractual mechanism of the penalty moratory clause is developed in Vasilescu (2012, p.538-542) and in Pop, Popa, Vidu (2012, p.316-317), the latter identify the advantages and usefulness as well as the inconveniences of the penalty clause. Among the advantages we point out the periodic role of the penalty clause, the pressure made on the debtor, a role that produces effects when the level of the penalty clause is raised. By setting a high level of the penalty clause, the debtor may be forced to fulfill its monetary payment obligation on time.

We foretell one of the aspects widely debated by the doctrine, which is the mutability of the penalty clause, to what extent it can be modified by the court , an aspect to which the NCC gives the regulation comprised in art. 1541. "The intentionally excessive penalty" compared to the prejudice that the parties could have foreseen on the conclusion of the contract, can be legally reduced by the court, in what regards the amount, in accordance with art. 1541 (1b), but it must remain higher than the main obligation, any stipulation on the contrary being considered unwritten.

Conclusions

In conclusion, in the absence of the conventional evaluation carried by the parties to the prejudice caused by the late payment of the monetary obligation, there shall be applied the rules of the legal evaluation, comprised by the regulation on the legal penalty interest, indicated *ut supra*. For the creditors, the usefulness of the system of legal evaluation of the penalty interest is undoubtfull. Having the purpose of ensuring the creditor's protection by improving its situation in case the debtor does not fulfill the monetary payment obligation on maturity, the „functioning"of the system of legal evaluation of the penalty interest, as far as the purpose desired to be obtained through this system is attainable, has economic perspectives that are to be developped as follows.

Economic perspectives on the legal penalty interest

The evolution of the monetary policy interest rate

Beginning with 1 September 2011, the reference interest rate of the National Bank of Romania is the monetary policy interest rate. Its amount shall be set through the decision of the Board of Directors of the NBR (according to art.3(1) of the GO 13/2011).

In Table no. 1 below, can be observed the evolution of the reference interest rate of NBR between December 2002 – October 2011.

Generally, the reference interest rate of the NBR dropped every year during the analyzed period of time, except for the years 2006 and 2008. If in February 2002 the amount was 34,6%, in October 2011 was registered a much more reduced amount of just 6,25%.

Beginning with November 2011, the evolution of the monetary policy interest rate is reflected in the chart shown below.
Also during this period of time the monetary policy interest rate contimued to drop reaching a minimum of 3,5% starting with 5 February 2014. The reason behind the NBR decreasing the monetary policy interest rate is related to the desire to stimulate crediting.

The legal penalty interest rate

The legal penalty interest rate is set starting from the legal reference interest rate of the NBR which is the monetary policy interest rate plus 8 percentage points. Therefore since 5 February 2014 its amount is 11,5%.

In order to calculate the legal penalty interest rate we use the formula for the calculation of the simple interest:

$$I = \frac{AxNdxIr}{100x365}$$

Where :
I = calculated interest
A = owed amount
Nd = number of days for which we calculate the interest
Ir = interest rate expressed in percentage.

Adapting this formula for the calculation of the legal penalty interest we have:

$$\text{Legal penalty interest} = \frac{\text{Owed amount x Number of days x Legal penalty interest rate}}{100x365}$$

For example, in the case of a debt of 10 000 ron due on 30 November 2013, that is paid on 01 March 2014, the legal penalty interest will be calculated as presented below in Table no.2 .

Hence, the legal penalty interest for a debt of 10.000 ron due on 30 November 2013 and paid on 01 March 2014 is of 290,76 ron. The amount is high considering that we are talking about a late payment.

Conclusions

After conducting this study we can draw the following conclusions:

- The monetary policy interest rate registered a continuous decrease during the last years reaching a minimum of 3,5%. The National Bank of Romania constantly reduced this interest wishing to stimulate crediting. If in February 2002 its value was 34,6%, currently the values is approximately 10 times lower;
- The legal penalty interest rate also registered a decreasing evolution, having in view that the monetary policy interest rate is at the base of its calculation.

Note: The case-law decisions indicated were delivered on the grounds of the old 1968 Civil Code, which does not allienate strikingly from the provisions of the New Civil Code developped in the present article.

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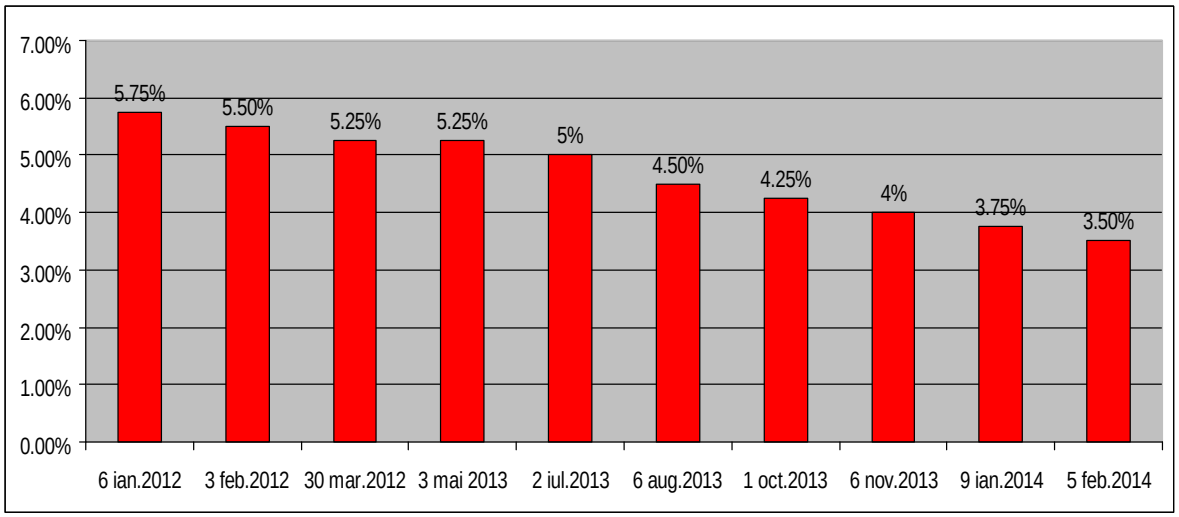
Table no. 1 The evolution of the reference interest rate of NBR between December 2002 – October 2011

Effective in the month:	The reference interest rate of the National Bank of Romania (%)
October 2011	6,25
December 2010	6,25
December 2009	8,00
December 2008	10,25
December 2007	7,50
December 2006	8,75
December 2005	7,50
December 2004	17,96
December 2003	20,41
December 2002	20,40

Source: http://www.bnro.ro/Rata-dobanzii-de-referinta-a-BNR,-istoric-3336.aspx

The evolution of the monetary policy interest rate:



Source: http://www.bnro.ro/Indicatori-de-politica-monetara-1744.aspx

Table no.2 The calculation of the legal penalty interest for a debt of 10000 ron, due on 30 November 2013, and paid on 01 March 2014

The period of time that exceeds the maturity date (number of days)	Legal penalty interest rate = monetary policy interest rate + 8% (%)	Legal penalty interest (ron)
1 December 2013 – 9 January 2014 (39 days)	4%+8%=12%	= (10000x39 days x12%)/100x365 days = 128.22 ron

9 January 2014 – 5 February 2014 (27 days)	3.75%+8%=11.75%	= (10000x27 days x11.75%) / 100 x 365 days = 86.92 ron
5 February 2014 – 28 February 2014 (24 days)	3.50%+8%=11.50%	= (10000x24 days x 11.50%) / 100x365 days = 75.62 ron
Legal penalty interest for the period 1 December 2013 – 28 February 2014		**= 128.22 + 86.92 + 75.62 = 290.76**