TOPICAL ISSUES CONCERNING USURIOUS INTEREST

This note concerns a number of controversial, topical issues regarding interest termed as “usurious”, referred to in Italian Law 108/1996 and in Article 644 of the Italian Criminal Code (1), and in particular those pertaining to default interest, to the so-called “supervening usury” and to the “floor” interest rate.

1. With regard to default interest, the question of whether or not it should be included in calculation of the usurious rate is the subject of debate.

On this matter, the judgment of the Civil Supreme Court, Division I, no. 350 of 9 January 2013, recently ruled that: “in order to ascertain whether or not the interest rates provided in a mortgage contract are usurious, the conventionally established default interest must also be included in the calculation”.

This judgment confirmed an approach that has been previously asserted in case-law (see, for example, Civil Supreme Court, Division I, no. 5286/2000 or Civil Supreme Court, Division II, no. 5324/2003) (2).

More recently two decrees were issued which, on one side, confirmed the ruling of the Supreme Court, but at the same time specified its practical application. The decrees in question were issued on 28 January 2014 by the Court of Milan (3) and by the Court of Naples (4).

(1) The legislator dealt with the matter in Italian Law 108 of 7 March 1996, making considerable amendments to the provisions of Article 644 of the Italian Criminal Code, which states the following: “Anyone who, outside the cases provided for by Article 643, induces someone to give or promise, in any form, for himself or for others, in return for a loan of money or other benefit, usurious interest or other charges, shall be punished with imprisonment of between two and ten years and with a fine of between EUR 5,000 and EUR 30,000.

The same penalty shall be applied to anyone who, outside the case of complicity in the offence provided for by the first paragraph, procures for someone a sum of money or other benefit by inducing another person to give or promise, to himself or others, for the mediation, a usurious fee.

The law establishes the limit beyond which interest is always usurious. Interest, even if below said limit, and other benefits or fees which, taking into account their actual terms and the average rate applied for similar transactions, prove in any case disproportionate to the loan of money or other benefit, or to the mediation activity, are also usurious when the person who gave or promised them is in economic or financial difficulties.

To determine the usurious interest rate, account is taken of the commissions, remunerations of any kind and expenses, excluding those for taxes and duties, associated with disbursement of the loan.

The penalties for the facts referred to in the first and second paragraphs shall be increased by between one third and one half: 1) if the guilty party acted in the exercise of a professional, banking or financial stock broking activity; 2) if the guilty party requested as collateral equity investments or shares in corporations or companies or real estate properties; 3) if the offence is committed to the detriment of a person in need; 4) if the offence is committed to the detriment of a person conducting a business, professional or craft activity; 5) if the offence is committed by a person subject with final order to the preventive measure of special surveillance during the established period of application and up to three years from the time execution terminated.

In the event of conviction, or application of the penalty pursuant to Article 444 of the Italian Code of Criminal Procedure, for one of the crimes referred to in this article, the seizure is always ordered of the goods constituting the price or profit of the offence or of sums of money, goods or other benefits of which the offender has the availability even through third parties for an amount equal to the value of the usurious interest or other benefits or fees, without prejudice to the rights of the person injured by the offence to restitution and to compensation of damages”.

(2) Both judgments cited stated that “the threshold rate referred to in Italian Law 108/1996 also regards default interest”.

(3) The Court of Milan (Cosentini) ruled as follows: “in agreeing with the principle affirmed by the Court according to which verification of compliance with the usury threshold must be extended to negotiation of the default interest rate, it follows that, if said rate proves to have been negotiated in terms that exceed the threshold rate recorded at the time the contract was concluded, the negotiation of the default interest rate would be null and void, pursuant to Article 1815(2) of the Italian Civil Code (and therefore not applicable), with the result that, in the event of delay or non-performance,
In both cases, the procedures were initiated by the borrowers who, in the light of the Supreme Court ruling set forth in the aforesaid judgment, requested the return or set-off of all the interest paid on the mortgage, as it was considered usurious.

The principles contained in the two decrees can be summarised as follows:
The default interest rate is of relevance for the purposes of usury;
This does not however mean that the default interest rate must be summed with the regular interest rate, as these indices must instead be verified individually;
If only the default interest rate is usurious, the Bank must only return the default interest and not the regular interest.

Hence, the courts dealing with the merits, by further developing the Supreme Court’s interpretation, have held that, even though the legislation considers the interest agreed for any purpose (and therefore even default interest) to be of relevance, it is more correct to assess the individual components separately because “they are rates that are provided for and applied alternatively”.

Accordingly, the customer may request the Bank, pursuant to Article 1815(2) of the Italian Civil Code, to return the default interest, but must continue to pay the regular interest, if lower than the usury threshold.

More recently further rulings were issued in compliance with the cited decrees, and namely by the Court of Venice (5) with decree of 26 February 2014, the Court of Trani (6) with decree of 10 March 2014 and the Coordination Committee of the Banking and Financial Ombudsman (ABF) (7) with decision no. 1875 of 28 March 2014.

2. Another issue that has been the subject of intense debate and which has caused extensive conflict is that of so-called “supervening usury” (8). Controversy specifically arose following the progressive lowering of market rates, and therefore, the consequent lowering of the related threshold rates.

Italian Law 108 of 7 July 1996 does not give any indication of the time when it is necessary to verify exceeding of the threshold rate. This has led to the assertion of two opposing approaches in academic writings and in case-law.

The first approach (9) believes that verification of whether or not the interest rate is usurious must be conducted at the time the contract is concluded.

\[\text{default interest could not be applied, and only the regular interest (if negotiated in compliance with the threshold rate) should be due}.\]

(5) In a similar way the Court of Naples (Ardituro) affirmed that: “only the provision relating to the rate to be applied to the default interest is sanctioned with total nullity of the clause determining the extent of interest, and not the one for the regular interest, which is in any case due because the rate is slightly lower than the usury rate established at the time by the Treasury Ministry”.

(6) The Court of Venice (Zanon) states the following: “it is held that it is not correct to sustain that the threshold rate would be exceeded as a result of the summation of the contractual borrowing rate and the default interest rate: these are rates that were provided for alternatively and that were applied alternatively. The Supreme Court case-law cited by the plaintiff to support the objection (Supreme Court 350/2013) does not in fact corroborate the assumption he makes, as it does no more than affirm the principle frequently expressed by Supreme Court case-law, that is, that the rule set forth in Article 1815 of the Italian Civil Code applies to the negotiation of interest due for any reason, that is, to regular interest and to default interest”.

(7) The Court of Trani (Pastore) rules as follows: “it is evident that the parties negotiated a different and alternative rate for the two different types of interest, applicable in different and separate circumstances”.

(8) The Coordination Board is an internal body of the Banking and Financial Ombudsman (ABF) responsible for deciding on appeals concerning matters of particular importance or that have generated – or could generate – different approaches among the three territorial boards. It is also observed that, in this ruling the Board deemed that Article 1384 of the Italian Civil Code, which provides that excessive penalties can be reduced upon own motion, is also applicable to default interest, following a direction that had already been seen in a Supreme Court judgment concerning leasing (Civil Supreme Court, Division III, no. 888/2014).

(9) On which, also for references, Dolmetta, Trasparenza dei prodotti bancari – Regole, 2013, 163 et seq. and Quaranta, Su usura e interessi di mora: questioni attuali, BBTC, II, 2013, 491 et seq.
Hence the contract which, at the time of conclusion, provides for a rate that is lower than the usury threshold must be considered valid, as any subsequent variation in the threshold rates is irrelevant.

These decisions appear to be in line with the provisions of Article 1 of Italian Law 24 of 2001 (10), which stated that: “interest that exceeds the limit established by law at the time it was promised or agreed, for any purpose, regardless of the time it was paid, is considered usurious” (11).

To support this theory which considers supervening usury to be irrelevant, reference is also made to Article 1815(2) of the Italian Civil Code, which states that the clause negotiated is null and void if “usurious interest has been agreed”, and which therefore suggests that the assessment must be made when the interest is agreed.

The second approach instead favours continuous comparison and adjustment of the interest rates accrued from time to time with the successive threshold rates in force from time to time.

In other words, here the reference time is considered to be the time the interest is paid (and not the time the contract is concluded).

This theory (12) specifically sustains that an interest rate which, even though it was originally lawful insofar as it complied with the threshold rate, later proves higher than said rate is usurious and that therefore if the APRC (13) for the period is higher than the UTR (14) in force at the time of payment, the first must be considered usurious, even if it was not at the time the loan was granted.

This reconstruction is founded on the wording of Article 644 ter of the Italian Criminal Code, which states that “the period of limitation of the offence of usury commences from the date of the last collection of both interest and principal”.

However it should be specified that if we were to opt for the admissibility of supervening usury, Article 1815(2) of the Italian Civil Code (which, as stated, provides for nullity of the clause containing usurious interest in the mortgage contract) could no longer be reasonably applied, as it refers only and exclusively to the clauses that establish usurious interest at the time the contract was negotiated.

Instead the cases of supervening partial nullity and of automatic replacement of the individual clause, provided for by Articles 1419(2) and 1339 of the Italian Civil Code respectively, should be applicable. Accordingly the “supervening” usurious rate must be replaced by the threshold rate and the Bank must return only the difference between the two rates to the borrower.

3.

(9) In this regard, of the many, the following judgments are cited: Civil Supreme Court, Division III, no. 8138/2009, Civil Supreme Court, Division I, no. 6514/2007; Civil Supreme Court, Division I, no. 25016/2007 and the very recent judgment Civil Supreme Court, Division I, no. 21885/2013 which opened a conflict within Division I of the Supreme Court by taking an opposite stance to Civil Supreme Court, Division I, no. 602/2013 and 603/2012.

(10) Law converting Italian Law Decree 395 of 2000, concerning “the authentic interpretation of Italian Law 108 of 7 March 1996, containing provisions on the matter of usury”.

(11) The Banking and Financial Ombudsman (ABF) also takes this approach in numerous decisions, including decision 2183/2011, decision 132/2013 and decision 5159/2013.

(12) In this regard, mention is given to the following judgments: Civil Supreme Court, Division I, no. 602/2013; Civil Supreme Court, Division I, no. 603/2013; Civil Supreme Court, Division I, no. 5286/2000. This theory is also favoured by rulings of the Banking and Financial Ombudsman (ABF), including decision no. 620/2012 and decision no. 1796/2013.

(13) APRC stands for annual percentage rate of charge

(14) Usury threshold rate
Lastly, another issue which, in view of the current trend in market rates, has raised a great deal of interest is the question of whether or not the so-called “floor” clause (15), provided for in some variable-rate mortgage contracts, is legitimate.

Banking and Financial Ombudsman (ABF) dealt with the matter and with decisions no. 668/2011 and no. 2688/2011 (16) it confirmed the validity of said clauses in contracts concluded with consumers insofar as compatible with the rules set forth in Article 34 of the Consumer Code on the unfairness of clauses, provided they are set forth in a clear manner and can therefore be easily understood by the customer.

However if, after their stipulation, the floor rates should exceed the usury threshold rates, the provisions of point 2 above would apply.

For further information please contact
Stefano Padovani, s.padovani@nctm.it

(15) The “floor” rate is a minimum interest rate and consists in the conventional provision of an interest rate that does not fall below the specified minimum limit.
(16) The Banking and Financial Ombudsman (ABF) considered the following clause to be valid, insofar as it was expressed in a clear and comprehensible manner: “the parties expressly establish that, during amortisation of the mortgage, the rate determined above can never be lower than 4.9%.”