

Premium interest rate payable to creditors which file claims before Italian courts

20 October 2020 | Contributed by [ARBLIT Radicati di Brozolo Sabatini Benedettelli Torsello](#)

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Creditors taking legal action before the Italian courts to secure payment against their debtors have long regarded this as a nightmare option due to the length and complexity of Italian civil proceedings. However, recently introduced legislation may render this nightmare a dream, as claimants bringing actions for payment are now entitled to a premium interest rate equal to that available in respect of late payments in commercial transactions under the relevant EU legislation.

Legal background

Similar to other EU member states, Italy implemented the EU Directive on Combating Late Payments in Commercial Transactions (2011/7/EU), which repealed EU Directive 2000/35/EC on the same subject matter. The directive was designed to combat late payments for goods or services within the European Union in order to protect weak parties (primarily small and medium-sized enterprises) from payment delays. The main legal tool devised to pursue such goal was the harmonisation of payment periods. To that effect, EU member states must ensure that if the date or period for payment is not fixed in the contract (provided that such contractual term is not grossly unfair), the creditor will be entitled to interest on the expiry of a 30-day period following receipt of the invoice or an equivalent request for payment.

Among the other measures provided for under the directive is the establishment of statutory interest for late payment, the rate of which corresponds to the sum of the reference rate and at least eight percentage points. Within the eurozone, the reference rate corresponds to the interest rate which the European Central Bank applies to its most recent main refinancing operations. Outside the eurozone, it corresponds to the marginal interest rate resulting from variable-rate tender procedures for the European Central Bank's most recent main refinancing operations. In short, the statutory interest amounts to at least 8%. Thus, the statutory interest exceeds the mere compensatory function of interest payable on late payments and incorporates a punitive component. This is even more apparent now, when interest rates are lower than ever, rendering the reference rate in the abovementioned calculation equal to zero.

Against this backdrop, Italy implemented as domestic law the original version of the directive (2000/35/EC) by means of Legislative Decree 231 of 9 October 2002 and the repealed directive (2011/7/EU) by means of Legislative Decree 192 of 9 November 2012. These pieces of legislation reproduced the wording of the directive almost literally. However, they did not amend the Civil Code and, in particular, Article 1284, which sets out the default interest rate applicable to pecuniary obligations, remained unchanged and applicable to all debts not falling within the material scope of application of the legislation implementing the late payment directive – namely, transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration.

Extension of premium interest rate beyond scope of commercial transactions

In 2014, in the pursuance of goals unrelated to those pursued by the Late Payments Directive, the Italian legislature added a fourth and fifth paragraph to Article 1284 of the Civil Code. In particular, by Government Law Decree 132/2014 (finalised by Law 162 of 10 November 2014), the government introduced "Urgent Measures of dejurisdictionalisation and other interventions for the definition of the backlog of civil proceedings" (with the word 'dejurisdictionalisation' sounding as cacophonous in Italian as it does in English). Within this framework, the newly introduced Article 1284(4) states that "[i]f the parties have not determined

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the rate, from the moment a legal claim is filed, the legal interest rate is equal to that provided by the special legislation on late payments in commercial transactions". Article 1284(5) further specifies that "[t]he provision of paragraph 4 also applies to the act by which the arbitration proceedings are instituted".

To fully understand the relevance of the new provision, the difference between the default interest rate applicable prior to the filing of a claim before an Italian court (0.05% as of 1 January 2020) and the interest rate applicable from the date of the institution of court proceedings must be considered. Assuming a payable debt of €1 million, the default interest payable for a delayed payment from 1 January 2020 to 31 December 2020 would amount to €500. The premium interest payable in the same period, assuming that court proceedings were instituted on 1 January 2020, would amount to €80,000 – 160 times more than the flat default interest.

It is therefore worth reviewing the conditions under which the premium interest rate applies.

Limits to scope of application of premium interest rate

As far as the applicability of the premium rate of interest is concerned, the reform that introduced Paragraphs 4 and 5 to Article 1284 of the Civil Code clarified that the new provisions apply only to court proceedings initiated after 11 December 2014, thus confirming that the reform was focused entirely on procedural rules and their impact on clearing the existing judicial backlog, rather than on the substantive law of payment of pecuniary obligations and remedies for the breach thereof.

As to the scope of application, Article 1284 of the Civil Code applies only to payment obligations, the non-performance of which is suitable to produce interests, provided that the payable sum is fixed (ie, determined in its amount) and due (ie, not subject to any terms or conditions). Under these circumstances, interests are due from the date of default of the payment obligation. However, the premium rate is payable only from the date of the filing of a request for payment in court (or before an arbitral tribunal) and only to the extent that the payment obligation originates from a contract or from the breach of a contractual obligation. Although the requirement of the contractual origin of the payment obligation is not expressly stated in the new legislation, following an initial period of uncertainty, with different commentators holding different positions in this respect, the solution discussed in this article was affirmed in at least two Supreme Court decisions. These decisions emphasised the possibility for the parties to derogate by agreement to the new legislative regime and affirmed that the:

legal interest rate equal to that provided for by the special legislation on late payments in commercial transactions, applicable from the time the legal action is filed, applies only when the court or arbitral proceedings are concerned with the breach of a contractual obligation (Cass, 7 November 2018, 28409 and Cass, 25 March 2019, 8289).

Types of proceedings suitable to trigger accrual of premium interest

Another aspect which has fuelled debate among commentators relates to the types of proceedings which are suitable to trigger the accrual of premium interest. There is no doubt that the filing of ordinary proceedings before a court (as well as the institution of arbitral proceedings) is suitable to trigger the accrual of premium interest. Further, although the issue is not entirely settled among scholars, relevant case law (Florence Court of First Instance, 31 January 2017) indicates that the granting of premium interest to a claimant does not require a detailed request for relief specifying that interests are requested under Article 1284(4) of the Civil Code. Rather, a generic request for interests in the relief sought is sufficient.

A more puzzling issue in this respect relates to proceedings other than ordinary proceedings, such as:

- *ex parte* court proceedings for the issuance of a payment order;
- expedited arbitration proceedings;
- enforcement proceedings; or
- other proceedings for interim measures or injunctive relief.

In this respect, the question arises as to whether these proceedings are suitable to trigger the accrual of premium interest.

The prevailing answer to the above question is positive with respect to all types of proceedings. The rationale in support of this conclusion sets out that Articles 1284(4) and (5) must be construed in light of the policy considerations that supported the legislative reform, which include not only the promotion of alternative dispute resolution methods and the fight against the excessive duration of court proceedings, but also, and maybe above all, the discouragement of debtors' initiatives aimed at extending proceedings through pretentious objections in order to postpone payment of what is due.

In light of the goal pursued (ie, the discouragement of dilatory use of judicial services which slows down the course of justice), it is reasonable to conclude that, as any kind of proceedings can in principle be used by a debtor to resist a claimant's requests, any kind of proceeding should be suitable to trigger the premium rate of interest payable by the debtor in the event that its defences are found to be unsubstantiated.

Comment

While primarily aimed at preventing strategic judicial tactics by debtor-defendants using (or abusing) court proceedings to unduly postpone payment, the recently introduced Italian legislation providing for a premium rate of interest payable from the date of institution of court or arbitral proceedings may prove attractive to creditors which are considering taking legal action in Italy in order to secure payment from their account debtors. The premium interest rate replicates the one available in EU member states under EU Directive 2011/7/EU with respect to commercial transactions between undertakings. However, the Italian reform has extended the application of that premium interest rate beyond the directive's scope of application, thus creating a unique situation in the international legal landscape and an attractive form of remuneration on capital for creditors which should, in the majority of cases, prove more rewarding than most businesses or investments. The longer the proceedings, the higher the amount payable in application of the premium interest rate. Thus, the creditor's nightmare of delay tactics and Italian 'torpedos' may fade into a dream of highly remunerative investments resulting from the filing of claims before the Italian courts.

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