

DOTTORATO DI RICERCA IN
“DIRITTO ED IMPRESA” - XXIX CICLO

INTERESSI BANCARI
E FORME DI USURA SURRETTIZIA.
IL COSTO EFFETTIVO DELL'ACCESSO AL CREDITO D'IMPRESA

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ABSTRACT

In the last few years, lawsuits between banks and their clients (whether businesses or individuals) have increased considerably.

The objective of the Thesis and the research carried out was to provide an overview of some of the main problems involving bank interest rates and the cost of access to credit for businesses.

The continuous transformation of the economy and the financial world lead to a constant search for new, more flexible, and innovative instruments and the creation of forms of lending that are more and more complex and advanced.

We attempt to point out how, sometimes, certain apparently “harmless” financial instruments and forms of lending actually contain hidden costs to such an extent that usury could be claimed.

The first chapter of the thesis contains a reconstruction of the main areas of L. 108/1996, art. 644 of the Penal Code and article 1815 of the Civil Code covering usury.

Subsequently, a more detailed analysis was conducted of certain lending forms that have the potential of introducing further forms of “surreptitious usury” (i.e. hidden interests), that appear of particular concern.

In particular, several chapters were dedicated to an analysis of usury contained in mortgages agreements and the phenomenon of the compound interest, which have always been under the scrutiny and criticism of legislators and jurisprudence, due to their potential to cause a high level of debt and costs for customers.

Subsequently, derivative financial instruments were examined, reiterating the main aspects of the dispute that has arisen of late regarding their legitimacy, to then focus attention on the relation between derivative instruments and the usury laws. Moreover, some specific types of “hidden” costs and commissions were analysed, included the so-called “up front” system.

Interesting reflections have also emerged from the analysis on leases, which nevertheless constitute a form of lending. Indeed, the most recent lawsuits have shown that, more and more, leases contain hidden, or “implicit” derivatives (the so-called “embedded derivatives”).

The last chapter covers “creditworthiness”, which is the rating as established pursuant to the European "Basel II" regulations attributed by banks to customers, whether upon granting the loan or throughout the entire relationship. The rating of a company carries significant weight with regard to granting credit to it, but with regard to the financial terms and conditions that are applied to it (interest rates, etc.). A deterioration of a company’s financial and economic conditions caused by illegitimate charges, resulting from speculative banking practices such as those indicated above, inevitably causes difficulties for the company, thus worsening its credit rating. Moreover, this situation can result in adverse reports in data bases used for assigning a credit rating, such as the "Centrale dei Rischi," the central risk database maintained by the Bank of Italy.

In some chapters we have been included excerpts of application analyzes that are inspired by actual cases, confirming the legal arguments set out in the course of the thesis and that numerically and graphically constitute legal concepts that often are likely to remain too abstract to be fully understood.

Upon finalization of the research, it appears safe to conclude that reducing the opportunistic, highly speculative banking practices that caused such a high number of lawsuits, and adopting a credit policy that is more compliant with the rules of the market, would serve the interests not only of businesses but of the banking system overall. Indeed, the latter would be less at risk of defaults while the legal and reputational risks we have witnessed over the last few years would be reduced.