

ACCESSORIES OF FISCAL OBLIGATION. LEGAL REGIME

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Abstract

The interest – which is an institution typical to private law, has been taken over by the fiscal field and adapted to the specific features of fiscal obligation – being defined by its imperative legal regime, which has at the least the following characteristic elements: unitary character, imposed legal percentage, compulsory demand of interest, automatic application. In order to render responsible fiscal debtors, the lawmaker has reintroduced, as an accessory of fiscal obligation, delayed payment penalties, which have a distinct nature and legal regime, but without the principle non bis in idem being transgressed. Our study aims to establish the legal regime of accessories typical to fiscal obligation, from the perspective of special normative acts, but also of the common law within the field – Civil Code and Government Ordinance No. 13/2011 – by pointing out at the same time both the particular circumstances and procedural ones regulated by the Fiscal Procedure Code, shedding light upon the controversial legal nature of accessories.

Keywords: interest, delayed payment penalty, delayed payment addition, civil interest, legal regime.

1. Introduction

The accessories of fiscal obligation are unitary regulated by the Fiscal Procedure Code¹, Title VIII “Collecting fiscal debts”, Chapter III “Interests, delayed payment penalties or delayed payment additions”, articles 119-124¹, accompanying any instituted obligation which has the specific features of a tax or contribution. Special law currently operates on the basis of three notions: interest, delayed payment penalties, delayed payment additions; although they seem apparently similar, they are different one from another, being at the same time different also from civil interest. The element which sets them apart is their specific legal regime, the three bearing the influence of fiscal field and constituting the object of the current analysis

The present work will establish the legal regime of the accessories of fiscal obligation, by carrying out not only a comparative analysis of them, but also by taking common law as reference point, underlining at the same time the particular features of the accessories in question.

Since there is no complete analysis of the accessories of fiscal obligation within specialized literature, we consider ourselves entitled to elaborate a thorough study of them, on the basis of the elements which provide legal substance to them.

2. Interest

2.1. Definition

Fiscal interest has a specific meaning, different from that attributed to interest by the Fiscal Code², Civil Code³ and Government Ordinance No. 13/2011 – regarding legal remunerative and penalty interest for financial obligations, but also the regulation of some financial-fiscal measures within bank field⁴.

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¹ Government Ordinance No. 92/2003, republished in Romanian Official Gazette, Part I, No. 513 from July 31st 2007, called in the present work *Fiscal Procedure Code* or Special law,

² Law no. 571/2003 on Fiscal Code, Romanian Official Gazette, Part I, no. 1027 from December 23rd 2003.

³ Law no. 287/2009 on the Civil Code, republished, Romanian Official Gazette, Part I, No. 505 from July 15th 2011, modified by Law No. 71/2011, Romanian Official Gazette, Part I, No. 409 from June 10th 2011; In relation to Civil Code, we will use in the current work, with the same meaning, the terms: common law

⁴ „Romanian Official Gazette, Part I, no. 607 from August 29th 2011.

The Civil Code regulates interest in the context of “payment conditions”, at article 1489 called “Interests for amounts of money”, which constitutes the maximum general ground of interest; the article in question deals with the legal remunerative interest or the interest-price for a borrowed amount of money.

The Government Ordinance No. 13/2011, article 1 paragraph (5) – the common law in the field of legal interest⁵ - attributes a broader meaning to interest, namely: “the amounts calculated in money, with interest title, but also other performances, with any title or name, to which a debtor commits himself, as an equivalent of the capital he uses”. According to the normative act mentioned above, interest has two components: a) remunerative interest – “the interest which is due by the debtor having the obligation to give back an amount of money at a certain term and which is calculated for the period which precedes the maturity of that obligation” [article 1 paragraph (2)] – this is in fact the definition attributed to remunerative interest by the Civil Code as well, at article 1489 b) penalty interest – “penalty which is due by the debtor of a payment obligation, for the failure to fulfill that payment obligation at the maturity” [article 1 paragraph (3)]; the meaning attributed to penalty interest is according to provisions of article 1535 of the Civil Code, which regulates “moratory damages in case of payment duties”⁶.

The Fiscal Code, at article 7 paragraph (1) point 13, attributes the following definition to interest: “Any amount of money which must be paid or received for the use of an amount of money, irrespective of the fact that it must be paid or received in the context of a debt or a deposit, or in accordance with a financial leasing contract, sale with payment in installments or any sale with payment in installments”; moreover, interest is here conceived as profit or income (“gains out of interests”), in order for the interest tax to be applied.

While the Civil Code regulates interest and damages (moratory damages, compensatory damages), the Fiscal Procedure Code institutes, by providing them with a specific meaning, the following: fiscal debt, delayed payment penalties and delayed payment additions, also called generically:

a) *accessory fiscal debt title* – signifies the “right to levy interests, delayed payment penalties or delayed payment additions, according to the case and legal conditions [article 21 paragraph (2) letter b) of the Fiscal Procedure Code] – from the perspective of the fiscal creditor;

b) *accessory payment obligation* – signifies the “obligation to pay interests, delayed payment penalties or delayed payment additions, as the case may be, corresponding to taxes, contributions and other amounts of money due to the general consolidated budget [article 22 letter d) of the Fiscal Procedure Code] – from the perspective of fiscal debtor.

According to the Fiscal Procedure Code, article 119 paragraph (1), interest, just like delayed payment penalty, is due as a result of the fact that “the debtor does not comply with his payment obligations within the maturity term”

Regulated in the context of taxes administration⁷, fiscal interest has an application scope limited to the delayed payment of a fiscal obligation – expressed, by definition, in money, and which, according to article 22 of the Fiscal Procedure Code, is represented by taxes, contributions, and so on. In the field of interest is also included the interest for the amounts of money which must be reimbursed or paid back from the budget to a taxpayer, according to article 124 of the Fiscal Procedure Code; this kind of interest is nonetheless particularized at least by the elements

⁵ In relation to the features of legal interest within civil law, see Silvia Lucia Cristea, “Cumulul dobânzilor cu penalitățile de întârziere”, in “*Revista de drept comercial*” Magazine (6/2004): 87.

⁶ According to which: “If an amount of money is not paid at the due date, the creditor is entitled to receive moratory damages, from the due date until the payment date”.

⁷ Defined as all the activities carried out by fiscal authorities in relation to: a) fiscal registration; b) declaration, establishment, verification and cashing of taxes, contributions and other amounts of money due to the general consolidated budget; c) settlement of the appeal against fiscal administrative acts [article 1 paragraph (3) of the Fiscal Procedure Code]

(hypotheses⁸) which generate it and by the procedural elements, becoming comparable with the restitution of the amounts of money not due within common law.

Fiscal interest and delayed payment penalties are levied for the fiscal debts which must be paid to the general consolidated budget, except for those debts which are due to the budget of administrative-territorial units and which trigger delayed payment additions.

2.2. Characteristics

The Fiscal Procedure Code institutes a “legal” interest, which is nonetheless different from the legal interest regulated by the Government Ordinance No. 13/2011, and which is characterized, in essence, by the following elements:

a) is mandatory, so that the fiscal creditor cannot give up on it; is quantified through the decision of a fiscal authority, with the exception of article 142 paragraph (6), which provides that the quantification is performed by the enforcement authority, the interest in question constituting an income of the budget to which the main fiscal debt belongs.

b) starts to operate from the day following the maturity term of the fiscal obligation.

Yet, special law also contains some exceptions from the rule mentioned above, regarding: differences of fiscal debt titles (additional or negative, as the case may be), resulting from the amendment of statements or the modification of a taxation decision; taxes and contributions extinguished by foreclosure; taxes, contributions and other amounts of money due to the general consolidated budget by the debtor declared insolvent or who does not have incomes or assets which can be pursued; the calculation method of the interest corresponding to the corporate tax, resulting after the annual regularization; the calculation method of the interest corresponding to the income tax, resulting after the annual regularization⁹;

Fiscal interest is automatically applied, not being necessary for the fiscal debtor to be put on default. Just as it happens in common law, the creditor is not interested in the reasons for the non payment, the simple fact that the maturity term of the main obligation is overcome leading to the automatic application of interest; for that matter, lawmaker establishes an absolute guilt presumption, which cannot be challenged.¹⁰

c) does not have a ceiling, so that it is calculated and due after the maturity term is reached¹¹, until the day the fiscal obligation is extinguished (included), for each day of delay;

d) has an unitary level, the same for all fiscal obligations, which is currently of 0,04% for each day of delay; this level is established by law and can be modified only through the annual budgetary laws, law giving up at the regulation of some criteria¹² for modifying interest.

⁸ According to article 117 paragraph (1) of the Fiscal Procedure Code (“Restitution of money”): “There are restituted to the debtor, on demand, the following amounts of money: a) those paid without a debt title; b) those paid in addition to the fiscal obligation; c) those paid as a result of a calculation error; d) those paid as a result of the erroneous enforcement of legal provisions; e) those reimbursed from the state budget; f) those established by means of decisions of judicial authorities or of other competent authorities, according to law; g) those remaining after the performance of the distribution provided for by article 170 of the Fiscal Procedure Code; h) those resulting from the valorization of the seized assets or from seizures by garnishment, as the case may be, on the basis of the judicial decision ordering the abolishment of foreclosure

⁹ See for that matter the provisions of article 120 paragraphs (2)-(7) of the Fiscal Procedure Code

¹⁰ See for that matter Daniela Moțiu, “Creanțele bugetare în procedura insolvenței” (I), in “*Revista de drept comercial*” (12/2007): 63-4.

¹¹ The absence of financial resources for insuring the financing of debtor’s activity cannot constitute a reason for removing the fiscal obligation – tax on salaries and accessories of the amounts of money due with such title; for that matter, see the Supreme Court of Justice, Department Contentious-Administrative, December, Decision No. 1093 from March 18th 2003.

¹² Previously, the value of fiscal interest was being established by taking into account the reference interest instituted by the National Bank of Romania, similar to how legal interest is established within common law.

Practically, we are talking about a legal valuation, so that interest cannot be established by the parties of the fiscal legal relation¹³;

e) is generalized, being due for any fiscal duty, including for custom duties, not paid at the due time, including for the particular circumstances regulated by articles 120-124 of the Fiscal Procedure Code.

There must not be paid interests or delayed payment penalties for the following: amounts of money due as fines of any type; fiscal obligations – accessories, established according to law; foreclosure expenses; judicial expenses; confiscated amounts of money, but also amounts of money representing the equivalent in lei of confiscated assets and amounts of money [article 119 paragraph (2) of the Fiscal Procedure Code]. The modified legal text mentioned above does nothing but confirming the specificity of fiscal interest, by delimiting its scope to the main fiscal obligation, special law observing the rule *non bis in idem*;

f) it can be subject to the facilities provided for by law, which can be usually granted by the authority administering taxes and contributions, according to special norms; facilities have a regime which is imposed as well, must be justified, not leaving place for the so-called “negotiation”.

g) is due also for the period for which were granted postponements or payment schedule files, in relation to the payment of the remaining fiscal obligations

2.3. Legal nature

Interest does not constitute an absolute novelty brought by the Government Ordinance No. 39/2010¹⁴ on the modification of the Fiscal Procedure Code. It also existed under this name in a previous period, being preceded and succeeded by the institution of delayed payment additions – which actually replaces, completely preserving their legal essence – the only different element being the name.

Throughout time, the legal nature of interest was differently understood by specialized literature, as it follows: pecuniary administrative sanction¹⁵, sanction typical to public law¹⁶, given that it is the result of a constitutional duty being transgressed¹⁷; “patrimonial accountability form, typical to fiscal law”¹⁸; specific sanction¹⁹ generated by administrative-financial transgressions within financial law; institution with a mixed nature – sanction for a delayed payment, but also partial damage of the state for levying with delay its rights²⁰.

We include interest and other accessories of fiscal obligations in the field of legal financial accountability²¹, which is accomplished by a variety of sanctions, such as: fine, blocking of a

¹³ According to common law, parties “can stipulate that the debtor commits himself to a certain performance in case the main obligation is not complied with”, through a penal clause concluded for that purpose, according to article 1538 paragraph (1) of the Civil Code. Moreover, according to article 1541 paragraph (1) letter b) of the Civil Code, the court can reduce the penalty when it “is obviously excessive in comparison with the prejudice which could be foreseen by parties at the conclusion of the contract, in relation to the non fulfillment of the contractual obligation”. In what concerns the “penal clause mutability”, see Liviu Pop, „Despre reglementarea clauzei penale în textele noului Cod civil”, in collective, *Noile Coduri ale României*, (Bucharest: Universul Juridic Publ. House, 2011), 279-291

¹⁴ Romanian Official Gazette, Part I, No. 278 from April 28th 2010.

¹⁵ Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, (Bucharest: Nemira Publ. House, 1996), 230.

¹⁶ Mihai Constantinescu, and others, *Constituția României, comentată și adnotată*, (Bucharest „Monitorul Oficial” Publ. House, R.A., 1992), 180.

¹⁷ The Constitution of Romania regulates taxes as main duties, under the form of financial contributions [article 56 paragraph (1)].

¹⁸ Dan Drosu Șaguna, *Drept financiar și fiscal. Tratat*, (Bucharest: Eminescu Publ. House, 2000), 695.

¹⁹ Emil Bălan, *Drept financiar*, 4th edition, (Bucharest: C.H. Beck Publ. House, 2007), 279. Moreover, the author associates fiscal duty with legal disciplinary accountability.

²⁰ Cristina Oneț, “Accesoriile creanțelor bugetare în lumina Ordonanței no. 61/2002”, in “*Revista de drept comercial*” Magazine (5/2002), 88-95.

²¹ See Rada Postolache, *Drept financiar*, (Bucharest: C.H. Beck Publ. House, 2009), 337-343.

budgetary credit, suspension from function of the persons who are responsible for committing deeds generating important damages or serious transgressions with a financial character, suspension of debtor's activity, seizures, interest, delayed payment additions, delayed payment penalties and so on, which have a legal regime provided for by the special norms which institute them.

By being included in the field of financial legal accountability, fiscal interest is clearly separated from remunerative interest, while the phrase "the non-payment at the due term generates interests" points the nature of reparatory interest of fiscal interest, having a special legal regime, governed by the provisions of the Fiscal Procedure Code. Understood like this, but preserving nonetheless its specific nature, fiscal interest can be compared with the interest for damages – moratory interest or penalty interest within common law, which is also due after the maturity date of the main obligations is reached. Following this reasoning, we consider fiscal interest as being a specific fiscal institution, reintroduced by the special law, with view to recover the prejudice caused to the general consolidated budget, by not paying in time the amounts of money due as taxes and contributions; it is easy to include fiscal obligation in the definition of legal accountability – "obligation to deal with the consequences emerging from the non observance of some behavioral rules" – here fiscal.

To conclude, as a result of interest being particularly taken over from the field of private law to the field of public law²², fiscal interest has a specific identity and legal regime, not being classified by the Fiscal Procedure Code in any way.

3. Delayed payment penalties

3.1. Legal nature

Together with interest, the lawmaker has reinstated also the obligation to pay delayed penalty interests, at article 120¹ of the Fiscal Procedure Code, by attributing a distinct legal regime to them. Delayed payment penalty sanctions the delayed payment of fiscal obligations, being accordingly regulated – "for each month and/or division of a delayed payment month" ("the delayed payment is sanctioned with a penalty").

Delayed payment penalties have the quality of a typical fiscal sanction and they can be cumulated with fiscal interest ("delayed payment penalties do not remove the obligation to pay interests"), but we cannot talk about two sanctions for the same fiscal transgression, law observing the principle *non bis in idem*. The regulation of delayed payment penalties upholds rather the idea of completely awarding damages to the fiscal creditor, similarly to what happens in common law²³, but delayed payment penalties are not similar to institutions regulated by Civil Code (*damnum emergens and lucrum cessans*, author's note).

Delayed payment penalties are at the same time a legal institution which is different from the legal or conventional penalties within common law, regulated by the provisions of article 1535 and the following of the Civil Code, any analogy for that matter being absurd.

²² Silvia Lucia Cristea, "Cumulul dobânzilor cu penalitățile de întârziere", in "Revista de drept comercial" (6/2004): 95.

²³ According to article 1531 of the Civil Code, "the creditor is entitled to receive complete amends for the prejudice which he suffered as a result of the non fulfillment of the legal obligation. The prejudice includes the loss effectively suffered by the creditor and the benefit of which he is deprived (...)". According to jurisprudence, the principle of *complete amends* for the prejudice caused by not paying an amount of money at the due term, allows, besides the interest which is due, also the updating of the amount of money which is due, by applying the inflation index. Interest is considered damages – moratory interests, while the amount of money resulting from application of inflation index represents damages – compensatory interests. For that matter, see the Supreme Court of Justice, Commercial Department, Decision No. 4579/2002", comment, Vasile Păulea, in „Dreptul” Magazine (2/2005): 202 – 206.

In brief, interests and delayed payment penalties have a reparatory-sanctioning character, accompanying the payment over the due term of the main fiscal obligation by the fiscal debtor and being integrated to the institution represented by fiscal legal accountability.

3.2. Percentage

Delayed payment penalties regulated by the Fiscal Procedure Code are added to the amounts of money representing interests and have a percentage which is legally determined, according to the delay period (art.120¹ of the Fiscal Procedure Code):

a) if extinguishment is performed within the first 30 days from the maturity date, there are not due and calculated any delayed payment penalties for the main fiscal obligations extinguished; practically, law institutes here a grace term, with the view to motivate debtor to pay his fiscal duty;

b) if extinguishment is performed in the following 60 days, the value of delayed payment penalty is of 5% from the main fiscal obligations extinguished;

c) after the term provided for by letter b) above is reached, the level of delayed payment penalty is of 15% from the main fiscal obligations which were not extinguished.

From a procedural point of view, penalties follow the rules instituted for fiscal interest.

The situations in which delayed payment penalties are due and the particular cases are identical to those instituted for fiscal interest.

4. Special situations regarding fiscal interest and delayed payment penalties

Special law, at articles 120-124, regulates some particular situations regarding the application of interest and delayed payment penalties, thus:

a) *Interests and delayed payment penalties for payments performed through bank channel*

According to article 121 of the Fiscal Procedure Code, "If banking units do not transfer the amounts of money to which the general consolidated budget is entitled, within 3 working days from the date the taxpayer's account is billed, this does not exempt the taxpayer from the duty to pay the amounts of money in question and causes him interests and delayed payment penalties at the value of those provided for by articles 120 and 120¹, after the term of 3 days" [paragraph (1)]. "In order to recover the amounts of money due to the budget and not transferred by banking units, but also the interests and delayed payment interests provided for by article (1), the taxpayer can file an action against the banking unit involved [paragraph (2)]. The text mentioned above does nothing but reinforcing the principle "accessorium sequitur principalem", but also preserving the quality of fiscal debtor, not only for the amount of money withheld and not transferred by the credit institution, but also for the accessories of that amount of money, the recovery of which can constitute the object of a legal action, according to common law.

b) *Interests and delayed payment penalties in case of compensation*

According to article 122 of the Fiscal Procedure Code and in the spirit of common law, in what concerns fiscal debts extinguished by compensation, interests, delayed payment interests or delayed payment additions, according to the case, are calculated by the date the mutual debts of creditor and debtor exist all together, being certain, liquid and demandable.

c) *Interests and delayed payment penalties due in case the insolvency procedure is opened*

Interests and delayed payment penalties due for fiscal debts which emerged before or after the date when taxpayers' insolvency procedure was opened have the legal regime provided for by the law regulating the insolvency procedure (article 122¹ of the Fiscal Procedure Code).

d) *Interests and delayed payment penalties relating to taxpayers for which a dissolution decision was passed*

As a result of taxpayer's dissolution, ceases the obligation to pay interest and delayed payment interests (which emerged before or after the registration of taxpayer's dissolution decision at the Register office), from the date the decision on taxpayer's dissolution was registered at the

Register office. The text above points out an application of the dissolution effects – taxpayer no longer exists as legal subject and, implicitly, his rights and obligations also cease.

The abolishment of the act which was at the basis of the dissolution registration has the following effect: interest and delayed payment penalty are calculated between the date dissolution acts were registered at the Register office and the date it becomes irrevocable the dissolution decision (article 122² of the Fiscal Procedure Code).

e) Interests for payment facilities

Special law includes in the field of facilities: postponements, payment schedule files, exemptions, payment discounts, for the remaining fiscal obligation. According to article 123 of the Fiscal Procedure Code, for the period these facilities were granted are due (only – author's note) interests²⁴, excepting the accessories mentioned ad article 119 (paragraph 2) of the Fiscal Procedure Code²⁵.

5. Delayed payment additions

Delayed payment additions, analyzed here, were introduced in the special law, article 124¹, through the Government Ordinance No. 39/2010, mentioned above, having an applicability scope which is limited to fiscal debts titles of local budgets, law instituting nonetheless their exclusivity.

Delayed payment additions have a legal regime which is different from that of fiscal interest and of delayed payment penalties; they constitute an accessory which is also different from delayed payment additions replaced by fiscal interest.

In relation to them, law has instituted an unique quota, of 2%, from the value of the main fiscal obligations not paid at due time, calculated for each delay month or division of a delay month, starting from the day which follows the maturity term and until the amount of money is extinguished.

At this point, law leaves no grace period, sanctioning the non payment starting from the day which follows the maturity term of the main obligation, as it happens with interest, but takes as reference unit “the delay month” or “the division of the delay month”, according to the case.

Even if from a procedural point of view is subject to the common provisions of article 119-124 of the Fiscal Procedure Code, instituted for interest and delayed payment interests, the delayed payment addition regulated by article 124¹ the Fiscal Procedure Code has a *hybrid* nature, borrowing elements from both fiscal interest and delayed payment penalty, law pointing out that it has both a reparatory and sanctioning function at the same time.

The existence of delayed payment additions does nothing but complicating the list of accessories of fiscal obligations, creating a non unitary legal regime for them.

6. Conclusions

Fiscal interest – civil interest. We exclude any similarity of fiscal interest with remunerative interest - regulated by Common Law, at article 1489 of the Civil Code, article 1 paragraph (2) of the Government Ordinance No. 13/201. Fiscal interest can be at most associated, according to its function, with penalty interest, which is legal, but without substituting it. Fiscal interest remains an institution typical to public law, bearing the latter's influence.

Fiscal interest – delayed payment penalty. They constitute accessories of fiscal obligation, are automatically applied, are generated by taxpayer's non adequate behavior and replenish the amounts of money due to public budget. Still, the different legal nature of the two separates them sometimes,

²⁴ See, for the application of article 123 of the Fiscal Procedure Code, Methodological norms for the application of the Fiscal Procedure Code, points 118.1.- 118.6.

²⁵ According to which: “No interests and delayed payment penalties are due for the amounts of money which must be paid back as any type of fines, fiscal obligations – accessories established according to law, foreclosure expenses, judicial expenses, confiscated amounts of money, but also amounts of money representing the equivalent in lei of the confiscated goods and assets”.

as their “tandem” is not generalized for all the situations provided for by special law. Fiscal interest has essentially a reparatory character, while delayed payment penalty has an accentuated sanctioning one, but both of them are integrated to financial legal accountability.

Fiscal interest – interest for the amounts of money restitution. Their names and common percentage, currently of 0,04% for each delay day, cannot lead to their overlapping. The interest for the amounts of money restitution is not mandatory, is not automatically applied and is granted only on the demand of the taxpayer-creditor. The hypothesis which generate such interest, but also the procedural aspects, make it differ essentially from the fiscal interest – due for the non payment of taxes and contributions, reconfirming the inequality of the subjects within the fiscal restitution relation. Moreover, as it is conceived, the interest for the amounts of money restitution has rather the legal regime of a restitution of the amounts of money which are not due within common law.

The existence, *by lege lata*, of the three types of accessories, creates a non-unitary regime of fiscal obligations: some may trigger interests, delayed payment penalties, while other only delayed payment additions, according to the public budget entitled to the debt title which generates such accessories. Moreover, the existence of delayed payment penalty and the fact that the latter is cumulated with interest, lead to an elevated value²⁶ of the accessories due, much greater than legal interest.

By lege ferenda, we plead for the unification of the three institutions analyzed in a common concept, which should be ideally called “delayed payment addition” and not be differentiated on budget categories, by observing, naturally, some particular situations, generated by the specificity of main obligation. Moreover, *by lege ferenda*, in order to render responsible the fiscal authority, we consider that is necessary to institute a legal unitary regime for fiscal interest and for the interest corresponding to the amounts of money which must be restituted by the public budget, if such amounts are certain and demandable.

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²⁶ In order to see their calculation, see Silvia Lucia Cristea, *quoted works*, 98.