COMPOUND INTEREST AND ITS VALIDITY (OR INVALIDITY) IN THE BANK-CUSTOMER RELATIONSHIP: THE STATE-OF-THE-ART OF BRITISH COMMON LAW DISCUSSED BY VIRTUE OF A COMPARATIVE ANALYSIS

Pierre Sinclair*

ABSTRACT: *Compound interest is a concept that, historically, has been tainted with an essentially mercantile flavour. It relates to the custom of banks in capitalising on the interest due by a client upon the expiry of a certain interval (the rest). Such practice, zealously vilified in some quarters, whilst acclaimed as a prosperous enterprise in others, has been challenged more recently at both judicial level and under statute, in the case of Italy. This contribution, in briefly recalling the origin of the concept of anatocism (the orthodox definition of compound interest) and, therefore, its Roman predecessor, the usurarum usurae and the futurarum usurarum usurarae (usurae), seeks to examine the state-of-the-art apparatus applicable to compound interest in the English common law. Such deliberations will thereupon give rise to what this paper aspires to describe as a peculiar development. In this respect, attention is drawn to the recent Consumer Rights Act 2015 and the manner in which the bank customer is theoretically entitled to rely upon it, with specific reference to the compound interest clause. As regards the 'Continental experience', the Italian jurisdiction, awash with judicial twists and incandescent doctrinal views on this topic, is discussed and analysed as a compelling and stimulating comparator.*

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*Associate Professor of Business Law, School of Management & Languages; Dept. of Business Management, Heriot-Watt University, Edinburgh (United Kingdom).

SUMMARY: 1. The etymology of a legal concept. - 2. The epistemology of a legal concept: the Roman law tradition and glimpses of a diachronic analysis. - 3. The compound interest from a common law point of observation. - 3.1. The rationale behind the compound interest in Britain and the historical development. - 3.2 Britain and statute. - 3.3. Britain and compound interest: a summary. - 4. The civil law position: Italy. - 4.1 The Italian Civil Code and the general rule of the invalidity of the compound interest. 4.2 The validity of the compound interest in the Italian Civil Code. - 4.3 Compound interest and the Italian banking legislation. - 5. A critical analysis and conclusion

1. The term 'compound interest' has been widely favoured for use both in common law and in the English speaking world,[1] whereas its Latin-based counterpart has opted for the more sophisticated term *anatocisme* (French) or *anatocismo* (both Spanish and Italian). The Latin *anatocisum* is derived from an ancient Greek term that, in turn, is a portmanteau of ANA and TOKOS. The former literally translates to 'above' while the latter signifies 'a product' and originates, albeit more remotely, from the verb TIRKO, more specifically 'to produce'. Ultimately, the portmanteau and its liaison with the expression 'compound interest' are somewhat intuitive and comprehensible: the anatocism, or, to apply the English terminology, the compound interest, is an agreement or, in some cases, merely a usage, whereby the creditor requests that the debtor execute the repayment, in connection with a balance (whether due or not), of an accrued sum of interest.

This sum of interest, differently from the simple interest, is not calculated on the capital,[2] but rather on the original capital plus the interest accrued during a specific or implied period,[3] commonly referred to as the rest. In other words, compound interest is a variant capable of producing interest for a future time span, such as a year, half a year or a quarter. It is clear that, from the debtor's perspective (whether or not he is a borrower or a guarantor or any person under an obligation to reimburse any pecuniary obligation to the creditor), the application of

[1]In Dutch, a further German language, the terminology is more similar to the English one: *samengestelde rente*, which literally means 'compound interest'.

[2]The Latin *sors*.

[3]It is a month, a term, a semester, a year.

compound interest may not afford him the most comfortable position. Yet, this concept is one of those topics that, when subjected to a comparative analysis, brings to light the most intriguing discrepancies between common law and civil law, and specifically two jurisdictions, the English and the Italian one.

The analysis will evolve through a discussion of both legislative sources and the relevant judicial precedents. The theory that will ultimately be corroborated in this contribution is that not only is the *ius positum* of the two jurisdictions diametrically at odds with each other, but that any possible convergence of the two is far from becoming a reality in the near future. Within such a context, the Roman law ancestor shall be wielded as an epistemological instrument as a means of highlighting, perhaps boldly, some inconsistencies of each of the two modern legal systems under scrutiny.

2. The topic of the compound interest reveals obvious and fascinating ties with the past and, surprisingly, an unexpected slight departure from the forebear of law itself, Roman Law.

In order to explain this, it is worth recalling that the *usurae supra duplum* were regarded as unlawful if the relevant clause was embedded in a contract. The usury, a phenomenon connected with the compound interest, was also prohibited as early as the Republican era: the *Lex Genucia*, dating back to 342 B.C., prohibited the practice, whereas a later *Lex Marcia*, probably dated 104 B.C., punished the shark lenders with the *manus iniectio pura*.[4] As recalled doctrinally,[5] the prohibition of the *usury* is ascribable to an Ulpianus' quote:[6]

'*Supra duplum autem usurae et usurarum usurae nec in stipulatum deduci nec exigi possunt et solutae repetuntur, quemadmodum futurarum usurarum*

[4]See VOLTERRA, *Istituzioni di Diritto Privato Romano* (Edizioni Ricerche, Rome 1961) 483.
[5]See CHERCHI, *Ricerche sulle 'Usurae' Convenzionali nel Diritto Romano Classico* (Jovene Editore, Naples 2012) 143-156.
[6]See ULPIANUS, 26 ad ed. D. 12.6.26.1.

usurae'.[7]

Likewise, as recalled by Cicero,[8] an opinion provided by the Roman Senate, the *senatusconsultum*, in the republican era, strongly banned the practice of the compound interest, usually associated with the usury.

The phenomenon of the *futurarum usurarum usurae* (the compound anatocism), therefore the compounding of the interest on a sum of interest, when the latter and the capital are not yet due, was prohibited in the Classical period. Seemingly, the reason lies on the fact that the creditor could not input to the capital (the Latin *sors*) an interest if the debtor was not yet under an obligation to return it.[9] Ulpianus' extract seems to suggest that the *usurarum usurae* too (the simple anatocism) was prohibited. This is the compound of an interest on the capital when the latter is already due. However, this reference might have been interpolated later, during the Justinian period.[10]

In the subsequent Justinian era, however, the *usurarum usurae* became an autonomous concept, independent of the *usurae supra duplum*,[11] therefore the interest exceeding the amount of the capital. More specifically, *usurarum usurae*, whether *futurarum* or not (therefore, whether on a capital not due yet or already due), became certainly prohibited.[12]

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[7]Basically: 'The interest above as much twice as the value of the capital as well as the compound interest connot be agreed upon, nor is the repayment possible, and the usury interest already paid could have been claimed back, whether or not the capital is already due.'

[8]See CICERO, ad Att., 5, 21, 12. It is recalled (VOLTERRA (n 4) 484) that the prohibition had been preceded by a ruling which banned the compound interest according to a monthly rest.

[9]See, in a convincing way, CHERCHI (n 5) 144. See also VOLTERRA, *Istituzioni di Diritto Privato Romano* (n 4) 483-484.

[10]This is suggested by some scholars: eg GUARINO, *Diritto Privato Romano* (Jovene Editore, Naples 2001) 800. *Contra*: CERVENCA, *Sul Divieto delle cd. "Usurae Supra Duplum* (1971) II Index 291 ff.

[11]See PIKULSKA, *Anatocisme*. C. 4,32,28,1: *Usuras Semper Usuras Manere* (1998)45 *Revue Internationale des Droits de l'Antiquite*, 429-449; MURILLO VILLAR, *Anatocismo. Historia de una Prohibición*, (1999)69 *Anuario de Historia del Derecho Español* 497-518.

[12]The adjective 'compound', now associated with the noun 'interest', may reveal the legacy of the 'compound anatocism' existing in Roman Law. See A Cherchi (n 5) *passim*.

3.1. The compound interest at common law would appear to be, particularly in the case of England, a concept unadulterated by unlawfulness. The legitimacy of the practice seems to rest on a fiction: on a certain sum of money that is lent by a bank to a client, the capital and the interest are virtually repaid and relent in the books, either on a yearly rest or a half-yearly one. However, the relevant sum that is lent for the following period will include also the interest (the compensatory one) previously accrued on the original capital. This is tantamount to saying that capital and interest are compounded for the following rest.

Historically, this practice dates back to a time when in England there was a specific statute which prohibited the usury interest. According to the legislation then in force, of a criminal nature and hinged upon a piece of legislation of 1545,[13] it was prohibited to charge interest exceeding a specific percentage, initially fixed at ten per cent per annum. This percentage, over the following centuries and until the 19th century, was repeatedly scaled down by the English legislature to the point where a more modest and less remunerative (for the banks) level of five per cent per annum was established. Any contract that allowed for an interest rate percentage exceeding the legal threshold would be instantly rendered void; further, any banker who, for a specified loan, overstepped the applicable threshold would be regarded as a potential perpetrator of a criminal offence.

As a means of sidestepping the aforementioned pitfalls, bankers envisaged a stratagem or, as just alluded, a fiction. Upon expiry of a specific period (the half-yearly or yearly rest), the loan should have theoretically been re-paid. In relending the money, though, the amount given to the client was not the original one, but the sum of the capital plus the interest accrued in the previous rest. The interest, calculated on the original capital, plus the interest accrued in the previous rest, no

[13] As recalled by Lloyd LJ in *National Bank of Greece SA v Pinios Shipping Co* [1989] 3 WLR 1330 (HL) at para 653. This piece of legislation is the Usury Act 1545, 37 Hen 8 c 9.

longer required the lender to fix an excessive percentage of interest.[14] Formally, the banker applied a rate within the legal limit also on the capital for the following rest. However, it is obvious that, in reality, the capital was not the pure capital, but rather the compounding of the original capital plus the interest accrued in the previous rest. It is consequential and logical that, without this myth, *ergo* the repaying and relending upon expiry of a specific rest, the interest rate would have been almost certainly usury. The banker, in applying the interest on a pure capital without compounding, would have had no option but to apply a very high interest rate, in order to secure adequate remuneration.

Despite some obvious perplexities of an ethical nature, this banking practice was regarded as lawful at common law, albeit with some *caveats* in term of applicability. As per Lord Cottenham L.C.'s remarks in consideration of *Fergusson v Fyffe*:[15]

'Generally a contract or promise for compound interest is not available in England, … except perhaps as to mercantile accounts current for mutual trans-actions …'

Some decennia before, at the beginning of the 19th century, in *Ex parte Bevan*,[16] Lord Eldon had already hinted at this principle and a possible validity of the compound interest:

'So this is legal between merchants; where there is no agreement to lend to either; but they stipulate for mutual transactions, each making advances; and that, if at the end of six months the balance is with A., he will lend to B., and vice versa.'

The usury law was abrogated later, in 1854, as a result of the Usury Laws Repeal Act 1854.[17] However, the compound interest, which to a certain extent was a consequence of that piece of legislation, somehow persevered thereafter, alt-

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[14]See also Section 4 below, particularly the minority, albeit persuasive, school of thought existing in Italy, where the phenomenon of the capitalisation of the interest in the banking current accounts is interpreted in the same way.
[15](1841) 8 Cl & Fin 121,140.
[16](1803) 9 Ves Jun 223,224.
[17]See 17 & 18 Vict c 90.

hough that abrogation had removed the *ratio essendi* of the practice. Needless to say, the process of validating the compounding of interest in a *corpus iuris* where the usury is no longer a criminal act, was not so straightforward.

A first, albeit timid, opening move in addressing the compound interest in the post-usury era is the Court of Appeal *decisum* in *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou*[18]. The legality of the practice is indirectly - indeed decidedly indirectly - inferable from Scrutton LJ's remarks[19] in commenting on *Fergusson v Fyffe*.

'The House of Lords in *Fergusson v Fyffe* treated compound interest as not payable, except perhaps on mercantile accounts current for mutual transactions'.

In essence, *Deutsche Bank und Disconto Gesellschaft* held that the compound interest practice was valid exclusively in connection with mercantile bank accounts. For transactions of a different nature, the stance which the courts would adopt was left unclear, although the tenor of Scrutton LJ's statement appeared to suggest that a further extension of its valid practice was unlikely.

However, and not without surprise, the more recent landmark case, 'Pinios',[20] marked a new chapter in the judicial attitude towards the issue of compound interest. In this case, Pinios Shipping Co. bought a ship. Pursuant to the relevant contract, part of its purchase price (70%) would be paid by the purchaser in force of 14 six-monthly instalments. On its turn, the payment of this balance would be secured, on the one hand, by a first mortgage on the vessel granted by the purchaser in favor of the builders. On the other hand, the National Bank of Greece SA (the Bank) guaranteed the payment of the first six instalments, whereas a second mortgage and a personal guarantee from another person afforded the necessary protection to the Bank. Due to a builder's non-performance of its own obligations, Pinios failed paying the first two instalment; therefore, the Bank was

[18][1931] 4 L.D.B. 293. See also *Yourell v Hibernain Bank ltd* [1918] AC 372 (HL).
[19]Again, see the '*Deutsche Bank und Disconto Gesellschaft*' *decisum* (n 18) at p 295.
[20]See *National Bank of Greece SA (Appellant) v Pinios Shipping Co No 1 and Another Respondents* (n 13).

called on to pay these two instalments under the guarantee. However, the ship was in the meantime lost at sea and the insurance monies received were insufficient to enable Pinios to repay the Bank under the second mortgage. The Bank made a written demand to Pinios to get the repayment of the second mortgage. Because Pinios failed to pay the Bank, the latter sued, claiming the amount owing under the mortgage plus interest. The Court of Appeal held that, since the second mortgage contained no provision entitling the bank to charge compound interest, the bank's entitlement to charge compound interest ended when the bank made its demand for repayment and thereby terminated the bank/customer relationship. However, the House of Lords overturned this decision and affirmed that the entitlement of the Bank to charge compound interest extended to the following period.

The *decisum*, which can be regarded in a non-legal discourse as bank-friendly, slightly overturned *Deutsche Bank* in holding that a term arranging for a compound interest should be construed to be a natural consequence of a contract existing between a bank and a client (not necessarily of a mercantile nature, but of any nature), with its usage extended also to transactions concluded beyond the bounds of those exclusively connected with bank accounts. The only qualification introduced by the neo-liberal 'Pinios' *decisum* is that the term is implied exclusively for mercantile transactions, whereas in other cases (therefore, it is assumed in this paper, in the relationship with a consumer) a specific term is necessary for the compound interest to be valid.[21]

A further principle introduced by the 'Pinios' *dictum* is that the compound interest can be charged not simply until such time that the bank asks for payment, but also in the subsequent period, in circumstances where the due amount has not yet been fully repaid and, seemingly, the relevant account is already closed. The

[21]For comments on 'Pinios', see *Banks and Compound Interest* (1990) *Journal of Business Law* 331-333; MANN, *Problems of Compound Interest*, (1990)106 *Law Quarterly Review*, 176-179; KINGSFORD-SMITH, *The Banker's Right to Compound Interest*, [1990] *Lloyd's Maritime and Commercial Law Quarterly*, 489-491.

comments of Lord Goff of Chieveley are worthy of contemplation: if the banker is entitled to capitalise interest, 'there appears to be no basis in justice or logic for terminating that right simply because the bank has demanded payment of the sum outstanding in the customer's account.'[22] The entrenched principle (*ergo*, entitlement to charge compound interest until and not beyond the request of payment), established as early as *Fergusson v Fyffe*,[23] was based on the distinct assumption that, once the account had been closed, the compound interest shall no longer be chargeable and, from this time onward, the bank is entitled to gain from a simple interest only. Additionally, a dilemma, namely whether compound interest can be charged exclusively on yearly or half-yearly rests, was resolved by a further court decision, *Kitchen v HSBC Bank plc*.[24] In this case, it was held that the usage of quarterly rests can be regarded as consistent with the functioning of modern banking practice.

For reasons of completeness of analysis, it is worth mentioning that English courts have ruled on the notion of compound interest also as regards the possible connection of the notion with the cognate construct of restitution of sums paid by mistake and, therefore, claims for unjust enrichment. In *Sempra Metals Lts v Inland Revenue Commissions*[25] it was held that the court had a common law jurisdiction to award interest, simple or compound, for damages on claims for non-payment of debts as well as on other claims for breach of contract and in tort. However, more recently, legal scholars[26] argue that this court decision erroneously equates the time value of money with compound interest, whereas the alternative 'benefit choice' approach to the time value of the money, endorsed by more re-

[22]See *National Bank of Greece SA (Appellant) v Pinios Shipping Co. No 1 and Another Respondents* (n 13).
[23]8 Cl. & Fin 121.
[24][2000] 1 All ER (Comm) 787, 791.
[25][2007] UKHL 34, [2008] 1 AC 561.
[26]See HSIAO, *A Shift in the Objective Measure of the Time Value of Money*, (2015)23 *Restitution Law Review* 92-105.

cent *decisa,*[27] seems to be more persuasive.[28]

3.2 In Britain, distinct from a civil law comparator,[29] banking legislation does not provide any legal provision specifically designed to regulate compound interest.[30] A bank customer, technically speaking, is not protected by *ad hoc* rules. As correctly suggested by scholars,[31] the only macro-system of norms safeguarding the bank customer is that already in place for any other customer: the Unfair Contract Terms Act 1977 (UCTA 1977) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999).[32] Actually, these two pieces of legislation have been amalgamated, very recently, in the Consumer Rights Act 2015 (CRA 2015).[33] In regard to this newly enacted statute, section 62, in a way not so dissimilar from, nor identical to what was established in the previous UTCCR,[34] would appear to contain a norm that may offer some protection to the bank customer. *Mutatis mutandis*, the compound interest clause would be unfair, and therefore invalid, if (a) it gives rise to a 'significant imbalance in the parties' rights and obligations',[35] and (b) the term is 'contrary to the requirement of good faith'.[36] The natural consequence of a term being ruled to be unfair would be the lack of enforceability attached to it. As per s 62(1), an unfair term of a consumer contract 'is not binding on the consumer', although the same consumer is not prevented 'from relying on the term … if the consumer chooses to do so', pursuant to the following s 62(3).

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[27]See *Benedetti v Sawiris* [2013] UKSC; [2014] AC 938.
[28]The link between a *quantum meruit* action for unjust enrichment and the notion of compound interest seems to be a peculiarity of common law. However, it does not take into account that compound interest is a mechanism merely of a banking nature.
[29]See the following Section 4.
[30]Such as the *Financial Services and Markets Act 2000*.
[31]See ELLINGER, LOMNICKA, HARE, *Ellinger's Modern banking Law* (OUP, Oxford 2011) 763.
[32]SI 1999 no 2083.
[33]Chapter 15. The Royal Ascent to this piece of legislation was given on 26 March 2015. The legal provisions applicable to the matter in discourse have started being applicable as from 1 October 2015.
[34]Particularly regulation 5(1).
[35]S 62(4).
[36]S 62(4).

In respect of the two alternative elements discussed above, subsection (b) would appear to present significant cause for concern on the part of the customer, also in light of the fact that, in Britain, the local central bank is not empowered to establish the average level of rates applicable to the range of specific banking transactions. In modern civil law jurisdictions, the interest rate applicable to a specific transaction shall be presumed as usury if it exceeds a certain threshold, established from time to time by the local authority.[37] Conversely, in Britain, where a possible infringement leading to criminal proceedings is not accounted for, the consumer would appear saddled with a decidedly onerous task in seeking to successfully lodge a legal claim if he wanted to corroborate that the compound interest has given rise to a significant imbalance in the parties' rights and obligations.[38]

Admittedly, a moderate form of relief is afforded to the bank consumer by the *Lending Code* (the LC), the code of practice promoted under the aegis, mainly, of the British Banking Association. This framework, in its latest version,[39] seems to suggest that any interest rate levied on the clientele must be explicitly communicated, therefore expressly agreed between the parties. The rule is encompassed within Section 5 of the LC, under the heading 'Current account overdraft'. In the pre-sale information usually provided by the credit institution, it is suggested that the customer 'must be provided, where relevant, with details of any charge payable, the interest rate to be applied or, if reference interest rates are to be used, the method for calculating the actual interest and the relevant date and index or base for determining such reference interest rates.'[40] It is further elaborated, under Sec-

[37]See, in Italy, Banca d'Italia, Tassi Effettivi Globali Medi.
As from 14 May 2011, any rate applied to a transaction exceeding by more than eight point percentages the average rate (the Annual Percentage Rate of Charge) ascertained by the same Bank of Italy, shall be regarded as usury.
[38]The bank could always argue that the unfavourable practice of the compound interest is more than compensated by the opportunity for the customer to have access to the credit.
[39]See BBA and UK Cards Association, *The Lending Code. Setting Standards for Banks, Building Societies, Credit Cards Providers and their Agents* (March 2011, revised on 28th September 2015) <http://www.theukcardsassociation.org.uk/wm_documents/2011%20Lending%20code%20%20-%20revised%20Sept%202015.pdf> accessed 12 October 2015.
[40]Rule 77.

tion 5 below, that the banks subscribing the LC 'should make information about overdraft interest rates available to customers' through 'a telephone helpline', 'a website', 'notices in branches' or 'information from staff'.[41] A similar suggestion, concerned with interest rates, is conveyed to credit cards providers to regulate the manner in which interest rates of the credit cards are charged and communicated to customers.[42]

Needless to say, the LC places no legal obligations on banks in respect to how they operate, although it may act as a framework of moral and good practice that providers, also in the area of the compound interest, 'feel' obliged to abide by according to principles of fairness. It is more dubious whether the customer may rely on this framework in order to sue a bank which decided not to comply with its guidance. As things currently stand, particularly in light of the fact that no domestic legislation currently provides a mandate to the code in order to protect the bank customer, any pursuit of a claim through the courts would invariably be futile.[43] Symbolically, the only avenue open to the customer or any consumers' association is to use the lack of compliance as a basis on which to mount an assault on the reputation of the bank concerned. Nevertheless, it is regrettable that compound interest is not acknowledged in the LC, as it is mingled with the general concept of interest rates and the way they are calculated: too little, too late! The protection afforded to the bank customer in Britain, in such a sensitive area of the customer-bank relationship, has proven to be very limited.

3.3. In reflecting both on British case law and on the relevant statute, it can be affirmed, albeit with a certain degree of approximation, that there are fundamentally four main principles as far as the compound interest is concerned.

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[41]Rule 90.
[42]Section 6, Rule 113, LC.
[43]Ombudsman.

- At common law, compound interest is a fiction, viz. the consequence of the reciprocal lending and re-lending between bank and customer upon expiry of every rest. This myth originates from the usury law and is a legal device for lenders to avoid what, otherwise, would be the obvious perpetuation of a crime. However, upon the abolition of the usury law in the mid-twentieth century, compound interest, instead of passing away quietly by virtue of 'natural causes', somehow managed to persevere.
- It was with the 'Pinios' case that the practice of compound interest, merely alluded to in prior case law,[44] became an autonomous and fully recognised *genus*. In this *decisum*, compound interest is acknowledged as implied for mercantile transactions, whereas it requires an express contractual term to be applicable to other typologies of banking activities.
- Additionally, a further protection of the consumer is achieved by means of a non-legislative framework. Specifically, the *Lending Code 2011* requires that British banks ensure that compound interest is charged exclusively in cases where a specific term is embedded in the contract.[45] However, the LC is far from affording the bank customer a judicial recourse on which to stake a claim, rather it merely requires that the compound interest be made explicit in the contract.
- Residually, in Britain, the protection of the bank customer, as regards the compound interest, rests exclusively on the laws aimed to protect the consumer, more recently enshrined in the Consumer Rights Act 2015, specifically in s 62. This statute is the legacy of the previous UTCCR 1999, particularly regulation 5. However, the relevant legal provisions, albeit theoretically applicable to the bank customer, has never been notably invoked vis-à-vis the British courts, with regard to the concept of compound interest.

4. Of the various comparators that theoretically could have formed the ba-

[44] *Deutsche Bank und Disconto Gesellschaft v Banque des Marchands de Moscou* (n 17).
[45] See specifically section 4 and section 5 of the Code.

sis of a revealing comparison with the British system, the Italian jurisdiction provides a particularly apt comparator. The choice is not coincidental. Italy is a country where compound interest is legislated upon within the Italian Civil Code (ICC). However, a specific piece of legislation has been passed to cover banks and intermediaries. The interaction between this *ad hoc* legislation and the ordinary one, encompassed within the ICC, has engendered a serpentine position of the Italian judiciary. These diverse and fluctuating stances are highlighted in this Section.

4.1 In the ICC, the manner in which compound interest is treated would appear to be quite straightforward:

According to art 1283 of the ICC, the due interest shall not usually accrue additional interest, *ergo* compound interest. The compensatory interest that generally accrues on any sum owed by the debtor to the creditor[46] is calculated, from time to time, on the original capital. However, the capital shall not encompass the future interest, neither the compensatory one nor the punitive one.[47] Accordingly, any clause in the contract arranging for a compound interest shall be rendered invalid. This concept of invalidity has been reinforced by recent court decisions[48].

Despite the general invalidity of compound interest, two exceptions are usually conceded: one is contemplated in the same Civil Code and is detailed in the following Section 4.2; the second one is enshrined in banking legislation (Section 4.3 below).

4.2 The entitlement of a creditor to demand compound interest is recog-

[46]In the Italian language and pursuant to the jurisdiction, this interest is defined as '*interesse corrispettivo*', roughly compensatory interest. The compensatory interest is the natural consequence of an amount of money borrowed by a debtor. It is charged on the debtor, simply because he has availed of a good - the money - and has taken advantage of that. See IUDICA, ZATTI, *Linguaggio e Regole del Diritto Privato* (CEDAM, Padua 2015) 258. In the ICC this is reiterated by art 1282.

[47]The penalty interest is due by the debtor for the damage caused by the lack of performance, simply by the late performance. In Italy this interest can be charged, and it is perceived as legitimate (art 1224, ICC).

[48]Italian Supreme Court, no 6518 of 22 March 2011.

nised in some specific circumstances. The general condition for this is that the compensatory interest must have been due for at least six months. If this is the case, the compound interest shall be charged in accordance with one of two possible procedures:

a. First, there shall be a judicial claim aimed at the restitution of the compound interest;[49] or

b. There is a specific agreement, subsequent to the expiry of the compensatory interest, and this agreement expressly recognises the right to demand compound interest (art 1283, ICC).

Furthermore, irrespective of whether or not one of the conditions above is met, the prohibition on compound interest is derogated by art 1283 and therefore to charge compound interest shall be lawful - in cases where there were specific practices of a normative nature[50] (the so called '*usi normativi*'). For the derogation to be valid and, therefore, the compound interest to be legitimately charged, the practice is required to be of a normative nature. The dilemma, therefore, is to distinguish practices which are normative from those which are merely contractual. A practice of a normative nature is defined, doctrinally,[51] to be characterised by two elements: (a) the general and regular repetition, in a certain environment and for a protracted period of time, of a certain kind of behaviour; (b) a compliance with that behaviour in the environment so as to suggest that behaviour is regarded not simply as practice, but also necessary.[52] If the latter element (b) was missing, that practice shall not be normative, but merely contractual, thereby not giving rise to any contractual obligation. Conversely, a practice of a legal/normative nature is a source of law; as a result, any individual or person who claims a violation of a right originating from such a source will have the right to raise a legal claim vis-à-vis a

[49]Italian Supreme Court, no 21340 of 18 September 2013.

[50]The 'usi normativi' in Italian, literally the 'normative usage' or, better, the 'legislative usage'.

[51]See TORRENTE - SCHLESINGER, *Manuale di Diritto Privato* (22nd edn Giuffre' Editore, Milan 2015) 37-38.

[52]This is the further element that, in Roman law terminology, shall be regarded as *opinion iuris ac necessitatis*.

court, seeking any judicial remedy required to protect that right.

4.3 To charge compound interest is a common practice in the banking sector, including in the case of Italy. Historically, the legitimacy of the compound interest in Italy rested on some entrenched decisions of the Italian Supreme Court, the *Corte Suprema di Cassazione*.[53] The reasoning underlying these rulings is the following one: art 1283 of the ICC allows a creditor to charge compound interest, so long as there is a practice which is normative in nature. Banks, including those in Italy, are conditioned by custom to fixing the terms and conditions of their main transaction on forms, each of the transactions/operations they offer to the market. These forms, in Italy traditionally promoted under the aegis of the Italian Banking Association and referred to as *Norme Uniformi Bancarie*, represent a normative usage, as they are applied uniformly to the clientele. For years, this practice of the banks had never been challenged as it was regarded to be of a normative/legislative nature, according to the requirements of the ICC. As a direct result, banks were entitled to charge compound interest.

However, this pillar of custom was unceremoniously uprooted by an unexpected decision of the Italian Supreme Court, no 2374 of 16 March 1999, which was immediately echoed less than two weeks later in the same Italian Supreme Court, no 3096 of 30 March 1999. The bottom line of these court decisions was that customary banking practice in charging compound interest was not decreed as tantamount to a legislative usage, but rather equated to mere commercial practice. Such a practice does not have the required element of the *opinion iuris ac necessitatis*. As a result of this, it was not lawful for the banks to charge compound interest due simply to the fact that the condition under art 1283 was not met. The usage is merely contractual, whereas art 1283 of the ICC requires that the practice be legislative in nature.

[53] Italian Supreme Court 15 dicembre 1981, no 6631; Italian Supreme Court 19 agosto 1983, no 5409; Italian Supreme Court 6 giugno 1988, no 3804.

The potential repercussions of the above court decisions were only too obvious to the Italian legislature, which had little option but to batten down the hatches. The unexpected decisions of the Italian Supreme Court would have put at risk the business of so many financial institutions. Clauses in bank accounts, loans and other forms of lending to the clientele, entitling the bank to charge compound interest, would have otherwise been regarded as null and void.

The outcome of this was the passing of a new statute, viz. the Legislative Decree 4 August 1999, no 342. This piece of legislation amended the Italian banking legislation, specifically the Legislative Decree no 395 of 1 September 1993 (the Italian Consolidated Banking Act or ICBA), particularly art 120.[54] According to the novel paragraph 2 of art 120 of the ICBA, a Governmental Body (the *Comitato Interministrariale per il Credito ed il Risparmio*, the CICR) was given a mandate to establish 'modalities and criteria for the accrual of interest on the interest in the banking transactions', so long as the interest – either the active one charged by the bank to the clientele[55] or the passive one due by the bank for its own liabilities[56] – accrues in accordance with the same rests.[57] Fundamentally, the CICR, in force of its decree issued on 9 February 2000 and which entered into force on 22 April 2000,[58] stipulated that 'the debit and credit of the interest shall occur based on rates and with a periodicity established in the contract' (art 2(1)), provided that 'as regards the same bank account the identical periodicity shall be established in the

[54]The original art 120 was made up of a simple paragraph stipulating as follows:
'The interest on payments with a bank of cash, checks issued by the same bank or banking checks drawn on the branch where the payment is executed accrues with the same date when the payment is made and until the date of the withdrawal.' (our translation)
For commentaries on the original art 120, ICBA, see TALIERCIO, *Trasperenza delle Condizioni Contrattuali*, in P Ferro-Luzzi and G Castaldi (eds), *La Nuova Legge Bancaria III* (Giuffrè Editore, Milan 1996) 1854-1859; DONVITO, FERRAJOLI, RODALI, SILLA, *Commentario alla Legge Bancaria* (Il Sole 24 Ore, Milan 1997) 273.
[55]For instance, loans and other lending transactions.
[56]An example can be bonds or bank accounts.
[57] For commentaries on this penultimate version of art 120, ICBA, see CARRIERO - CASTALDI, *Commentary to Art 120*, in F Capriglione (ed), *Commentario al Testo Unico delle Leggi in Materia Bancaria e Creditizia* (2 nd edn CEDAM, Padua 2001) 926-935,
[58]See MANZI, *Commentary to Art 120*, in F Capriglione (ed), *Commentario al Testo Unico delle Leggi in Materia Bancaria e Creditizia III* (3rd edn CEDAM, Padua 2011) 1756.

calculation of the interest both the active and the passive one'.

In the immediate aftermath of the passing of the CICR decree, the area of compound interest in Italy enjoyed a comparatively untroubled period of tranquillity, although the truce did not extend sufficiently to placate some remaining grey areas. Among these, it was unclear and thus debated extensively whether the decree of the CICR, implementing the new wording of art 120, was a retrospective norm, intended to apply to bank accounts opened prior to the new legislation coming into force. In this case, the compound interest clause encompassed within these contracts would have been regarded as invalid. The alternative position (*ergo*, the new art 120 being innovative, rather than retrospective) would have rendered all contracts entered into before the judicial U-turn of 1999 as valid, in respect to the usage of compound interest. In the judicial battle that stemmed from this dispute, with the Italian lower courts demonstrating no evidence of a consistent pattern of rulings, it was the Italian Supreme Court that, in a plenary meeting, decreed all compound interest clauses existing prior to the Court decision of 1999 to be unlawful.[59] The rationale behind this decision is straightforward:

'[T]he clauses of quarterly capitalisation of the interest represent a violation of the prohibition of compound interest as set forth under art 1283 of the Italian Civil Code, for the reason that there is no such thing as a legislative usage, nor did this legislative usage exist in the periods preceding the judicial U-turn occurred in 1999 (…).'[60]

Additionally, the interpretation which the Italian judiciary applied to the compound interest clause, existing until 1999,[61] 'inclined to affirm the legitimacy of these clauses, was not enough to render legislative a usage that resulted in be-

[59]Italian Supreme Court, Plenary Meeting, 4 November 2004, no 21095.

[60]Italian Supreme Court, Plenary Meeting, 4 November 2004, no 21095. Our translation.

[61]Before the 1999 U-turn, the Italian Supreme Court was quite well disposed to affirm the validity of compound interest clauses. See Italian Supreme Court, 15 December 1981, no 6631; Italian Supreme court, 19 August 1983, no 5409; Italian Supreme Court, 6 June 1988, no 3804.

ing against the law too.’[62]

A further complication subsequent to the CICR decree was the decision of the Italian Constitutional Court, relating to the Legislative Decree 4 August 1999, no 342. Art 25(3) of this decree stipulated that the compound interest clauses existing in contracts before its coming into force ought to have been regarded as converted into valid terms. As a result, art 7 of the CICR decree arranged for a period during which the capitalisation clauses should have been amended in order to bring alignment to the new provisions. However, the Italian Constitutional Court unexpectedly declared such legal provisions (art 25, Legislative decree no 342 and its implementing norm within the CIRC decree) to be invalid.[63] The Government, in passing the legislative decree, had exceeded the mandate given to it by Parliament.

This legislative novelty *de facto* legalised the practice of the compound interest in Italy, and - possibly - overturned the judicial stances of the controversial double Supreme Court *dicta*. However, it was held that the accrual of the compound interest ought to have been calculated according to the same rest or timeframe, for the same transaction, particularly in relation to bank accounts. The rest on which the compound interest was required to be determined would be symmetric and identical for the same bank account. Previous banking practices where banks would traditionally calculate active compound interest[64] every quarter, and passive compound interest[65] every year, became unlawful. This reform of art 120(2) remained unaffected by a following amendment, passed in 2010.[66] In essence, in the period spanning the years of 1999 and 2013, the practice of charging

[62]Ibid, our translation.
[63]Italian Constitutional Court, 17 October 2000, no 462.
[64]Therefore, interest owed by the bank to the client eg because of an overdraft.
[65]Therefore, interest owed to the client by the bank eg because of a balance in favour of the client above zero.
[66]The reform is courtesy of article 4 of Legislative Decree 13 August 2010, no 141, as amended by art 3(3), Legislative Decree 14 December 2010, no 218, effective as from 2 January 2011. See MANZI, *Commentary to Art 120*. in F Capriglione (ed), *Commentario al Testo Unico delle Leggi in Materia Bancaria e Creditizia III* (n 58) 1746-1761.

compound interest, which had been seriously challenged by the decisions of the Italian Supreme Court in 1999, was officially legalised in Italy - whether or not this has given rise to any retrospective consequences is still open to debate,[67] given the decision of invalidity of the Italian Constitution Court[68] - subject to specific conditions. As correctly acknowledged on a doctrinal level:[69]

‘As far as the legislation is concerned, the only limit established by the Italian Banking Consolidated Act [was] the compliance with the equal treatment between active and passive interest, which [would] be applicable in an imperative way according to the same rest.’[70]

However, the rather fractured stance on compound interest in Italy had not yet concluded, and the tenor of art 120, ICBA has been further altered as a result of a new reform, which came into force later in 2013.[71] Charges related to compound interest are no longer permitted in the light of the amended article 120(2) of the IBCA. This legal provision stipulates that the *Comitato Interministeriale per il Credito ed il Risparmio* establishes modalities and criteria in the way the interest relating to transactions carried out in the performance of the banking business will accrue.[72] Yet there is a significant departure from customary practice, that is to

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[67] Italian Supreme Court, Plenary Meeting, 2 December 2010, no 24418) has held more recently that, in cases where the quarter compound interest clause is null, the fall-back applicability of the yearly compound interest clause shall be ruled out, as there was no usage, nor any practice, of yearly capitalisation for periods preceding the 1999 *decisa*.
[68] See above under this Section 4.3.
[69] See MIRONE, *Commentary to art 120*, in Costa (ed), *Commento al Testo Unico delle Leggi in Materia Bancaria e Creditizia II* (G Giappichelli, Turin 2013) 1372.
[70] Our translation.
[71] More specifically, this is the outcome of article 1(629) of Law 27 December 2013, no 147, in force as from 1st January 2014. For commentaries to this new piece of legislation, see STILO, *Dall’art. 120, comma 2, TUB alla Proposta di Delibera CICR: verso il Ritorno dell’Anatocismo Bancario*, [2015] *Rivista di Diritto Bancario*, 1-23. Se also TOLA, *Anatocismo e Conto Corrente Bancario nel Diverso Approccio alla Giustizia*, (2016)69 *Banca Borsa e Titoli di Credito* 327-340.The latter autor discusses both a court decision (Cagliari Tribunal, 20th May 2015) and a decision of the Italian Banking Financial Ombudsman (8th October 2015, no 7854).
[72] As far as commentaries on the draft of this new CICR decree are concerned, see in the recent literature FIORIO, *Il Divieto di Anatocismo a la Nuova Disciplina degli interessi Bancari. Prime Osservazioni alla Bozza di Deliberazione CICR*, (2015) Il Caso, 26 October 2015 http://www.ilcaso. it/articoli/ban.php?id_cont=833.php> accessed 29 October 2015.

say, it will be mandatory that the interest capitalised upon every rest shall not give rise to further interest and that any interest (whether compensatory or penal) shall be calculated exclusively on the simple capital, without any addition of interest.[73] The tenor of the amended art 120(2) is worthy of a recollection:

'The CICR established modalities and criteria for the accrual of interest in the transactions carried out in the performance of the banking activity, provided that in any case:

(a) In the bank account transaction it is warranted that, vis-à-vis the clientele, both the active and passive interest shall be calculated according to the same rest;

(b) The interest capitalised with periodicity shall not give rise to further interest that, in the following operations of capitalisation, are calculated exclusively on the capital'.

Essentially, the norm seems to have administered the last rites to compound interest in Italy, although some interpretations still remain unclear as to how this new legal provision affects existing transactions concluded prior to the new legislation coming into force.[74] In this respect, the very recent *decisa* available[75] seem to suggest that the prohibition of compound interest does apply to the past, and therefore the amended art 120(2) of the ICBA is retrospective, although objections to this interpretation are voiced by other sides of the same Italian judiciary.[76]

Given the serpentine development of the Italian legislation in this area too, it would not be overly speculative to predict future episodes in this never-ending series, laden with twists in the narrative and fluctuating outcomes. Curiosity killed

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At the time of the writing of this contribution, the official CICR decree implementing the new version of article 120 of the TUB has not been passed yet.

[73]Our translation.

[74]See TORRENTE and SCHLESINGER (n 51) 405.

[75]Among the few *decisa*, see Rome Tribunal, 20 October 2015; Milan Tribunal, 29 July 2015.

[76]See the very recent Bologna Tribunal, 7 December 2015, where it is stated that the new amended version of art 120(2), prohibiting the compound interest, cannot be regarded as in force, so long as the secondary legislation (*ergo*, the CICR decree) has not been passed.

the cat! Law no 49 of 8th April 2016 entered into force on 15th April 2016, further amending art 120, paragraph 2 of the ICBA, in force of art 17bis.[77]

The amendments are threefold.

First, the CICR is empowered to fix 'criteria and modalities for the calculation' of any interest, including the simple one. By contrast, in the past, this entitlement related exclusively to the compound interest. Furthermore, this power of the CICR is concerned with any kind of lending activities put in place by the bank, not necessarily bank account transactions.

Second, from an accounting point of observation, the new legal provision, particularly art 120(2)(b), stipulates that the interest accrued on either bank accounts or any other contractual relationship settled via a bank account,[78] be calculated according to the same rest, both if this interest is owed to the bank or against it. In this respect, the legal provision fundamentally reinforces the rule encompassed with the previous correspondent art 120(2)(a) of the 2013 TUB version, already referred to above. However, it is also expressly stipulated that the interest shall be calculated every year upon expiry of the 31st December and in any case when, upon expiry of the transactions, the interest is due.[79]

Third, art 120(2)(b) of the TUB substantially confirms the prohibition of compound interest for any sum owed by the debtor,[80] including the interest accrued on credit card loans. In these cases the interest shall be calculated exclusively on the capital However, the exception is the default interest which, if compounded, seems to be (again) valid in Italy, based on the very recent piece of leg-

[77] Law no 49/2016 converted Law Decree 14th February 2016, no 18. It is worth noting that an initial attempt to reinstate the compound interest after the 2013 reform was Law Decree 24th June 2014, no 91, art 31. However, this interim norm, encompassed with a piece of legislation passed by the Italian Government, was not later converted in law by the Italian Parliament.

[78] It is argued doctrinally (FARINA, *La (Ennesima) Resurrezione dell'Anatocismo Bancario* [2016] *I Contratti*, 707) that the terminology adopted in the new framework (*rapporti di conto corrente o di conto di pagamento*, therefore current account o payment account transactions), albeit formally different from the 2013 counterpart (*operazioni in conto corrente*, therefore current account operations), does not substantially change the scenario, nor does it warrant different legal stances.

[79] New art 120(2)(a), second part.

[80] The wording is so vast that the expression seems to be applicable to any bank transaction which, theoretically, may give rise to debt interest owed by the customer to the bank. FARINA (n 78) 709.

islation . Nevertheless, the legal provision under discussion caters for a further option. Namely, the customer may authorize, also before the currency of the bank account, the debit of the interest on his/her bank account, therefore on the capital, where this interest is due, as far as three main transactions are concerned: bank accounts; revolving credit cards; credit openings; overdraft bank accounts. However, in order to partly protect the customer, for these transactions, it is also expressly stipulated that the interest shall be calculated every year upon expiry of the 31st December, and made due on 1st March of the following year, or the year when there accrue.[81] Ultimately, it is possible to infer that compound interest is again legal in Italy, particularly if this is a default interest. However, as regards compensatory interest, the validity is not the automatic outcome of the contract, enforced by the bank, rather a deliberate choice of the customer and it concerns exclusively some bank transaction. According to the legislative novelty, this choice can be revoked by the client until the bank account has been debited.

In light of the absolute novelty of this body of law, no *decisa* appear to have been issued. From an interpretive point of view, it is possible to briefly mention that the choice about whether compound interest is permitted or not, as left to the party autonomy, may leave room for numerous and uncertain judicial outcomes. Seemingly, the judiciary will be asked to assess whether consent has been given according to the orthodox cannons of contractual diligence. Bearing this in mind, it is possible to figure out legal claims by clients aimed to invalidate the compound interest clause. Needless to say, this may pave way for uncertainties and dubieties about the further judicial stances. Doctrinally, it is also emphasised that the new legal provision, with its partial opening to the compound interest, can be explained through a political *fil rouge*: the current Italian Government, concerned about the huge losses recorded by its credit institutions in the last years,

[81] Nevertheless, in case of final termination of the transaction, the interest shall be immediately due. See new art 120(2)(b)(1).

has simply decided to indirectly help the domestic banking system as a whole.[82]

Apart for the legislative developments and twists occurred in Italy in the last decades, it is worth mentioning that a different, albeit marginal, school of thought in Italy is inclined to affirm that the capitalisation of the interest is a phenomenon not ascribable to the compound interest usage as legislated and, ultimately, prohibited under art 1283, ICC. With a reasoning that may be similar to what historically has been suggested by the British courts, the quarterly annotation of the compensatory interest on the bank account is tantamount to a payment by the client of that capital plus the interest, with the termination of the balance and re-loan of the balance plus the interest. Accordingly, the future interest shall be permissible as it is calculated on the re-lent money, although this comprises of the capital plus the interest.[83]

5. The British common law has recognised compound interest in an almost tangential manner in order to bypass, with an accounting artifice, the prohibition of usury laws. The anti-usury *corpus iuris* had been introduced in Britain as early as the Renaissance period and had been scrapped by the middle of the 19th century. Yet the abolishment in the contemporary era of the usury has not engendered a crisis of the concept of anatocism, which has persevered and, to a certain extent, flourished until recently. However, this contribution, in diverging from the traditional critique, unearths and hopefully demonstrates that the lawfulness of the practice of the compound interest in Britain is a comparatively recent phenomenon, courtesy of the 'Pinios' case. Conversely, a critical discussion of previous case law, specifically those of the 20th and 21st centuries, reveals that the compound interest in the British common law was merely tolerated in the past, and exclusively

[82]See TOLA (n 71) 340. For a historical analysis of the compound interest in Italy, see the very recent TAVORMINA, *Anatocismo e Frutti Civili da Napoleone ai Nostri Esegeti* (forthcoming).

[83]See MORERA, *Sulla non Configurabilità della Fattispecie "Anatocismo" nel Conto Corrente Bancario*, [2005] *Rivista di Diritto Civile* 17-25; FERRO-LUZZI, *Una Nuova Fattispecie Giurisprudenziale: "l'Anatocismo Bancario": Postulati e Conseguenze,* (2001)28 *Giurisprudenza Commerciale* 5-34.

in relation to mercantile bank account transactions. Ultimately, the Pinios case should be read in a more revolutionary way that scholars have not done so far.

Furthermore, given the distinct lack of an *ad hoc* piece of legislation in this area, which conversely has flourished in the civil law systems of comparators, Britain offers a limited form of protection to the bank customer via the legislation aimed to protect the general consumer. As highlighted by this paper, the way in which the legislation is worded makes it a particularly arduous task to ascertain whether the bank customer enjoys an easy and effectual form of protection. As a result of this, the British bank customer, in tackling the phenomenon of the compound interest, shall merely rely on the benevolence of the banks and on the precarious rules of a 'code', issued by the credit institutions and credit card providers, that encourages - but does not oblige - the provider to be as explicit and transparent as possible in disseminating the manner in which the interest is calculated. Notwithstanding this, the contribution criticises this *modus operandi* for two main reasons: (a) it does not offer a judicial protection to the customer, as it is not made explicit; (b) with dubious transparency, the existing code does not explicitly acknowledge compound interest, but merely implies that the concept has been considered, requiring the banks to clarify to the public the way in which any interest rate is calculated.

Additionally, from a comparative perspective, this contribution castigates the Italian approach to compound interest. The unfettered and, at times, obsessive protection of the weaker party (ie the bank customer) pursued in that country in the *sedes materiae* of banking law, where the compound interest has even been rendered illegal courtesy of an unexpected 2013 legal framework, may represent a Pyrrhic victory for the customers and induce a quickly curtailed bout of scaremongering amongst the service providers, the banks. The reaction of the latter, in the long term, will be to either increase the costs of their services or to engage in an impromptu exodus from that national market. In this respect, the continuous changes in legislation and judicial twists over the concept of *anatocimo*, recorded in Italy over the past two decades, would appear to suggest that the matter has now transcended a purely legal battleground. The discussions on the compound interest in that country appear to echo the medieval battles of Guelphs and Ghibellines and, therefore, the tensions between two different factions, rather than the logical development of the legal tradition of that country.

Moreover, from a 'law and economics' viewpoint, it can be affirmed that within Italian law the continuous changes and amendments to the legislation no longer afford certainty; ultimately, this may estrange the investors in a medium-long term perspective. Conversely, the common law, hinged upon its entrenched precedents, more recently accompanied by the soft law, caters for a more stable 'stage' where the evolution of the rules (either cogent or not) is more balanced and the approach more market-friendly.[84]

Also, in relation to both the British common law and the Italian comparator, a possible criticism may arise from this paper. A more careful analysis of the ancestor, the Roman law, and its clear distinction between *futurarum usurarum usurae* and *usurarum usurae*, might have lent itself to the discovery of a helpful epistemological method in order to strike a middle ground between diametrically opposing, and not entirely justified, stances in the area of the anatocism.[85] More specifically, the British common law, in drawing on this distinction, could have re-

[84]On the entrenched differences between common law and civil law, particularly as regards the rules of interpretation, see G Carney, 'Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions' (2015)36 Statute Law Review 46-58. More in general, as regards the traditional differences between *common law* and *civil law* and their missing intercommunication, see LEGRAND, *European Legal Systems Are Not Converging*, (1996)45 *The International and Comparative Law Quarterly* 52-81. For a methodological study on comparative law, see SIEMS, *Comparative Law* (Cambridge University Press, Cambridge 2015).

[85]In the British common law, the possible connection between the modern phenomenon of compound interest and the *anatocism* does not seem to have been even highlighted. In the Italian literature, a scholar (BELVEDERE, *Anatocismo Bancario e "Usi Contrari"* , in MV De Giorgi, S Delle Monache e G De Cristofaro (eds), *Studi in Onore di Giorgio Cia*n (CEDAM, Padua 2010) 156-199, particularly 198), without entering the details of the Roman ancestor, seems to suggest that a better historical analysis was required in order to solve the private law debate about the legality of the compound interest in that country.

garded as lawful exclusively the compounding of the interest already due.[86] As far as the Italian jurisdiction is concerned, the piece of legislation enacted in 2013, whereby any form of compound interest has been declared illegal, regardless of whether or not the interest is due, should have been better considered. It goes without saying that this certainly would have occurred, had the Roman archetype been afforded due contemplation.

Finally, the comparison between the two countries (Italy and England) shows a significant difference in the way the legislature protects the bank customer as regards the compound interest. Intriguingly, a new legal framework at an EU level could be promoted in order to protect the bank customer in this niche area of private law. Paradoxically, though, the country (Britain) where this protection is needed could get away with this as after the Brexit this prospective EU legislation would no longer apply across the Channel. Are the Brexit and the compound interest in Britain a mere coincidence?

[86] Whereas, as highlighted under the Section 3 above, traditionally common law regards as lawful any kind of compound interest.