The a *Semet Ipso Exigere* Obligation of the *Negotiorum Gestor* Concerning Interest Payment

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Negotiorum gestio could be limited to a specific business, but it could also refer to all the affairs of a person, or to all those he has in a specific city or province. In the latter cases the obligation of the *negotiorum gestor* was not to neglect any act included in the sphere of management that he has undertaken: in this regard, particular importance was given by jurisprudence to the obligation to demand credits towards third parties as well as from himself (*a semet ipso exigere*), with the effect of *actio negotiorum gestorum* even the obligations that for whatever reason pre-existed between the *negotiorum gestor* and the principal could be enforced. In the following, fragments from the primary legal sources of the *negotiorum gestio* (D. 3, 5) will be analysed, in which the interest payment obligation of the *negotiorum gestor* arises in connection with the *a semet ipso exigere* principle. Hopefully, the results of this paper will prove useful in the area of researches dealing with the liability of the *negotiorum gestor*.
Keywords: *a semet ipso exigere, negotiorum gestio, liability of the negotiorum gestor*

Introduction

An unauthorized administrator has a fundamental obligation to compensate the *dominus negotii* for the damages and expenses incurred as a consequence of his intervention.[1] *Negotiorum gestio* was based on *bonae fidei iudicium*, hence conduct of the *negotiorum gestor* was assessed according to the criteria of *bona fides*[2] and the *gestor* was already held liable in classical law for slight negligence *(culpa levis)*[3]. The *dominus* could enforce his claims

1 Max Kaser: *Das Römische Privatrecht*. München, C. H. Beck'sche Verlagsbuchhandlung, 1971[2]. 589.
2 Reinhard Zimmermann: *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Oxford, Oxford University Press, 1996. 445.
3 The same liability of the *negotiorum gestor* as the category of stakeholder originally only be realised by breaking through the 'Utilitätsprinzip', since he had nothing to gain from protecting the interests of the *dominus* – as long as his claims for reimbursement

against the *gestor* by *actio negotiorum gestorum directa*,[4] while the latter could claim reimbursement of his necessary expenses by *contraria actio*[5].

On the one hand, the administration of another's affairs included the recovery of claims of the *dominus* against third parties,[6] and on the other, the *gestor* was obliged to pay his own debts *(sibi solvere)*[7] to the *dominus*,[8] whether incurred before or during the administration. Failure to collect or pay the due debts would have induce the consequences of delayed payment.[9] The literature refers to the accounting obligation of the *gestor* by the authentic term *a semet ipso exigere*.

The present article deals with those fragments of the *De negotiis gestis* title of the Digest, which are directly related to the *a semet ipso exigere* obligation concerning interest payment. The aim of our analysis is to detect, on the basis of the sources, the correlation between the *a semet ipso exigere* principle and the obligation to pay interest and to identify the most important factors develop the liability system of the *negotiorum gestor* in that structure.

Economic background

The following cases are related to the obligation of *negotiorum gestor* to pay interest. Since interest regulation was a central element of Roman credit life, it is worth briefly reviewing its basic features.

Interest is an antique legal institution, thus was known not only by Greeks and Romans, but in ancient Eastern societies such as Egypt, China and India as well.[10] As we know, interest is as old as loan and it also gained legal regulation along with that.[11]

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have not been recognized: Bernhard Kübler: Die Haftung für Verschulden bei kontraktsähnlichen und deliktsähnlichen Schuldverhältnissen. *SZ* 39 (1918), 172–223. 196.

4 Otto Lenel: *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*. Leipzig, Verlag von Bernhard Tauchnitz, 1927[3]. 102.

5 Hans Ankum: Utiliter gestum. *OIR* 1995/1, 19–53. 45.

6 Vincenzo Arangio-Ruiz: *Istituzioni di diritto romano*. Napoli, Jovene, 1991[14]. 359.

7 Paul. 2 *ad Nerat*. D. 3, 5, 18.

8 Giovanni Finazzi: *Ricerche in tema di negotiorum gestio. Obbligazioni gravanti sul gestore e sul gerito e responsabilità.* Vol. II/2. Cassino, Edizioni dell'Università degli Studi di Cassino, 2006. 47.

9 Vincenzo Arangio-Ruiz: *Il mandato in diritto romano*. Napoli, Jovene, 1949. 26.

10 Benjamin S. Horack: A Survey of the General Usury Laws. *Law and Contemporary Problems* 8 (1941), 36–53. 36.

11 Hans-Peter Benöhr: Versura. *SZ* 107 (1990), 216–248. 219.

As the Latin term for interest, the words *fenus* and *usura* are both found in the sources of Roman law. From the end of the Republic, the latter naming became dominant.[12]

Roman law mainly laid down rules on the collection of interest, the level of interest rates and the limitation of the amount of interest.[13] The obligation of interest payment could have resulted from a contractual clause or from a statutory provision.[14]

In Rome, the maximum interest rate was first established by the Law of the Twelve Tables *(unciarium foenus)*.[15] Over time, it became necessary to regulate widespread abuses in the field of interest collection by separate acts.[16]

The rate of interest was probably set at $8^1/_3$% by the Twelve Tables. Then, in the eras of Roman law, it took on different values: At the time of the principate it was already 12% per annum,[17] and then Iustinian reduced it to 6% in general[18].

Roman society was impelled by land and interest usury, therefore high interest collection caused serious problems in circulation for a long time.[19] This permanent problem is also reported by Pliny the Younger in his letter to the Emperor Trajan.[20]

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12 Elemér Pólay: Kamat a római jogban. *Miskolci Jogászélet*, 1942/18. 72–96, 73.

13 András Földi—Gábor Hamza: *A római jog története és institúciói*. Budapest, Novissima Kiadó, 2022[26]. 416. Usury was also punished. Although, Romans meant something different by usury than what modern private law defines as such. Anyone who exceeded the maximum interest rate by any amount was considered as a usurer. Roman law prohibited both forms of compound interest — the *anatocismus coniuncustus* and the *separatus*: Elemér Pólay: Kamat a római jogban (Folytatás). *Miskolci Jogászélet*, 1942/18. 107–110, 107–108.

14 Ferenc Benedek—Attila Pókecz Kovács: *Római magánjog*. Budapest, Ludovika Egyetemi Kiadó, 2021[9]. 260.

15 János Zlinszky: *A tizenkéttáblás törvény töredékei*. Budapest, Nemzeti Tankönyvkiadó, 1995. 30.

16 Several laws were passed in the 5th and 4th centuries BC, e.g. *Lex Licinia Sextia*, *Lex Duilia et Menenia de unciario fenore*, *Lex Martia de usuris reddendis*, *Lex Genucia*, but even these could not settle the economic relations satisfactorily.

17 Mario Talamanca: *Istituzioni di diritto romano*. Milano, Giuffrè, 1990. 545–546.

18 Iustinian allowed the following exceptions to the rate of interest: 4% for members of the upper classes, 8% for merchants and bankers, and 12% for the maritime loan: Max Kaser—Rolf Knütel—Sebastian Lohsse: *Römisches Privatrecht*. München, C. H. Beck, 2021[22]. 173.

19 Imre Molnár—Éva Jakab: *Római jog*. Szeged, Leges, Diligens, 2021[9]. 251.

20 Trajan's campaigns took a heavy toll on the financial resources of the empire, tax revenue decreased, especially the maintenance of the army required significant ex-

Plin. Sec. *Epist*. 10,54: "Thanks to your foresight, Sir, the sums owed to public funds have been paid in under my administration, or are in process of being so; but I am afraid the money may remain uninvested. There is no opportunity, or practically none, of purchasing landed property, and people cannot be found who will borrow from public funds, especially at the rate of twelve per cent, the same rate as for private loans. Would you then consider, Sir, whether you think that the rate of interest should be lowered to attract suitable borrowers, and, if they are still not forthcoming, whether the money might be loaned out among the town councillors upon their giving the State proper security? They may be unwilling to accept it, but it will be less of a burden to them if the rate of interest is reduced."[21]

As can be seen, in Pliny's time, only a few people could afford to buy land, and taking out a loan had very unfavourable consequences for the debtor, accordingly, most people tried to avoid paying the legal interest.[22] But they could hardly exempt themselves from high interest rates, as both the state and the creditors endeavoured to compensate somewhat the damage caused by the economic crises through the "exploiting" of the debtors.[23]

Obligation of the *negotiorum gestor* to fulfil his own debt

Our first text in which the *a semet ipso exigere* obligation is discussed, comes from Tryphoninus and is thus probably a product of the late classical period.[24]

Tryph. 2 *disp*. D. 3, 5, 37: *Qui sine usuris pecuniam debebat, creditoris sui gessit negotia: quaesitum est, an negotiorum gestorum actione summae illius*

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penses. Arable farming and agricultural production began to decline, which led to grain shortages: Károly Visky: *Spuren der Wirtschaftskrise der Kaiserzeit in den römischen Rechtsquellen*. Budapest, Akadémiai Kiadó, 1983. 14.

21 Translation by Betty Radice.

22 On the economic problems noted by Pliny, see René Martin: Plinius der Jüngere und die wirtschaftlichen Probleme seiner Zeit. In: Helmuth Schneider (ed.): *Sozial- und Wirtschaftsgeschichte der römischen Kaiserzeit*. Darmstadt, Wissenschaftliche Buchgesellschaft, 1981. 196–233.

23 Usurious loan was already punished in the republican era: William F. Allen: The Monetary Crisis in Rome, A.D. 33. *Transactions of the American Philological Association*, 1887/18. 5–18, 8. The defencelessness of inferior debtors was somewhat alleviated by the abolition of debt slavery in the *Lex Poetelia Papiria* (326 BC): Robert P. Maloney: Usury in Greek, Roman and Rabbinic thought. *Traditio* 27 (1971), 79–109. 88. The laws of Caesar, Augustus, Tiberius and later Claudius also allowed interest-free *(sine usurae)* borrowing in times of economic crisis: Tac. *Ann*. 6,16-17; 9,13; Suet. *Iul*. 27, 42; *Aug*. 41; *Tib*. 48.

24 Wolfgang Kunkel: *Herkunft und soziale Stellung der römischen Juristen*. Weimar, Hermann Böhlaus Nachfolger, 1952. 231.

usuras praestare debeat. Dixi, si a semet ipso exigere eum oportuit, debiturum usuras: quod si dies solvendae pecuniae tempore quo negotia gerebat nondum venerat, usuras non debiturum: sed die praeterito si non intulit rationibus creditoris cuius negotia gerebat eam pecuniam a se debitam, merito usuras bonae fidei iudicio praestaturum. Sed quas usuras debebit, videamus: utrum eas, quibus aliis idem creditor faenerasset, an et maximas usuras: quoniam ubi quis eius pecuniam, cuius tutelam negotiave administrat, aut magistratus municipii publicam in usus suos convertit, maximas usuras praestat, ut est constitutum a divis principibus. Sed istius diversa causa est, qui non sibi sumpsit ex administratione nummos, sed ab amico accepit et ante negotiorum administrationem. Nam illi, de quibus constitutum est, cum gratuitam certe integram et abstinentem omni lucro praestare fidem deberent, licentia, qua videntur abuti, maximis usuris vice cuiusdam poenae subiciuntur: hic bona ratione accepit ab alio mutuum et usuris, quia non solvit, non quia ex negotiis quae gerebat ad se pecuniam transtulit, condemnandus est. Multum autem refert, incipiat nunc debitum an ante nomen fuerit debitoris, quod satis est ex non usurario facere usurarium.

According to the fact pattern, the original legal relationship of the parties was an interest-free, overdue debt from an earlier loan agreement.[25] The debtor may have later undertaken to manage the creditor's affairs, that is there is a contractual relationship between them regarding the loan and a quasi-contractual regarding the *negotiorum gestio*. A *condictio* would be available to the creditor to claim the loan, but with this, he cannot sue for the interests.[26] Thus, the question is whether the creditor can recover the interest on the debt from the debtor by an *actio negotiorum gestorum directa*.

Tryphoninus replied that if the debtor was under *a semet ipso exigere* obligation, then he must pay the interest. But, if the debt is not yet due, he does not have to pay it. The jurist therefore makes the interest payment dependent on the omission of the *a semet ipso exigere* obligation or the occurrence of the duty date. The *negotiorum gestor* had to record the payment in the creditor's account book in order to fulfil the obligation *(intulit rationibus creditoris)*.[27]

25 Alfons Bürge: Fiktion und Wirklichkeit. Soziale und rechtliche Strukturen des römischen Bankwesens. *SZ* 104 (1987), 465–558. 543.

26 It was not possible to fix the interest rate under a loan agreement, the parties had to create a separate *stipulatio* for that purpose: Salvatore Riccobono: Stipulatio ed instrumentum nel Diritto giustinianeo. *SZ* 43 (1922), 262–397. 321.

27 The Romans managed their finances in account books *(codex accepti et expensi)*. In the sources, the words *rationes* or *tabulae* refer to the registration of private loan claims ('private Darlehensforderungen'), the concept of *kalendarium* rather included a register of commercial money lenders. Bookkeeping not only made it possible to control the money paid out and the money reimbursed with interest, but it was actually a

As the loan is a *stricti iuris* real–contract, not on the basis of a *condictio*, the interest could only be claimed by means of a separate interest stipulation.[28] On the other hand, we have no information about that a *stipulatio* would have been established between the parties.[29] The other solution might have been stipulating the interest rate within the framework of an informal agreement, but the loan did not make this possible.[30] However, Tryphoninus does not consider the interest payment on the basis of an additional obligation, rather he finds the fair solution to enforce the *bonae fidei iudicium* derived from *negotiorum gestio*.[31]

The jurist points out, through an analogy, what type of interest the *gestor* has to pay. In accordance with the basic case, those which the creditor normally lends *(quibus aliis idem creditor faenerasset)*. But, in special situation, when someone manages another's affairs — for example as a guardian or administrator[32] — or if, as a *magistratus municipii*[33], he embezzles public

list of stipulated credit claims. However, if the claim was established in *stipulatio* and a deadline was set for the payment of the interest-bearing debt, then the content of the *kalendarium* was only nominal: Ralf Michael Thilo: *Der Codex accepti et expensi im Römischen Recht. Ein Beitrag zur Lehre von der Litteralobligation*. Göttingen–Zürich–Frankfurt, Muster–Schmidt, 1980. 107-108.

28 Paul du Plessis: *Borkowski's Textbook on Roman Law*. Oxford, Oxford University Press, 2010. 295.

29 *Stricti iuris obligatio* would exclude the possibility of assessing diligence. As the object of *mutuum* is fungible, it would result an objective liability, however no interest payment obligation could arise from *mutui datio*: Kaser 1971, 531. Theoretically, based on a *stipulatio usurarum* connected to the loan, the debtor could be obliged to pay interest, but this possibility can also be rejected in the context of the fragment *(incipiat nunc debitum an ante nomen fuerit debitoris)*. Cf. Paul. 4 resp. D. 22, 1, 12.

30 George Mousourakis: *Roman Law and the Origins of the Civil Law Tradition*. Cham–Heidelberg–New York–Dordrecht–London, Springer, 2015. 129. For the distinction between *pactum* and *stipulatio*, see György Diósdi: *Contract in Roman Law. From the Twelve Tables to the Glossators*. Budapest, Akadémiai Kiadó, 1981. 127.

31 Cf. Attila Pókecz Kovács: Rücktrittsvorbehalt und pactum displicentiae (Ulp. D.19.5.20pr.). *Revue internationale des droits de l'antiquité*, 2011/58, 315–338. 319. Interestingly, the interest on the amount of money lent by the cities could also be claimed *ex nudo pacto*: Paul. *sing. reg*. D. 22, 1, 30.

32 *Negotiorum gestio* was a subsidiary institution, in the absence of applicability of *actio mandati* and *actio tutelae*, the parties could sue by *actio negotiorum gestorum*: Josef Partsch: Studien zur Negotiorum Gestio. Vol. I. *Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philosophisch-historische Klasse*, 1913/12. 46.

33 The term *magistratus municipales* included the *duumvires* or *quattuorvires* belonging to the *municipium* or *colonia*: Adolf Friedrich Rudorff: *Das Recht der Vormundschaft aus den gemeinen in Deutschland geltenden Rechten entwickelt*. Bd. 3. Berlin, Ferdinand Dümmler, 1834. 159.

money, then he will be obliged to pay the maximum interest rate of 12%,[34] prescribed by the *divi principes*[35]. This is to be understood as, that those administrators, guardians and *magistratus* are obliged to pay the legal interest maximum, who abused his rights in a manner contrary to the nature of the *fides (licentia, qua videntur abuti*[36]*)* and intended to profit from foreign money. They have to pay the highest interest rate as a kind of punishment *(vice cuiusdam poenae subiciuntur)*.[37]

After presenting the analogy, the jurist returns to the case in front of him with the phrase, *Sed istius diversa causa est* and summarizes the legal problem. Those to whom the emperor's decree extends, that is who gratuitously, certainly altruistically attended and abstained from any profit, are responsible for *fides*.[38] Furthermore, the fact pattern also includes the situation when someone received a loan from a friend, before starting the management *(ab*

34 Tryphoninus, however, did not link the interest payment obligation arising from the infringement of the *a semet ipso exigere* principle to the legal regulation. It seems that the action of the *negotiorum gestor* is not subject to the same consideration as those who otherwise carry out asset management activities: Finazzi 2006, 52. Cf. the specific rules on guardianship: Éva Jakab: Vis ac potestas. Gyámi vagyonkezelés a klasszikus római jogban. In: Márta Görög—Andrea Hegedűs (ed.): *Lege duce, comite familia. Ünnepi tanulmányok Tóthné Fábián Eszter tiszteletére, jogászi pályafutásának 60. évfordulójára*. Szeged, Iurisperitus Kiadó, 2017. 199–211, 201; 209. For the relation between *cura*, *tutela* and *negotiorum gestio*, see Emese Újvári: Összetett eszköztár a gyámolt érdekeinek védelmében a klasszikus korban: a C.5.75.1 tanúsága. In: Béla P. Szabó—Emese Újvári (ed.): *Risus cum lacrimis. Könyv Babják Ildikó emlékére (tanulmányok, baráti írások)*. Debreceni Egyetem Marton Géza Állam és Jogtudományi Doktori Iskola, Debrecen, Lícium-Art Könyvkiadó, 2017. 267–280, 270.

35 Regarding *divi principes*, the names of Marcus Aurelius and Lucius Verus, as well as Septimius Severus and Caracalla have appeared in the literature: Giovanni Gualandi: *Legislazione imperiale e giurisprudenza*. Vol. II. Milano, Giuffrè, 1963. 190.

36 Here the pejorative sense of *licentia* is used, referring to licentious, impudent behaviour: Adolf Berger: *Encyclopedic Dictionary of Roman Law*. Philadelphia, The American Philosophical Society, 1980. 564.

37 For the relationship between interest payments and public funds, see Roger Vigneron: Franco Gnoli: Ricerche sul crimen peculatus. *SZ* 99 (1982), 412–417. 416. With respect to the *a semet ipso exigere*, no connection can be shown between the facts presented in the analogy and the specific case, since the latter is not subject to the provisions on interest maximisation: Finazzi 2006, 52. On the question of the interest payment obligation of *magistratus municipii*, see Paul. *sing. usuris* D. 22, 1, 17, 7.

38 The Roman category of *fides* originally meant truthfulness and honesty, the objective concept entered in the *bonae fidei iudicium* was presumably developed in pre-classical law: András Földi: Remarks on the notion of 'bona fides'. *Annales Universitatis Scientiarum Budapestinensis de Rolando* Eötvös *Nominatae - Sectio Iuridica 48*. (2007), 53–72. 58.

amico accepit et ante negotiorum administrationem). Therefore, we should assess the liability and the interest payment obligation of the *negotiorum gestor* in the light of *bona fides*.

The *gestor* obtained the money loan in an honest way *(bona ratione accepit)*, but since he failed to register the performance in the account book *(quia non solvit)*,[39] he acted negligently and is liable for it. In addition, it must be considered that the debt has only just arisen or existed before the administration began.[40] In the latter case, it is sufficient to convert the non-interest-bearing debt into an interest-bearing one *(satis est ex non usurario facere usurarium)*. Due to failure to repay the debt within the deadline, the *gestor* becomes a debtor in default and has to pay the resulting interest.[41]

Therefore, it is not an interest-bearing debt stipulated in an accessory obligation — this did not take place either at the start of the administration or its duration —, the *negotiorum gestor* is obliged to pay the default interest due to the non-fulfilment of the original obligation, the loan. If the interest payment emerged from debtor default, beyond due date and the *interpellatio* of the creditor, imputation is also belonged to the factual elements.[42] This is based on contractual liability, thus, according to *bona fides*, he is justly liable for the interests *(merito usuras bonae fidei iudicio praestaturum)*.

Although, the jurist stated at the very beginning of his opinion that the infringement of the *a semet ipso exigere* obligation in itself provides a legal basis for demanding the interest payment *(a semet ipso exigere eum oportuit, debiturum usuras)*,[43] Tryphoninus finally identified *bona fides* as its legal title.[44]

39 The accounting of performance ('Solutionsakt') does not in itself fulfil the obligation, at the same time, the *gestor* had to actually pay his debt: Andreas Wacke: Tilgungsakte durch Insichgeschäft. Zur Leistung eines Tutors oder Prokurators an sich selbst. *SZ* 103 (1986), 223–247. 229. Cf. Hans Peters: Generelle und spezielle Aktionen. *SZ* 32 (1911), 179–307. 269.

40 Cf. Aldo Cenderelli: *La negotiorum gestio. Corso esegetico di diritto romano*. Vol. I. Torino, Giappichelli, 1995. 191-192.

41 Matteo Marrone: *Manuale di diritto privato romano*. Torino, Giappichelli, 2004. 261.

42 Róbert Brósz—Elemér Pólay: *Római jog*. Budapest, Tankönyvkiadó, 1986[4]. 354.

43 The *a semet ipso exigere* principle, as a *lex specialis*, is a prerequisite ('presupposto') for the payment of interest: Finazzi 2006, ibid. Knütel states that the jurists did not impose an obligation to pay interest only on the basis of a clause or default, but in all cases where the debtor could use other people's money for his own benefit: Rolf Knütel: Zum Nutzungszins. *SZ* 105 (1988), 514–541. 530.

44 Cf. Marc. 4 *reg*. D. 22, 1, 32.

The amount of the interest rate is not clear from the fragment.[45] It could be determined either by the *rescriptum* or by the jurisprudence.[46] Probably only the average rate of interest could be demanded from the bona fide manager.[47]

In the text by Tryphoninus, the *negotiorum gestor*'s obligation to pay interest partly depends on the breach of the *a semet ipso exigere* principle,[48] partly the due date of the bond itself[49]. *Solutio sibi* was lacking on the part of the *gestor*, that is registry of payment of his own debt in the account book, hence in this case, the interest payment obligation follows from the non-fulfilment of the contract.[50]

Obligation of the *negotiorum gestor* to collect foreign debt

A very similar situation to D. 3, 5, 37 is found in the following fragments. The interest payment obligation is also at the centre of the Ulpian text, with the difference that this time the *negotiorum gestor* is bound to collect debts from debtors of the *dominus negotii*. The continuation of D. 3, 5, 5, 14 can be found at Paul, who provides us valuable information on the assessment of the liability of the *gestor*.

Ulp. 10 *ad ed*. D. 3, 5, 5, 14: *Videamus in persona eius, qui negotia administrat, si quaedam gessit quaedam non, contemplatione tamen eius alius ad haec non accessit, et si vir diligens (quod ab eo exigimus) etiam ea gesturus*

45 According to Bürge, the rate of interest was determined by the usual practice of the given region: Bürge 1987, 543. Cf. Ulp. 10 *ad ed*. D. 22, 1, 37. The *bonae fidei iudicium* could also provide a basis for taking (legal) customs into account: Ulp. 1 *ad ed. aed. cur*. D. 21, 1, 31, 20, see the exegesis of the text: Éva Jakab: Die ädilizischen Stipulationen. In: János Zlinszky (ed.): *Questions de responsabilité. XLVème Session de la Société Internationale „Fernand de Visscher" pour l'Histoire des Droits de l'Antiquité. 14-22 Septembre 1991*. Miskolc-Eger, Hongrie, Miskolc 1993. 167–178, 174-175. Finazzi on the other hand, notes that the interest rate generally applied by the *dominus* did not necessarily coincide with the *mos regionis*; thus, they could also paid regard to that, in case of timely performance, the principal would have used the money according to his own habits: Finazzi 2006, 51.

46 Finazzi 2006, 53.

47 Wacke 1986, 229.

48 Hans Kreller: Das Edikt de negotiis gestis in der klassischen Praxis. *SZ* 59 (1939), 390–431. 402.

49 For the relationship between contractual interest and default interest: Rolf Knütel: Stipulatio und pacta. In: Dieter Medicus—Hans Hermann Seiler (ed.): *Festschrift für Max Kaser zum 70. Geburtstag*. München, C. H. Beck'sche Verlagsbuchhandlung, 1976. 201–228, 221.

50 Finazzi 2006, 50.

fuit: an dici debeat negotiorum gestorum eum teneri et propter ea quae non gessit? Quod puto verius. Certe si quid a se exigere debuit, procul dubio hoc ei imputabitur. Quamquam enim hoc ei imputari non possit, cur alios debitores non convenerit, quoniam conveniendi eos iudicio facultatem non habuit, qui nullam actionem intendere potuit: tamen a semet ipso cur non exegerit, ei imputabitur: et si forte non fuerit usurarium debitum, incipit esse usurarium, ut divus Pius Flavio Longino rescripsit: nisi forte, inquit, usuras ei remiserat:

Paul. 9 *ad ed*. D. 3, 5, 6: *Quia tantundem in bonae fidei iudiciis officium iudicis valet, quantum in stipulatione nominatim eius rei facta interrogatio.*

During the — presumably general — administration, the *negotiorum gestor* attended to some matters and neglected others *(quaedam gessit quaedam non)*,[51] regarding to this *(contemplatione)*[52], another party could not take charge of what was neglected *(alius ad haec non accessit)*.[53] Ulpian compares his act to the conduct of a prudent person *(vir diligens)*[54], as this is the social requirement *(quod ab eo exigimus)*.[55] The *vir diligens* would have completed all matters, including those that the *gestor* failed to do *(etiam ea gesturus fuit)*. Whether he ought to be considered liable in a suit based on business transacted, including those things which he neglected? According to the jurist, yes, because, the *gestor* can undoubtedly be blamed for the failure to collect what he was obliged to *(a se exigere debuit)*. However, he cannot be blamed for not suing the other debtors, since he had not the power to do so, as he was not authorized to institute any legal proceedings *(quoniam conveniendi eos iudicio facultatem non habuit)*.[56] Consequently, he can only be held liable based on *a semet ipso exigere* obligation.[57]

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51 The administration scope of the *gestor* could have been quite broad: Hans Hermann Seiler: *Der Tatbestand der negotiorum gestio im römischen Recht*. Köln–Graz, Böhlau Verlag, 1968. 16.

52 *Contemplatione domini* is considered an innovation by Iustinian: Raymond Monier: *Manuel* élémentaire *de droit romain*. Vol. 2. Paris, Scientia Verlag Aalen, 1970^{5}. 209.

53 According to Arangio-Ruiz, the action of the *gestor* is a "truly unique construction", which seems dissonant with the generally used *negotia administrare* passage: Vincenzo Arangio-Ruiz: *Responsabilità contrattuale in diritto romano*. Jovene, Napoli, 1958^{2}. 214.

54 The measure formulated by Paul is the same as the care of the diligent *pater familias*: Francesco M. de Robertis: *La responsabilità contrattuale nel sistema della grande compilazione*. Vol. II. Bari, Cacucci, 1982. 812.

55 The structure of *vir diligens* is believed interpolated by Peters 1911, 270. and Heinrich H. Pflüger: Zur Lehre von der Haftung des Schuldners nach römischem Recht. *SZ* 65 (1947), 121–218. 187.

56 Cf. C. 2, 18, 20, 2.

57 Wacke 1986, 228.

At first glance, it seems as if the liability of the *gestor* can be traced back to two causes. The *gestor* did not comply with the *a semet ipso exigere* obligation, in this manner — according to Ulpian — he is undoubtedly liable.[58] On the other hand, the *vir diligens* would have fulfilled this obligation, but there was no opportunity for such a careful person to intervene, as the *gestor* impeded this.[59] Potential administrators probably knew about the activities of the *negotiorum gestor* and therefore did not even attempt to intercede, because they trusted that he would perform the administration perfectly.[60] The jurist presupposes that, as a result of the *gestor*'s intervention, among the persons, who are no longer able to act in the interest of the principal, there could be one, who would have performed the task with due diligence.[61]

A conception arose in literature, which identifies the administrator as a *procurator omnium bonorum*.[62] This theory seems reasonable, if we accept

58 Perhaps because he trusted that he could abstain from doing other businesses without harming the *dominus* ('senza danno astenere dall'intervento in altri affari'): Arangio-Ruiz 1958, ibid.

59 Seiler 1968, 15.

60 To impede the interference of other, it is not necessary for the *negotiorum gestor* to pretend to be a guardian or a general agent. It is sufficient if, based on the objective context, a third person – who would otherwise interfere in another's affairs – believes that someone else is already managing the matter: Finazzi 2006, 37-38. Naturally, the ascertainment of liability does not require that a third person actually offers to perform the administration: Rudolf Jhering (ed.): *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*. Vol. 19. Jena, Mauke, 1881. 261.

61 Finazzi points out that the obligation of the *negotiorum gestor* could only be limited to the case in which others would have undertaken to manage the affairs of the principal, even before he began to do so: Finazzi 2006, 37. According to Peters, the requirement of *a semet ipso exigere* forms the basis of general administration ('generelle Geschäftsführung'): Peters 1911, 270-271.

62 Giovanni Nicosia: *Gestione di affari altrui (premessa storica)*. In: Enciclopedia del Diritto. Vol. XVIII. Milano, Giuffrè, 1969. 628–644, 643. The literature on the institution of *procurator omnium bonorum* is quite controversial. On the legal basis and the powers of the *procurator* – to mention only the two most important issues – there are different views among Romanists. According to Schlossmann, there was no legal relationship between the *dominus* and the *procurator omnium bonorum*: Siegmund Schlossmann: *Der Besitzerwerb durch Dritte nach römischem und heutigem Rechte. Ein Beitrag zur Lehre von der Stellvertretung*. Leipzig, Breitkopf & Härtel, 1881. 104. This view is partly shared by Serrao, who believes that slaves, due to their services *(ministerium)* and purely within the framework of family customs ('costume familiare') managed the assets of the principal in his absence, or performed a specific economic activity. However, he does not consider servile obligations of this kind to be *procuratio* and according to him, extensive administrative activities cannot be traced back to the mandate either: Feliciano Serrao: *Il procurator*. Milano, Giuffrè, 1947. 1; 111ff.

that the *procurator* acting *sine mandato*, belongs to the fact pattern of *negotiorum gestio* and in accordance with that, shall be subject to the rights and obligations of the *gestor*.[63] In our case, this question may be relevant to the extent that the *negotiorum gestor*, who was obliged to take care of several affairs, was seen by an outsider, a third party, possibly as a general agent.[64]

If the debts to be collected were originally interest-free, they would become interest-bearing *(si forte non fuerit usurarium debitum, incipit esse*

Levy regards the *procurator omnium bonorum* as a general agent under the power of the *dominus*: Ernst Levy: *Weströmisches Vulgarrecht. Das Obligationenrecht*. Weimar, Hermann Böhlaus Nachfolger, 1956. 60. Behrends considers the *procurator omnium rerum*, who took care of the affairs of the absent person, to have the same social status as the *dominus* (he believes that this term has classical origin): Okko Behrends: Die Prokuratur des klassischen römischen Zivilrechts. *SZ* 88 (1971), 215–299. 231; 216[7]. Angelini defines the *procurator* as a general trustee: Piero Angelini: *Il procurator*. Milano, Giuffrè, 1971. 122. Claus asserts that the *procurator omnium bonorum* could act on the basis of the *praepositio* of the *dominus*: Axel Claus: *Gewillkürte Stellvertretung im Römischen Privatrecht*. Berlin, Duncker & Humblot, 1973. 308ff. Kaser assumes a *procurator* with general administrative authority ('Gesamtprokurator') was initially freed and therefore his activity fell within the fact pattern of *negotiorum gestio*, but certain types of cases could only be carried out by special mandate – even by a person of a higher social class: Max Kaser: Stellvertretung und „notwendige Entgeltlichkeit". *SZ* 91 (1974), 146–204. 190-191; 186. Beside the unlimited power ('poteri illimitati'), it is also recorded by Miceli that until the 2nd century the relationship between the *dominus* and the *procurator* was regulated exclusively by the *actio negotiorum gestorum*: Maria Miceli: *Studi sulla «rappresentanza» nel diritto romano*. Vol. I. Milano, Giuffrè, 2008. 140-143. Watson and Zimmermann definitely mention a dual scope of subjects and general management authority: Zimmermann 1996, 53. Alan Watson: *The Law of Obligations in the Later Roman Republic*. Oxford, Oxford University Press, 1984. 193. Despite of the wide range of situations which could be administered by *procurator omnium bonorum*, the concrete term appears in only four places in the Digest: Paul. 10 *ad ed*. D. 3, 6, 7 pr.; Scaev. 1 *resp.* D. 17, 1, 60, 4; Gai. *sing. ad form. hypoth*. D. 20, 6, 7, 1; Ulp. 76 *ad ed*. D. 44, 4, 4, 18.

63 Koenraad Verboven: *The Economy of Friends. Economic Aspects of Amicitia and Patronage in the Late Republic*. Brussels, Latomus, 2002. 235-236. The designation of *negotiorum gestor* as a *procurator omnium bonorum* can be derived from the 2nd century: Franz-Stefan Meissel: Altruismus und Rationalität. Zur „Ökonomie" der negotiorum gestio. In: Ulrike Babusiaux—Peter Nobel—Johannes Platschek (ed.): *Der* Bürge *einst und jetzt. Festschrift für Alfons* Bürge. Zürich-Basel-Genf, Schulthess, 2017. 255–288, 280. Cf. Kaser 1971, 587. A contrary position is taken by Benedikt Frese: Prokurator und negotiorum gestio im römischen Recht. In: Emilio Albertario—Émile Jobbé-Duval (ed.): *Mélanges de droit romain dédiés à Georges Cornil*, Vol. I. Gand-Paris, 1926. 326–384, 348-349.

64 Finazzi 2006, 40.

usurarium),[65] as the emperor wrote in his rescript addressed to Flavius Longinus[66]. The *gestor*, who fails to comply with *a semet ipso exigere* obligation must therefore pay the interest. The legal basis for interest payment is the same here: The *negotiorum gestor* acted negligently, he did not pay the due debt, so he is liable for the payment of default interests.[67] However, the interest payment is not unconditional, the principal is entitled to exempt him from this obligation.

If the *dominus* were to litigate the capital claim with *negotiorum gestorum actio*, then the determination of the obligation to pay interest — just as with regard to compensation[68] — would belong judicial discretion. Which, according to Paul, has the same force as if the debtor had promised the creditor the interest payment in a *stipulatio*. Fragment D. 3, 5, 6 appears as an underlying rule, which in the case of *bonae fidei iudicia* defines the ascertainment of interest payment as one of the roles of the judge *(officium iudicis)*.[69] This direction of interpretation ('linea interpretativa') ensures the examination of the content of *bona fides* on a case-by-case basis, accompanied with the possibility of considering all the particularities of the facts.[70]

Observations

After the analysis of the interest payment obligation of the *negotiorum gestor* arising from the obligation of *a semet ipso exigere*, the following conclusions can be drawn.

The asset management activity of the *gestor* falls within the scope of the *a semet ipso exigere* principle.[71] This obligation refers to the fact that he must

65 The conversion of debt into an interest-bearing one is caused by *bonae fidei iudicium* cf. C. 4, 32, 13.

66 For the liability of the tutor prescribed *a divo Pio et ab imperatore nostro et divo patre*, see Ulp. 36 *ad ed*. D. 27, 3, 1, 13.

67 The *a semet ipso exigere* obligation of the *gestor* is also set into the requirements of *bona fides* by Proculus and Pegasus: Paul. 9 *ad ed*. D. 3, 5, 17.

68 Cf. Scaev. 1 *quaest*. D. 3, 5, 8.

69 Pap. 9 *quaest*. D. 16, 3, 24; Herm. 2 *iur. epit*. D. 19, 1, 49, 2; Paul. 5 *resp*. D. 19, 2, 54 pr.; Bürge 1987, 542ff.; Knütel 1988, 516ff.

70 Riccardo Cardilli: «*Bona fides*» tra *storia e sistema*. Torino, Giappichelli, 2014[3]. 70. In the fragment by Paul, *fides* means faithfulness to the promise ('Worthalten'), which establishes a bond between the promisor and the addressee: Luigi Lombardi: *Dalla «fides» alla «bona fides»*. Milano, Giuffrè, 1961. 105ff.

71 Here, *negotiorum gestio* is to be understood as a "generic term", which includes any person who perform general management activity and whose act is not subject to a special rule: Moriz Wlassak: *Zur Geschichte der negotiorum gestio. Eine rechtshistorische*

pay his debt based on the previous legal relationship established between him and the *dominus negotii*, as well as the collection of the claims of the principal against third parties.

In the light of *interpretatio systematica*, it can be concluded that the obligation of *negotiorum gestor* to collect does not change the general rules of contractual liability. The Tryphoninus fragment deserves special attention in this respect. The text first reads a compressed position — perhaps the conclusion of the jurist — according to which, *si a semet ipso exigere eum oportuit, debiturum usuras*. This detail suggests that the payment of interest is causally related to the infringement of the *a semet ipso exigere* obligation. But, later Tryphoninus himself formulates the basis for determining liability: *merito usuras bonae fidei iudicio praestaturum*.

Therefore, the obligation of the *negotiorum gestor* to interest payment regardless of the *a semet ipso exigere* principle derives from the *bonae fidei iudicium*, [72] because in these cases it is *usurae moratoriae*, which arise as a consequence of non-fulfilment of the obligation: *...quia non solvit* — as Tryhoninus writes.

Ulpian also refers to the *gestor*'s contractual liability with the requirement of the diligence of the *vir diligens*, the neglect of certain areas of management entails the liability of the general agent for *culpa levis*.[73] The use of the term *a semet ipso exigere* beside the verb *imputare* can also refer to the fact pattern of debt default.

It should be noted that the liability rule arising from default also applies to the debtor acting as *negotiorum gestor*.[74] However, this only foresees risk bearing, as the specific extent of the liability of the *gestor* was assessed by the judge, regarding the *bonae fidei iudicium*.

It can be established that the *a semet ipso exigere* obligation protected the interests of the *dominus* and existed only, if there was a risk of delays in

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Untersuchung. Jena, Gustav Fischer, 1879. 29. Accordingly, the *a semet ipso exigere* obligation is imposed on the debtor of any transactions that may fall under the fact pattern of *negotiorum gestio* – e.g. *tutor*, *curator*, *procurator* or *mandatarius*. Cf. Finazzi 2006, 83; Peters 1911, 186ff.

72 Cf. Riccardo Cardilli: *L'obbligazione di «praestare»* e la *responsabilità contrattuale in diritto romano (II sec. A.C. – II sec. D. C.)*. Milano, Giuffrè, 1995, 403.

73 Arangio-Ruiz and Kunkel also detect *culpa levis* liability, however, they consider it to be of post-classical origin: Arangio-Ruiz 1958, 214; Wolfgang Kunkel: Diligentia. *SZ* 45 (1925), 266–351. 291-292.

74 The responsibility of the *gestor*, who is considered a debtor in default, becomes stricter *(perpetuatio obligationis)*, therefore, hypothetically, he may even be liable for *casus maior*: Jan Dirk Harke: *Mora debitoris und mora creditoris im klassischen römischen Recht*. Berlin, Duncker & Humblot, 2005. 14.

performance concerning a debt from earlier or if the debt arose after the beginning of the administration.[75]

The examination embedded in the question of the obligation to interest payment ends with the reply of Emperor Trajan, which he sent to Pliny, who had complained about the bitterness of the Roman credit life.

Plin. Sec. *Epist*. 10,55: "Neither can I see any other solution myself, my dear Pliny, to the problem of investing public funds, unless the rate of interest on loans is lowered. You can fix the rate yourself, according to the number of potential borrowers. But to force a loan on unwilling persons, who may perhaps have no means of making use of it themselves, is not in accordance with the justice of our times."[76]

75 It can be assumed that for the *a semet ipso exigere* to arise, there had to be a conceptual or juridical relationship between the administration and the debt of the *gestor*: Finazzi 2006, 81.

76 Translation by Betty Radice.