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Green Paper Mortgage Credit in the EU COM(2005) 327 final

Dear Sir/Madam,

The Austrian Federal Chamber of Labour would like to thank you for the working document and is following the diverse consumer policy initiatives of the European Commission with considerable interest. The Federal Chamber of Labour (BAK) represents the legal interests of around 3 million workers, and one of its tasks is consumer protection. Strengthening consumer protection in Europe is therefore of particular concern to the BAK.

Summary

- The BAK considers it fundamental that consumers are informed about all the charges and costs associated with lending so that they can compare the individual offers.
- The information should at any rate include commission charges, administration or handling charges, total amount borrowed and payable (including APR, calculation rate, compound period, variable interest rates and total interest payable), direct costs and effects on interest rates, form of product, early repayment fee, compensation and period for the redemption plan.
- The consumer should already be provided with pre-contractual summarised information at the earliest stage of contact between him/her and the lender or intermediary.
- The information must be given to all those involved in lending. This also applies to intermediaries and brokers.

- A standardised method of calculating the annual percentage rate (APR) is important in all Member States. That is why it is essential to include all charges and costs incurred in this interest rate in order to create a comparable interest rate for the consumer.
- The BAK sees no advantage in a “26th regime” as it fails to clarify which legal protection system should be used to clear up disputes arising from a “26th regime”.
- The BAK would welcome the promotion of alternative dispute resolution instruments (ADRs) not only with regard to mortgage credit.
- Discrimination-free access to databases is then only possible if there is a maximum level of consumer protection.
- However, the BAK pronounces itself against corresponding interconnections and an information system in connection with databases – apart from doubts about data protection rights, this would make the borrowing costs more expensive and these costs would be passed onto the consumer.
- On the other hand, the BAK declares itself against public land registers being able to be run by private persons and that is why it calls for registers with irrebuttable presumption of the accuracy of their contents to also be run by corresponding “authorities”.
- Public registers also need to be implemented in all Member States.
- The BAK declares itself against the abolition of accessoriness (link between mortgage debt and collateral).
- The BAK declares itself against allowing institutions that do not fall under the scope of the EU definition of a credit institution to perform mortgage lending. We should not create the possibility to allow other institutions to grant mortgage credit.

Consumer information

What information should the consumer receive?

The BAK considers it necessary to provide consumers with enough information so that there is corresponding security, transparency and flexibility in the relevant mortgage credit.

The BAK considers it fundamental that consumers are informed about all the charges and costs associated with lending so that they can compare the individual offers.

In the BAK's experience, the costs for registering a mortgage in the land register as well as the estimated costs are not included in the APR in Austria. However, as these costs are not insignificant (registration costs in the land register = mortgage register, costs of 1.2% of the charge amount), these should at any rate be included in the APR in connection with lending or drawing up an offer. In addition, the costs for insurance or other collateral should be included as these also burden the consumer. Greater

transparency and comparability and increased competition are only possible if all costs are broken down and included.

The BAK therefore endorses Point 9 of the recommendations made in the Forum Group on Mortgage Credit report which states that the information should at any rate include commission charges, administration or handling charges, total amount borrowed and payable (including APR, calculation rate, compound period, variable interest rates and total interest payable), direct costs and effects on interest rates, form of product, early repayment fee, compensation and period for the redemption plan.

The BAK believes it is important that the consumer is already provided with pre-contractual summarised information at the earliest stage of contact between him/her and the lender or intermediary. In the BAK's view, it should be possible for all Member States to implement this despite their different traditions and legislation.

The BAK considers it important to introduce minimum harmonisation at the highest level in order to protect consumers. This also means that information should be provided not only by the lenders, but also by all those that are involved in lending. After all, brokers and credit intermediaries also come into contact with the consumer and should therefore be subject to the same obligations. To ensure that the information obligations of these professional groups are adhered to, the BAK proposes – if the information is not provided – that these professional groups should not receive commission of any kind whatsoever. The BAK calls for commission charges to be fixed at a maximum amount for reasons of consumer protection as well as additional measures for imposing sanctions by local supervisory authorities for non-compliance.

Advice provision and credit intermediation

Should the provision of advice to a borrower be made compulsory or should it be a matter of choice?

The BAK doubts whether compulsory advice would increase the quality of advice. From the consumer's viewpoint, it is more important that there is an obligation to provide the best possible advice so that the complex mortgage credit contract can be drawn up based on the consumer's requirements and needs. The BAK therefore welcomes the idea of a group of experts providing the consumer with the data on a permanent data carrier or even on paper, irrespective of whether the advice is given in a bank or by an intermediary. In any case, it is important to set standards for the advice and – as already explained – have sanctions in place for non-compliance with these advice standards.

From the consumer's viewpoint, it is also important that the consumer is told prior to being given advice what fees might accrue for this advice and what role the advisor performs as part of his/her occupation.

Early repayment

From the consumer's viewpoint, it is at any rate important and essential to have the right to early repayment. A consumer should not be able to do without this possibility. However, this right should not be restricted to the extent that it exists but cannot be exercised due to high penalty payments.

In the BAK's view, it would be desirable anyway not to introduce any early repayment fees (ERFs). However, if ERFs were to be introduced, there must be a guarantee that the right to early repayment exists at any time, and that an ERF may only be demanded under certain conditions. The conditions for charging need to be regulated exactly and be restricted to a maximum rate. The ERF should also only be possible if a fixed interest rate is guaranteed for more than 10 years. The lender should only be able to demand it if the consumer ends or terminates the mortgage credit at the beginning of the period. Charging someone only in the first three years would therefore be conceivable. This compensation may only be calculated based on objective criteria.

The BAK believes it is necessary at any rate to inform consumers about the possibility of early repayment and also show them by way of examples what an early release would mean and what additional payments they should expect.

Annual Percentage Rate (APR)

The BAK believes that a standardised method of calculating the APR is important in all Member States. The purpose of the APR is to show the relationship between the borrowing costs and the amount of credit paid off. That is why it is important to include all charges and costs incurred in this interest rate in order to create a comparable interest rate for the consumer. Then the consumer would be better able to compare the offers in a market of European providers as a standardised APR would exist as the standard for all players. The BAK therefore supports European harmonisation of the APR and the inclusion of all costs. However, the BAK also believes that the registration costs and the estimated costs as well as all the costs incurred through lending should be included in this APR. Likewise for the costs of insurance provided mortgage insurance is used to redeem a loan.

The BAK does not think it makes sense – and this has been shown to be the case in Austria – to exclude certain costs in the APR as it therefore makes it difficult to compare products again. For example in Austria, provided it is not a condition of lending, insurance, public costs and estimated costs are not included in the interest rate. However, these costs lead to a considerable increase in the costs for mortgage credit as the consumer must bear such costs.

This problem should also be taken into consideration as part of the Commission's revision of the consumer credit directive.

Usury rules and interest rate variation

It is inconceivable for the BAK that “usury rules” would have a negative effect on a regulation on mortgage credit.

Credit contract

The BAK sees no advantage in a “26th regime” as it fails to clarify which legal protection system should be used to clear up disputes arising from a “26th regime”. The BAK believes that it would make more sense to implement a standardised, fully harmonised national rule for all EU Member States. It would be more advantageous if all Member States had an equally high level of consumer protection, and had to apply the same rules as part of full harmonisation. It would be easier in terms of application of the law not to have another higher “regime”.

Enforcement and redress

The BAK would welcome it if the Commission were to consider imposing on Member States an obligation to ensure the existence of alternative dispute resolution instruments (ADRs) not only in the area of mortgage credit. This is so as not to increase the strain on the courts and obtain swifter – and ultimately more cost-effective – proceedings in the event of disputes. However, it should not be a matter of mediation systems established on a voluntary basis, but binding procedures that enable a conflict to be resolved cost-effectively and out of court. These dispute settlement courts should therefore introduce binding rules of procedure of equal value for all Member States. In any case, the credibility of such dispute resolution instruments can be increased if they are impartial. There are currently ombudsmen in Austria created by the respective mortgage banks or institutions that grant credit and that are under them. In the BAK’s experience, there is therefore hardly any recourse to these mediation bodies.

Legal issues

The BAK considers it sensible with regard to the issue of collateral, the principle of applicable law, to apply and maintain the substantive law in force in the Member State in which the property is situated (*Lex rei sitae*).

Client credit-worthiness

The BAK has had fairly negative experiences in Austria in dealing with the credit-worthiness data of borrowers. Data is transmitted or entered into so-called “warning lists or negative lists” mostly when someone enquires about taking out a loan. This enquiry is often not dealt with in accordance with data protection rules. These data are not updated and even if there was no requirement, it does not always lead to the data of the person affected being deleted immediately. If the Commission plans to create discrimination-free

access to the databases of other Member States, it must ensure that with every query, the consumer or at best the guarantor are informed of the fact that a query was made and what this query refers to.

From the BAK's viewpoint, discrimination-free access to databases is only possible if the highest possible level of consumer protection is afforded. Even if the BAK is not negative towards the idea of a credit-worthiness check in principle, it has nevertheless been shown that the default risk to banks is rather low particularly in the area of personal loans – all the more so if the granting of credit involves a loan that is secured by a mortgage. For a charge on property offers relatively good security and a fairly practicable realisation of the security's value. However, the BAK declares itself against corresponding interconnections and an information system in connection with databases – apart from doubts about data protection rights, this would make the borrowing costs more expensive and these costs would be passed onto the consumer.

Property valuation

The BAK declares itself in favour of uniform EU standards in the evaluation process so that we can be sure that the evaluation of corresponding property is carried out in the same way throughout the EU even with property funds.

However, the evaluation of property should be performed by neutral experts that use uniform standards and standardised valuation methods. If all experts apply the same standards and use the same evaluation processes, mutual recognition is also not a problem.

The BAK considers it advisable to take into account high valuation standards and all valuation reports as well as key risk criteria and considers the recommendation by the European Mortgage Federation on valuation to be a suitable instrument that should be implemented. This is why the BAK declares itself against mutual recognition of different national valuation standards.

Forced sales procedures

The Commission's opinion – to collect information on the cost and duration of forced sales procedures from the Member States and be informed about the protective regulations as part of these forced sales procedures – makes perfect sense to the BAK. However, the BAK considers it problematic to assume that forced sales procedures will take a certain time as there is no standardised duration in Austria with regard to the institution of forced sales procedures through to the actual auction.

Mortgage collateral

Land registers

The principle that only those real rights of disposal that are entered in the land register are valid prevails in Austria. Apart from the ownership right, there is also the charge (lien) and certain information rights.

Since the land register is a public register and all ownership rights, charges on property and other rights are only valid vis-à-vis third parties if they are recorded, and are also only effective then for third parties if they can see this registration in the land register, a particularly high level of mutual trust is needed to run these registers. Any order, change or deletion to a charge on property is only possible if this right is recorded in the public register. This is managed by the public courts. It can also be accessed by all parties or their representatives as well as by third parties. All entries, registrations or changes are effected in order of precedence (priority principle). The Commission should also not deviate from this principle and should endeavour to implement a public register like this in all Member States.

The BAK declares itself against these public registers being run by private persons and therefore calls for registers with irrebuttable presumption of the accuracy of their contents to only be run by corresponding “authorities”.

Euromortgage

The BAK declares itself against linking mortgage debt and collateral in a flexible way. It is not considered sensible to do away with the close bond between loan and collateral (accessoriness) as it is precisely this in our legal system that constitutes a decisive feature of real collateral. The BAK is firmly against it if this were to facilitate a “26th regime”.

Funding of mortgage credit

The BAK declares itself against allowing institutions that do not fall under the scope of the EU definition of a credit institution to perform mortgage lending. After all, it has been shown in the past in Austria that there have been considerable problems particularly with companies that do not fall under the scope of the term “credit institution”. For example the “Rieger Bank”, which was not a bank and led to widespread bankruptcy among creditors. It would be all the more incomprehensible to give such institutions the opportunity to offer mortgage credit. We should therefore retain the strict rule on credit institutions and should not allow any deviation from the current rule of giving other institutions the opportunity to offer mortgage credit.

Kind regards,

Herbert Tumpel
President

Johanna Ettl
pp Director