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**Position of the Verband der Privaten
Bausparkassen e.V.**

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

Is there a Need for EU Measures to integrate EU Credit Markets?

The Verband der Privaten Bausparkassen e. V. is pleased to use the consultation process as an opportunity for commenting upon aspects addressed by the European Commission in its Green Paper on „Mortgage Credit in the EU“ dated 17 June 2005, KOM (2005) 327 final.

I. INTRODUCTORY REMARKS

The European Commission's considerations to take action, if appropriate, with a view to integrating Member States' mortgage credit markets stems from the fact that the internal market hitherto existing in this sector has not satisfactorily functioned so far compared with the internal markets for products of other financial services providers.¹ This has been so for diverse reasons (1). We recognise the advantages of a single European market for mortgage credit, and we support a competition-based approach for its realisation (2). However, the measures based on a Study commissioned with London Economics by the EU Commission to justify the action it has proposed to take are not deemed acceptable (3). On the other hand, we welcome the EU Commission's view that home ownership should be recognised as long-term financial security for old age (4).

1. Obstacles to creating a single European market for mortgage credit

On the one hand, most consumers lack the language skills they need for obtaining product information from credit institutions in foreign countries and for conducting talks with foreign financial services providers on the precise modalities attached to the products of their choice. This is one of the factors influencing the confidence of consumers in foreign services providers. Another one is that borrowers would be exposed to the risks of a foreign legal system which they would find to be even harder to understand, on average, than their own country's legal system. These circumstances act as deterrents to citizens inducing them to turn to the local credit institution they are used to bank with in order to obtain the funding they need for realising their home ownership acquisition plans; this normally is the largest investment they make during their lifetime.

On the other hand, there are divergent cultural aspects regarding the financing systems of countries. It is customary in Great Britain, for instance, to obtain from a single credit institution at least 100 per cent of the funds necessary for buying real property. This is not so in continental Europe. Belgian banks, for example, would finance the real estate purchasing price in full; but not the taxes due upon acquisition and other costs such as notary public fees accounting for another 20 per cent of the purchasing price, as a rule. In Germany, by contrast, just 60 to 80 per cent of the real-property value qualifies for credit-financing, whilst the balance must, as a rule, be provided by the prospective buyer from his own resources.

Another obstacle concerns the collateral to be provided as security in real property transactions. Normally, the property to be funded by mortgage credit at the same time serves as collateral to the lending institution enabling it to make provision for potential loan defaults.

¹ See Eurobarometer, Qualitative Study among cross border buyers of financial services in the European Union, Final Report.

Building societies are permitted to take as collateral security for lendings property located in any of the EU Member States.² The collateral is, by definition, tied to specific locations; this may mean in cross-border loan transactions that the country where the mortgage credit is transacted is not necessarily the same as the one where the collateral is located. This is yet another factor preventing credit institutions from financing real estate purchases in other countries because they do not wish to run the risk of having to launch a forced sale procedure that might turn out to be unsuccessful for practical reasons and would be extremely expensive at any rate.

2. Benefits of a single European market for mortgage credit

This is regrettable especially because a single European market for mortgage credit would bring advantages to consumers and to the credit industry alike.

Whilst such a market might give rise to new business opportunities for the credit industry by permitting it to carry out cross-border activities on a wider scale or by adding „new foreign“ products to its own ones, for instance, consumers would be able to choose from a wider product diversity in their own countries. Moreover, the competition among home-state and host-state providers of financial services in the same market would, not least, be an advantage for consumers. The Verband der Privaten Bausparkassen e. V. has therefore supported for many years ideas suggesting to create a single European market for mortgage credit.

a. No single European market solely by harmonising contract rules

But creating a single European market for mortgage credit solely by harmonising contract rules would be the wrong approach, in our view. This precisely is not the right way towards a well-functioning internal market with a large number of different products being available to consumers. Harmonising rules of contract would legally restrict the scope for designing products which would, of necessity, result in product harmonisation. Under such circumstances, it would probably be impossible to continue to offer certain products or groups of products in their present forms, which would ultimately fall victim to harmonisation. Consequently, it would not be possible any longer to maintain the present product diversity. In this context, the EU Commission itself has expressed the view that any measure it might ultimately take for integrating these markets would definitely need to result in higher levels of performance and competitiveness to the benefit of all, and this would have to be achieved not only by maintaining, but also by widening the present product variety (see para. 3 of the Green Paper). But this cannot be attained through consumer policy-motivated harmonisation of mortgage credit markets, but only through an approach based on competition.

b. Internal market through mutual recognition of financing techniques

For this reason, the Verband der Privaten Bausparkassen e. V. is of the opinion that a single European market for mortgage credit cannot come into existence before the legal bases have been created that are necessary for permitting all financial products to be offered across national borders, i.e. in all EU Member States, and for preventing foreign products on offer from being discriminated against by national legal provisions. This requires mutual recognition of financing techniques and products. However, so far the existing banking directives have not ensured this to the desirable extent. Although these directives are to ensure that credit institutions, once licensed in one of the EU Member States, are unconditionally

² See § 7 II Bausparkassengesetz (German Bausparkassen Act)

authorised to operate in the other EU Member States as well without having to meet additional bureaucratic and supervisory-law provisions. However, by reference to the general interest it would still be possible for Member States to escape individually from the workings of the principle of mutual recognition; they can simply deny certain foreign products access to their markets by subjecting them to strict consumer protection rules or by making foreign products unprofitable by way of additional costs and by way of requiring national legal regulations to be met. This is no longer up-to-date in view of the existing high level of consumer protection guaranteed by EU legislation Europe-wide. This is also consistent with the reiterated postulation of the European Parliament to rely primarily on existing and well functioning instruments.

3. Study prepared by London Economics

Since consumer protection is an especially crucial aspect in the process of further European market integration, the approach of integration through harmonisation must be viewed with special criticism.

In their Study on the Costs and Benefits of Integration of EU Mortgage Markets³, the advisers of London Economics have underlined as well that a low level of regulation in the field of product design on the one hand and a wide product variety on the other would be laudable characteristics of an optimally integrated market.

However, it is necessary to examine whether the approach employed by London Economics for their Study, i.e. to use the present British market as a model for an optimally integrated market, has been reasonable. Even the Bank of England has expressed concern about the stability of the British financial market. For the level of indebtedness of average British households stands at 140 per cent of the average household income⁴. At 4.6 per cent, the present savings ratio ascertained for British households is down to an all-time low in a period of 40 years. The country has even seen a large number of forced sales procedures. It must be assumed that this situation is not least the outcome of the British practice as well as of the more recent recommendation of London Economics to contract debts at a level that is clearly in excess of 100 percent of the value of the real property to be purchased and to permit lendings to be made at that level.

By comparison, the savings ratio in the Federal Republic of Germany, for instance, is about 10 per cent. Apart from this, the German practice is to finance home ownership up to a level not exceeding 60 to 80 per cent of the respective real-property value. Schemes to finance owner-occupied housing characteristically involve a relatively high portion of own capital resources averaging some 30 to 40 per cent. German citizens seeking to acquire home ownership typically finance over 50 per cent (not depending on capital market fluctuations) of the real-estate price on a loan basis, including building-saving funds. This explains why credit institutions have seen an extraordinarily small number of defaulted home loans and forced sales procedures and why the corresponding figures observed for the Bausparkassen have been even smaller.

Against this background, the view of London Economics that the closed German system of Bausparkassen refinancing and the French system of collective financing represent obstacles to creating a single European market for mortgage credit is incorrect and can therefore not be

³ London Economics, The Costs and benefits of integration of EU mortgage markets, August 2005, p. 20

⁴ Merxe Tudela and Garry Young, Bank of England, Working paper Nr. 266

accepted.⁵ All countries have made it a point to steady economic development and to ensure a certain economic balance, overall. Levels of employment and productive capacity utilisation that are as steady as possible represent the best prerequisites towards optimal economic growth. The construction industry depends on steady demand to a special extent. The German collective building-saving system offers ideal conditions for satisfying these economic policy requirements, since it combines institutionalised saving with investment.

Finally, it must also be pointed out that the method employed by the Study for ascertaining the value added that would arise to an internal market for mortgage credit from action by the EU Commission appears to be questionable from an economic point of view. After all, the assumed mortgage credit market is a „hypothetical“ one in which the prices of all products would be identical in all Member States, the bandwidth of all the products on offer would be just as wide as it is in EU Member States at present and the current obstacles to setting up a single European market for mortgage credit such as different languages, cultural and consumer-preferences, national legal provisions and national banking supervisory restrictions on product diversity would cease to exist all of a sudden. Against the background of such theoretical assumptions, a Gross National Product increase would not come as a surprise.

4. The importance of mortgage credit for business and pension financing

Germany's experience in recent years also shows that its Bausparkassen system represents an „automatic stabiliser“ for the level of housing construction activity. The German closed financing system in the Bausparkassen sector makes it independent from capital market fluctuations. This means that lending commitments under the system are influenced by cyclical developments to a rather small extent. So, the building-saving system exerts a stabilising influence on the housing construction cycle.

We therefore welcome the EU Commission's view according to which the volume of mortgage lendings and the terms and conditions of contract are of special importance, overall. It has been pointed out in this context that contractual restrictions on early loan repayment would delay transmission of interest-rate changes and, as a result, obstruct refinancing which exemplifies the relationships between macroeconomic conditions and mortgage credit (see para. 8 of the Green Paper).

At the same time, we also support the fact that the EU Commission has verbalised in its Green Paper the possibility for EU consumers to use home ownership as a means for making provision for old age on a long-term basis (see para. 2 of the Green Paper). After all, many EU Member States will have to meet far-reaching demographic challenges in the next few years owing to severe changes in the age pyramid and to more acute problems facing social welfare systems. The need for citizens to increasingly make provision for social distress and old age themselves and the role of home ownership in this context will play an even greater role in future.

In all, a single European market for mortgage credit cannot be achieved by harmonising national contract regulations. The Verband der Privaten Bausparkassen e. V. is of the opinion that such a market can only be achieved by placing the principle of mutual recognition on a legal basis. The proposal for a directive⁶ submitted by the European Commission to this end as early as in 1984 represented the right approach in our opinion, but there has apparently been no room for it in the present Green Paper.

⁵ London Economics, The costs and benefits of integration of EU mortgage markets, August 2005, p.64 ff.

⁶ COM/84/0730 final 2, OJ C402 of 14 February 1985.

Nonetheless we should like to submit views on a number of contentual elements of the Green Paper. In this context we expressly welcome the opinion of the EU Commission suggesting to propose measures only after the consultation process has been terminated, provided that good economic reasons can be proven to exist that justify Commission action in the EU market for home loans, i.e. provided that the potential benefit of Community action is equal to what it costs and provided that the impact of such future action is ascertained beforehand (see para. 4 of the Green Paper).

II. CONSUMER PROTECTION

Information, 15-16

Should the Code of Conduct be replaced by binding legislation or remain voluntary?

The Code of Conduct signed in 2001 must retain its character of a voluntary and self-binding arrangement.

The effects obtained with the help of the „European Standardised Information Sheet“ (ESIS) already suggest to leave the character of the Code of Conduct as it is at present. It is of outstanding importance for the functioning of a single European market, in which the national products on offer are not subject to any restriction, that consumers are able to make decisions on the basis of satisfactory information about the characteristics of products. In this context, it is essential for consumers to be in a position to compare individual product elements. This objective has already been achieved through ESIS. For this reason, any new harmonisation measures at the level of the EU Commission – e.g. adoption of a new regulation – would not improve possibilities for obtaining information and for making comparisons, but would launch an unnecessary and cost-triggering European law-making process in the first place. Besides, a number of the countries having applied for EU membership have already transposed the Code of Conduct successfully.

Replacing the Code of Conduct by binding legal regulations would not be recommendable because Member States have some discretion when transposing directives. This latitude ordinarily prevents European law-requirements from being transposed in a uniform manner; this would have especially negative consequences with respect to the information needs regulated by the Code of Conduct. Moreover, Article 153 V of the EC Treaty permits Member States to retain consumer protection provisions that are stricter than the corresponding requirements under European law. Compared with a directive, the Code of Conduct thus offers an advantage whereby there is no latitude as regards its uniform and direct application in EU Member States.

It should also be noted that the obligation of one party to meet the requirements of a Code of Conduct already has a binding legal effect. This has been demonstrated especially by the possibility of competitors to take action against unfair commercial practices within the framework of the law against unfair competition. Pursuant to Annex 1, No. 1 of the 11 May 2005 directive on unfair commercial practices, non-compliance with the Code may in certain circumstances be an unfair commercial practice with the risk of triggering the legal sanctions provided for under the directive.

What information should be given to consumers? A careful balance must be found between information deficiency and information overload.

The extent of information as provided for under the Code of Conduct is practice-oriented and satisfactory for consumers seeking to make balanced and informed decisions.

The provisions of the Code of Conduct were adopted after long and comprehensive negotiations among representatives of consumer organisations, the credit industry and the European Commission; at the end of them, all participants agreed to initially give consumers general information on home loans. In addition, the „European Standardised Information Sheet“ (ESIS) will have to be completed and handed over to potential clients after talks with them;

the ESIS is to enlist information, standardised Europe-wide, on contractual elements of specific offers. This makes it possible for customers to obtain an overview of specific offers.

Through the ESIS consumers are to be put into a position to compare all contractual elements of the loans offered to them. Having obtained information about the level of the annual percentage rate of charge, the right to early repayment as well as about early repayment fees, the credit length and other elements, consumers are thus in a position to make informed decisions. This represents the maximum of what is possible in terms of information without overloading consumers. Confronting them with too much information does, as a rule, not make them wiser, but rather tends to confuse them and to adversely affect clarity.

For numerous legal and voluntarily adopted bodies of rules now exist nation-wide and Europe-wide regulating information and advisory duties as well as the - partly overlapping - modalities pertaining to contract conclusion, e.g. how to provide customers with information prior to contract-signing (examples: regulations on distance selling, European Code of Conduct, French “code de la consommation”); what kind of advisory duties are to be satisfied (examples: French “code de bonne conduite”, jurisdiction in individual countries); how to prepare contract conclusion (examples: right of cancellation, waiting period, hand-written remarks, compulsory postal carriage (France), „eyelets“ (Germany)); and what contractual regulations would be ineffective of necessity (examples: credit contracts are ineffective where subsequent credit-financing is denied in real estate purchasing transactions or in the event of any failure to conclude the principal contract (France), regulations on abusive clauses, provisions on special product phenomena (German Bausparkassen Act).

Even the report of the Forum Group on Mortgage Credit refers to the contents of the Code of Conduct as satisfactory. There are no known consumer complaints to the effect that the Code’s contents is unsatisfactory. Nor has the „Institut für Finanzdienstleistungen“ (iff) monitoring transposition of the Code indicated that further information should be furnished beyond the information included in the Code.

The Commission considers it fundamental that pre-contractual information is provided at a stage that enables the consumer to shop around and compare offers. Can such a common EU stage be identified, given the variations in Member States’ traditions and legislations?

In view of the fact that EU Member States have different traditions and legal regulations, it has not been possible to reach agreement, Europe-wide, on what would be the proper moment for handing over the ESIS.

The Code of Conduct provides for the ESIS to be handed over in the pre-contractual phase. Whilst it would be too late to do this on the moment of contract conclusion, it would certainly be too early to fix that date on the day on which potential clients first contact a credit institution. There would be no point in such a stipulation because the ESIS can only be completed in a meaningful way taking care of individual circumstances when after a first comprehensive discussion the lender knows enough about the potential customer’s real property acquisition plans so that he can submit a tailor-made credit offer by completing the ESIS.

It is legally impossible to fix a date, compulsory Europe-wide, by which the ESIS must have been handed over to consumers, because it becomes clear at closer sight that differences in the

general provisions of national contract law systems must be taken into consideration. Under French law, it would be possible to take the ESIS as a credit offer by a financial institution that is binding for 15 days from the date on which it was handed over.⁷ This means that the interest variation risk rests with the lender in that period. Under German law, it is necessary to distinguish between information and a legally binding contract offer. Only the latter would be binding on German lenders pursuant to the general provisions of the German Bürgerliches Gesetzbuch (BGB - German Civil Law Code).⁸

Should an information provision regime apply only to lenders or to others such as brokers too? How can compliance with any such regime (binding/voluntary) be ensured?

The information offered should be binding on lenders only. For the Code of Conduct is only binding on its signatories. Intermediaries acting as agents for or signing credit contracts on behalf of financial institutions are required to meet the provisions of the Code, since the credit institutions on whose behalf they act are bound by the Code.

Brokers, on the other hand, act on behalf of their customers and get paid by them. The credit brokering sector should therefore actively seek to sign and apply the Code. Credit institutions are in no position to influence the business activities of brokers.

Competition ensures that the provisions of voluntary self-binding arrangements are satisfied. There are legal possibilities at the national level for monitoring compliance with the Code of Conduct (see above).

Advice Provision and Credit Intermediation, 17-19

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

Furnishing pricing information to customers should not be made compulsory. The choice of whether advice is wanted should rather be on the customer's side. This is relevant for whether clients seek information that clearly exceeds the knowledge to be imparted to them according to Nos. 15 and 16 of the Green Paper, for instance, or for whether they seek advice on questions affecting their financial plans during their whole lifetime, the object to be funded as well as issues concerning collateral security (especially Public Register issues). Advice of this kind may be highly varied. Supply and demand will develop in the market place and will have to be taken into account when prices are fixed (e.g. should advisory costs be kept separate or be included in credit terms and conditions). Here, it is necessary to take into consideration that the liability risks associated with advice to customers will be included in prices.

Should conditions be applied to any advice actually provided, whether under a duty or by choice (e.g. standards for the advice, sanctions for non-compliance, advance disclosure of fees, of the adviser's role and recording on durable medium)?

Terms and conditions attaching to advisory services should not be laid down. Our national bodies of rules which include regulations on contractual liability for the advice furnished to clients and the pertinent jurisdiction in this field are fully satisfactory. Further terms and conditions would represent nothing but further specialised rules. In view of the fact that the fields in which advice is given is highly varied, specific rules do not appear to be to the point. One could, at best, think about specifying the main elements of advice as well as the fees chargeable thereon.

⁷ § 311-8 Code de la Consommation, France

⁸ §145 Bürgerliches Gesetzbuch - BGB

Early Repayment, 20-22

Should early repayment be a legal right or a matter of choice? If it is to be a right, should it also be made possible for a consumer to waive this right? Under what conditions? Should this right be subject to compensation in the form of fees?

We do not see any need for a legal provision regulating a legal right of customers to making early loan repayment, because - under the currently valid law - borrowers already are permitted to choose from among several product groups and because they are free to abstain from contracting fixed-interest credit. It is up to borrowers to say whether they want either a (completely) variable-interest loan or a fixed-interest credit for periods different in length, and they may choose from among several groups of products (e.g. building-saving loans, interim credit, advance loans) with special characteristics that appear to be either an advantage or a drawback for them.

Fixed-interest loans in their present form give borrowers the benefit of a high level of security and, thus, of a high level of protection for the whole fixed-interest period. The fact that customers have the option to conclude loan contracts under which early loan repayment is not permissible takes account of the principle of faithful contract performance reflecting customers' social position and flexibility and the security they have when making their calculations and plans. Any exemption from this stipulation forbidding early loan repayment within the agreed fixed-interest period must therefore reflect an even balance between the opportunities and the risks involved in market interest variations. Nonetheless, borrowers/consumers should be granted a right to early loan repayment in defined special groups of cases in order to allow them to escape from economic oppression and/or social distress. However, borrowers should not have the option to decide on early loan repayment "at will".

Any unlimited right of borrowers to early loan repayment would, to that extent, adversely affect or even prevent stabilisation of capital markets by way of maturity-matched loan refinancing, which would be economically desirable, overall. For even if credit institutions were fully compensated for losses sustained on account of early loan repayment, they would in any event have to face the impossibility of making balance-sheet plans. This drawback can therefore be accepted only in exceptional cases and must be kept within the narrowest possible limits. Besides, any unlimited borrower right to early loan repayment would reduce the length of time during which the money loaned is on the books of credit institutions. This would result in greater "transaction velocity" in the field of lendings and repayment with the consequence of larger amounts of sales and handling charges having to be paid by borrowers/consumers and, more precisely, by the vast majority of the customers faithfully meeting their obligations.

Any legal right of borrowers to premature repayment of fixed interest loans would ultimately involve the risk of product diversity shrinkage in the long term, because fixed-interest loans would invariably disappear and be substituted for by variable-interest loans, which would rather tend to be counterproductive to creating a single European market for mortgage credit. In order to take care of refinancing costs, fixed-interest loans are generally less expensive, overall, because for fixed-interest loans as distinct from variable-interest loans handling cost additions would be spread over a longer period. This shows that fixed-interest credit is invariably more favourable in relative terms. If the penalties due for early loan repayment were generally shifted onto the consumer side through wider margins, fixed-interest credit would become more expensive as well. Both options would be contrary to the interests of borrowers/customers.

How should such fees (whether under a right or through contractual choice) be calculated? Should there be caps, as is the case in some Member States?

Should the penalties to be paid by way of compensation for early loan repayment include in full damages for losses sustained within the meaning of the current jurisdiction by the Federal Supreme Court (BGH), losses would have to be made up for by wider margins that would ultimately be payable by all borrowers to the benefit of a small number of profiteers.

The ceiling on such compensation should be limited to what would be due to lenders to make good the losses actually sustained by them. By way of analogy with the existing BGH jurisdiction, the method for calculating losses actually sustained takes into account the principle of faithful contract performance with social aspects being taken into consideration (= termination of funding); it is not permitted to shift customer-specific burdens arising from changes in original plans to any third party (socialisation of costs). Contentually, offsets for losses sustained should therefore comprise in full higher refinancing costs, handling charges as well as calculated shortfalls in profits. Any fixed percentage-based ceiling, by contrast, would lead to injustice to borrowers with the consequence that credit institutions, in order to offset losses threatening to arise from early loan repayment, would charge flat rates as additions to prices and interest margins charged to customers. This general rise of market interest rates would be detrimental to consumers.

How should the consumer be informed about early repayment? Is there scope for consumer education here?

Compulsory customer information on early loan repayment would seem to be problematic as well. Any information not associated with legal consequences would not represent any additional benefit to borrowers. If, on the other hand, such information is to be of some use to customers, it would be necessary to first define legally binding minimum standards especially in respect of the legal consequences (calculation method) of early loan repayment and in respect of faulty advice to customers. Because of the need to have a flexible range of products, so a far-reaching intervention in the contractual freedom of credit institutions would seem to be of no avail to either borrowers/customers or credit institutions owing to the unavoidable increase in distribution costs that would be shifted onto the consumer side as well.

Annual Percentage Rate, 23-25

What is the purpose of an APR? Information? Comparison? Both?

Annual percentage rates of charge serve the purpose of both information and comparability with the focus on comparability for borrowers/customers.

Should there be an EU standard covering both the calculation method and the costs elements?

In the interest of a large measure of comparability, it would be desirable as a matter of principle to have a single EU standard for the annual percentage rate of charge. For this reason, the EU Commission should ensure a uniform method and basis for calculating the APR. Here, a close definition limited to the costs charged to borrowers/customers at the moment a lending is made would be preferable.

If so, what kind of cost elements should such an EU standard include?

To enhance comparability, loan-related direct costs such as discounts, handling charges, loan charges, nominal interest rates, redemption rates, fixed-interest periods and total loan periods ought to be included in the APR calculation, although a possibility to grant limited exemptions ought to be retained to take care of product-specific characteristics.

However, the total amount of credit costs should not be laid open because this would tend to confuse customers rather than provide them with further clarifying information in the absence of data relating to credit periods and redemption percentages as reference basis and would, to that extent, be of no value for borrowers at all.

Moreover, monthly payable costs should also be given only for the elements relevant for the annual percentage rate of charge. Other costs such as those attaching to collateral provision are, as a rule, beyond the influencing possibilities of credit institutions. Besides, this type of costs cannot be clearly identified by them (e.g. sureties of other financial institutions etc.) so that compulsory furnishing of information about the amount of such costs would be next to impossible.

The Commission welcomes views on the merits of providing separately information on all costs not specified in the APR, and on the presentation of the effects of the APR in concrete terms such as the cost per month or the overall cost of the loan. Please give us your views with regard to the issues raised by the Commission.

(see above)

Usury Rules and Interest Rate Variation, 26-28

What are the implications of usury rules for market integration (including any relationship with products such as equity release and mortgage insurance)?

There is no need for loan-specific rules on usury, because the general principles and legal regulations existing at national level suffice for the purpose.

Nor is there, in this context, any direct relationship with collateral security for being accessory in nature, as a matter of principle. Pertinent rules should therefore be discussed in a wider context.

This is another field in which it has been generally accepted that any absolute restriction not bearing any reference to individual risks would limit the diversity of financing instruments on supply.

Should this issue rather be examined in a broader, non-mortgage specific, context?

(see above)

Do such restrictions hinder market integration?

(see above)

What impact can they have on the development of particular products such as equity release products?

(see above)

Credit Contract, 29

The Commission welcomes views on the merits of the standardisation of mortgage contracts, e.g. via a 26th regime instrument. Please give us your views with regard to the above issue.

It is urgently recommended to abstain from realising the demand to standardise mortgage credit contracts. The consequence of such standardisation would be just one product being left. So, such a step would hinder even the slightest competition. The advantages of a single European market, by contrast, would give market participants an unrestricted choice. By realising this proposal, the legislator – instead of the market - would perform the task of designing products.

Nor is it a task of the European Union to ensure uniformity of contract terms within the framework of its European Contract Law Initiative mentioned in the Green Paper. It is the task of the working groups currently preparing a common frame of reference in this field to design a body of rules in the field of the law of obligations. However, in addition to the terms and conditions of the law of obligations, mortgage loan contracts also provide for direct links to collateral realisation, i.e. a contractual clause whereby in the event of defaulted loans the real estate could immediately be put up for forced sale. However, this contractual aspect relates to the law of (personal and real) property and has, for this reason, not been covered by the common frame of reference.

Finally, most representatives on the Group on Mortgage Credit⁹ did not find this Commission proposal acceptable. Just four of them (consumer protectionists) have shown themselves to be in favour of a standardised mortgage loan contract.

Enforcement & Redress, 30

Should the Commission consider imposing on Member States an obligation to ensure the existence of such alternative means of redress in the mortgage credit area?

There is not need for the European Commission to propose compulsory adoption of legal enforcement and redress regulations. Alternative redress systems are already existing and well functioning on national level.

For example, the members of the German Verband der Privaten Bausparkassen e. V. voluntarily introduced in 2002 an ombudsman procedure of its own in the interest of providing customers with enhanced services. This procedure has been favourably accepted and been taken advantage of by consumers. In addition to the Bausparkassen, also other federations of the credit industry have set up ombudsman systems as a service to their own members and the latter's customers.

⁹ Report of the Forum Group on Mortgage Credit: “ The integration of the EU mortgage credit markets”, December 2004. Recommendation No. 8.

Concerning customer complaint submitted to settlement under the ombudsman procedure of the private Bausparkassen in Germany, i.e. arbitration and out-of-court settlement cases, 44 per cent were adjudicated in favour of consumers and 49 percent in favour of the Bausparkassen. In 7 per cent of the cases, the parties to the dispute were recommended to come to terms before going to court. Legal disputes have thus been settled between a Bausparkasse and a number of its customers also because the Bausparkasse has been ready to accommodate which it was not obligated to do. Arbitral awards are binding on a Bausparkasse up to an amount of EUR 5,000; this does not apply to consumers. Since all complainants are thus free to refer disputes to the ordinary courts, the extremely small number of proceedings shows that the ombudsman procedure as a proven method for settling legal disputes has been well received by consumers.

Not only the European Commission promotes the idea of settling legal disputes by way of arbitration and out-of-court agreement. In addition to the European Commission's recommendation¹⁰, Member States have made efforts at the national level as well for putting arbitration procedures in place. The German Parliament (Deutscher Bundestag) for example enacted an out-of-court dispute settlement procedure effective 01 January 2000.¹¹ This law stipulates that the German federal states shall be permitted to require civil courts to wait until after an ombudsman procedure has been carried through without success before accepting for adjudication complaints involving disputed sums below a certain level.¹²

The Austrian credit industry has set up a joint dispute settlement system as well.¹³ The activities of Fin-Net at the European level show that the of out-of-court dispute settlement systems in place have functioned well and that there is thus no justification for the European Commission to take further action.

With respect to Fin-Net it ought to be noted that the European Commission should be urged to have the online portal for consumer complaints translated into all official EU languages in order to enable consumers in all EU Member States to make use of this facility; this would be preferable to a discussion in the Green Paper about whether compulsory legislation would be desirable.

The Commission welcomes views on ways to reinforce the credibility of existing alternative redress systems, particularly in the mortgage credit area. Please give us your views with regard to the issues raised by the Commission.

The ombudsman system operated by the Verband der Privaten Bausparkassen e. V as well as its legal dispute settlement procedures have already been made use of, and the confidence of consumers in the effectiveness of such systems has not been put into doubt so far. In addition, personalities have been appointed to ombudsman-offices who can rely on the experience they have gathered during many years of service as judges at the highest national law courts in Germany, mostly the Bundesgerichtshof (Supreme Federal Court) and an Oberlandesgericht (Supreme State Court) and who are thus able to perform their tasks of independent arbiters in

¹⁰ Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ L 109/56 of 19 April 2001.

¹¹ § 15a EG ZPO

¹² Background information on the present arbitration system in Germany: about 10,000 arbiters. Except in Bavaria, Baden-Württemberg, Bremen and Hamburg, such arbiters have been appointed in all federal states to provide a dispute settlement device prior to litigation. The procedure is available for settling both penal and civil disputes. In the five new federal states this device is called "Schiedsstellen".

¹³ See <http://www.bankenschlichtung.at> for further information.

a convincing manner. This suggests that there is no need for action on the part of the EU Commission.

III. LEGAL ISSUES

Applicable Law, 31-33

Although the European Commission did not ask specific questions concerning the area of international private law (Rome I Convention). Nevertheless this legal area is of outstanding importance. Therefore we take the liberty to comment on this issue as follows.

So far, the requirements of the Rome I Convention (Convention on the application of the law of contractual obligations) have been regarded as the main hindrance to cross-border business transactions. Even the final report of the Forum Group on Mortgage Credit refers to the applicable law issue in cross-border transactions as the main obstacle in the internal market for mortgage credit. It is therefore all the more astonishing that the Green Paper does not include any concrete perception regarding the provisions of Article 5 of the Rome I Convention.

The Rome I Convention permits as a matter of principle the free choice of the applicable law. Nonetheless, a number of exemptions from this rule have been granted for contracts concluded with consumers. In cross-border transactions, Art. 5 I Rome I stipulates that the law of the country, in which the consumer ordinarily resides, shall be the applicable law. This provision ultimately requires lending institutions to adjust the contract offered to the consumer to his legal environment.. Such adaptation partially means that their financial products would hardly stand a chance in consumer-country markets unless they have been modified to an extent that would make them competitive again with the other products on offer. But this would deprive consumers of the benefits of the single European market, i.e. the possibility to shop around and buy products also from other EU Member States. This would run counter to a functioning internal market.

It would only be possible to justify statutory ordinances under Article 5 I Rome I where EU Member States have not harmonised their consumer protection rules at a high level and where such rules have hardly been developed into a consumer protection system. But all EU Member States have set up consumer protection systems till now so that it would simply be logical to mutually recognise them.

It follows therefrom that it is necessary to make sure with respect to the further development of international private law provisions that the restrictions of Art. 5 I Rome I be modified in such a way as would give consumers the full choice of products in the internal market.

Client Credit-Worthiness, 34-36

Following the same approach as for consumer credit, the Commission considers that the priority could be to ensure cross-border access to databases on a non discriminatory basis. It welcomes comments on this. Please comment on the approach considered by the Commission.

Non-discriminatory access to business-owned or government-owned data bases is desirable where the creditworthiness of customers is to be assessed. Where certain technical conditions must have been met by credit institutions or where they are required to run subsidiaries in host

countries, there may be cases of discrimination. It is therefore necessary to adopt uniform regulations on access and to create uniform technical platforms.

Data bank systems based on reciprocity (give and take of information) would, in our view, not represent cases of discrimination. The principle of reciprocity is conditional for the system's functioning ability.

Property Valuation, 37-38

What are the merits of a single EU standard, for both valuation processes and valuers?

A uniform standard would make it easier for credit institutions to understand expert opinions prepared by foreign nationals. But it must be assumed that the expenses involved in creating such a uniform standard would not bear any reasonable relationship with the desired objective.

The wide diversity of assessment systems does not obstruct cross-border lending activities. Banks are only required to make sure that experts recognised in any host state prepare their reports in accordance with that state's laws and that their reports be comprehensible.

Importance must be attached to mutual recognition of supervisory law provisions, because this would ensure legal security and mean lower amounts of cost for banks (e.g. when ascertaining the real credit portion in cases under § 18 of the German Credit Act).

What are the merits of Commission action to ensure mutual recognition of national valuation standards?

(see above)

Forced Sales Procedures, 39-42

The Commission seeks views on the following gradual approach to encourage improvements in forced sales procedures: to first collect information on the cost and duration of these procedures in all Member States and their effectiveness in protecting the interests of all involved, then present it in a regularly updated "scoreboard" and, should this prove ineffective in the long run, consider putting forward more robust measures.

The Commission's proposal to initially proceed on a step-by-step basis is acceptable.

It would certainly be useful to have country-specific information on the length and the costs of forced sales procedures, including their impacts. The information needed should also include procedural elements, such as compulsory formalities and cut-off dates in particular.

It should also be noted that, chronologically, forced sales are at the end of the loan recovery process and are regulated by the laws of the country in which such sales take place. For this reason, efforts for making more transparent not only forced sales procedures, but also the ability to foreclose the loan and call upon the security would be highly welcome.

Tax, 43

The Commission seeks information on similar or other tax obstacles to the cross-border provision of mortgages, which are likely to infringe the freedoms provided for by EU law.

So far, the Bausparkassen do not know of any tax and similar obstacles to cross-border mortgage lendings.

IV. MORTGAGE SECURITY

Land Registers, 44-46

Before making further assessments, the Commission would welcome input on all these issues.

The EULIS (European Union Land Information Service) project developed by several EU Member States for a number of years and addressed by the EU Commission in its Green Paper must be welcomed as a joint portal for Public Register inspection in all participating countries. It represents the first step into the right direction, i.e. towards attaining the objective of establishing a comprehensive European information data base.

But enhanced access to registers does not mean very much, as long as such registers do not furnish information about the legal rank and contents of mortgage security entered (e.g. bona fide protection issues, non-disclosed rights including priority rights, mortgage security currently in the process of being entered, etc.).

In the first place, dependable Public Registers are of overwhelming importance for national legal systems, real property owners and the real estate business; whilst their importance for credit institutions comes second. For this reason, it cannot be the task of the credit industry to design such registers, contentually, and to finance them.

In view of the wide differences among European register systems as regards real property classification (either by location or by ownership rights), the way in which registers have been structured (divisions, current up-dating), the contents of mortgage rights (comprehensive transcript of contractual clauses, often by hand, or of far-reaching references), other legal specialities concerning bona fide protection, priority of claims in the process of being registered, etc. suggest that hopes that further progress will be made in the short term would not be realistic. Using the services of foreign experts (notary publics, registration officers) as well as thorough knowledge of foreign legal provisions will also be necessary in future in the absence of reform efforts prior to uniformization also in this field (law of (real and personal) property, law concerning Public Registers).

Euromortgage, 47-48

The Commission invites views on the feasibility and desirability of the Euro-mortgage. It will, in any event, await the outcome of ongoing initiatives to inform its assessment of this issue.

We support the proposal on a Europe-wide instrument for securing loans on property that can be flexibly used of (strict accessoriness between mortgage collateral and mortgage security commonly referred to as “Euro-mortgage” in form of a 26th regime.

For cross-border – as well as national – financing schemes, a flexibly usable mortgage right might help save registration costs since it would be available as loan security based on land in more than one lending case. A flexibly transferable mortgage right would be of special importance also in terms of the negotiability of mortgage security in the field of real estate financing.

It is now unusual also in Germany and in other countries to provide mortgages security by way of collateral. The practice rather is to use the land title instrument (Grundschuld) instead. This means that the accessoriness between land title and credit security is not based on legal regulation, but on contractual obligation, although it would be easy to quickly change the latter at low cost. In this context, it would also be possible to save costs if entries in the Land Register need not be changed. In this way, the rank would be retained and the land title would be available as security for future loan liabilities. It might be helpful if the Euro-mortgage were designed along these lines.

V. FUNDING OF MORTGAGE CREDIT, 49-52

The Commission intends to create an ad hoc stakeholder working group to examine the need for and nature of action on the funding aspects (primary and secondary) of mortgage credit.

Summoning a group of experts on mortgage credit would be welcome provided that all market participants are allowed to participate. As in the case of all the other EU measures, it must be ensured that a cost-benefit analysis is made and that decisions on whether or not to proceed with regulation at the EU level are taken individually in light of the benefit in value-added terms that would arise for the single European market. Moreover Community action would only be justified if market failure in this area had been proven.

It is interested to assess to what extent a pan-European market in mortgage funding can be promoted by market led initiatives, e.g. on documentation standards and model definitions to be used in cross-border funding activities.

The issue of whether documentation standards and cross-border financing models should be prepared must be addressed by the ad-hoc working group still to be set up (see above).

In this respect, the Commission is interested to receive views on whether mortgage lending should necessarily be an activity which is restricted to credit institutions, or whether and under which conditions such activity could be performed by institutions which do not take deposits or repayable sums, and therefore do not fall within the scope of the EU definition of a credit institution and therefore of all related prudential rules.

Financial institutions subject to supervision by the state are the only ones authorised to offer mortgage loans. This is so for overall economic reasons on the one hand and for protecting consumers on the other.