European Federation of Building Societies
Fédération Européenne d'Epargne et de Crédit pour le Logement
Europäische Bausparkassenvereinigung

Mailing List Supervision/Accounting/Money Laundering
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Kö/Wl

Written grounds of the court judgment in the appeal procedure on the termination of Bauspar contracts pursuant to § 489(1)(2) of the German Civil Code (BGB) (Ref. XI ZR 185/16)

Dear Sir or Madam,

Please find enclosed for information the first of two judgments by Germany's highest court, the Federal Court of Justice (BGH), which ruled by judgment of 21 February 2017 (Ref. XI ZR 185/16) that termination of Bauspar contracts by a Bausparkasse ten years after the due date for allocation, pursuant to § 489(1)(2) of the German Civil Code (BGB), is lawful.

"§ 489 Right of the borrower to give notice of termination

(1) The borrower may terminate a loan contract with a pegged lending rate, in whole or in part, […]

2. in any case at the end of ten years after complete receipt, observing a notice period of six months; […]"

The underlying case involves a Bauspar contract concluded in 1978.

In paragraphs 21 and 22 of the very detailed judgment, the BGH does not determine, with respect to the dispute, what the nature of the Bauspar contract is, as regardless of the respective decisions in the dispute, in the case in hand a loan relationship arose in the savings phase between the Bauspar customer and the Bausparkasse.

Lending law is also applicable *mutatis mutandis* to this loan relationship.

In paragraph 26 ff., detailed comments are made on the right of the Bausparkasse to terminate on completion of the savings phase pursuant to § 488(3) BGB; the bar on termination ceases to exist if a Bauspar loan can no longer be claimed.

In paragraph 29, the BGH states, with regard to the purpose of the Bauspar contract, that Bausparen is saving for a specific purpose in order to be able to claim a loan for housing purposes. Obtaining the right to the granting of the Bauspar loan is key to the definition of the purpose of the contract and not actually claiming this loan (paragraph 30). The Bauspar customer has the option to claim a Bauspar loan.

Starting from paragraph 34 ff., the BGH explains that the provision in the old version of § 489(1)(3) BGB, which is now § 489(1), second sentence, BGB, applies to both Bausparkassen and borrowers.

The BGH follows the prevailing doctrine by first interpreting the provision grammatically, then systematically, then historically and finally teleologically.

The relevant interpretation of the applicability, which is the focus of the judgment, is set out in paragraphs 38 to 68.

Finally, the BGH states that § 489(1)(2) BGB is a debtor protection provision which can be used by Bausparkassen to be able to terminate a loan ten years after it has been received in full.

Paragraph 61 contains the pronouncement of the BGH that it is in the interests of the Bausparkasse to be able to terminate Bauspar contracts in which interest rates have been agreed which are no longer in line with the market. The BGH observes that the right of termination is mandatory and does not require any agreement in the general Bauspar terms and conditions (ABB) (paragraph 62). In the opinion of the BGH, it is also not a matter of the Bausparkassen having been able to change their conditions pursuant to § 9(2) of the Bausparkassen Act (BauSparkG). The Bausparkassen were also not obliged to obtain supervisory approval of the deduction of interest on credit balances.

In paragraph 69, the BGH comments on the actual prerequisites for full receipt of the loan proceeds.

In this respect, it states that it is a matter of the contractual agreements (paragraph 78).

The decisive aspect as a general rule is the first due date for allocation (paragraph 80).

It is unclear how the formulation in paragraph 81 is to be understood by practitioners whereby in this respect different provisions would apply if, according to the contractual agreements, the Bauspar customer receives an (interest) bonus, for example in the case of renunciation for a limited time of the Bauspar loan allocated and after a certain loyalty period has expired.

In the view of the BGH, in such a case the purpose of the contract between the contracting parties has been modified in that it is achieved only with acquisition of the bonus, so that it is also only at this time that full receipt of the loan within the meaning of the old version of § 489(1)(3) BGB can be assumed.

In paragraph 86, the BGH comments that the Bausparkasse is not obliged first to demand regular savings contributions and then possibly to terminate.

In paragraph 91, the BGH explicitly rejects the termination of the Bauspar contract for good cause.

In the opinion of the BGH, good cause does not lie in the change of the interest rate (paragraph 92). The risk of changes in interest rates is assumed by the contracting party at whose expense the interest rate change goes; in the present case it is the Bausparkasse.

Also a right of termination pursuant to § 313(1) and (3) BGB for interference with the basis of the transaction (paragraph 93) is in principle rejected by the BGH.

It is therefore not relevant whether the conditions existed here, as the adaptation of the contract by reducing the interest on the credit balance should be undertaken as a priority. This was not adduced in the concrete case.

If you have further questions, please contact us at any time.

Yours sincerely,

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Annex

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