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Brussels, 18 July 2017
CK

Written grounds of the judgment of 9 May 2017 of the German Federal Court of Justice (BGH) on the inadmissibility under the law governing standard terms and conditions of a clause on account fees for a Bauspar loan contract (Ref. XI ZR 308/15)

Dear Sir or Madam,

Please find enclosed a further judgment of the German Supreme Court, the Federal Court of Justice, of 9 May 2017 (Ref. XI ZR 308/15), by which the clause on charging account fees for a Bauspar loan contract was regarded as contrary to the law governing standard terms and conditions.

In § 17(1) of the Bauspar terms and conditions (ABB), the Bausparkasse had stipulated:

"a) Account fee currently EUR 9.48 per account per year (in accordance with the ABB)

...For an account in the loan phase, the account fee shall amount to EUR 9.48."

The Bausparkasse charges an account fee during the savings phase too, although this part of the clause was not challenged and was therefore not the subject of a court ruling.

In the opinion of the Federal Court of Justice, this clause on charging a loan fee in the Bauspar loan phase is a subsidiary price agreement subject to content review according to the law governing standard terms and conditions.

The management of the special-purpose savings collective, for which this fee may be charged, is a so-called "background activity" of the Bausparkasse. It is not a main service to be performed by contract by the Bausparkasse in relation to its individual customers, to which the latter have a legal entitlement, but only a prerequisite for the actual service provision, namely the granting of the Bauspar loan at a relatively low interest rate from the allocation fund.

Furthermore, the Bauspar borrower no longer has any interest at all in the management of the savings collective, since he has already received the loan from the funds of the special-purpose savings collective. The special-purpose savings collective is run by the Bausparkasse purely in its own interests.

In the opinion of the BGH, this clause is also in conflict with the key principles of the statutory concept of the loan contract, since the price of a loan is the interest payable and not a fee irrespective of term.

The Bauspar customer has a system-related option of being able to make early repayment even free of charge of the loan with an interest rate below the market rate, which is already adequately remunerated by renunciation of the normal market interest rate on savings and the payment of a transaction fee.

At the start of the judgment, the BGH makes clear comments on the regulatory effect of the ABB approval by the German banking supervisory authority (BaFin). This prudential approval does not result in any restriction of the capacity to control these clauses, for which the courts have exclusive competence.

The BGH clearly points out, however, that a term-dependent discount would be admissible.

In conclusion, the BGH states that the Bausparkasse, when granting the Bauspar loan, is not acting as administrator of a special fund, but in its own interests.

At no point does the BGH broach the issue of whether an account fee is admissible in the savings phase of the Bauspar contract too. On the contrary, the BGH expressly emphasises that this assessment of the breach of the law governing standard terms and conditions relates to the Bauspar loan phase. In this respect, the BGH clearly states several times that the general lending law applies to the Bauspar loan phase.

The examination of the clause on charging an account fee in the savings phase was explicitly not covered by this judgment. This would be for the courts to review in the future. Corresponding injunctive proceedings brought by the Verbraucherzentrale Sachsen (Saxony consumer association) concerning the levying of the service charge in the savings phase are already pending before the Regional Court of Koblenz. We shall report on the outcome of these proceedings.

We enclose the judgment in German.

Yours sincerely,



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European Federation of Building Societies