FEATURES

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Processing fees of banks in Austria and Germany: (only) a question of consumer protection?

In Austria, the regional court of Innsbruck has recently handed down a decision, which is not yet legally binding but might attract great attention. Within the context of a special collective action (*Verbandsklage*) the court has found that terms within banks' general terms and conditions that allow for a fixed processing fee (ie, a certain percentage calculated on the basis of the credit amount) are undue. The decision of the regional court of Innsbruck only concerns processing fees in contracts with consumers. 'Verbandsklage' is defined as a proceeding by means of which certain consumer protection organisations can reach an injunction against the use of certain terms (especially regarding general terms and conditions).

These processing fees are meant to cover the activities and expenditures of the bank, which arise until the contract closing or the loan disbursement.

Summary of the reasons for the regional court's decision

In short, the regional court of Innsbruck has justified its decision as follows:

- Within the context of the injunctive relief due to a collective action, a possible partial validity of the clauses in question does not have to be considered. Reducing the term to its legally permitted core is not permissible. The clause in question has to be interpreted in its least 'customer-friendly' form.
- Different from what Austrian scholars have argued so far, the processing fee has to be classified as an ancillary service. This basically is the reason why the clause is subject to judicial review in a collective action proceeding.

From the facts mentioned above, the regional court of Innsbruck has concluded that the clause regarding the processing fee is grossly disadvantageous, because:

- by law, the bank is required to conduct the credit check as well as the remaining 'preparatory tasks' regarding the bank lending; or
- these measures are carried out in the bank's own interest; and
- in the opinion of the regional court of Innsbruck, the gross disadvantage caused by the clause already results from the fact that the fee is given as a percentage calculated on the basis of the credit amount and therefore independent of the actual amount of work necessary.

The situation in Germany: the judicature of the Bundesgerichtshof (BGH)

In its decision XI ZR 405/12 of 13 May 2014, the BGH argued that according to the legal guideline of section 488 of the German Civil Code (BGB), interests have to be calculated with regard to the period of the loan and that no other additional processing fees independent of the period of the loan can be charged.

Austrian scholars have correctly pointed out that no such 'legal guideline' exists for Austria and that agreeing upon a processing fee is admissible.

Also, the BGH revisited the issue of processing fees (to be more precise: account entry charges, which means the price per accounting entry) again in its decision XI ZR 43/14 of 28 July 2015 and found that such flat fees for entries are against the law. This case involved a business client.

Effects on the practice in Austria

Even though the decision of the regional court of Innsbruck is not entirely convincing, it cannot be ruled out that this judgment will become legally binding. This raises the question of whether one can react to the present decision by means of individual agreements. The relevant clauses would have to be construed in a way so that the judicial review for general terms and conditions could not be applied to them. Here one has to keep in mind that contract provisions do not count as 'individually negotiated' if they are only discussed among contract parties and communicated to the business partner. Instead, the borrower must have had a say regarding the contract's conditions. Any such clause would have to satisfy this criterion. 'Non-negotiable terms' that are part of form contracts are normative standard forms and thus subject to the same scrutiny as general terms and conditions.

Another possibility would be to pass on the processing costs to the consumer credits granted. For practical purposes, a suitable calculation variable for processing fees (as unit costs) might have to be added to return on risk-adjusted capital calculation (RORAC), the tool that is used to calculate credit costs.

Passing on the processing fee to credit customers (via the credit margin) does not raise any concerns.

Economically speaking, nothing really changes for credit customers. Customers will still have to pay for the bank's processing efforts, in one way or the other. The bank is obliged to pass on the (unit) costs related to granting credit – and therefore also the processing fee – to the individual credit agreements. In addition, regulatory requirements force the bank to carry out increasingly expensive credit checks.

Also, transparency of credit agreements is not going to be enhanced in case the current decision gets confirmed. The processing fee has already been shown in the effective interest rate. This means that credit customers have already been able to inform themselves about processing fees.

The processing fee will have to be calculated over the credit period. For this reason credit customers who pay back their credit prior to the scheduled maturity date will only have to pay a proportional processing fee. As a result, the remaining part of the processing fee will have to be passed on to the other credit customers.

Whether the processing fees already paid can be claimed back will still have to be assessed for every case individually. In the course of legal proceedings to determine claims, the controversial question is raised whether the gap in the contract, which was left by the clause's ineffectiveness, can be filled by means of a supplementary interpretation. The focus will lie on what rational contractual parties would have agreed upon as purpose of the contract. As a consequence, whether (and to which extent) there are any claims to repayment depends on the admissibility of supplementary interpretation.

The main questions still need to be answered (beyond doubt). It is not yet clear whether: (i) this decision will be confirmed and therefore legally binding; (ii) credit arrangements with professional clients will also be affected by this decision; (iii) the decision will lead to repayment claims.

As the legal situation in Austria is clearly different from that in Germany, and due to the negative practical implications of the regional court's decision, one can only hope that Austrian courts do not adopt the decisions of the BGH, but that they annul the decision of the Innsbruck regional court and confirm the practical mode of calculating processing costs that has been used so far.