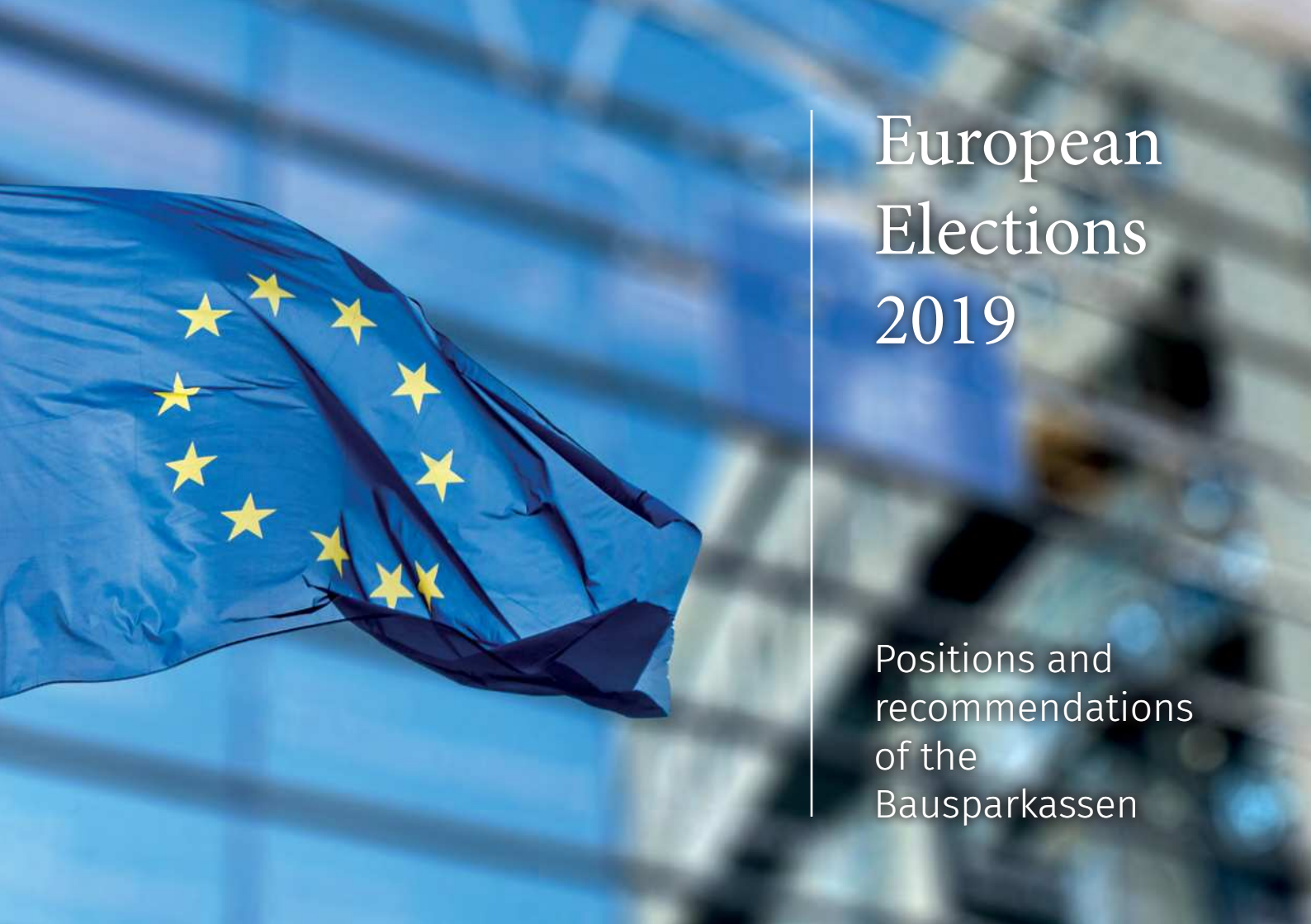

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Positions and recommendations of the Bausparkassen

For decades, European integration has been a success story. It is the greatest post-war peace project. Political and economic cooperation and convergence have long formed an integral part of this process. In 2019, the United Kingdom, a founding Member State of the European Union, is leaving this union of States. “Brexit” and the anti-European sentiment are not a one-off event, but the expression of a general scepticism towards supranational institutions in Europe. The European Union is today facing the need to reform internally and to maintain the confidence of the people. In doing so, it should be guided by the principles which for decades have constituted its strength, namely those of subsidiarity and proportionality.

The Bausparkassen consider the Banking Union created in response to the financial crisis which erupted in 2008 and the harmonisation of European banking supervision law (Single Rulebook) to be key factors for the creation of a secure, sound European financial sector. In this connection, however, the business models of specialised institutions, such as that of the Bausparkassen, should also be given greater consideration to avoid discrimination in relation to universal credit institutions. In addition, with regard to financial market regulation, the EU should, as a priority, oversee only such business models and institutions of importance for the internal market.

Against this background, the Bausparkassen have drawn up the following recommendations for the forthcoming legislative period of the European Parliament and the new European Commission.

- Sustainable finance without discrimination
- Proportionality and appropriate consideration of the risk of different business models
- Regulatory break and extension of implementation deadlines
- Risk-adjusted implementation of the final Basel III decisions
- Regulation of shadow banks
- Risk reduction before Pan-European deposit guarantee
- Prevention of abuse and introduction of the possibility of action for a declaratory judgment in the case of representative actions
- Increase in legal certainty and practice-oriented consumer information when evaluating the Consumer Credit Directive
- Risk-based approach to combating money laundering
- Housing in Europe: Interparliamentary dialogue on urban-rural divide

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Recommendations at a glance

Sustainable finance without discrimination

Reorientation of capital flows towards more sustainable investments is to be supported in principle in order to be able to take effective action against climate change and to achieve the goals of the Paris Agreement. For this purpose, there is a shortfall of approximately 180 billion euro per year, which cannot be raised by the public sector alone. The core business of the Bausparkassen, in addition to financing housing, also includes the provision of renovation loans. These are used by customers predominantly for measures to improve energy efficiency and thereby already at the present point in time represent an important contribution to sustainable development. In the context of the legislative package on "sustainable finance" presented by the European Commission in May 2018, we emphatically advocate focusing more strongly on the voluntary principle and especially on providing for measures which serve to create market transparency. Standards for the definition of what is to be considered as "sustainable" may not extend beyond this.

The principles of subsidiarity and proportionality should be given greater prominence in European regulation. The EU banking market consists of credit institutions with a very wide variety of business models. These also include the Bausparkassen with their routinely small-scale, low-risk Bauspar business. The national supervisory authorities are acquainted with the particularities of the various business models from their decades of supervisory activities. Consequently, their competence should be strengthened in order to regain more appropriate and risk-oriented supervision and regulation. This is urgently required, as a large number of regulatory projects are tailored to global systemically important institutions (especially the specifications of the Basel Committee on Banking Supervision). The ECB and EBA should therefore receive the statutory mandate in each case to examine whether individual business models require specific regulation and how, where appropriate, discrimination against them can be avoided.

Proportionality and appropriate consideration of the risk of different business models

Regulatory break and extension of implementation deadlines

In addition to a proportionate and business-model-specific approach, there is a need for a general regulatory break. The massive new regulatory frameworks constitute a burden on the institutions in terms of both financial and human resources. After ten years of intensive regulation, a respite is in order. To cope with the flood of regulations, self-mandating by the EBA must also be restricted. In addition, an extension of the implementation deadlines is needed to enable careful implementation of all regulatory issues and the introduction of the IT necessary for this purpose.

EU Directives and EU Regulations as a rule are to be transposed into national law and/or applied two years after entry into force or taking effect. As the example of the Directive on credit agreements relating to residential property shows, the European specifications are frequently so complex that this deadline is insufficient for the national legislators. For the transposition and/or application of Directives and Regulations, three years should be provided for in general in the future.

Risk-adjusted implementation of the final Basel III decisions

Also in the case of the implementation of the final Basel III decisions, it is necessary to consider the business model of the Bausparkassen in order to avoid unjustified regulatory discrimination. Two examples illustrate this. Under the new standardised approach for operational risk, the services component of the business indicator is to be considered as the maximum of fee income and fee expenses. This would lead to an unrealistic risk assessment in the case of fee-based business models, such as that of the Bausparkassen. Sample calculations by the banking supervisor have shown that this would lead to a significant increase in capital requirements. In order to take the business model of the Bausparkassen sufficiently into account, netting of fee income and fee expenses should be authorised in cases where fee income and fee expenses are fully conditional upon one another.

A second example relates to the boundary between the trading book and the banking book, which is redefined in the context of the fundamental review of the trading book (FRTB), and effects on the necessary capital requirements for market risk. New requirements for the trading book may lead to a situation where existing non-trading book institutions, such as Bausparkassen, will possibly be classified as trading book institutions, even though maintaining a trading book would be disproportionate. Especially specialised credit institutions with a limited investment range, with no intention to trade, might be affected, because investment in fund units which are reviewed on a daily basis is widespread in such institutions. The Bausparkassen therefore call for an instrument or product to be assigned to the trading book only in the case of the intention to trade.

Regulation of shadow banks

The density of supervision and regulation for credit institutions has in the meantime reached a very high level. However, it should be borne in mind that a threat to the system does not emanate exclusively from credit institutions. In order to maintain a level playing field, undertakings with the same business activities and the same risks must also be subject to the same supervision and regulation. In this context, particular attention should be paid to the growing influence and systemic importance of shadow banks, FinTechs and BigTechs.

Their regulation should be brought in line with the strictness of regulation for credit institutions. The same activities and/or the same risks must be regulated uniformly.

The Bausparkassen are of the opinion that the introduction of a European deposit guarantee scheme (EDIS) can occur only after a comprehensive reduction of the credit risks in the banking sector. The rushed introduction of EDIS could lead to incalculable consequences for financial stability, since in this way liability for the risks incurred would be transferred to risk-averse, solvent institutions, while the profit opportunities remain exclusively with the risk-inclined institutions. EDIS is therefore accompanied by the danger of separation of risk and liability and compulsory transfers between the banking systems of the Member States.

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Risk reduction before Pan-European deposit guarantee

Prevention of abuse and introduction of the possibility of action for a declaratory judgment in the case of representative actions

We welcome in principle that the European Commission, through the proposal for a Directive on representative actions, wishes to make available an efficient instrument for the protection of collective consumer interests. However, we advocate requiring an explicit mandate by the consumer in the structuring of the representative action (so-called "opt-in model"). The consumer should himself be able to decide whether he wishes to take legal action. To prevent "forum shopping", the opt-in model should apply uniformly in all Member States. In addition, it must be ensured that only cases with a genuine connection to the body of claimants can be made the subject of representative actions. To prevent abuse of the representative action to the detriment of the economy, above all the conditions for the legal standing of entities should be tightened up. Since the amount of the consumer's claim for damages often depends on the individual case, a European representative action in the form of an action for a declaratory judgment is routinely more efficient. In this respect, no regulatory requirements should be created which extend beyond already existing, adequate standards in the Member States (e.g. model declaratory action in Germany).

Increase in legal certainty and practice-oriented consumer information when evaluating the Consumer Credit Directive

The new provisions from the Consumer Credit Directive and the Directive on credit agreements relating to residential property (CCD and MCD respectively) have only just been implemented, involving a considerable administrative burden. At present, the European Commission is again evaluating the Consumer Credit Directive (2008/48/EC).

Creditworthiness assessment

In principle, European rules should be adopted only if they serve the creation and functioning of the internal market. The supreme principle for the legislator should be to increase legal certainty for both parties to the contract. It is precisely in this area that there is a need for a variety of improvements. For instance, it must be clarified at European level that the focus must be on household income for the income and expenditure account for the creditworthiness assessment and not on the individual income of the borrower, as has already been clarified in prudential law with the concept of the borrower unit.

Definition of the credit agreement and calculation of the annual percentage rate of charge

A key point which should be discussed at European level is in any case the question of the definition of the credit agreement. In particular, European law does not define the essentialia negotii, i.e. the components of the loan agreement. This results in the price for “borrowing money” in some Member States possibly comprising a fee in addition to interest, which is the case in Austria, for example. In Germany, on the other hand, according to the case law of the Supreme Court, fees independent of the term of the

contract may not be charged. This elementary difference is possible in spite of the same EU consumer protection provisions because European law has not defined the loan agreement. This is also paradoxical from the point of view of the provisions on the calculation of the annual percentage rate of charge in the respective Directives. The EU provisions provide that such fees must be included in the calculation of the annual percentage rate of charge. They therefore assume that such fees exist, even though in Germany, for example, they are not permitted at all. Explaining this contradiction to someone is no easy matter.

Negative interest rates

In the context of the basic discussion to be conducted on the definition of a credit agreement, the topic of agreeing negative interest should also be raised.

It is precisely the European Institution of the ECB which sets negative interest rates and European civil law remains silent as to whether such an agreement is possible. The case-law of individual Member States has already had to deal with this phenomenon, especially in the case of variable rate clauses, and in this respect too has come to different conclusions.

Precisely the possibility to agree negative interest is however one of the key questions concerning the legal nature and the possibility to configure consumer loan agreements, on which it would be worthwhile to develop a basic guideline at European level.

Foreign currency loans

A further problem arises at present in the context of the implementation of the provisions for foreign currency loans under the Directive on credit agreements relating to residential property. Since the Directive differentiates between the currency of the country in which they work and the currency of the country in which they are resident, many frontier workers who avail themselves of the European freedom of movement, by living in the euro area but working in a neighbouring EU country, are largely excluded from taking out loans. There is an urgent need for regulatory correction here.

European standardised information sheet (ESIS)

The European standardised information sheet (ESIS), specially developed to create more transparency in the cross-border supply of housing loans now, according to the specifications of the Directive on credit agreements relating to residential property, comprises 30 pages (Germany) and 80 pages (Denmark). Firstly, this thwarts the original purpose of the ESIS to allow the consumer, when seeking the most favourable credit cross-border, to make a rapid comparison of the main elements of the offers made. Secondly, consumers no longer take any note of the information which is important for them. There is therefore a need for urgent action here, precisely in the interests of improving the cross-border supply of credit. Moreover, the cross-border distribution of financial products has become unattractive due to various provisions on income from commission, with the consequence that the one-off authorisation by the banking supervisors in the country of origin (single European passport), provided for by the European Directives, ultimately remains a dead letter.

Rome I Regulation

However, the greatest obstacle, in the opinion of the Bausparkassen, is the Rome I Regulation, according to which the applicable consumer protection law is that applied in the place of residence of the consumer. This leads to incalculable legal risks for suppliers, in so far as they do not adapt their products 100% to the legal framework conditions of the country of destination. As a result, suppliers are in general deterred from the cross-border supply of financial services. We therefore call upon the European Commission, by amending Article 6(1) of the Rome I Regulation, to create the necessary conditions for increasing the cross-border supply of financial services.

Risk-based approach to combating money laundering

The Bausparkassen welcome the fact that the European legislator follows a risk-based approach for its measures on combating money laundering and the financing of terrorism. However, precisely at institutions which – like the Bausparkassen – supply products with a low money laundering risk, this approach should be applied consistently in all fields of combating money laundering. In this connection, it would be expedient for instance to extend the list of products with low money laundering risk, contained in the Annex to the EU Money Laundering Directive, to include financial products with a long-term investment horizon. In this way, the use of simplified due diligence would also be possible in relation to Bauspar contracts. Moreover, the requirements under money laundering law in connection with the procurement and acquisition of private residential properties should be designed in a practical way, for instance through the introduction of threshold values.

In the context of automatic exchange through financial accounts (FATCA and OECD reporting standard), a greater distinction should also be drawn between financial products on which criminal interests focus and those which are ill-suited for this purpose. Since Bauspar contracts are ill-suited to tax evasion and also no money laundering risk exists, Bausparkassen and Bauspar accounts, as “low risk non-reporting financial institutions” or “low risk excluded accounts” respectively, should remain excluded from the OECD reporting standard.

Housing is one of the key fundamental human needs. There are major differences between the housing markets in Europe, although some trends emerge equally in all Member States: the trend towards urbanisation is continuing, there is a shortage of accommodation in the economically strong centres and the prices there are following an upwards trend. At the same time, there are regions in Europe which are becoming increasingly empty and basic public services are facing major challenges there. The resulting urban-rural divide has become a problem for cohesion in the countries of the Union. Nevertheless: there are good examples everywhere of how it is possible to deal with the problems – approaches from which others in turn can learn.

The Bausparkassen suggest that the European Parliament again institutionalises an exchange of experience between housing politicians of the parliamentary groups, for instance in the form of an interparliamentary group in which such best practices can be presented and debated.

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Housing in Europe: Interparliamentary dialogue on urban-rural divide

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