the credit agreement and the currency of the Member State applicable at the time of the conclusion of the credit agreement are compared. Obviously, these provisions dealing with foreign currency loans are unattractive to creditors because they now bear the exchange risk. Consequently, property loans for EU-foreigners would either be more expensive or reduced.

Summary

The implementation of the Mortgage Credit Directive should not be a tool to combat a potential real estate bubble (especially because there is no need for this). We believe the legal framework should encourage investors to invest in residential projects because cities such as Vienna need flats to grant affordable housing – if nobody is willing to build new flats, affordable housing cannot be granted – and individuals to build/buy their home. These targets can only be met in an atmosphere where regulations do not impede the credit business and tenancy laws do not disfavour property owners excessively.

In any case, the law should grant legal certainty, which has not yet been achieved.

However, in the past the incentive to make careful credit assessment might have been insufficient. Now we are faced with an excessive countermovement and a regulatory overkill.

Notes

1 S 9, para 5.
2 S 879, para 1, ABGB.
3 S 14 HIKrG.
4 Art 23 MCD; Art 120-quaterdecies D Lgs No 72/16; S 24 HIKrG).

RANCE

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Impacts of the French contract law reform on real estate law

The ordinance of 10 February 2016[1] deeply reforms French Contractual Law. Based on more than 300 articles of the French Civil Code, this is the most important reform in France since the 1804 Napoleonic Code. For the most part, this reform only confirms already well-established precedent solutions; however, some new clauses have been added in our law like the notion of *unforeseeability*. This update of the French Civil Code has impacts on real estate contracts during the negotiation phase and the contract formation phase, as well as the contract execution phase.

Negotiations phase

The ordinance confirms the Manoukian[2] precedent in what it predicts as the *loss of opportunity cannot be compensated*.[3] Unlike German or Swiss law, French law does not recognise pre-contractual responsibility. The abusive exercise of contractual freedom adjusts itself only on the grounds of extra-contractual responsibility and therefore cannot extend itself to the compensation of any part of the anticipated profit of the discussed contract. It is specified that in case of wrongful break of negotiation, the compensation cannot cover the loss of the advantages that were expected from the contract. However, it is possible to ask for the damages and interest of expenses arising from the negotiation, such as expertise fees, audit fees, fees regarding the drafting of contracts, etc.

Present in consumer law or environmental law, the duty of information spans article 1112-1, new to the French Civil Code, and spreads to all contracts and joint contractors in such a way that at the time of a contract of sale in a future state of completion[4] or of a labour market, the future parties must from this point forward mutually give each other all the decisive information of their agreed consent, such as those that are 'in direct link and necessary with the contract contents or the party's qualities'.[5]

On the other hand, the developer, who will know the value of the land that the owner ignores, is exempted from the obligation

of communicating this information to the owner. Another obligation consecrated by the ordinance and essential in property law is the duty of confidentiality.[6] This obligation allows developers, builders, purchasers, sellers, and so on, to be protected against indiscretion even without a non-disclosure agreement. Nevertheless, it is highly important to write confidentiality agreements in order to supervise them and, notably, to provide sanctions in case of noncompliance.

Formation phase

The ordinance also modifies the formation of the contract, notably during the conclusion of preparatory contracts, also called preliminary contracts. The ordinance reviews the sanctions at the time of the violation of preliminary contracts, particularly the unilateral promises of sale and the pre-emption agreements.

A pre-emption agreement is a contract by which a party commits to offer, as a matter of priority to its beneficiary, to reach an agreement with it in the case in which the party will decide to contract it. If the reform takes the precedent solution that allows the cancellation of the contract concluded with a third party in breach of its rights, as well as to obtain its substitution to the purchaser, it is on the condition that this third party was aware, when the contract was concluded, of the existence of a pre-emption agreement and the beneficiary's intention to claim it.

As for the unilateral promise to sell, the ordinance puts an end to the much-criticised *Consorts Cruz*[7] case law that refused forced execution in the case of breach of the unilateral promise to sell before the promisee exercises the option. In the case if the withdrawal of the promisor he is only liable for damages and interests. As of now, Article 1124 of the new French Civil Code makes sure that 'the withdrawal of the agreement during the time left to the beneficiary to decide doesn't prevent the formation of the promised contract'. Thus, the withdrawal of the promisor in the circumstances mentioned below can lead to a forced execution of the promised contract.

Contract execution phase

In real estate law, at the time of the execution contract, various novelties are to be noted. New article 1195 provides as follows:

> 'Where a change of circumstances that was unforeseeable at the time of the contract's conclusion renders performance exceedingly onerous for a party that had not accepted to assume such risk, the party may ask the other party to renegotiate the contract. The requesting party must continue to perform its obligations during the renegotiation. In the event of refusal of the other party to renegotiate or in the event that the renegotiation is not successful, the parties may agree to terminate the contract on the date and on the conditions determined by the parties, or mutually request the judge to adapt the contract'.

Finally, in the case of non-implementation of the contract, the ordinance tempers the right for the creditor to obtain a forced execution of a contract by his joint contractor. Indeed, the new Article 1221 of the French Civil Code breaks with the pre-eminence of forced execution. This article makes sure that if forced execution is the rule, there can be an exception made: 'If there is a clear disproportion between its cost for the debtor and its interest for the creditor.' The introduction of this new provision has disrupted the building system that recognised until then very radical jurisprudential solutions.[8] Consideration of both the cost to the debtor and the interest to the creditor should no longer lead to such solutions and should be able to avoid forced execution.

Thus, the reform should bring greater efficiency to the real estate contract, with the guarantee for the beneficiary of a unilateral promise of sale to be able to resort to a forced execution in case of withdrawal of the promisor. While the essence of the ordinance confirms previous case law, there are still some small revolutions modelled on the introduction of the theory of unpredictability.

However, it must be noted that the reform is only a few months old, so it is difficult at this time to predict how these new mechanisms will be judged by the courts.

Notes

1 Entry into force on 1 October 2016.
2 Cass com, 26 November 2003, No 00-10.243, arrêt Manoukian.
3 Article 1112-1, new to the Civil Code, states that: 'In case of error committed in the negotiations, the compensation for damage that results can not have for object of compensation the loss of expected benefits from an unfinished contract.'
4 In French: Vente en état futur d'achèvement (VEFA).
5 Alinéa 1er de l'article 1112-1 new Civil code.

6 Art 1112-2 of the Civil Code states that: 'Whoever uses or divulges, without authorization, confidential information obtained during negotiations engages his responsibility in the conditions of common law.'

7 Cass 3ème chambre civile, 15 Décembre 1995, No 91-10.199.

8 Eg, a manufacturer had been sentenced to the demolition and reconstruction of two houses located 86 centimetres too low and two metres too close to a neighbouring property.

GERMANY

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Mergers and takeovers in the German housing sector

'One million apartments for Vonovia, to me this sounds like a reasonable figure on a mid-term perspective', said Vonovia Chief Executive Officer (CEO) Rolf Buch, and the market believes him. Because Vonovia and other major players aim to feed their appetite for growth by acquiring massive portfolios, medium-sized investors are encouraged to compile portfolios in order to structure and resell them.

Within the past three years, the German housing sector has seen a series of large mergers and takeovers, starting in 2014 when the then Deutsche Annington announced the takeover of its rival GAGFAH. Given the fact that the two companies had nearly a similar size, with 200,000 lettable apartments of Deutsche Annington and 145,000 of GAGFAH, it turned out to be a good idea for Deutsche Annington to seek an amicable business combination agreement (BCA) with GAGFAH rather than a hostile takeover. Under the BCA, a 'best of both world' policy was agreed, providing for a competitive recruiting process for management positions just below the board of directors, a new headquarters, and a new name for the then combined company, being 'Vonovia'. With the closing of the GAGFAH takeover in 2015, Vonovia – with currently around 340,000 apartments and a portfolio value of more than €23bn – became the second-largest listed real estate company in Continental Europe, directly after the French Unibail-Rodamco group, which is concentrated on commercial real properties.

However, in 2016, bullish Vonovia failed to acquire a majority of shares of Deutsche Wohnen in a hostile takeover attempt. Fighting tooth and nail, Deutsche Wohnen's management stated that Deutsche Wohnen with its 150,000 apartments, approximately 100,000 of which are situated in Berlin, was better off alone, without having its portfolio diluted with Vonovia's apartments, which predominantly arose from former public housing. Nonetheless, market experts believe that Vonovia's next attempt is only a matter of time.

Recently, Vonovia managed to conclude 2016 with a 70 per cent-plus takeover of shares of Austria-based Conwert. It is believed that this takeover was successful due to both an amicable approach as well as a low threshold of 50 per cent plus one share. Conwert holds about 24,500 apartments in Germany and Austria.

Economies of scale – loans without mortgages

Merging large residential portfolios allows for some economies of scale, such as standardised information technology-based property management processes, and advantages through large-scale purchase of goods and services including construction works.

Less obvious advantages of scale are comfortable loan conditions. According to Standard & Poor's, Vonovia has a long-term corporate credit rating of BBB+, with a stable outlook. Unimaginable for a homeowner or private real estate investors, this allows for loans not secured by mortgages.