

Consideration of eligibility for a loan in accordance with the Swiss Consumer Credit Act

Topic: **Miscellaneous** Case number: **2017/22**

Shortly after taking out a consumer loan with the bank, the client had some difficulty making the required monthly repayments. According to him, the bank made serious errors when reviewing his eligibility for the loan which resulted in loss of the entire debt. He also asked the bank to cancel the remaining balance of the loan outstanding. It was impossible to find a solution in this case during mediation because of some basic issues for which the Federal Supreme Court has not yet set any precedent.

Referring to the Swiss Consumer Credit Act, the client, supported by social services from his place of residence, argued that, prior to granting a consumer loan to a client, banks are obliged to check said client's eligibility for a loan. The purpose of this review is to ensure that the client will be able to repay the loan within 36 months using the disposable (unseizable) portion of his or her income even if a longer loan term may have been agreed upon. The aim of this provision is to prevent the borrower from taking on excessive debt. The client also pointed out that a budget should be drawn up as part of reviewing a client's eligibility for a loan. The disposable portion of income is determined under the terms of the directives on calculating the minimum survival income in force within the canton of residence of the client submitting the loan application. The client further stated that if the information provided by the applicant was incomplete, or if uncertainties emerged, the bank was obliged to complete this information or resolve these uncertainties by asking additional questions.

The client felt that, in his case, the bank had committed serious errors when drawing up the budget. On the one hand, it noted income that was too high and, on the other, it ignored, or did not allow sufficiently for, certain basic expenditures. The differences related in particular to the assumed income and the costs incurred by the client for travelling from home to work. The budget also did not take into account the additional costs associated with meals taken outside the home. Finally, the amount deducted for tax was not verifiable.

On the basis of a court ruling, the client also asserted that, to determine whether or not the loan could theoretically be repaid in 36 months using the disposable portion of his income, as provided for by law, then, in addition to the principal, all interest and charges incurred during the total loan term, set at 60 months, must also be considered. The amount thus obtained was higher than the total interest and charges actually incurred by the end of the theoretical 36-month term.

The disposable portion of the income, determined based on a budget corrected by the client, or by the social services assisting him, would not have been sufficient to repay the loan within 36 months, including interest and charges, regardless of the method used to calculate said loan. In general, if the bank that granted the loan has committed serious errors during the credit review, it will lose the amount owed, including principal and interest. The borrower will then be entitled to demand the reimbursement of any repayments already made and is under no obligation to pay the remaining balance of the loan. If the bank has made minor errors, it will generally only lose its entitlement to the interest and charges. According to the client, the errors made in this case were serious. He expressed his willingness to forego the reimbursements of the sums already paid if the bank would release him

from his obligation to pay the remaining loan balance and would withdraw the proceedings initiated against it. The bank refused. With the help of social services, the client then asked the Ombudsman to initiate mediation proceedings.

The bank explained to the Ombudsman that the differences between it and its client related to fundamental issues that would be impossible to resolve in mediation. It was also categorically opposed to accommodating the client's request. The bank argued in particular that the appropriate method for calculating the credit amount repayable within 36 months was a matter of law not yet settled by the Federal Supreme Court. The ruling quoted by the client was delivered by a cantonal court. The bank did not share the position maintained in said ruling and believed that only the interest and charges actually incurred during the 36 months were crucial. Thus, the interest and charges incurred up to the term end set at 60 months should therefore be reduced proportionally when calculating the decisive loan amount. The bank further maintained that the income taken into consideration was correct and that the flat rates included in the budget for the client's travel between his home and his place of work were sufficient. The bank also had no intention of including additional charges for meals taken outside the home. With regard to the taxation amount, it pointed out the fact that this had been calculated by an external company and could therefore be deemed correct. Finally, it reiterated that the figures for the various items in the budget had been provided by the borrower and that he also confirmed them with his signature.

The Ombudsman's mediation proceedings generally reach their limits when the subject of the dispute constitutes a matter of law on which the Federal Supreme Court has not yet set a precedent and where the parties stand their ground regarding their differing positions. In the present case, the issue of calculating the loan amount theoretically repayable within a period of 36 months constituted such a matter of principle. The Ombudsman was therefore unable to propose a solution. There was no doubt, in his opinion, that the other matters raised by the client regarding the various budget items could have been resolved during mediation but, again in this respect, no mediation was possible due to the adamant stance adopted by the bank. The Ombudsman therefore could do no more than assess the arguments put forward by both parties. On the whole, he found the few arguments submitted by the bank less convincing than those of the client. He therefore considered a commercial gesture from the bank appropriate. To his regret, the Ombudsman had to leave it to the client to assert his arguments during the course of debt collection proceedings or litigation, at the end of which a binding decision may be handed down. For the sake of completeness however, one point revealed during mediation should be noted: a renowned voluntary organisation intervened with the Swiss Financial Market Supervisory Authority (FINMA) because, according to it, certain banks systematically make mistakes when reviewing eligibility for a loan under the Swiss Consumer Credit Act. The organisation also maintains that the disposable part of the borrower's income is therefore often overestimated resulting in the clients in question taking on excessive debt.