

IMPLEMENTATION OF GOOD PRACTICE AMONG THE EQUITY RELEASE PROVIDERS IN POLAND

IMPLEMENTÁCIA PRÍKLADOV DOBREJ PRAXE MEDZI POSKYTOVATEĽMI REVERZNÝCH HYPOTÉK/HYPOTEKÁRNYCH DÔCHODKOV V POĽSKU

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Abstract

Equity release schemes are products that allow people (especially pensioners) to release value from their properties without the necessity of moving out. Currently in Poland, there is no specific legal regulation which can standardize the process of offering this kind of products, which are becoming more and more popular. The aim of this paper is to present functioning of equity release schemes in Poland, indicate their weaknesses and find solutions how to improve them.

Abstract

Schémy „equity release“ (hypotekárne dôchodky či reverzné hypotéky) sú produkty, ktoré umožňujú ľuďom (najmä dôchodcom) „zlikvidovania“/„speňaženia“ ich nehnuteľného majetku bez nutnosti vystaňovania. V súčasnej dobe v Poľsku neexistuje žiadny osobitný právny predpis, ktorý by štandardizoval proces ponuky tohto druhu produktu, ktorý je stále viac a viac populárny. Cieľom tohto článku je predstaviť fungovanie týchto schém v Poľsku, poukázať na ich slabé stránky a nájsť riešenie, ako ich zlepšiť.

INTRODUCTION

The phenomenon of equity release schemes in Poland appeared for the first time in 2008. Since then, seven providers have entered the market and created new solutions of offering “reverse mortgage” products. It could be said that this market in comparison with countries like Great Britain or Ireland is rather small, almost marginal. Nevertheless, excitement built around this issue makes it very intriguing and noteworthy.

Excitement around equity release products in Poland results from traditional way of perceiving a real estate. In Polish society there is a deep-rooted conviction that a house or a flat is a family treasure and should be inherited by next generations. The entrepreneurs who offer Polish seniors access to money against the value of their property are often considered as frauds that extort the biggest material value which belongs to family. Another aspect which makes equity release products controversial is the element of moral hazard. For entrepreneurs who offer it, it is less beneficial if their clients will live longer than they have predicted. As a result, seniors who have concluded the agreement on some equity release product may feel uncomfortable or even unsafe.

Regarding to all emotional aspects of equity release products in Poland, searching for stable and fair rules of offering it seems to be a crucial issue for this business. This paper discusses the bad practices which appear on Polish equity release market and try to indicate good practices which may be implemented by entrepreneurs.

1 TYPES OF EQUITY RELEASE SCHEMES

First of all, it should be said that in Poland there is a great confusion around reverse mortgage definition. Products which are called “reverse mortgage” have nothing in common with mortgages at all. A review of the scholarly literature and reports exposes that products offered on Polish market can be qualified as a type of equity release products (ERS). The idea of equity release is *the release of cash at this point in time in return for giving up some or all of the value of one’s home*¹. Equity release product should be defined by the following features²:

- it should be a financial service,
- it should provide a liquidity for the future,
- a client should be able to continue to live in the property,
- it should rely on the sale of house (or flat) for the repayment of the funds used for clients.

The construction of this product makes it beneficial for older people, especially pensioners who are looking for additional cash-flows and do not want to move out from their properties. Still they should be aware of consequences connected with two distinct models of ERS: lifetime mortgage (also known as a reverse mortgage) and home reversion schemes. The lifetime mortgage is a loan model of ERS which includes all products that provide a loan secured against the value of property. In Poland this form of ERS is being legally introduced (the act is currently discussed in Senate of the Republic of Poland)³. So that, there are no providers of this ERS form on Polish market yet. Second form of equity release is a sale model (in the Anglo-Saxon countries it is called a “home reversion scheme”). In this model, clients sell all (or a part) of their properties to a company and they receive money (mainly in form of regular payments but it may be also a lump sum) in return. Moreover, they get a guarantee that they may remain in their home as long as they choose. This model is not legally regulated in Poland (nevertheless the Ministry of Economy is preparing this regulations), but it is available on the market. At the moment, there are seven providers who offer sale model of equity release schemes:

- Fundusz Hipoteczny Dom S.A. in Warsaw,
- Fundusz Hipoteczny Dom S.A. s.k.a. in Warsaw,
- Fundusz Hipoteczny Gwarancja sp. z o.o. in Gorzow Wielkopolski,
- Fundusz Senior sp. z o.o. in Jastrzebie Zdroj,
- Fundusz Hipoteczny Familia S.A. in Warsaw,
- Fundusz Hipoteczny Omnes sp. z o.o. in Szczecin,
- Towarzystwo Ubezpieczeń na Życie Europa S.A. in Wrocław.

Five of them have in their name expression “fundusz hipoteczny” which means “a mortgage fund”. However, it should be clearly said that in the sight of the Polish law none of them is the mortgage fund. Providers use this name in order to create more trustworthy image of themselves. This causes a lot of confusion, especially among their clients – older people who are convinced that those providers work similarly to bank institutions. Moreover, in the names of products which they offer, they often use the expression “reverse mortgage”, which is reflected in the definitional confusion mentioned above.

¹ TERRY R., GIBSON R. 2006. *Obstacles to equity release*, Joseph Rowntree Foundation.

² REIFNER U., CLERC-RENAUD S., PEREZ-CARRILLO E.F., TIFFE A., KNOBLOCH M., 2009. *Study on Equity Release Schemes in the EU, Part I: General Report*, Project No. MARKT/2007/23/H, p. 9.

³ The status of introducing this act may be checked at the website: www.sejm.gov.pl/sejm7.nsf/PrzebiegProc.xsp?nr=1442

2 FUNCTIONING OF EQUITY RELEASE PROVIDERS IN POLAND

As it was said above, there is no special legal act that regulates functioning of equity release sale model in Poland. Nevertheless, providers conclude agreements on these products, regarding to regulations of the Civil Code⁴. ERS contracts under the civil law may take the form of:

- a life rent contract,
- a life annuity agreement,
- a loan agreement
- an insurance contract.

The most popular are a life rent contract (offered by: Fundusz Hipoteczny Dom S.A. s.k.a in Warsaw, Fundusz Senior sp. z o.o. in Jastrzębie Zdrój, Fundusz Hipoteczny Omnes sp. z o.o. in Szczecin) and a life annuity agreement (provided by: Fundusz Hipoteczny Dom S.A. s.k.a in Warsaw, Fundusz Hipoteczny Gwarancja sp. z o.o. in Gorzów Wielkopolski, Fundusz Senior sp. z o.o. in Jastrzębie Zdrój, Fundusz Hipoteczny Familia S.A. in Warsaw).

A life rent is a concept used to designate the right to live in the property and receive means of support in exchange for transfer of property ownership. What is distinctive for this form is that it guarantees lifelong help and care in sickness⁵. Nevertheless this law was created with a view of regulating rather family issues, not business transactions. Equity release providers which use this concept, interpret duties like: giving means of supporting and guaranteeing help, as equivalent to providing regular payment for senior. Only one provider, Fundusz Hipoteczny Omnes sp. z o.o., offers regular visits of person who is obliged to help in household activities and small maintenance.

Another form which is used by Polish companies providing equity release schemes is a life annuity agreement. The Civil Code defines it as a contract in which one party is obligated to provide regular benefits to other party⁶. Of course annuity is not the only element of whole equity release agreement. A senior who decided to conclude it, should sell his property to the provider first. The right to remain in the property is set separately. Company may submit the written statement that his client may live in his house until his death or land registration could be made.

An insurance contract which in Civil Code is defined as an agreement in which one party is obligated to provide certain benefit in case of accident, whereas other party has to pay a certain premium⁷. This legal construction is used only by one provider - Towarzystwo Ubezpieczeń na Życie Europa. This provider accepts as a premium – the value of property which ownership will be transferred to him. In return, a company is obligated to provide monthly payments for a client.

A loan agreement is currently used only by one provider on Polish market – Fundusz Senior sp. z o.o. Civil Code describes this legal construction as a contract in which one party (lender) lends a specific amount of money or certain things and other party (borrower) is obligated to return the same amount of money or certain things⁸. On equity release market it works as follows: provider lends money to senior (in form of regular payments), then borrower makes a will in which he includes the statement that the provider is his only inheritor, and as a result the loan is cancelled. In this case it is not obvious that this method of concluding equity release

⁴ Civil Code, *Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Dz. U. nr 16, poz. 93 z późn. zm.)*.

⁵ Civil Code, art. 908.

⁶ Civil Code, art. 903.

⁷ Civil Code, art. 702.

⁸ Civil Code art. 805.

agreement may be qualified as a sale model. In fact, the ownership of property is transferred after the death of a borrower, not like in other legal agreements.

To sum up, all presented legal constructions used by equity release providers are interpreted and applied quite freely. It is a result of lack of specific legal act which could regulate providing and functioning ERS products in Poland. Not only is the interpretation a problem, but also some issues are not regulated at all. For example in case of bankrupt of a provider, clients' rights to live in property may occur insufficient.

3 BAD PRACTICE IN FUNCTIONING EQUITY RELEASE PROVIDERS IN POLAND

3.1. Abusive Clauses in Standard Contracts

On October 2013, Polish Office of Competition and Consumer Protection (OCCP) published a report in which specific equity release providers' activities were presented and evaluated⁹. The OCCP concentrated on examining standard equity release agreements and misleading advertising of offered products. The research conducted by the OCCP revealed that abusive clauses occur in standard agreements quite often (among 37 examined contracts, 17 were questioned). The abusive clauses regard¹⁰:

- moving in of a consumer's close family members conditional upon consent of equity release provider,
- imposing onerous obligations on consumers – especially charging them with costs of essential repairs in their properties,
- cancelling the providers obligation to transfer property ownership back (in case of not obeying the contract) in return of a financial penalty,
- imposing, under contractual penalty, an obligation to inform provider about assembly held by local community or a housing cooperative, etc.

The first abusive clause which regard gaining provider's consent on living in property with close family members was used by three ERS providers: TU Europa, Fundusz Dom S.A. s.k.a and Fundusz Gwarancja. According to the Civil Code, there is no right to provide any limitations on it, and senior do not have to gain any consent from provider. OCCP highlighted that this clause may be treated as a breach of good customs.

Charging clients with costs of certain repairs in their properties, occurred in a standard contract in TU Europa provider, is also an unfair clause. According to the Civil Code, a client who lives in property is obligated to keep it in good condition by checking and repairing it regularly. Nevertheless, maintenance should result from day-to-day use, not from the provider's subjective opinion.

The clause, which imposes under contractual penalty, an obligation to inform equity release provider about assembly held by local community or a housing cooperative, occurred in standard agreement in Fundusz Gwarancja. Amount of the financial penalty, mentioned above is one hundred zlotys. The OCCP claims that it is the provider who should get information from local community or housing cooperative directly. A client should not be disturbed by this information and this is not his obligation to inform equity release company.

The most unacceptable clause was found in the standard agreement in Fundusz Senior. According to its statements, in case of not obeying the contract, it could be dissolved, but the

⁹ URZĄD OCHRONY KONKURENCJI I KONSUMENTÓW, 2013. *Raport z kontroli przedsiębiorców zawierających umowy świadczeń dożywotnich*, Wrocław.

¹⁰ Ibidem, p. 54-64.

provider may pay a financial penalty only and transferring ownership to the client is not necessary. Definitely it may be treated as a breach of good customs, because the main idea of offering equity release products is to allow client to live in the property until his death.

3.2. Misleading Advertising

Not only are standard agreements full of flaws, but also advertising of equity release products in Poland is highly misleading. The OCCP has examined 46 equity release schemes advertisements (on the radio, television, Internet, in the press, the leaflets, billboards). Seventeen of them were challenged by the OCCP, because of violation of collective consumer interest. Violations regarding i.a.¹¹:

- the range of benefits promised by provider,
- untrue information that a consumer may let the premises to a third person,
- deceiving information about inheritor's rights,
- misleading conditions which should be fulfilled by senior who wants to conclude equity release agreement.

The range of benefits which appeared in advertisements contained providers' promises like "we will pay a rent for you" (Fundusz Dom S.A), "we will pay your real estate tax", "we will insure your property against fire or flood" (Fundusz Omnes). Promise of paying a rent by the provider may be misleading for a client. The company pays it directly to the house cooperative, but as a result client receives his monthly payment decreased by the amount of a rent. Moreover, paying real estate tax and insuring property are owner's obligation, so those should not be understood as a benefit for a client.

Letting the premises to a third person is not possible in case of using legal constructions like life rent contract. That means that this advertisement also may be misleading for consumers. Advertisements provided by Fundusz Dom S.A and Fundusz Senior sp. z o.o. presented that inheritors might participate in property ownership with equity release provider or, at least, they could receive lump sum of payment. Nevertheless in examined standard contracts, the OCCP did not find any regulations which contained these inheritor's rights.

Deceiving might be also the way of describing conditions which allow senior to conclude equity release contract. Fundusz Senior, on its website, writes: "every owner of property, even if he is not creditworthy, may receive life-time annuity, which can increase his incomes on the pension". Using the expression "creditworthy" is misleading for consumers. This type of agreement have nothing in common with a credit, so there should not be any creditworthiness considered.

Consumers who are interested in equity release products are specific group – they are older people, on the pension, who often live alone. Advertising message addressed to them should be clear and easy to interpret. Regarding to this, it could be said that misleading advertisement is definitely the bad practice.

4 EXAMPLES OF GOOD PRACTICE WHICH COULD BE IMPLEMENTED ON POLISH MARKET

As an example of well-organised, transparent market, where good practices in offering equity release products are broadly used is Great Britain¹². What makes this market worth noticing,

¹¹ Ibidem, p. 70-78.

¹² REIFNER U., CLERC-RENAUD S., PEREZ-CARRILLO E.F., TIFFE A., KNOBLOCH M., 2009. *Study on Equity Release Schemes in the EU Part II: Country Reports*, Project No. MARKT/2007/23/H, p. 6-7.

is that there is a specific institution – Equity Release Council - which ensures that equity release products are safe and accessible for consumers. This industry body associates providers, financial advisors, intermediaries, lawyers and surveyors who work in ERS sector. All those members are parties to the Equity Release Council's Code of Conduct – the set of strict rules which must be obeyed¹³. Those rules were also described in detail in Equity Release Council Rules and Guidance. They can be used in order to recognize some possibilities of improving business practice on Polish equity release market (see: Table 1).

Table 1: Equity Release Council Rules and Guidance and possibilities of their implementation on Polish market

Area of good practice	Equity Release Council Rules and Guidance	Possibilities of implementation on Polish market
The sales process	<i>Providers are not permitted to accept execution-only business. Sales must always be made on an advised basis, with a personal recommendation being given to the customer¹⁴.</i>	The OCCP examined seniors who have concluded ERS contracts. The research revealed that the process of concluding the agreement is multistage. Clients usually got answers to all questions connected with their rights and obligations. Nevertheless, providers do not have any standard procedure of informing seniors about threats and opportunities of equity release. Providing standardised consultations with clients seems to be a possible solution. However, it requires cooperation among ERS providers in Poland.
	<i>Provider members will not accept business unless they have taken reasonable steps to ensure that:</i> - <i>there has been a full discussion as to the implications of the plan for the customer and for his family.</i> - <i>the customer has been advised of the risks, features and benefits of the relevant product.</i> - <i>the customer has considered all alternative action.</i> - <i>the customer's physical and mental health has been considered in relation to the suitability of the plan</i>	
Product standards	<i>Provider members may only indicate that a product meets the Equity Release Council standards if that product meets all of the product standards.</i> <i>The standards are as follows:</i> - <i>customers must have the right to remain in their property for life,</i> - <i>customers must have the right to move to a suitable alternative property,</i> - <i>interest rates must be either fixed or, if variable, with a cap fixed for the life of the loan,</i> - <i>the product must have a "no negative equity guarantee", so that, whenever the amount owing to the provider member is</i>	It would be difficult to set standardisation of equity release product in Poland, because of the variety of legal constructions on which based all of agreements. As it was presented above, standard contracts may differ significantly and it could be the most serious obstacle to regulate their features. Of course, standardisation is possible but again it would require cooperation among providers.

¹³ www.equityreleasecouncil.com

¹⁴ EQUITY RELEASE COUNCIL, 2013. *Equity Release Council Rules & Guidance*, p. 4-5.

	<i>to be repaid from the proceeds of sale of the secured property, the amount owing must not exceed the net proceeds of sale¹⁵.</i>	
Independent legal advice	<i>It is essential that a Solicitor, Licensed Conveyancer or Chartered Legal Executive should meet the customer face-to-face at least once during the legal stage of the equity release transaction and certainly before completion takes place¹⁶.</i>	Providing independent legal advice could be possible to gain, but rather after implementing specific legal act regulating functioning the equity release products. In Great Britain there is a legal obligation to advise client before concluding the contract. Solicitors who could give this kind of advice in Poland should be independent, specialised in this area lawyers or financial advisor. If there was the idea of implementing this solution, certification of this profession would be necessary.

Until there are not any specific legal act regulating sale model of equity release scheme, the only way to improve the transparency of this market may be cooperation among providers. They can together set universal rules referring to methods of selling products, products' requirements and independent legal advice. This cooperation may result in increasing confidence of clients and improving the image of whole Polish equity release sector.

CONCLUSION

There are two types of equity release schemes: loan model and sale model products. On Polish market, currently only sale model is offered by providers. Regarding to lack of specific act regulating ERS market in Poland, companies base on civil law when concluding their agreements with their clients. Polish Office of Competition and Consumer Protection has examined how does this sector work and which areas are the most dangerous for consumers. As it was expected, agreements based on legal constructions from civil code does not protect the rights of consumer sufficiently. Moreover, providers use abusive clauses and present misleading information in their advertisements. The bad practice on Polish market is opposed to good practice on British ERS market. Equity Release Council in Great Britain which is a voluntary industry body, set the number of rules which can be considered as the best example of providing fair and effective ERS business. Implementing this good practice on Polish market may be possible only in case of cooperating among all providers. Maybe the best way to improve functioning equity release schemes is to set the industry body associating all companies that offer equity release product. Of course, setting the specific legal regulation will be the most effective way to discipline providers and force them to apply good practice in their businesses.

¹⁵ Ibidem, p. 6-7.

¹⁶ Ibidem, p. 9-10.

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