Minutes

of the Meeting of the Legal Affairs Committee of the
European Federation of Building Societies,
Brussels, 18 November 2010

Members present

Presidency: H. Pfeiffer, **President**, Slowak Republic
A.J. Zehnder, **Managing Director**, Germany

Participants:

Z. Andel, Croatia
E. Bernhard, Rumania
Dr. R. Conradi - **Secretary** -
N. Dauer, EFBS
A. Gruhn, EFBS
J. Guhr, Germany
Dr. B. Gundlach, Germany
G. Haberzettl, Germany
R. Hager, Austria
Dr. H. Hamm, Germany
Dr. C. Harrer, Austria
Dr. H. Huber, Austria
H. Imgrund, Germany
J. Jeniček, Czech Republic
E. Karner, Austria
Dr. J. Klare, Germany
C. König, Germany
M. Koller, Czech Republic
Dr. J. Kreuziger, Germany
V. Lukáš, Czech Republic
V. Lüdemann, Germany
F. Merkel, Germany
J. Phlippen, Germany
J. Pivonka, Czech Republic
J. Pokorný, Czech Republic

C. Rautenberg, EFBS
R. Schäfer, Germany - **Chairman** -
J. Šedivý, Czech Republic
V. Staňura, Czech Republic
H. Straubinger, Germany
C. Vallant, Croatia
P. Ulrich, Germany

Mr. R Schäfer opened the meeting by welcoming the President as well as the Managing Director. He then bade Mr. G. Haberzettl farewell, who took part in a Legal Affairs Committee meeting for the last time, since he would retire soon. He thanked him for many years of co-operation within the Committee.

Requests for amending the Agenda were not made.

Agenda item No. 1: Approval of the Minutes of the Meeting of the Legal Affairs Committee in Munich, 17 May 2010

Mr. R. Schäfer informed the Delegates that written requests for amending the Minutes of the preceding meeting had not been received. Nor were any such requests made at the current meeting.

He thereupon established that the Minutes stood unanimously adopted as presented.

Agenda item No. 2: Responsible Mortgage Lending and Borrowing – Current State of the Discussion -

Dr. Conradi informed the Delegates that, as a consequence of the consultation procedure on „Responsible Mortgage Lending and Borrowing“ conducted in the summer of 2009, the Commission now planned to adopt a directive in spite of the fact that the White Paper on Mortgage Credit submitted in December 2007 did not envisage legislative action. A Working Paper submitted on 22 July 2010 now justified such action not only by the overwhelming importance of mortgage credit for the European economy, but also by doubtful lending practices in the course of the financial market crisis, by measures to supplement the planned more restrictive own capital requirements as well as by the need for comprehensive regulation of all markets, market participants, financial products and territories. Increases in number of cross-border credit offers and the development of the internal market, by contrast, played an only subordinate role in the paper.

The scope of the directive would cover housing loans of any kind regardless of the type of credit security submitted, but no so-called equity-release products and loans from employers. There were neither any intentions to regulate product development and early loan repayment. The contents of the planned directive would largely follow the lines of the Consumer Credit Directive especially as regards contractual and pre-contractual information obligations, the need to adequately explain product characteristics to customers (excluding advice), minimum professional qualification requirements to be met by the staff of credit institutions and finan-

cial intermediaries as well as rules on advertising and marketing. Moreover, there were plans for obligating lenders to assess the creditworthiness of customers as well as the suitability of products for the requirements of customers. Finally, regulations would be adopted on the calculation of the annual percentage rate of charge, in which context it should be noted that the Commission currently showed a trend towards including in the calculation not only the cost elements directly caused by the lender, but the totality of the costs arising in connection with lending operations. But this no longer deserved to be called "annual percentage rate of charge", but represented a „total cost concept" making it impossible for consumers to compare products.

At a hearing of the associations of the European Banking Industry on 14 September 2010, the EU Commission had made it clear that, internally, a decision had already been reached in favour of a directive and that the contents of such a directive was already clear, by and large. The official proposal would be submitted in January or February 2011. Comments by the EBIC associations could only be taken into consideration in the following ten days, if at all. The EBIC associations had criticized the fact that only so short a period of time had been allowed for responding; in replay to this criticism, the representatives of the Commission had pointed out that the Working Paper on „Responsible Lending" must be deemed to represent a step in the consultation process towards harmonization of the European mortgage credit market, which had begun in 2005 already. The representatives of the Commission had also rejected the EBIC representatives' objection that the subject of the consultation process had thus far been the creation of a single European market for housing finance, whereas the Commission now apparently pursued an entirely different goal by introducing the topic of "responsible lending". Further in the hearing, an in-depth discussion had taken place especially on the following issues.

- Assessing the creditworthiness of customers and/or the suitability of products: The representatives of the Commission had made it clear that the aim was to create identical framework conditions in this field for the credit institutions of all 27 EU Member States. In addition to the creditworthiness of customers, lenders would be required to assess whether the credit product on offer would meet the individual requirements of anyone borrower. There was no intention to envisage an obligation on credit institution staff to advise customers, but it was apparently intended to make it compulsory for lenders to reject credit applications of customers lacking the necessary creditworthiness.

  The EBIC representatives had rejected the Commission's proposal to accept corresponding detailed legal obligations since they would restrict the already existing national practices and result in considerable legal insecurity. Moreover, obligating lend-

ers to justify why they had rejected a credit application had also been turned down on the ground that this must be deemed to be irreconcilable with the principle of freedom of contract and to make the lending process more bureaucratic.

- Advertising and marketing / precontractual information: The representatives of the Commission had insisted on applying the advertising and marketing rules of the Consumer Credit Directive also to the mortgage credit sector. A supplementary measure would consist of warnings to be given in the field of specific products (e.g. foreign-currency loans). When the European Standardized Information Sheet (ESIS) is revised, the results of the studies commissioned by the EU Commission in 2009 ought to be taken into consideration; this would mean modifications especially for the institutions of those Member States where the Consumer Credit Directive and the need to use the European Standard Information Sheet were applicable also to the mortgage credit sector. The EBIC representatives, by contrast, had demanded an understanding on noticeably less extensive information requirements in the fields of marketing and advertising. Excessive information requirements impairing or even rendering impossible TV and/or broadcasting advertising of credit terms and conditions would be totally unacceptable.

- Ten-day reflection period: In the opinion of the EU Commission, a ten-day respite ought to be granted to customers between the submission of precontractual information and the signing of credit contracts in order to enable customers to obtain and compare further credit offers. It had turned out in the course of the discussion that the Commission had in no way any specific ideas either about details of how to implement such a reflection period or about the legal and especially practical consequences which would result from possible consumer wishes for cutting this period short.

- Disclosure of intermediation fees: In the EU Commission's opinion, it would also be necessary to disclose the commission fees lenders pay their credit intermediaries. The EBIC representatives, by contrast, advocated that only the commission fees payable by consumers ought to be disclosed. Furthermore, disclosure obligations ought to be limited to independent intermediaries.

- Qualification requirements to be met by credit institutions staff: The EBIC representatives had rejected a European regulation because it had to be assumed that such a regulation could not be implemented owing to the wide variations between fields of responsibility and activity of credit institution staff.

The issues discussed above played a role also in the comments submitted by the EBIC to the EU Commission. The Federation regretted that it had not been able to win the support of the responsible EBIC working group which would have been necessary for addressing also the topic of „annual percentage rate of charge calculation“ and for arguing against the EU Commission's intention to replace the concept of a mathematically correctly calculated annual percentage rate of charge by the "total cost percentage" concept, although this issue had been unambiguously addressed in the comments of the Federation.

At end-October 2010, the EU Commission had submitted the document entitled „Towards a Single Market Act“, which contained a whole bundle of highly differential proposals on how to expand and develop the single European market. Reference had to be made especially to proposal No. 41 for envisaging a "Directive geared towards the creation of a single integrated mortgage market with a high level of consumer protection" without mentioning „responsible lending“ at all in this context. This might be interpreted as concerns of the Commission about whether the EU Treaties offered a satisfactory legal basis for adopting a directive on responsible lending. These Treaties provided for not more than the enabling basis for the creation of a single European market.

Commission representatives had only very recently contacted the EBIC again with the suggestion to hold discussions about a directive on "responsible lending" and had indicated that, internally, the Commission was not yet quite clear about the harmonization approach to be adopted, about the nature of the obligation to reject credit applications, about how to assess the suitability of products for customer needs as well about the reflection period.

In the subsequent brief discussion, agreement existed on the need for drawing a strict dividing line between assessing the suitability of products for customer needs on the one hand and advice to consumers on the other in the course of the further legislative procedure. Mr. R. Schäfer pointed out in response that the planned ten-day reflection period must be assumed to have considerable implications for distribution practices, because – as a rule – customers wished to obtain the credit funds they needed quickly, with the consequence that a possible renunciation to the reflection period must be based on legally secure grounds and must be correspondingly documented. Especially in the field of renovation loans, credit institutions had made considerable efforts for making information on the granting of the requested credit available very quickly at the point of sale. The introduction of a reflection period would threaten to counteract these efforts.

Agenda item No. 3: Proposal of the EU Commission for a Consumer Rights Directive (Consumer Acquis)

Ms. C. Rautenberg informed the Delegates about the current state of the legislative procedure. The rules of the proposed Directive currently covered also financial services. For, No. 11 of the whereases made it clear that the directive would be applicable also to financial services insofar as financial services did not fall within the scope of application of other directives. This meant in concrete terms that mortgage credits and other types of loan of less than EUR 200 and over EUR 75.000 would be subject to the rules of the directive. Consequently, the rules on information requirements in particular as well as the rules on abusive practices in consumer contracts would have to be observed. The deliberations of the Committee had shown that especially the full harmonization approach of the EU Commission had been a matter of dispute. For this reason, the competent rapporteur, Dr. Andreas Schwab (MEP), had modified in his draft report this strict approach, now proposing so-called „targeted" harmonization. This meant that only those areas would be subject to full harmonization for which this was expressly by the directive.

In view of the fact that the deadline on submission of requests for amendment had ended in mid-October of this year, the Federation had proposed to selected Members of the European Parliament requests for amendment which provided for excluding financial services from the scope of application of the directive. It was gratifying to note that a number of Parliamentarians had supported these amendment proposals. From among the 1,594 requests for amendment submitted to the competent Internal Market and Consumer Protection Committee (IMCO), about 60% aimed for excluding financial services from the scope of application of the directive so that there was a reasonable chance of getting this Federation wish fulfilled. A final decision on this matter was to be expected at end-November of the current year. Important for building societies could also be Article 31 para. 3, which classified clauses on general conditions of contract concerning ancillary services as unfair, if these could only be „unsubscribed" by an express consumer statement to that effect. This might be relevant for clauses in building-saving contracts on taking out subscriptions to in-house publications, for instance.

The Committee took note of the information given by Ms. C. Rautenberg. Mr. R. Schäfer pointed out that it might become necessary indeed to redefine the clauses on taking out subscriptions to in-house publications should Article 31, para.3 be adopted unaltered.

Agenda item No. 4: Unofficial draft text of a Regulation of the European Commission on fixing a final date for migration of national payment systems to SEPA

Dr. R. Conradi reported that an unofficial draft proposal for a Regulation of the EU Commission on the definition of important elements pertaining to EU-denominated credit transfers and direct debits disclosed in July provided for the following:

- Provided that the Regulation entered into effect in 2012 in the version as currently envisaged by the EU Commission, separate deadlines on migration to the SEPA of national payment procedures of 12 months after entry into effect of the Regulation for credit transfers and of 24 months after entry into effect of the Regulation for direct debits would mean that the SEPA format would only be available after 2013 for credit transfers and, respectively, after 2014 for direct debits.

- A legal obligation to ensure reachability also of cross-border SEPA credit transfers (already existing for SEPA direct debits).

- A Europe-wide obligation on customers to use as customer identification numbers exclusively the IBAN of the payee in the case of transfers and of the payer in the case of direct debits.

Moreover, the draft text of the Regulation provided for the need to adopt so-called „essential requirements“ for incorporation in the SEPA Rule Books as well as technical standards pursuant to ISO 20022. This met with strong resistance by the European credit industry, because the way of handling payment operations had thus far been regulated by inter-federation agreements at national level and by the so-called EPC (European Payments Council) Rule Books at European level. The European banking industry did not see any justification in such a severe intervention by the European Commission in existing agreements and was afraid – certainly not without reason – of impediments arising in the development of products in particular. Moreover, there was a danger that short-term modifications of the requirements to be observed by the relevant technical standards and, respectively, the SEPA procedure descriptions, which would be justified by the draft Regulation of the Commission, might result in substantially higher costs.

In view of the original plan to publish the official proposal for the Regulation in early October of this year, the German Federal Ministry of Finance had requested the federations of the „final users“ to submit comments. In response to this invitation, the German Bausparkasse fed-

erations had energetically opposed an EU-wide obligation to prescribe the use of SEPA formats also for purely national payment operations and had advocated to leave the introduction of a single European payment area to a market-driven process, as originally intended. Proposals for amending the draft text of the Regulation had been submitted restricting the mandatory use of SEPA formats exclusively to cross-border payment operations. Moreover, this proposal provided for identical periods of 48 months for reorganizing cross-border credit transfer and direct debiting procedures from the present national to the SEPA formats so that the measures of reorganization can be implemented with the usual innovation cycles being taken into consideration.

As matters stood at present, the Commission was planning to submit the final text of the proposed Regulation before end-December 2010 so that the entry into effect of the Resolution must not be expected before mid-2011.

The report was taken note of without discussion.

Agenda item No. 5: Proposal of the European Commission on Modification of the Deposit Guarantee Scheme (DGS) Directive

Dr. R. Conradi informed the Delegates that a compromise text of the Belgian Council Presidency had become known just recently, which did – upon first sight – not contain any substantial modifications compared with the official draft text of the directive submitted by the EU Commission. This compromise text envisaged the following, by and large:

- *All credit institutions* must be members of a Deposit Guarantee Scheme officially recognized by their Member States and supervised by national supervisory authorities.

- The *DGS coverage level* would be limited to € 100.000 per customer in all Member States.

- In order to *fund Deposit Guarantee Schemes,* member credit institutions must contribute 1.5 % of their total deposits (target value) within a period of 10 years , i.e. 0.15% of their annual deposits. If the disposable funds amount to less than two-thirds of this target value, even 0.25% of the deposits must be paid into the Scheme. For the totality of the German Bausparkassen this would mean mandatory contributions of approximately two billion Euro. If the *DGS is triggered* and/or if it is established that the funds available are not sufficient, it is also possible to require ex-post contributions of up to 0.5% of the deposits.

- The *term* 'deposit' had been defined to mean all credit balances arising from ordinary banking operations including interest due, but not yet credited. Not covered were certificates, loans, structured products as well as deposits by credit institutions, insurance undertakings and investment funds.

- After triggering of a DGS, depositors would have to be compensated for losses *within seven days*.

- Deposit Guarantee Schemes would be subject to an *EU-wide mutual obligation* on credit institutions to make available to one another, where necessary, *limited loans commensurate with their respective levels of contribution,* which would be repayable within five years and would carry interest.

If the proposed directive were transposed in the current version, this would have substantial consequences especially for the institution guarantee schemes which exist in a number of Member States, because the proposal focused on the set-up of Deposit Guarantee Schemes. This ultimately implied the danger that institution guarantee schemes could only exist parallel to Deposit Guarantee Schemes so that the institutions concerned would have to pay twice the respective amount.

Concerning the further procedure, it had to be pointed out that the doubts expressed by Germany about whether the action proposed by the Commission complied with the principle of subsidiarity had not reached the required quorum of one-third of all Member-State votes. However, it had to be assumed that Brussels had taken note of the signal, especially because also other countries' parliaments had adopted comparable resolutions. It had turned out in the course of the discussions by the EU Council of Ministers that many Member States were concerned about the excessive membership cost burden as a result of the modified directive, the schematically identical treatment of different banking groups as well as the incalculable liability risks owing to the obligation to support one another's deposit guarantee scheme. On the specific concerns of the building-saving societies, Federation representatives had had a conversation with Commissioner Michel Barnier, which would be a subject for reporting at the Administrative Council meeting.

In the subsequent brief discussion, special mention had been made of the fact that from among the existing guarantee mechanisms for the business activities of building-saving societies especially the technical security reserve ought to play a special role at EU level.

Agenda item No. 6: Miscellaneous

Ms. N. Dauer and Ms. C. Rautenberg informed the Delegates on the latest developments in the fields of class action, revision of the money laundering directive, the current accounts for everybody, transparency on bank fees, product coupling and bundling, European contract law as well as on the ruling of the European Court of Justice on banning insurance pricing on gender when weighting insurance risks (legal proceeding C-236/09). Dr. R. Conradi also added information on a conversation with the staff member of the Commission responsible for revision of the money laundering directive. In this conversation, mention had been made in particular of ways and means for clarifying certain wordings which would permit administrative facilitations to the credit industry without impairing the conditions for fighting money laundering activities. This had been demonstrated on the basis of the identification obligations to be met also by brokers among other professions without differentiation between whether brokers were involved in financial transactions (which was the case in Sweden) or not (which was the case in Germany). The Commission had shown itself to be open-minded to this request, while signaling at the same time that it was unable to hinder overfulfilment of the directive at national level (about which it was perfectly aware).

This information was taken note of without discussion.

Mr. R Schäfer established no further requests for the floor had been received. He thanked Ms. N. Dauer, Ms. C. Rautenberg and Dr. R. Conradi for having prepared the meeting as well as the participants for their lively participation in the discussion, and he closed the meeting with his special thanks to the interpreters.