

Minutes

of the Meeting of the Legal Affairs Committee
of the European Federation of Building Societies
Berlin, 7 October 2021

Participants:

M. Cariboni, Germany
P. Čejka, Czech Republic
Dr. R. Conradi, Germany – **Secretary** –
Th. Dörr, Germany – online –
R. Eichwede, Germany – online –
C. Forche, Austria – online –
A. Freise, Germany
K. Gergely, Hungary
G. Grebler, Germany – online –
A. Guthmann, Germany
K. Holler, EFBS
P. Jiráček, Czech Republic
R. Kašiar, Slovak Republic
L. Keuper, EFBS
M. Kopřivová, Czech Republic
T. Kranz, Germany
C. König, Germany
S. König, Germany
A. Malinowska, Austria
D. Marwan, Slovak Republic – online –
J. Masar, Slovak Republic – online –
S. Masuch, Germany
S. Melchior, Austria
K. Nowak, Austria
D. Otterbach, Germany – online –
J. Phlippen, Germany – online –
J. Riemer, Germany – **Chair** –
Z. Szendrey, Hungary
J. Šedivý, Czech Republic
Dr. L. Takacsova, Slovak Republic – online –
Dr. Z. Tichy, Hungary
Dr. F. Trappe, Germany
M. Weinrich, Germany

Agenda item No. 1: Welcome

Mr. C. König, EFBS Managing Director, opened the meeting and welcomed the participants who were present in the conference room and those attending online.

Agenda item No. 2: Presentation of the European Commission's new legislative Proposal for a Directive on Consumer Credits

The participants took note of the contribution by Ms. Elena Brolis (DG JUST, Consumer Policy, European Commission) on the objectives and main content of the proposal for a new Directive on Consumer Credits, presented by the European Commission on 30 June 2021. The Commission's review of the current Consumer Credit Directive showed that – apart from the originally intended increase in the provision of cross-border consumer credit – the Directive had generally achieved its objectives. However, the shortcomings of the current Directive are apparent, not least, in relation to increasing digitalisation, which has gained in significance in the context of the COVID-19 crisis. Further details of the contribution can be found in the handout, attached as **Annex 1**.

In the subsequent discussion, Dr. R. Conradi asked what the introduction of caps on interest rates, the annual percentage rate of charge and the total cost of the credit to the consumer, envisaged in Article 31 of the proposal, would mean. He pointed out that in various EU member states, such as Germany, no such fixed caps exist. There are, however, the general provisions of civil law, based on which the courts have developed a body of established case-law which sets a clear limit beyond which a contractually agreed interest rate is deemed “unethical” and therefore ineffective. Is a fixed legal cap now required, in lieu of this case-law? Ms. Brolis replied that it was not the purpose of Article 31 to oblige member states to introduce absolute caps. Rather, the member states should be free to determine how they regulate the provision of particularly high-risk products. For countries such as Germany, this may mean writing the principles developed by the courts into law. Ms. S. König pointed out that the proposed requirement in Article 9(1) for the creditor to provide the borrower with pre-contractual information one day before the signing of the credit agreement was to the detriment of consumers, who would wish to access the loan as quickly as possible. Ms. Brolis said that the Commission was aware of the problem. Article 10(1), second paragraph, therefore states that in cases where the pre-contractual information cannot be provided one day before the conclusion of the credit agreement, the creditor may notify the borrower separately about the right of withdrawal in accordance with Article 26.

Mr. C. König thanked Ms. Brolis for her contribution and informed the participants that the EFBS had produced a position paper on the proposal for a Directive, which would be submitted to the Commission, the Council and the rapporteurs in the European Parliament (EP) in the near

future. In this context, he called on the Commission to think again about introducing caps on interest rates.

Agenda item No. 3: Election of a new Committee Chairman / Approval of the Minutes of the Legal Affairs Committee held on 19 March 2021

Mr. C. König informed the participants that the previous Committee Chairman, Mr. U. Körbi, had retired in September. The EFBS Presidium had thereupon submitted a recommendation to the General Assembly that Mr. Jens Riemer, designated Member of the Board (*Generalbevollmächtigter*) of LBS Ostdeutsche Landesbausparkasse in Potsdam, be elected as his successor. On the assumption that the General Assembly followed this recommendation when it convened after the meeting of the Legal Affairs Committee, he invited Mr. Jens Riemer to take the chair for the remainder of the meeting.

Mr. Riemer thanked Mr. König for inviting him to take the chair and briefly introduced himself to the participants.

He then informed the participants that no written requests for amendment of the Minutes of the preceding meeting of the Committee had been received, nor were any such requests made at the meeting itself.

Mr. Riemer thereupon stated that the Minutes were approved unanimously as submitted.

Agenda item No. 4: EU Commission's anti-money laundering and countering the financing of terrorism (AML/CFT) legislative package

The Committee took note of the report by Dr. R. Conradi on the main content of the anti-money laundering legislative package presented by the European Commission on 20 July 2021. The background to this initiative was, not least, a number of prominent cases of money laundering (Danske Bank, Deutsche Bank) which the Commission attributed mainly to delays in the transposition of the European anti-money laundering rules into national law, differences in national implementation of these rules, and insufficient central coordination and cooperation among national supervisory authorities and financial intelligence units (FIUs) at the EU level. In May 2020, the Commission responded by presenting an Action Plan whose pillars included not only effective implementation of the existing rules, but also the introduction of a single rule book, EU-level supervision and a cooperation mechanism for FIUs.

The current legislative package now implements this Action Plan. Specifically, the package consists of four legislative proposals:

- Regulation on AML/CFT: In essence, this will contain the rules applicable to the private sector under the current 5th Anti-Money Laundering Directive. However, in order to ensure consistent application of rules across the EU, a number of provisions are clarified, such as the expansion of the list of obliged entities to include crypto-currency and crowdfunding credit service providers, requirements in relation to internal policies, controls and procedures of obliged entities, due diligence requirements in relation to customers, the requirements in relation to third countries and politically exposed persons, and the rules on beneficial ownership.

An initial perusal had revealed that the proposal includes a number of provisions that are problematical from the credit industry's perspective. They primarily include the introduction of a requirement to keep records even if a business relationship has been refused (Article 17(2)). This concerns the collection of personal data, for which a contractual and hence a legal basis is lacking. Also new is the requirement to obtain information for *all* nationalities (Article 18(1)). In practice, however, this is likely to be almost unworkable. At the very least, institutions would face complex enquiry and documentation requirements. Even more serious impacts are likely to ensue from the provision in Article 21(2) that the frequency of updating of customer information may not exceed five years. This has been reduced compared with the current rule and would probably only apply in situations with a low risk of money laundering; this means that updating will have to take place more frequently overall and where the risks are higher, updating would also have to be carried out at shorter intervals, threatening to create a constant cycle of updating.

Lastly, it is doubtful whether the Regulation can genuinely achieve the objective of ensuring consistent application of rules across the EU. At 11 points in the Regulation, it is stated that its provisions should be clarified by guidelines or regulatory technical standards issued by the future EU Anti-Money Laundering Authority (AMLA). This applies, inter alia, to the requirements in relation to identification by third parties (Article 41).

- Anti-Money Laundering Directive: The Directive contains provisions on the activities of the national supervisors. Its objective is to improve supervisory procedures and the procedures of the FIUs and, at EU level, to ensure better cooperation among the competent authorities.
- Regulation establishing an EU Authority for Anti-Money Laundering (AMLA): The AMLA will take over the powers relating to anti-money laundering that currently lie with the EBA, and will also be responsible for direct supervision of selected financial sector obliged entities, in particular significant credit institutions (SIs) and groups of credit institutions, as well as cross-border institutions. Very few Bausparkassen are therefore likely to be subject to direct supervision by the AMLA.
- Revision of the Regulation on Transfers of Funds: This envisages the comprehensive expansion of the rules on combating money laundering to include the crypto-sector, in order

to ensure the full traceability of transfers of crypto-assets such as bitcoin. As the Regulation only applies to institutions which provide payment services, the Bausparkassen are not affected.

The legislative package has now been submitted to the Council and the EP for further deliberation. Which EP committees will lead on this issue has not yet been finally determined.

In the subsequent brief discussion, Ms. A. Freise additionally reported that the European Commission official who is responsible for the anti-money laundering package had made it clear at an EFBS event that after the issuing of regulatory technical standards and guidelines by the AMLA, there would no longer be a place for the existing Interpretation and Application Guidance provided by the national supervisors. In future, therefore, matters of specific relevance to the Bausparkassen would have to be raised directly with the EU institutions.

Agenda item No. 5: Tour de table: Exchange on current developments in the field of Bausparkassen law (Legislation / Jurisdiction)

Participants from the following countries reported on current developments:

Germany (Ms. A. Freise): With its judgment of 27 April 2021, the Federal Court of Justice (*Bundesgerichtshof* – BGH) declared ineffective two provisions regarding amendments of general terms and conditions (AGB) which were used in broadly the same version by the German credit industry as a whole. In future, it will no longer be permissible to offer customers amendments to general terms and conditions which come into effect on a specific date unless the customer has notified the bank that the changes are not accepted (deemed consent). One of these provisions concerns the contractual relationship in general; the other relates to changes to charges for services and, in essence, implements a corresponding provision of the EU Payment Services Directive. However, the judgment has little relevance to the current general terms and conditions of the German Bausparkassen, which, for some time, have provided only limited scope for amendment: the key provisions of the general terms and conditions may be only be changed with the supervisory authority's consent. However, for amendments required as a result of supreme court rulings or legislative changes, the customer's tacit acceptance will still be permissible in future.

After rulings by the Federal Court of Justice (BGH) in 2016 and 2017 that the charging of a loan fee and ongoing fees during the lending phase was unlawful, the fees charged by the Bausparkassen during the saving phase are increasingly being challenged in class actions. Regrettably, various courts of first instance have, in the meantime, extended the BGH's arguments relating to the lending phase in their entirety to the savings phase as well. There is a possibility that the BGH will make a final decision in one of these cases in the coming year. In contrast to case-law, which takes a very critical view of fees during the saving phase, an increasing number of voices in the legal literature endorse the view of the Bausparkassen that these fees are permissible.

Further details of the report can be found in the handout, attached as **Annex 2**.

Hungary (Dr. Z. Tichy): In March 2020, a general moratorium was introduced on all payments under existing credit agreements (e.g. for people who had received no income for more than 30 days due to unemployment and who were therefore unable to repay their loans). The measure was extended several times until October 2021. After that, an amended moratorium regime would be introduced, applicable until June 2022.

Czech Republic (Mr. P. Jirak): The Czech banking supervisor interprets the rules on early repayment as meaning that borrowers may switch lender several times a year on payment of a small administration fee, but without being required to pay compensation for early redemption. This costs the Czech Bausparkassen around €100 million per year. They are therefore holding talks with the Ministry of Finance, but have so far been unable to make headway with their argument, which is based to a large extent on the EU's Mortgage Credit Directive.

Austria (Ms. S. Melchior): A forthcoming amendment to the Building Society Act (*Bausparkassengesetz*) will abolish the current 18-month minimum waiting period for the allocation of funds. The draft is currently passing through Parliament and is expected to enter into force on 1 January 2022. A reference for a preliminary ruling from Austria's Supreme Court of Justice (*Oberster Gerichtshof* – OGH) to the CJEU is also significant; the referring court asks whether the EU Mortgage Credit Directive is to be interpreted as precluding national legislation, in this instance a provision of Austria's Mortgage Credit Act, which, in the event of early repayment of credit, does not require the repayment of costs that are not dependent on the duration of the agreement. The appellant in this case is a consumer organisation.

Agenda item No. 6: Miscellaneous

Mr. König informed participants that this was Dr. Conradi's final meeting as Secretary of the Legal Affairs Committee as he would be retiring in early 2022. Dr. Conradi had served in this capacity since 1994, during which time he had prepared more than 60 meetings of the Committee in total, held numerous discussions with EU representatives and thus made a substantial contribution to the successful lobbying work of the Bausparkassen at EU level. Mr. König thanked Dr. Conradi for his many years of service and, on behalf of the European Federation of Building Societies, wished him all the best for the future.

Mr. Riemer satisfied himself that there were no further requests for the floor. He thanked the participants for their lively participation in the discussions as well as the speakers for their contributions. He closed the meeting with his special thanks to the interpreters.



The new proposal for a Directive on consumer credits repealing and replacing Directive 2008/48/EC

European Federation of Building Societies

7 October 2021

*JUST E1 Consumer Policy
European Commission*

The Consumer Credit Directive Review: Impact Assessment



The CCD Review process

✓ CCD Evaluation (2020)



External study
supporting the Review

Stakeholder consultation

- Feedback on Inception Impact Assessment
- Public consultation
- Workshops, interviews, surveys

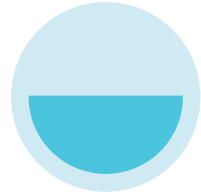
30 June 2021: Adoption of new proposal

✓ CCD Impact Assessment (2021)

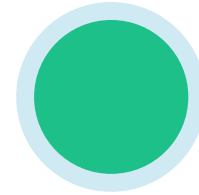
Impact Assessment – Problems & Objectives



PROBLEMS



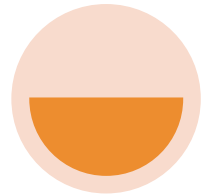
Consumers taking out loans face detriment that could be avoided



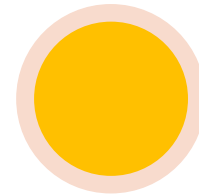
The competitiveness of the internal market is not fully achieved



OBJECTIVES



Reduce the detriment of consumers taking out loans in a changing market



Facilitate cross-border provision of consumer credit and competitiveness

The new proposal for a Directive on consumer credits



The proposal for a Directive on consumer credits



SCOPE

- **Enlarge the scope to some credits** currently exempted (free interest rate credits, all leasing agreements, all overdrafts)
- **Delete lower threshold** (below EUR 200) & **adapt the upper threshold** (above EUR 75 000) to **inflation** (also in the future) up to EUR 100 000
- Several articles also apply to **crowdfunding credit services providers facilitating the granting of credit between consumers** (i.e. not creditors nor credit intermediaries)

The proposal for a Directive on consumer credits



INFORMATION DISCLOSURE

- Information should be **clearly legible** and **adapted to the medium**
- **Reduce amount of information** disclosed in representative examples via **advertisements not visually displayed**
- **‘Staged disclosure’ for pre-contractual information:** summary page on top of the Standard European Consumer Credit Information (SECCI) form i.e. a Standard European Consumer Credit Overview (SECCO)
- Consumers get **pre-contractual information at least one day before the contract signature**. Otherwise, they receive a reminder of the possibility to withdraw from the agreement.
- Provision of **adequate explanations** (in line with MCD)
- **Information** for consumers in case of **modification of the agreement** (in line with NPL trilogue)

The proposal for a Directive on consumer credits



PRACTICES EXPLOITING CONSUMERS' SITUATION AND BEHAVIOUR

- **Clear identification of personalised offers on the basis of automated processing**
- **Conduct of business obligations** when providing credit to consumers (in line with MCD)
- **Knowledge and competence requirements for staff** (in line with MCD)
- Standards for **advisory services** (in line with MCD)
- **Ban on tying** consumer credits to other financial products e.g. insurances (in line with MCD)
- **Ban on pre-ticked boxes** (in line with CRD)
- **Caps on interest rates/APR/total cost**
- **Ban on unsolicited credit sales**

The proposal for a Directive on consumer credits



CREDITWORTHINESS ASSESSMENT (CWA)

- Obligation for creditors to carry out CWAs based on **information on financial and economic circumstances** which is necessary and proportionate, in the interest of consumers to prevent over-indebtedness (in line with MCD)
- **Credit is made available**, in principle, if the obligations resulting from the agreement are likely to be met (i.e. **positive outcome**), **unless in specific and justified circumstances**
- Right of consumers to request and receive a **clear explanation of the creditworthiness assessment**

The proposal for a Directive on consumer credits



CIRCUMSTANCES LEADING TO OVER- INDEBTEDNESS

- Member States to promote **financial education measures** (in line with MCD)
- Member States to require creditors to have policies and procedures to exercise **reasonable forbearance** before enforcement proceedings are initiated (in line with MCD and NPL trilogue)
- Member States to ensure that **debt advice services are made available** to consumers

The proposal for a Directive on consumer credits



ENFORCEMENT

- Member States to designate specific **competent authorities** to implement the Directive (in line with MCD)
- **4% rule set in the Omnibus Directive**: amount of maximum fines for widespread infringements being at least 4% of the trader's annual turnover in the Member States concerned (in line with UCPD UCTD as amended by the Omnibus Directive)

Thank you



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Tour de Table

- Current Court Decisions in Germany

Legal Affairs Committee
Thursday, 7 October 2021,
Agnes Freise



Tour de Table

- Current Court Decisions in Germany

1. Amendment of general terms and conditions of a bank by deemed consent of the consumer in the event of lack of his timely rejection
2. Annual Fees during the Saving Period of a Bauspar Contract



Amendment of the GTC by deemed consent

**Federal Court of Justice, Judgement of 27 April 2021, XI ZR 26/20:
No effectiveness of provisions regarding the deemed consent of the consumer
to amendments in the general terms and conditions**



DIE WELT

Bankgebühren-Beben: Das müssen Sie jetzt wissen
BGH kippt Klauseln zu automatischen Gebührenerhöhungen bei Girokonten, wenn Kunden nicht widersprechen. Ein Urteil mit großer Tragweite

Frankfurter Allgemeine
ZEITUNG DER ALLGEMEINEN LITERATUR

Die neue Macht der Bankkunden

Lange konnten Inhaber von Girokonten gegen Gebührenerhöhungen wenig ausrichten. Ein gerade vom Bundesgerichtshof gefälltes Urteil mischt die Karten vielleicht neu - zum Vorteil der Kunden und zum Schrecken der Branche.

Handelsblatt

Comdirect stoppt vorerst die geplanten Preiserhöhungen für das Girokonto

Die Commerzbank-Tochter wollte im Mai ein neues Gebührenmodell für Kunden einführen. Wegen eines Urteils des Bundesgerichtshofs legt sie die Pläne zunächst auf Eis.

So holen Sie sich Ihr Geld von der Bank zurück
Ein neues Urteil des Bundesgerichtshof kann für Bankkunden zum Geldsegen werden: Es eröffnet die Chance, jede Menge Gebühren zurückfordern. Wie das funktioniert.

SPIEGEL

Bundesgerichtshof



Keine fiktive Zustimmung zu Banken-AGB
Stand: 27.04.2021 17:57 Uhr

Plötzlich ist das Konto teurer: Bislang konnten Banken ihre geänderten Allgemeinen Geschäftsbedingungen auch dann anwenden, wenn der Kunde nicht ausdrücklich zugestimmt hat. Nach einem BGH-Urteil geht das nun nicht mehr.



Amendment of the GTC by deemed consent



Federal Court of Justice, Judgement of 27 April 2021, XI ZR 26/20

No effectiveness of 2 provisions regarding the deemed consent of the consumer to amendments of the general terms and conditions of a bank:

- Amendments of general terms and conditions and the special conditions without any restriction, No. 1 (2) GTC
- Amendments of charges for services which are typically used by the customer, No. 12 (5) GTC

Common content of these 2 provisions:

- Amendments shall be offered to the customer in text form no later than 2 months before their proposed entry into force.
- The customer shall be deemed to have given his consent unless he has notified the bank of his refusal before the proposed date of entry into force.
- The bank shall specifically inform the consumer in its proposal that such consent will be assumed in the absence of any objection.
- If amendments of the charges are proposed to the consumer, he may terminate the contract before the date of their entry into force free of charge.



Amendment of the GTC by deemed consent

Federal Court of Justice, Judgement of 27 April 2021, XI ZR 26/20

Reaction of the German Banks:

- NEW No.1 (2) GTS: Very restricted possibility of amendments by deemed consent
- NEW No. 12(5) GTS: No possibility to introduce or to amend any charges by deemed consent

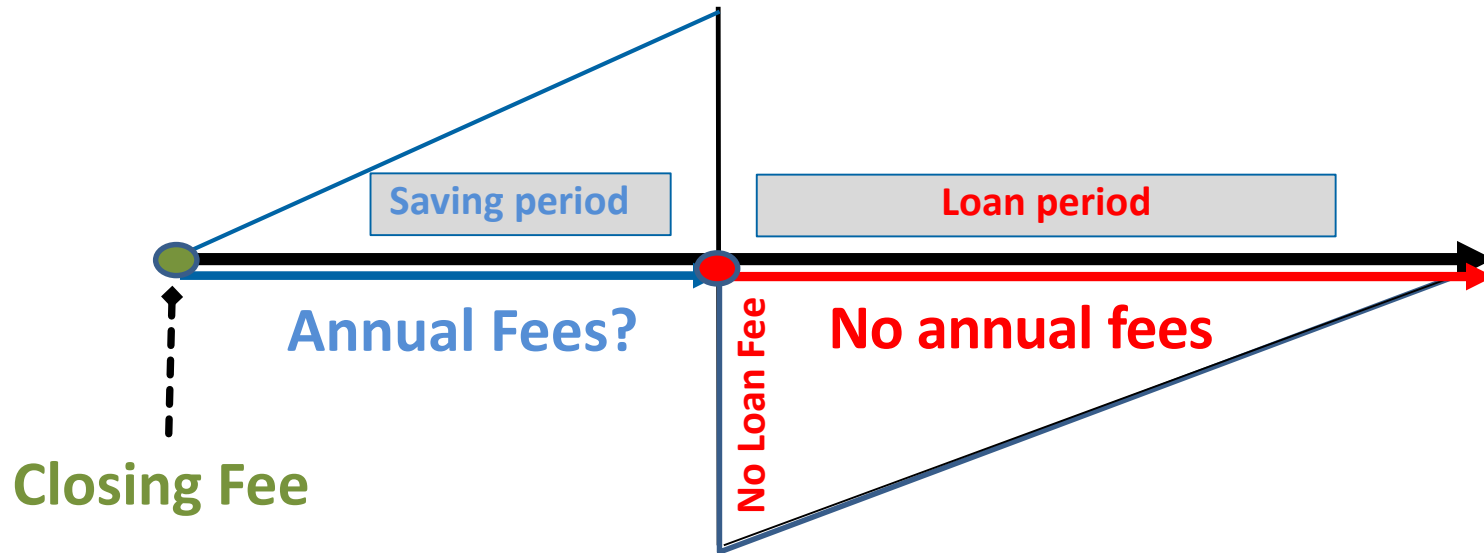
Reaction of the German Bausparkassen:

No need for amendments of the Sample Bauspar Terms and Conditions :

- Very restricted possibility of amendments by deemed consent of the consumer
- Possibility to amend the bauspar terms and conditions by:
 - Consent of the Federal Financial Supervisory Authority, or
 - Deemed consent of the consumer,
mostly if the amendment is needed in order to comply with
 - legal provisions or regulations issued after the conclusion of the Bauspar contract, or
 - decisions of the Federal Court of Justice issued after the conclusion of the Bauspar contract



Annual Fees during the Saving Period



Decisions of the Federal Court of Justice with regard to Bauspar Fees

- **2010:** Effectiveness of Closing Fee
- **2016:** Ineffectiveness of Loan Fee
- **2017:** Ineffectiveness of annual fees during loan period
- **2022:** Effectiveness of annual fees during saving period??



Tour de Table

Short oral reports of the Committee members
on current legal developments

