Minutes

of the Meeting of the Legal Affairs Committee of the
European Federation of Building Societies,
Brussels, 8 March 2018

Participants:
Z. Andel, Croatia
Dr. R. Conradi, Germany – **Secretary** –
Dr. I. Ferencz, Hungary
C. Forche, Austria
A. Georgiou, Republic of Cyprus
Prof. Dr. A. Grünbichler, Austria
K. Holler, EFBS
H. Imgrund, Germany
J. Jeníček, Czech Republic
A. Kármán, Hungary
R. Kaschel, Hungary
M. Khalife, Germany
Dr. A. Kratschmann, Austria
Dr. V. Kreuziger, Germany
L. Kohler, Czech Republic
C. König, Germany
U. Körbi, Germany
N. Lohöfer, Germany
D. Marwan, Slovak Republic
S. Masuch, Germany
J. Markvart, Czech Republic
L. Molnárová, Czech Republic
A. Negrila, Romania
T. Pauer, Germany
J. Pfenning, EFBS
J. Šedivý, Czech Republic
A. Senjak, Austria
Dr. M. Springl, Austria
Dr. K. Stifter, Austria
H. Straubinger, Germany – **Chairman** –
Dr. L. Tacacsova, Slovak Republic
C. Varzaru, Romania
P. Zaremba, Czech Republic
A. Zehnder, Germany
Dr. T. Zoltán, Hungary

Mr. H. Straubinger opened the meeting and welcomed the participants a well as the President, the vice-presidents present, the Managing Director as well as the former Managing Director, Mr. A. J. Zehnder.

Agenda item No. 1: Approval of the Minutes of the Meeting of the Legal Affairs Committee, Bukarest, 3. November 2017

Dr. R. Conradi informed the delegates that no written requests for amendment of the Minutes of the preceding meeting had been received, nor were any such requests made at the meeting itself.

Mr. H. Straubinger thereupon stated that the Minutes of the preceding meeting were unanimously approved and thus stood as submitted.

Additions to the Agenda were not requested.

Agenda item No. 2: Financial Services Action Plan: Cross-border constraints obstructing the way towards opening „EU savings accounts“

The Committee took note of Mr. C. König's report on the Spanish initiatives in the European Parliament by MEP Jonás Fernández on savings promotion measures. Precisely because of these initiatives, the Federation had invited Mr. Fernández to explain his ideas to the members of the EFBS Legal Committee, but it was regrettable that he was prevented by an urgent appointment in Spain to appear personally at the current meeting. The situation in the field of savings formation was as follows: Within the framework of its activities aimed at building a Single Capital Market, the EU Commission had not only introduced a number of legal acts (one regulation on securitization and another one on covered bonds, among others), but had also made several moves to motivate savers to invest their monetary resources in the capital market because of the low interest paid on savings deposits in the wake of the ECB's low-interest policy in order to obtain larger interest amounts in the capital market. This had met with the Federation's criticism on several occasions because it failed to see advantages for each and every category of saver in pursuing a policy to invest money in risky projects. MEP Fernández, on the other hand, had asked the EU Commission on several occasions to take into account in its planning concepts the need of savings formation and had asked the Commission several times why the study finalized one and a half year ago on impediments to cross-border savings formation had still not been made public. The reply he had received was that savings formation was currently no matter of priority. From the Federation's point of view, it was im-

portant, however, to get across both to the EU Commission and to the European Parliament the idea that special-purpose saving in particular was important. For, it was in the consumer's best interest to possess at the end of a low-interest period sufficient financial resources in order not to be forced to go in for excessive borrowings when planning to make major purchases such as buying owner-occupied residences and, thus, to be able to avoid excessive amounts of debts. This was why the Federation supported the efforts of MEP Fernández to sharpen the awareness of the EU institutions for the importance of savings formation which did, however, not mean that his own policy had always been identical with that of the Federation as regards the EU attitude towards supporting savings formation. For, in his opinion, savings formation at the European level should take the form of payments into a fund to be administered by the European Investment Bank (EIB) in Luxembourg and would thus be available for financial support of European infrastructure measures.

Agenda item No. 3: Consumer financial services Action Plan: Overview over the European Commission's still not completed priority plans

The Committee took note of the report submitted by Mr. Ralf Jacob, head of Directorate D 3 „Consumer financial and payment services" of DG FISMA of the European Commission on the latest measures taken by the Commission with the intention to transpose the Consumer Financial Services Action Plan. He started off with a brief overview over the Action Plan the purpose of which was to improve the provision of financial services to consumers by opening EU markets more widely. Thus far, only very few consumers had made use of cross-border financial services. However, such market fragmentation might perhaps be overcome through cross-border FinTech operations. In his opinion, the Commission saw a need for action in three fields: Consumers, providers and new technologies. In this context, the emphasis was on the objective to reduce the costs involved in cross-border transactions. In the field of cross-border remittance costs, this applied to providers resident outside the Euro area in particular. Moreover, the Commission examined the obstacles which might exist with respect to changes of provider and how such changes could be facilitated. In this respect, the payment account directive was already in existence which enabled consumers to switch among banking account providers. On the other hand, there were no further plans of legislation. For the time being, the Commission examined the obstacles which might exist to providers on the one hand and (in co-operation with the Joint Research Center of the Commission) might prevent consumers from accepting changes of provider on the other. Furthermore, examinations were carried out to see what possibilities existed for improving the quality of on-line vendor-independent portals and whether such portals figuring in the payment account directive would do their jobs satisfactorily as well as whether the experiences gained therefrom could be successfully used also in other areas. Another measure would be to increase the depth of the internal market for consumer credit. On the one hand, there were new providers in this field; this contrasted with

an extremely limited cross-border demand on the other hand. Yet another focus of Commission activity was to avoid excessive indebtedness of consumers. Since the law on insolvency continued to be a national responsibility, Member States exchanged information in this field with a view to identifying best practices. Their findings would be taken into account in the course of the imminent revision of the consumer credit and the mortgage credit directives. Moreover, the question would be examined whether national consumer protection regulations represented obstacles to cross-border credit provision. In this context, the credit industry had signalled to the Commission that it did not see any major difficulties in this respect. Finally, examinations would be carried out concerning the extent to which the existing rules pertaining to the appraisal of the creditworthiness of consumers were sufficient and how credit providers carried out creditworthiness checks across national borders. The objective in this context was to develop rules of the kind that existed already in the field of mortgage credit, i.e. the EBA guidelines. But there were no plans for legislative measures in the present Commission's term of office. With a view to facilitating the cross-border activities of the FinTechs, plans existed for installing a taskforce designed to deal in particular with the uniformization and/or mutual recognition of electronic identity verification. Last but not least, there were plans to improve online selling of financial services. To this end, the DG Justice had commissioned a pertinent study.

In the subsequent discussion, Dr. V. Kreutziger pointed out that the measures contemplated by the EU Commission within the framework of the Action Plan would not solve the key problem pertaining to cross-border financial services provision. This problem resulted from the fact that the Rome-I Regulation required foreign FinTech providers to comply with the consumer protection regulations in force at the respective consumer's place of residence, in spite of the fact that the European legislation on consumer protection standards were largely uniform, Europe-wide. Because of the inherent residual legal risks as well as of the resultant extremely large IT expenses, his company had thus far abstained from making cross-border offers. In Mr. Jacob's opinion, a viable solution in this field might perhaps be mutual recognition of consumer protection standards. In this context, Mr. A. J. Zehnder recalled the proposal for a directive the EU Commission had submitted in the early 1990s and withdrawn later, which had included rules concerning mutual recognition of financing techniques in the field of mortgage credit and would, if it had been adopted, have avoided the kind of problems which had now emerged in connection with the realization of cross-border provision of financial services. Mr. Jakob expressed the view that the creation of a 29th regime might be more promising, always provided that this represented a practicable solution in the opinion of the building societies. Dr. Conradi pointed out that the consumer protection standards introduced by the EU Commission would ultimately be meaningless, if they prevented providers from offering their services across national borders. The present legal situation was that products such as long-term mortgage credit, i.e. a widely used option in Germany, could not in its pre-

sent form be offered in France, for instance, where the early loan repayment regulations were different from the German ones. This problem could only be eliminated by the EU Commission by developing European standardized contract forms providing for a high level of consumer protection (e.g. a European standardized consumer credit contract which could be offered to consumers as an alternative option to local products). The inherent advantage of such a procedure would be the fact that credit providers would have a product in hand they could launch Europe-wide without running legal risks and, moreover, without the need to modify national legal systems. Mr. Jakob expressed the view that this might be a viable procedure. Although there were not yet any such considerations held at Commission level, such a proposal could be made in connection with the procedure to be run in 2019 when the residential real estate directive is revised. In conclusion, Mr. H. Straubinger appealed to Mr. Jakob to do all he could to ensure that the future rules governing creditworthiness checks would not provide for civil law-based, but only for supervisory law-based sanctions. For, liability pursuant to civil law included the risk that consumers might try to evade their obligations to pay early repayment penalties on grounds of allegedly mistaken creditworthiness checks.

Agenda item No 4: **Regulation of the European Commission on adjustment and upgrading of European Supervisory Authorities‘legal framework (ESA’s)**

The Legal Affairs Committee took note of the report submitted by MEP Wolf Klinz who monitored the dossier in his capacity of shadow rapporteur of the ALDE group of the leading committee of the European Parliament. He made it clear by way of introduction that his presentation reflected his own personal appraisal of the Commission‘s proposal as distinct from the rapporteur’s opinion whose report would not be published before June 2018 anyhow. The installation of the system of European supervisory authorities (ESAs) represented a response to the financial crisis of 10 years ago. The ESAs were expected to contribute to the development of a uniform body of rules for financial institutions and financial markets throughout the whole European Union as well as to a uniformization of the supervisory practices of the national supervisory authorities. This was expected to equally guarantee both the protection of consumers and of financial stability. The establishment of the European supervisory authorities in 2010 had been recommended by the European Parliament, because a fully integrated internal European market for financial services was considered to be essential for economic growth and the creation of jobs. However, such an internal market would only be functionable if it obeyed uniform rules and was supervised in accordance with uniform standards. Although the ESAs had thus far done a good job, there was still room for improvement. For instance, neither the EBA‘s stress tests had thus far produced optimal results, nor had the Authority intervened in cases of visible deficits such as fees for the disbursement of foreign

currency amounts by cash dispensers. The EIOPA had not yet managed to evenly transpose the solvency-II regulations, and the ESMA had failed to intervene in cases of unjustified management fees charged in cases of indexed funds. By contrast the working methods of the ESRB would have to become more transparent. Moreover, there still were also differences of opinion as regards the direction in which to go in future: Whilst the proposals on further integration of the Economic and Monetary Union were based on the concept of a single supervisor (English translation) in the so-called „five-presidents report“, the term used in the German translation simply was „uniform supervision“. Not only the German banking supervisory authority had often demanded scope of discretion. This meant that there was still too much „scope” within which authorities could carry out their supervisory duties.

The present draft submitted by the EU Commission for reregulating the legal bases of the European supervisory authorities had to be seen in a positive light, as a matter of principle. The aim to further strengthen the existing supervisory authorities was to be welcomed in general. But such strengthening would have to be achieved in a manner which would avoid „demotivation“ of national supervisory authorities; the consequence thereof would be that a European supervisory system existed only on paper because of a lack in the support granted to these authorities. On the other hand, he expressly welcomed the possibility of submitting national authorities to supervision by the ESAs. These should have the express authority to define supervision priorities Europe-wide and to intervene in good time whenever there was too much supervision and disrespect of EU law. Furthermore, redefining the authority of the European Supervisory Authorities would also have to include, among other things, the possibility to deal in future with especially important problems. Here, examples were so-called non-performing loans and the handling of third-country financial products including the United Kingdom after the BREXIT. The group of rapporteurs would still have to discuss ways to deal with transgression of future terms of reference by the ESAs, namely the adoption of regulations which was actually the business of the European legislators. It was agreed that the necessary two-thirds majority required for the votes of the so-called Stakeholder Groups should be replaced by a simple majority in future.

Concerning the future organization of the ESAs, the management board and the supervisory boards should be replaced by a single executive board whose members should be appointed on the basis of competence, as a matter of priority, as distinct from nationality. The latter must be presumed to turn out to be difficult, because the larger Member States would wish to be members of these bodies, In his view, it was important as well to prescribe a „cooling-off period“ for the members of this body, so that national supervisors would not be able to switch smoothly over to the executive boards of the ESAs .

The financing formula (40 % EU budget, 60% financing industry) which was part of the Commission‘s proposal would be too inflexible in his opinion. On the one hand, the weight of the financing industry of individual Member States should play a role in this field, and the budgets of the ESAs should be submitted to strict examination at regular intervals, on the other. With a view to ensuring sustainable financing, the policy of the European supervisory authorities should be neutral insofar as technology was concerned and their actions should be guided by the principle of relativity, because the objective in the field of financial products was stability in the first place. Overall, he would do his best to avoid additional supervision-based costs to the financing industry in the further course of the legislative procedure. Provided that the further activities in this field would proceed smoothly, the legislative procedure could nonetheless still be finalized before the end of the present legislative period.

Agenda item No. 5: Revision of the EU directive on injunctions for the protection of consumer interests

The Committee took note of the report submitted by Ms. Egelyn Braun, member of Directorate F of DG Justice of the European Commission for „consumer and marketing rights“, on plans for a so-called „New Deal“ for consumers. The respective measures would be publicized on 11 April 2018 and ought to comprise, among other things, a proposal on modification of the directive on injunctions for the protection of consumer interests. The „New Deal“ related to a „fitness check“ carried out in 2015 and 2016 in the field of consumer protection rules at EU level. This fitness check suggested that the existing rules were still sufficient, by and large, always provided that these rules had been adequately translated into practice. Room for improvement of the directive existed only in respect of unfair clauses in consumer contracts. It should be noted that the checks of consumer protection costs to the industry had gratifyingly not exceeded 0.024 percent of total annual sales. However, room for action existed insofar as it was now clear that consumers, entrepreneurs and law courts were not sufficiently aware of the contents of consumer protection rules and had, for this reason, not applied them at all or only to an insufficient extent. On the other hand, it was necessary to ensure more widely the respect of consumer rights on which fact consumers did often not insist for a variety of reasons, e.g. for lack of money in many cases. This explained why an important part of the package of legislation would focus on modification of the directive on injunctions, which would have to be complemented by the right of consumers to claim damages, among other things. Apart from this, the EU Commission was planning a number information measures for consumer, enterprises and also law courts. Another measure would fall into the field of online commerce, e.g. regulation of the so-called free internet contracts, inter alia. Another measure still in the planning stage was to supplement the directive on unfair clauses in consumer contracts so that individual consumers could sue in court for reasons of violations of their rights under the directive, i.e. sue against merchants as well as manufacturers of a given product. Fi-

nally, the provisions regulating the fines imposed for violations of consumer protection rules would be part and parcel of a framework of fixed regulations and be free from discretion, which was not the case at present. The maximum fines should be expressed as a percentage of total annual sales.

A number of modifications were in the planning process in the field of the not yet widely known and widely applied directive for injunctions. This included that the injunctions could be decreed in future by qualified entities independently of whether the consumer protection clauses had been violated by a national or an international organization. For instance, in future it would be possible for qualified entities resident in EU Member States to file suits for injunction in another EU Member State. Qualified entities should, by and large, be consumer organizations with a legitimate interest in enforcing consumer right. Such entities might also include industrial organizations and public institutions (e.g. ombudsmen in Sweden) with a right to take action in court. But law firms and litigation funders should not have any right to sue. Moreover, the necessity to modify the directive stemmed from the fact that a number of EU Member States had thus far not had any regulations allowing collective action to be taken for the purpose of consumer protection**.**

Agenda item No. 6: 5th EU Anti-Money Laundering Directive – current state of legislation

The Committee took note of the report rendered by Dr. Conradi on the essentials of the compromise text adopted within the framework of the trilogue procedure on 15 December 2017. This was already agreed by the EU Council of Ministers on 19 December 2017. The agreement by the European Parliament in plenary session was planned to be held on 16 April 2018.

Fort the building-saving industry, the following aspects were of special importance:

- Definition of economic beneficiary: Here, the European Parliament had not been able to win support for its demand that the limitation of participations by natural persons in legal persons be reduced to 10 percent. As a result, the presently valid upper limit of 25 percent plus one share (companies limited by shares) and, respectively, participations of over 25 percent in other economic enterprises would continue to remain in force.

- Politically exposed persons: Both the EU Member States and the EU Commission were required to draw up lists of politically exposed persons on the basis of which the EU Commission would be able to prepare a single joint list of all important public offices

and to publish such a list. This would make the process of identifying politically exposed persons noticeably easier for the institutions.

- Updating customer data: There was no need for updating customer data at regular intervals, but this could be made when there was a visible need for it. This would make life much easier for the institutions.

- Mandatory copying of identification documents: It was regrettable that the proposal made by the European Federation of Building Societies to grant exceptions from such mandatory copying pursuant to Article 40 of the directive in respect of products in no great danger of money laundering, e. g. long-term savings deposits and insurance contracts, had not been adopted in the course of the legislative procedure.

- Period allowed for transposition: This time span had been reduced to 18 months, which meant that the presumed entry into effect of the directive would presumably enter into effect in April 2018 so that the transposition process in Member States could not be expected before early 2019.

Aenda item No 7: Miscellaneous

Mr. H. Straubinger pointed out that it was necessary to think about regulations governing the closure of German Bausparkassen which planned to discontinue their operation against the background of the current low-interest period. Since it must be assumed that such a case would have implications for the reputation of the industry not only at a national, but also at the European level, it would be recommendable to discuss this topic in good time and that, for this reason, an exchange of opinions among Member States should be prominently placed on the agenda of the of the Legal Affairs Committee's next meeting.

In view of the fact that he would retire at the end of 2018, the present meeting was the last one under his chairmanship. His successor in office would be Mr. Uwe Körbi who was responsible as a trained lawyer on the Executive Board of LBS West in the fields of law and marketing. Mr. Straubinger himself had always liked to chair the meetings of the EFBS Legal Affairs Committee, and he wanted to thank all its members for their always profitable collaboration. In conclusion, Mr. C. König praised the activities of Mr. Straubinger as chairman of the Legal Affairs Committee since 2011 and thanked him on behalf of the Federation.

Mr. H. Straubinger established that he did not see any more requests for the floor. So he thanked the participants in the meeting for their lively participation in the discussions as well

as Dr. R. Conradi and the Brussels office for the organization and preparation of the meeting. He then closed the meeting with his speccial thanks to the interpreters.