

## European Law Institute

### Meeting of the Council

Vienna, OGH, 16 September 2011, 10:00

Present:

Ajani, Gianmaria

Varul, Paul

Alonso Landeta, Gabriel

Wendehorst, Christiane

Andrieux, Façoise (UIHJ)

van Erp, Sjeff

Aubert de Vincelles, Carole

Graf von Westphalen, Friedrich

Botusharova-Doicheva, Snezhana

Zoll, Fryderyk

Caponi, Remo

Clément, Marc

Doralt, Walter

Represented by proxy

Fauvarque-Cosson, Bénédicte

Bermann, George

Flogaitis, Spyridon

Cafaggi, Fabrizio

Fobe, Antoine

Dal, Georges-Albert

Grundmann, Stefan

Garlicki, Lech

Illescas, Rafael

Grundmann, Stefan

Jacobs, Sir Francis

Huguenin, Claire

Jerez-Delgado, Carmen

Kaindl, Rudolf

Philippe, Denis

Lando, Ole

Polčák, Radim

Schulte-Nölke, Hans

Prunbauer-Glaser, Marcella

von Bar, Christian

Sorabji, John

Thomas, Sir John

Storme, Matthias

Timmermans, Christian

Keeper of the Minutes:

Walter Doralt

**I. Jacobs opens the Council Meeting and invites Doralt to report on the activities of the Membership Committee (MC), Item 1 on the agenda.**

Doralt informs the Council that Micklitz acts as chairman of the MC, other members are Botusharova, Dal, Auby and Doralt. He points to the report prepared by the MC, circulated before this meeting. He explains that in accordance with the Council decision 2011/11, all applications by those who had been invited to the Founding Congress have been reviewed positively by the MC and have by now received a letter from the President welcoming them as new members. As for applications received after the Founding Congress, every application has been reviewed. A recommendation to accept the application was made either when two referees were provided, or when the information received by the MC (usually a CV provided by the applicant) demonstrated that the application should be accepted. Doralt then informs the Council about applications received during the last days before this meeting and suggests admitting the positively reviewed applications as well.

The Council approves of the review performed by the MC for applications made before the Founding Congress and for those after. The Council takes a decision to admit these persons as new members.

Doralt then informs the Council about the negotiations currently ongoing with the Founding Institutional Observers (CCBE, CNUe, UIHJ, Association of the Land Registries) and is confident that a result will soon be presented.

Doralt proposes to admit as new Institutional observers:

- the Hague Institute for the Internationalization of Law,
- the Association des Conseils d'État et des Juridictions Administratives Supremes de l'Union Européene,
- the Conseil Supérieur du Notariat, and
- the Academy of European Private Lawyers,

and to invite Giuseppe Gandolfi to become a Fellow of the ELI.

**The Council approves these suggestions.**

Aubert de Vincelles and Botusharova suggest an address by the President could be helpful when inviting new members. **Jacobs agrees to draft such a document, which will be put on the ELI website and perhaps also given to Council members as a pdf document, so that it can be used when members contact persons who might be interested in becoming a member.**

Doralt suggests adding a button on the website of the ELI with a message "tell a colleague", similar to the website of the ALI. **The Council approves.**

Doralt suggests placing a list of members on the website publicly visibly, with a possibility to sort by names, nationality, city, country and membership type. It is suggested to add a possibility to sort according to European members and other members as well. **The Council approves of these suggestions.**

Doralt informs the Council about the Membership form prepared by Wendehorst, her assistant Liedermann and by the MC. It will gather vital information required by the ELI inter alia to set up project groups. **Doralt reminds the Council members that all ELI members, including Founding Members, have to fill in this form.**

Doralt suggests that in order to ensure the faster processing of membership applications, the Council delegates the power to admit members when an application should be accepted without any doubt, as will usually be the case when two referees are provided.

Storme would prefer that lists are sent to all Council members before the MC accepts an application and that a two week period is available to raise concerns or to object.

**Consensus is reached that the MC shall examine, at regular intervals, and in any case once every second month, incoming applications for membership and circulate a list of applications together with a recommendation of the MC within the Council plenary. The list shall indicate, inter alia, who are the Fellows of the ELI that are prepared to support the application in accordance with Article 8(2)(b) of the Statutes. Where an application is not supported by recommendations from two Fellows of the ELI, the MC shall ensure that the Council plenary has access to the information required for making an informed decision. Applications for ELI membership that are recommended by the MC for approval shall be deemed to be approved by the Council if, within a period of two weeks after circulation, no objections are raised from any Council member.**

It is discussed that the ELI welcomes new membership applications from highly reputed members of the legal community. A progressive growth of the membership structure ensuring diversity will be envisaged. Particular attention will be paid to regional diversity and the representation of all branches and fields of the legal profession.

Doralt inquires how the Council wishes to proceed with applications of organizations and individuals who are not lawyers and who apply for membership as institutional or individual observers (ie without voting right). **After a discussion the Council decides that the decision will be taken on an individual basis but that in principle, these applications are also welcome.**

Fauvarque-Cosson informs the Council about the application of the Fondation pour le droit continental as an Institution Observer. The Committee will review this application.

## **II. Jacobs opens the discussion on the Council and Senate Composition Committee (CSCC), Item 2 on the agenda.**

van Erp informs the Council first about the suggestions for the Senate. Consensus was reached very quickly as to the appointment of the Chairpersons of the Founding Committee, ie Zimmermann and Griss. He explains how the CSCC decided on the list eventually presented by the CSCC. All persons on that list have, in the meantime, been contacted and accepted. As for possible imbalances in the current list, it will be up to the Senate to rectify these through the cooptation procedure.

van Erp then informs the Council of the criteria taken into account by the CSCC for the additional Council members. He suggests keeping some vacancies open so that appointments remain possible in the future.

Timmermans suggests that a public international lawyer might be added in the future.

Jacobs asks about whether there are objections to the suggestions for additional Council members. **Consensus is reached on the four candidates named by the CSCC. This will, in particular, lead to an adequate representation of the judiciary and of public law.**

**Consensus is reached to leave 10 seats open at this time for future candidates. [Given the other points decided, see below, the total number for remaining vacant seats was eventually reduced to 6].**

**Consensus is also reached to follow the procedure envisaged by the CSCC for the additional candidates, whose names will be suggested to the CSCC by 1 October 2011. After an assessment of the CSCC an electronic vote will be held.**

Prunbauer-Glaser inquires about the number of suggestions. There is consensus that four suggestions by the CCBE and four suggestions by the CNUE will be made and considered for appointment.

**The CSCC will submit its proposal for the co-option of 8 Council members before 15 October, taking into account representations from the CCBE, the CNUE and other practitioner associations and organisations regarding suitable practitioners from under-represented constituencies.**

Flogaitis inquires about the quorum for the Council.

Wendehorst informs the quorum is half of the members, but they can also be represented by way of proxy according to the rule of the statutes.

Ajani thinks the quorum can be met without difficulty because of the proxy system.

Prunbauer-Glaser suggests that organizations should be allowed to be represented not only by their president as an ex-officio member but also by their Vice-President.

Clément inquires about how to deal with persons who never attend a meeting of the Council.

Jacobs sums up the discussion and suggests to follow the procedure envisaged by the CSCC and to carefully think about the concerns raised.

A longer discussion follows on the status of the representatives of the Founding Institutional Observers and their presidents, who are ex-Officio members of the Council.

Sorabji suggests that the status of those persons who hold Council membership qua President of an institutional member when their term of office determines has never been satisfactorily clarified. The question whether they, in principle, retain the membership in the Council, even when no longer president of his or her organization, has not been settled. Membership in the Council may of course be given up to make space for a new incoming president of an organization.

Clément suggests that organizations will have to decide who they want to send for election to the Council.

Storme clarifies that persons will have to be elected because Council membership is purely personal according to the Statutes.

Prunbauer-Glaser states that the CCBE expects the acting president to become a member of the Council ex-officio and explains this was the clear understanding of the CCBE upon becoming a Founding member.

Sorabji's view was that that was the impression given in Athens.

Wendehorst clarifies that the discussion is potentially about an amendment of the Statutes. Approaches in this regard may either be to allow a Council member to resign and be replaced without a vote of the GA by another person of the same organization (such as its new president) or to directly leave it up to the organizations to appoint the new Council member.

**Consensus is established that the CSCC will submit, within due time after this Council Decision, and in any event before 30 November 2011, a proposal for an authentic interpretation of the Statute by the Council concerning the relationship between ex-officio membership in the ELI [Statute Article 8(3)] and Council membership [Statute Article 10(1)-(3)] where Council members had, at the time of their election, the status of ex-officio members; the conditions under which certain Institutional Observers may be accepted as Observers to the Council, with a right to attend Council meetings and full access to Council documents; and the right of Council members to be represented or accompanied at Council meetings by persons who are not members of the Council.**

Jacobs invites van Erp to make a proposal for a suggestion solving this question. van Erp agrees to do so.

As to the numeric limitation of Council seats, Sorabji suggests dealing with this issue by having ex-officio membership separately from the number of persons elected individually.

Clément agrees.

### **III. Jacobs opens the discussion on the Project Committee (PC), item 3 on the agenda.**

Jacobs invites specific comments on the projects listed in the paper.

Zoll suggests that the examination of projects will need to be fast.

Jacobs agrees and suggests that the criteria should be discussed first, because that may simplify the decision on specific projects.

Timmermans inquires about the project number 1 (ELI Statement on the forthcoming Commission proposal for an optional EU Sales Law). He suggests the persons involved in this project should be designated, before a decision can be taken.

Clément inquires about the aim of the statement. If it is to influence the proposal, it will come too late, as the proposal will be presented on 12 October 2011. If it is to influence the legislative process after the Commission draft is presented, it should still be in time.

Fauvarque-Cosson reminds the Council that a decision to work on this project has already been taken by the Council. Fauvarque-Cosson suggests that a decision on who will be in the working group must be taken today. A workshop on this work will take place in Vienna on 17 November. Deciding on a chairman and members for drafting the statement will be urgent. She informs the Council that Sir John Thomas is willing to chair the working group and informs the Council about possible members. Fauvarque-Cosson thinks the group must be kept small, regionally balanced and also strike a balanced between practice and academia.

von Westphalen recommends the adequate representation of legal practice in the working group.

Fauvarque-Cosson invites Council members present to state their interest if they wish to join. Zoll, Storme and Aubert de Vincelles express their interest, Denis is will to give input to the group without becoming a full member. Fauvarque-Cosson will also invite all other members to join if they so wish.

There is consensus that the newly appointed senators will also be invited to participate.

van Erp mentions that the CNUE, whose President he represents in this meeting, has a working group on this topic and wishes to participate in this ELI project as well. It is suggested that professor Limmer joins the working group on behalf of the CNUE.

After a further discussion it is agreed that the CCBE will be represented by Storme in this working group.

Clément thinks that on the basis of the current information a decision about the project can not be taken because it is not even clear, at this time, what the result should be.

Ajani inquires about the funding of the project.

Flogaitis thinks funding by the ELI will make a decision making process in general more difficult, while an externally funded project should be much easier to decide upon.

von Westphalen refers to the decision of this morning on the budget, approved for the projects. He suggests that a detailed decision for the budget and costs can be taken at a later stage.

Jacobs supports this and suggests not being too concerned about financing, as it is presently available, as long as the ELI independence is not endangered.

Storme suggests, as a general principle, installing a simple decision making procedure for externally funded projects and a different procedure, with an additional decision, for project funded by the ELI.

Flogaitis raises concerns on behalf of Cafaggi, who suggests Council members are in a conflict when suggesting a project and then becoming part of the working group. Also, Cafaggi suggests having two Vice-Chairmen in every committee, one public and one private lawyer.

Jacobs thanks Flogaitis for raising these concerns and points to VI of the paper prepared by the PC.

Wendehorst thinks that a difference must be made between the ELI statements such as the one intended for contract law now and on the other hand ELI instruments, which are long term projects and may raise more issues about conflicts of interest.

Zoll sees no problem about conflicts of interest with advancing an idea as a project. There should be no exclusion for a Council member to subsequently take part in the work. Perhaps conflicts may arise in the context of the appointment of a reporter.

Storme thinks that members of the project committee should not be excluded from proposing projects in which they participate.

Wendehorst agrees.

Jacobs points to IV of the handout provided by the PC.

**Consensus is established that members of the PC may suggest projects and also at a later stage participate in a project they suggested.**

Illescas inquires about conflicts of interest on the substance of projects.

Zoll thinks Art. 16 of the Statutes does not apply for the question of voting.

Jacobs thinks the point on whether a person can vote is less important, than the decision now taken as to proposing a project. According to the statutes, participating in the vote is currently excluded.

**Consensus is established that the PC will make specific proposals electronically and a decision will be taken through the e-voting procedure on specific projects then.**

Jacobs sums up that the point IV of the paper prepared by the PC (conflicts of interest) is not currently adopted. The decision on this point will be postponed and possibly it may be solved together with the adoption of the project guidelines.

Fauvarque-Cosson informs the Council about point V of the PC regarding future procedure.

Jacobs indicates that V simply means that the PC will prepare a decision making process.

Sorabji suggests that the criteria should be drawn up as soon as possible, at the latest by the end of the year.

Clément indicates the Council has to appoint the reporters. He suggests there should be guidelines as to minimum requirements on reporting standards and the like for projects.

Jacobs thinks this will depend on the specific projects.

von Westphalen points out that the practical demand for all statements and instruments will be crucial for all projects. This question should always be the first one asked, even before the procedure on how to deal with a project is set.

A detailed discussion ensues on whether projects II.2. and II.3. on the proposal of the PC can be voted on.

Clément thinks information still missing in this context is the timing, the persons involved, and specific results.

Fauvarque-Cosson suggests that within a few weeks, all this information should be sent to the Council and a decision should be taken electronically on that basis.

**Jacobs sums up the discussion; a decision will be taken before the meeting in November electronically. There is consensus that proposals will be sent to the Council members. There will be a period for possible comments. A vote will only follow after that.**

von Westphalen inquires whether full information on the participants will be provided.

Jacobs sums up that this will be provided.

#### **IV. Jacobs opens the discussion on the logo, item 4 on the agenda.**

Wendehorst presents the suggestions.

Timmermans suggests that the abbreviation should in any case be in the logo and raises concerns as to whether the 12 stars, as a symbol of the EU, should indeed be part of the logo.

Flogaitis reminds the Council that the 12 stars are also used beyond the context of the EU e.g., the Council of Europe.

**After a thorough discussion and a vote on the alternatives consensus on the logo and on how to amend the chosen suggestion is established.**

#### **V. Jacobs turns to the appointment of the Secretary General, item 5 on the agenda.**

Wendehorst informs the Council that about 30 applications were received after the EU-wide job advertisement. Persons without international experience or job experience were not invited. Six persons were interviewed together with Marc Clément. Wendehorst informs the Council about the interviews.

Clément shares the assessment of Wendehorst on the candidates.

Jacobs and Fauvarque-Cosson inform the Council about their impressions.

A discussion follows.

Botusharova inquires about the probation period.

Wendehorst suggests that the University will probably offer a one year contract at first.

Flogaitis inquires about the jurisdiction to which the contract will be subjected.

Wendehorst says it will, by law, be subject to Austrian law.



## **VI. Jacobs turns to the electronic decision making process, item 6 on the agenda**

Wendehorst encourages all Council members to take part in all Council votes and points to the statistics prepared for the Council.

Polčák thinks in the long run it should be considered whether the doodle e-voting should be replaced by a different system for security and other reasons.

Jacobs finds the system remarkably easy to use and simple.

## **VII. Jacobs opens the discussion on other issues, Item 7 on the agenda**

**van Erp informs the Council he will transfer the domain name of the ELI website originally registered in his name to the ELI.**

Storme wants to inquire whether there should be a committee on language issues as suggested by Ajani.

Ajani suggests that such a committee should deal with the technical issues of language.

Storme thinks a committee may help in deciding how much effort is dedicated to translations.

**Jacobs invites Ajani and Storme to prepare a note on the topic and send it to all Council members. There is consensus to proceed in this way and take a decision on that basis.**

Jacobs closes the Council Meeting and expresses his gratitude to Wendehorst for her efforts in preparing the meeting and for hosting this meeting.

The next ELI meeting will take place on 17 November in Vienna (project meeting, optional European contract law).