

European Law Institute: A Possible Road Map

Over the last couple of years a number of authors have suggested the creation of a European Law Institute. This suggestion, at first, fell on deaf ears. Now it seems that the time has come to implement it. Two initiatives have been launched, both with the explicit aim of establishing a European Law Institute. This has caused concern among members of the academic community. A meeting was, therefore, held in Hamburg on 22 and 23 June in order to find out whether these two initiatives can be brought together and whether a common road map can be developed for the establishment of a European Law Institute. The discussions held in Hamburg, and the points on which consensus was reached by those present in Hamburg, are reflected in the minutes of that meeting ("Hamburg Memorandum"). There was agreement that the outcome of the Hamburg meeting was to be made publicly available in order to ensure a maximum degree of transparency. The Hamburg Memorandum is, therefore, attached to this message. It has been accepted by all those present at the meeting in Hamburg as correctly reflecting our deliberations.

In the meantime, the Hamburg Memorandum has been accepted by the Board of one of the initiatives involved, the Association for a European Law Institute (ELIA). The resolution of the ELIA Board makes the proviso that the final decisions on the tasks and on the organization of the European Law Institute will have to be taken by the Founding Congress. This proviso is clearly in line with the spirit of the Hamburg Memorandum.

Due to the impending holiday season, the other initiative involved, the European University Institute (EUI), has not yet reached a decision on whether or not to accept the Hamburg Memorandum. Preliminary discussions within the EUI have revealed a need for further clarification.

There is general agreement between all initiatives and all persons involved that the creation of a European Law Institute should be the outcome of a discussion that is as open, inclusive and transparent as possible. It is in this spirit that the Hamburg Memorandum is made publicly available.

Hamburg, 15 July 2010

Reinhard Zimmermann

HAMBURG MEMORANDUM

Meeting, Hamburg, Max-Planck-Institute for Comparative and Private International Law
Tuesday 22 June and Wednesday 23 June 2010

Present:

Bénédicte Fauvarque-Cosson

Miguel Maduro

Hans-Wolfgang Micklitz

Hans Schulte-Nölke

Sjef van Erp

Christiane Wendehorst

Reinhard Zimmermann

Keeper of the minutes: Walter Doralt

1. Zimmermann welcomes the participants and thanks everybody for the preliminary exchange of papers. He points out that no binding decisions for the foundation of a European Law Institute (ELI) will be taken at this meeting. The aim is merely to advance the process of preparation and to do some preliminary work for a bigger constitutive meeting. As ELIA and the EUI have been the institutions most intimately involved in the process so far, it is legitimate to search for common denominators and to suggest parameters for a potential ELI. The aim of this meeting is to find out whether the two initiatives can be brought together. That would require consensus on strategy, the agenda for the next steps to be taken, the possible tasks of the ELI, the form of organisation and funding. All this should be done in a spirit of cooperation and trust.

Zimmermann suggests that the entire process should be as transparent as possible and therefore the current meeting is in no way a "secret" meeting. Its results should be communicated to all persons involved in the two initiatives and possibly also to a wider audience. Zimmermann suggests that first all the persons present should give an account of the groups represented by them and of the steps taken so far.

There is consensus that no one present has a specific mandate or is empowered to bind their respective constituencies.

2. A summary by Schulte-Nölke, van Erp and Wendehorst on the steps taken so far in the ELIA initiative follows. Schulte-Nölke says the process has been halted for the moment in order to find out whether a joining of forces with the EUI initiative is feasible. Especially the conference originally planned for September is currently being called off. Of the persons invited by ELIA about half have joined; also, some of those who have not joined have provided feedback.

van Erp recalls that he has always suggested that the body of persons founding the ELI should not be identical with any of the groups working on the DCFR (in which he had not himself been involved). He mentions that ELIA has a website the address of which he, van Erp, has registered in his own name and without having been requested by anyone to do so. He has allowed ELIA to use that website.

Wendehorst addresses the relation between ELIA and EUI and observes that there is much overlap. Both want to initiate a European debate; aims and goals seem to be the same. She informs the meeting that the idea of ELIA has changed over the years, starting first as an association of law faculties and slowly evolving with every meeting (held in Amsterdam, Prague, Frankfurt, Stockholm and twice in Brussels). Also, there had first been a focus on developing the DCFR but this is no longer the case.

Micklitz gives an account of the EUI project. Four EUI professors took the initiative and after some preparatory discussions organised the meeting in Florence in April 2010. This was aimed at bringing the relevant networks together. The organizers also wanted to involve judges and regulators. In his view, agreement and cooperation between EUI and ELIA would be desirable. Micklitz points out that, like Schulte-Nölke, he cannot speak for the other persons involved.

Maduro suggests that a road map for an assembly should be developed but that ultimately decisions should be left to such an assembly; preparatory works could be done; the constitution of the Institute itself, however, should be left for a constitutional assembly.

Fauvarque-Cosson gives an account of TEE and its foundation, which had been based on the need for the involvement of more French academics in international European networks and joint efforts. TEE especially wants to be a forum for young academics to get involved in the Europeanization of private law. Currently, there are 250 members, of which about 200 are French. TEE now participates in European projects and in tenders, e.g. from the European Parliament. Some of its success in France seems to be due to the fact that it is largely perceived to be a French initiative. It might not be easy to enthuse the members of TEE to become members of the ELI.

3. Micklitz asks to what extent ELIA is an initiative just focusing on private law.

van Erp points out that it is not an extension of the Acquis Group or of the Study Group. It aims at being a general initiative involving also criminal and public law. It just happened to start as an initiative very largely focused on private law. Schulte-Nölke confirms this.

There is consensus that the ELI should not be limited to private law and it should include all branches of the law, in particular criminal and public law. Public Law already has an association in place (SIPE) which could get involved in the process of founding the ELI.

Zimmermann raises the question of the relationship between an ELI and the existing networks. In his view the ELI should neither be a master network sucking up the other networks nor just one more network competing with the others. It might be an organisation assisting the existing networks in their various activities and helping to coordinate them.

Schulte-Nölke says that he would not like to see a change in the current diversity of the landscape. The ELI could have the important function of a kind of council of all the existing networks. He suggests that one of the projects the ELI might take up and advance is the work of the Acquis Group, if the Group so wishes.

Maduro mentions that, none the less, the ELI could be perceived as a threat by some of the established organizations.

There is consensus that the ELI is not intended to replace the existing networks or organisations.

4. van Erp indicates that the European Parliament will want to be involved and would not like to see the ELI as an entirely independent body.

Zimmermann suggests that the ELI should be independent from all political institutions, and after some discussion consensus is reached on this point.

5. Fauvarque-Cosson asks about the role of the ELI in tenders. She and Schulte-Nölke point out that tenders are currently very important in the law-making process. Schulte-Nölke draws attention to the difficulties, due to public procurement laws, if the ELI were to participate in tenders.

After a thorough discussion there is consensus that the ELI should not participate in tenders itself in order to maintain its independence. Also, participation in tenders would create competition with the existing networks. There is, however, also consensus that the ELI may support existing networks by informing them about the

possibility of tenders or by helping them to find participants for a project for which tenders have been invited.

6. Zimmermann opens the discussion on the membership structure.

Schulte-Nölke, van Erp and Wendehorst inform the meeting about their preparatory work for ELIA and say the only workable and realistic scenario is personal membership.

After a number of other options have been discussed, there is general agreement that only individuals should be members of the ELI. Membership should not be restricted to academics but should include the various branches of the legal profession.

Schulte-Nölke turns to another point regarding membership: He reports that ELIA has studied the ALI approach and taken over many of its admission features. He, as well as other participants in the meeting however, also point out that it would be problematic to find admission criteria such as distinguished contributions to European private or public law.

After considerable discussion consensus is reached that no more than a minimum threshold should be required. Members should hold a law degree, or an equivalent qualification to practice law, and have to be “of good repute”.

There is also consensus that a declaration of independence should be required. Persons who are not in a position to give such declaration (e.g. officials of ministries) could be offered observer status. The board of the ELI will have to check whether the requirements for membership are fulfilled.

7. Zimmermann mentions that he was very impressed by the fact that during the conference in Florence just about everybody spoke out in favour of creating an ELI.

There is consensus that a general meeting constituting the ELI should be held in 2011.

8. Zimmermann opens the discussion on the possible organisation of an ELI.

Schulte-Nölke suggests a board of between 25 - 40 persons in order to be able to accommodate the various constituencies. He points out that the ALI has 65 board members.

Micklitz suggests that a body of independent, disinterested and highly respected persons should be agreed upon. That body should decide how the ELI should be run and should have decision making powers within the ELI. These persons should not be involved in the secretariat or the board, which, in turn, could be very small.

Zimmermann suggests that if such a body should be thought desirable, it might be called a Senate. But he asks whether it should not rather have a consultation function. The day to day

decisions probably need to be taken by the board or rather an executive committee established by the board.

Various persons present suggest that there should be a general assembly either every year, or at least biannually, in the years between the meetings of the European Jurists' Forum. During these meetings of the general assembly the board will have to inform the general assembly about what has been done, how the institute's projects have progressed, etc. The general assembly would then give its discharge ("Entlastung") for what has been done. A quorum will have to be fixed for members to be able to propose resolutions to the general assembly and also to suggest amendments to the agenda.

Fauvarque-Cosson is hesitant about giving a lot of voting power to the general assembly, because primarily persons from the country where it takes place will be attending. She mentions that a general assembly might have to be held at least once a year for the accounts. Otherwise she would favour a biannual general assembly. Maduro supports this.

There is consensus that working projects can be initiated by the board of the ELI, but that the final project will have to "stand on its own legs", i.e. it will not be formally approved of by the board or the general assembly.

Maduro raises the question of who should be invited to participate in the constitutional meeting and how to get a constitutional assembly as representative as possible.

There is consensus that a Founding Committee will be needed.

There is consensus that the Founding Committee should be built around two equally strong groups of persons representing the EUI- and the ELIA-initiatives.

There is consensus that the twelve board members of ELIA should be included. From the EUI initiative a total of twelve persons should be included, i.e. the four professors who have organised the conference at the EUI and eight other persons representing the networks and other bodies represented at that conference. These eight persons will be chosen by the organisers of the EUI conference.

In addition to those 24 persons two representatives of TEE from France should be included, i.e. Fauvarque-Cosson and another French lawyer to be chosen by her. Another six members are to be included. Since until now many private lawyers are involved, these six additional persons should not be private lawyers. The list of the latter six persons is to be agreed upon, after the participants from the ELIA Board and the EUI have discussed the matter with their respective constituencies within ten days, i.e. by Friday 2 July 2010.

There is consensus that the Founding Committee should meet in Florence in November 2010. On 22 November 2010 a meeting of the network representatives will take place and on 23 November 2010 the Founding Committee will meet. The EUI will chair the network meeting and send out the invitations. The meeting of the Founding Committee is to be chaired jointly, at the request of ELIA, EUI and TEE representatives, by ...*, who will send out the invitations. Participants of the first meeting will have to arrive on Sunday 21 November 2010, and participants of the second meeting should only leave on Wednesday 23 November 2010, so that one full working day is available for each meeting. EUI will attempt to provide funding for the two meetings.

There is consensus that the Founding Congress for the ELI should be held in Paris. Fauvarque-Cosson will try to obtain funding for it. Such funding will not include the travel and accommodation expenses of the participants of the congress. The Congress should be held in the Amphithéâtre of the Sorbonne.

Possible dates for the Founding Congress are 1 June 2011 (first preference), 30 May 2011 (second preference) or 3 June 2011.

If the preparations should run into difficulties Luxemburg, Stockholm or Vienna should be considered as possible alternative locations for the Founding Congress.

There is consensus that the Founding Committee should ensure representativeness of the invitees to the Founding Congress. In particular, all persons involved in the existing ELI initiatives of the EUI and of the ELIA should be invited.

9. Zimmermann opens the discussion on funding for the ELI.

Maduro wishes the membership fees to be the source of financing.

Membership fees are discussed and consensus is reached that the fees should be modest, around € 60; however, payment of a fee of € 30 should be possible in exceptional circumstances.

Schulte-Nölke points out that the membership fees would cover only a minor part of the costs involved. The institution hosting the ELI secretariat would need to provide whatever funds are necessary for the remaining costs of running the ELI.

* The names of the two chairpersons envisaged will be disclosed once they have agreed to perform that function.

There is consensus that for the costs of staff, meetings and running expenses a sum of around € 250.000 will be needed in addition to the membership fees.

There is consensus that an open bid should be launched and different locations will be able to compete for the seat of the secretariat; they will have to provide at least the minimum funding of € 250.000 per year and commit themselves to providing this funding for a minimum of two or three years. There is consensus that the location would require a good infrastructure and not be too difficult to reach.

The deadline for final submissions answering the open call should be the end of February 2011. As the call will have to be formulated by the Founding Committee, it can only officially be issued after the meeting of 23 November 2010, but it could inofficially be communicated before that date. It will be left open whether the secretariat will be established at a specific place only for those two or three years or permanently. Bids are possible for both alternatives.

10. The discussion then turns on possible tasks of the ELI.

There is consensus that teaching and legal education should not be tasks of the ELI.

There is consensus that participation in tenders on the part of EU organisations should not be part of the tasks of the ELI.

There is consensus that the ELI should suggest research initiatives that it thinks fit, particularly because they are not yet carried out by anyone else or because academic input may be required for EU legislation.

There is also consensus that the evaluation and the drawing of up model rules may be legitimate tasks of the ELI.

Zimmermann points out that the secretarial function of the Institute will also be important for the advancement of European law; drawing up lists of addresses of persons acting in the field of European law, providing information about which individuals, or working groups, or networks, are working on which topics, etc. The ELI might also publish a newsletter. In any case collecting information and making it publicly available would be an important task of the ELI. van Erp suggests that the setting up of data bases would be useful. Maduro suggests that publishing papers or event calendars on its website should also be tasks of the ELI.

11. There is consensus that the outcome of the meeting in Hamburg is not confidential and will therefore be made public.

12. The text of these minutes has been approved by the participants of the meeting in Hamburg and will be termed the Hamburg Memorandum.