

## **Towards a European Law Institute: A Joint Initiative**

Two initiatives have been launched to prepare the creation of a European Law Institute (ELI); one of them is the Association for a European Law Institute (ELIA; see <http://europeanlawinstitute.eu>), the other is based at the European University Institute (EUI) in Florence (see Robert Schuman Centre for Advanced Studies Policy Paper 2010/03: A European Law Institute? Towards Innovation in European Legal Integration, Conference held in Florence April 2010; cf. also ZEuP 18 (2010), 719 ff.). In June 2010 a meeting was held in Hamburg in order to investigate how these two initiatives can be brought together. The result of that meeting was a Memorandum suggesting a possible road map. That Memorandum was widely distributed. In October 2010 the EUI organized a conference sounding out the views of various constituencies involved and taking the discussion further.

As a result of these meetings it was thought desirable to form a joint project group and to meet on 23 and 24 November in Vienna. That meeting was held in the building of the Austrian Supreme Court. The list of participants was based upon the list of invitees to the two conferences organized by the EUI in April and October, and it included the members of the board of ELIA. The results of the meeting in Vienna are summarized in the attached “Vienna Memorandum”.

A number of persons had supplied us with written submissions in the run-up to the Vienna meeting; these submissions have been taken into account in the course of our discussions.

We sincerely hope that the Vienna Memorandum will pave the way towards the creation of a European Law Institute that will be able significantly to further the development of law and legal scholarship in Europe.

Irmgard Griss  
President of the Network of the Presidents  
of the Supreme Judicial Courts of the EU

Reinhard Zimmermann  
Max Planck Society for the  
Advancement of Science

Vienna and Hamburg, 2 December 2010

# Vienna Memorandum

## I.

A manifesto is to be drawn up specifying the **purpose and the tasks** of the ELI. This manifesto will include the following points:

(i) The ELI will facilitate pan-European research in all branches of the law. It may 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. The manifesto will emphasize the practical dimension of the research initiated by the ELI for courts and legislatures (e.g. comparative implementation research concerning EU directives).

(ii) The ELI will be available to give advice to the European Commission, to the European Parliament, and to other bodies involved in the development of the law on a European or national level. The ELI will not participate in tenders. However, it may support existing networks by informing them about invitations to submit tenders or by helping them to find participants for projects for which tenders have been invited.

(iii) The ELI may initiate research projects aiming at the drawing-up of model rules, or of evaluating model rules drawn up by other bodies.

(iv) The ELI will be available as a forum for discussion of developments in European law between academics, judges, practitioners, and persons involved in legislation.

(v) While the primary focus of the ELI will be on the development of the law within the European Union, it will also pay attention to legal developments in other parts of the world and liaise with relevant organizations, such as the American Law Institute or Unidroit.

(vi) Teaching is not part of the tasks of the ELI, neither as far as students or postgraduates, nor as far as practitioners are concerned. That does not preclude the ELI from contributing to discussions about the improvement, harmonization, and Europeanization of legal education.

## II.

The ELI should start by initiating, or adopting under its umbrella, a number of **research initiatives**. The following initiatives were presented to the meeting in Vienna and were, on the basis of a preliminary discussion, regarded as suitable for the ELI: Restatement on the law

of administrative procedure (Herwig Hofmann), e-commerce and the implementation of the relevant directives (Hans Schulte-Nölke), and a condensed guidance tool of interpretation for national and European courts (Christiane Wendehorst). Other possible projects were mentioned by Remo Caponi, Bénédicte Fauvarque-Cosson, Clare Huguenin, and Fabrizio Cafaggi. Whoever wants his or her project to be pursued further by Working Group III (see *infra*) will draw up a brief description of the project of 2-3 pages.

### III.

The ELI will be based on the following **key principles**:

- (i) It is not intended to replace or absorb existing networks or organizations.
- (ii) It is comprehensive as far as legal disciplines are concerned.
- (iii) It is comprehensive as far as legal professions are concerned.
- (iv) It reflects the diversity of regions and legal traditions within the European Union.
- (v) It will be independent.

### IV.

**Structural features** of the ELI that are to be reflected in its statute include the following points:

- (i) There is a large majority favouring an ELI based on individual membership of natural persons. Institutions, networks and other bodies may be granted observer status. The observer status is to be defined in the ELI statute.
- (ii) Members may have to sign a declaration of independence. Persons who are not in a position to give such declaration may be granted observer status. The code of good conduct (*infra* (viii)) may, however, envisage other avenues to secure independence of the members of the ELI.
- (iii) There is widespread scepticism whether it will be possible, and indeed advisable, to establish more than a minimum threshold for membership (law degree, or an equivalent qualification to practice law, and “good repute”). However, it may be desirable to adopt a co-

option mechanism similar to the one in place for the American Law Institute: recommendation by two or three members of the ELI and approval by its board.

(iv) The ELI will have a General Assembly (to be held every year or biannually), a board, and an executive committee. There is considerable sympathy for also instituting a Senate, i.e. a body of persons with an outstanding reputation, ready to give advice, without being directly involved in any of the projects carried out by the ELI.

(v) Fees for membership should be moderate.

(vi) The secretariat of the ELI need not be at its seat of incorporation. There are strongly diverging views as to whether the seat of the secretariat should be permanent or rotating. There is an emerging consensus, however, that the secretariat should not immediately be established permanently at one place. Initially, at least, it should only be established for a period of three to four years. The question will then have to be decided by the General Assembly of the ELI.

(vii) A sum of 250.000 € per year will probably be required, in addition to the membership fees, for the running of the ELI.

(viii) A code of good conduct for members of the ELI, and for the ELI itself, will either be part of the statute or be appended to it.

(ix) The ELI should not raise money by engaging in remunerated private service contracts, e.g. for law firms. Under which circumstances it may accept donations is to be dealt with in the code of good conduct.

## V.

The **road map** towards establishing the ELI

1. A Founding Committee will be established. Members of the Founding Committee will be (a) all persons who have taken part in the meeting in Vienna as well as all those who have been invited but were unable to participate, (b) additional persons to be co-opted by Working Group II (see *infra*) so as to ensure that the membership of the Founding Committee, as far as possible, reflects the principles set out under III. (ii)-(iv), and (c) additional members to be named by the three Working Groups in accordance with the procedure set out below under 5.

The Founding Committee will meet in Athens in the middle of April 2011. The Athens meeting will be organized by Spyridon Flogaitis.

2. A list of criteria will have to be developed which have to be met by the place where the secretariat of the ELI is to be established. A commitment to provide the financing required for the running of the Institute for the first few years will be part of these criteria.
3. The deliberations of the Founding Committee will be prepared by three Working Groups.

Working Group I (to be coordinated by Christiane Wendehorst, Fabrizio Cafaggi and a legal practitioner to be agreed upon by CW and FC) will prepare a draft manifesto and a draft statute; and it will investigate, and present a proposal, concerning the question of the place of incorporation of the ELI.

Working Group II (to be coordinated by Hans Micklitz, Sjef van Erp and a legal practitioner to be agreed upon by HM and SvE) will take a decision on which additional members to adopt in accordance with what is set out under 1. (b). In taking their decision, the members of Working Group II will draw upon suggestions to be made by other members of the Vienna project group, and they will contact the relevant European networks (e.g. the executive of the Conseil des Notariats de l'Union Européenne). In addition, Working Group II will prepare the decision to be taken in Athens on the seat of the secretariat of the ELI (*supra* under 2.)).

Working Group III (to be coordinated by Miguel Poiares Maduro, Hans Schulte-Nölke and a legal practitioner to be agreed upon between MPM and HSN) will look into the question which academic projects should be pursued by the ELI, and it will prepare the Founding Congress of the ELI.

Coordination between the three Working Groups is very much encouraged.

All members of the Vienna project group, and especially the practitioners belonging to it, are welcome to indicate if they are interested in participating in one of the Working Groups.

4. Working Group I will prepare a draft manifesto by the end of December and a draft statute as well as suggestions on the seat of incorporation by the end of January.

Working Group II will take a decision on further participants of the Founding Committee by the end of December and draft a paper containing the criteria to be applied, and the procedure to be adopted, for deciding about the seat of the secretariat of the ELI by the end of January. Working Group III will report by the end of January. All Working Groups will report to the two chairpersons (IG and RZ) who then, in turn, will send all documents around to the other members of the project group for comment. Members of the project group will have approximately one month time for their comments. The Working Groups will then prepare final drafts. This means that the draft manifesto (Working Group I) will be sent around for comment at the beginning of January; all the other papers to be received from Working Groups I, II and III will be sent around for comment at the beginning of February.

5. The three Working Groups should have a membership of between 8-12 persons. Each Group is free to decide which persons to co-opt in the spirit of the criteria set out under III.(ii)-(iv) and taking account of the expressions of interest by members of the Vienna project group. Each Group may decide about its own rules of procedure. The three coordinators of each Working Group are members of the Founding Committee. In addition, each Working Group may nominate a fourth person from among its members to be a member of the Founding Committee. These persons are additional members of the Founding Committee (*supra* 1. (c)), unless they are also nominated by Working Group II (*supra* 1. (b)).
6. The Founding Congress for the ELI is to take place in Paris on 1 June 2011; it will be organized by Bénédicte Fauvarque-Cosson who should be co-opted into Working Group III.

## VI.

### Preliminary **language policy**:

Working Groups established by the ELI may work in whatever language they think adequate. The meeting of the Founding Committee will be conducted in English. The same applies, in principle, to the Founding Congress. At the Founding Congress, however, individual contributions are also very welcome in French.

Irmgard Griss  
Vienna

Reinhard Zimmermann  
Hamburg

## European Law Institute

Vienna 23/24 November 2010

### Participants

	<b>Name</b>	<b>Affiliation</b>
1.	Auby, Jean-Bernard	Directeur de la Chaire Mutations de l'Action Publique et du Droit Public à Sciences Po, Paris
2.	von Bar, Christian	European Legal Studies Institute, Osnabrück
3.	Bermann, George	Network of American Law Professors Teaching EU Law (observer)
4.	Cafaggi, Fabrizio	European University Institute, Florence (EUI)
5.	Caponi, Remo	International Association of Procedural Law
6.	Clément, Marc	Association of European Administrative Judges
7.	Cretin-Magand, Emmanuelle	DG Justice, European Commission (observer)
8.	Fauvarque-Cosson, Bénédicte	Trans Europe Experts (TEE)
9.	Flogaitis, Spyridon	European Public Law Organization (EPLO)
10.	Fobe, Antoine	Conseil des Barreaux européens
11.	Gernandt, Johan	Member of the Stockholm Bar and Chairman of the Stockholm Centre for Commercial Law
12.	Griss, Irmgard	Network of the Presidents of the Supreme Judicial Courts of the EU
13.	Grundmann, Stefan	Society of European Contract Law
14.	Hofmann, Herwig	Research Network on EU Administrative Law
15.	Huguenin, Claire	Professor of Private Law, Business Law and European Law at the University of Zurich
16.	Jerez-Delgado, Carmen	Profesora Titular de Derecho Civil at the Universidad Autónoma de Madrid
17.	Micklitz, Hans	European University Institute, Florence (EUI)
18.	Schulte-Nölke, Hans	European Legal Studies Institute, Osnabrück
19.	Schulze, Reiner	European Law Faculties Association



20.	Sorabji, John	European Network of Councils for the Judiciary
21.	Tesauro, Giuseppe	Italian Constitutional Court
22.	van Erp, Sjef	Professor of Civil Law and European Private Law at the University of Maastricht and Deputy Justice at the Court of Appeals of 's-Hertogenbosch
23.	Wendehorst, Christiane	Professor of Private Law at the University of Vienna
24.	Graf Westphalen, Friedrich	Practicing lawyer, Cologne
25.	Zimmermann, Reinhard	Max Planck Society for the Advancement of Science
	Doralt, Walter	Max Planck Society for the Advancement of Science (responsible for taking the minutes)

#### Unavailable for the Vienna meeting

Ajani, Gianmaria	Professor of Law at the University of Torino
Beale, Hugh	Professor of Law at the University of Warwick
Estrella-Faria, José-Angelo	Secretary General, UNIDROIT (observer)
Francioni, Francesco	European University Institute, Florence (EUI)
Hall, Victor	Secretary General, European Judicial Training Network
Kreins, Yves	Président, 2ème Chambre du Conseil d'État de Belgique / Association of the Councils of State
Lord Justice Thomas	European Network of Councils for the Judiciary
Peters, Anne	President, European Society of International Law
Poiars Maduro, Miguel	European University Institute, Florence (EUI)
Safjan, Marek	European Court of Justice
Storme, Matthias	Member of the Brussels Bar and Professor of Law at the Catholic University of Leuven
Timmermanns, Christiaan	European Court of Justice
Trstenjak, Verica	European Court of Justice
Zoll, Fryderyk	Professor of Private Law at the Jagiellonian University Kraków