

Minutes of the Council Meeting

University of Vienna – Senatssaal – Universitätsring 1, 1010 Vienna, Austria

8 February 2013, Vienna

Present

Members of the Council:

Gianmaria Ajani (proxy for Hugh Beale)
Christian Alunaru
Snezhana Botusharova-Doicheva
Carole Aubert de Vincelles (proxy for Hans Micklitz)
Fabrizio Cafaggi (proxy for Rafael Illescas)
Remo Caponi
Marc Clément (proxy for Bernard Reynis)
Mark Clough
Walter Doralt (proxy for Anne Birgitte Gammeljord)
Bénédicte Fauvarque-Cosson (proxy for Denis Philippe)
Spyridon Flogaitis (proxy for Jean Bernard Auby)
Friedrich Graf von Westphalen (proxy for Marcella Prunbauer-Glaser)
Herwig Hofmann
Francis Jacobs
Rudolf Kaindl

Wim Louwman (proxy for Gabriel Alonso Landeta)
Maarten R. Meijer
Frank Molitor
Leo Netten
Radim Neubauer
Radim Polčák (proxy for Claire Huguenin)
Hans Schulte-Nölke (proxy for Ole Lando)
Reiner Schulze
John Sorabji (proxy for John Thomas)
Christiaan Timmermans
Sjef van Erp (proxy for Carmen Jerez Delgado)
Diana Wallis
Christiane Wendehorst (proxy for George Bermann)
Marek Wierzbowski (proxy for Lech Garlicki)
Boštjan Zalar
Fryderyk Zoll (proxy for Christian von Bar)

Members of the Secretariat:

Gerard Ehrismann
Jelena Kopanja
Jan Ph. Meyer

Mary Penman
Alina Waloszczyk

Observer:

Heiko Wagner (DG Justice, European Commission)

Keepers of the minutes:

Gerard Ehrismann
Alina Waloszczyk

Meeting begins at 09:42

I. Opening and welcome by Sir Francis Jacobs

- (1) Sir Francis Jacobs opens the meeting and expresses his gratitude to the Secretariat's staff and Christiane Wendehorst for their preparation of the meeting. He indicates that many decisions need to be taken at this meeting of the Council, in particular with regard to the Council elections procedure. A certain amount of drafting may well be necessary afterwards, as details might not be finalized, however the decisions need to be taken in principle at the meeting. Sir Francis Jacobs remarks that the ELI has made a good progress in many areas. He points out that there have been difficulties when it comes to the work of the Council Committees as the experts do not always have the time required and it is often hard to meet in person. The same difficulties are faced by the Executive Committee, especially when it comes to organizing meetings or teleconferences which cannot always be attended by all the members.

II. Report from the Council Composition Committee by Sjef van Erp

- (2) Sjef van Erp presents the work of the Council Composition Committee (CCC). He explains that the original Committee composed of three members has now gained two additional members as its tasks were very complex. Along with its chair, the Committee consists of the following members: Matthias Storme, John Sorabji, Maarten Meijer and Hugh Beale. No physical meetings have taken place; discussions were held via e-mail and resulted in the note presented in Annex I. The Committee did not agree on specific solutions, but has decided to present various alternatives. Looking at the Council members' comments there are points on which agreements were reached, but the more controversial issues, in particular the points on diversity and continuity, should be the subject of today's discussion. The newly elected Council should not consist purely of the new Council members, but also members of the current Council, to ensure some continuity. The Committee also gave a lot of thought to the question of diversity. It is clear that the Institute needs to represent both practice and theory and it should adequately represent various legal traditions and professions. Moreover, the Statute does not provide for ex-officio members on the new Council. It should therefore be considered whether ex-officio members should be on the new Council. Some consensus has already been reached in the comments that have been submitted on the MyELI platform, so today's discussion should focus on diversity and continuity. The CCC hopes that the note will be useful and will help structure the discussion.

III. Procedure for the Council elections

- (3) Sir Francis Jacobs thanks Sjef van Erp for his introduction and continues presenting the CCC's note on Council elections by reading out the first point on Elections Management. Taking account of the comments submitted by the Council members, Sir Francis Jacobs believes that the Council in fact agrees on that point. He suggests a slight rewording. The first sentence should read as it does. The second sentence should read: **"The process should however be overseen by a Returning Officer who should preferably be a member of the Senate and will otherwise take no part in the election process"**. This solution meets no opposition.

(4) Sir Francis Jacobs continues with the next point of the CCC's note: Voting Rights and Electronic Voting. The CCC has proposed in its note that the election process should be carried out by electronic voting. This proposal however has not been endorsed by the majority of the comments. Although both solutions have advantages, the majority of the Council members seems to be in favour of holding the Council elections at the General Assembly. Herwig Hofmann points out that the general intention should be to involve as many Fellows as possible in the ELI's proceedings. Consequently he suggests that there should be a procedure in place to allow people who do not have the time or money to attend the GA to also cast their votes. Fryderyk Zoll underlines the importance of physical meetings and the huge incentive that the elections would create for the ELI Fellows to come to the GA. He mentions that electronic voting could function well in an institution which already has a standing and people know each other, however in the case of the ELI it is absolutely necessary to have a physical meeting. Hans Schulte-Nölke agrees with the points raised and adds that the Fellows should know who they are voting for; it should be actual people who are voted for and not only certain profiles on the website; electronic voting is hence not a satisfactory solution. Face to face meetings are of crucial importance. Leo Netten explains that in his experience electronic voting is easier; however that is not what the ELI is looking for. He agrees that in order to ensure a certain level of continuity the elections should take place at the GA. Fabrizio Cafaggi supports electronic voting. Spyridon Flogaitis raises a concern that elections at the GA could mean that only a small group of people who attend the GA will control the whole procedure. For many Fellows the possibility of attending the GA is limited. He points out however that electronic voting risks the ELI becoming a phantom organisation of people who never meet and vote for candidates who they don't know or simply only vote for those whom they already know. Both proposals have their risks. Maarten Meijer suggests another solution, which would however require a change in the Articles of Association. Under the ELI Statute proxy voting is currently not possible. The solution would be to allow proxy voting at the GA. Mark Clough agrees that proxy voting could be a good compromise at least for the first elections. Christiane Wendehorst points out that there should be an upper limit for the proxies. Fryderyk Zoll mentions that presence at the GA indicates a Fellow's interest in the Institute, and therefore he is not in favour of proxy voting. Herwig Hofmann suggests another compromise to enable all the ELI Fellows to contribute. In principle the elections would take place at the General Assembly; however there should also be a possibility to cast votes electronically. Irmgard Griss mentions that among the Senate members there was a slight preference for voting at the General Assembly. She agrees however with the comments of Christiaan Timmermans, who suggested that the ELI should hold the first Council elections at the General Assembly and if necessary change the procedure in the future. Fabrizio Cafaggi points out that having elections at the physical meeting is outdated and suggests holding them in a few different places instead (hubs could be used for that purpose), which would allow a democratic participation, which otherwise is not possible. Sir Francis Jacobs summarizes the discussion that has taken place so far. He puts the proposal for the first elections to be held at the physical meeting of the General Assembly to vote. **A large majority is in favour of the Council elections taking place at the General Assembly.** The second vote takes place with regard to voting at the General Assembly with a possibility to vote through a proxy. Two options are put to a vote; the first one allowing for the representation of two proxies per person, the second allowing only one proxy per person. **27 Council members vote in favour of the mandate of one proxy per person** (13 Council members vote in favour of the first option; 6 abstentions).

(5) Sir Francis Jacobs presents the next issue to be discussed, namely standing for Council elections. The first item to be discussed is endorsement by ten ELI Fellows. It has been largely supported by the comments. Herwig Hofmann asks how the Fellows can find out which individuals standing for election are actually “full members”, who have paid their fees and complied with other obligations. Christiane Wendehorst explains that so far all admitted persons, even if they have not yet paid their fees, are still Fellows. There is the possibility under the Statute to send them a final reminder and to consider them as having resigned, but this has, so far, never been done and would need to be discussed separately. Fabrizio Cafaggi suggests that the endorsements should be public for transparency reasons, so everybody knows who is endorsing whom. Sir Francis Jacobs points out that this issue will be decided later, while discussing the nomination process for Council elections. Spyridon Flogaitis suggests that there should be no manifesto and there should be no endorsements at all. If ELI Fellows are not well connected they will not be endorsed, but they will also not be elected. Therefore people should get a chance to present themselves. Sir Francis Jacobs suggests that instead of a manifesto there should be a “statement of interest”. Snezhana Botusharova-Doicheva believes that the manifesto and endorsements contradict and the number of 10 endorsements is too high. She suggests endorsements of 5 Fellows as an alternative solution. Fryderyk Zoll points out that voting at the GA has been decided upon, and therefore the manifesto would not be really necessary as candidates should present themselves at the GA. Walter Doralt explains that a manifesto would not hurt and it could actually be useful to have a few lines of information about each candidate. The requirement of 10 endorsements is good as it requires people to make an effort and show certain level of commitment, involvement and familiarity with the Institute. It means that people will have to participate in the activities of the ELI, such as the GA, in order to receive votes. Hans Schulte-Nölke finds the idea of manifesto and endorsements very bureaucratic and burdensome. Some basic information would be necessary in order to ensure transparency and democracy. He suggests that the idea of 10 endorsements should be dropped. Diana Wallis finds the number of 10 endorsements rather high, 5 should be sufficient. Moreover she agrees with Hans Schulte-Nölke that the actual manifesto is not necessary, it could be simply a “candidate statement” limited to 100 words. Sjef van Erp outlines the background of the proposal. The manifesto was meant as a clear statement of interest, making sure that a candidate knows what she or he is running for and is committed to the ELI. The endorsements were to confirm that the candidate is a sincere candidate. In light of the discussion Sir Francis Jacobs suggests the amendment of the proposal in three points, namely: **there should be a brief CV (background information about the candidate), a very brief statement of interest as well as a brief statement on how the candidate could contribute to the aims of the ELI. It should be short. With regard to endorsements, there is a tendency to favour 5 rather than 10 endorsements. There is a tacit agreement among the Council members.** Sir Francis Jacobs mentions the issue of endorsements by Senate members. Spyridon Flogaitis again suggests not having endorsements at all as it could lead to certain candidates being endorsed by exactly the same people, which would not leave a good impression. Sir Francis Jacobs puts the issue of endorsements to a separate vote. **27 Council members vote in favour of endorsements by 5 ELI Fellows, whereas 14 Council members vote against it. There should be no endorsements by Senate members.** Gianmaria Ajani asks how many endorsements an individual Fellow can make. Sir Francis Jacobs points out that the CCC did not suggest any limit. Spyridon Flogaitis suggests that there should be a minimum and a maximum number of endorsements. Gianmaria Ajani indicates that he would not like

endorsements to be transformed into a referendum. Consequently **the maximum number of endorsements should be limited to 5. There are no objections.**

- (6) Sir Francis Jacobs presents both models (model A and B) proposed by the CCC with regard to the nomination process for Council elections. The CCC and numerous Council members expressed preference for model B. Bénédicte Fauvarque-Cosson mentions that the number of endorsements being limited to 5 changes the situation and she finds it no longer necessary to place candidates' profiles on the website. Marc Clément supports model B. **Sir Francis Jacobs suggests combining the two models.** Sjef van Erp supports the idea. **ELI Fellows should have the option to obtain endorsements prior to submitting the nomination form but also to have their profile on the website for a specified period during which ELI Fellows may endorse the nomination. This is agreed.**
- (7) The next point, securing continuity on the Council is discussed. Sir Francis Jacobs presents the options suggested by the CCC. The first issue is whether the elections should take place every two years with 30 Council members being elected or rather every year with 15 new members being elected. The comments submitted by numerous Council members showed a slight preference towards the second option, arguing that it would better ensure continuity on the Council. Sir Francis Jacobs suggests taking a decision on whether, in principle, it would be preferred that 30 new members are elected every two years or rather 15 every year. If the second model is chosen then the Secretariat should come up with a proposal on how to avoid certain members serving for a very short term. Fabrizio Cafaggi suggests discussing these two options as well as the issue of continuity before the actual decision is made. The election of 30 Council members from among the current Council Members would not leave a good impression. Fabrizio Cafaggi is not in favour of either of the proposed solutions. Leo Netten highlights that the issue of ex-officio members should be also considered, while deciding how many Council members should be elected. Sir Francis Jacobs agrees, however suggests taking a decision in principle only, leaving the possibility of revising it at a later stage when the issue of ex-officio Council members is discussed. A question is raised with regard to a procedure for deciding which Council members would have to resign after one year of serving on the Council, in case annual elections are opted for. Irmgard Griss suggests that there could be either an agreement or it would be decided by drawing lots. Sir Francis Jacobs confirms that these would be the two possibilities. The two options are put to the vote. **The vast majority of Council members supports the CCC proposal, including the idea of 30 new Council members being elected every two years.** Sir Francis Jacobs refers the Council members to the comments submitted by Christiaan Timmermans, in which he asks whether, in accordance with the model proposed by the CCC, the members of the Founding Council would get two chances to be elected. Sjef van Erp clarifies that the model proposed did not intend to give the current Council members two chances. Christiane Wendehorst is under the impression that the measures proposed by the CCC to secure continuity and those proposed to secure diversity overlap and therefore suggests that there should be no final decision taken on how to secure continuity before the decision is taken on how to secure diversity. **Sir Francis Jacobs explains that a decision was taken to adopt the CCC proposal but that this decision might be reconsidered later in the even that it should conflict with a measure concerning diversity.**
- (8) Sir Francis Jacobs presents the measures proposed by the CCC for securing diversity on the Council. He admits that the question of how to secure diversity on the Council is not an easy one.

He points out that in accordance with the Statute Council members must adequately represent different legal traditions, disciplines and professions. The CCC suggests two models, Model I, which is the Appointment Model and Model II, the Slate Model. The comments submitted were largely in favour of the Slate Model, as a more democratic model. Sir Francis Jacobs refers the Council members to comments submitted by Herwig Hofmann, who pointed out that the criteria that could be taken into account are so many that it will be impossible to find the right mixture. Sir Francis Jacobs suggests that it might be worth waiting and seeing how the elections process works out before taking any complex decisions, even taking account of the requirements of the Statute. There is no reason to believe that the elections will not lead to a sufficient degree of diversity. Mark Clough indicates that another option would be the co-option, which allows for indirect democracy. Hans Schulte-Nölke points out that both models will not be well perceived by ELI Fellows as it will seem as if the current Council wishes to retain as many seats as possible for themselves. He suggests a two-step approach: free elections for 45 members of the Council and in the second step after the results are known (possibly even at the same meeting) the election of the remaining 15 seats. This solution would allow the GA to correct undesired results in a democratic way. Sjef van Erp stresses the importance of continuity for a young institution such the ELI. The solutions proposed by the CCC are pragmatic and ensure stability. Christiaan Timmermans suggests combining the Appointment Model with the Slate Model, however fix 25 percent of the seats for which the Slate Model will be used, which would mean that there would be a list of candidates drawn up according to the Slate Model, but the decision would still be taken by the voters. It would ensure some degree of continuity. All the candidates should be elected and not appointed. John Sorabji clarifies that the models discussed were meant to ensure diversity and not continuity, which seems to be confused. Spyridon Flogaitis mentions that the first model is not democratic and there could be other ways for the Senate to influence the elections in a more subtle way than by appointment, in order to ensure diversity. If that could not be done, then the co-option by the Council members would be another solution. Reiner Schulze believes that one step democracy can be trusted with respect to ensuring continuity on the Council; however it cannot be trusted when it comes to ensuring diversity. Consequently, the Council should look for a solution which favours two-step democracy, according to which a certain ELI body submits recommendations to the GA on whom to elect in order to ensure diversity. Marc Clément suggests waiting and seeing how the elections actually progress without providing for overly complex solutions. If there is a necessity to amend, it can be done in the future. Fryderyk Zoll is also against artificial methods of securing continuity and diversity. Instead there could be a sort of affiliation system, where certain number of seats would be preserved for public lawyers or for different regions. The appointment or approval system could damage the Institute in a long term. In light of the discussion and vast support of not introducing any complex solutions at this stage, but rather some sort of informal measure, Sir Francis Jacobs proposes the following: **an express provision should be included on a voting ballot, which would encourage ELI Fellows to give special concern to diversity while they cast their votes.** The Secretariat/Returning Officer should draw up the measure. **That solution is endorsed by the Council.**

- (9) Sir Francis Jacobs moves onto the issue of the ex officio membership. He reminds the Council that ex officio membership should not seriously enlarge the Council and therefore it might be necessary to provide for some kind of rotation system. Sjef van Erp explains that the original idea of having professional organisations as ex officio Council members was to demonstrate that the

ELI is not an academic institution. The Statute does not provide for ex officio Council members. It would most likely come as a surprise to the CCBE or CNUE that on the new Council they would not have the same ex officio seat as they currently have. The CCC is neither for nor against ex officio membership on the Council but wanted to raise this issue with the Council members by mentioning it in its note. However the organisations which have supported the ELI from the beginning should have a seat on the Council. Sir Francis Jacobs agrees that there should be ex officio Council members, but points out that the Council should not be too large and therefore the number of ex officio Council members is the question. Fryderyk Zoll suggests that the members of the Executive Committee could remain on the Council as ex officio members, which would ensure continuity on the Council. Reiner Schulze does not support any proposals intended to ensure continuity as he is convinced that the GA will elect a large number of the current Council members, as long as they perceive that the Council has been working well. Fabrizio Cafaggi has strong reservations with regard to Fryderyk Zoll's idea. Herwig Hofmann points out that there is an issue of legitimate expectations of the organisations which are currently on the Council as ex officio members. He suggests that for the moment the ex officio seats on the Council should be limited to these organisations. Sir Francis Jacobs raises the question of whether these organisations should remain on the ELI Council indefinitely and whether that is what they expect. Friedrich Graf von Westphalen suggests that ex officio membership on the Council should be limited and there should be a rotation system in place, which could be decided by the Senate, in order to give other organizations the opportunity to have an ex officio member on the Council. However some of the ex officio members could be permanent. Irmgard Griss supports the idea and expresses the willingness of the Senate to participate. She agrees that new organisations should have the chance to become ex officio Council members. Hans Schulte-Nölke confirms that there should be ex officio members on the Council and suggests including a provision either in the bylaws or in the Statute, which would specify that the current ex officio members retain their seat on the Council and the next GA may add or remove certain organisations. Mark Clough suggests that the organisations should be observers rather than ex officio Council members, meaning that they would not have a right to vote. John Sorabji does not favour the solution proposed by Mark Clough as the organisations which are currently on the Council have legitimate expectations of retaining their voting rights as mentioned by Herwig Hofmann, therefore their status should not be changed to observer. **Sir Francis Jacobs reminds the Council that there is no necessity to work out the details at this meeting, but rather they should be worked out in the implementing measure. However, the decision in principle should be taken with regard to the necessity of having the ex officio Council seats in general and that their number should be limited. If the number of ex officio Council seats is limited they could be added on the top of the 60 Council members.** Leo Netten says that he will abstain as an ex officio Council member. **It is agreed that the current ex officio Council members will retain their seats on the Council.**

(10) Sir Francis Jacobs moves onto the next issue of the Executive Committee (EC) elections. He presents the CCC's proposal and the comments submitted by various Council members. Many comments are in favour of having a search committee, possibly involving the Senate, which would search for candidates for the position of ELI President. The question is whether there should be a special procedure for the position of the Vice-President and the Treasurer and precisely what procedure it should be for other members of the EC. Irmgard Griss suggests that because the President, the Vice-President and the Treasurer form a team, they are of crucial

importance for the ELI and it is essential who holds these positions, the search committee should also make proposals for the candidates to fill these positions. John Sorabji asks how this procedure is consistent with democratic rules of elections; the newly elected Council members will put themselves forward. Also, if the candidates are chosen from outside the Council how will they then become members of the Council? Sir Francis Jacobs clarifies that the fact that there will be certain candidates recommended by the search committee does not prevent other candidates amongst Council members from putting their names forward. John Sorabji questions the necessity for a search committee. Hans Schulte-Nölke recalls how the current EC was elected. There was a similar procedure in place, the search committee found the President, then the Vice-President and the Treasurer were elected, who then together made proposals for the other four EC members. Hans Schulte-Nölke suggests that the search committee proposes a candidate for the President, but he is against the idea of the search committee presenting a package of candidates for the whole EC as it is less democratic and less transparent. The search committee could also present more than just one candidate so the Council has a choice. Diana Wallis agrees in part with the idea of a search committee but on the other hand agrees with John Sorabji and thinks that the search committee does not fit well with a democratic elections process. However, if the package of candidates is presented it gives a very bad impression, as the ELI is a democratic organisation and that should be reflected in its procedures. Sjef van Erp understands the concerns raised by John Sorabji and Diana Wallis; however the idea of a search committee is not bad as long as there are elections and the Council can decide. Christiane Wendehorst explains that it has never been proposed that the search committee makes a decision, but that it just makes a non-binding proposal. Nevertheless she agrees with John Sorabji that it has to fit with the election procedure. There are arguments, which speak in favour of a search committee, e.g. the fact that eminent personalities should serve as the President of the ELI; they might not stand for elections as a "simple" Council member on their own initiative. Therefore, without the search committee, the ELI runs the risk of random results. Sir Francis Jacobs suggests combining the idea of the search committee with the principles of democracy and transparency. The search committee for example could make suggestions and they could be discussed by the Council. **Sir Francis Jacobs invites Council members to approve the idea of a search committee, including members of the Senate, which would have the task of making non-binding proposals to the Council for candidates for the position of ELI President. The majority of the Council members votes in favour of a search committee. The President and the other members of the Executive Committee will be elected by the newly elected Council at its first meeting.** Christiane Wendehorst points out that it should be made sure that the President is a member of the Council even if he is elected from outside the ELI Council; the solution could be that he would automatically become a member of the Council, meaning that one additional seat would be reserved for him.

IV. Report from the International Relations Committee by Bénédicte Fauvarque-Cosson

(11) Bénédicte Fauvarque-Cosson presents the report of the International Relations Committee. She invites the Council members to take an active part in developing the ELI's international relations.

V. Report from the Projects Committee by Hans Schulte-Nölke

(12) Hans Schulte-Nölke presents the report of the Projects Committee (PC). He briefly presents the ongoing projects and further project ideas. He reports that there will be a joint workshop on the project on European Principles of Civil Procedure held by ELI with UNIDROIT and ALI. The project on European Principles of Financial Service Contracts has been suggested by ELI Member, Olha Cherednychenko, a Professor of European private law and comparative law at the University of Groningen. The PC has positively evaluated the proposal, but expressed certain concerns, namely that the project's scope is too broad, and has recommended that Olha Cherednychenko work further on the proposal in order to limit the scope and to rather submit a proposal for an ELI Statement rather than an Instrument, with focus on the European consumer mortgage credit and its relationship with the Consumer Credit Agreements Directive. The Optional Instrument for Services was proposed by Fryderyk Zoll, however Hans Schulte-Nölke is also interested in this particular topic. The PC finds that the title should be "Principles of European Service Contract Law" and the approach should be more modest; a new proposal will be submitted for the next meeting of the PC. With regard to the project in the area of insolvency law the PC would recommend the Council to embark on the Statement in the area of European Insolvency Law, which should follow the methodology of the Statement on the Common European Sales Law. The Common Core Constitutional Principles of Europe is a project suggested by the Senate. Preparations are underway, headed by Sabino Cassese. Hans Schulte-Nölke presents other topics which were briefly discussed at the PC meeting and indicates that there will be further discussion held in June, when the Committee meets next. Wim Louwman mentions that he, Sjef van Erp and a Spanish Professor are considering a project in the area of property rights, which could be funded by the European Commission grant. Sir Francis Jacobs indicates that he himself has a project idea in mind in the area of child protection in particular with respect to child abductions, which could be a joint project with Missing Children Europe, the European Federation for Missing and Sexually Exploited Children.

VI. ELI Project Guidelines

(13) Sir Francis Jacobs indicates that a Council decision on the ELI Project Guidelines is required. Christiane Wendehorst explains the rationale behind the new Project Guidelines and thanks those who contributed to the draft. She outlines in general the amendments that were made to the current Project Guidelines and further elaborates on the latest amendments made to the draft. Herwig Hofmann suggests reconsidering section 16 on intellectual property rights, indicating that the definition seems to be very narrow. He further explains that it is in the interest of the ELI to distribute the projects' results throughout the various legal systems and therefore some form of openness should be adopted, such as creative commons or similar. Christiane Wendehorst points out that there is already a general flexibility clause, which could be used, however in principle adding a specific flexibility clause should also be possible. Radim Polčák agrees with Herwig Hofmann in principle, however proposes that this form of openness could be applied to the results other than the official results of the ELI's projects; when it comes to Instruments and Statements he prefers the more restricted approach. Fryderyk Zoll points out that certain problems could arise when cooperating with other institutions, which might have conflicting rules. Christiane Wendehorst agrees in substance and explains that there is already a

flexibility clause included in the Guidelines. The question is what signal the ELI wants to send. Normally, the ELI will aim at publishing the Statements and Instruments under its name and will have exclusive intellectual property rights thereof. If there are however imperative reasons there can be a certain flexibility. Too much openness in respect to IP rights would mean that the ELI had to negotiate individually in each and every case with the project team. Herwig Hofmann considers that the ELI should send out a different message and support creative common licences and allow for the further development of its products. Radim Polčák suggests that the provision in the Guidelines should be kept; however the ELI may always decide to publish the project results under, e.g. creative commons licence. John Sorabji suggests an amendment to the draft in section 1 paragraph 3, it should read: **“In exceptional cases, after consulting the Senate, the Council may (...)”**. **The text of the Project Guidelines is adopted with this amendment by the majority of Council members.**

VII. Adoption of upcoming ELI Projects

(14) Hans Schulte-Nölke reports that the PC is making a formal recommendation to adopt the project proposal on the EU Copyright Regulation. Radim Polčák was working on the project proposal, which is attached in Annex V. The Projects Committee positively evaluated the project proposal and therefore recommends that the Council adopt the project, albeit under certain conditions. The final outcome of the project should be more cautious than the proposal for an EU copyright regulation. It should rather aim at formulating the principles of European copyright law, which would be a softer “heading” for this project. Furthermore, the PC recommends involving high ranking practitioners as the reporters and other members of the project team. The reporters should be appointed step by step, starting with the appointment of one individual who has already been identified, namely Professor Axel Metzger. **Sir Francis Jacobs puts the project proposal in the area of EU Copyright Law and the appointment of the reporter to a vote. There are no objections raised.** Hans Schulte-Nölke briefly outlines the conclusions of the PC with respect to a project proposal for an Instrument on a European Association, presented in Annex VI. The PC does not recommend going ahead with the project at this stage as it concluded that it needs further elaboration. Herwig Hofmann does not support going ahead with the project; the formulation of the project scope should be more careful. Christiaan Timmermans mentions that it should be considered what the final outcome would be. Maarten Meijer supports the project idea as nowadays many associations which would like to engage in international activities face problems. **Council supports the project in principle and the PC has a mandate to develop it further; however no acceptance at this stage.** Hans Schulte-Nölke presents the next project in the area of insolvency law. The PC recommends that the Council start with a short term project, a Statement, which would follow the same methodology as the Common European Sales Law. Hans Schulte-Nölke asks the Council whether the ELI should go ahead with such a project. Sir Francis Jacobs points out that no proposal has been submitted. Hans Schulte-Nölke explains that the PC would recommend embarking on a Statement, which would be a reaction to the proposals of the European Commission. Sjeff van Erp mentions that there are certain problems in the area of insolvency law, which the Commission is trying to solve at short notice; therefore it would be useful if the ELI analyzed the proposals of the Commission and presented its views. Sir Francis Jacobs indicates that there is not enough information at this stage to make a decision; however if a project proposal is submitted a decision can be also made in an electronic vote. Sjeff

van Erp mentions that the proposals draw a lot of attention, especially of practitioners. John Sorabji indicates that if it is a Statement, then it would require steps taken on the part of the Executive Committee, rather than the Council. Christiane Wendehorst indicates that the Council's vote on whether to embark on the project is however necessary and then the Executive Committee will be in charge of appointing reporters. **Sir Francis Jacobs suggests that there should be a proposal formulated in due time by the PC and the Council will express its view via the electronic procedure. If approved, then the Executive Committee will take further steps.**

Lunch break starts at 12:50. Meeting continues at 13:58

Mark Clough leaves the meeting

VIII. Report on the preparations for the 2013 General Assembly by Christiane Wendehorst

(15) Sir Francis Jacobs reopens the meeting. Christiane Wendehorst reports on the preparations for the 2013 General Assembly. It has been scheduled for 5 and 6 September, although originally the Executive Committee had envisaged a different date at the end of September, but that collided with a major public law conference. Christiane Wendehorst encourages Council members to come forward and make suggestions for possible venues for the upcoming General Assemblies. She further invites feedback and suggestions on how to design the GA. After last year's event the feedback of the ELI Members was in general positive, but there were also some suggestions for improvements, which are outlined in annex VII. In general the ELI Fellows would like to know what their role is and how they can contribute to the ongoing work. There was also an idea raised that concrete samples of the ELI's work should be circulated among the ELI Members in advance, so that the audience could contribute when the projects are presented. Christiane Wendehorst raises the issue of the ELI's relationship with the European Jurists Forum (EJF) and briefly outlines the current situation. A decision of the Council on how to proceed and what sort of relation should be established between the ELI and the EJF is required as the EJF will have a meeting on the very same day. A possible solution could be that the ELI project conference is a part of the EJF, where ELI Fellows would have a free access to ELI related events and possibly reduced access to the other parts of the conference. The ELI would perhaps provide administrative support to the EJF, help setting up the website, registration process, etc. There are also downsides of that cooperation: there might be an administrative burden, financial commitments, and therefore it would probably be advisable to organise it in conjunction with some local players. Sir Francis Jacobs mentions that although the GA was well organised there was probably not enough space for the members to engage. It would be very important if lawyers could come along and take part in the conference and contribute to the work of the ELI, and the reporters should prepare certain questions in advance, which would then be put to the audience. Spyridon Flogaitis mentions that the ELI should not serve as an international platform for a more national project like the EJF as it would send the wrong signal. Christiane Wendehorst confirms that indeed the EJF has German origins, but many other nations contribute to the organisation of the EJF, for example now it takes place in Barcelona. Clearly, there is a tendency to become European. Spyridon Flogaitis explains that the ELI joining forces with an initiative deriving from a particular state will send a clear signal and the ELI should be aware of that, although in principle he is not against this idea. Sir Francis Jacobs mentions that the ELI is still in the process of defining its own identity and therefore it would be probably more advisable at this

stage not to link with other organisations, which have other objectives. Walter Doralt suggests that even if there is no formal cooperation, some limited cooperation should be considered. The EIJ is well established and goes beyond the German-speaking world; the meetings took place in Geneva, Budapest, Athens, and now in Barcelona. It would therefore be worthwhile considering whether the ELI could for example get a slot in their programme in order to present the Institute. Reiner Schulze mentions that the ELI should maintain its own profile, possibly have a relationship with the EIJ, but should not be strongly linked with the EIJ or become a “section” of the EIJ. Irmgard Griss explains that the EIJ is not really an organisation per se, it is just a trademark and a sort of predecessor of the ELI, but there would be no cooperation with other organisations, because there is none. Reiner Schulze insists that the ELI should develop its own trademark. Sjef van Erp disagrees with Irmgard Griss saying that the EIJ was not a predecessor of the ELI as it was a national initiative, which only later became more European. The ELI was initiated as a European institute. Sjef van Erp has doubts about the “European” part of the EIJ. Walter Doralt considers how the ELI would benefit from cooperation with the EIJ; perhaps more information should be gathered on what sort of cooperation is exactly envisaged by the EIJ and how the ELI could benefit from it. Heiko Wagner makes a personal remark that the ELI, through cooperation with the EIJ, could contribute to current discussions and debates that are taking place in Europe on different issues and see how the ELI’s projects results could work in practice. Herwig Hofmann mentions that the EIJ, FIDE and other organisations of this type could give ELI a forum to discuss and circulate project results and receive feedback, so the ELI should have an interest in such cooperation. Hans Schulte-Nölke points out that the Council should consider whether the ELI could envisage organising a conference together with the EIJ in 2015; he is in principle not against the idea, however in general the ELI should remain independent in organising its conferences. The incentive would be the wide audience that the ELI would gain. Walter Doralt mentions that the EIJ has an audience of several hundred people, many of whom are not yet the ELI Members, so the ELI could gain exposure. Sir Francis Jacobs asks whether it can be agreed that the ELI should not establish any formal links, however it could consider some sort of cooperation with the EIJ. Christiane Wendehorst points out that when the ELI was formed there were queries raised by the European Commission about the relation it has with the EIJ as the goals of both are similar. Similar queries were raised later by other stakeholders. There are certain expectations that the ELI will cooperate with the EIJ. Moreover the EIJ is an important event, which attracts between 300 and 1500 people, and if the cooperation is not initiated a number of players in Europe will be wondering what are the reasons for that. Bénédicte Fauvarque-Cosson explains that the goals of the ELI are different than those of the EIJ, therefore supports the idea of using it as a platform, but advises against organising common conferences. The ELI should be represented at the EIJ in a way it is represented at FIDE or at the International Academy of Comparative Law; this cooperation should be at the same level. Marc Clément suggests that the ELI should be represented at the EIJ, as many points on their conference program correspond to the projects that the ELI is conducting and it would give the ELI an opportunity to present the Institute. **Sir Francis Jacobs summarizes the discussion. No sustained institutional relationship should be established at this point in time, but the ELI should take advantage of the EIJ, by for example taking a platform at the EIJ conferences, participating in projects of common interest; it should be rather ad hoc cooperation. The ELI must maintain its own profile.** Christiaan Timmermans suggests that the ELI should organize its General Assembly on its own; however if, as Marc Clément mentioned, there is a particular project of common interest it would be worth considering a presentation of the relevant views of the ELI at the EIJ.

The Executive Committee should probably explore technicalities of such an arrangement. Heiko Wagner makes a personal remark that probably the more often such cooperation with the EJF is initiated, the better. Diana Wallis mentions that a relationship with the European Law Academy (ERA) would be worth developing. **There is an agreement to explore the options and develop these relationships step by step.** Fryderyk Zoll mentions that the ELI should concentrate on organising its own conferences. Sir Francis Jacobs explains that the ELI should organise its own conferences and participate in the conferences organised by others in order to present the Institute. Christiane Wendehorst raises the question of what it means for the discussion which will take place in the afternoon with the representatives of the EJF. Is that a clear “no” from the ELI or should the EJF come up with concrete proposals and the ELI consider it for the future? **Sir Francis Jacobs explains that in principle ad hoc cooperation possibilities are not excluded.**

IX. Report from the Membership Committee and Fundraising Committee by Walter Doralt

(16) Walter Doralt presents the report from the Membership Committee. The system of referees is in place and works well. In the past it was decided that the requirement of having two referees should not be too strict, because there were not enough members. There are still applications which are not submitted with referees. Is it the expectation of the Council that the Membership Committee should in these cases write a polite request to submit referees or rather continue the current approach and wait until there are more members. There are about 625 Fellows at the moment. **Fryderyk Zoll mentions that the referee policy is a good system and the current number of members would be sufficient to request referees for each application. If the applications are submitted without the referees they should be requested from the applicants. There is no opposition to this suggestion.** Walter Doralt reports on the situation with regard to Institutional Observers. There is progress: some supreme courts have joined recently and others are in process of joining. It is of crucial importance that these courts join the ELI as observers, as it will encourage others to join and gives the ELI legitimacy. Walter Doralt invites the Council members to approach their national organisations and courts. State institutions can become members without paying the membership fees. There is a progress also in membership, however a lot of work still needs to be done. There are many underrepresented countries. Fryderyk Zoll asks which countries are underrepresented. Walter Doralt explains that there is a very strong representation from bigger countries, Germany, France, the UK, Poland, the exception would be Spain. In all smaller countries the effort must be made to approach more members and practitioners. Walter Doralt presents the report of the Fundraising Committee in the absence of Johan Gernandt, with whom he cooperated on the issue of getting law firms to join the Institute. It is not merely a fundraising issue, it is also very important to involve the practitioners on a regular basis. Johan Gernandt has approached several law firms; so far three of them committed to make a financial contribution to the ELI; larger law firms should be approached first. Walter Doralt explains that membership fees were waived for certain institutions and now the MC suggests **extending it to intergovernmental organisations and the United Nations and its bodies. No opposition is raised. The MC further suggests to the Council that any institution which qualifies for the exception from the annual membership fee, should be admitted as Institutional Observer, once their application has been accepted by the MC; meaning that the MC would have a mandate from the Council to accept them without delay. There are no objections raised. Furthermore the new applicants are approved by the Council.** Sir Francis

Jacobs mentions that it is a responsibility of Council members to attract suitable candidates and encourages them to do so. Fabrizio Cafaggi agrees, but points out that there should be a certain targeted policy towards under-represented constituencies.

14:55 Diana Wallis leaves the meeting

X. General developments and strategies for the ELI (e.g. national hubs)

(17) Sir Francis Jacobs mentions that over the last few months there were many efforts made to develop this idea. The UK Hub is about to launch and the first hubs have already been created in Ireland and France. The UK Hub will be launched on 25 February, the programme has been prepared; a lot of work has been done by the leading firm of solicitors, Clifford Chance. To some extent this overlaps with a fundraising exercise. There are ideas of establishing hubs in Belgium, Germany and most recently Cyprus. Ideally the ELI should have hubs in all European countries as a good way of involving the ELI members in the activities of the ELI. Sjef van Erp reports that Maastricht University agreed to act as a host for the Dutch Hub. Sir Francis Jacobs mentions that it would be good to involve leading law firms in the process of creating hubs. Bénédicte Fauvarque-Cosson reports on the launch of the French Hub, which was organised with help of all French Council and Senate members. There was a breakfast organised for law firms. Bénédicte Fauvarque-Cosson concludes that it is very difficult to attract law firms. After the meeting the law firms who participated were approached twice and were invited to become members, however it is not an easy task. It is true that it is partly a fundraising exercise, however it is also about attracting more practitioners. There was an interest in the projects among the participants in the French Hub; however the ELI procedures were perceived as very complicated. In the light of these experiences, it is very important to follow up with the participants and create incentives for them to join the Institute. Jean-Marc Sauv  was very supportive at these events and afterwards the Conseil d'Etat became an Institutional Observer. The question arises what the hubs should do; perhaps it should be raised when there are more hubs already in place. Possibly joint meetings of the hubs could be organised. It is crucial not to lose the alliance, which was already created. Herwig Hofmann supports the idea, and asks about the nature of the relation between national hubs and ELI projects, as the projects are the core of the ELI's work. Sir Francis Jacobs explains that the hubs are complementary to the organisation of the ELI as individuals involved within national hubs will have opportunities to meet and make useful contributions by enriching the projects with their national perspectives.

15:00 Leo Netten leaves the meeting

XI. ELI internal communication (in particular MyELI)

(18) Gerard Ehrismann presents the MyELI platform to the Council members. Sir Francis Jacobs thanks him for the presentation.

XII. Any other business

(19) Sir Francis Jacobs expresses his gratitude to all the members of the Secretariat individually for their work. Herwig Hofmann raises a question about the position of the Secretary General, whether there will be someone employed. Sir Francis Jacobs explains that the Executive Committee after consulting the Senate has been working towards identifying a candidate who could head the Secretariat. The post has been advertised and the deadline for applications is 21 February.

(20) Sir Francis Jacobs thanks all the participants for their attendance and **concludes the proceedings at 15:25.**