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Council Meeting  
University Main Building, Senatssaal  
Feb. 18<sup>th</sup> 2012, Vienna  
Minutes

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## I. Present

### **Members of the Council:**

Gabriel Alonso Landeta  
Christian Alunaru  
Françoise Andrieux  
Remo Caponi  
Marc Clément  
Walter Doralt  
Bénédicte Fauvarque-Cosson  
Spyridon Flogaitis  
Johan Gernandt  
Herwig Hofmann  
Claire Huguenin  
Rafael Illescas  
Sir Francis Jacobs  
Carmen Jerez-Delgado  
Rudolf Kaindl

Amélie Leclercq  
Hans Micklitz  
Leo Netten  
Olivier Schrameck  
Hans Schulte-Nölke  
Reiner Schulze  
John Sorabji  
Sir John Thomas  
Christiaan Timmermans  
Evangelos Tsouroulis  
Sjef van Erp  
Christiane Wendehorst  
Friedrich Graf von Westphalen  
Boštjan Zalar  
Fryderyk Zoll

### **Members of the Secretariat:**

Tobias Schulte in den Bäumen  
Paul Reichert

Jelena Kopanja

### **Guest**

David W. Rivkin, American Law Institute and  
International Bar Association

### **Keeper of the minutes:**

Paul Reichert

## II. Opening and Welcome by the President

- (1) **Jacobs**, President of the ELI, welcomes all the attendees and opens the meeting. He welcomes in particular the new staff of the recently founded Secretariat in Vienna and announces the date of the General Assembly, scheduled for the weekend of September 28<sup>th</sup>/29<sup>th</sup>. He then gives the floor to **Zimmermann** to report on the meeting of the Senate.

## III. Report and proposals of the Senate

- (2) **Zimmermann** reports the outcomes of the Senate meeting, held on February 17<sup>th</sup>. He emphasizes the discussion he had with Thomas about the CESL and states that a paper summarizing the changes recommended by the Working Party should be pursued. He expresses the concerns of the Senate as to how effective the detailed suggestions would be. Thus, he argues a paper flanking the detailed work would increase the impact and visibility of the Working Party's work.
- (3) **Zimmermann** reports that the Senate is very keen on the case management of the ECHR project. In the view of the Senate, it would be essential to have a French lawyer on the Advisory Committee, suggesting Jean-Marc Sauvé as a good choice.
- (4) **Zimmermann** reports that the Senate would initially recommend 3 or 4 project proposals, but not more, to be endorsed by the Council at this stage. Project **no iii** of the information note "ELI-Projects – State of play" from the Secretariat and the Project Committee from 10 February 2012 (hereafter referred to as *Projects Document*) with the title "Towards Restatements and Best Practice Guidelines on EU Administrative Procedural Law" (*Administrative Law*) is highly interesting to the Senate. Its downside, however, is that it is in a very advanced stage so that the impact ELI's work would have is questionable. **Zimmermann** says that the Senate believes that ELI could, however, benefit from a timely revision of the project by the Advisory Committee and the Consultative Committee.
- (5) The project **no xi** of the Projects Document ("The Reform of the Data Protection Directive" – *Data Protection*) would equally be interesting to the Senate but is recommended to be broadened in scope to include the recent developments regarding the digital world (IP, ACTA, C). Projects **no v** ("EU Model Law on Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law" – *Criminal Law*) and **vi** ("Income Tax and Mobility of Individuals in Europe" – *Income Tax*) would have a high potential, but they are in a very rudimentary stage and require further elaboration. Full proposals need to be drafted and the reporters groups need to be defined for all four projects. This would be a good portfolio for the ELI and many of these fields are currently underrepresented in the ELI.
- (6) **Zimmermann** also reports the general view of the Senate that ELI Projects should reflect the diversity of the European culture, the geographic diversity and the diversity of traditions. In this regard, Zimmermann proposes a short discussion of the Guidelines.

#### **IV. Report and proposals of the Membership Committee**

- (7) **Doralt** reports on the activity of the Membership Committee (MC) and reminds all Council members to submit or complete the electronic form. Also, **Doralt** reminds all Members to transfer the annual membership fee, as a number of Council members have not yet been paid the fee.
- (8) **The Council agrees on Doralt's proposal that all ELIA members who have not yet become members will be admitted as members of the ELI. A message will be sent to these persons.**
- (9) Since the last meeting 106 fellows were admitted and several institutions have become members or are about to. The fees with the institutional observers have been negotiated. **Doralt** suggests all Council members should encourage outstanding candidates to apply for membership. **Doralt** also indicates that many new members from Central and Eastern Europe have joined the ELI, but that further applications are most welcome, especially from new Member States of the EU and from legal practice. He informs the meeting that the ELI website will be revised and a membership database implemented. The Secretariat has taken up this task and assured that the new website will be operational as soon as possible but in any case before the end of June 2012.
- (10) **Consensus is reached that the Czech Supreme Court will be admitted as a new Institutional Observer. Also, consensus is reached as to the reduction of the membership fee of an applicant with a monthly income of € 240; the fee will be set at € 10 for 2011 and € 20 for 2012 with the full fee payable thereafter.**
- (11) The Membership Committee seeks advice of the Council regarding whether students can join before obtaining a law degree. In one case, a student with a strong CV, an expected graduation date in 2012 and already working full-time in a law firm as a paralegal applied for membership. However, he does not have any referees amongst ELI Fellows.
- (12) **On Jacob's proposal, it is decided that the application can be processed positively if two referees support the application or in this particular case if at least one referee supporting the application is provided.**
- (13) **On Doralt's suggestion, the Council decides that the membership fee payment methods will have to be revised. The mandate is given to the Secretariat to install the system for credit-card payments and or electronic cash transfers (PayPal).**

#### **V. Report and proposals of the Council and Senate Composition Committee**

- (14) **Van Erp** reports on the CSCC. He refers to the current main task of selecting Council members, 3 nominated by the CCBE and 3 by the CNUE.
- (15) No decision is taken on the new Council members.
- (16) The CSCC aims to have an interpretation of the Statute, which would require no further changes to the same. **Van Erp** refers to the document presented to the Council members

ahead of the meeting, titled “Proposal on Authentic Interpretation of the Statute: Ex-Officio membership”. Main issues are the ex-officio membership in the Council, the role of Institutional Observers and the representation of Institutional Observers in the Council.

- (17) **Van Erp** addresses **Tsouroulis’** question and explains that according to the Point 3 of the authentic interpretation, an Ex-Officio Member holds his mandate until 2013, even if his Ex-Officio Membership terminates.
- (18) In response to **Wendehorst’s** question, **Van Erp** clarifies that the Point 3 of the authentic interpretation may lead to an increase of the total number of Council members, because new Members come and old Members remain. This is subject to the maximum Council membership limit under Article 10 (1) of the Statutes. This is currently not an issue as the membership in the Council has not reached its limit. The situation will also change when the Council is fully elected by the General Assembly.
- (19) **The Council approves the interpretation as outlined in the proposal.**

## VI. Report and proposals of the Project Committee

- (20) **Schulte-Nölke** clarifies that he holds the position of the acting Chair of the Project Committee (PC). Sir Francis Jacobs, as the President, chairs the Committee. He thanks the Senate and the Secretariat for the work done in preparation of the *Projects Document*. He reports the outcome of the meeting of the PC.
- (21) **Schulte-Nölke** suggests pursuing the four projects mentioned by the Senate, namely Administrative Law, Criminal Law, Income Tax and Data Protection (*A-List*).
- (22) **Schulte-Nölke** continues to present a draft of a “*B-List*” of projects which are not ready for adoption, but would be worth for the PC and the Council to develop. The project **iv** (“Principles of the Methodological Acquis” – *MAP*) of the Project Document is mentioned as the first B-List project followed by the project **vii** (“Principles of European Corporate Income Taxation Law” – *Corporate Tax*) which should be tackled step by step. Also on the list is **no viii** (“Optional Instrument for Service Contracts” – *Service Contracts*), which should not start before the work on the CESL has been completed. Project **no ix** (“Draft Regulation on a European Non-Profit Association / Foundation” – *Association/Foundation*) is on hold because the EU is currently working on legislative measures. Project **no x** (“The Rights of the Child” – *Child*) has been added to the B-List as it is not fully clear what would be the end product of such a project. Finally, the PC would like to keep the project **no xii** (“State Liability in cases of negligent financial supervision” – *State Liability*) and **no xxi** (“Set-off and insolvency” – *Set-off*) on the list but needs to explore the feasibility of these projects further.
- (23) **Schulte-Nölke** asks the Council to empower the PC to continue with its efforts in regards to the A and B-List projects.
- (24) **Jacobs** asks for general remarks. **Clément** raises the issue of the separation between Instruments and Statements. **Huguenin** suggests having more Instruments which would give ELI a “face” and would like to have MAP added to the A-List. **Timmermans** asked whether the Council is equipped with enough information to make a selection today and calls for more

information on Administrative Law. **Jacobs** shares his view that the public is expecting to see what the ELI is embarking on. Some of the project ideas, such as Data Protection and Administrative Law, require a swift action. **Micklitz** inquires about the criteria for the selection process and doubts whether the ELI should jump on the EU-legislative machinery. **Jacobs** points out that the ELI should maintain a balance between EU-Law and other areas of law when selecting its projects.

- (25) **Schulte-Nölke** answers to **Timmermans** that the Project Document had been created before the launch of the discussion with the Senate based on the Guidelines that have been adopted so far. In regards to the Data Protection, he points to the far more advanced legislative process regarding ACTA, where the project would struggle to have an added value. Other projects in the A-List would not face any time pressure and could be pursued for 3-6 years.
- (26) In the following discussion, the Council feels in general that Instruments which do not follow but inspire European legislation are essential to build up the reputation of the ELI. Members of the Council express their view that the criteria should be also practical, considering the needs of the European legislators and other actors. The Council discusses the suggestion made by **Schulte-Nölke** to give the PC the mandate to explore the projects and to identify the actors. The Council discusses which decisions can be taken in the meeting and what further work needs to be done to finalize all the projects on the A- and B-List.
- (27) In particular, **Schulze, Clément, Timmermans** and **Flogaitis** ask for more detailed proposals as the Council should not only follow but also discuss and influence the decisions on the projects. In particular, the Council would need more information on funding and potential reporters in order to make its decision.
- (28) In the further discussion, **Zoll** underlines the need for tackling the ACTA as it is decisive for the future of fundamental rights and our future society. ELI may come under pressure to say something. **Timmermans** states that the role of the Council and the Senate should be defined more clearly in the Guidelines; **Leclercq** argues along the same lines. **Fauvarque-Cosson** reminds that reporters are responsible for setting the timetable, as outlined in the Point 22 of the Guidelines. **Netten** inquires whether a B-List is useful at this stage. **Zimmermann** repeats the view of the Senate that the projects on the A-List should be perceived as Instruments which have a long term perspective. A decision on Data Protection and MAP seems urgent to him. ELI should take 3-4 projects forward and then resume the debate about the B-List. **Flogaitis** brings up general concerns that ELI should be aware of the financial and structural crisis the EU is facing at the moment and that ELI should tackle also the cultural issues.
- (29) **Schulte-Nölke** explains that he will continue the discussion with **Netten** at a later stage. A Council decision today would not anticipate the appointment of Reporters. If the Council adopts the idea, the PC will hold additional explorative meetings with internal and external experts during spring.
- (30) **Doralt, Hofmann, Schulze, Huguenin, Zoll, Zimmermann** and **Illescas** suggest that the Council decides on the preliminary information available for the projects and to give PC the mandate to investigate some projects further. **Gernandt** and **Schulte-Nölke** argue in that line. **Thomas** expresses his view that the ELI will be judged by the products it delivers. In his view, Criminal

Law gets very close to policy issues. He tends to support the proposal of the PC. **Wendehorst** wonders whether a preliminary decision on a project proposal would be efficient.

- (31) **Schulte-Nölke** concedes that the proposals fulfill the first four paragraphs of Art 11 of the Guidelines. However, potential reporters and the funding scheme are still pending. He highlights the issue of the Guidelines and that they may need to be amended to allow a step by step procedure, as the consequences of a rejection would be even harsher if proposals are fully elaborated in terms of funding and reporters.
- (32) **Jacobs** sums up the discussion. In his view, the Council should seek the approval of the topics of the A-List and clarifies that the Guidelines should be revised in the light of the discussion in the meeting. The role of the Council is to contribute to the discussion and not only to say yes or no; however, the proposals have been examined by the Senate and the PC. The PC is also invited to follow up on the projects listed on the B-List. The A-List shall have the clear priority and needs to be worked out soon.
- (33) **The Council unanimously agrees (without abstention) to give the PC the mandate to continue working on the A-List to develop full project proposals.**

## VII. Lunch Break

- (34) The Council attends to the lunch reception given by the Austrian Minister of Justice, Dr. Beatrix Karl, on the occasion of the 40th European Presidents' Conference of the European law societies and bar associations – "Wiener Advokatengespräche 2012" (co-organized by CCBE and ÖRAK, Palais Trautson, Federal Ministry of Justice, Museumstraße 7).

## VIII. Report on Relations with the ALI

- (35) After the lunch break **Jacobs** welcomes **Rivkin**, ALI Council Member and Secretary General of the IBA, as a guest. **Rivkin** talks about the ongoing work of the ALI and how the Institute carries out its projects. **Rivkin** expands on the way ALI chooses project reporters, advisors and how the Council of the ALI supports the work of the various projects. Restatements are broken up into various parts as usual in common law: Black letter statements; comments; reporters notes. Each project is led by academics, 1-2 principal reporters and associate reporters, complimented by the advisors who do not have to be Members and the Members' Consultative Group. When a chapter of a project is brought up before the Council for approval, the Council usually approves under the condition of incorporation of the comments made in the discussion. The projects gain their influence as the US judiciary is frequently quoting and referring to them. The ALI has a huge interest in the development of the ELI.
- (36) **Wendehorst** stresses that the ELI has already taken measures to deepen the cooperation with the ALI. **Van Erp** summarized his impressions from the General Assembly in San Francisco in 2011.
- (37) **Jacobs** thanks **Rivkin** for his contribution and expresses his hope that the ELI and the ALI can embark on many common ventures in the future.



## IX. Report on the ongoing ELI-Projects

### A. Common European Sales Law

- (38) **Jacobs** invites **Thomas** to inform the Council on the progress made in the CESL project. **Thomas** summarizes the development since the last Council meeting and highlights the successful CESL conference that took place in Vienna in November 2011. The Group followed the approach that detailed practical suggestions to the different stakeholders in Europe would be needed to improve the quality of the CESL draft. The Group also looked at the implications of the potential adoption and how EU Member States may implement the CESL in their national legal frameworks. The Group is very satisfied with the results achieved in many sections, especially parts I-III of the CESL project document. It also reported it is making progress in parts IV-VI. The text is not yet at a stage where it could be adopted by the Council. The Group has decided to take more time in the light of external political factors. However, the Group has been keen to deliver and discuss the text as it stands. **Thomas** informs the Council that the Group would like to be mandated to discuss the ELI draft with the bodies of the European Union. He asks the Council for its detailed comments on the draft and for the admission of its general ideas.
- (39) **Jacobs** thanks the group for all the energy and time invested in the CESL project. **Clément** and **Gernandt** ask the group to expand more on the nature of the expected outcomes. **Thomas** confirms that the Group would work on a statement / paper after the consultation with the European bodies.
- (40) **Micklitz** and **Timmermans** raise the point that the project does not question the rationale behind the CESL and to what extent the project is needed in the light of the political climate surrounding the CESL. **Thomas** confirms that the CESL Group does not investigate the political and constitutional side of the proposal. They would rather accept the political decision and would try and enhance the work done by many European experts and the European Commission. The group was also aware that it would be difficult to reach a consensus within the Council and the other ELI bodies on the political issues. The Group deliberately chose to focus on the technical quality of the CESL. **Schulze, Wendehorst, Hofman, Tsouroulis, Thomas Zoll and Doralt** are skeptical about incorporating political issues but acknowledge that also technical changes may raise political issues **Zoll** explains that the question whether the consumer has a right to cure or not is always a political question.
- (41) **Fauvarque-Cosson** asks for further information on the scope of the document, in particular in regards to the cross-border limitations and the inclusion of fields other than the sales law. Further questions address the summary statement and the procedures taken to ensure the input of the Council and the Senate. **Thomas** stresses that the Group would be grateful for comments on the draft and they would like to postpone the submission of the summary statement to the Council until after the discussions with the European institutions.
- (42) **Gernandt** urges that a paper of 8-10 pages be delivered prior to the meeting with the Commission. **Hofmann** underlines the importance of such documents for the transparency of the exercise. **Thomas** reminds that such a paper would require an approval of the changes in the draft.

- (43) **Jacobs** sums up the discussion. He asks the Council to approve the general approach taken by the group – in other words to continue the work on technical aspects of the CESL – and to discuss the current draft with the European institutions.
- (44) **The Council approves the general approach of the CESL Working Group gives the mandate to the Working Party to discuss the draft with the EU Institutions welcoming the opportunity to comment on the draft before it is presented to the European bodies.**

## **B. Case Overload at the European Court of Human Rights**

- (45) **Jacobs** introduces the Council to the project on the caseload at the European Court of Human Rights. He summarizes the background and history of the project. The project is a short term project, feeding into the debate on the political level, which will take place in the next few months. Members of the Advisory Group have been nominated, the first draft will be delivered to them at the beginning of March, and the final document is expected to be delivered by the end of March.
- (46) **The work is welcomed by the Council and the Council expects to have the opportunity to discuss the project with the project reporters and comment on the drafts.**

## **X. Report by the Secretary General**

- (47) **Schulte in den Bäumen** reports on the ongoing and planned activities of the Secretariat. He outlines the timeline for the re-launch of the website. Furthermore a blog is developed by **Kopanja** which will be moderated and edited by the Secretariat. **Doralt** welcomes the innovation of the envisaged blog. The Secretariat finalized the brochure which contains statements and information about the ELI. The brochure is available as a print and pdf Version.
- (48) The Council decides that the Executive Committee will discuss the blog before it goes online.

## **XI. Reports on relations with the World Bank**

- (49) **Van Erp** reports on the relations with the World Bank and the results of the Law, Justice and Development Week conference held in November 2011. **Fauvarque-Cosson** stresses the importance of the topic no xv (“World Bank Project on Mediation and Alternative Dispute Resolution” – *Mediation*) and how the World Bank wants to move forward this topic. The World Bank is emphasizing global topics, e.g. with regard to the financial crisis. **Schrameck** and **Favarque-Cosson** explain how the work will be embedded into the justice program and how it informs the management of the public services. This work will add to the work done by the World Bank on the economic development. A Steering Committee will have a conference by the end of February. Other possible topics relate to research management of public utilities and PPP.
- (50) **The Council clarifies that ELI has not yet given any content commitment. Further discussions shall be carried out between van Erp, Doralt and Fauvarque-Cosson.**

## **XII. Reports on relations with the Institutions of the EU**

- (51) **Fauvarque-Cosson** summarizes the meeting at the Commission on Dec 15<sup>th</sup> and the future meeting with the Parliament Committee on Legal Affairs on March 26<sup>th</sup> 2012. **Jacobs** adds information regarding to relations with the Council of Europe. **Clément** suggests establishing ties to other DGs of the European Commission. Any other business
- (52) In any other business, **Schulte in den Bäumen** briefly outlines the General Assembly to be held in in Brussels on September 28<sup>th</sup> and 29<sup>th</sup>. The meeting will be organized together with the KVAB (Royal Flemish Academy of Belgium for Sciences and the Arts) as the local host. A meeting room with 240 seats and different break out rooms will be provided. The date was chosen to avoid conflicts with other events. The Executive Committee and the Secretariat will also schedule meetings of the Council and the Senate alongside the General Assembly. **Hofmann** reminds that meetings on Saturday are not family-friendly.
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- (53) **On Jacobs' proposal, the Council agrees to organize a Council meeting alongside the General Assembly.**
- (54) **Rivkin** invites ELI to work closer with the IBA and the different committees of the IBA. Christiane Wendehorst asks whether the Group would be willing to discuss the Guidelines again. **Hofmann** brings up IP and authorship rights. He advocates a modern approach towards sharing of knowledge and facilitating the sharing of knowledge.
- (55) **Timmermans** suggests amending point 14 of the Guidelines in the sense that the Senate should be giving advice to the Council when taking its decision on the adoption of project proposals.
- (56) At 15.30 **Jacobs** thanks all the participants for the fruitful discussions and closes the meeting.