

Minutes of the Council Meeting

Royal Flemish Academy of Belgium for Science and the Arts (KVAB)

29 September 2012, Brussels

Present:

Members of the Council:

Gianmaria Ajani	Hans Schulte-Nölke (proxy Reiner Schulze)
Christian Alunaru	John Sorabji
Carole Aubert de Vincelles	Matthias Storme (proxy Christian von Bar)
Hugh Beale	Sir John Thomas
Remo Caponi	Christiaan Timmermans
Marc Clément	Sjef van Erp
Walter Doralt (proxy Stefan Grundmann)	Christiane Wendehorst (proxy George Bermann)
Bénédicte Fauvarque-Cosson	Boštjan Zalar
Spyridon Flogaitis	Fryderyk Zoll (proxy Lech Garlicki)
Sir Francis Jacobs	Georges-Albert Dal
Carmen Jerez-Delgado	Marcella Prunbauer-Glaser
Janis Neimanis	Wim Louwman
Denis Philippe	
Radim Polčák	

Members of the Secretariat:

Tobias Schulte in den Bäumen	Jelena Kopanja
Paul Reichert	Alina Waloszczyk

Observers:

Markus Buschbaum (on behalf of Tilman Götte, CNUE)	Gonçalo Moreira (on behalf of Emmanuelle Cretin-Magand, DG Justice, European Commission)
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Keepers of the minutes:

Tobias Schulte in den Bäumen
Paul Reichert
Alina Waloszczyk

Meeting starts at 14:00

I. Opening and welcome by Sir Francis Jacobs

- (1) Sir Francis Jacobs, President of the ELI, welcomes all the participants and opens the meeting. He underlines the need for projects to be undertaken and for the Institute's visibility to be increased through the development of national hubs.

II. Composition of the Council

- (2) **Sjef van Erp** presents the candidates for the Council and briefly discusses the need for the dissolution of the Council and Senate Composition Committee. The drafting of the rules should be separated from the oversight of the elections. **Sjev van Erp** suggests that the Senate or at least 3 members of the Senate should do so.
- (3) **The Council approves a proposal for the co-option of new Council Members.**
- (4) **The Council approves dissolution of the Council and Senate Composition Committee.**
- (5) **The Council approves the decision that a new standing Committee - Council Composition Committee will submit a proposal for the Council elections procedure but will not supervise them; personalities who do not take a personal interest, e.g. Senate Members, will oversee the elections.**
- (6) **The Council approves proposed members of the committee: Sjef van Erp, John Sorabji and Matthias Storme. Sjef van Erp is appointed as the chair of the committee.**

III. Report from the Executive Committee

- (7) **Bénédicte Fauvarque-Cosson** refers to her presentation in the morning and reports on the meeting of the Executive Committee. More meetings of the committee shall take place in the future. All Council Members are encouraged to promote the ELI Statements and to publish about them in their native countries. **Bénédicte Fauvarque-Cosson** notes that conferences were highlighted at the General Assembly as an important tool to increase the Institute's visibility. She suggests that an agenda could be developed, which would record all the presentations made on behalf of the ELI at different conferences and events; the Secretariat should be informed about these presentations and keep track of them.
- (8) **Bénédicte Fauvarque-Cosson** notes that the next Council meeting will take place either on the 8th or 9th of February 2013 in Vienna.
- (9) **Fryderyk Zoll** suggests that governments should also be properly informed about the work and the results of the work of the ELI. **Christiane Wendehorst** underlines that informal channels are very useful but agrees with **Fryderyk Zoll** that formal channels are needed.

(10) **Hans Schulte-Nölke** suggests that meetings should not take place on Saturdays. The Council Members agree that Friday meetings are more desirable. **Hugh Beale** suggests that Council meetings could also be combined with roadshows. **Bénédicte Fauvarque-Cosson** states that a presence in Vienna is very useful and needed. **Christiane Wendehorst** agrees that it would be good to have the next meeting in Vienna to combine it with the Presidents' Meeting and the Lawyers' Ball. **Marcella Prunbauer-Glaser** will clarify whether it will be possible for the ELI to team up with the Presidents' Meeting.

(11) **Fryderyk Zoll** asks whether there is a copyright policy in place for national translations of the ELI documents. **Sir John Thomas** agrees that a policy decision is needed and he stresses that this is a good idea if proper reference is given and it is made clear that this is not an official translation. **Matthias Storme** underlines the point that it could be restricted to use for non-commercial purposes. He also feels that translation should be checked by the ELI. He is not sure whether the same rules should apply to the ELI Instruments; however this could be decided when one is published. **Sir Francis Jacobs** stresses that ELI hopes to also publish documents commercially, therefore restrictions might be needed. He suggests handling the translation rights on a case by case basis. **Fryderyk Zoll** suggests that the Executive Committee should elaborate this and publish guidelines on the website.

IV. Appointment of Council Members on the committees

(12) **The Council approves members of the Membership Committee: Marc Clément, Walter Doralt, Anne Birgitte Gammeljord, Lech Garlicki.**

(13) **The Council approves members of the Projects Committee: Hugh Beale, Remo Caponi, Marc Clément, Bénédicte Fauvarque-Cosson, Lech Garlicki, Janis Neimanis, Hans Schulte-Nölke, John Sorabji, Matthias Storme, Radim Polčák, Diana Wallis, Christiane Wendehorst, Friedrich Graf von Westphalen, Marek Wierzbowski, Boštjan Zalar.**

(14) **The Council approves members of the International Relations Committee: Gianmaria Ajani, Mark Clough, Sjef van Erp, Bénédicte Fauvarque-Cosson, Anne Brigitte Gammeljord, Wim Louwman, Denis Philippe, Christiane Wendehorst, Fryderyk Zoll.**

(15) **The Council approves members of the Fundraising Committee: Johan Gernandt, Maarten R. Meijer.**

V. Report from the International Relations Committee

(16) **Bénédicte Fauvarque-Cosson** reports on behalf of the committee, which has so far been chaired by Bénédicte Fauvarque-Cosson and Fabrizio Cafaggi. She reports on relations with the American Law Institute and other bodies. With regard to ALI several meetings took place with the director of the ALI, Lance Liebman. The projects on consumer regulation and data protection might be two projects to start the cooperation. The ALI will host a meeting of the advisory group to the consumer regulation project on 30 November in New York. **Hans Schulte-Nölke** is a member of

the advisory group and will attend the meeting. It is so far an US oriented project. **Sjef van Erp** also refers to the Tort Law project as more Europeans are involved there. **Sjef van Erp** will attend all the meetings, and **Bénédicte Fauvarque-Cosson** suggests that he should represent the ELI in this project. **Sjef van Erp** mentions however that he is not a member of the advisory group.

- (17) **Bénédicte Fauvarque-Cosson** reports on the World Bank project. ELI joined the Global Forum and became a member and is currently one of more than 90 members of the Forum. If the ELI wants to continue the work within this project, the World Bank invites the ELI to do so. Originally the ELI wanted to focus on ADR and mediation, but the Executive Committee suggests that before expanding to other countries the ELI should focus for the moment on European law and not become the leader of a mediation project in the World Bank Forum. **Bénédicte Fauvarque-Cosson** suggests to remain there as an observer and this is agreed by the Council Members. **Bénédicte Fauvarque-Cosson** also refers to the meeting of the World Bank in December; she invites members to participate but so far no official representation of the ELI is foreseen.
- (18) **Bénédicte Fauvarque-Cosson** reports on relations with UNCITRAL. The ELI has received an invitation to attend the sessions of the working groups. **Bénédicte Fauvarque-Cosson** mentions that Christiane Wendehorst will be the contact person in Vienna. More members are invited to join the UNCITRAL sessions on behalf of the ELI. Information is available on the website of UNCITRAL. Interested members are encouraged to contact the Secretariat. UNCITRAL has endorsed UNIDROIT principles and at some stage may also do so with ELI's work.
- (19) **Bénédicte Fauvarque-Cosson** reports on relations with UNIDROIT. UNIDROIT has launched new projects recently and also there the ELI could have an opportunity to get involved as an observer. **Bénédicte Fauvarque-Cosson** has already received signals that UNIDROIT has an interest in developing links with the ELI but should ELI wish to become an observer of some of UNIDROIT working sessions, a commitment from the Council members is needed. **Matthias Storme** expresses his interest and will get in touch with **Bénédicte Fauvarque-Cosson**. **Sir Francis Jacobs** mentions that members should express their interest based on personal preferences.

VI. Report from the Fundraising Committee

- (20) In the absence of Johan Gernandt, **Sir Francis Jacobs** reports on the activities of the Fundraising Committee and stresses that some Swedish law firms would make a financial commitment to ELI of 15,000 euro/year for a period of 3 years, subject to a condition that other law firms would join as well. **Sir Francis Jacobs** suggests spreading the fundraising activities. Meetings with law firms should be arranged. **Sir Francis Jacobs** may start such activities in London and will also suggest linking this to the creation of national hubs and the distribution of ELI documents. **Hugh Beale** suggests that ELI could also raise money at the occasion of meetings and conferences. **Sir John Thomas** reminds everybody that attracting law firms is a subtle exercise and needs to be adapted to the local conditions. **Christiaan Timmermans** also suggests looking more at the Brussels market as many international firms are present there. **Fryderyk Zoll** asks what should be offered to them besides publishing certain information about them on the ELI website. **Sir Francis Jacobs**

answers that not much more than this can be offered, however they can have an influence on the projects through Membership Consultative Committee. **Sir John Thomas** underlines that the independence is the key asset of the ELI and must be preserved during that process. **Fryderyk Zoll** asks whether we have a policy on conditions for sponsors and the minimum contributions from sponsors. **Sir Francis Jacobs** responds that so far there is no such policy, but it should be developed in the future.

VII. Report from the Membership Committee

(21)**Walter Doralt** reports on the activities of the Membership Committee and suggests that the fundraising should also be combined with the task of attracting new members, both institutional and individual. With the help of the Secretariat the Membership Committee has worked out a new application procedure and the website has been updated. The “tell-a-colleague” function works and is used. The list of members is uploaded and it is organised by both the nationality and the country of residence. The membership issues on the website are presented in legible and clear manner and the website has made great progress. The progress in receiving new membership applications is satisfactory, however attracting new members does need a particular effort. **Walter Doralt** encourages Council Members to advertise ELI membership, in particular amongst practitioners. We are still underrepresented in areas such as public law, labour law and several other areas. Criminal law is also fairly weak and so is tax law. The distribution of members (country of residence) is not equal and some countries are severely underrepresented. Therefore particular effort should be made in order to add at least a few fellows before the next Council meeting. **Walter Doralt** refers to the Membership Committee’s report presented in the materials of the Council meeting. The proposal for new ELI members is outlined. Almost all applications are now done through the referee system.

(22)**The Council approves new ELI members.**

(23)**Walter Doralt** also asks whether it would be acceptable to lower the membership fee for the applications approved at the end of the year (in November and December). **Matthias Storme** suggests that these members should pay 90 EUR as a membership fee for 14 months. That does not pose major problems for the Secretariat. **Walter Doralt** welcomes the idea.

(24)**Walter Doralt** will also approach Supreme Courts; such state bodies can join without a fee (for example the Czech Supreme Court became ELI member). If the other courts join, it will encourage other organisations which pay the membership fee to follow the example of the courts and also join the Institute. So it would be very valuable in order to recruit other members. However a link to the Institute and its work needs to be ensured. **Walter Doralt** encourages Council Members to approach the national courts and suggest the membership to them, with no fee. He also invites Council Members to put forward suggestions, which institutions could be addressed.

(25) Lastly, some organisations (in particular groups of judges) don't have a real budget and therefore have difficulties with paying a membership fee. **Walter Doralt** was approached by the competition court judges and CJEU judges; some of them meet informally and do not have a budget to pay a membership fee, nevertheless they would be interested in joining the ELI. Organisations are interested in the ELI but can only join for a fee of minimum of 250 EUR. **Walter Doralt** suggests that a policy is needed for these situations, depending on the size and the willingness of members to become fellows of the Institute. Hence, such institutions could join without paying a fee. **Matthias Storme** raises the issue whether organisations without legal personality could become members at all. There is indeed a problem and **Walter Doralt** suggests handling these cases on a case by case basis. **John Sorabji** mentions that such an organisation should be seen as a network under the ELI Statute. **Christiaan Timmermans** stresses it would be important to attract more judges and organisations of judges to the ELI. Other organisations should be then encouraged to join. **Sir John Thomas** mentions that about 15 European associations of judges exist. **Christiane Wendehorst** notes that the inclusion of "networks" was foreseen for this reason and individuals will represent these organisations. As the Treasurer **Christiane Wendehorst** stresses that it is difficult to draw the line when a non-profit body should be fee-exempt. Being a non-profit organisation may not be a good indicator of the financial strength. **Walter Doralt** underlines the fact that organisations will also bring more individual members. **Sir Francis Jacobs** suggests that **Walter Doralt** and **Christiane Wendehorst** will work this out and should come back to the Council.

(26) **Walter Doralt** mentions that the ENCJ (European Network of Council for the Judiciary) would like to have an ex-officio member on the Council. This issue has been raised in the discussions that **Walter Doralt** had with the ENCJ. **Sjef van Erp** agrees that judges should be well represented in the Council. **Matthias Storme** stresses that one ex-officio membership and more individual memberships could be considered. **An ex-officio seat is welcomed.**

15 minutes break. Meeting continues at 15:40

VIII. Report on the Common European Sales Law project (CESL)

(27) **The Council accepts Professor Timmermans joining the Projects Committee**

(28) **Sir John Thomas** reflects on the work of the CESL group and thanks the group, and in particular **Christiane Wendehorst**, for their hard work. The group visited the Commission twice and will meet the JURI Committee. They will also present the CESL work in a meeting with members of parliaments of the Member States. The group is in the process of circulating its work to the Council of Ministers, Governments and the Presidency of the Council. The ELI will also be present at conferences. The Commission asked the group to work on digital contents and they asked how the changes suggested should be implemented. **Sir John Thomas** recommends that it would have to be a policy decision to make major changes to the work. The group agreed to reflect upon the Commission's requests. The group is ready to continue working and will also continue distributing the contents of the work. The group will help the Commission by offering more ideas

and by working on the implementation (but not running any implementation tool). The group will also work on digital contents and help the Parliament to assess the substance of the CESL document, however do not go beyond what was already in the Statement. If it is necessary to go beyond that, the group will come back to the Council for a decision. **Sir Francis Jacobs** endorses the suggestions. **Hugh Beale** suggests giving the Working Party the mandate to work on changes needed unless they are fundamental. **Gianmaria Ajani** raises a question how to draw the line with regard to statements, how we can keep our distance and make sure that ELI is perceived as an independent body. **Sir John Thomas** suggests that the answer to the question depends on the gravity and the policy implications of changes which are necessary. Errors should be corrected in any case in order to enhance the quality of the work delivered. **Sir John Thomas** asks for the mandate to sell and to continue working with the European bodies. **Hans Schulte-Nölke** recommends that the ELI does not enter into any contractual relationship with the Commission or the European Parliament as this is governed by procurement rules. **The suggestions made by Sir John Thomas are endorsed including work on rules which might be added with respect to digital contents.** **Fryderyk Zoll** stresses that the digital content is a huge gap in the CESL as it stands and substantial work might be needed. **The Council gives the CESL group the mandate to continue its work.**

IX. Report from the Projects Committee

(29)**Hans Schulte-Nölke** refers to the conference day and the presentation of the project ideas as well as to the report given to the General Assembly. Regarding the working methods **Hans Schulte-Nölke** refers to the suggestions made by Sir Francis Jacobs and John Sorabji. The work on projects requires a more formalised working structure. Therefore the Projects Committee shall meet about 6 weeks ahead of the Council meetings and at the Council meetings (4 times a year). Projects need to be put on track and the ongoing projects need to be monitored. This implies that money and time should be allocated. The preparation must be streamlined and documents needs to be prepared ahead of time (deadline 7 weeks ahead of the Council meeting). **Matthias Storme** agrees and suggests a date should be fixed for the next PC meeting. **Hans Schulte-Nölke** suggests that members check their availability either shortly before Christmas or at the beginning of January next year and he will come back to it at the end of the meeting.

(30)**Hans Schulte-Nölke** explains that two decisions with regard to the projects can be made: to endorse projects (including the project's working party) or to postpone the formal decision of endorsement, but to endorse a project idea and to give the Projects Committee the mandate to continue working on ideas and turn them into full project proposals for submission at the next Council meeting. **Matthias Storme** raises whether we can separate the content and the persons to be appointed.

(31)**Hans Schulte-Nölke** presents a project on administrative law (cooperation with the ReNEUAL Group). He suggests appointing only one reporter at this stage and this should be Herwig Hofmann. **Christiane Wendehorst** asks whether a cooperation agreement with ReNEUAL has been signed. **Sir Francis Jacobs** confirms that it has been signed. **Hugh Beale** asks what the

reporter's obligations are in case of this project. **Hans Schulte-Nölke** explains that the reporter is a central person coordinating and running the project and reporting to the ELI bodies. He outlines that at least one reporter needs to be appointed at this stage if we want to proceed and we are not advanced enough to appoint additional reporters. A reporter is a team leader and other members of the working party can be appointed as reporters at a later stage. **Christiane Wendehorst** raises the question whether ReNEUAL has given Herwig Hofmann the mandate to make formal commitments on behalf of ReNEUAL or can ReNEUAL reject the whole agreement. **Hans Schulte-Nölke** explains that ReNEUAL suggested that Herwig Hofmann should be appointed as a reporter. It is envisaged that there will be a central coordination group of 3 persons. **Hugh Beale** suggests to ask for the acceptance of the appointed reporter and co-reporters by ReNEUAL. **Christiane Wendehorst** reminds the Council that, according to the cooperation agreement signed, this is a collaborative project to which the ELI Project Guidelines apply only with appropriate adaptations. It would therefore be possible to leave the issue of reporter open at this stage until further discussions with ReNEUAL have taken place. **Sir Francis Jacobs** suggests to endorse the project but to leave the question of the reporter open. This is seconded by **Sir John Thomas** as he notices that there are other details to be sorted out. **Marcella Prunbauer-Glaser** underlines that more practitioners are needed in the ReNEUAL bodies. **Sir Francis Jacobs** asks whether any Council members are interested. **Boštjan Zalar** expresses his interest. As suggested the Council endorses the project with the reservation that the details will be worked out including the appointment of a reporter. **Hans Schulte-Nölke** suggests that a reporter is appointed via an electronic vote after clarification of the open questions related to the mandate of Herwig Hofmann. **Hugh Beale** suggests to endorse the project subject to the clarification of the open questions (mandate, involvement of practitioners). **This suggestion of Hugh Beale is endorsed.**

- (32) **Hans Schulte-Nölke** presents the project on tax law. The project has been suggested by the European Association of Tax Law Professors. The idea has been worked out with the goal to satisfy all the criteria of the ELI. There are two objectives, a set of principles and then a subsequent model law. They shall facilitate the mobility with regard to pension schemes. It does not address EU law but rather the OECD Model Convention. The proposers suggest that Bertil Wimann from Sweden and Peter Essers from Tilburg are appointed as reporters. Further potential members of the working party are mentioned, including practitioners and persons with a double affiliation. The funding is secured through the participating parties. The Projects Committee and the Senate have recommended to accept the project proposal. **Hugh Beale** has a question regarding the scope of the work; it should be clearly pensions and not income tax in general: **Hans Schulte-Nölke** refers to page 5 of the project proposal. **Sir John Thomas** has reservations towards the geographical coverage and the political minefields associated to the topic. Who is representing the interest of the public? **Matthias Storme** mentions that professor Frans Vanistendael has always defended public interest. The Council feels more input is required from Central and Eastern Europe. **Hans Schulte-Nölke** suggests to start with these reporters and to consider those remarks when appointing more reporters. **Marcella Prunbauer-Glaser** suggests making a reservation also in this case to ensure involvement of practitioners and to ensure that

consumers' interest is protected. That should be reflected in the projects' content. **Sir Francis Jacobs** suggests adopting the proposal with Essers and Wimann as reporters under the regular procedure. That approval concerns, for the time being, only the first step (pension schemes) and is given under the condition that Essers and Wimann will establish a working group that satisfies the requirements of geographical spread, involvement of practitioners and that the project will take a balanced position as to the different stakeholders (public interest/taxpayers, etc.).

(33)[16:36 **Carole Aubert de Vincelles** and **Marc Clément** leave]

(34)**Hans Schulte-Nölke** presents the project on criminal law. The criminal law project has been developed more recently. Some questions arose in the Projects Committee, in particular the project proposal was considered as being too academic and the working group should better reflect the diversity of legal traditions. The objectives of the project need to be worked out in more detail and the product must be in line with the requirements set for ELI Instruments. It is not entirely clear whether the group would pursue a model law and the group is discussing this also internally. The Senate was fond of the project and suggested the endorsement. **Sir John Thomas** underlines that it is absolutely essential to have practitioners, someone from the Common Law and to take into consideration that for example high profile cases, such as bribery, terrorism and cyber-terrorism are very sensitive and political and quite often involve the United States. There are some very difficult issues that this project proposal does not touch upon. It should be broad enough to deal with the essential problems in that area of law.

(35)[16:44 **Bénédicte Fauvarque-Cosson** and **Remo Caponi** leave]

(36)**Christiane Wendehorst** suggests that reporters should be present in the Council meeting to make sure questions which arise can be clarified in the meeting. Without the reporters being present it cannot be sure that they will be able to take all the suggestions into account and would be willing to work on those issues. **Hans Schulte-Nölke** suggests that due to the long list of recommendations there should be a meeting organised in Vienna with the potential reporters and the issues raised today should be solved then. **Hugh Beale** feels that the issues are too fundamental to approve the project under conditions. **Sir Francis Jacobs also suggest to postpone the decision.**

(37)[16:50 **Christiaan Timmermans** leaves the meeting]

(38) [16:53 **Gianmaria Ajani** and **Spyridon Flogaitis** leave]

(39)**Sir Francis Jacobs** states that the Council might at this point not have a quorum to make decision on the projects; subject to how many proxies there are.

(40)There is a quorum to make decisions.

(41)Regarding the data protection project **Hans Schulte-Nölke** suggests that the outline is reviewed and draft statement proposal is prepared and resubmitted to the Council. **This is endorsed by the Council. Radim Polčák** agrees to continue to work on the project.

(42)The European Foundation/Association project from the B-List is discussed. Martin Schauer is mentioned as a potential reporter. The Senate recommended endorsement of the Statement. **Hans Schulte-Nölke** suggests that there could be a formal decision made on Foundation as it is a Statement, therefore there is no need to appoint a reporter at this stage. **The Council welcomes the project idea.**

(43)The Insolvency project is also introduced and **much welcomed by the Council. Matthias Storme** and **Fryderyk Zoll** expressed their interest in the project.

(44)The Senate recommended to continue with the work on the right of the child and to work out the optional instrument for services. **The Council accepts it for further elaboration.**

(45)As the last point **Hans Schulte-Nölke** mentions the Senate's project idea under the working title: 'Common Constitutional Principles of Europe'. **Matthias Storme** expresses a concern that it is much too vague at this point and suggests that such a topic should be limited in scope and the outcomes need to be clearly defined. The idea will be worked out further by members of the Senate: Jean-Marc Sauvé and Sabino Cassese strongly favored working on such a project. The idea is discussed, but the Council expresses its concerns regarding the limitations and the exact scope of such a project. It is premature to discuss further. **Sir Francis Jacobs** suggests to continue working on the B-List and to await for further specifications before the Senate's project idea is decided upon.

X. Any Other Business

(46)An exact date for the Projects Committee meeting should be agreed among its members. Two dates are taken into consideration: the first week of January 2013 (4, 5th of January) or the second week (10,11 or 12th of January), depending on the place of the meeting.

(47)**Sir Francis Jacobs** concludes the Council meeting at 17:05.