

Newsletter n° 15/2010

Programme of the conference held in Florence (13-14 december 2010)

The Initiative of the European Network

Appointments

Editorial

President Griss

The year 2010 ended on a heavy programme of work successfully completed for the Network. The new Board, appointed on the occasion of the Dublin General Assembly last March held its second meeting in Florence to discuss our activities in 2011. On 28 March next, we will be officially received at the Court of Justice in Luxembourg with a view to discussing the new issues of civil and criminal cooperation in the wake of the Treaty of Lisbon. This meeting follows the invitation extended to us in Dublin by the President of the Court of Justice, Mr. Skouris, to engage in this dialogue with the members of the Court of Justice. We also thank Mr. Gruev, President of the Supreme Court of Bulgaria, who has invited the Network to Sofia in autumn 2011, where, at the suggestion of Mr Lamanda, First President of the French Cour de cassation, we will discuss the budgetary management of supreme courts.

The Florence Conference from 13 to 14 December on the comparative approach to judicial cooperation in Europe and the United States of America was particularly successful, its conclusions validating the results we had already begun to obtain from our study on the Network's strategy and future activities which we discussed in Dublin. The main aspects of cooperation concern above all the management and organisation of our courts or procedure. This year, for example, we conducted two studies on legal aid before the supreme courts, the conclusions of which were published in issue 13 of our Newsletter and, early in 2011, we will have the conclusions on expert reports. In the area of substantive law, the Common Portal of National Case Law offers an opportunity for cooperation through the access to and knowledge of jurisprudence which it provides.

In 2011, the Network plans to start publication of its proceedings, as provided by our Statutes. We will also continue the exchanges of judges between our courts, a programme which, this year, made possible twelve exchanges.

Programme of the conference held in Florence (13-14 december 2010)

The Florence Conference jointly organised at the invitation of the European University Institute of Florence (Robert Schuman Centre) by the Network of the Presidents of the Supreme Judicial Courts of the European Union and the Dwight D. Opperman Institute in New York University Law School, on 13 and 14 December 2010 gathered together Members of the Network and representatives of the Members of the Conference of Chief Justices of the United States on the basis of a programme on judicial cooperation between supreme courts in Europe and the United States of America. The novel and innovative aspect of this meeting was highlighted by the participants. The proceedings of this Conference will be published, the first in a series devoted to judicial cooperation, which will see the publication of the work accomplished by our Network since its creation.

Judicial Cooperation among State Courts in Europe and the U.S.: A Comparative Approach

European University Institute, Florence 13-14 December 2010

New Directions in Judicial Cooperation: Instruments of Cooperation

Moderator: Professor Fabrizio Cafaggi

- The initiative of the European Network (Hon. Prof. Dr. Irmgard Griss, President of the Network of the Presidents of the Supreme Judicial Courts of the EU and President of the Supreme Court of Austria)
- The role of the U.S. Conference of Chief Justices of State Supreme Courts (Hon. Christine Durham, Chief Justice of the Supreme Court of Utah and Immediate Past President of the Conference of Chief Justices)
- Questions and Discussion

Other models of cooperation

Moderator: Hon. Prof. Dr. Irmgard Griss

- The Role of the European Institutions - Mr. Fernando Rui Paulino Pereira, Head of Unit, responsible for judicial cooperation in civil and commercial matters, Chair of the Council Working Group on e-Law and e-Justice
- The ALI and its influence in the context of "soft" law unification ? (Prof. Lance Liebman, of Columbia Law School and Director of the American Law Institute)
- The Role of the Uniform Law Commission - (Hon. Shirley Abrahamson, Chief Justice, Supreme Court of Wisconsin)
- Cooperation between state and federal courts in the U.S. - (Judge Robert Katzmann, U.S. Court of Appeals, for the 2d Circuit)
- Questions and Discussion

Constitutional and other impediments to judicial cooperation

Moderator: Mr. Ernesto Lupo, First President of the Corte Suprema di Cassazione of Italy

- European perspective ? (The Hon. Mr. Justice John L. Murray, Chief Justice of Ireland)
- U.S. perspective ? (Hon. Margaret Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts)
- Questions and discussion

Constitutional and other impediments to judicial cooperation, continued

Moderator: Professor Oscar Chase

- U.S. perspective ? (Prof. Geoffrey Miller, NYU School of Law)
- Questions and discussion

Governance and processes of judicial cooperation: existing and proposed models

Moderator: Mr. Branko Hrvatin, President of the Supreme Court of Croatia

- European experience and perspective ? (Ms Pauliine Koskelo, President of the Supreme Court of Finland)

- U.S. experience and perspective ? (Hon. Wallace B. Jefferson, Chief Justice of the Supreme Court of Texas and President of the Conference of Chief Justices)

- Judicial Cooperation in the U.S.- an historical survey ? (Russell Wheeler, Brookings Institution)

- Questions and discussion

Cooperation/harmonization imposed by higher authority

Moderator: Professor Troy McKenzie

- International human rights norms:

- European perspective:

The European Court of Justice ? (Mr. Geert Corstens, President of the Supreme Court of the Netherlands)

The European Court of Human Rights ? (Prof. Dr. Klaus Tolksdorf, Präsident des Bundesgerichtshofes, Germany)

- U.S. perspective - (Prof. Burt Neuborne, NYU)

- The U.S. Supreme Court and the doctrine of preemption (Prof. Catherine Sharkey, NYU)

Concluding Remarks and future directions

Moderator: Hon. Margaret H. Marshall

- Observations by Hon. Jonathan Lippman, Chief Judge of the State of New York

- Observations by Mr. András Baka, President of the Supreme Court and of the National Council of Justice of Hungary

- Comments from the floor

The Initiative of the European Network

Introduction

Europe is a "Rechtsgemeinschaft", a community of law, as Walter Hallstein put it. Last year the Lisbon Treaty entered into force and the Stockholm Programme was accepted. That has meant that the quest for developing a European judicial culture has been intensified. In this process networks of professionals can play an important role. It might therefore be a legitimate question whether it would be useful to have one European Network coordinating the activities of all other networks, in other words a network of networks.

I am not aware of any initiative to create such a network than that directed at the creation of the European Law Institute (ELI). The Network of the Presidents of the Supreme Judicial Courts has been involved in that initiative. This year I had the opportunity to participate in three meetings two of which were held in Florence and one in Vienna. At the Vienna meeting the representative of the European Commission made it clear that the Commission is not pursuing a competing project.

I would like to depict the status quo of the initiative to create the ELI, to describe the envisaged purpose and tasks of the ELI, and to discuss what could be the relationship between the ELI and the Network of the Presidents.

Status quo of the ELI initiative

To be precise, at the start of the ELI project there were two initiatives. One initiative originated in the aftermath of the Draft Common Frame of Reference project and led to the founding of the Association for a European Law Institute (ELIA) which took place in early 2010. The second initiative was taken by professors of the European University Institute (EUI) in Florence and was launched after a conference in Florence in April 2010.

The conference was attended by politicians of the EU - Commissioner Viviane Reding and the Vice President of the EU Parliament Diana Wallis were present -, by representatives of the American Law Institute (ALI), by academics, and by representatives of different networks. All participants were in favour of the creation of the ELI but it is quite natural that they expressed different opinions especially regarding the tasks of such an institute and whether the ALI could be a role model for it.

After the (first) conference in Florence representatives of the two initiatives met in order to find out whether the two initiatives could be brought together and whether a common road map could be developed for the establishment of the ELI. The outcome was laid down in the so called Hamburg Memorandum identifying the points on which consensus was reached by those present in Hamburg.

The next step was a meeting convened again in Florence in October 2010. At this meeting the discussion was taken further. Consensus was reached that the next meeting should be held in Vienna on November 23.

At the Vienna meeting a road map was agreed upon. The two chairpersons of the meeting ? Professor Zimmermann, director of the Max-Planck-Institute in Hamburg, and myself ? drew up the so-called Vienna Memorandum providing a summary of the results of the meeting.

At the meeting it was agreed that a founding committee will be established. It will meet in Athens in the middle of April. Three working groups will prepare its discussions and decisions.

Each working group will have three coordinators. Two coordinators were appointed at the meeting, one professor from the EUI and one member of the Board of the ELIA. The third coordinator is to be chosen among practitioners by the two coordinators already appointed. The three coordinators have to co-opt other members so that each working group might have 8 to 10 or even 12 members. The working groups should reflect as many as different professions, regional areas, and areas of law possible.

The working groups were assigned different tasks. The first working group has to draft the statute and a manifesto and to make proposals where the ELI should be incorporated; the second working group has to make proposals who should be co-opted for the founding committee and on the procedure by which and on the criteria according to which the seat of the secretariat of the ELI could be determined; the third group has to prepare the founding congress which will take place in Paris on June 1st and to make proposals regarding research projects to be taken up by the ELI.

The proposals shall be sent to Professor Zimmermann and to me partly by the end of December, partly by the end of January. They will be distributed and opportunity will be given to make comments. The final proposals of the working groups should be available at the end of March.

As mentioned earlier, the founding committee will meet in Athens. It will be composed of all those who have been involved so far; of additional persons to be co-opted by the second working group; and of additional working group members to be named by each working group. In Athens the proposals of the working groups will be discussed and decided upon so that they can be submitted to the founding congress.

To sum up, it has to be said that it is a very ambitious programme and I very much hope that the spirit of co-operation characterising the Vienna meeting will last.

Purpose and tasks of the ELI

At the Vienna meeting it was agreed that the ELI should not replace or absorb existing networks or organisations; that

it should be comprehensive as far as legal disciplines and legal professions are concerned; and that it should reflect the diversity of regions and legal traditions within the EU. There was also consensus that the ELI should be independent. A large majority was in favour of the idea that the ELI should be based on individual membership of natural persons and that institutions, networks, and other bodies should be granted observer status.

Regarding the tasks it was agreed that the ELI should not engage in teaching and legal education. There was common consensus that the ELI should concentrate on research projects research being understood in a very broad sense.

There is a need for pan-European research particularly in connection with the European legislative process, not only in the narrow sense of drafting new legislation or in drawing-up model rules but also regarding the evaluation of European rules. The ELI could offer implementation studies or impact assessments. Such studies and research work already exist but it is not always transparent who is chosen as expert and for what reasons. The ELI could help to make the process more transparent and to legitimize it.

The ELI will also be available to give advice to the European Commission, to the European Parliament, and to other bodies involved in the development of law on a European or national level. It can constitute a forum for discussion of developments in European law among academics, judges, practitioners, and persons involved in legislation.

Concerning the input one of the advantages of the ELI would be that its projects could include input from academics, members of the judiciary, and legal practitioners. It should also be possible that the ELI gathered information on request of, for example, a network, made some expertise available, drew up and distributed a questionnaire. The ELI would act as coordinator and facilitator by referring requests to the relevant network, to a study group or team of experts. If no such group or team exists it could decide to build up its own group or team from among its members.

So far several projects have been suggested: A research project on the restatement of administrative procedure; a research project on e-commerce and on the implementation of the relevant Directive; a research project to draw up a condensed guidance tool of interpretation for national and European courts; a research project addressing the protection of fundamental rights from the Charter of Fundamental Rights of the EU, as a parameter of the law making process of EU's bodies, as a parameter of administrative regulation, and as a parameter of judicial interpretation and adjudication.

In the future there could also be a need for and an interest in even global research projects, for example in competition law and intellectual property law. These are issues which by their very nature have become not simply pan-European but global.

Relationship between the ELI and the Network of the Presidents

Before discussing the relationship between the Network and the ELI it has to be asked what are the tasks of the Network and whether and to what extent the ELI could be of assistance in fulfilling them.

The Network of the Presidents was established to give an opportunity to request the opinions of supreme courts and to bring them closer by encouraging discussion and the exchange of ideas and best practices. Discussion and the exchange of ideas and best practices are not ends in themselves. They aim at safeguarding or even improving the high level of administration of justice in Europe. Networks thus play an important role in realising the idea of a strong European area of law, rights, and justice.

This idea can only be realised if the main actors work together. That means for judicial networks that the Network of the Presidents, the Association of the Councils of State and Supreme Administrative Jurisdictions, and the Network of Councils for the Judiciary should cooperate. Such cooperation already exists. As far as cooperation of the three main judicial networks is concerned there is therefore no need for coordination or for any other assistance by the ELI or any other network.

But the ELI could act as a kind of facilitator for contacts which go beyond the sister networks. It could help to organize conferences ? like the conference we are attending - by providing information on persons and groups to be invited and

by providing academic assistance.

As to requesting the opinion of supreme courts two procedures have been followed so far. There were questionnaires distributed to all members in preparation of a colloquium and there were questionnaires distributed on behalf of one of the supreme courts. In both cases ? as for instance, in the first case, on practical aspects of independence or, in the second case, on legal aid ? it could have been of interest to have some academic follow-up. Such follow-up could be provided or at least organised by the ELI.

As judges we are being confronted with an ever increasing number of European rules. There is some academic input in the European legislative process but the process is, as mentioned earlier, in many cases far from transparent. In addition, there is no sufficient input from practitioners despite the fact that practitioners have to cope with the situation before the rules are enacted and to apply them afterwards. Practitioners and particularly judges must have and have a fundamental interest in rules that are practical and workable and will enable citizens to understand the law more easily. Such rules will also enable judges to deliver timely and effective justice. This is particularly important as we move more and more towards a Europeanization of our law. The ELI could be a kind of catalyst to that end.

Conclusion

Although there is no need for a network of networks in the sense of a network superimposed on all other networks, some institutionalisation of cooperation among the numerous players in the field of European legal integration is desirable. The ELI could fulfil this function. It could help to ensure that European law is developed in a clear and pragmatic way so that it is fair and as simply expressed as possible to the benefit of both citizens and legal practitioners.

Appointments

Mr. Branko Masle?a has been elected President of the Supreme Court of Slovenia on 23 November 2010.

Attached file:

[Newsletter n° 15/2010.pdf](#)^[1]

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