

SCOTLAND

Date: 10 February 2006, 2.30 – 5.30pm

Location: Melville Room, University of Glasgow, Glasgow Scotland G12 8QQ

Organised by: Scottish National Correspondents, Professor Dr Elizabeth B Crawford, Professor of International Private Law, University of Glasgow; and Dr Janeen M Carruthers, School of Law, University of Glasgow; in conjunction with the TMC Asser Institute, The Hague.

Number of experts invited: 19

Number of experts present: 10

Consortium representative:

Mr Michiel de Rooij, TMC Asser Institute, The Hague

In attendance:

Mr Richard Aird QC

Professor Paul R Beaumont, University of Aberdeen

Dr Janeen M Carruthers, University of Glasgow

Professor Dr Elizabeth B Crawford, University of Glasgow (chairperson)

Ms Joelle Godard, University of Edinburgh

Dr Kirsty J Hood, Advocate

Ms Louise Miller, Scottish Executive

Professor Barry J Rodger, University of Strathclyde

Mrs Alayne Swanson, Maclay, Murray & Spens, Solicitors, and President of the Society of Solicitor Advocates

Apologies:

The Hon Lord Clarke

Ms Fiona Gavin, Morton Fraser, Solicitors

Ms Donna Mackenzie Skene, University of Aberdeen

Professor Gerard Maher, Scottish Law Commission

Ms Margaret Mitchell MSP, Member of Justice 1 Committee

The Hon Lord Penrose

The meeting was opened at 2.30pm by Professor Dr Crawford, who welcomed the participants to the University of Glasgow, effected introductions, and gave a précis of the nature of the Feasibility Study and of the EU Commission's purpose in commissioning the Study. Professor Dr Crawford then gave the floor to Mr de Rooij.

Mr de Rooij proceeded to give a presentation, explaining the general objectives of the Study.

Functions of the Network – Consultation

It was explained that the principal objective of the proposed Network is to devise a structure which will deliver an improved flow of communication and co-operation between the Commission and stakeholders (academics, practitioners and policymakers) in each Member State, in relation not only to the preparation of new legislation, but also the monitoring and refinement of existing legislation.

The point was made by various delegates at various stages throughout the meeting that the Scottish consultative response to proposed or existing EU legislative instruments to date has tended to be given on an individual (usually academic, less frequently practitioner) rather than co-ordinated basis. Individual responses necessarily reflect the subjective stance of the consultee.

Typically, moreover, responses from Scottish experts are made not directly to the Commission, but rather in response to requests from an internal (often political) entity or organisation, usually the Private International Law branch of the Scottish Executive, the Justice 1 Committee of the Scottish Parliament, or (more rarely now) the Scottish Law Commission. There does not appear to be a widespread practice in Scotland of legal experts communicating their responses directly to the EU Commission; nor currently any form of non-political, co-ordinated effort among interested parties.

The current proposal might bring about the creation of such a grouping at the instance of the members thereof. No such permanent national grouping appears to have been established by the Scottish Executive, at least so far as is known to the National Correspondents.

In consequence, the current consultation process can lack transparency because legal experts who respond to the internal Scottish entity generally are not advised as to (i) who else has been or is to be consulted; and (ii) the final response submitted by the entity in question to the Commission. Moreover, the question of *who* is consulted is at the discretion of the national political entity (there being no standing, co-ordinated expert academic/practitioner grouping aside from those individuals who, from time to time, may be consulted at the option of the Scottish Executive), and the views of any consultee may be filtered by that national entity, in light of its own political objectives. Expert consultees responding via a national political entity have no way of controlling the manner in which their opinion is used, or their response edited. Thus, the ‘non-political’, expert legal perspective may be subordinated to the ‘political’ perspective. It was felt, therefore, by a number of delegates that a ‘non-political’ consultation exercise (ie one distinct from, eg, Scottish Executive consultations) would be very valuable, and that there may be particular strength in making co-ordinated responses to the Commission from the Scottish legal profession.

Whilst an impression was gained at the meeting that there would be practitioner interest in contributing to the consultation process, it was recognised that principally it is the function and duty of the academic to comment on proposed and current legislation. The meeting noted that the consultation process in respect of EU legislation has a three-fold character: first, the need for consideration in general, and at the outset, of potential legislative topics; second, the making of expert comment on Green Papers and subsequent Proposals; and third, the monitoring of implementation and interpretation of EU instruments (eg amendments made to the Brussels

Convention by Council Regulation 44/2001; and suggested amendments to the Rome Convention by the proposed Rome I Regulation).

There was a strong consensus among delegates that currently there is a gap in the consultative process, namely, at the very inception of a proposal. It was felt generally that greater individual Member State input at an early stage would be highly desirable (eg *prior* to the issue of a Green Paper). To take the particular example of the Green Paper on Succession & Wills, the National Correspondents gave evidence to the Justice I Committee of the Scottish Parliament in September 2005, with other expert witnesses, including practitioners. It was clear at that meeting that there was no enthusiasm among the Scottish legal community for the changes proposed, and this advice was accepted by the Justice I Committee. The lack of enthusiasm for the project was palpable. But whether an antagonistic response from a minority of Member States, at an early stage, would have significant impact at the centre is perhaps doubtful.

Ideally, practitioners should have an in-put at all three stages, but being realistic, it is likely that their contribution would be most readily obtained at the third stage. Nevertheless, the suggestion was mooted that if, at the first and second stages, practitioners were to have sight of, and put a practical gloss on, opinions written by academics, this might operate to their mutual benefit, and to the benefit of the project. However, it was noted that from the personal standpoint of the academic who would be commenting on these matters in any event, the advantage would be less clear, and might result in an academic being unable to publish, under his/her own name, his/her conclusions and recommendations.

A further point was made that the detailed monitoring of the operation of any given set of provisions is properly the subject of formal EU tendering, and expert responses under the aegis of the proposed Network should not come to be regarded as an informal, unpaid substitute for such exercises.

The fact was recognised (borne out it appears by the minutes made of expert meetings in other Member States with regard to the number of experts in attendance) that in any given jurisdiction the number of people well-versed in international private law, and willing and able to respond, is finite and small, and no matter how responses are arranged or processed, the same personnel is likely to have produced them.

One factor underlying the discussion was awareness of, and sensitivity to, the political implications. It has been noted above that experts having given their opinion to inform the domestic consultative process, or UK response, lose control over the onward response to the Commission. This is all very well if experts are regarded simply as sounding boards, but there is a danger that a degree of scepticism may justifiably arise if much unpaid work is done only to be 'lost' in the political 'cut-and-thrust'. In this regard, it is possible that Scots lawyers from each branch of the profession would see an advantage in forming a network to produce a non-political response for transmission directly to the Commission.

In summary, the view of participants was that there were potential advantages in establishing a network of interested parties, but that the principal beneficiary would be likely to be the project. While the production of an agreed response, more representative of legal opinion in Scotland, would be a positive result, and while there are undoubtedly intangible benefits to be added from involvement in a consultative

process upon a proposed instrument, the drawbacks of team efforts are well known and would have to be addressed.

Functions of the Network – Creation of Information Database

It was noted that an additional possible function of the Network would be the creation of a case database. Whilst it was accepted that this would be an attractive outcome, the idea was rejected on the grounds of commercial expediency and practicality. It was agreed that commercial ventures such as Westlaw/LexisNexis would be far better suited to developing and resourcing such projects, including easy access to full case reports from the various jurisdictions of the EU, including ECJ decisions.

The meeting noted the role of IPR Verlag in creating an Internet portal.

Possible models

There was some discussion of the model which the Network should follow, and some uncertainty about the precise nature of each of the Models on offer. However, there was no support for the 'Back to simplicity' model, on the basis that this presumably would be exclusive, and therefore at odds with the apparent objective of inclusivity. There was some antagonism towards the 'Complex' model, both in principle and in nomenclature. Delegates objected to the term 'Network of Excellence' on the basis that no one present would have any truck with a 'Network of Mediocrity'. Therefore, by process of elimination, a 'Simple' model, amounting to a self-directed organisation of interested individuals, was thought best.

It is important that any grouping would include representatives from all branches of the legal profession in Scotland, so long as contribution was sought only from those having an active interest/expertise in the relevant area.

Funding

A basic concern, which often in such discussions is not squarely addressed, is that of funding. It was noted that the nature and structure of any network would be determined, to a large extent, by the degree of funding which the Commission would offer. The scarcer the resources, the more informal the network, for while the leadership/co-ordination of the work of such a group in Scotland, if relatively minimal, might rotate, on the basis of each person being willing to contribute to this worthwhile exercise for the public good and in exchange for certain benefits which attend being privy to the unfolding of EU legislative events, anything more onerous (eg systematic dissemination of information, and collation of responses) would require funding. There is no point in being uncommercial in approach.

Information dissemination

If such a Network were to be set up in Scotland, in order to supply the EU Commission with the summary of the Scottish legal community response (being retained as it were for that purpose so as to be ready to comment on each and every proposal as required), the non-monetary *quid pro quo* would be an expectation that

the Commission would set up a system so as to ensure direct communication to interested parties of all relevant information.

Products

□ ***Directory of Experts***

The point was made on several occasions that the value of directories is limited. They are useful in giving initial information, but entries in a register do not necessarily guarantee that an individual listed has a particular expertise and competence in a particular area.

□ ***Handbooks***

There was no enthusiasm for 'Handbooks' on EU Regulations. It was felt that the onus should be on the Commission to produce suitable Explanatory Memoranda, and that it is within the scope of work of academics to write academic commentaries.

Concluding remarks

Having thanked Mr de Rooij for his presentation, and the participants for their attendance, Professor Dr Crawford invited participants to submit to the National Correspondents any subsequent thoughts which occurred to them concerning the project, and also to submit the names of additional interested parties. It seems likely that names still could be added to the list of interested parties in Scotland.

The meeting closed at 5.30 pm.

Glasgow, 10th of February 2006.