



8.01.2024

## MISSION REPORT

following the *ad hoc* delegation of the Committee on Constitutional Affairs to Washington D.C., United States of America and Ottawa, Canada from 30 October to 3 November 2023.

Committee on Constitutional Affairs

Members of the mission:

Othmar Karas (Delegation Leader)	(PPE) (1 <sup>st</sup> EP Vice-President)
Loránt Vincze (Alternate Delegation Leader)	(PPE) (AFCO Vice-Chair)
Cyrus Engerer	(S&D)
Damian Boeselager	(Verts/ALE)
Helmut Scholz	(The Left)

Ex officio Member:

Sandro Gozi	(Renew)
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## ***Introduction***

The Committee on Constitutional Affairs (AFCO) had been authorised by the Conference of Presidents, at its meeting of 11 May 2023, to organise an *ad hoc* delegation to Washington D.C., the United States of America, and Ottawa, Canada, with up to seven Members, including the Chair, from 29 October to 2 November 2023. The mission was part of the AFCO programme of missions for the second semester of 2023.

In order to create synergies with other committees of the European Parliament travelling to Washington during the same week, the AFCO coordinators decided to reschedule the *ad hoc* delegation to 30 October - 3 November 2023, which was authorised by letter from the President of 28 September 2023.

The aim of the *ad hoc* delegation was to:

- exchange views in the United States of America about the recent jurisprudential line of the US Supreme Court resulting in devolution of powers from the federal to the state level, its reasons and consequences for the constitutional architecture of the US;
- learn about the transparency of the legislative process in Canada, through meetings with the Offices of the Commissioner of Lobbying of Canada and the Office of the Commissioner of Conflict of Interest and Ethics of Canada.

The purpose of the discussions in the USA was to make comparison to the situation in the European Union, where the concept of the primacy of the EU law over the national law has been challenged, and to provide input to the own-initiative AFCO-JURI draft report on the implementation of the principle of primacy of EU law, as well as to the AFCO report on proposals of the European Parliament for the amendment of the Treaties.

The discussions in Canada aimed at seeking best practices from the authorities responsible for the transparency, lobbying and ethics in view of the ongoing interinstitutional negotiations aiming at setting up of the EU ethics body based on the Commission proposal of 8 June 2023 and with regard of the continued evaluation of the functioning of the EU's transparency register.

Additionally, the overarching aim of the AFCO visit to Washington and Ottawa was to confirm the strategic relations between the EU and the USA and Canada and to strengthen the inter-parliamentary cooperation and dialog on institutional and constitutional matters.

## ***Summary account of meetings***

Five members of the Committee on Constitutional Affairs (AFCO): Othmar Karas (EPP, Austria) - First Vice-President of the European Parliament, Loránt Vincze (EPP, Romania) - Fourth Vice-Chair of AFCO, Cyrus Engerer (S&D, Malta), Damian Boeselager (Greens/EFA, Germany) and Helmut Scholz (The Left, Germany) had an exchange of views with:

- in Washington: the representatives of the US judiciary (Supreme Court and US Court of Appeals for the Federal Circuit); the US government administration (Solicitor General); the US Congress (Senator Sheldon Whitehouse from the Democratic Party - Member of the Senate Committee of Judiciary, and Environment and Public Works and of the Senate Committee on Security and Cooperation in Europe and House

Representative Glen Ivy from the Democratic Party - Vice-Chair of the House Subcommittee on Oversight, Investigations, and Accountability, Member of the House Committee on the Judiciary, and the Committee on Ethics) as well as American think tanks representing a broad spectrum of political views (Brennan Center for Justice - a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice; Constitutional Accountability Center - a non-profit think tank that seeks to advance a progressive interpretation of the Constitution of the United States and Heritage Foundation - a research and educational institution whose mission is to build and promote conservative public policies);

- in Ottawa: the Commissioner of Lobbying of Canada - Nancy Bélanger and the Conflict of Interest and Ethics Interim Commissioner of Canada - the Honourable Konrad Winrich von Finckenstein; Members of the Canada - EU Parliamentary Association, including its President - Francesco Sorbara; practitioners active in the subject of ethics and lobbying (Karl Salgo – senior advisor in the Institute on Governance; Guy Giorno - lawyer in private practice, head of the Government Ethics, Transparency and Political Law practice group at Fasken and Noah Arshinoff – Interim Executive Director in the Transparency International Canada); as well as Ambassadors of several EU Member States in Canada including the EU Ambassador.

The programmed meeting with the Standing Committee on Access to Information, Privacy and Ethics (ETHI) of the Canadian House of Commons was cancelled due to an urgent need to convene an extraordinary meeting of this committee for the consideration of an ethics related case in the Canadian government revealed by the media.

AFCO Member Sandro Gozi (Renew, France) - Member of the coinciding *ad hoc* delegation of the Committee on the Internal Market and Consumer Protection (IMCO) in the USA participated *ex officio* in several meetings of the AFCO *ad hoc* delegation in Washington.

The *ad hoc* delegation of the AFCO in Washington coincided with the visit in the US of the delegations of four other standing EP committees and two subcommittees. It took place in the politically important moment shortly after the EU-US Summit on 20 October 2023, which adopted a joint declaration about the renewed transatlantic partnership, and before the 87th EU-US Inter-Parliamentary Meeting of the Transatlantic Legislators' Dialogue on 30 November - 2 December 2023 in Washington. The AFCO *ad hoc* delegation in Ottawa proceeded the EU-Canada Summit scheduled for 23-24 November 2023 in St. Jones in Newfoundland and Labrador, which adopted a joined statement on reaffirmed strategic partnership and advanced cooperation.

### ***Washington (USA)***

#### ***Devolution of powers***

The question of the devolution of powers from the federal to the state level as a consequence of the recent jurisprudential line of the US Supreme Court, in particular following its ruling on the return of the abortion policy issues to the states<sup>1</sup> as well as its rulings concerning the legality of the COVID-19 measures introduced and enforced by the federal government<sup>2</sup>, was raised at

<sup>1</sup> US Supreme Court decision of 24 June 2022 in *Dobbs v. Jackson Women's Health Organization*

<sup>2</sup> US Supreme Court decision of January 13, 2022 in *NFIB v. OSHA* and in *Biden v. Missouri*.

all meetings in Washington. Members discussed with their American interlocutors about the reasons for the change of perspective of the US Supreme Court on the constitutional division of powers between the federal and state level, and its implications for the development of the constitutional order. These discussions were held against the European background provided by the recent developments related to the questioning of the principle of the primacy of the EU law by the constitutional and supreme courts of several Member States. Debates included the comparison of the American and European judicial supremacy and their constitutional limits, as well as the possibility of correcting the legal shortcomings by means of amending the US constitution and EU treaties. The interlocutors offered different perspective to the questions raised by the Members in particular in explaining the reasons for the recent jurisprudential trend of the Supreme Court, which empowers the states against the federal government. The members of the judiciary and the solicitor general (as well as the representatives of the Heritage foundation) pointed to the objective reasons like the choice of the methodology applied in the rulings, which belongs to the full discretion of the justices. The current methodology used by the majority of justices goes back to the roots of the US state when the cooperation of states under the federation was favoured, and it results in the restoration of the powers of the states against federal primacy. The underlying concept is that the states are separate sources of rights and their constitutions can provide even more rights for the citizens than the federal level. This explanation was supported by the argument that the states have been recently powered by considerable amounts of funds to manage the consequences of the crises like the COVID-19 pandemic, and naturally, this is expected to be followed by their empowerment in legal terms. The Members of the Congress from the Democratic Party, as well as the progressive think tanks presented a more critical approach and raised the problem of the politicisation of the Supreme Court, which results in the court decisions that favour interests of the Republican Party. They provided an overview of the recent proposals aiming at reforming the statute of the Supreme Court to address its excessive politicisation and restore citizens' trust. The proposals suggest among others to introduce term of office limit of 18 years, increase the number of justices by four and introduce transparency of donations.

Concerning the idea of anchoring the concept of the primacy of the federal law in the constitution, the interlocutors explained that this is impossible given the specifics of the US federal system, where the states are laboratories of democracy, and as such often give rise to solutions that serve as best practices followed later at the federal level. This bottom up modification of the constitutional practices is supported by the lack of language difference, high degree of uniformity between the states and the union culture.

All interlocutors underlined that according to the US legal order and traditions the problems of a constitutional character should not be addressed by amending of the US constitution but by means of the ordinary legislation. Some pointed to the problem of the complexity of the decision making in the Congress due to the two party system, which results in the fundamental matters being brought to the Supreme Court and decided there. The Solicitor General highlighted though that from the perspective of her office the unresolved issues under Article III - Judicial Branch of the US constitution would require revision, namely with regard to the types of injuries that justify the states to sue the federal state and the types of remedies available.

### *Ethics*

The *ad hoc* delegation of the AFCO committee to Washington took place in the midst of a public debate concerning the need for an enforceable code of ethics for the US Supreme Court.

Therefore, discussions in Washington touched upon the issues related to the code of ethics applicable to the office holders in all three branches of power, in particular to the judiciary and especially to the US Supreme Court. These subjects were discussed in detail with the representatives of think tanks and Members of Congress, especially with Senator Sheldon Whitehouse, who sponsored the “Supreme Court Ethics, Recusal, and Transparency Act of 2023”, introduced in August 2023. This bill foresees introducing an ethics code for the Supreme Court and establishing procedures for overseeing compliance with this ethics code. It also aims at expanding disclosure requirements, and make recusal broader and more heavily encouraged in situations where there may be a conflict of interest.

Members took also the opportunity to discuss with their US counterparts about the investigative powers of the US Congress in comparison to the powers of the EP inquiry committees. This subject was discussed in details in particular with the Congressman Glen Ivy, who is a ranking Member (the equivalent of minority 'Vice-Chair') of the Subcommittee on Oversight, Investigations, and Accountability of the US House of Representatives.

#### *Other subjects*

Other subjects raised during the meetings included the internal politics of the United States, prospects of the US and European elections both scheduled to take place in 2024, as well as different aspects of the transatlantic relations.

#### ***Ottawa (Canada)***

##### *Ethics*

The transparency and ethics of the legislative process in Canada was discussed during the meetings with the Commissioner of Conflict of Interest and Ethics of Canada and the Commissioner of Lobbying of Canada, who explained the Canada’s federal lobbying and ethics regimes, as well as with the representatives of non-governmental organisations, think tanks and academia, who presented their assessment of the functioning in practice of both regimes.

Canada has a strong tradition of transparency in its legislative process, which constitutes an important aspect of the country's democratic system. It involves the federal, provincial and territorial level of the government, each with its own procedures. The Offices of the Commissioner of Lobbying of Canada and the Commissioner of Conflict of Interest and Ethics of Canada contribute to the transparency of the federal government.

The Conflict of Interest and Ethics Commissioner of Canada is an independent officer (accountable directly to the House of Commons) responsible for upholding ethical standards and addressing conflicts of interest within the elected members of the federal government by means of the *Conflict of interest code for Members of the House of Commons* and within the appointed public office holders in the federal government (including Senators) by means of the *Conflict of Interests Act*. The aim of both ethics regimes is to preserve the integrity of the federal public institutions by administering rules that the regulatees must follow, minimising the possibility of conflicts of interest and reporting on regulatees’ compliance. Although both laws set out the same types of rules on: conflict of interests; requirements on the disclosure of information about the assets, liabilities and activities as well as the enforcement powers of the Commissioner, these rules differ with regard to the type of the office holders. For example with regard to the appointed office holders there are rules on post-employment and the

Commissioner can impose penalties for failure to disclose or can order compliance, following the investigation. Whereas, with regard to the elected office holders the Commissioner can only recommend sanctions following an investigation, for the decision of the ETHI committee of the House of Commons. All in all the role of the Office of the Conflict of Interest and Ethics Commissioner is to encourage the culture of integrity and the whole regime is concentrated on the disclosure, education and information.

The Commissioner of Lobbying of Canada is an independent Agent of the Parliament responsible for regulating lobbying at the federal level. She is responsible for administering of *the Lobbying Act* (2008) and the *Lobbyists' Code of Conduct* (2023). The key functions and roles of the Office of the Commissioner for Lobbying include also: maintaining the Registry of Lobbyists (ca. 8000 entities), education to increase awareness and understanding of the rules governing the lobbying activities at the federal level and compliance work to ensure the lobbying regime is respected. The Commissioner has investigative powers in the same manner and to the same extend as a superior court (summoning witnesses, compelling production of documents and compelling evidence under oath). She has the authority to impose sanctions and penalties on lobbyists who violate the *Lobbying Act* or the *Lobbyists' Code of Conduct*. The primary goal of the Commissioner's office is to enhance transparency in government decision-making processes and ensure that lobbying is conducted in an ethical and accountable manner.

Unlike in the EU, in Canada the reporting requirement concerning the meetings lies with the lobbyists and not with the office holders. According to the Commissioner, the reason for this solution is to avoid adding a burden on the public administration. However, the question on whether the office holder should also be required to report on meetings with lobbyists occur in the debates on the potential reforms of the regime.

From the practical point of view, the federal level legislation on lobbying, transparency and ethics is robust, but its enforcements seems to be week. Some possible reasons for that are among others: no strong enforcement power of the Commissioners and their offices, minor penalties foreseen in the legal acts, loopholes in the legislation, no priority given to the offences of the lobbying, transparency and ethics legislation by the policing authorities.

#### *Other subjects*

Additionally, the question of the investigative powers of the Canadian parliament, in particular in comparison to the powers of the EP inquiry committees were also discussed during the meetings in Ottawa. Other subjects raised included the internal politics of the Canada, relations between the federal level and the provinces, prospects of the European elections in 2024 and elections in Canada in 2025, as well as different aspects of the EU-Canada relations. These issues were discussed mainly during the meetings with the Members of the Canada - EU Parliamentary Association of the Canadian Parliament and with the Ambassadors of the Member States and of the EU in Canada.

#### *Conclusions*

The discussions that the Members had with their interlocutors gave precious insights into:

- the US constitutional order, in particular with regard to the relationship between the federal and state law following the recent jurisprudential line of the Supreme Court;

- ethical regime applicable to the office holders in the US federal administration, especially to the US Supreme Court;
- the transparency and ethics of the legislative process in Canada, particularly with regard to the federal level.

The main takeaways of the *ad hoc* delegation are as follows:

- The exchanges in Washington revealed considerable differences between the US and the EU in: the supremacy struggles; the tendencies of the devolution of powers from the federal to the states level; and in the approach to amending the legal foundations as means to address the new challenges. The discussions displayed also an importance of having a robust ethical regime covering all branches of powers, including the highest level of the judicial system.
- The meetings held in Ottawa showed that the federal legislation on the lobbying in Canada is based on the conviction that free and open access to the government is important, and lobbying is a legitimate activity; knowing who is engaged in the lobbying activity is desirable and registration should not impede access to the government. A long and strong culture of the transparency of the legislative process prevents conflict of interests and maintains public trust. There are different regimes for the conflict of interest and ethics and for the lobbying. Additionally there are no unified rules across the country, since the provinces have their own regimes. This begs the analogy with the European Union, where the EU transparency register rules cover the three EU institutions but not Members of the Council, who are bound by their national transparency rules. As opposed to the EU's rules, in Canada reporting requirements on the meetings with the representatives of the public administration lies with the lobbyists and not with the office holders. The Canadian legislation on the transparency, ethics, conflict of interest and lobbying is robust. However, the enforcement of these rules seems to be weak.
- Discussions in both Washington and Ottawa offered an interesting perspective with regard to the areas of competence of the Committee on Constitutional Affairs, in particular on the: implementing of the treaty provisions on the primacy of EU law; European Parliament's proposals for treaty changes; interinstitutional negotiations on establishing of the EU ethics body, review of the implementing measures on the transparency register; implementing of the amendments to Parliament's Rules of Procedure with a view to strengthening integrity, independence and accountability. The information gathered will serve as input to the present and future work of AFCO.
- The visits constituted a welcome opportunity to resume and continue the dialogue between the AFCO committee and the US and Canadian administration and judiciary, which had last been organised in 2018 and 2017 respectively. It might be beneficial for all sides if such encounters could take place more frequently.





**FINAL PROGRAMME of the *ad hoc* delegation of the Committee on Constitutional Affairs (AFCO) to Washington DC (USA) and Ottawa (Canada) on 30 October - 3 November 2023**

**Monday, 30 October 2023**

17:00- 20:00	Welcome by <b>Walter Goetz</b> , Head of European Parliament Liaison Office in Washington DC and briefing by <b>Michael Curtis, Deputy Head of Delegation the European Union to the United States of America</b> (jointly with other committee delegations visiting Washington: FISC, SANT, IMCO)  Followed by the <b>EPLO reception for visiting committee delegations</b>
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**Tuesday, 31 October 2023**

8:15 - 9:00	Meeting with <b>Judge Richard Taranto, US Court of Appeals for the Federal Circuit</b>
9:15 - 10:15	Meeting with <b>Dan Weiner, Director of Elections and Government Program in the Brennan Center for Justice</b>
11:00 - 11:45	Meeting with the <b>Constitutional Accountability Center: President Elizabeth B. Wydra and Vice President Praveen Fernandes</b>
12:00 - 12:45	Meeting with the <b>Heritage Foundation: Giancarlo Canaparo, Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies</b>
14:00 - 15:00	Meeting with top officials of the <b>US Supreme Court: Chief Justice Counselor - Judge Robert M. “Bob” Dow Jr.; Clerk - Scott Harris and Reporter of Decisions - Rebecca A. Womeldorf</b>
16:00 - 17:00	Meeting with <b>US Solicitor General Elizabeth Prelogar</b>
17:30 - 18:00	Meeting with <b>Senator Sheldon Whitehouse (D-Rhode Island)</b>

**Wednesday, 1 November 2023**

9:00 - 10:00	<b>Meeting with House Representative Glenn Ivey (D-Maryland)</b>
12:50 - 14:31	Flight from Washington DC to Ottawa
15:15 - 16:15	Briefing by <b>Christian Burgsmüller, Deputy Head of the Delegation of the European Union to Canada</b>

16:30 - 18:30	Meeting with <b>Members of the Standing Committee on Access to Information, Privacy and Ethics, House of Commons, Parliament of Canada</b> - cancelled
19:00 - 20:30	Dinner at the residence of the European Union Ambassador <b>Melita Gabrič</b> with <b>Members of the Canada - EU Parliamentary Association</b> and <b>EU Heads of Mission of represented EU Member States</b>

**Thursday, 2 November 2023**

9:30 - 11:00	Meeting with the <b>Commissioner of Lobbying - Nancy Bélanger</b> and the <b>Conflict of Interest and Ethics Interim Commissioner - The Honourable Konrad Winrich von Finckenstein</b>
11:00 - 12:30	<b>Roundtable discussion with practitioners: Karl Salgo</b> – senior advisor in the Institute on Governance; <b>Guy Giorno</b> - lawyer in private practice, head of the Government Ethics, Transparency and Political Law practice group at Fasken and <b>Noah Arshinoff</b> – Interim Executive Director in the Transparency International Canada
13:30 - 15:00	<b>Lunch</b> (own expenses)