

## Minutes of the ELI Council Meeting 23–24 February 2023

**Venue:** Faculty of Law of the University of Vienna, Schottenbastei 10–16, 1010, Vienna, Austria

### **Present:**

**Chair:** Pichonnaz, Pascal (ELI President)

### **Council Members**

Anagnostopoulou, Despoina  
Başoğlu, Başak  
Bachmaier, Lorena  
Bechaalany, Sarah (proxy for Fountoulakis, Christiana)  
Bielska-Sobkowicz, Teresa  
Calderai Valentina  
Gimeno-Ribes, Miguel (proxy for Shirvindt, Andrey (first two hours on 23 February); then de Pretis, Daria)  
Guercio, Laura  
Howells, Geraint (proxy for Twigg-Flesner, Christian as of 11:00 on 24 February)  
Jiménez Muñoz, Francisco Javier  
Josipovic, Tatjana (proxy for Tot, Ivan)  
Kramer, Xandra  
Lehmann, Matthias  
Machnikowski, Piotr (proxy for Santos Silva, Marta on 23 February 2023)

Malberti, Corrado (proxy for Povlakic, Meliha)  
Maugeri, Marisaria (proxy for Grasso, Gianluca)  
Neumayr, Matthias (proxy for Koch, Bernhard A)  
Patti, Francesco Paolo  
Pocar, Fausto (proxy for Bray, Robert)  
Pozzo, Barbara  
Pretelli, Ilaria (proxy for Tremosa, François)  
Rodríguez de las Heras Ballell, Teresa (proxy for Busch, Christoph)  
Santos Silva, Marta  
Scherpe, Jens (proxy for Forschner, Julius)  
Schroeter, Ulrich (proxy for Anderson, Ross)  
Shirvindt, Andrey  
Szabados, Tamás  
Vos, Sir Geoffrey  
Wiewiorówska-Domagalska, Aneta (proxy for Zoll, Fryderyk)

### **Ex-Officio Council Members**

Pichonnaz, Pascal  
Gammeljord, Anne Birgitte (proxy for Zlatescu, Irina)  
Lord Thomas, John (proxy for Gilligan, Paul)

Sirena, Pietro  
Senior Advisor/Project Leader of the European Land Registry Association (ELRA), Manfred Buric

### **Senate**

Zimmermann, Reinhard (Speaker of the ELI Senate)

### **Observers**

Tirado, Ignacio (on behalf of UNIDROIT)

### **Other Attendees**

Ahmed, Masood (remotely, for the part on the Digitalisation of Justice Systems project)

Doralt, Walter (for the part on the ELI Young Lawyers Award)

Heijning, Sabine (remotely, for the part on the Innovation Paper)

Klip, André (remotely, for the part on the E-Evidence project)

Minkjan, Lineke (remotely, for the part on the Innovation Paper)

Nicolicchia, Fabio (remotely, for the part on the Corporate Criminal Liability in the EU project)

Novak, Jiri (remotely, for the part on the Digitalisation of Justice Systems project)

Nowak, Celina (remotely, for the part on the Corporate Criminal Liability in the EU project)

Reiling, Dory (remotely, for the part on the Digitalisation of Justice Systems project)

Salimi, Farsam (in person, for the part on the E-Evidence project)

Wendehorst, Christiane (ELI Scientific Director)

Zalar, Boštjan (remotely, for the part on the Detention project)

### **Members of the ELI Secretariat**

Wilcox, Vanessa

Dudek, Tomasz (keeper of the minutes)

Duzel, Lucija

Fačková, Zuzana

Ivanova, Viktoriia

Klonner, Matthias

Kolman, Katja (keeper of the minutes)

Papasodaro, Laura

The meeting commenced at 11:05 CET.

#### **I. Opening and Welcome**

- (1) President Pichonnaz welcomed the participants and, among other things, expressed his sympathies with everyone affected by the devastating earthquake and aftershocks across Southern Turkey and Northern Syria.
- (2) He also reflected on the anniversary of the Russian invasion of Ukraine and expressed his solidarity with ELI Members from Ukraine.

#### **II. Approval of the Agenda**

- (3) **The agenda was approved.**

#### **III. Report from the President and Executive Committee**

- (4) Pichonnaz reported about his (upcoming) meetings with ELI Institutional Members. He praised ELI's excellent cooperation with the American Law Institute (ALI), which, among other things, produced the ALI-ELI Principles for a Data Economy. A further joint project is currently being discussed with the ALI.
- (5) He also pointed out that the Executive recently took several decisions on enhanced benefits for ELI Members.

#### **IV. Report from the Treasurer**

- (6) Pietro Sirena provided an update on the 2022 budget execution. He pointed out that ELI is expected to close the financial year with a positive balance. However, the Institute should remain mindful of its prospective financial situation in light of expected in-person meetings, now that the pandemic is under control. ELI therefore needs to stay further committed to fundraising.
- (7) He went on to present three proposals concerning outstanding Membership fees, namely to:
  - cancel the Memberships of those with outstanding fees of three and more years **(the Council unanimously approved the proposal (39 votes in favour))**.
  - send another payment reminder to individuals with outstanding fees of two years; their Memberships will be terminated should they fail to pay **(the Council unanimously approved the proposal (37 votes in favour))**.
  - write off outstanding debts of Ukrainian Members as well as refrain from issuing Membership invoices to Ukrainian Members so long as the war continues **(the Council unanimously approved all three proposals (39 votes in favour))**.

## **V. Report of the Membership Committee**

- (8) Teresa Rodríguez de las Heras Ballell presented the above report. She pointed out that ELI's Membership has seen an increase of 6% since the first meeting of the current Membership Committee in September 2021. She emphasised the importance of ensuring that ELI Members are involved in ELI activities. The Membership Committee therefore discussed many proposals to this end at length. The Executive Committee adopted several of them, as developed by the Secretariat, at its last meeting, including the idea of organising an online ELI Members Day.

## **VI. Signing of the Second Memorandum of Understanding (MoU) with UNIDROIT**

- (9) President Pichonnaz pointed out that the ELI-UNIDROIT MoU is an enlarged and renewed cooperation agreement between the two parties which will enable them, among other things, to mutually participate as observers in project meetings and governing bodies' sessions. He congratulated UNIDROIT for all its work and for its achievements, which are fundamental for legal developments in Europe and beyond.
- (10) UNIDROIT Secretary-General Ignacio Tirado reflected on the cooperation with ELI since the first MoU between the two organisations was signed. He commended ELI both for its achievements and practical guidance. He praised the cooperation on the ELI-UNIDROIT Model European Rules of Civil Procedure and expressed his hopes that this 'cross-fertilisation' will continue in the future.
- (11) The speeches were followed by the official signing ceremony.

## **VII. Admissibility of E-Evidence in Criminal Proceedings in the EU**

- (12) Project Co-Reporters Lorena Bachmaier Winter and Farsam Salimi presented the 'Draft Legislative Proposal of the European Law Institute for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings', which had been revised since the discussion held at the ELI Council meeting in September 2022.
- (13) This was followed by a discussion with Council Members, during which the distinction between electronic and digital evidence, the issue of whether 'disproving' a fact is correct, the process of obtaining electronic evidence, the distinction between constitutional principles/fundamental constitutional principles were discussed, among others. It was also suggested to align the vocabulary used in the draft further with Directive 2013/48/EU and to revise the text in Article 7(3) of the Draft to align it with the style of Article 7(1) (using 'only if' instead of double negation). Members also discussed cross-border aspects, a possible reference to the proposed framework regulation on digitization of judicial cooperation, the relationship between the general rules on evidence and rules on electronic evidence, and the distinction between 'common standards' and 'minimum rules'.

- (14) **The Council unanimously adopted the Draft Legislative Proposal under the usual editorial prerogatives and the Philippe motion, ie subject to the condition that Article 7(3) is revised to align it to the drafting style in Article 7(1). The Reporters can decide whether they wish to opt for ‘constitutional principles’ or ‘fundamental constitutional principles’ in Article 4(1). The decision on the latter should be applied consistently throughout the text.**

#### **VIII. Access to Digital Assets: Enforcement**

- (15) Project Co-Reporter Teresa Rodríguez de las Heras Ballell presented the progress made and the most recent draft output, pointing out the need to coordinate the work of the project with UNIDROIT, which is currently conducting a project on Digital Assets and Private Law, as well as other initiatives in the field.
- (16) Council Members welcomed the overall progress of the project. During discussion, among other things, it was considered necessary to clearly indicate any differences in the definition of digital assets used in the present output, compared to the previous instalment of the project on securities, as well as to generally ensure good coordination between this and other ELI projects. It was also suggested to re-consider the notion of ‘value’ used, to further elaborate on the role of intermediaries, and to move Principle 4 to the start of the draft. An adjustment in the wording on Principle 6 was suggested. The team was also invited to consider issues connected to stablecoins, enforcement of cryptocurrencies on chain (without intermediaries) and developments in the US and UK (case *Tulip Trading v Bitcoin Association*). The level of abstraction and scope of the Principles as well as their possible alignment with existing regulations and proposals were considered. The team was invited to consider whether *lex fori* in Principles 4 and 5 will work in light of different approaches being adopted by countries.
- (17) Rodríguez de las Heras Ballell thanked Council Members for their comments, which will be incorporated following discussions with the team.
- (18) The Executive welcomed a possible extension of the project until September 2023, should the team consider it helpful.

#### **IX. Guiding Principles and Model Rules on Algorithmic Contracts**

- (19) Project Co-Reporter Teresa Rodríguez de las Heras Ballell presented the progress made to date. She also presented the draft Guiding Principles, expected to be adopted at the end of the project, as well as an illustration from the interim report on the algorithmic decision-making (ADM) readiness test, expected to be ready in summer 2023.
- (20) During discussions, among other aspects the level of consumer protection in this new (anticipated) legal reality of ADM was considered, both with a view to protecting and empowering consumers. In this context, it was said that the right to object and the role of producers of such

technology should also be considered. A question about whether agency law was appropriate to describe the role of ADM systems was raised. The team should also consider if the nature of such contracts corresponds more to an exchange of promises instead of to a meeting of the minds, and its consequences. The methodology and coordination with general concepts of contract law were discussed. It was also considered whether to split up the work further, with the first instalment identifying the key issues without suggesting alternative solutions yet. It was agreed to include further Principles where appropriate. It was suggested to further consider sustainability aspects.

#### **X. Update of the ELI Report on ELI Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards**

- (21) Boštjan Zalar, Reporter of the above ELI project which was completed in September 2017, presented the proposal for an update of the Report. The update would entail the inclusion of the new case law of the European Court of Human Rights and the Court of Justice of the European Union that emerged since the report's publication, with a view to providing up-to-date guidance to practitioners. **The Council was unanimously in favour of the update (48 votes in favour).**

The meeting recommenced on 24 February at 09:00 CET.

#### **XI. ELI Council Elections: Nominate Members of the Executive Committee**

- (22) Reinhard Zimmermann, Speaker of the Senate and Returning Officer, explained that the Council elects four nominate and three innominate Executive Committee members. The former are elected in February of the elections year, so that they can prepare themselves before taking office in September. He said that the Search Committee put forward Pascal Pichonnaz for the President, Anne Birgitte Gammeljord for the First Vice-President, Sir Geoffrey Vos for the Second Vice-President and Pietro Sirena for Treasurer. The Council was invited to suggest further nominations. As no nominations came in, there was one candidate per position.
- (23) The candidates presented themselves, following which Council members proceeded to cast their ballots.

#### **XII. ELI Principles on the Digitalisation of Civil Justice Systems in Europe Proposal**

- (24) This project proposal originated from ELI High Level Expert Group meetings on Digitalisation of Justice Systems organised on 13 and 29 April 2022 and chaired by Lord Thomas. Proposers, Xandra Kramer, Dory Reiling, Jiri Novak and Masood Ahmed presented the project proposal and the feasibility study.
- (25) Discussion in the Council followed. It was observed that the project has the potential to go beyond European Commission for the Efficiency of Justice's (CEPEJ) Guidelines. It was advised to expand the scope to include Alternative Dispute Resolution (ADR) methods and the experiences of countries such as Brazil or China in the analysis.

- (26) **The Council unanimously adopted the project and gave the Executive Committee and the Scientific Director the mandate to clarify the project’s scope, structure and timeline with the Reporters (41 in favour).**

### **XIII. Corporate Criminal Liability in the European Union Proposal**

- (27) This project proposal originated from ELI High Level Expert Group meeting on Corporate Criminal Liability organised on 16 December 2020. Proposers, Celina Nowak and Fabio Nicolichia presented their project proposal and the feasibility study. They also informed those present that they successfully applied for a European Anti-Fraud Office (OLAF) grant, under which the project should commence in March 2023 and end within 24 months.
- (28) The Council was appreciative of the project and congratulated the proposers on receiving the grant. It was noted that the ELI’s project might take longer than 24 months. It should also make reference to other ELI’s output in the field, such as the Report on Business and Human Rights and the Report on Ecocide. The project should also, in its ELI phase, take into account non-EU Member States.
- (29) **The Council unanimously adopted the project and gave the Reporters 36 months to complete it. In addition to the appointments below, Ilaria Pretelli and Fausto Pocar (the latter as an Assessor) were added to the Advisory Committee to ensure other ELI output in the field is taken into account in the development of the project (48 in favour).**

### **XIV. Appointment of Assessors**

- (30) Ewa Bagińska and Barbara Pozzo were appointed Assessors for the Climate Justice – New Challenges for Law and Judges project; Lorena Bachmaier Winter (MCC Chair), Teresa Bielska-Sobkowicz, Matthias Neumayer and Sir Geoffrey Vos were appointed as Assessors for the ELI Principles on the Digitalisation of Civil Justice Systems in Europe project; Lorena Bachmaier Winter, Paul Craig, Pietro Sirena and Miguel Gimeno Ribes (MCC Chair) were appointed as Assessors for the Corporate Criminal Liability in the European Union project; and Laura Guercio, Sir Geoffrey Vos and Irina Zlatescu were appointed as Assessors for the Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards project.

### **XV. Draft Innovation Paper**

- (31) Pascal Pichonnaz explained that a paper by ELI Members Sabine Heijning and Lineke Minkjan on Cohabitation in Europe was selected as the next ELI Innovation Paper following the call. The Authors presented their tentative Draft. A revised version will be submitted to ELI Membership for consultation on 24 March 2023 and the final version should be submitted for the Council vote at its July 2023 meeting.
- (32) The Council was of the opinion that the topic is very interesting, but also very difficult. Among the issues that the authors were advised to focus on in their further work were the problem of the

choice of law and of applicable law. They were also asked to reconsider taking the Regulation on the property law of registered partnerships as a basis for their proposal as well as the terminology used (de facto relationships as opposed to cohabitation).

**XVI. ELI Young Lawyers Award (YLA)**

- (33) Walter Doralt, Chair of the YLA Jury, asked Council Members to disseminate the YLA flyer to promote the Award. He informed those present about the improvements made to the prize for 2023 and outlined ideas to further increase the attractiveness of the Award.

**XVII. Announcement of Elections Results**

- (34) After a recount of the vote following an administrative error, Reinhard Zimmermann announced the results: Pascal Pichonnaz was re-elected as President, Anne Birgitte Gammeljord was elected as First Vice-President, Sir Geoffrey Vos was elected as Second Vice-President, and Pietro Sirena was re-elected as Treasurer. They all accepted their elections.

**XVIII. Any other business**

- (35) Pascal Pichonnaz thanked Executive Committee members, and in particular the Vice-Presidents, Lord Thomas and Anne Birgitte Gammeljord, ELI's Scientific Director, Christiane Wendehorst, and ELI's Secretary General, Vanessa Wilcox, as well as members of the Secretariat, Tomasz Dudek, Katja Kolman, Zuzana Vadehra, Laura Papasodaro, Lucija Duzel and Viktoriia Ivanova for their work. He also thanked Council members for taking the time to travel to Vienna for the meeting and for all their work and support.

The Council meeting ended at 12:10 CET.