

ELI Council Meeting 31 March – 1 April 2017, Hull

Minutes of the Council Meeting

University of Ferrara, Ferrara, Italy

7 September 2016

Present:

Chair: Wallis, Diana (*proxy for Wierzbowski, Marek*)

Council Members:

Alunaru, Christian
Avgerinos, Yannis
Azizi, Josef
Bargelli, Elena (*proxy for Iamiceli, Paola*)
Beale, Hugh
Caponi, Remo
Clément, Marc
Clough QC, Mark
Cvejić Jančić, Olga
Doralt, Walter (*proxy for Prunbauer-Glaser, Marcella*)
van Erp, Sjef
Fauvarque-Cosson, Bénédicte
Gernandt, Johan
Gilligan, Paul (*proxy for Philippe, Denis*)
Illescas-Ortiz, Rafael
Infantino, Marta
Jerez-Delgado, Carmen
Josipović, Tatjana
Király, Miklós
Malberti, Corrado
Možina, Damjan
Porchia, Ornella
Povlakić, Meliha
Ruda González, Albert (*proxy for Jiménez Muñoz, Francisco Javier*)
Sabato, Raffaele (*proxy for Cafaggi, Fabrizio*)
Schulte-Nölke, Hans
Schulze, Reiner
Sorabji, John (*proxy for Mader, Oliver*)

Stamelos, Harry
Storme, Matthias
Thomas, Lord John
Vervaele, John
Wendehorst, Christiane (*proxy for Graf von Westphalen, Friedrich*)
Zalar, Boštjan
Zlatescu, Irina

Ex-Officio Council Members:

Lewis, Alasdair
Pasqualis, Paolo
Vos, Geoffrey

Senate:

Jacobs, Sir Francis
Mance, Jonathan
Ramberg, Jan
Sauvé, Jean-Marc
Wymeersch, Eddy

Keepers of the minutes:

Garciandía, Rosana
Ólafsson, Daði
Šabanovič, Ala

Meeting started at 14:00.

I. Opening and welcome

- (1) Diana Wallis opened the meeting and welcomed those present.

II. Approval of the agenda

- (2) The agenda was approved.

III. Approval of minutes of the February 2016 Council meeting

- (3) The minutes were approved.

IV. Current projects

- (4) Lord Thomas presented the draft Statement of the European Law Institute on the European Commission's Proposed Directive on the Supply of Digital Content to Consumers (COM (2015) 634) and explained that the draft had been slightly amended in the last few days. Christiane Wendehorst presented the amendments to Council members, particularly concerning article 15, article 3, and an insertion of a reference to the General Data Protection Regulation and indicated that the relationship between the regulation and the proposal might warrant more attention at a later stage.
- (5) Hans Shulte-Nölke pointed out the need to discuss the next steps of the ELI in this field. Marc Clément wondered whether it would be possible to continue with this work within the online platforms project (to be presented by Hans Schulte-Nölke later in the meeting). Hugh Beale asked the Council whether the Project Team would be authorised to insert minor changes to the draft. He also wondered whether full harmonisation is actually the right path to go, and whether the ELI should stick to the technical approach or adopt a more strategic approach. He mentioned the Consumer Law REFIT as a field that could benefit from the contribution of the ELI.
- (6) Regarding the next steps, Lord Thomas suggested that the group should wait and see what happens at the EU level before taking any action. Diana Wallis pointed out that it might not be necessary to wait and see what happens. The ELI could be brave and tell the European institutions what its position on the matter is. The Council voted on the draft. It was approved with the amendments presented and Council members gave authority to the Project Team to insert minor changes after the panel discussions in Ferrara. **The Statement was approved.**

V. Potential projects

- (7) Proposal for a project on Online Intermediary Platforms: Hans Schulte-Nölke presented the proposal for this project. According to him, applicable law only regulates bilateral consumer-producer relations and now a triangular context needs to be considered for online platforms. He stated that some governments have tried to influence the European Commission to avoid

any regulation of this triangular context. He suggested that an ELI Instrument could thoroughly develop a model law on online intermediary platforms, setting out a balance between conflicting policy options, and demonstrating how such a regulation could look like. Some members of the Council pointed out, as the Executive Committee had already done in the annexes to the Agenda, that the project team needs to ensure diversity between academics and non-academics. Bénédicte Fauvarque-Cosson expressed her preference for “drafting principles” instead of a “draft Directive”. She also stated the need for the ELI to keep distance with all the EC projects and show that the Institute is thinking forward. She suggested that the ELI could start a new reflection on principles of contract law, in light of digital contract, data protection and online platforms. It could be an overarching instrument stating how the ELI sees the future in digital law, a more forward thinking exercise. Lord Thomas supported this view and encouraged the ELI to look again at what is the law applicable to the new digital market place. He added that this would be very different from the very focused projects, such as the one on online platforms.

- (8) Reiner Schulze highlighted the connection of this idea with the Digital Law SIG. Mark Clough pointed out the relevance of competition law in these matters. Eddy Wymeersch reminded members of the Council that a lot of work has already been done in B2C concerning online platforms in financial services and advised that the ELI looked into this. Hugh Beale supported the proposal for a project on online platforms and expressed the view that the project should not only aim at drafting a text in case the matter is to be regulated but also state the position of the ELI on whether it should or should not be regulated. Josef Azizi mentioned, as food for thought, the situation in some Member States when someone is trying to trade with an intermediary platform and the provider of the platform refuses to provide cross-border service to the consumer’s Member State. Rafael Illescas asked who this project is addressed to, who should make applicable law uniform, and wondered whether it would not be better to talk about preliminary rules. He also suggested keeping out B2B. Matthias Storme reminded that the distinction between B2B and B2C is blurring and expressed his doubts about a too strict distinction. He reminded the audience that the Lando Commission came to the conclusion some years ago that general contract law could fit for the digital law with only small changes. Hans Schulte-Nölke expressed his preference for model rules, while Hugh Beale preferred to stick to the current title. Alasdair Lewis suggested that this is adjusted depending on the outcome. The Council voted on the proposal and agreed that this project is to be developed as an adopted project under the auspices of the ELI, subject to changes in the Project Team and Advisory Committee that will guarantee diversity. **The project proposal was approved.**
- (9) **Proposal for a project on R & D tax incentives:** Georges Cavalier presented the proposal for this project that would aim at coordinating research and development tax incentives over the EU. Josef Azizi wondered if, as a side effect, harmonising tax rules would discourage enterprises from outsourcing to other Member States. Georges Cavalier clarified that the preliminary objective of the project would be to assess whether it is advisable or not to have harmonised

rules. Miklós Király asked about the competence of the EU on that matter. Walter Doralt expressed his view that it is a great fortune to have this proposal and would suggest involving state aid specialists, as the legal questions in this field of tax law are frequently touching upon state aid and face scrutiny on that level. He suggested considering the involvement of an economist. Georges Cavalier confirmed that this will be done. **The project proposal was approved.**

(10)**Proposal for a project on vulnerable adults:** Richard Frimston presented the idea for a project, explaining that, the day after the Council meeting, a panel session would take place as part of the ELI Annual Conference and that, after those discussions, a project proposal will be drafted and submitted to the consideration of the Council for approval. Bénédicte Fauvarque-Cosson asked whether the project would focus only on conflicts of law or would be broader. She pointed out that, if it is limited to conflicts of law, the existing international work should be kept in mind. If not, a problem of competence could be encountered in Europe. She highlighted that the advantage of the EU would be to give authority to the CJEU. Richard Frimston clarified that the project would focus more on the rights of a person than on family matters. According to Matthias Storme, this is an interesting and important project, more related to freedom of movement than related to family matters. **The Council expressed its support to this idea, looking forward to receiving the project proposal.**

(11)**Proposal for a joint ELI-ALI project on Data as Tradable Items and Currency in the 21st Century:** Christiane Wendehorst informed the Council of the preliminary talks with ALI representatives to ascertain whether it is possible to launch a joint project. The idea would be to set up a small project team in order to reduce costs (2 ALI reporters and 2 ELI reporters). The work of the US reporters would be to firstly look at existing ALI statements and then check what would need to be changed in order to adapt them to the new data economy. The ELI reporters would do the same with the existing EU legislation and/or with existing sets of principles. Ideally, at the end of this joint project the ELI and the ALI would come up with a set of transnational principles on how to deal with data in the existing legal systems. The potential ELI-ALI joint project would not look at digitalisation in general but at data. The timeline envisaged could be of around 3 years, with the first year focused on commercial and consumer contracts, including restitution; the second year concentrating on property, intellectual property and trust; and the third year concentrating on non-contractual obligations and litigation.

(12)Reiner Schulze commented that this is a huge project that might involve considering modification of existing law. Bénédicte Fauvarque-Cosson raised a question concerning the relationship between the ELI and ALI in this cooperation and asked whether the final product would constitute the rules for both Europeans and Americans and how the differences between the two sides (America and Europe) will be managed. Christiane Wendehorst confirmed that the ELI and the ALI will have calls and discussions on the cooperation and will

come back to the Council with a more concrete proposal in the upcoming weeks. Diana Wallis asked whether this project would preclude Bénédicte's idea to embark on a big project on digital law (see para. 7 of these minutes). Christiane Wendehorst saw two possibilities in this regard: one project could be included in the other, or two projects could coexist and inform each other. The ELI-ALI project would look at data, and the other project would look at digitalisation in general. **The Council expressed its support to this idea and gave the Executive Committee a mandate to continue negotiations.**

VI. Discussion on ELI general strategy for projects and annual conferences

(13) Christiane Wendehorst presented to the Council the strategy paper attached to the Agenda, which was based on the summary of the discussions held at various Council and other ELI meetings. She raised mainly three points: i) the format of upcoming ELI Annual Conferences; ii) the participation of the ELI in topical debates, its capacity to react quickly (i.a. in the context of "Brexit"); and iii) the format and methodology of ELI projects. The floor was opened to discussions.

(14) Harry Stamelos suggested that the ELI should follow what is going on and react. Josef Azizi stated that the ELI should act in two different stages: the first stage should be a general debate aimed at scrutinising problems and identifying areas of concrete action; the second stage would consist of launching particular projects on particular areas. There should be no contradiction between the two steps. According to Diana Wallis, the ELI may have things to say as a result of projects, but should not produce one press release every day. She would suggest organising a brainstorming event regarding the challenges facing Europe after Brexit, to identify the best possible contribution of the ELI in this respect. She also announced that **the ELI will have a Conference in Hull on digital issues on 30-31 March, coinciding with the next Council meeting.** The Executive Committee has already seen the need to capture the actuality and believes that the Institute has gained respect thanks to its neutrality, which should not be jeopardised.

(15) According to John Vervaele, the ELI should not intervene as a political group and should stick to its mandate. He mentioned consolidation and better regulation and saw room for contributions in that respect. He mentioned as an example the Criminal Law project, where several alternative scenarios have been presented and wondered why the ELI should make political choices. He suggested that the ELI should offer consistent possible solutions instead. He also indicated that the ELI needs to work further on its communication strategy, so that the results of its work are circulated to a broader audience. According to Harmut Wicke, the ELI should focus on project work and avoid political statements. According to him, the value that the ELI has provided is through the improvement of the quality of law in Europe and this should be the overwhelming principle and the focus of its work. It takes time and expertise to realise what the political issues are and how to deal with them. Therefore, the ELI should stick to producing thorough legal project work, and not become a legal forum; this might be a side effect, but not the focus. Regarding the communication strategy, he stated that it would be

desirable to communicate results of ELI projects in a better and more understandable way. He suggested that it might be worth considering establishing a pool of experts that could be contacted for the diverse topics. These experts could talk as “working for” the ELI but not “on behalf” of the ELI. He also suggested that in every Council meeting agenda an item is devoted to “strategy on ongoing political discussions”. Meliha Povlakic encouraged discussions in small groups, such as SIGs and working groups, because it is normally difficult to participate in discussions within a larger group.

- (16) Tatjana Josipović called for the need of more practical projects. According to her, for practitioners, existing EU law is more important than draft future legislation. Institutional Observers could be involved and projects would be more attractive to practitioners. This would also be a way of attracting more members and Institutional Observers. For Hans Schulte-Nölke, the standard for ELI projects should be to create a reference text, which no legislator in Europe working on the new law could ignore, with concrete time validity. According to him, on the list of ongoing ELI projects, there are some projects which have potential to be called “hallmark projects” where the ELI could do that. Concerning the challenge of “Brexit”, Mark Clough stated that one of the aims of the ELI should be to contribute to the improvement of the functioning of European institutions. This could be done by looking at how EU institutions work in the legal world. He said there might be a need to redefine the EU institutions in the *fide* sense and that it would be fantastic if the ELI would be able to do at least 1% of the work to be carried out.
- (17) Reiner Schulze clarified that the particularity of the Institute is its capacity as an organisation of lawyers and legal experts and that the ELI’s best possible contribution to deepen European integration is to improve European law. In this sense, he would suggest that the ELI embarks on projects on improvement of the European law that are independent from the Commission, which can be developed in 3-5 years. The ELI should ask itself the questions: “Why are we better? How are we better than European Bar associations or European governments?” According to him, the ELI should discuss its strategy. He reminded the Council that the Institute used to have a Projects Committee whose powers were transferred onto the Executive Committee, and he stressed that the Executive Committee should not only be a political body. He observed that the current structure of the ELI is very much focused on the Executive Committee and only a bit on the Council.
- (18) For Elena Bargelli, annual conferences should focus on projects, and be made as attractive as possible to non-members, i.e. by giving more space to projects which sound more “burning” or attractive to the public. She believes that the ELI has to remain a “technical” institution, with an improved communication policy. John Vervaele talked about the option of producing reports on some issues, encouraging smaller forums for discussion, such as SIGs or small working meetings. Paul Gilligan raised the issue of language in the context of the future of the EU.
- (19) Matthias Storme expressed his support to the opinion of Hans Schulte-Nölke and suggested that the ELI should stay away from “grande parole”, big statements, but stimulate members to

do something on their behalf. Bénédicte Fauvarque-Cosson suggested giving ELI Council members the opportunity to present a subject of their concern from the European perspective. A 5 minute presentation would allow members of the Council to know each other better from the intellectual perspective. Diana Wallis closed the item thanking Council members for the incredible discussion and great ideas and promising that the Executive Committee will consider them all while calibrating the next steps. Summing up, the Council expressed its support to continue progressing in the same direction, but working to communicate that better.

VII. Report on negotiations with OUP on ELI Journal

(20) Sjef van Erp updated the Council on the current state of play of the negotiations. Matthias Storme suggested that offers from other publishers should be heard, and called the attention of the Executive Committee on the importance of technical details of the negotiation, such as who owns the title, what is the minimum period to stay together or to communicate termination, the consequences of termination, IP rights, etc.

(21) Walter Doralt congratulated the Executive Committee for this promising concept and welcomed the indication that the Council will be given more detailed information. He would advise against an increase in membership fees to make the Journal financially sustainable. Bénédicte Fauvarque-Cosson also advised in favour of checking offers from other publishers, and supported the possibility of launching an open journal.

VIII. Any other business

(22) Walter Doralt raised two membership-related issues. Firstly, he informed the Council of a particular case where the Membership Committee (MC) would suggest to exceptionally wave an individual membership fee as established in the Statutes and asked the Council to give a mandate to the MC to wave or reduce membership fees temporarily, on an exceptional basis and providing sufficient documentation upon which a decision on the reduced membership fee can be taken. **The Council approved this.**

(23) Secondly, he presented a package deal that the MC had used for an institutional observer, which would allow members of that institutional observer to join the ELI as fellows at a slightly reduced rate that the institution would pay directly. He asked the Council for approval. **The Council approved this.**

Meeting ended at 18:20.