



Minutes of the ELI Council Meeting 1 September 2021, Remote

Venue: Remotely over Zoom

Present:

Chair: Wendehorst, Christiane (ELI President)

Council Members

Avgerinos, Yannis
Avolio, Francesco
Bargelli, Elena (proxy for Vervaele, John)
Bielska-Sobkowicz, Teresa
Biondi, Yuri
Bray, Robert (proxy for Guercio, Laura after 10:35 CET)
Busch, Christoph
Cavalier, George (proxy for Cotiga, Andra)
Clough, Mark QC
Cvejic Jancic, Olga
Dollani, Nada (proxy for Giannakoula, Athina)
Gimeno-Ribes, Miguel
Giubboni, Stefano
Graf von Westphalen, Friedrich
Guercio, Laura
Iamiceli, Paola
Josipović, Tatjana (proxy for Scherpe, Jens)
Keglevic Steffek, Ana

Klip, André
Malberti, Corrado (proxy for Biondi, Yuri after 10:55 CET)
McKechnie, William M
Moser, Philip QC
Neumayr, Matthias
Povlakic, Meliha
Pretelli, Ilaria
Rodríguez de las Heras Ballell, Teresa
Schroeter, Ulrich (proxy for Forschner, Julius until 11:50 CET)
Shirvindt, Andrey
Storme, Matthias (proxy for Schroeter, Ulrich after 11:50 CET)
Tremosa, François
Tuori, Kaius
Twigg-Flesner, Christian (proxy for Anderson, Ross)
Zalar, Aleš

Ex-Officio Council Members

Council of the Notariats of the European Union (CNUE), Susanne Krämer
International Union of Judicial Officers (UIHJ), Jos Uitdehaag
Lord Thomas, John
Philippe, Denis (proxy for Gammeljord, Anne Birgitte)

Pichonnaz, Pascal (proxy for Kaiafa-Gbandi, Maria)
President of the Council of Bars and Law Societies of Europe (CCBE), Margarete von Galen
Wendehorst, Christiane

Senate Members

Jacobs, Francis
Vékàs, Lajos

Other Attendees

Andersen, Henrik (for the part on Climate Justice)

Athanassiou, Phoebus (for the part on Digital Assests)

Jutilainen, Teemu (for the part on Digital Assests)

Nicolicchia, Fabio (for the part on Corporate Criminal Liability)

Nowak, Celina (for the part on Corporate

van Erp, Sjef (for the part on Digital Assests and Blockchain)

Members of the ELI Secretariat

Dudek, Tomasz (keeper of the minutes)

Fačková, Zuzana

Kolman, Katja

Wilcox, Vanessa

The meeting commenced at 09:00 CET.

I. Opening and Welcome

- (1) Wendehorst welcomed those present and thanked them for joining this Council meeting which she was chairing as the ELI President for the last time. She said it was an immense privilege to have been working with Council Members and to have been entrusted twice as ELI President. She thanked her colleagues in the Executive Committee, without whom ELI's achievement over the past four years would not have been possible. Some will remain in the Executive Committee, she added, meaning that ELI would be in good hands. Some, including Philippe, the Treasurer, who can no longer run, would not be in the next Executive Committee but she thanked him for ensuring that he is leaving ELI in a financially very positive state.
- (2) She said she was extremely grateful and proud of the Secretariat Team and that she was glad to have Wilcox back from maternity leave. She added that she was proud of ELI's Senior Officers, Dudek, Kolman and Fackova, who did an amazing job during Wilcox's maternity leave.

II. Approval of the Agenda

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

III. Approval of the Minutes of the Council Meeting of 5 July 2021

- (4) Lajos Vékàs, ELI Senate Member, congratulated Wendehorst and the staff for their work in the last two years, which in his view was excellent, in particular given the pandemic.
- (5) **The minutes were approved.**

IV. Report from the President and Executive Committee

- (6) Wendehorst highlighted four points from the above Report covering the period from February 2021. First, the Decennial Celebrations – organised online due to the pandemic. She informed those present that the event gathered important speakers, including Koen Lenaerts (President of the Court of Justice of the European Union (CJEU)), Robert Spano (President of the European Court of Human Rights (ECtHR)), Didier Reynders (European Commissioner for Justice) and Věra Jourová (Vice President of the European Commission for Values and Transparency) among others. She was grateful to the Secretariat for having arranged the event in that difficult time.
- (7) Second, she mentioned ELI's Membership database software which will streamline internal activities, in particular finances, membership management, the ways Members engage with ELI, etc. Prior to it being fully operational, it will be tested. She thanked Fačková for all the time she invested in developing this software with two external companies.
- (8) Third, she mentioned representation. The Executive, despite the pandemic, continued to reach out to other organisations, including ones on other continents, such as the Asian Law Institute and the Asian Business Law Institute. Other meetings with organisations on the Asian continent are forthcoming.

- (9) Fourth, she mentioned the 2022–2025 EU Framework Partnership Agreement. Thanks to Dudek, Kolman and Fačková, a successful application, which forms a basis for ELI to continue its work, was prepared, submitted and signed.

V. Report from the Treasurer

- (10) Philippe presented the accounts and stressed that ELI’s financial situation is much better in comparison to 2017 when he took office. This, to a great extent, was thanks to COVID. He said that the Council already approved the 2020 accounts and that they will be deposited at the Belgian National Bank shortly. He then gave an overview of the updated 2021 budget.
- (11) Philippe thanked the ELI staff and his colleagues in the ELI Executive. Fačková, in particular, was thanked for the terrific job she did.
- (12) Concerning 2022, Philippe presented two scenarios; ‘with’ and ‘without’ the EU Operating Grant. He was confident, he said, that ELI will receive the grant, in which case, along with the agreement with the University of Vienna and Membership fees, ELI would be comfortable financially. If ELI is not awarded the grant, staff and travel costs will have to be reduced. He added that the financial buffer (of EUR 145,000 that was built up since 2019) allows ELI to absorb the expenses of up to seven months.
- (13) Povlakic wondered why in both grant and no-grant scenarios some positions are fixed, while staff costs double under the grant scenario. She also wished to know if the Fritz Thyssen Foundation would continue supporting ELI.
- (14) Philippe explained that in case of a grant scenario, there will be more projects, and therefore more Project Officers would be needed.
- (15) Wendehorst clarified that the Fritz Thyssen Foundation does not provide institutional support to ELI, but supported a particular project (the Principles for a Data Economy). She sought that support as there was an agreement that the project could not receive money from ELI, given her position as (then) ELI Vice-President. She hoped Thyssen might be willing to support other projects in future.
- (16) Wendehorst thanked Philippe for ensuring that ELI is in a much better financial position.
- (17) **The 2022 budget forecast was unanimously approved.**

VI. Current ELI Projects

a) Principles for a Data Economy – Presentation of the Final Council Draft

- (18) Lord Thomas informed those present that since the last Council meeting, the text of the above project had now been finalised. The final output he said would be appropriately publicised (including in the form of a conference devoted to the Principles on 18–19 October 2021), and published (he explained that he was liaising with American Law Institute (ALI) in this regard).

- (19) As the European Commission is putting forward a public consultation on the Data Act, Lord Thomas said it seemed appropriate to respond to it on behalf of ELI, as opposed to the Reporters, as it took as its basis the ALI-ELI Principles for a Data Economy. However, the question on the authorship of the response to the consultation, as well as whether the project should be approved is a question for the Council.
- (20) Pichonnaz outlined the points in favour of the consultation response going out in ELI's name and added that the approach should not set a precedent where projects are in early stages. In the latter case, responses should be on behalf of Reporters, but in the case of the Principles for a Data Economy, this is a final product and a response might have a positive impact on dissemination. Bargelli supported this idea.
- (21) Pichonnaz went on to explain that there are some gaps in the response. In the ALI, the 'Boskey Motion' allows for an approval of a draft by the Council or Membership, subject to any requested changes to which the Reporter have agreed, or general non-substantive editorial changes in order to speed up the process, so that there is no need to get back to the Council with non-controversial revisions. As this was named after one of ALI's treasurers, he invited the Council to establish a 'Philippe Motion', to thank Philippe for the work he has done in improving ELI's financial position, given ELI was close to bankruptcy in 2017. This motion would mean that a draft is accepted subject to any requested changes to which the Reporters have agreed, to any motions that passed during the course of the meeting, as well as to any general, non-substantive edits to the commentary, illustrations or the black-letter Principles/rules that may be required before publication.
- (22) Where a vote has been taken by the Council, that question will clearly not be regarded as non-substantial.
- (23) **The 'Philippe Motion' was approved.**
- (24) **The Council agreed to the submission of the Project Team's response to the European Commission's public consultation on the Data Act in ELI's name.**
- (25) The project's Assessors went on to provide their evaluations of the Final Council Draft of the Principles for a Data Economy. Twigg-Flesner said that he considered the project excellent and concluded that the output would make a massive contribution to the development of data law. It will have an impact on Europe and internationally, including in common law jurisdictions. Keglevic-Steffek agreed. In her view the aims of the project were achieved and the output is of practical applicability. She was also impressed by the quality of Project Team meetings and the cooperation between ELI and ALI. She congratulated the Reporters and the whole Team. Pichonnaz also agreed and stressed that the work done is of incredible quality.
- (26) Wendehorst and Lord Thomas left the meeting. Following internal discussions, **the Council unanimously approved the Principles.**
- (27) Upon return, Wendehorst thanked the Council, Assessors, Members of the Advisory Committee and of the Members Consultative Committee for their support and guidance.

b) Freedom of Expression as a Common Constitutional Tradition in Europe

- (28) As Mario Comba and Riccardo de Caria had to cancel their participation in the Council meeting at short notice, Lord Thomas, one of the project's Assessors, explained that, in line with the Executive Committee's decision, he and the other Assessors will hold a meeting with the Reporters to discuss some final open matters in the draft. He hoped that the Final Draft would be ready for the upcoming Council meeting in December 2021.
- (29) Wendehorst thanked the Assessors and the Team for investing time in this project and for their work.

c) Access to Digital Assets (Use of Digital Assets as Security)

- (30) Wendehorst explained that the Council decided to publish the results of this project in instalments, as soon as they are available, as to wait for the full draft would mean that the project will not make the influence that was envisaged. The most advanced part is that on Digital Assets as Security, prepared by Phoebus Athanassiou, Teemu Juutilainen and Denis Philippe, under the guidance of Sjef van Erp and Jos Uitdehaag. The Council, she explained, had already received the draft of 9 July 2021 and had provided helpful comments. The Team revised the draft and went on to submit the current draft of 27 August 2021.

Sjef van Erp, Phoebus Athanassiou and Teemu Juutilainen joined the meeting at 10:30.

- (31) Wendehorst thanked the Team for being responsive to the Council's comments and for having prepared the revised draft within a short timeframe.
- (32) Van Erp explained that work on enforcement and succession will begin soon, following which he passed the floor to Athanassiou. Athanassiou presented the overall approach the Team took, which is pragmatic and commercially minded. The Project Team sought to provide guidance that private parties and those adjudicating disputes between them can easily follow, so that the use of digital assets as security and the realisation of their considerable economic potential could be facilitated. It opted for the combination of substantive and conflict of laws rules in the draft. Concerning the definition of digital assets which is notoriously difficult to pin down given the elusive nature of such assets and the constant evolution in this field, the Project Team preferred to identify the core characteristics of assets that qualify as digital, such as intangibility, they being of measurable value, they being capable of substantial control, etc, instead of proposing an exhaustive list of assets qualifying as digital assets. Juutilainen then explained the conflict of laws aspect of the draft. Among other things, the Team agreed to implement the points made by the Assessors.
- (33) Pretelli congratulated the Team and agreed with the solutions they provided. She wondered, among other things, whether there is a need to protect consumers and other weaker parties. She also wondered who the target audience of the rules was. Other comments and questions followed.
- (34) Athanassiou explained that the notion of uncontrollability was considered, but dropped, to facilitate private contracting party autonomy and as this is in line with the overall commercial approach of the rules and the manner in which digital assets would be most likely used as security. Juutilainen added that consumer aspects were not really dealt with as the conflict of law rules proposed are

concerned with property law aspects and whatever is proposed in the rules cannot supersede current law; contractual rules are included in the Rome I Regulation. He added that the Team sees the Principles as a source of inspiration for the conclusion of private agreements.

- (35) Bargelli suggested more illustrations or examples of practical implications of Principles in this and all ELI reports, so that it is easier for readers to understand them.
- (36) Among other things, it was also suggested the target of the report be clarified, as currently it is not sufficiently clear whether it is addressed to policy makers or contracting parties.

Sjef van Erp, Phoebus Athanassiou and Teemu Juutilainen were moved to the waiting room at 11:10 CET.

- (37) An internal discussion followed. It was advised that illustrations as well as further elaborations on the operation of the Principles should be added, which would help readers to understand the report. Further clarification as to the target audience of the Principles was also agreed. The Team should also elaborate more on some policy choices made, in particular when they differ from the work of other stakeholders in the field, and explain in more detail whether there is a need to protect consumers and other weaker parties.
- (38) **In light of the various points raised in closed discussions, the Council gave a mandate to the Executive Committee to guide the Project Team, in cooperation with the Assessors, in the finalisation of the project, with a view to putting it to a Council vote in December 2021.**

Sjef van Erp, Phoebus Athanassiou and Teemu Juutilainen joined the meeting again at 11:30 CET.

- (39) Wendehorst informed the above about the Council's decision.

d) Blockchain Technology and Smart Contracts

- (40) Van Erp explained that the Principles were ready to be submitted to the Council, but that he and Hanzl were contacted by the European Commission which requested that the project also looks into consumer protection aspects. In order to have impact, this would have to be finalised at the beginning of 2022. Following discussions with the Executive Committee, a decision was taken to add consumer protection aspects to the existing Principles. The Reporters are working on this.
- (41) Wendehorst added that indeed it would have been impossible to start a separate project. It was agreed that the results will be submitted for the February 2022 Council meeting at the latest and should matters develop differently, the current file would still be available to vote upon in February.
- (42) The Assessors provided their assessment. Busch welcomed the innovative features of this project, including the close link between standardisation work on blockchains by the International Organisation for Standardization and the legal aspects. He advised the Team to elaborate more on unwinding transactions (principle 12) and provide more examples or illustrations in the explanatory notes. He thought the character of the project would change if consumer aspects are taken into consideration, which is not a bad thing, and revealed that in the new draft guidance for the Consumer Rights Directive there is an explicit reference to blockchain technology and smart

contracts. He opined that this Directive should apply to smart contracts, but there is a gap in this regard currently, which ELI should fill. Van Erp responded to the above.

- (43) Rodríguez de las Heras Ballell thanked the Team for preparing the draft. She suggested the wording be refined to ensure terms are used consistently and to provide illustrations only in comments (as opposed to in the Principles). She also provided further specific comments with regard to some of the Principles.
- (44) Wendehorst thanked the Team and Assessors and said she looked forward to the final product in February 2022.

e) **Ecocide**

- (45) Bray presented developments in the project.
- (46) Klip, an Assessor, advised the drafters to formulate the proposed crime more precisely. Issues relating to substantive criminal law, including the elements of the crime (what legal good is protected and what kind of intent or negligence is required). He emphasised the difficulties in defining the crime of ecocide given jurisdictional and causal issues, for instance the act could take place in one country, and the consequences appear in another. The same goes with lapse of time; the act could take place now, but the consequences might appear decades later. This temporal matter is a serious one that also relates to the issue of intent and causality. Can the crime be committed by one individual or jointly by several? Causality is an issue as it relates, inter alia, to criminal responsibility; not only to evidence. The above are the first questions to pose.
- (47) Klip believed that ELI should come up with a manual or a model law that could be applicable in Europe rather than simply copy the work of the Sands Group. So there is no need to wait for the Group's work. He also noted some contradictions in the project, namely that on the one hand corporate criminal liability is not being dealt with, while at the same time the Team wishes to reflect on conspiracy and the funding of ecocide, without knowing what the crime looks like. That ecocide can be handled by administrative law with regard to the principle of *ultimo ratio* was emphasised by von Galen so that criminal law should be the last resort in this area which should be as narrow as possible. Members of the Team responded, among other things stating that the advantage of a crime of ecocide is its deterrent effect. Civil remedies will also be considered.
- (48) After a discussion, **the Council agreed to extend the deadline indicated in its earlier decision, CD 2021/9, for the group to develop the general enforcement framework of the project until the next Council meeting.**

VII. Future ELI Projects and Feasibility Studies

a) Climate Justice – New Challenges for Law and Judges

- (49) Andersen explained that he and De Franceschi were approached by ELI to elaborate Principles for climate justice that would support courts. The aim of the Principles would be to guide courts in deciding when States and/or corporations have obligations to reduce carbon emissions. National

courts, the European Court of Human Rights, the Court of Justice of the European Union as well as international courts are all facing difficulties in identifying the law to be applied in such cases.

- (50) Wendehorst explained that there was no project proposal or feasibility study yet but pointed to a document drafted by Andersen and De Franceschi. The latter said that they received comments from members of the ELI High Level Expert Group at a meeting which was organised in July 2021. The meeting gathered both academics and judges, who also indicated their interest in working on the project. Andersen and De Franceschi explained that they are currently working on the project proposal and the feasibility study which should be ready by November 2021. The Principles will cover several aspects of law and the interactions between national and international law and consider the democratic and political issue related to the topic. The need to balance the protection of the climate and not to undermine the international competition of corporations was emphasised. Andersen thanked the ELI Secretariat, in particular Dudek, for his support.
- (51) A discussion followed. Pichonnaz advised Andersen and De Franceschi to reduce the size of the proposed Project Team to facilitate the drafting of the Principles. The presence of an Advisory Committee and Members Consultative Committee will ensure there is still scope to incorporate other ideas.
- (52) Emphasis was also placed on the importance of addressing the issue of obligations (with the source defined) and enforcement (which tools should be focused on?). Further, it was advised that the proposers clarify who will be the addressee of the Principles (EU legislators, Member States, companies/other private actors, courts, etc?), as this will have implications on enforcement and remedies. Andersen invited Council members to share any further comments they might have in writing.

b) The Concept of Corporate Criminal Liability

- (53) Wendehorst explained that although named a feasibility study and Project Proposal, the document delivered was a progress report. Nowak explained, among other things, that there is a need for a more coherent approach to corporate criminal liability throughout the EU. She and Nicolicchia hope to develop a set of model rules on corporate criminal liability and other issues pertinent to criminal liability (the attribution of liability, sanctions, procedural issues, etc). The rules would be based on comparative research, which will include carefully selected EU Member States.
- (54) A discussion followed. Members asked about procedural issues, including the interplay between lawyers that conduct internal investigations and the role of defence lawyers and the right to one in proceedings. It was also agreed that the scope of the project would be broadened to look at different models of holding corporations liable as, for some Member States, criminal liability is not acceptable. Other effective sanctions would therefore be prepared. Nowak and Nicolicchia agreed to submit a project proposal with a broader scope for the feasibility study at least and to include a sample of the model rules. At feasibility study stage, various forms of possible liabilities would be taken into consideration and the outcome might be criminal liability. Possible functional equivalents to criminal law would then be included and the title would then be finalised in due course, without confining the proposers now. It was agreed that they would liaise with the Secretariat and Executive to agree on a good suggestion for a project design and title going forward.

- (55) Bray suggested the Team contact the European Commission to inform it of ELI's work as they are old Commission studies on this point. This would also prevent duplication.
- (56) That a broader focus may result in an expansion of the Project Team and/or Advisory Committee was mentioned.
- (57) No formal votes were taken.

c) General discussion on other future projects

- (58) Wendehorst informed those present that there are four more project ideas that were included in the Framework Partnership Agreement with the European Commission, following the approval by the Council. They will be further developed during the High Level Expert Group meetings that will take place in 2021 (three) and in 2022 (one). She added that there would likely be progress reports at the December 2021 or February 2022 Council meeting and invited anyone that is interested in joining a meeting to inform the Secretariat.
- (59) Wendehorst also noted that ELI's internal structures are being revised, as the Executive Committee wished to appoint a Scientific Director to intensify the oversight of projects.
- (60) Storme observed that Lord Thomas is the only Founding Member that will sit in the next Council. He expressed his hope that the new Council will ensure that ELI's output reflects its foundations 10 years ago, ie that they are instruments, model laws, etc based on good comparative analysis.
- (61) Departing members of the Council were thanked sincerely for contributing to the work of the ELI Council.

VIII. Any other business

- (62) Pichonnaz informed the remaining Council members that there will be a Council meeting on 15 September 2021 to elect the innominate members of the Executive Committee and another substantive one on 1 December 2021.
- (63) He said he was thrilled to have Lord Thomas and Gammeljord with him on the next Executive Committee.
- (64) Pichonnaz thanked the Executive Committee and the Secretariat for their work and congratulated Wendehorst and thanked her on behalf of the Council for all she had done for all. Wendehorst received an applause from the Council.
- (65) Wendehorst thanked everyone, including the members of the Executive Committee for their support and all her colleagues in the Council. It had been a huge privilege for her to serve as President, a marvellous phase of her life. She said she believed ELI would be in the best possible hands and that she would remain a Fellow and that she wished to contribute further in other capacities.

The Council meeting ended at 14:30 CET.