

Minutes of the ELI Council Meeting 4 September 2019, Vienna

Venue: Vienna City Hall, Vienna (Austria)

Present:

Chair: Wendehorst, Christiane (ELI President)

Council Members

Alunaru, Christian	Keglevic Steffek, Ana
Avgerinos, Yannis	Király, Miklós
Avolio, Francesco	Lord Thomas, John
Azizi, Josef	Malberti, Corrado
Bargelli, Elena (proxy for Jiménez Muñoz, Francisco Javier)	Meijer, Maarten
Beale, Hugh	Možina, Damjan
Bray, Robert	Philippe, Denis (proxy for Gilligan, Paul)
Busch, Christoph	Pichonnaz, Pascal
Caponi, Remo	Povlakić, Meliha
Cavalier, George	Sabato, Raffaele (exited the meeting after a while)
Clough QC, Mark	Schulte-Nölke, Hans
Comba, Mario (from 11:15 onwards)	Schulze, Reiner
Cotiga, Andra	Sorabji, John
Cvejić Jančić, Olga	Storme, Matthias (proxy for Albert Ruda)
Dollani, Nada (proxy for Miller, Katharina)	Trstenjak, Verica
Doralt, Walter	van Erp, Sjef
Gammeljord, Anne Birgitte	Vervaele, John
Gernandt, Johan	Wallis, Diana
Guercio, Laura	Wierzbowski, Marek
Iamiceli, Paola	Zalar, Boštjan
Infantino, Marta	Zlătescu, Irina
Josipović, Tatjana	

Ex-Officio Council Members

Council of Bars and Law Societies of Europe (CCBE), Philip Buisseret
Council of the Notariats of the European Union (CNUE), Raul Radoi
European Land Registry Association (ELRA), Fernando de la Puente
International Union of Judicial Officers (UIHJ), Marc Schmitz

Other Attendees

Cassese, Sabino

Griss, Irmgard (Deputy Speaker of the ELI Senate)

Hartkamp, Arthur

Jacobs, Sir Francis

Lasserre, Bruno

Vékás, Lajos

Zimmermann, Reinhard (Speaker of the ELI Senate)

Members of the ELI Secretariat

Carruet, Aline

Kolman, Katja (keeper of the minutes)

Wilcox, Vanessa

The meeting commenced at 10:00.

I. Opening and Welcome

- (1) Wendehorst welcomed participants to the ELI Council meeting. She explained that the discussions at the present meeting were limited as the Council only has two hours available to it. She stated that one of the decisions that the new Executive Committee will have to take, together with/under the guidance of the Council, is whether the September Council meeting should be extended to two days, which will mean that members will have to travel to the event a day in advance.

II. Approval of the Agenda and the Minutes

- (2) Wendehorst asked Council members to approve the agenda and explained that there was a change in the agenda as there will be no vote on the Draft Statement on R&D Tax Incentives. At the very last moment, important suggestions were submitted to the Project Team and they would still like to take them on board. **The agenda was approved.**
- (3) Hugh Beale noticed a minor typo in that the word 'mutual' needs to be amended to 'neutral' in the minutes of the February–March 2019 Council meeting. **The minutes were approved.** There were no other matters arising from them.

III. Explanation of New Voting and Proxy Voting Procedure

- (4) Vanessa Wilcox explained the new voting procedure. White nameplates indicate that the person has a voting right. Grey nameplates indicate that the member is a proxy for another member and holds their voting right. Blue nameplates indicate ex-officio Council members that do not have a voting right. During a vote white and, if applicable, grey nameplates should be lifted in order to register a vote or votes.

IV. Report from the President and the Executive Committee

a) Matters Arising From the Reports Presented to the Membership

- (5) Wendehorst explained that members received lengthy reports. She invited them to ask questions. No questions were raised.

b) ELI Project Strategy

- (6) Wendehorst briefly presented the Executive Committee's work on developing projects. First, with the great help of Lord Thomas, the Project Guidelines were revised. A rather strict quality management system was put in place. Next, the Executive Committee prepared the ELI Project Strategy, that focuses on issues such as how typical ELI projects should look like, criteria for project adoption by the Council, Project Team requirements and funding guidelines. She explained that the draft ELI Project Strategy was discussed both with the Council in February and with the Senate. Council members can now find the final document, at least from the perspective of the Executive Committee, in their conference pack. **The Council approved the Project Strategy.**

- (7) Josef Azizi put forward the question of whether ELI projects should also cover international conventions under public international law. Wendehorst explained that these should be covered under the legislative proposals, model laws and model rules category. However, if this does not transpire from the draft as it stands, the Executive is very grateful for the remark and will add a couple of clarifying words. She added that this is rather an informal document, which does not clarify how ELI selects projects to be taken on board.
- (8) Wendehorst continued explaining that ELI has established High Level Expert Groups (HLEGs). ELI's Executive Committee has identified a number of focus areas in which they believe ELI could make a contribution to the development of European law. Four such HLEGs are scheduled and one, on administrative law, has already taken place. She had the privilege of attending the meeting and is very enthusiastic about the approach. It made the Executive reflect on whether this should be the way ELI projects should be developed in the future. Each of these meetings would yield a list of something in the region of three topics that deserve further development. ELI bodies would then look carefully at these proposals, rank them and select the most promising ones. Probably not all proposals can be taken on board, however, a number of them still could. She stressed that the Executive hopes that the Council supports this way of developing projects, but is open to discussing this new strategy with the Council.
- (9) Reiner Schulze pointed out that in the past, most projects were started by people in the internal ELI circle. More input from the outside world is needed. He added that this new approach is one way of ensuring this. Wendehorst emphasised that the experts are also persons from or suggested by the ELI Council and some have been very active in ELI. A very targeted approach is being taken to invite people, whether internal or external, who have experience and have strong contacts with EU institutions.
- (10) Wendehorst continued that it will be for the next Executive Committee, which will meet in November, to look at all the proposals that have been made as well as the Commission's and other institution's work programs. Then a real project agenda will be drafted which flashes out in detail the topics to be addressed over the coming years. This will be put to the Council and will be discussed intensively in February. No further questions were posed.

V. Report from the Treasurer, Including Approval of the 2018 Accounts

- (11) ELI Treasurer, Denis Philippe, explained that ELI has three sources of income: the contribution from the University of Vienna, the EU grant and membership fees. The main expenses are the Annual Conference, meetings of ELI bodies including the Council, our staff, which is very efficient, projects, and other expenses like accounting. At the end of 2018, ELI's accounts closed with a healthy profit. However, many members are still not paying their membership fees, therefore many memberships were terminated after final reminders were sent out this year. The same procedure with final reminders and, if appropriate, terminations is planned for next year. Philippe referred to the fact that the accounts were drafted by Deloitte and approved by the auditor, whose report is also included in the documents. **The Council approved the 2018 accounts.**

- (12) Philippe continued that in 2019 ELI received a substantial operating grant from the Commission and its usual welcome contribution from the University of Vienna. In addition, membership fees should be received from ELI's individual, and institutional, members. As Treasurer, Philippe revealed that he increased the buffer (ie the amount below which ELI's accounts should not fall each year) from EUR 16,000 to EUR 28,000. This is in line with the prudence principle adopted by a good company. Philippe added that the amount could still be increased in future. In 2020, the figures and sources of income will remain the same. Thanks were given to Wilcox, to Zuzana Fačková, the Administrative Officer, and the whole Secretariat for the tremendous work done on accounts. Wendehorst recalled past meetings when the figures were not as positive and expressed her gratitude to the team once more and to a committed Treasurer. They all received a round of applause.

VI. Final Discussion on the Draft Statement on R&D Tax Incentives

- (13) Wendehorst explained that final discussions on two projects, namely the Draft Statement on R&D Tax Incentives and Draft Instrument on Model Rules on Online Intermediary Platforms, will be held as both projects will be put to electronic votes soon. She revealed that the R&D Tax Incentives project should have been put to Council's vote today and passed the floor to Georges Cavalier to explain where things stand.
- (14) Cavalier explained that the Draft Statement on R&D Tax Incentives project is being finalised. In February 2019, it was reviewed by experts. Their comments were addressed in the draft in early summer. The draft was circulated within the industry and the Project Team opined that they could make some useful amendments to the draft. These will be discussed at tomorrow's panel which features a representative from the industry. Moreover, the Project Team is waiting for further comments from Michael Lang, who is very much involved in European tax law harmonisation. It was thought that it would be better to have comments from both sides before proceeding with the vote on the project.
- (15) Wendehorst emphasised that the Executive very much appreciates the move to get the industry involved as well as that the Project Team decided to wait and take on board all suggestions and submit the final outcome in due course as opposed to making an amendment to the document ex post.
- (16) Cavalier added that they expect to receive Lang's feedback tomorrow. Therefore, the Team will probably deliver the final output by the end of September 2019.
- (17) No further comments were made.

VII. Final Discussion on the Draft Instrument on Model Rules on Online Intermediary Platforms

- (18) Hans Schulte-Nölke presented a progress report on the project: the full Project Team met three times in Brussels. They took on board an enormous amount of comments from the ELI Council, advisors and some active Members Consultative Committee (MCC) members. They invited quite a number of stakeholders from the industry, big platform operators, to a meeting in Brussels. After the Brussels meeting in June 2019, the Executive Committee commissioned two assessors, Marta Infantino and Damjan Možina, who are Council members not closely involved in the project, in order to have a fresh

look at the draft and to advise the Council on it. The reports of the assessors were extremely positive and were shared with the Council. The assessors also recommended that the Council adopt the Team's output. The result of the above process is the draft submitted to the Council. Further explanations were given including on the commentary drafted by the Team.

- (19) Schulte-Nölke explained that the next step would be to take into account comments the Team will receive at the plenary panel of the Annual Conference and then put the draft to the Council for an electronic vote. He added that the Commission and Parliamentary services of the EU, as well as quite a lot of States, are very active in preparing platform regulations. There is an enormous demand to contribute to these discussions, therefore it might be useful to have something adopted soon. The new President of the EU Commission has announced a new Digital Services Act, in which one of the key elements would be platform regulations. Several Project Team members have been approached to contribute to it. This is one of the reasons why the Project Team will try to get the draft adopted very soon. The date depends on the input received. Ideally, it should be put to an electronic vote within this month.
- (20) Sjef van Erp briefly explained the approach to be taken at the upcoming Online Platforms panel at the Conference, which follows the approach of the ALI and encourages article-by-article discussions. Wendehorst welcomed such real working sessions at ELI Annual Conferences.
- (21) Walter Doralt emphasised that the project is very exciting and that it is amazing to see how much has been done in such a short time. Nevertheless, he emphasised the need to include commentaries that explain the rules and called for this in advance of the vote. Moreover, only after substantial progress was made on the project were practitioners included in it. Doralt thought that it would be interesting for the Council to know, before voting on the draft, what input industry and practitioners provided and whether this led to changes. Otherwise, there is a risk of criticism that the output is a purely academic endeavor and that it will therefore not get the place it should and deserves to have in legislation and comparative law.
- (22) Hugh Beale underlined that he appreciates the work that has gone into the project and thinks that the basic rules are very good. He was, however, concerned about presentation. He thanked the Team for the commentary but felt that these were still not adequate, particularly in the case of very controversial articles such as Article 19. He had expected to see proper policy justifications when new rules are invented as any potential legislator would wish to know why a certain rule is thought to be the best. Current references are, however, fine when reflecting existing *acquis*. He also agreed with Doralt that more people should have been involved in the project. Beale advocated a new stage, ie to approve the project subject to ELI consulting with stakeholders outside the organisation, particularly within the industry, before coming back to the Council. That would probably get the project more publicity than simply signing it off today.
- (23) Wendehorst clarified that the project will not be voted upon today and not before the whole document, with all the commentaries, has been submitted to the Council and Council has had a fair chance to look at it. The present discussion is potentially the final discussion at a physical Council meeting. If later consultations show that the output is not mature enough to be put to an electronic vote, then it will be discussed again in February. However, at some point, probably after tomorrow's panel and after the full document has been released, a decision will have to be taken as to whether

the project needs to be put before a further physical Council meeting in February or whether it can, indeed, be put to an electronic vote and published as soon as possible. The latter would be sensible if we as ELI wish from an institutional point of view to make a better impact on the next work program of the Commission. However, this is for the Council to decide.

- (24) Elena Bargelli was of the opinion that comments should be more comprehensive and include at least cases from the Court of Justice of the European Union (CJEU) and/or national courts to show the practical relevance of the project. Moreover, the explanatory memorandum/preface should, in her opinion, disclose whether and the extent to which the model rules are addressed to EU institutions rather than to national legislators to show their practical scope of impact.
- (25) Schulte-Nölke agreed that the project has a history which, given its starting point from outside ELI, cannot now be changed but can develop from a certain point. He would have loved to see a more extensive and broader commentary but looking at the project's history, one can see that the Team only managed to get the rules into the sort of shape the Team was happy with in the last few weeks, based on meetings with stakeholders and input received from them. However, it is not a big issue to add some already existing comments, in particular on Article 19, into the commentary. Schulte-Nölke expressed doubts regarding the suggestion of informing the reader who the model rules are addressed to as the Rules try to reflect the current state-of-the art and are intended for those who want to make use of them. Moreover, responding to another request, he said that it is a bit hard to summarise the concrete influence of various stakeholders. The Team discovered that some rules were not practical and therefore needed reformulation. The Team dropped quite a number of rules which were too sophisticated and incomprehensible. Schulte-Nölke concluded that he did not think that the stakeholders consulted really changed much, in terms of substance; the more technical impact made by the stakeholders was perhaps more important. He referred to the synopsis at the end for those who wish to see what was edited out following stakeholder consultations.
- (26) No further comments were received.

VIII. Brief Q&A on Issues Arising From Progress Reports on Current Projects

- (27) Due to the limited time available, Wendehorst suggested turning to the Civil Procedure and Protection of Adults in International Situations projects, as both will be subjected to votes soon. She asked that only brief words on the progress be given and referred those present to the written materials submitted for all the projects for more detailed insights. Should timing be an issue later on, Wendehorst invited those present to raise questions with the Project Reporters directly.

a) Civil Procedure

- (28) Diana Wallis began by congratulating the Executive for the progress they have made on an organisational front. She explained that the Civil Procedure project is now beginning to take final shape. She invited participants to provide detailed comments at the two afternoon panels, where only certain aspects of the output will be discussed due to the high number of articles of the outcome (250). Over the past years, article-by-article discussions took place at Project Team meetings. As to the time scale of the project, she explained that the International Institute for the Unification of Private Law (UNIDROIT) had a governing Council meeting in May 2019, where there seemed to be general assent and happiness with the way the project was progressing. The Structure Group,

Reporters, notably John Sorabji and Rolf Stürner (in the latter case from UNIDROIT), and others, worked on a consolidated draft with comments during summer. Hopefully, the output will be put to a final vote at the next Council meeting in order for UNIDROIT to be able to approve it in May next year. Wendehorst thanked the Team for the tremendous work done and opened the floor for questions.

(29) Mathias Storme asked for a clarification as to the relationship between the rules and existing EU law. In this project, he observed, different approaches are taken in different places – sometimes the idea is to replace an existing regulation, sometimes it overlaps a little bit, sometimes it takes for granted that EU law and rules on jurisdiction exist and sometimes reference to existing laws are vague. Wallis responded that there are parts of the rules that relate quite specifically to EU law. Both representatives from the Commission and Council closely followed and contributed to the work. There is an aspiration on the Team’s side that this is helpful for the ongoing formulation of EU law. She was doubtful how closely this needed to be spelled out. She emphasised that the output is a soft law instrument that is there for those who wish to be influenced by it or take notice of it.

(30) No further comments were raised.

b) Protection of Adults in International Situations

(31) Bargelli explained that the Project Team has now shaped the aim of the Project, namely to promote the ratification of the Hague Convention, to suggest some changes to it and to promote good practices in this field. Initially, the aim was to promote EU intervention in the field (based on the European Parliament’s resolution in 2017). However, after a seminar held in Milan in March and some discussions with the Hague Conference on Private International Law (HCCH) and legal experts of national governments, the Project Reporters took the decision to focus on more reachable objectives. Bargelli explained that the output presented today is quite incomplete; it is a hybrid instrument which brings together rules addressed to the EU, good practices, as well as suggested changes to the Hague Convention. It is still under progress and the discussion at tomorrow’s panel will maybe clarify things more.

(32) Wendehorst explained that the HCCH and their approaches have a much stronger role in this project now. She referred to closer links between ELI and the HCCH. By and large this is a very good development, because having a conflict with developments going on at that level would not been very wise. The final draft will probably be ready in February 2020. Wendehorst opened the floor for questions.

(33) No questions were raised.

c) Business & Human Rights

(34) Wallis requested a vote on the above project. Wendehorst explained that this session was originally envisaged as a Q&A session since no document was submitted by the Team at the time the agenda was drafted. She was not sure, given time constraints, if a vote could be held on the spot as this was not announced. It was agreed to have a discussion on it and then put it to an electronic vote as soon as possible under the new Council. Wallis agreed, but expressed certain concerns.

- (35) Wendehorst opened the general discussion, in particular on the Business and Human Rights project, and also on any other projects Council members might wish to discuss. In the absence of further questions, the floor was offered to Wallis.
- (36) Wallis briefly presented the history of the project and the importance of the topic. She thanked Robert Bray and Laura Guercio for their support in revising the proposal.
- (37) Wendehorst stressed that the Executive Committee fully appreciates the developments and supports the project as was made clear in letters to the Project Reporters. She invited Wallis to elaborate further on the operative part of the project, which Wallis proceeded to do. A discussion ensued.
- (38) Wendehorst assured the Team that the Executive will accelerate the decision on the approval of the project proposal as much as possible and that the Council will definitely be approached in September to make a decision.

IX. Executive Committee's Recommendation on Hubs and SIGs Following Triannual Review and Council Decision as to How to Proceed

- (39) Sjef van Erp explained that the Executive Committee reviewed the functioning of Hubs and SIGs as required by the respective Guidelines. Some groups perform better than the others. However, overall, the Executive Committee is quite happy with how they function. As a result, it was decided there was no need to advise the Council that some Hubs/SIGs should cease to exist. **No opposing views were raised.**
- (40) Wendehorst informed the Council that the Hub and SIG of the year awards would be granted at the Evening Reception.
- (41) Wendehorst thanked Council members and stressed that it has been a great privilege to have worked with them.

X. Any Other Business

- (42) Paola Iamicelli thanked Wendehorst for her words and for the work done over the years. She also thanked members whose mandates were coming to an end. Iamicelli expressed pride that a Council member has become a judge of the European Court of Human Rights and underlined that she was sure that outgoing members of the Council would do their best to contribute to the success of ELI in future.

The meeting ended at 12:05.