

ELI Council Meeting 5 September 2018, Riga (Latvia)

Venue: University of Latvia, Senate Hall, 2nd Floor

Present:

Chair: Wendehorst, Christiane (proxy for Király, Miklós)

Other Council Members

Avolio, Francesco (proxy for Guercio, Laura)	Iamiceli, Paola
Azizi, Josef	Infantino, Marta
von Bar, Christian	Josipovic, Tatjana
Bargelli, Elena (proxy for Cvejic Jancic, Olga)	Klip, Andries
Beale, Hugh	Malberti, Corrado
Biondi, Yuri	Philippe, Denis
Bray, Robert	Pichonnaz, Pascal
Busch, Christoph	Povlakic, Meliha
Caponi, Remo (proxy for Stamelos, Harry)	Ruda, Albert (proxy for Jiménez Munoz, Francisco Javier)
Cavalier, Georges	Sabato, Raffaele
Chatzinikolaou, Nikolaos (proxy for Kaiafa-Gbandi, Maria)	Schulte-Nölke, Hans (proxy for Schulze, Reiner)
Clough, Mark	Sorabji, John
Doralt, Walter (proxy for Moser, Philip)	Storme, Matthias
van Erp, Sjef	Thomas, John
Gammeljord, Anne Birgitte	Uitehaag, Jos
Giannakoula, Athina	Vervaele, John
Gilligan, Paul	Wallis, Diana
Graf von Westphalen, Friedrich	Zalar, Bostjan
Hrádek, Jiří	Zlatescu, Irina (proxy for Alunaru, Christian)

Ex-Officio Council Members

Radoi, Raul from the Council of the Notariats of the European Union (CNUE)
Raga, Nuria from the European Land Registry Association (ELRA)
Skrastins, Janis from the Council of Sworn Notaries of Latvia (CNUE)

Senate Members

Hartkamp, Arthur
Jacobs, Francis
Zimmermann, Reinhard

Members of the ELI Secretariat

Šabanovič, Ala (keeper of the minutes)
Walker, Harry
Wilcox, Vanessa

The meeting commenced at 11:05.

I. Opening and Welcome

- (1) Christiane Wendehorst welcomed those present and informed them that to avoid duplication, some matters would be reported at the ELI General Assembly.

II. Approval of the Agenda and Minutes

- (2) Wendehorst made a proposal to add new items to the agenda: the first concerned the seat of the ELI Secretariat; the second would be presented by the speaker of the Senate, Reinhard Zimmermann, who together with other Senate members, Arthur Hartkamp and Sir Francis Jacobs, were present at the Council meeting. Wendehorst explained that the Senate had a meeting the night before and that they also met in the context of the joint Executive Committee-Senate meeting before the Council meeting. She continued that Zimmermann wished to inform the Council of the Senate's advise to the ELI on amending its Election Byelaws.
- (3) **The draft agenda was approved.**
- (4) Wendehorst informed those present that Josef Azizi had approached the Secretariat earlier requesting an amendment to the February Council meeting minutes, which have since been revised. Among other things, the minutes now specify that the proposal mentioned in para 30 was received. Wendehorst thanked Azizi for sending it to the Executive. John Sorabji mentioned that Lord John Thomas was his proxy at the meeting of 8–9 February 2018 in Vienna.
- (5) **The minutes were approved, subject to revision,** and there were no other matters arising from them.

III. The Seat of the ELI Secretariat

- (6) Wendehorst explained that the University of Vienna has been hosting the ELI Secretariat for a total of seven years. The first funding period was for four years, which was extended for another four years and will expire in September 2019. With the permission of the Council, the Executive Committee entered into the negotiations with the Rector of the University of Vienna to extend the current term. The Rector has sent a guarantee letter confirming the University's commitment to extend the Cooperation Agreement for another four years. Under the offer, the new period would run from 2019–2023 on the same terms as the former agreement. Wendehorst added that the Executive Committee's view is that the ELI has been treated very well by the University of Vienna.
- (7) Following a short exchange, the Executive Committee was **given a mandate by a majority of those present to continue negotiations and sign an agreement with the University of Vienna before the next Council meeting, on the premise that it is under the same terms as existed previously.**

IV. Draft Internal Guidelines

- (8) Wendehorst explained the process of revising the Draft Internal Guidelines. She said that some changes were made after some provisions were tested in practice. Other changes were included based on the input received from the Council in February 2018.
- (9) **There was a clear majority in favour of adopting the Draft Internal Guidelines.**

V. Draft Revised ELI Project Guidelines

- (10) Lord John Thomas explained the rationale behind the Draft Revised ELI Project Guidelines, following which Wendehorst thanked him for the tremendous job he had done and encouraged Council members to discuss the draft. He was given a round of applause by the Council.
- (11) In the course of discussions, Paola Iamiceli, among others, suggested that reference to impact on society was rather narrow. An outcome may have an impact on other constituents like the judiciary, for example. Yuri Biondi raised a question on the circumstances under which materials published by the ELI openly can be used by the others. Christian von Bar put forward the suggestion of abandoning copyright as far as black letter rules are concerned, as is the approach under the Draft Common Frame of Reference (DCFR), for example. Additionally, he raised an issue pertaining to the procedure of the adoption of project outputs. His preference was for outputs to be approved on an article-by-article basis in plenary Council meetings.
- (12) Lord Thomas felt that intellectual property right issues once an output has been approved should best be left to separate discussions/guideline on publications as one has to take the interest of the Commission, where the project is EU funded, and agreements with the publisher, where applicable, into consideration. As far as the approval procedure is concerned, he suggested it should be either for the Executive Committee or for the Council itself to specify the precise method of approval procedure on a case-by-case basis. In the case of complicated far-reaching projects, a more thorough approval method could be adopted.
- (13) As regards the substance of the Draft Revised ELI Project Guidelines, on reflection Lord Thomas suggested deleting the 'Appointment of Assessors' heading on page 4 after paragraph 15. Also, paragraph 16 would be rephrased as follows: 'The Council must concurrently add to the Advisory Committee ~~a small informal group~~ of two or three drawn from the Council, known as "Assessors", who will ...' to make certain that they are part of the Advisory Committee and not an independent group. Finally, he also proposed amending some provisions on IP rights to reflect the discussions.
- (14) **There was a clear majority in favour of approving the Draft Revised ELI Project Guidelines and of giving Lord Thomas a mandate to take the feedback on board, make the editorial improvements discussed, and come back to the Council should anything that has not already been raised come to light.**

VI. Summary Report Following the Evaluation of Hubs and Special Interest Groups (SIGs) and Revised Draft Guidelines

- (15) Wendehorst turned to the Summary Report following the Evaluation of Hubs and SIGs and Revised Draft Guidelines. The Report, she explained, is based on the results of a survey conducted by the ELI Secretariat on the activities of ELI Hubs and SIGs over the past years. Wendehorst added that Hubs and SIGs, which were adopted on the initiative of the ELI's founding President Sir Francis Jacob, have in the meantime become a very important aspect of the ELI's life.
- (16) She continued that the Executive Committee now proposes an update to the Guidelines for Hubs and SIGs on the basis of the Report. It also does so taking all the discussions held at Council meetings in the past into account. Having said that, the revised Guidelines also seek to deal with

the inactivity of some Hubs and SIGs, they try to be more precise than the initial guidelines and reflect the experience of the Secretariat in dealing with such groups over the years.

- (17) Among other changes, Wendehorst referred to the inclusion of a new provision article 14 on termination before opening the floor for discussion.
- (18) Elena Bargelli was among several others that spoke. First, she disclosed that she was in favour of the Guidelines but advised on the inclusion of the grounds for a possible termination of Hubs and SIGs to avoid surprises. Second, Bargelli emphasised the importance of published work in promoting ELI activities. **A decision was made to include wording that is more encouraging and motivating on SIG publications.**
- (19) A discussion on other points ensued. Wendehorst summarised the discussion, following which the following decisions were made: **a paragraph in the evaluation to give Hubs and SIGs the opportunity to submit more information about difficulties should be added; reference to 'Termination' in article 14 should be replaced with 'Duration'; a clause in article 14(a) along the lines of 'this applies to the existing Hubs and SIGs so that they have now three years' should be added; more supportive terminology should be used in general; a few words in article 14(b) (eg 'taking into account the differences between Hubs and SIGs') should be added.**

VII. Report from the Senate

- (20) Reinhard Zimmermann informed those present that one of his tasks as a Speaker of the Senate is to convene a Search Committee consisting of members of the Senate and/or other persons appointed by the Senate in order to identify candidates for the position of the ELI President at an early point in time. **The Search Committee, consisting of the entire Senate, he said, proposes to extend Christiane Wendehorst's period of Presidency for another term, ie for two years (from 2019–2021).** Zimmermann said that two years is simply too short for a President to implement everything they wish to implement, especially one who has demonstrated such dedication and commitment to the role as Wendehorst has.
- (21) Zimmermann explained that he disclosed the above because a President needs time to adjust his/her life to an extension of term so the earlier they are informed of this the better. Zimmermann added that the ELI Statute, as currently drafted, prohibits the Council from voting on this nomination just yet.
- (22) Moving on to his second point. Zimmerman explained that it is both awkward and inconvenient for a President to be elected at a Council meeting and immediately nominated into office. A President-Elect needs time to organise themselves. As such, the Senate and Executive Committee unanimously agreed on the institution of an incoming President, meaning that the President is elected six months ahead of the annual general meeting by the old Council (ie that is in office at the time). The Search committee will then do its work earlier and make a recommendation for that meeting six months ahead of the annual general meeting.
- (23) In order to implement this, Zimmermann explained that it will be necessary to change the ELI Statute and the Election Byelaw. If the Council agrees, the Senate suggests the appointment of a small Committee to draft these changes. The Committee should consist of a member of the Senate

(represented by Reinhard Zimmermann), a member of the Executive Committee (represented by Hans Schulte-Nölke) and a member identified by the Council.

(24) The fourth proposal includes three sub-proposals:

- Due to the growing amount of work, the idea is to establish the office of a second Vice-President. This is not a proposal to extend the Executive Committee, which will still consist of seven members: a President, two Vice-Presidents, Treasurer as well as three additional members.
- Another sub-proposal is to treat all four nominate Executive Committee Members the same as the President as far as duration of the office is concerned. Zimmermann referred to article 10(2) of the ELI Statute which stipulates that: ‘... Once a member has served two consecutive four-year terms that member is not eligible to stand as a Council member, unless it is as President, until four years has elapsed.’ The sub-proposal is to apply this principle, in the interest of continuity, to the other three nominate members.
- The last sub-proposal is to elect all four nominate members six months ahead of the Council and the annual general meeting. The nomination committee of the Senate will nominate a President, and in consultation with the President, will submit a proposal for two Vice-Presidents and a Treasurer. The new Council would elect three additional members of the Executive Committee. [An important consideration raised after the meeting is the issue of timing and the propriety of a candidate who has not yet been elected deciding about the others’ positions.]

(25) Wendehorst expressed her gratitude to the Senate for the confidence they have in her and added that she is grateful for the conscientiousness shown by the Senate. This would allow her and future Presidents to plan ahead.

(26) As the ELI is registered in Belgium, Matthias Storme was of the view that it may be wise to have a Belgian lawyer on board. He thus volunteered to represent the Council in the drafting Committee to modify the provisions of the ELI Statute and the election Byelaws.

(27) **There was a clear majority in favour of the proposal to establish a Committee composed of Zimmermann, Schulte-Nölke and Storme, who will have a mandate to propose changes of the ELI Statute and the Election Byelaws as presented by Zimmermann above. Those modifications should be ready for the next Council meeting in February/March 2019.**

Meeting continued after lunch break at 14:05. Denis Philippe chaired the rest of the meeting so Wendehorst could present her projects. Sjef van Erp arrived at 14:37.

VIII. Draft ELI Self-Evaluation Report

(28) Following an update by Lord Thomas, Philippe asked whether there were any comments on the report. No comments were raised.

IX. Current and Prospective ELI Projects

(a) **Progress Report on the Empowering European Families: Towards More Party Autonomy in European Family and Succession Law Project**

- (29) Wendehorst updated those present on the Empowering European Families project and submitted the question of the nature of the documents to submit to ELI bodies for voting as part of the ELI instrument.
- (30) **There was no clear outcome on this. However, the majority's sentiments seem to have been that the background materials developed during the project's lifetime can be published with OUP (as up to at least three different volumes). Items such as the toolkits should be submitted as part of the Instrument.**
- (31) Given the fast moving nature of this area, the need for all materials to state clearly when they were last updated was emphasised.

(b) Online Intermediary Platforms Project Advisory Committee

- (32) Schulte-Nölke presented the proposal for the composition of the Advisory Committee of the project. He explained that some candidates were identified by the project team and the others were suggested by ex-officio Council Members. Schulte-Nölke explained, in light of the developments to the Project Guidelines earlier in the day, that the two or three Council members or 'Assessors' may be added to the group at a later stage.
- (33) **The Council approved the appointment of the individuals as proposed in the Annex VII of the Council meeting.**

(c) ALI-ELI Principles for a Data Economy Project

- (34) Lord Thomas reminded the Council that the project proposal was adopted at the meeting in February 2018. The Council was asked to vote on the list of proposed candidates as reflected in Annex VIII and to give a mandate to the Executive Committee to allow more individuals, including experts from the industry to be appointed as Advisory Committee members at a later stage.
- (35) **The Council raised no questions or objections.**

(d) Common Constitutional Traditions in Europe Project

- (36) Raffaele Sabato explained that Mario Comba unfortunately could not attend the Council meeting following a bereavement in his family.
- (37) **The Council approved the appointment of a new reporter and additional members of the Advisory Committee of the project.**

(e) Business & Human Rights: Access to Justice and Effective Remedies Revised Proposal

- (38) Wallis referred to the revised proposal and explained that the project is specifically targeted at remedies in the area of human rights. The project proposal was already discussed at the ELI Council meeting in February 2018. At the time, it was unclear what type of project this might be. Wallis explained that the project team has since met once and that the ELI's partner in this project, the European Union Agency for Fundamental Rights (FRA), has launched a mapping exercise with its network. A questionnaire was sent to individuals in all 28 EU Member States to gather experience

on the ground and FRA is expecting the first results towards the end of September 2018. This should provide more clarity on the form the project could take. Wallis revealed that the project is already creating a lot of interest: a group in The Hague is working on rules in the same area but in the context of arbitration and that the intention was to keep in touch with them. Wallis also mentioned another group in Ireland that is keen to collaborate. She also made reference to the Business & Human Rights project's broader team and Advisory Committee which she hoped would reassure everyone about the diversity of those involved in the project.

(39) A discussion ensued on the nature of the project. In addition, Christiane von Bar **suggested amending the project's title, which currently reads as if the project is about access by business to justice and effective remedies. He also suggested revising the abstract that should transmit a clearer message about what the project explains.**

(40) **The Council agreed that Hugh Beale, Sorabji, Lord Thomas and Storme would sit together in consultation with Diana to discuss how things should proceed. It was stressed that the document should be submitted to the Executive Committee prior to its further distribution.**

(f) Principles of Liability in Digitalised Environments: Conflict of Law and Substantive Law Issues

(41) Schulte-Nölke explained that no proposal is being submitted to the Council because the proposal widely overlaps with the current work of the European Commission's Expert Group on Liability and New Technologies. The timeline envisaged by the project proposal was longer than the Commission's one. Therefore, the proposed solution is to assess what areas a potential project could cover after more details are known about the work conducted by the Commission's Expert Group. A request to approve the project electronically may be issued once more information comes to light.

(42) An issue arising from not submitting the proposal at this stage is that the current EU operating grant for 2018 envisages that the ELI will conduct such a project, otherwise, the ELI runs a risk of losing some money from the grant. The Commission will have to be given a good reason, in particular that outlined in no 41 above, as to why the ELI did not proceed with the proposed project.

(43) **There was no clear Council decision on the way forward.**

(g) Blockchain Technology and Smart Contracts

(44) van Erp explained that Juliette Sénéchal approached him to become a co-reporter for this project, given its complexity. He explained the nature of the proposed project and spoke highly of the project team. Beale revealed that the Law Commission of England and Wales has started a project on exactly the same topic and **van Erp agreed to get in touch with it.**

(45) In response to a question as to the proposed project outcome, van Erp said that the area is too big and too complicated but that the outcome would not be a regulation one but rather a regulatory framework. 'What to do with blockchains and smart contracts from a European viewpoint? What are the legal consequences?' He continued that it is difficult to give a precise response to the output at this stage.

(46) **The proposal was put to the vote and the Council decided in favour.**

(h) Fiduciary Access to Digital Assets

(47) Sjef van Erp outlined the project proposal.

(48) **An informal vote revealed that those present were happy with the topic and reporters. However, Philippe mentioned that it had been suggested to him that the formal vote for the above project should be rescheduled for the next Council meeting in February/March 2019.**

X. Council Decision on the Appointment of Pascal Pichonnaz as a Member of the Membership Committee

(49) Walter Doralt asked the Council to vote on the extension of the Membership Committee and to appoint Pichonnaz as a member of the Membership Committee. This would be useful in a bid to expand ELI membership in Switzerland.

(50) **The Council voted in favour of this proposal.**

Meeting closed at 15:30.