

## ELI Council Meeting 8–9 February 2018, Vienna

**Venue:** Austrian Ministry of Justice (*Palais Trautson*)

**Present:**

**Chair:** Wendehorst, Christiane (proxy for Irina Zlatescu)

**Council Members**

Alunaru, Christian (proxy for Tatjana Josipović)  
Avolio, Francesco  
Azizi, Josef  
Bargelli, Elena (proxy for Paola Iamiceli on 9 February)  
Biondi, Yuri  
Bray, Robert  
Caponi, Remo  
Cavalier, Georges  
Clément, Marc  
Clough, Mark (proxy for Yannis Avgerinos)  
Comba, Mario  
Cotiga-Racchah, Andra (present on 9 February)  
Doralt, Walter (proxy for Nada Dollani)  
Gammeljord, Anne Birgitte  
Graf von Westphalen, Friedrich  
Guercio, Laura (present on 9 February)  
Hrádek, Jiří  
Iamiceli, Paola (present on 8 February)

Infantino, Marta  
Kaiafa-Gbandi, Maria (proxy for Athina Giannakoula)  
Király, Miklós  
Malberti, Corrado  
Philippe, Denis  
Pichonnaz, Pascal  
Ruda, Albert (proxy for Francisco Javier Jimenez Muñoz)  
Sabato, Raffaele (proxy for Paul Gilligan)  
Schulte-Nölke, Hans (proxy for Christoph Busch)  
Schulze, Reiner (present on 9 February)  
Storme, Matthias (proxy for von Bar, Christian)  
Thomas, John  
Van Erp, Sjef (proxy for Johan Gernandt)  
Vervaele, John (proxy for John Sorabji)  
Wallis, Diana (proxy for Hugh Beale)  
Wierzbowski, Marek  
Zalar, Bostjan

**Ex-Officio Council Members**

Raga, Nuria from the European Land Registry Association (ELRA) (present on 8 February)

**Senate Member**

Griss, Irmgard (present briefly on 8 and 9 February)

**Other Attendees**

Grimheden, Jonas (present briefly on 9 February)

**Members of the ELI Secretariat**

Blessing, Amy  
Deniz, Ayper  
Dudek, Tomasz (keeper of the minutes on 9 February)  
Foidl, Ines  
Šabanovič, Ala (keeper of the minutes on 8 February)  
Wilcox, Vanessa

The meeting commenced at 10:05 on 8 February.

### I. Opening and Welcome

- (1) Christiane Wendehorst welcomed everyone present and informed them that Irmgard Griss would be representing the Senate at the meeting.

### II. Approval of the Agenda and Minutes

- (2) Members of the Executive Committee suggested adding a new item to the agenda – a short report on their meeting with the European Law Faculties Association (ELFA).
- (3) Josef Azizi proposed that a new item relating to administrative law be discussed under ‘Any Other Business’. In his view, the legal basis or analysis of the question of service of administrative documents in an electronic manner is not sufficiently discussed.
- (4) Mark Clough proposed a discussion on the preliminary impact of Brexit on the ELI. Both topics were **added under the ‘Any Other Business’ section of the agenda.**
- (5) **The draft agenda was approved.**
- (6) President Wendehorst explained that the minutes from the last Council meeting consist of two documents due to the fact that the Council held two meetings in September 2017 (one of the outgoing Council and the other of the incoming Council). **Outgoing Council members would be able to review the minutes of the meeting of 6 September 2017.**
- (7) **The minutes were approved** and there were no matters arising from them.

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

- (8) Wendehorst thanked Diana Wallis and the previous Executive Committee for all the work done as this provided a solid foundation from which the new Executive Committee could take off. She proceeded to summarise the above report.
- (9) As regards ELI projects and publications, Wendehorst explained that the Executive Committee had been entrusted to manage projects for 12 months pursuant to Council Decision 2014/10 of 26 September 2014 and its tacit extension under Council Decision 2015/03 of 13 February 2015. Wendehorst continued that in the past the Executive Committee took responsibility for assisting in developing new projects, monitoring progress and disseminating project results. Wendehorst added that the Executive Committee was of the opinion that now was the opportune time to reflect about the future of ELI projects. The ELI needs a vision, in particular for flagship projects, for the future.
- (10) Among other things, Wendehorst mentioned that the Partnership Agreement between the ELI and University of Vienna would expire in autumn 2019. It is therefore important to start negotiations about a possible extension soon. The Executive Committee is hopeful for Council’s mandate to pursue these negotiations on behalf of the ELI.

- (11) She also observed that the ELI is turning seven soon and will undergo a self-evaluation procedure, more details on which would be presented to the Council for their input on 9 February. Wendehorst informed those present that for an organisation of its size, the Executive Committee had to look at the ELI's internal structure critically. The Executive Committee had reviewed international standards on internal control systems and concluded that the ELI is not faring badly. The Executive was of the view, however, that things could nonetheless be improved. It is important to ensure that there are procedures in place that fully comply with international standards for non-profit organisations and that internal control and risk assessment systems are rigorously applied.
- (12) Wendehorst moved onto a related point: project quality management. She continued that on the Council's consent, the Executive Committee would revise the current Project Guidelines (to include better quality control systems such as peer review) and would prepare a proposal for the Council's input soon.
- (13) The floor was opened for comments.
- (14) Diana Wallis complemented the new President and Executive Committee for the professional and ambitious way they had taken their mandate on. Wallis wondered whether the ELI should return to the formation of a Projects Committee. The Executive had initially taken up the position because there was a feeling that there needed to be extra impetus to the ELI's central mission. Wider engagement of members of the Council would favour the return of the Projects Committee so that more people could be involved in horizon scanning. Wallis said she would nevertheless imagine a very direct line between projects and the Executive Committee. On the point of the partnership agreement with the University of Vienna, Wallis agreed that Vienna serves the ELI wonderfully and hoped the ELI can continue the cooperation in future. She asked, however, whether there was a contingency plan in place.
- (15) Wendehorst responded that as far as Executive Committee input in projects is concerned in the majority of cases, the Executive Committee had received positive feedback from Council members. Nevertheless, the issue of re-establishing the Projects Committee would be discussed further. With regard to the second point, Wendehorst informed those present that the current partnership agreement with the University of Vienna provides for clear rules on the negotiation procedure. The agreement is for the ELI to begin negotiating with the University of Vienna in good faith and only if these negotiations do not bring about the desirable outcome, may the ELI commence other negotiations.
- (16) Pascal Pichonnaz commented on the ELI's outreach and complemented the Executive Committee for the excellent work done in representing the ELI. Coming from Switzerland, he suggested that the ELI Executive Committee meet with tribunals, supreme courts and other bodies outside the EU. Furthermore, among other things, Pichonnaz wondered whether the agreement with the University of Vienna could be renewed without a public offering.
- (17) In response to the first point, Wendehorst explained that the Executive Committee also dealt with entities outside the EU such as the Council of Europe (CoE) and the American Law Institute (ALI). She mentioned that the Executive Committee is also very sensitive when it comes to travel costs and that its members try to combine their regular activities at minimal or no extra costs to the ELI

when representing the same where possible, which is one of the reasons why inaugural visits are taking more time than is expected or desirable. She admitted, however, that Pichonnaz raised a fair point and that the **Executive Committee will discuss how it can make more visible the fact that the ELI is not an EU organisation.** With regard to the Framework Cooperation Agreement with the University of Vienna, Wendehorst repeated that under its terms, which was approved by competent ELI bodies, an obligation exists to start negotiating with the University in good faith and only if those negotiations fail, can the ELI call for tenders.

- (18) Several individuals supported the establishment of a new Projects Committee. Wendehorst clarified that the Executive Committee did not anticipate developing a project quality management system in its sole hands. The ELI had a Projects Committee from 2011–2014. It was abolished in 2014, because it had cost implications due to its size (almost half the Council). Members of this Committee travelled in-between Council meetings, which was a very costly exercise. There was also the question of who takes decisions and who assumes responsibility for those decisions as the Executive is the body that has to respond to the outside world. These were the two main reasons why the Council opted for a different solution and entrusted the Executive Committee with the coordination of and responsibility for projects.
- (19) Sjef van Erp added that the Projects Committee was dissolved at the request of the Senate to cut costs. The issue of the project quality management system would need to be discussed in the context of the outcome of peer reviews for the upcoming ELI book series conducted by Oxford University Press (OUP). As regards Pichonnaz’s first point, van Erp pointed out that the ELI also looks outside the borders of the EU and cooperates with such partners as the US Uniform Law Commission (ULC), the Uniform Law Conference of Canada (ULCC), the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT). He added that the Executive also appreciates the Swiss perspective provided by Pichonnaz in the Council and other members of the General Assembly.
- (20) Maria Kaiafa-Gbandi congratulated the Executive Committee for the great work done in terms of the internal control system. Kaiafa-Gbandi said it was not clear for her, possibly due to the fact that she unfortunately found it difficult to attend some Council meetings previously, whether the ELI produces positions on very important matters of European law or whether projects are also a basis for getting funding.
- (21) Wendehorst clarified that the ELI does not gain any financial profits from its projects. The budget consists of membership fees and third-party funding, through which projects can be conducted.
- (22) John Vervaele commented on the projects strategy in light of the Framework Partnership Agreement with the EU. He mentioned that last time the operating grant did not cover the full range of the ELI’s activities in that the scope of co-financed activities were limited to civil matters and wondered if future applications could cover the whole range of the ELI’s dimension. Vervaele went on to suggest that the ELI should report or at least evaluate itself on the impact of its dissemination activities. If the ELI’s impact is limited in any way, this should be explained and remedied.
- (23) Wendehorst responded that under the current application, the Commission has a list of priorities. The ELI must in the first place have convincing project proposals based on its own project strategy

and pursue that strategy based on the merits of a project. It should not be confined by the Commission's agenda.

- (24) When Vervaele asked whether the next round of projects under the current grant application are exclusively in the civil law realm, Wendehorst responded affirmatively adding, however, that there are a number of non-EU grant sources that the ELI should continue to pursue.
- (25) Clough commented on the OUP review, stating that it is the membership's direction of the organisation, not that of the Projects Committee or Council, that dictates output. The Executive decided to return to this issue at the OUP section of the agenda.

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

- (26) Denis Philippe presented the draft 2017 financial position of the ELI. Among other things, he mentioned that the Executive Committee would take strict steps to avoid over expenditure and would closely monitor income from membership fees. He added that the ELI Secretariat had to send a number of reminders to collect outstanding membership fees and there is still a lot that needs to be done. Some sanctions may need to be applied in consultation with the Membership Committee regarding members who have not paid fees for up to five years despite reminders being sent out. Philippe said that the Fundraising Committee would gather to discuss further funding opportunities. He reported that the Executive Committee was still working on the 2018 budget, which would include a no-grant and grant scenarios.
- (27) Doralt explained that under Wallis' presidency, the Secretariat, in cooperation with the Membership Committee, managed to collect a substantial amount of outstanding fees. He added that the issue of defaulters will be a recurring one. It may therefore be better not to take a radical approach. He referred to two possible options: (a) writing personalised letters; and (b) insisting on SEPA Direct Debit payment methods, especially for new members and serial defaulters. Other forms of automatic payments (eg Paypal) should also be encouraged. The discussion continued.
- (28) Returning to the accounts, Wendehorst clarified that they were prepared by Grant Thornton in accordance with International Accounting Standards and decisions taken by the previous Treasurer on how to present things. Referring to lines nine and 11 of the Income Statement, she explained that that was profit within the meaning of International Accounting Standards. It does not mean that the ELI's income is that amount higher than its expenditure. Rather, the dissolution of a reserve and funds from the University of Vienna are included in the figure.
- (29) Responding to Friedrich Graf von Westphalen, Philippe explained that the figure of €500 in the Report from the Treasurer is an accounting profit (in the no-grant scenario) not a liquidity one.

#### **V. Draft Internal Guidelines for the ELI Executive Committee and Secretariat and Council Decision on the Confirmation of CD 2014/10**

- (30) Wendehorst presented the Draft Internal Guidelines. She explained that by drafting these Guidelines, the Executive Committee sought to have more clarity and transparency in the daily processes of the ELI especially as Executive members and staff within the Secretariat change. Rules in black reflect previously existing rules, whether introduced with the Council's consent, scattered

in various documents or agreed orally; in the current Guidelines all of them were put down together. Rules in red represent new provisions which the Executive Committee found to be useful or necessary to include. Wendehorst presented several examples of new provisions.

- (31) Among other things, **Pichonnaz suggested that the Speaker of the Senate as opposed to the entire Senate should be informed about manifest violations of the Guidelines under art 29(2).**
- (32) **Paola Iamicelli suggested art 29(2) should provide for a confidentiality clause.** Wendehorst agreed but added that the person to whom the accusation is raised also needs a chance to respond to it and that the Executive will look for the appropriate wording. Further suggestions were made.
- (33) Wendehorst expressed her gratitude for all the feedback received and asked the Council for a straw vote so the Executive knows how to proceed. She formulated the issues as follows:
- Should the document be split into two parts: one being a kind of a code of conduct including the Senate and the Council, another part including more technical provisions about filing and communication, etc?
  - Is there a need for an explicit approval, right to object or just a right for the Senate and Council to be notified of contracts between the ELI and Executive Committee or Secretary General or where the ELI agrees to contribute, out of its own funds, to the funding of a project led by an ELI Executive Committee member?
  - Should there be a 1,000 Euros threshold on transactions which would not have third-party effect for SP funds but would have internal effect or should the ELI stick to the 5,000 Euros limit it had so far?
- (34) On the question of the appropriate involvement of the Senate, **Griss suggested that she discuss things with the Senate.** In her view, the right to object is the correct way to proceed.
- (35) Council members were asked to vote:
- There was a clear majority in favour of **splitting the regime with stricter rules for contracts and a less stringent regime for projects**; there was a clear majority in favour of the **explicit approval by the Council for contracts** (with the Senate returning to the Executive in due course); and
  - There was a clear majority in favour of **keeping the current limit** (ie only transactions over 5,000 Euros require a signature or mandate by the President, Vice-President and Treasurer).
- (36) **Wendehorst informed those present that the Executive would get back to the Council with the revised draft.**

## VI. Report on Special Interest Groups (SIGs) and Hubs

- (37) van Erp gave a brief overview of ELI SIGs and Hubs.

The meeting adjourned for a lunch break at 12:37 and resumed at 13:38.

- (38) van Erp continued the previous discussion. One of the first issues to be discussed was the publication of papers by SIGs, van Erp explaining that the question arose in the context of the Business and Financial Law SIG's desire to publish a Green Paper.
- (39) Corrado Malberti explained that the SIG wanted to promote the results of discussions at the Business and Financial Law SIG's workshop of 2 June 2017 (in Vienna, Austria) to the outside world, and that it had never been its aim to promote the discussions as an ELI document. Yuri Biondi added that a disclaimer stating that it was the SIG's and not the ELI's Green Paper to be published on Social Science Research Network (SSRN) was included. In his view, SIGs are incubators for future ELI projects and publications are an interim step in the process.
- (40) Referring to a further request by the Business and Financial Law SIG, Wilcox raised the question about the extent to which the ELI can co-finance or finance SIG activities. In her view, the guidelines were explicit in stating that SIGs should be both financially and administratively independent. She also reminded those present about the upcoming evaluation of SIGs in 2018. She raised a question about whether this evaluation should only be limited to SIGs or if it should also apply to Hubs. A further issue was in respect of Hub logos. Wilcox's question was whether logos designed for ELI Hubs should be restricted to Hubs or extended to SIGs and whether the logos were sufficiently clear that activities are run by Hubs themselves and not the ELI.
- (41) Biondi explained that the 'Business and Financial Law' SIG had enquired into whether sponsoring of a conference in December or having the ELI's logo on the event's website or brochures was possible.
- (42) Wendehorst summarised the discussion on SIGs and Hubs by stating that there was a positive atmosphere as regards encouraging SIGs to produce work and the **Executive Committee will revise the guidelines as part of the ELI's evaluation, ideally including the evaluation of Hubs. Wendehorst continued that publications, use of logos, minimal involvement of the Secretariat and similar issues would be covered in the Guidelines.** As regards sponsoring of individual conferences, Philippe felt that sponsors would have to be found as, at the moment, there are no resources to finance such activities.

## VII. Dissemination Activities on Finalised ELI Projects

### (a) Prevention and Settlement of Conflicts of Jurisdiction in Criminal Law

- (43) Vervaele explained the background of the project. As regards dissemination, he said that the team had seminars, workshops and roundtable discussions with relevant stakeholders, namely Eurojust, the European Bar Association (EBA), Academy of European Law (ERA) and a session was held at the European Parliament's Research Service (EPRS). The results of the project will be published with OUP and a book launch on 31 May 2018 as well as other events are planned. Vervaele also revealed that the team engages in discussions with academia and with the European Commission, which is very much interested in the project.

### (b) Rescue of Business in Insolvency Law

- (44) Wendehorst reported on the above project, stating that the team was engaged in a broad range of dissemination activities both in the insolvency community and outside of it. The ALI promoted

the Instrument on the front page of its website and the results of the project were also presented on the margins of a UNCITRAL event in December 2017. The Instrument was published on the ELI's website and will also be published in a form of a book with OUP.

**(c) Detention of Asylum Seekers and Irregular Migrants and the Rule of Law**

- (45) Clément presented the background of the project and listed the activities in which the team and the project's Reporter, Boštjan Zalar, had been engaged recently. He stressed that the Statement targeted judges and lawyers and had been disseminated, inter alia, with the European Judicial Training Network (EJTN), which was enthusiastic about the output, and at ERA where a seminar on the 'Recent Case Law of the European Court of Human Rights on Detention' was held in December 2017. A workshop was organised by the Centre for Judicial Cooperation of the European University Institute (EUI) to present the outcome of the project to a targeted audience.

**VIII. Discussion on Professional Training as a Form of Dissemination**

- (46) Raffaele Sabato explained that the Executive Committee wanted to solicit the ELI Council's opinion on professional training as a form of dissemination. Several scenarios were given, including whether the ELI can engage in dissemination with a body dealing in professional training, whether a project team can use a training activity as a means of disseminating approved ELI output or whether a Hub can provide training.
- (47) Following several contributions, Wendehorst summarised that there seemed to be broad scepticism when it comes to competing with other existing training providers, risking the ELI's status as a non-profit organisation or losing its tax status and similar issues. On the other hand, there was broad agreement that the ELI should not stop getting feedback from stakeholders during the life cycle of a project. There was no objection to the ELI charging a small fee to cover essential expenses relating to the organisation of an event (or conference), preferably through existing networks like ERA, when the purpose of such event is merely to disseminate an ELI project. In essence, there is no change in the ELI's policy on this point.

**IX. Vote on the ELI Statement on the Principled Relationship of Formal and Informal Justice through the Courts and Alternative Dispute Resolution**

- (48) Following Wallis' presentation, the joint project with the European Network of Councils for the Judiciary (ENCJ), was put to a vote. There were 40 votes in favour the Statement, 0 rejections and 0 abstentions. Wallis mentioned that the team hoped to disseminate the Statement in the course of 2018, subject to the ELI obtaining an EU grant and Wendehorst that the team would now seek approval of the Statement from the ENCJ.

Meeting adjourned for a coffee break at 15:15 and resumed at 15:35.

**XII. Progress Reports on Current ELI Projects**

**(a) From Transnational Principles to European Rules of Civil Procedure**

(49) Wallis explained that the project is undertaken jointly with UNIDROIT. It began in 2013 and is due to end in spring 2019. Among other things, she referred to a conference on 26–27 November at ERA in Trier (Germany) and encouraged Council members to read the team’s work-in-progress: a consolidated draft on European civil procedure principles. In response to one of several questions, Wallis explained, particularly with regard to service and notification, that Reporters have been asked to future-proof rules. While the team has not looked into the debate on embedding code in rules so that time limits operate automatically with ‘automaticity’, Wallis agreed to **discuss the question with the team**. Further discussion on the theme of blockchains and other technological developments ensued with Wendehorst rounding up the session by suggesting that members of the European Commission, who sit in the project as Observers, could assist the team from a technological perspective.

#### **(b) R&D Tax Incentives**

(50) Georges Cavalier started by explaining the context in which the idea for the project developed. Among other things, he mentioned that the team is in the process of finalising the first phase of the research. This has not been released to the ELI but has been shared with the Secretariat and some Council members with the instruction that this should not be circulated further. The team is hopeful of dispatching the final draft by the next Council meeting in 2018. Responding to a question on the circulation of the document to EU institutions, Cavalier said that so far the final version of the document has not been communicated. **Once feedback from the circulated draft is received, the output will be finalised and the final product will be phrased as an ELI Statement.** Cavalier mentioned further that the team is currently waiting for the outcome of a funding application with French regional authorities. Among other things, **he agreed to consider involving more tax administrators in the team.**

#### **(c) Online Intermediary Platforms**

(51) Schulte-Nölke presented the history of the project. He explained that the product is drafted in the style of legislation which regulates the contractual relationship between online intermediary platforms and suppliers on the one hand and customers on the other (ie not between suppliers and customers). Schulte-Nölke explained that the scope of issues now covered is broader. Among other things, more attention is being focused on platforms and suppliers. Also, the team has not limited the geographical scope of the project to Europe. He informed those present that the team is planning to hold two stakeholder conferences funded by industries: one in Brussels (Belgium) and the second in Beijing (China). He revealed that there were five members of the Advisory Committee, mainly regulators, and **that he is confident that the list would grow by the end of the month, following which formal appointment of Committee members would be sought.** The team is also planning on inviting Advisory Committee members to the ELI’s Annual Conference in Riga. Schulte-Nölke also proposed inviting members of the MCC to joint meetings, at their own cost, to solicit feedback from them.

(52) In response to a question raised about the vocational diversity of the team, Schulte-Nölke **invited any interested non-academic members of the Council that are willing to actively contribute to the project to join the team.** Moreover, although not on the list, an individual (who is also a professor) will be added and a further team member (a Commission Observer) prefers not to be listed. Schulte-Nölke added that one of the team members is a member of the International Standards Organisation (ISO) and that several current team members have vast practical

experience. The discussion continued with Wendehorst concluding that **an electronic vote on the Advisory Committee is much anticipated. She reiterated the need for more practitioners to be taken into consideration.** In response to a question raised, Schulte-Nölke mentioned he would be interested in working with the Council of Bars and Law Societies of Europe (CCBE).

**(d) Empowering European Families**

- (53) Wendehorst presented the background and the context of the project as well as the materials produced. Among other things, she mentioned that various documents will be **submitted to the Council for consideration in early June.** The team would then ask for a vote or revise their work if needed. Discussions ensued on the publication of the documents on the E-justice portal. Responding to a question, Wendehorst explained that the team cooperated with national correspondents from all EU Member States and is planning to visit national ministries to disseminate the results and discuss things further.

**(e) Protection of Adults in International Situations**

- (54) Bargelli presented the background of the project explaining that it is based on a resolution of the European Parliament calling for the European Commission to adopt a proposal for a regulation on the protection of vulnerable adults (with an initial deadline of 1 March 2018). It was revealed recently, however, that the Commission is not willing to submit one, at least not within the timeline given. Bargelli explained that one of the aims of the project is to draft measures that the EU could adopt to improve the protection of vulnerable adults and to unify European laws. The team is planning a meeting in Vienna on 28 February to discuss preliminary reports developed by respective members of the team and a possible change of timeline in light of developments within the Commission.

- (55) It was decided to postpone that last two remaining items of the agenda to the next day.

Meeting adjourned at 18:00.

Meeting commenced at 09:00 on 9 February 2018.

**I. Opening and Welcome**

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

**II. Points Postponed from 8 February**

**(a) ELI-ELFA Meeting**

- (2) Wendehorst reported on the meeting which the Executive Committee had with the European Law Faculties Association's (ELFA) representatives on 7 February 2018. During the fruitful meeting, a potential cooperation between the ELI and ELFA was discussed, in particular on developing curricula, basic elements of curricula, best practice guidelines or teaching materials with the aim of preparing the next generation of lawyers to be fit for a common and genuinely European legal culture (preparing a European jurist). The ELI would not be engaged in teaching as such but would enter, with the Council's mandate, into a dialogue with ELFA and other organisations like the CCBE, the Council of the Notariats of the European Union (CNEU) and the ENCJ on the matter. The idea is to establish informal working groups on the sides of the ELI and ELFA to begin a dialogue, without making any commitments. Any headway made would be reported to the Council.
- (3) Members of the Council expressed their support. In particular it was emphasised that such a collaboration could be a good way to further promote ELI as well as attract new Fellows and contribute to ELFA's output. It was also suggested that the potential curriculum might touch upon the impact digital transformation has on lawyers and their work in the future, as current curricula do not respond to that.
- (4) The Executive Committee was given the mandate to continue its work in this area. Interested members of the ELI Executive and Council, including Vice-President van Erp, will be attending the ELFA Annual General Meeting and Conference from 25–27 April 2018 in Barcelona (Spain).

**(b) Reports on the Preparation of Project Proposals**

- (5) van Erp went on to present two closely-related topics which might evolve into ELI projects – Fiduciary Access to Digital Assets and Blockchain Technology and Smart Contracts. In particular, he emphasised the amount of money dedicated by the Commission to Blockchain research. An observatory to watch developments has also been set up. He thus emphasised the effect of technological developments and the need to react to them. With regard to the former topic, the idea is to prepare a draft EU directive/regulation, since it was decided by members of the Feasibility Study Group that a model law might not be effective (since only some Member States would accept it and others may not). As both topics are at an early stage of project proposal preparation, van Erp invited Council members to share their views, especially on where to put the focus.
- (6) Discussions ensued with **Pichonnaz raising his desire to join the Blockchains project team.**

- (7) Wendehorst invited members of the Council to share any further ideas via email and concluded that something more tangible **would be produced by the prospective project team by September at the latest.**

### III. Proposals for Prospective ELI Projects and Council Decisions on their Adoption

- (8) Wendehorst explained that the upcoming list of potential projects had already been presented at the Annual Conference in 2017. Proposals had now been prepared and are ready to be voted upon. Wendehorst emphasised that the project proposal on human rights is subject to the ELI receiving EU funding but not that on the ALI-ELI Principles for a Data Economy, which would more appropriately be funded by the Thyssen Foundation or by some other source.

#### (a) Common Constitutional Traditions in Europe

- (9) Mario Comba gave an insight into the history of the prospective ELI project on Common Constitutional Traditions (CCTs) in Europe, its significance, scope, methodology, the composition of the proposed team and an outline of funds already secured.
- (10) Storme welcomed the proposers' efforts. As regards scope, he referred to the case law of the European Court of Human Rights (ECtHR), adding that the whole *acquis* is already part of Europe's CCTs. He sought clarification as to whether the project would focus on what is beyond the rulings in Strasbourg. With regard to methodology, he sought clarification on the nature of the checklists, to which Comba replied that the project's aim is to describe reality but not to impose CCTs (in the form of a 'to do list'). That is a political decision. He further clarified that it aims at the Court of Justice of the European Union (CJEU) (as a proposal of a method to assess what CCTs are).
- (11) Azizi welcomed the project, among other things stating that it could serve policy, sharpen the sensitivity for exceptions to common traditions (or national identities) and constitute a good point of departure for legislators to be aware of what is and is not common ground. He was also of the opinion that it would serve the CJEU well as there is a lot of activity on this topic now and ahead.
- (12) Remo Caponi also stressed the importance of the project, stating that it would be the first time the ELI deals with constitutional law. He mentioned that it would be interesting if this project were linked with other ELI projects, for instance that on civil procedure. A member of that team could perhaps join the CCTs team's Advisory Committee.
- (13) Schulze suggested that discussions on tradition by historians and legal historians be included in the research and real (legal) historians should sit in the Advisory Committee, for example, to avoid possible criticisms that these aspects were ignored. Lord John Thomas agreed, adding that voices of people who can support and criticise conclusions brought by lawyers (eg from historical or philosophical perspectives) should also be included. Views of the public as well as institutions, whether in favour or hostile to common traditions, should also be taken into consideration. Robert Bray agreed that the team should be open to the views of the general public and institutions (eg the chairman of the European Parliament's Committee on Constitutional Affairs could be involved). He suggested further that terms used every day in law whose meanings vary, eg 'the rule of law', should be carefully considered. The German and English view of that phrase, among others, are very different.

- (14) Comba thanked everyone for the suggestions. **He agreed to link the research to existing ELI projects, referring specifically to access to justice as being an important principle since most CJEU decisions relate to that point. He agreed that the team would increase the number of participants in the project and welcomed any concrete suggestions of non-lawyers that could contribute to the output.** Responding to an earlier question, Comba said the checklist is a proposal for the CJEU for a method to follow when they have to ascertain what a CCTs is. The Court is the recipient of the checklist.
- (15) Wendehorst asked Comba to leave the room so the vote could be taken.
- (16) The nature of the checklist was raised again. It was observed that with other ELI Instruments, tools are drafted. Here the plan is to instruct the court how to find tools. This needs clarification. The support of the research service of the CJEU in assisting the team was raised in answer to this point.
- (17) **It was agreed that the CCTs team would be referred to the minutes to take the above criticisms on board. The Council approved the project under the above conditions and gave the Executive Committee the mandate to check whether the criticisms voiced by Council were reflected in the revised proposal.**
- (18) 40 voted in favour of the project, there was 1 rejection and 3 abstentions.
- (19) On Comba's return, Wendehorst explained that the project was approved on condition that the criticisms raised in the minutes are taken into account and the project proposal revised. She voiced her gratitude to the team for the work done so far.

**(b) Principles for a Data Economy**

- (20) Wendehorst presented the ALI-ELI Principles for a Data Economy proposal, including the background to the proposed project. She revealed that the ALI Council unanimously approved the proposed project a few weeks ago. Lord John Thomas added that the proposed project constituted a great opportunity for the ELI to learn from the ALI, an immensely successful organisation. The project will also require engagement with the IT industry, but will be conducted independently of industry influences. The idea is to draft a set of transnational principles that could serve as a source of inspiration for legislators, practitioners and others. Wendehorst referred to the Team's draft principles discussed at the ELI's 2017 Annual Conference (available on the ELI's website).
- (21) Philippe took the chair. Bray emphasised that the team has to be very careful with regard to exchanges with the industry in the US, since things are highly politicised. van Erp responded that the team is working on the basis of parity (ie equal representation on the ELI and ALI side). The team is aware of the impact of US high-tech giants (previous experience saw the industry derail a project within a year) and of the European views on data protection. He offered the Council to come back regularly with progress reports to check whether the team's direction is in conformity with the Council's wishes.
- (22) Following further discussions, Wendehorst, Thomas and van Erp left the room and Philippe continued as chair.

- (23) The Council agreed that the following three conditions were crucial:
- **The team should report regularly and in detail at least at every Council meeting on any discernible conflict of economic interests in a candid manner.**
  - **The team should take all relevant, but need not necessarily deal with, data protection aspects.**
  - **The team should report in detail on any aspect of funding of the project, both on the ELI and ALI side.**
- (24) The Council approved the proposal unanimously, subject to the above conditions.
- (25) Wendehorst, Thomas and van Erp reentered the room and Philippe informed them that the proposal was approved under three conditions. Schulte-Nölke repeated them.
- (26) Wendehorst thanked the Council for their trust.
- (27) Schulze observed that present or previous members of the Executive Committee seem to be leading most projects. He commended the Executive for going beyond their administrative tasks but recommended that the scope of leading persons in ELI projects be enlarged so as to discharge the Executive to some extent of its workload. Wendehorst referred to the discussion on conflicts of interest that took place the day before and explained that the Data Economy project began long before she was elected into her current position.
- (28) Schulze explained that his concerns were not conflict related but referred to the need to ensure the integration of others in leading roles.

Coffee break until 10:45.

**(c) Business & Human Rights: Access to Justice and Effective Remedies**

- (29) Wallis presented the genesis of the proposed project, which would be undertaken jointly with the European Union Agency for Fundamental Rights (FRA). She introduced Jonas Grimheden from FRA and thanked him for coming. She went on to give a precis of events leading to the current proposal and its aim. In sum, the idea is to prepare a soft law or legislative option at European level and to present it to the European legislator and in particular to the incoming Commission in the summer of 2019. She said that a Council member from Italy may be added to the team to reflect a Southern European interest.
- (30) A discussion ensued. Storme raised the question of scope of territorial application and asked whether the project is limited to rights violations in Europe or the rest of the world; in the latter case, he asked whether the rules would only apply to European companies or other companies, subsidiaries or suppliers where European courts have no jurisdiction. Storme also raised jurisdiction and conflicts of law issues, enquiring whether existing rules are wholly insufficient or whether the idea is to use them as a basis going forward. A potential overlap with the ELI-UNIDROIT project was also mentioned since the latter deals with fees, costs, funding, group representative actions, access to information and evidence, etc. Storme asked about the relation between both projects.

- (31) Vervaele branded the subject topical and timely. As regards scope, he raised the limitation of remedies to civil law and suggested the team look at criminal and administrative law too and their interaction with civil law. He also referred to the wealth of work done by specialist human rights organisations, like Amnesty International, on this topic. Rather than inventing the wheel, he suggested that such organisations be taken on board as stakeholders. Finally, he agreed that the jurisdiction issue that Storme raised was very important and suggested the team define the aims of the remedies being sought since remedies can serve different aims.
- (32) Responding to Storme, Wallis revealed that activities outside the Union by entities within the Union would be caught. She continued that in addition to looking to existing rules on jurisdiction and conflicts of laws, other avenues such as corporate governance would also be considered. That said, while preventive, such rules do not provide victims with remedies. She felt that remedies should not always be monetarised and all the above would be looked into. As regards the civil procedure project, Wallis felt that being a part of both projects would help ensure that there is no duplication. The relevance of criminal law and the inherently human rights angle of the project should also prevent duplication. Wallis disclosed that Amnesty International and other stakeholders were present at an event the team held in London in 2017.
- (33) Since most of these cases never get to courts, Grimheden agreed that a broad range of remedies, including non-judicial remedies, should be taken into consideration.
- (34) Azizi drew the attention of those present to the fact that the topic was already discussed at length at the last autumn session of the Austrian, German and Swiss section of the International Law Commission. He suggested the team get in touch with people that have already submitted detailed observations and analyses, especially as discussions were not limited to access to (civil) justice. **Wallis agreed to follow up on this.**
- (35) Pichonnaz suggested the team look into investment arbitration and bilateral investment treaties and discussions on the integration of human rights and corporate social responsibility into the access to justice mechanism for business. While States are normally parties to such agreements, in the new generation of such treaties, the idea is to have companies as parties. Indeed, it is already the case to some extent. He felt that a lot of subject areas under the proposed project end in investment or commercial arbitration, even within the EU, so the focus should also fall on that. **Wallis agreed to follow up on this.**
- (36) Bargelli questioned whether all types of business and any human rights violations were at stake, to which Grimheden clarified that the Organisation for Economic Co-operation and Development (OECD) is already doing a good job on segments of industries. That is a valid way to approach things if one is trying to look at things from the perspective of commitment from the industry. Since the team is suggesting something on an EU level, more generic suggestions would be more authoritative.
- (37) Further, the composition of the team was discussed, with suggestions that more members from Continental Europe should be added.

- (38) Graf von Westphalen was skeptical about reference to soft law and referred to the many publications on this theme already. On the other hand, he also acknowledged the difficulties of a hard law approach in this field. Wallis explained that the correct approach is to complete the initial mapping exercise before deciding definitely on how to proceed.
- (39) Comba referred to public procurement as a way to foster social goals and human rights. Public entities should reconsider collaborations with companies that violate human rights. Doralt also referred to Corporate Social Responsibility Directive and information duties as worthwhile for the team to look into.
- (40) Diana explained with regard to the diversity of the team that it consists of a lawyer based in France too and that the team would ensure further diversity. She added that the Team is keeping a close eye on developments in French law. Grimheden said that as a Swedish lawyer, he has a Continental flare. He also mentioned the jurisdictional diversity of staff at the FRA and FRA's network of experts and concluded by saying that the mapping exercise will draw on that expertise.

Wallis and Grimheden left the room.

- (41) The discussion continued. The Council focused on the fact that the project timeline is very short. The need to balance stakeholders was raised (the project should not only involve NGOs but also company representative, otherwise the project will fail). The extraterritorial issue was raised again.
- (42) Following discussions, the proposed project was put to the vote: 44 voted in favour, 0 against and there were no abstentions.
- (43) Wendehorst informed Wallis and Grimheden on reentering the room that there was a unanimous decision in favour of the project but there were concerns as to whether it is possible to embark on it under the regular procedure since that required the proper involvement of ELI bodies. Therefore the **Council asks the team to start, subject to the EU grant, taking the Council's criticism on board and engaging in a close discussion with the Executive Committee and selected members of the Council that volunteered to assist the Executive in the further development of this proposed project. Given the tight timelines, the Council decided that the team should return to it with the preliminary (mapping) analysis so that the Council can decide whether this should proceed as a Statement or Instrument.**
- (44) Grimheden left.

#### **IV. Proposal for a Prospective ELI Project: Principles of Liability in Digitalised Environments: Conflict of Law and Substantive Law Issues**

- (45) Schulte-Nölke presented preliminary reflections on the above prospective ELI project and sought the Council's mandate to continue engaging in discussions with experts in the field. Given that the team has to react to the Commission's actions in the field, Schulte-Nölke revealed that it may be that the team seek electronic approval from the Council before the next meeting.

- (46) Bray suggested that the team get in touch with Andrea Bertolini from the *Scuola Superiore Sant'Anna* who has already done some work on this, with Wendehorst and Schulte-Nölke responding that they already had him on their radar. Marta Infantino suggested broadening the project to go beyond robots, to which the team agreed that the project would not be limited to the tangible world. Schulze suggested the team cooperate with other groups and institutions that are also working in the field; one possibility suggested was to divide the team into different working groups.
- (47) Jiří Hrádek proposed limiting the topic to tort law and Kaiafa-Gbandi advised expanding it to criminal law. She added that she could suggest candidates to the team. Clément also mentioned the need to stay close with the technological industry. The ethics of robotics issue is also linked to legal problems and law and liability issues.
- (48) Wendehorst thanked the Council for their input, invited its members to share any further suggestions, in the form of names, topics, etc, via email and recapped **that the team will continue work on the proposal.**

#### V. Report on Self-Evaluation

- (49) Lord Thomas explained that the obligation to conduct the evaluation stems from the ELI Statute. The Executive discussed internally whether this exercise should be done by an external company or management consultant and concluded that this would be too time consuming (as the background of things would have to be explained) and expensive. For the time being it was decided to opt for a self-evaluation that would focus on membership (and fees), Hubs and SIGs, projects, etc.
- (50) The role of initiating and supervising projects would be considered in detail, especially considering the number of projects the ELI is currently dealing with. Lord Thomas referred to the possibility of reestablishing the Projects Committee (the disadvantage being it would cut down the principal function of the Council). Another option is to rely on the Executive Committee and/or Secretary General to do the arm-twisting necessary or to persuade two or three people to be 'external friends' of each project (they need not be experts and should not be involved in the team). Their task would be to ensure that the project conforms to the ELI's expectations and to produce a report prior to each Council meeting (the advantage being that Council discussions on projects would be more focused).
- (51) Further topics to be reviewed include publicity and public relations, the ELI should ensure that it has the best Secretariat, finances need to be looked into (in particular with regard to internal controls), etc.
- (52) Lord Thomas solicited other ideas for things the Executive should look into. He also welcomed written suggestions, following which a report would be drafted for the Council to consider.
- (53) As former chair of the Projects Committee, Schulte-Nölke suggested splitting the Council meeting into separate groups monitoring projects. This would be combined with a decent reporting system. Kaiafa-Gbandi agreed. As an accompanying obligation, Graf von Westphalen suggested also having

two to three peer reviewers from the ELI General Assembly or Council to accompany project teams from the beginning of each project and throughout the project's lifecycle. They would monitor progress independently and would issue guidance on the approval or disapproval of the final result. The process would be based on trust and confidence. Graf von Westphalen added that internal management should be elaborated upon within the Executive Committee for the time being. The latter can approach the Council for further suggestions or the approval of any clear-cut governing rules.

- (54) **Lord Thomas concluded that the best approach would be to defer any decision on whether to revive the Projects Committee and that the Executive Committee would come back with a document with suggestions on how to proceed on the matter.**

The Council had a brief lunch from 12:40.

## **VI. Membership & Fundraising**

### **(a) Membership Report**

- (55) Doralt, chair of the Membership Committee, presented the Report from the Membership Committee emphasising that more memberships may be terminated in future due to outstanding membership fees, as was done in 2016. Doralt mentioned that members from Finland, France, Poland, Hungary, Ireland, Luxembourg, Slovakia, Sweden, Switzerland and the Czech Republic would be welcome. Similarly, he stressed that in areas of particular interest identified at the September meeting last year, namely judges and notaries, there are developments but there is still more to be done.
- (56) **Doralt also asked members of project teams to invite those members that are not yet Fellows to join the ELI.**

### **(b) Fundraising Report**

- (57) Philippe, a co-chair of the Fundraising Committee, introduced the other members of the Committee – Francesco Avolio, Yannis Avgerinos, Bray (co-chair), Cavalier and Marek Wierzbowski – and explained that the team first targeted law firms and already sent letters to law firms based in Luxembourg, in which they explained the advantages of supporting the ELI. More concrete results would be provided in Riga. Bray mentioned he would speak to the Law Society in Brussels in the coming days as the Society has a trust dedicated to promoting legal projects. He would also seek guidance about how the ELI should go about contacting law firms, chambers, barristers, etc in the UK. Bray revealed that he had also talked to representatives of the Bar Council in Brussels and that other avenues are being explored. Whether the Committee should approach people via a standard letter from the President and incentives for joining the ELI are being discussed (including the expert legal database).
- (58) Wierzbowski called for Council members to point out prospective donors. He added that it is easier to ask for financial support for particular projects rather than for the organisation as such.

- (59) Cavalier explained that donations to associations qualify for tax deductions (up to 66% in France). Any assistance, advice, contacts would be welcome.
- (60) Wendehorst thanked the members of both Committees for their commitment and underlined the links between the Committees.
- (61) Responding to Schulze's suggestion on attracting more members from France, Wendehorst explained that members of the Executive Committee will meet Trans Europe Experts (TEE) representatives on 16 March, when several ELI projects will be presented. **Schulze also suggested that standard letters should also be drafted in French for French members as a matter of symbolic importance. Philippe agreed.**
- (62) **Doralt invited the Council to notify Membership Committee members whenever there are similar possibilities for the ELI to be present in conferences.** Similarly, members of the Council were invited to distribute ELI brochures whenever they attend conferences. They can contact the ELI Secretariat whenever they need more brochures.
- (63) Graf von Westphalen underlined that if the ELI terminates memberships of all defaulting members at once, this might create a negative impression on potential donors. He suggested not writing off all the bad debts at once but doing so over a period of time. In this regard, Philippe explained that the idea is to try to keep all members within the ELI. The write-off will be the last resort. Doralt added that this will only be the case with members with long-term outstanding fees (three to four years). Wendehorst emphasised that keeping members would mean keeping expertise within the ELI.

## VII. Discussion on the Increase of ELI Membership and Conference Fees as well as on the Sustaining Membership Notion

- (64) Wendehorst presented the background of the Sustaining Membership. She explained that Wallis started the discussion on raising ELI membership fees in September 2017. That turned out to be controversial, among other reasons, as it might be difficult for some people to pay more than the current 60 Euros. She continued that the Executive Committee considered alternative possibilities. The Sustaining Membership notion is not new but rather it derives from the ELI Benefactor Scheme, which is already in place, but is not very conspicuous. The idea behind the Sustaining Membership is to do something that other similar organisations (including American Law Institute) have been doing for decades. This could be a more standardised and visible way of donating. Wendehorst mentioned that all members of the Executive Committee and some members of the Council and of the Senate have already subscribed to join the scheme. She added that there was some criticism with regard to the name of the scheme and reassured the Council that the Executive Committee is open to changing it. Wendehorst asked the Council for feedback on the issue, in particular on whether ELI membership invoices should be accompanied by a letter inviting members to subscribe to this scheme.
- (65) Wallis preferred a modest rise in fees as the scheme creates inequality among members. Responding to Wallis' concern, Azizi proposed combining the scheme with a raise in membership fees (to say 65 Euros).

- (66) Doralt explained that the newly composed Membership Committee discussed the issue of raising fees at the meeting the previous day. He emphasised the risk of losing members if the fee is increased, even modestly. This is because there are a lot of passive members who do not actively participate in ELI events, but who pay fees. A modest rise would also require a lot of work for the Secretariat (and members who use direct debit or standing orders). Schulte-Nölke agreed. Doralt mentioned further arguments in favour of retaining the current level of fees and concluded that while in principle he agrees to increasing fees, the risks are too great.
- (67) Bray added that as a member of many organisations, his feeling was that the ELI is the best value for money. He suggested that perhaps, in order to popularise direct debit as a method of paying fees, those members who decide for direct debit should pay 60 Euros, while those who choose another method would have to pay say 70 Euros.
- (68) Pichonnaz suggested regional fee variations.
- (69) On accumulated membership fees, Doralt was confident that outstanding Institutional Observer fees would come in. He estimated that approximately 80% of individual members would pay. Doralt expressed his hope to report favourably on this at the next meeting in Riga.
- (70) Wallis added that there is also a perceived difference when the email comes from a particular person (she did so from her President's email account at one point) compared to when it comes from a general organisation's address.
- (71) Wendehorst referred to the Internal Guidelines and mentioned that so far reminders were done exclusively by email. She explained that the Executive Committee would suggest, before terminating the membership, for the Secretariat to also do so using traditional or even registered post. The first invoice and the first reminder would be sent electronically though.
- (72) **The discussion continued on the name for the scheme. Wendehorst referred to the draft Council vote and asked the Council to voice whether they are in favour of the scheme. Letters on the same will be sent to members together with invoices. 36 Council members were in favour, 0 against and 0 abstentions.**

#### VIII. Report on ELI Young Lawyers Award

- (73) Bray informed those present that the second Young Lawyers Award would be handed out in 2018 and that the deadline for submissions of papers is 30 April 2018. The jury remains the same as last year as they were appointed for a term of two years. He further revealed that Philippe had identified a volunteer to sponsor the next award.
- (74) Philippe revealed that Interleges is the sponsor in question.
- (75) Bray encouraged the Council to publicise the award further and Doralt suggested that the **Secretariat could send out a flyer on the award to all Council members.**

- (76) Wendehorst added the ELI could use ELFA to further promote the award. Biondi suggested LinkedIn be used to popularise the award. Wendehorst invited the Council to send any possible further feedback to the Secretariat. She agreed that social media should be used more to promote the award.
- (77) In response to Bargelli's suggestion, Wendehorst explained that the Executive Committee is in touch with national branches of ELSA. When it comes to ELSA International, they use announcing such awards as a major source of income. Law firms pay a lot of money to advertise with ELSA International as it is a means to promote their firm. The ELI might therefore not be able to have an agreement with ELSFA International but is negotiating a ground for exception with them.

#### **IX. Negotiations on ELI Book Series and the ELI's 'Emerging Legal Issues' Journal**

- (78) van Erp reported on the negotiations with OUP with regard to the Journal and the Book Series. A discussion followed.

#### **X. Any Other Business**

- (79) Clough suggested that the ELI should consider addressing the issue of Brexit, to which Wendehorst responded that the ELI would be grateful to receive a project proposal. She revealed that the former Executive had discussed the issue. The problem is, given the lengthy procedures within the ELI, that there is a risk that the output of such a project would be overtaken by the political agenda. Defining a topic where the ELI could really make a difference and remain within its mandate was another consideration. Among other suggestions, Doralt proposed that this topic could be interesting as an idea for a Hub event.
- (80) **Concerning the electronic cross-border servicing of administrative decisions, Azizi briefly raised the question of a possible feasibility study on a draft additional 'Model Agreement on the Electronic Service Abroad of Documents Relating to Administrative Matters', in complement to the present 'European Convention on the Service Abroad of Documents Relating to Administrative Matters' dated 24 November 1977. Wendehorst asked Azizi to prepare a brief note on his idea for a potential project in the field of administrative law and to share it with the Executive Committee. [The note was duly received and shared with the Executive which discussed the proposals.]**
- (81) Wendehorst thanked those present for their contributions. She underlined that this is exactly what the ELI needs. She suggested that in future it might be good to have more decisions concerning administrative issues dealt with via electronic voting and to focus physical meetings on projects, which is really what the ELI is about. **She added that the rest of the Executive Committee would work towards the improvement of the ELI's structures with Lord Thomas and that suggestions would be presented in Riga.**
- (82) In particular, she thanked members of the Council for their contributions. She also thanked Executive Committee members and Secretariat staff, including Ines, who is leaving soon.

The meeting was brought to an end at 15:25.