

Minutes of the ELI Council Meeting 8–9 September 2020, Vienna

Venue: Remotely over Zoom

Present:

Chair: Wendehorst, Christiane (ELI President)

Council Members

Anderson, Ross (proxy for Scherpe,
Jens on 9 September)

Avgerinos, Yannis

Bargelli, Elena (proxy for Vervaele,
John)

Bielska-Sobkowicz, Teresa

Bray, Robert (proxy for Gilligan, Paul on
8 September after 13:30)

Busch, Christoph

Clough, Mark QC

Comba, Mario

Cotiga, Andra

Dollani, Nada (proxy for Powlakic,
Meliha on 8 September after 16:00)

Fauvarque-Cosson, Bénédicte (proxy for
Kaiafa-Gbandi, Maria on 8 September
and on 9 September until 11:15)

Gammeljord, Anne Birgitte

Gilligan, Paul

Jimeno-Ribes, Miguel (proxy for Cotiga,
Andra on 8 September after 15:45)

Guercio, Laura (proxy for Giubboni,
Stefano)

Iamiceli, Paola (proxy for Biondi, Yuri on
8 September)

Josipović, Tatjana (proxy for Cvejic

Jancic, Olga)

Keglevic Steffek, Ana

Király, Miklós

Klip, André (proxy for Giannakoula,
Athina)

Malberti, Corrado (proxy for Forscher,
Julius)

Moser, Philip QC

Možina, Damjan

Neumayr, Matthias

Pocar, Fausto

Powlakic, Meliha

Pretelli, Ilaria

Rodríguez de las Heras Ballell, Teresa
(proxy for Iamiceli, Paola on 9
September)

Scherpe, Jens

Schroeter, Ulrich

Schulze, Reiner

Shirvindt, Andrey

Storme, Matthias

Tremosa, François

Tuori, Kaius

Twigg-Flesner, Christian

Wiewiorowska-Domagalska, Aneta
(proxy for Schulze, Reiner on 8
September after 12:00 and on 9
September after 10:11)

Zalar, Aleš

Zlatescu, Irina

Ex-Officio Council Members

Lord Thomas, John

Philippe, Denis (proxy for Fauvarque-Cosson, Bénédicte on 9 September after 11:15)

Pichonnaz, Pascal (proxy for Comba, Mario on 9 September)

Council of Bars and Law Societies of Europe (CCBE), Margarete von Galen

Council of the Notariats of the European Union (CNUE), Raul Radoi

European Land Registry Association (ELRA), Jan Moerkerke

International Union of Judicial Officers (UIHJ), Jos Uitdehaag

Wendehorst, Christiane (proxy for Graf von Westphalen, Friedrich)

Zoll, Fryderyk (proxy for Busch, Christoph on 8 september in the morning and on 9 September)

Senate Members

Hartkamp, Arthur

Jacobs, Francis

Wymeersch, Eddy

Zimmermann, Reinhard

Other Attendees

Bachmaier Winter, Lorena (briefly on 8 September)

Clément, Marc (briefly on 8 September)

Grimheden, Jonas (briefly on 8 September)

Hanzl, Martin (briefly on 8 September)

Karsten, Jens (briefly on 9 September)

Schneider, Jens-Peter (briefly on 8 September)

Sénéchal, Juliette (briefly on 8 September)

Thomale, Chris (briefly on 8 September)

Tridimas, Takis (briefly on 8 September)

van Erp, Sjef (briefly on 8 September)

Vogelaue, Vera (briefly on 8 September)

Wallis, Diana (briefly on 8 September)

Members of the ELI Secretariat

Dudek, Tomasz (keeper of the minutes)

Fačková, Zuzana

Kolman, Katja

Verschraegen, Bea

The meeting commenced at 09:00 on 8 September.

I. Opening and Welcome

- (1) Christiane Wendehorst welcomed those present and emphasised that Covid-19 pandemic changed so much and affected many within our community, therefore our thoughts are with them. She further expressed her gratitude to all those who continued to work for ELI, including the reporters, members of the Council and the Executive Committee who kept this organisation going together with the ELI Secretariat.

II. Approval of the Agenda

- (2) Wendehorst asked Council members to approve the agenda. **The agenda was approved.**

III. Approval of the Minutes of the Council Meetings of 20–21 February 2020

- (3) Wendehorst informed that, as the meeting is online, the subsequent voting will take place in accordance with the Technical Guide prepared and sent out by the Secretariat. Katja Kolman explained the procedure. The first vote concerned the approval of the minutes of the Council meetings of 20–21 February 2020. **The minutes were approved.**

IV. Report from the President and Other Executive Committee Members

- (4) Wendehorst presented the report, pointing out that the ELI Executive has been very active during the past six months, in particular in reaction to the Covid crisis. The Executive dealt with organisational issues as well as with drafting of ELI Principles for the Covid-19 Crisis. She expressed her gratitude to the members of the Council and the Senate for having supported the Executive in this endeavour. She reported that, with regard to the Principles, a series of webinars was organised and that the feedback was very good. The Principles were published in various languages across Europe.
- (5) The question was raised, whether an election is needed in case a Council member resigns. Wendehorst explained that in accordance with the Statute and Bylaws there is no need for election as long as it is not an Executive Committee member.

V. Report from the Treasurer, including approval of the 2019 accounts and 2021 budget forecast

- (6) Denis Philippe presented the 2019 accounts. He emphasised ELI has profit, which is reassuring. However, the Executive follows the rule of caution, in order to be prepared for the future. He then put the 2019 accounts to the vote. **The accounts were approved.**
- (7) Philippe went on to explain the situation with Deloitte as well as with regard to the membership, including the unpaid fees. The decision was taken not to send reminders during the Covid-19 crisis, but to do so in September.

- (8) He presented two scenarios for the budget in 2021, one with and one without ELI receiving the Operating Grant from the European Commission. Philippe put the **2021 budget forecast** to the vote, which **was approved**.
- (9) Wendehorst thanked Philippe for his work and the Secretariat for support. Philippe thanked Zuzana Fačková for excellent and diligent work.

VI. Progress reports, discussion and decisions (where applicable) on current ELI projects

a) Business and Human Rights

- (10) Diana Wallis, Co-Reporter, said that the Team met several times since the last Council meeting, also with the Assessors. The report submitted to the Council deals with due diligence and certain aspects of international law, but the Team also progressed in other areas. The Team will meet again in September to work on collective remedies, based on FRA findings. She further expressed her hope that the Team might have a full first draft in early October and aims at being able to present it to the JURI Committee in the European Parliament.
- (11) Jonas Grimheden, Co-Reporter, added that in less than a month FRA will have a more extensive report. He referred to two developments that are of relevance to the project: the Non-Financial Reporting Directive is being tightened up, which might lead to a better reporting by companies on issues such as gender equality, and EU Taxonomy Regulation, adopted in June, which refers to human rights.
- (12) Robert Bray said the he worked with Ilaria Pretelli on the section on private international law and that it was useful to have meetings with the Assessors. It seems unnecessary to change the existing EU instruments (Brussels Ibis and Rome II). He advocated the French approach on due diligence creating duty of care for companies, their subsidiaries and subcontractors. Ilaria Pretelli reported that, among others, recommendations on the interpretation of existing rules will be prepared.
- (13) Wendehorst congratulated the Team on the progress and emphasised that ELI should be able to have some results ahead of the European institutions, in order to ensure an impact of the project. She then opened the floor for discussion.
- (14) The question was raised whether the project is moving in the direction of substantive tort law. Wallis confirmed that this might be the impression on the basis of what is submitted to the Council. The chapter on collective redress, not yet submitted, will be subject to the Team discussion and will end up with a more pragmatic view. There might be differences between what FRA recommends and what the Team will recommend. Wallis informed that Katja Kolman prepared a very detailed timeline, according to which the draft with recommendations should be ready by the beginning of October. Further steps will adhere to the timeline.
- (15) Wendehorst again thanked the Team for dealing with the topic. She then invited the Assessors to present their observations.
- (16) Bénédicte Fauvarque-Cosson congratulated the Team and sought clarification as to where the Team stands with regard to the forum necessitatis, not provided for in EU instruments. The Team, however, does not consider the forum necessitates, because this is an exceptional provision. The UNIDROIT Agricultural Guide on Land Investment was mentioned as a source of inspiration. Lord John Thomas emphasised that the progress has been excellent. He expressed his confidence in the

project's timeline and stressed that the project will focus on remedies. Corrado Malberti congratulated the Team and emphasised that it is moving in the right direction. This was backed by Mark Clough, who added that the timing is good, given the German Presidency, which has this topic on the agenda. As collective regress was the original motive of this project, perhaps this will be major contribution from ELI.

(17) Wallis thanked all for their suggestions and thanked the Assessors and others for comments.

b) ALI-ELI Principles for a Data Economy

(18) Thomas explained that the next ALI meeting takes place in early October in Philadelphia. He hoped that the draft will be completed by May 2021, when ALI General Meeting takes place and for ELI after that. He stressed the need to have results as quickly as possible in order to influence the market. Wendehorst proceeded with presenting the Preliminary Draft No 4.

(19) Pascal Pichonnaz, Assessor, said that Assessors are following the project since September 2019 and are thrilled about the efficient work of the Team, which promises excellent results. There were some changes to the structure of the Draft, taking into account the other ELI project – Access to Digital Assets, which is positive. The Draft was discussed with the Advisory Committee and Members Consultative Committee.

c) Access to Digital Assets

(20) Sjef van Erp, Project Chair, presented the progress report. The Team is dealing with definitional issues and discusses matters of private international law (jurisdiction and conflict rules). The *lex fori* should not always apply, but if eg a consumer wishes to sue Google, he / she should be able to do so in his / her country of residence. Jos Uitdehaag added that the Team is thankful to the Assessors for their support.

(21) Aneta Wiewiorowska-Domagalska said that she and two other Assessors took part in the Project Team meetings and that the discussions were interesting. She opined that Chapter 5 is the most developed and suggested to focus the project on the topic of that chapter, develop it further and only then deal with other areas, such as private international law. Concern was uttered that the Team wants to deal with access to assets without defining what assets are. Schulze thanked the Team for the work done. He acknowledged that progress has been made and some criticism was taken into account. He emphasised the need to have results and said that Chapter 5 is close to be presented as final. The Assessors recommend to follow the example of that chapter and come back to the general parts at the end.

(22) Van Erp reported that the Team wants to discuss the general principles and will consider what is feasible from IT point of view (access first, followed by assets). Uitdehaag clarified that the Team aims at having the final output ready by September 2021.

(23) The question was raised whether the Team coordinates definitions with the Blockchain Technology and Smart Contracts project. Van Erp explained that he wants to work with common baseline and only diverge where necessary.

(24) Wendehorst enquired about the relationship between the principles developed by the Team and Brussels Ibis and Rome II, as most cases will be dealt with by these instruments. Van Erp responded that if an asset is part of succession, the answer is given. It is questionable, however, whether these Regulations apply to assets created after they became applicable.

- (25) Reinhard Zimmermann added that this is a very ambitious and difficult topic. He emphasised the need for results and suggested to publish them step by step. Van Erp agreed to discuss with the Team the potential idea of splitting the project, in order to at least finalise the draft on securities by September 2021.

d) Blockchain Technology and Smart Contracts

- (26) Van Erp explained that the Reporters have some diverging views concerning the project. This has consequences for the project, eg for the question, whether there should be a traditional contract 'off chain' and one 'on chain', or not. The project is dealt with from three perspectives: civil, public and 'sandbox'. Martin Hanzl, Co-Reporter, continued with presenting some principles developed within the civil law perspective.
- (27) Meliha Povlakić said that the project is moving in the right direction and opted for including the definitions in the final output. Teresa Rodríguez de las Heras Ballell, Assessor, expressed her overall satisfaction with the progress made. She suggested that concepts should be based on legal definitions, that the project should be coordinated and coherent with other ELI projects as well as UNIDROIT and UNCITRAL projects and that the Team focuses on the civil law approach.
- (28) Further questions were raised on the cross-border dimension (Fauvarque-Cosson) and concerns voiced on Part two (Pichonnaz). It might be better to focus on Part one, to have results quickly, as well as on the consequences of the technical input of blockchain. Fryderyk Zoll expressed his concerns with regard to the principles presented earlier and a definition of the declaration of intent.
- (29) Reinhard Zimmermann suggested to split the project up and deal with smart contract and blockchain separately. Hanzl presented an overview of the internal discussions including on the potential for splitting up the project. On the steps to be taken by the Team, he explained the Reporters would prefer a draft of principles and guidelines on how blockchain technology can be dealt with under the existing legal framework. The principles are in line with the prevailing voices in the literature.
- (30) Wendehorst thanked van Erp and Hanzl for their presentation and others for contributing to the discussion and suggested to proceed in writing with regard to suggestions made by Assessors and others.

e) Artificial Intelligence (AI) and Public Administration

- (31) Jens-Peter Schneider, Co-Reporter, thanked Council members for their time. He then reported the Team had several meetings already and were approached by Wendehorst to join her in drafting the response to one of the public consultations of the European Commission. He went on to explain the background of the project and its architecture. The idea of impact assessment represented by the Team is that this is an instrument of informed self-reflection and should be combined with accountability structures. The Team is currently discussing the topic of the standards of assessment and would suggest a two-tier approach (one focusing on risks and the other on advantages of AI). A potential challenge will be for the Team to coordinate this with Article 35 of the GDPR, as the latter focuses on risks related to AI, while the Team would like to also make use of the AI advantages.
- (32) Concerns were expressed by Bray, who gave the advise not to encourage the use of AI. He explained that he is very suspicious about AI, as algorithms are biased and therefore the latter reinforced. He believed it is a good idea indeed to have some rules. Marc Clément, Co-Reporter, explained that the

Team is not seeking to promote the use of AI in the public area. Philip Moser QC, Assessor, congratulated the Team.

- (33) Wendehorst expressed her admiration for how far the Team already progressed, given that the project was approved only recently.

VII. Future ELI Projects: Feasibility Studies

- (34) Wendehorst reported that the Project Guidelines were changed after the February Council in order to introduce the two stage procedure, so that new projects can be accepted if the results of a feasibility study are submitted by project proposers. A feasibility study should give the Council an idea of what could be the rules or principles in the final output.

a) Fundamental Constitutional Principles

- (35) Takis Tridimas, one of the project proposers, presented the project, which will deal with the identification and articulation of fundamental constitutional principles as foundations of a European democratic state (European constitutional DNA). He then explained the feasibility study submitted to the Council, which focused on the independence of the judiciary and emphasised that the Team wants to take into account also temporary challenges, such as digitalisation. He added that the Team intends to identify certain values, not necessarily universally shared, but ascribed by almost every Western legal system, and thus should keep a good balance. The Team will also look at some grey areas and therefore wants to consult as widely as possible.
- (36) Tridimas moved to the waiting room and the discussion in Council followed. Members emphasised, among others, that the topic is fascinating, but perhaps the focus should be tightened.
- (37) The Council then voted and approved the project under the following conditions: project will 1) tighten the focus, 2) increase diversity in the group, 3) clarify whether it is prescriptive or descriptive, 4) and clarify how it will deal with diverging views. The Council gave the Executive Committee a mandate to oversee the implementation of these conditions. Wendehorst informed Tridimas accordingly upon his return.

b) EU Conflict of Laws for Companies: The Acquis and Beyond

- (38) Vera Vogelauer, assistant of Chris Thomale, project proposer (absent), presented the proposal.
- (39) Some doubts were raised regarding the elaboration of a Regulation, because it is not on the political agenda at the moment. Further, concerns were expressed with regard to the possibility of ELI to keep the open access database after the project is accomplished, as well as with regard to the methodology and challenges in this regard.
- (40) Thomale, upon joining, clarified that he envisages using the CILFIT database of the CJEU and will also count on the expertise of National Correspondents. He explained that many cases do not reach CJEU and that they should not be excluded, but rather analysed. Because the Mobility Directive does not cover all cases, there is need for a Regulation on Company Conflict of Laws. Some Member States are anxious about certain policies, especially co-determination. The project would aim at identifying these policies and proposing general rules. A bit more clarity is needed with regard to what exactly is the scope of corporate law and how to carve out the contentious issues.

(41) Thomale and Vogelauer moved to the waiting room and the Council continued the discussion. After the discussion the Council voted and approved this as an ELI project provided that: 1) the proposers will demonstrate to the Council the feasibility of the method they have put forward, 2) they will ensure diversity in the Project Team and 3) the project will be initially limited to a restatement.

(42) Upon their return, Wendehorst informed them about the Council decision.

c) Admissibility of E-Evidence in Criminal Proceedings in the EU

(43) Lorena Bachmaier Winter presented the project proposal and explained that the idea is to develop a draft legislative proposal for a directive or a regulation on digital evidence. She emphasised that this is foreseen in TFEU, but so far has not been dealt with. It is currently a priority for the Commission within the area of digital data. The aim of the project would be to facilitate criminal justice and establish minimal rules. The general principles will not be limited to e-evidence, but in order to make sure that the EU adopts and takes seriously this proposal, the proposers thought to focus on e-evidence.

(44) Bachmaier Winter moved to the waiting room and the Council continued discussion. The Council then voted on the proposal and approved it as an ELI project.

(45) Upon her return, Wendehorst congratulated Bachmaier Winter on the **approval as an ELI project**.

d) The Concept and the Role of Courts in Family and Succession Matters

(46) Elena Bargelli presented the proposal. She explained that the idea for the project was developed during one of the ELI High Level Expert Group Meetings in 2019. The observation was that at national level many cases in family and succession law are being taken from courts and decided by other bodies. The questions arises how to adapt EU instruments to that phenomenon. So far the CJEU case law and European legislator's action do not yet provide answers to all questions. She went on to explain that the project is ambitious and was therefore divided into two phases, the second phase will start as soon as the project received further funding.

(47) There was a general impression that the project proposal is very good.

(48) Bargelli and Tremosa moved to the waiting room.

(49) The Council **approved this as an ELI project**. Upon their return, Wendehorst congratulated Bargelli and Tremosa.

(50) Wendehorst invited everyone to the Second Ole Lando Lecture later on that day and ended the meeting.

The meeting adjourned at 16:30.

The meeting recommenced on 9 September 2020 at 09:00.

VIII. Discussion on project strategy and future projects

- (51) Wendehorst welcomed those present and hoped that everybody enjoyed the lecture delivered by Christian von Bar. She emphasised that the Council adopted new ELI projects and observed that the remote meeting format went rather well and thanked the members of the Council as well as of the Secretariat.
- (52) Then, the experience with the new project strategy adopted in February and the revised Project Guidelines were mentioned by Wendehorst. She believed it was a right step to be much stricter and more selective when it comes to project adoption, and that streamlining of some procedures is helpful. She hoped that with some guidance, eg some templates, it will be easier in the future to understand what is expected from a feasibility study.
- (53) Regarding the lessons from the ELI Covid-Principles and the responses to EC consultations, she disclosed it was not an easy decision within the Executive on how to react to Covid crisis. In the end the Executive elaborated Principles, with great support from the Senate and the Council. The Executive were hesitant when publishing this, as the ELI had not done such thing before, but then were overwhelmed by the positive feedback. Journals from European countries had published the Principles, sometimes even translated, letters from various EU institutions and organisations congratulated ELI.
- (54) With regard to EC public consultations, the Executive decided to encourage responses by ELI project reporters, not on behalf of ELI. Wendehorst reported that three responses were submitted. Then the Executive had a discussion with the Commission, which is grateful for responses, reactions on the spot, when input needed. The ELI might wish to pursue this policy and thus react quickly.
- (55) On Innovation Papers Wendehorst explained that this might be a new way of short output, top experts producing excellent output fast. She revealed that the Executive approached Twigg Flesner to produce Guiding Principles for Product Liability, and that he agreed. In the future there will be open calls for such Papers.
- (56) Wendehorst then opened the discussion. The success of the Covid principles was welcomed. Project proposers advised that some guidelines, templates accompanied with a clear explanation on what the Council expects from proposers would be beneficial. It was also discussed that responses to EC consultations on behalf of ELI might add weight to them. Further ideas consisted in giving assistance on the *acquis communautaire* (eg to Ukraine) and to the use of ELI's integration power.
- (57) On ELI providing quick responses, some reminded of the procedures to be followed in order not to loose credibility towards stakeholders. It should be the responsibility of the Executive to scan the horizon to identify the need for quick interventions and to identify experts, this would then need approval by the Council within a reasonable timeline. Additional Zoom meetings might contribute to the discussion. Wendehorst suggested that he Executive will return to the Council with a written proposal.
- (58) With regard to the Conference on the Future of Europe, the Executive have been in touch with the European Parliament.

(59) The discussion then turned to the possible cooperation with Mount Scopus Group (established by Shimon Shetreet; Zoll is a member). It developed a number of standards of judicial independence and ELI could establish a working group and develop a set of principles. A very broad cooperation with various organisations might be useful. Concerning the relation with Fundamental Constitutional Principles, the Executive would have to decide on this, but independence of judiciary ought to take more prominent role.

(60) **The Council supported** the idea of the project on ecocide (a term coined by Polly Higgins) and Bray's suggestion to establish a group to prepare a feasibility study on the inclusion of ecocide as a crime against humanity.

(61) Jens Karsten may wish to elaborate his ideas in the field of Food and Farm Law further.

IX. Report from the Senate and Search Committee

(62) Wendehorst explained changes to the ELI statute and Election Byelaws, according to which the election of key officers takes place earlier than of others, in order to facilitate the management of the Organisation.

(63) Zimmermann reported that in accordance with Article 10 of the Byelaws, he, as a Speaker of the Senate, convened a Search Committee, comprising of Lord Mance, Arthur Hartkamp, Irmgard Griss, Eddy Wymeersch and himself. The Committee first identified the person for the position of the President and in consultation with him, candidates for Vices and Treasurer. He then revealed that the Committee wishes to nominate Pascal Pichonnaz for the position of President, Lord John Thomas for First Vice-President, Anne Birgitte Gammeljord for Second Vice-President and Pietro Sirena for the Treasurer. The elections for these position will take place in February 2021. The remaining three officers will be elected in September 2021.

(64) Zimmermann emphasised this selection ensures reasonable balance of vocational backgrounds and geographical balance. They all have considerable experience, also when it comes to management. ELI would be in good hands if these people are elected.

(65) As ELI has grown in number of members and projects and because the Secretariat is in Vienna, the new Executive, if elected, would envisage to delegate powers to a third person in accordance with Article 11 point 4. Pichonnaz, together with the other members of the future Executive thought it appropriate that a Scientific Director in a honorary position deals with projects development tasks to support the Executive. It is being contemplated to ask Wendehorst to take this position.

(66) Pichonnaz thanked the Search Committee for their trust and emphasised, among other things, the need to ensure gender balance in the Executive. Lord Thomas thanked the Search Committee as well. He explained that the idea of a Scientific Director is inspired by ALI and went on to say that the Executive was supported by Secretariat staff, without them the organisation will not be able to function and will not be able to put up this Conference as it did. He expressed his hope to use more technology. Birgitte-Gammeljord joined the other in their thanks to the Search Committee. She hoped to see more women in the organisation and to assist in some of the practical issues. She said that without the Secretariat's enormous work this organisation will not be able to work.

(67) Wendehorst thanked everyone for considering her for the position of Scientific Director. She would be willing to support the Executive in the background from Vienna, liaising with the University, with Reporters, and support a number of functions from the background.

(68) Zimmermann emphasised no decision has been made, but that they will be happy if Wendehorst agrees. Wendehorst thanked him and the Senate for their work.

X. Lessons from the COVID-19 pandemic and future of meeting formats and interaction with the public

(69) Wendehorst explained that in the Executive technology revolutionised their work. The Executive used to meet four times a year, there were always problems with flights, busy schedules, very packed meetings. Since the Covid crisis, such gatherings were replaced by Zoom meetings and additional meetings posed no problem. It could be worthwhile to consider a change of the Council meetings' format as well.

(70) During the discussion the wish to use more technology became obvious, but to provide for physical meetings as well, while taking into account all pros and cons and paying regard to diversity, to those who have families and may be less flexible.

(71) Wendehorst summarised the discussion and said that the Executive will come back to the Council with a proposal, most likely this will include regular online meeting on particular topics, for instance looking more closely on feasibility studies. She emphasised that hybrid meetings are problematic, as was showed during the 2020 February Council meeting.

XI. Any other business

(72) Wendehorst invited everyone to join the Opening of the Annual Conference, which will feature Alma Zadić, Austrian Minister of Justice, and Didier Reynders, the European Commissioner for Justice.

(73) She thanked everyone very much for devoting their time and expressed her satisfaction that the Council made some really good progress.

The Council meeting ended at 12:10.