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ELI Updates Summer 2012

Message from the Vice President



The European Law Institute was founded as an international non-profit association on 1 June 2011, in Paris. It is only one year old and much has been accomplished.

In the year since its inception, the European Law Institute has welcomed many esteemed colleagues from the legal professions, initiated several projects and brought two of them close to completion.

The first two projects undertaken by ELI addressed the European Commission's proposal on a Common European Sales Law and the case overload at the European Court of Human Rights. Further projects that have been put on track deal with criminal law, administrative procedural law, tax law and data protection. These ongoing and future endeavours already cover all branches of the law: substantive and procedural; private and public.

The ELI reflects the special place of European law in the world and carries with it the dynamics of globalization. It embodies the values and principles which progressively forge a European *jus commune*, as a result of a community of States and of the action undertaken by European institutions. It contributes to increasing interactions between internal, European and international legal worlds.

In an effort to continue strengthening these relationships, the ELI has developed partnerships with many prominent organizations including the World Bank and the American Law Institute. The Institute endorsed the Joint Declaration and Statement of Commitment on Supporting the Global Forum on Law, Justice and Development set out by the World Bank. It thus anticipates having a significant involvement in the undertaking of collaborative initiatives, in particular in the Justice area. The ELI has also met with the American Law Institute (ALI). The ALI was closely involved in the preliminary discussions, which led to the foundation of the ELI and, since then, the ELI International Relations Committee has been exploring different possibilities in order to start cooperative projects with the ALI.

As I look back on this year filled with important milestones, I am reminded of just how much of the Institute's success depends on an active contribution from our Members.

ELI's strength is based on its uniquely broad membership. The Institute is built on the wealth of diverse legal traditions and cooperation among jurists from different vocational backgrounds. It brings together scholars, practitioners and judges from the whole of Europe as well as from other parts of the world.

The Institute's Members, with their various views, legal skills, and professional experiences, will play an essential role as the Institute continues to grow both in size and in the scope of its undertakings. Our Members are encouraged to take part in ELI's life and work.

Therefore I would like to invite all of our Members to join us for the 2012 General Assembly to be held on 28 and 29 September at the Royal Flemish Academy for Science and the Arts in Brussels. The registration is now open on the European Law Institute's website.

Yours sincerely,

Bénédicte Fauvarque-Cosson

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European Law Institute: A Year in Review

The European Law Institute was created after close to a decade of discussion amongst institutions, organizations and members of the legal community concerned with strengthening European legal integration. It is largely a product of two initiatives – the Association for a European Law Institute (ELIA) and the European University Institute (EUI) – which came together in 2010 with a shared goal of establishing an institution that would promote better law-making in Europe.

Following several meetings in Hamburg, Vienna and Athens, the European Law Institute was inaugurated in Paris on 1 June 2011. On the occasion of its establishment, one of the early advocates of the initiative, Viviane Reding, Vice-President of the European Commission and Commissioner for Justice, envisaged the Institute as a contribution to the development of a European legal culture, and a milestone in building a Europe-wide area of law, rights and justice.

ELI was thus founded on both high hopes and expectations of many prominent leaders in the European legal community. It was also founded on their hard work and their pledge to make the fledgling institution a success.

In the first year of its existence, much effort was invested in order to meet these expectations. The Institute's first two projects – on the Common European Sales Law (CESL) and the case-overload at the European Court of Human Rights (ECHR) - were initiated at the very beginning and brought almost to a close as the first year neared its end. Both are in their final stages today (for more information, see *The Statement on the European Commission's Proposal for a Common European Sales Law nears completion* in this newsletter).

The Senate and the Council of the ELI met in February 2012 in Vienna, where they endorsed four additional topics as prospective ELI Instruments. In consultation with groups of experts, the Projects Committee is currently developing these topics into proposals, which will be presented during the ELI Conference in September. The topics include Income Tax and Mobility in Europe, Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law and Data Protection and Enforcement of IP Rights (for more information, see *Call for Interest* in this newsletter).

In addition to its work on developing the projects, the ELI continued to build partnerships with prominent organizations from Europe and beyond. In March 2012, it had an opportunity to present its work at the European Parliament upon the invitation of the Legal Affairs Committee. In May, ELI representatives attended the 89th Annual Meeting of the American Law Institute in Washington D.C. (for more information, see *ELI at the 89th Annual Meeting of the American Law Institute* in this newsletter). Moreover the ELI has strengthened its cooperation with the EU Institutions and Agencies, the Council of Europe, the European Court of Human Rights, various universities and numerous European associations of legal practitioners, many of which joined the ELI's growing network of Institutional Observers.

The Institute also grew in its membership. To date it has close to 600 Fellows and Individual Observers coming from academia, the judiciary, various legal professions and representing all corners of the globe.

It is essentially these Members who form the backbone of the Institute – the foundation of its present and the driving force behind ELI's progress in the future. ELI counts on their contribution to continue making the high hopes and expectations enshrined in its foundation a firm reality.

The forthcoming General Assembly in September will present a perfect opportunity to review this year's achievements, to analyse the work conducted so far and to make plans for another successful year.

Call for Interest: ELI Projects on Data Protection, Income Tax and Conflict of Jurisdiction in Criminal Law

In the meetings of the Senate and the Council in February 2012, both bodies of the ELI endorsed the following projects as prospective ELI Instruments: Data Protection and Enforcement of IP Rights, Income Tax and Mobility of Individuals in Europe and Prevention and Settlement of Conflicts of Jurisdiction in Criminal Law. The final project proposals are currently being developed by the Projects Committee.

Below you will find a short outline of the core issues the projects plan to address. The outline is only a preliminary document and is not meant to serve as the final project proposal or its summary.

At this stage, we would like to invite feedback from our Members with regard to the envisaged content of each of the projects. We would appreciate it if our Members could share their thoughts with us, in particular with regard to the scope, the relevance and the potential deliverables. In order to gain a more comprehensive understanding of our Members' views, we hope to receive many responses.

Please send your comments to secretariat@europeanlawinstitute.eu

Data Protection and Enforcement of IP Rights

This ELI project aims to address the protection of privacy and enforcement of intellectual property rights in a digital environment. Based on the assumption that the efficiency of the enforcement of copyrights is in direct relation to the level of protection of privacy and personal data of users of information society services, the project will highlight the interface between the two rights. In the light of the recent global debate surrounding the Anti-Counterfeit Trade Agreement (ACTA), the ELI assessed the current framework for the enforcement of IP rights in the digital world and its impact on privacy protection. Traditionally, privacy is not an absolute right and needs to be balanced with other fundamental rights and legally protected interests. However, the same applies to IP rights, and therefore the ELI project will aim to find alternative ways to reward the results of creative or inventive activities without a need to infringe rights to information self-determination.

Creativity and invention represent the most important European cultural and economic resources. Moreover, the European legal culture is defined by balanced respect for individual freedom and solidarity. Consequently, a fair balance (concordance) needs to be achieved in order to protect IP rights holders and internet users adequately.

The ELI Instrument intends to develop certain policy recommendations that would, amongst other issues, address the use of retained traffic data for private legal enforcement of IP rights. Another area of focus would be the rights and duties of information society services providers to provide user data directly to right holders. In addition to policy recommendations, certain analytical outcomes are also envisaged.

Income Tax and Mobility of Individuals in Europe

This project seeks to explore ways in which income tax systems may create barriers to the mobility of individuals in Europe.

Whereas the EU has no mandate to harmonise income tax, international coordination mainly lies in the realm of the OECD, in particular in the frame of the OECD Model Convention on Double Taxation. To the extent that the fundamental freedoms of the EU are concerned, the case law of the Court of Justice of the EU may come into play.

This general research area is rather broad. Therefore the most important core fields will be identified and analysed step by step. One of the topics, receiving a lot of attention recently, is the taxation of occupational pensions. Under the umbrella theme "Income Tax and Mobility of Individuals in Europe" this topic would be examined first. Another prominent example is the taxation of private retirement plans, such as cash value life assurance. This will be analysed in the second step, with the project thus covering the field of taxation of supplementary pensions in Europe in its entirety. Future steps could focus e.g. on the taxation of income from employment and on family taxation.

The project intends to identify the main instances where differences in income taxation may create a barrier to individual mobility in Europe. Based on the analysis that will follow, proposals could be made regarding how such barriers could be removed or lowered. The final deliverable could be a set of principles for an income tax system that fosters individual mobility in Europe. Such principles could be very useful for the EU, the OECD and the EU Member States with regards to the further development of the Double Taxation Conventions.

Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law

Conflicts of exercise of jurisdiction in criminal law are omnipresent in Europe. The EU has enacted a Council Framework Decision (2009/948/JHA) on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings. This framework decision has not been implemented in all Member States. Moreover, it is restricted to only some procedural aspects of solving conflicts of exercise of jurisdiction. The issue is now on the political agenda since the EU has been accorded a broader legal basis for the adoption of criminal law legislation under the Lisbon Treaty.

The project could build upon recent comparative research on the basis of the laws of many EU Member States and some other States (e.g. /Sinn /[ed.], *Conflicts of jurisdiction in cross-border crime situations – A comparative law study on international criminal law*, 2012). This study mainly deals with positive conflicts of exercise of jurisdiction, i.e. cases where several states claim jurisdiction over the same case. In the case of negative conflict in the exercise of jurisdiction (i.e. where no state at all claims jurisdiction) much more groundwork needs to be done.

Initially, an analysis of the national laws on conflicts of law in criminal law in all EU Member States (and beyond) has to be carried out. On the basis of this comparison and the already existing research, the ELI Instrument could develop an EU model law on the resolution of conflicts of exercise of jurisdiction which would encompass rules on the prevention and settlement of conflicts of exercise of jurisdiction in criminal law, including the procedures which are needed between the respective national prosecutors and courts. The proposed Instrument could aim to solve conflicts of jurisdiction in a similar manner to the Brussels Regulations in the area of private law.

The Statement on the European Commission's Proposal for a Common European Sales Law nears Completion

The CESL working party had a final, and very productive, meeting in Vienna on 17 – 18 June. This was its third meeting since November 2011, and marked the near culmination of its initial analysis of the Commission's Proposal; an analysis which sets out a series of recommendations which if implemented would increase the CESL's utility and legal certainty.

In Vienna the working party had a detailed discussion of the CESL's approach to, amongst other things, remedies, restitution and the sale of digital content. This comes after consideration of important comments and suggestions received from Council members in the period from January to June, when its draft Statement was initially placed on the ELI's wiki-site, and of those comments and suggestions made at the ELI Council and Senate meetings held in Vienna in February. It also comes after consideration of discussions which the working party has had with the Commission and the Danish Presidency of the Council of Ministers.

Following its June meeting the working party will finalise its work and submit it to the Council during the summer in order to seek its endorsement of it as an ELI Statement. The working party's recommendations encompass both the CESL's substantive provisions, such as its application to SMEs or the introduction of payment protection mechanisms for internet trade, and procedural application through the creation of an Advisory Council to complement an Official Commentary and a case law digest to complement a systemised case law database. If some or all of the recommendations put forward by ELI are adopted, the CESL should be simpler to use for both businesses and consumers, more suited to contracting in the digital age, and subject to effective practical implementation.

If approved by the Council, the working party's Statement will stand as ELI's initial response to the Commission's Proposal. The Proposal will undoubtedly undergo revision during the coming months. Such revision will call for further discussion and comment by ELI and no doubt a further Statement.

ELI at the 89th Annual Meeting of the American Law Institute



89th Annual Meeting of the American Law Institute in Washington D.C.

On 21-23 May 2012, the American Law Institute (ALI) held its 89th Annual Meeting in Washington, D.C., where several representatives of the European Law Institute were in attendance. The agenda of the three-day meeting covered numerous projects the Institute is currently undertaking, showing the diversity of both substance and form of ALI's work.

All aspects of the law are being examined in an atmosphere of cooperation between legal practitioners and academia. The ALI is responsible for the well-known "restatements of the law" and during this Annual Meeting the Restatement of the Law Third, Employment Law, Restatement of the Law Third, The U.S. Law of International Commercial Arbitration and the Restatement of the Law Third, Torts: Liability for Economic Harm were on the agenda.

Next to restatements, the ALI is responsible for model code projects, such as the Model Penal Code (the part on sentencing was debated) and (together with the Conference of Commissioners on Uniform State Laws) the Uniform Commercial Code (an amendment to Article 4A was presented).

Furthermore, the ALI prepares "principles." In this Annual Meeting, Legal and Economic Principles of World Trade Law, Principles of

Election Law: Dispute Resolution, Principles of the Law of Liability Insurance and Transnational Insolvency: Principles of Cooperation were discussed.

In addition to the engaging content, of particular interest were some of the procedural measures. The size of the meeting and the number of people in attendance did not preclude a strict adherence to the agenda, thanks to disciplined speakers observing the given time limits and follow-up comments limited to three-minute time slots. A lot was accomplished in a short span of three days.

The European Law Institute's International Relations Committee has initiated preliminary discussions with the American Law Institute on several joint endeavours to be developed further over the course of the next year. The ELI looks forward to a long and fruitful partnership with the ALI.



ELI Presentation in Dublin



The European Law Institute representatives with Chief Justice of the Supreme Court of Ireland, Susan Denham

On 11 June 2012, the European Law Institute gave a presentation at the Four Courts building in Dublin. The meeting was organized by Paul Gilligan, member of the CESL Working Party and a judge at the High Court in Dublin.

On behalf of the ELI, Sir Francis Jacobs, Fabrizio Caffagi, John Sorabji and Tobias Schulte in den Bäumen attended the event.

The ELI presented its organizational structure, the current and future projects as well as the goals and ambitions of the organization. The presentations were followed by a lively discussion with the audience which consisted of representatives of academia and the judiciary. In the discussion a need was articulated to set up a structure which allows the legal communities to develop stronger ties with the ELI. Both the ELI and the local communities would profit from a national hub which helps linking the two.

The Dublin presentation marks the starting point of a number of similar events that the ELI would like to organize in the second half of 2012 and in 2013 as it continues to reach out to the European legal community in an effort to build stronger relationships that could help further the Institute's ambition to facilitate the exchange of best practices in European law.

EU environmental Law serves Protection of Human Health

By Marc Clément, Administrative Judge (France)



It is very often artificial to consider that protection of human health and protection of the environment are two separate domains. This is all the more true in terms of EU law. For instance, the reference to a concentration of 50 mg/l of nitrates in water, used to evaluate water quality, is directly derived from WHO recommendations. In the mid-70's, the very first Directives adopted in the field of the environment explicitly referred to the protection of human health: guaranteeing quality of drinking water or sound management of waste is mainly justified by human health considerations. Today, most of the air quality legislation is developed in relation to health considerations. The limit values for particulate matter, ozone or nitrogen dioxide are set to serve this objective.

Invoking human health issues to justify the action of the European Union in the environment sector is a strong argument for the European legislator and the European judge. In numerous judgements of the European Court of Justice, the fact that a potential breach of EU law

constitutes a threat for human health certainly plays a significant role in tilting the balance in favour of environmental protection. Human health protection supports environmental protection. Reciprocally, it should for instance be noted that the precautionary principle, initially introduced by the Maastricht Treaty as a principle governing the action of the Union for the environment, has been rapidly upgraded by the Court to the level of a General Principle of EU law to be applied in particular to issues related to protection of human health. Environmental law principles support the development of EU legislation in the health sector.

Many of the health challenges we have to face will only be addressed if significant improvements are achieved in cleaning our environment. Over the last 40 years the European Union has developed a solid body of legislation for the protection of the environment and this now represents the main source of inspiration for Member States' environmental legislation. By combating exposure to chemicals, aerosols or contaminated water, EU environmental law is also EU health protection law.

ELI joins „European Week Against Cancer“



On the occasion of the "European Week Against Cancer" (May 25-31), the European Law Institute invited Dr. Ralf Herold and Dr. Agnès Saint Raymond from the European Medicines Agency (EMA) and Mr. Alojz Peterle, the head of the MEPs Against Cancer (MAC) initiative, to contribute their views on this important issue affecting the whole of Europe.

The full text of their contributions can be found at: <https://www.europeanlawinstitute.eu/news>

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Building on the wealth of diverse legal traditions, European Law Institute's (ELI) mission is the quest for better law-making in Europe and the enhancement of European legal integration. By its endeavours, ELI seeks to contribute to the formation of a more vigorous European legal community, integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and taking a genuinely pan-European perspective.

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