

SELF-EVALUATION REPORT

I INTRODUCTION

Requirement for self-evaluation

1. Under Article 12(6) of its Statute,

‘The Association’s activities, including the Association’s projects, shall be subject to self-evaluation every four years. The self-evaluation report shall be made public.’
2. No evaluation has been carried out since the establishment of the Association (ELI).

Aims of ELI

3. The aims of ELI, as set out in Article 3 and on the website, are to:
 - evaluate and stimulate the development of EU law, legal policy, and practice, and in particular make proposals for the further development of the *acquis* and for the enhancement of EU law implementation by the Member States;
 - identify and analyse legal developments in areas within the competence of Member States which are relevant at the EU level;
 - study EU approaches regarding international law and enhance the role EU law could play globally, for instance in drafting international instruments or model rules;
 - conduct and facilitate pan-European research, in particular draft, evaluate or improve principles and rules which are common to the European legal systems; and
 - provide a forum, for discussion and cooperation, of jurists irrespective of their vocation or occupation, *inter alia* academics, judges, lawyers and other legal professionals, who take an active interest in European legal development and together represent a broad range of legal traditions.
4. This self-evaluation seeks to measure ELI’s performance against the aims.

Establishment of ELI

5. ELI was established at a meeting in Paris in June 2011. Vienna was chosen as the seat of the Secretariat after discussion within ELI and after agreement was reached with the University of Vienna to assist with the Secretariat. A Secretariat was established under that arrangement which was continued after the initial period and continues to subsist till 2019.
6. The governing organs of ELI were established. Elections have been held and meetings have taken place in accordance with the Statute in each year. A conference on the work of ELI has been held each year at a time that has coincided with the meeting of the General Assembly: see paragraphs 38 and following below.

II PROJECTS

The scope of the work

7. The core function of ELI, as set out in its aims, is its project work.
8. Since its inception, ELI has become progressively more active in this work. The present position can be summarised by me as follows:
 - a. *Public/constitutional law*
 - i. European Court of Human Rights (completed)
 - ii. Detention of Asylum Seekers (completed)
 - iii. Criminal Jurisdiction (completed)
 - iv. Common Constitutional Principles (in progress)
 - b. *Access to justice and the courts*
 - i. Collective redress and competition damages claims (completed)
 - ii. Relationship between courts and ADR (completed)
 - iii. Civil procedure (in progress as a joint project with the International Institute for the Unification of Private Law (UNIDROIT))
 - iv. Access to justice and effective remedies (in progress with the European Agency for Fundamental Rights (FRA))
 - c. *Business law, consumer law and the law relating to data and the digital market*
 - i. Rescue of businesses in insolvency (completed)
 - ii. Sale of goods and sale of digital content (completed)
 - iii. Research and development tax incentives (in progress)
 - iv. Online intermediary platforms (in progress)
 - v. Access to digital assets (a possible prospective project)
 - vi. Principles for a data economy (in progress as a joint project with the American Law Institute (ALI))
 - vii. Block chain technology and smart contracts (a possible prospective project)
 - viii. Application of traditional conflict of laws and liability rules to digitalisation (a possible prospective project)
 - d. *Personal law*
 - i. Party autonomy in family and succession law (in progress)
 - ii. Protection of adults (in progress)
9. This work has fulfilled several of the aims set out in the Statute:
 - a. Many of the projects have stimulated the development of EU law, policy and practice and progressed the analysis of areas within the competence of Member States.

- b. The project undertaken with ALI on the principles for a data economy is an example of the potential for an international model law.
 - c. The projects on asylum and common constitutional traditions are examples of the ascertainment of principles and rules common to European legal systems.
10. The Statements and instruments produced as a result of the projects are published on ELI's website. It was decided that more permanent publication is needed. Negotiations are at an advanced stage for the publication of books of two instruments. In the light of the prevailing view that publication in hard copy, as distinct from publication on the website, is essential, it is necessary for ELI to continue to strive to ensure that such hard copy publication is achieved either through the current arrangements or with other publishers.
11. No external assessment has been made of the impact of the projects undertaken and the statements published, but it is evident that they have had an impact on some legislative proposals and have had an influence in the development of policy. It may be desirable to consider further work on impact and to ensure that the value of potential impact is taken into account when determining whether to approve a project.
12. However, despite this achievement, ELI should not be complacent. A number of matters should be considered.

A better description of the types of projects

13. The principal Article in relation to projects (Article 12) generally refers to the results of projects as statements, but at other places there are references to the drafting of instruments, model rules, principles, rules and position statements.
14. Experience has shown that the projects undertaken could be described as generally falling into four broad categories, using more readily understood distinctions:
- a. Draft legislative proposals, model laws, model rules. These are referred to sometimes as instruments, but as this is such a broad term with different meanings, it would be better to use one of terms that can readily be understood by others;
 - b. Policies, statements of principles;
 - c. Checklists; and
 - d. Position papers.
15. Each proposal for a project should identify the type of project by references to these more readily understood descriptions; the project would be referred to throughout its development under the description and the website could with advantage use these descriptions for the results of the projects.

Management of projects

16. A detailed procedure for managing projects is set out in Article 12 of the Statute supplemented by the guidelines of 13 February 2015. Although experience has enabled ELI to improve the procedure for identifying projects, for sharing the work with other institutions and for ensuring that progress is kept under review, it has been necessary to review the management of the projects and to ensure that results, whether it be a model law or a checklist, are of the highest possible standard and quality.
17. At one stage, a Projects Committee was established, but discontinued and the responsibility transferred to the Council with the Executive Committee managing progress through the Secretariat between Council meetings. There has been a discussion as to whether a Projects Committee should be re-established with a particular responsibility for monitoring all the projects, but there is a strong view that would largely duplicate the work of the Council whose principal function should relate to the core work of ELI on projects.
18. It is suggested that the following would be a workable way forward for projects that are to proceed under the regular procedure specified in Article 12(3). The principal aim of these suggestions is ensure that (1) quality standards are guaranteed (2) there is adherence to the timeline or, where that is impracticable, agreement on an amended timeline and (3) the process is as simple as possible, given the constraints of the governing structure and the provisions of the statute of ELI.
 - a. The persons proposing a project would submit a proposal to the Executive Committee on a project proposal form (as is presently the practice). The form should be amended to include further matters such as the project type and an explanation as to the wider social and economic benefit of the project. It should also contain clear provisions on intellectual property. The form in its finalised form approved by the Council should be the project plan and used as the basic document to monitor the project, as it contains the essential details of the project and the timeline.
 - b. The Executive Committee should report to the Council on the potential feasibility of each project. The report, as indicated in paragraph 11, should include an assessment of the broader value of the project to the law and to society and its potential impact on society at large.
 - c. The Council would then give detailed scrutiny to the project and the composition of the team (reporters, advisors and Members Consultative Committee (MCC)) that is to carry it out. It would decide, after consultation with the Senate, on the approval of the project, the reporters that are to carry out the project and the advisors. The approval could be made the subject of conditions.
 - d. The Council would concurrently add to the Advisory Committee, a small informal group of two or three from the Council (2/3), not necessarily experts in the field, who would not participate directly in the project but act in the capacity of peer reviewers and auditors of quality (referred to as 'the assessors'). They would:

- i. keep themselves informed on the project, closely monitor the quality of the work being carried out and contribute to the regular reports to the Council and Executive Committee on progress of the project at regular intervals.
 - ii. provide a separate report on the project to focus discussion on approval of the results produced. One of the matters that should be included in the report would be a series of questions that the Council should address when considering the final approval.
 - e. The reports on the progress of the project (including the contribution of the assessors) would be regularly considered by the Executive Committee and the Council.
 - f. The draft setting out results of the project should be submitted with supporting signed statements from each of those that formed the project team (reporters, advisors and the MCC) to make it clear that each has read and considered the draft and supports what is said, or if there is a major reservation, identifying that reservation.
 - g. The Council would then consider the draft submitted and the report of the assessors on the project. It would then determine whether it should be submitted to the General Assembly for approval and publication. It is essential that there be sufficient time for detailed consideration by the Council of the entire results.
 - h. It would be generally desirable for the whole of the Council to consider the results of the project and the report by the assessors, but if there were several projects before the Council, it might be desirable for the Council to agree that it should divide and one part consider the results of some projects and the other part consider the results of the other projects.
19. The guidelines envisaged by Article 12(5) and published on 13 February 2015 should be recast once agreement is reached on the principles set out. It might be desirable to consider other steps to ensure that the projects and the resulting statements maintain the very high standards of quality set by ELI.

Planning for future projects

20. It would be desirable for ELI to continue to increase the number of projects undertaken at any one time, but this is dependent on finance, the availability and timely notification of EU grants, the capacity of the Secretariat and the willingness of persons to undertake projects. In the light of these factors a more systematic approach is needed to the identification of areas of law where a project should be undertaken and prioritisation in the selection of projects. In ELI's present and likely future position, a decision to undertake one project probably means that another cannot be undertaken.
21. ELI should therefore put in place a strategic plan to identify future projects over a rolling five year period. The details would need to be worked out, but it is likely that it would be necessary for each of the principal fields of law to be examined by a small number of experts in each

field and a list of potential projects produced with a commentary of the need for such a project and the likely impact on society, the economy and the delivery of justice of the successful completion of the project. The Council can then make its decisions on a systematic and strategic basis. However, the strategic plan must take account of retaining ELI's capability to carry out projects that may have to be started at very short notice and completed on an urgent basis, to fit in, for example, with a legislative proposal.

Special Interest Groups

22. Following Council Decision 2015/1 of February 2015, it was decided that Special Interest Groups (SIGs) would be formed to create subject specific ELI Hubs. To date 11 SIGs have been set up on subjects varying from digital law to competition law. The size varies significantly: the digital law SIG has 94 members; the competition law SIG has 22. Their activities vary considerably.
23. It is not clear whether all the SIGs are being run in accordance with the guidance given by the Executive Committee on 23 June 2015.
24. Compliance with the guidance is important. The SIGs were established on the basis that they would be self-running and not call on the present very limited resources of the Secretariat. As they are self-running and their work does not go through the clearly laid out discussion and approval system required of ELI projects, SIGs should not make statements in the name of ELI. That is not their purpose. Some SIGs call on the resources of the Secretariat to help in the organisation of meetings; unfortunately the Secretariat's limited resources do not permit this; steps must therefore be taken to curtail this until greater resources are available to ELI.
25. There are a number of reasons why it is important that the work of the SIGs is published. However, it is equally important that the publication of a report by a SIG is not confused with the work which has been subject to the procedure for approval as a project and subsequent publication as an ELI statement. It is therefore important that guidance be given as to the terms in which the work of a SIG can be published and that this is monitored by the Executive Committee.
26. It is important that each SIG follows the guidance set out by the Council; and that the Executive Committee puts in place a scheme for self-monitoring.
27. Each SIG should therefore provide an annual report to the Secretariat in May of each year. The report should cover matters such as the activities of the SIG, its governance, its funding and the level of active participation. Each report (together with comments from the Secretariat) should be considered by the Executive Committee in June of each year and a report made by the Executive Committee to the General Assembly and Council. This

procedure has been adopted this year following consideration of the Executive Committee of an earlier draft of this self-assessment.

28. There are proposals for the establishment of further SIGs. This is to be encouraged. However, it has become clear that a SIG on a particular area may only be required for a particular period, that interest in particular subject might wane, or that it would be better if two SIGs were amalgamated. As SIGs represent a commitment of ELI's resources, it would therefore be desirable if a strategy was developed which included consideration of:
- a. Whether each SIG should be established for an initial defined period;
 - b. Whether the Council or the Executive Committee should review each SIG at defined periods and if necessary close the SIG or amalgamate it; and
 - c. The overall consideration for the establishment of new SIGs.

III THE MEMBERSHIP

The growth in and types of membership

29. The individual membership has grown from 589 in September 2012 to nearly 1500 in August 2018; the number of institutional observers has grown from 18 to over 100. This is a very substantial achievement and very significant credit and thanks must be due to the Membership Committee.
30. The categories of membership have been (1) Individual Fellows (2) Individual observers and (3) Institutional Observers. A notion of Sustaining Membership has been created to strengthen the financial base of ELI.
31. Despite this success, ELI is not complacent. Plans are in place to continue to expand the membership and to ensure that there is a proper balance between the different states and the different legal vocations. It will be important to secure sufficient resources within the Secretariat to support this strategy and to show familiarity with the membership of ELI.
32. In addition ELI is examining the production of a proper database of the membership in compliance with the GDPR.
33. There are problems with the late payment of membership fees. These are being addressed administratively and it is not necessary to cover the ways in which this is being done in this self-evaluation.

National Hubs

34. Hubs were established as a practical means through which ELI Members could meet closer to home, communicate in their native language, discuss current or upcoming projects and

generate ideas for future ELI activities. They are of fundamental importance to ELI's success. They played an important role in making the existence of ELI known across Europe and in encouraging recruitment.

35. Guidance was given as to the running of Hubs on 18 July 2014. This has not been followed in every case. The Secretariat has agreed to address this issue, but as in the case of SIGs, it is desirable that there be better self-monitoring.
36. Each Hub should therefore provide an annual report to the Secretariat in May of each year. The report should cover matters such as the activities of the Hub, its governance, its funding and the level of active participation. Each report (together with comments from the Secretariat) should be considered by the Executive Committee in June of each year and a report made by the Executive Committee to the General Assembly and Council. This procedure has been adopted this year following consideration of the Executive Committee of an earlier draft of this self-assessment.
37. It is encouraging to note that new Hubs are in the process of launch or consideration. However, it is necessary for the Executive Committee to take action, either by finding a new co-ordinator for the Hub or taking other steps with the authority of the Council (such as suspending or dissolving a Hub) if a Hub becomes inactive or no longer serves its purpose.

IV GOVERNANCE

38. The governance of ELI is complex, with features such as four distinct bodies having a role in governance and rules as to the length of time persons can be members of the bodies or hold office. However, at this stage of ELI's development, it would not be appropriate to review the need for such complexities, though such a review should be considered in due course.

The General Assembly

39. The annual meeting of the General Assembly has alternated between a meeting in Vienna and a meeting in a city that has generously agreed to host the meeting. Though the annual meeting has been largely formal in nature, it has been accompanied by very successful conferences with a combination of distinguished speakers, panels and meetings of SIGs. Attendance has increased year on year.
40. The combined annual meeting and conference has been the principal means through which the fifth aim set out in Article 3 has been achieved.

The Council

41. The membership of the Council is stipulated in Article 10 as being between 7 and 60. The membership has throughout been 60. Although this would appear large, it has worked in practice because it is usually the case that only somewhere between 50% and 60% of the membership has been present at meetings. Given the extensive role of the Council in relation to projects and the need for a wide range of expertise, meetings of less than the number actually present would probably not provide the right balance. For the long term, however, there is a powerful case for consideration to be given to making the Council a body of the size which in fact is present at meetings; if this were done, members would have to understand it was their obligation to attend, absent compelling circumstances.
42. As with many new organisations, it has taken a body the size of the Council time to establish its best method of working, particularly in relation to projects. The meeting in February 2018 provided an example of the way in which the Council should work – scrutinising some of the governance and management issues proposed by the Executive Committee, receiving reports and other such matters, but devoting the greater part of the meeting spread over a day and a half to its role in relation to projects.

The Officers and the Executive Committee

43. The running of an organisation of the size of ELI is a substantial task. It has four principal components:
 - a. Administration: the membership, the organisation of the meetings of the Executive Committee, Council and General Assembly, collecting fees and paying expenses etc;
 - b. Finance: securing funding, setting the budget, controlling the budget and approving the budget;
 - c. The supervision and support of projects; and
 - d. External relations, including dealing with EU and state institutions and media.
44. The general supervision of these four tasks is in practice the responsibility of the Executive Committee under Article 11 of the Statute, though the budget and accounts (as well as the appointment of auditors) is the responsibility of the General Assembly.
45. The way in which these four principal tasks have been discharged over the years since the foundation of ELI has varied considerably. Some changes have been made and new procedures soon to be established (such as the 2018 draft Guidelines for the ELI Executive Committee and Secretariat).
46. However, in the light of the growth of ELI, the substantial project work now undertaken, and the substantial administrative burdens, it would be opportune for there to be a review of the

way in which the Officers, Executive Committee and the Secretariat distribute and discharge those ever increasing responsibilities.

The Senate

47. The Senate has played an important part in the development of ELI and an informal advisory role in the maintenance of continuity in the officeholders and Executive Committee where succession planning is of real importance. Succession planning has to take account of Articles 10(2) of the Statute (which sets the length of terms of members of the Council) and 11(3) (which sets the length of the terms of the Officers and the Executive Committee).

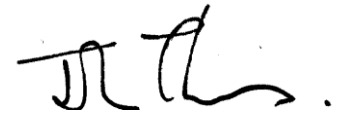
Finances and Fundraising

48. The generous support provided by the University of Vienna has been essential to the establishment and functioning of ELI.
49. The significant grant made by the EU has enabled ELI to increase the number of projects it has undertaken. At some future stage, it would be desirable to discuss with the EU Commission the way the funding could be optimised.
50. Attempts continue to raise further funds through the Fundraising Committee. A special thanks is due to this Committee which has worked hard; but experience has shown that this is in present circumstances can be difficult. An important task is to raise funds for the annual ELI Young Lawyers Report and to encourage Foundations to support particular projects.
51. There has been discussion about raising the current annual membership fee from €60, but although this should be kept under review, it is important that the fee set does not discourage those of more limited means from joining. A decision has been made to create a notion of Sustaining Membership at an annual rate of €120 which will bring some much needed help to strengthen the finances of ELI.
52. As the placing of ELI on a secure long term financial basis remains a significant task for the future, it would be desirable to keep the strategy under continual review.

Communications, publicity and public relations

53. Communications, publicity and public relations comprise at least two distinct activities – (1) collection of information and communication with the membership and (2) making the profile and activities of ELI more widely known through the media, social media and conversations with public institutions, publications bearing ELI's imprint etc.

54. Much has been done in relation to the first activity – ensuring that information about ELI’s activities are collated and distributed to the membership in regular newsletters and through the website. Thus the first aspect of communications etc has seen real progress.
55. However, despite the considerable achievement of ELI, the recognition of that achievement by those familiar with the work of ELI, the work done to promote that work through speeches, articles, seminars, meetings and publication under ELI’s imprint, and the exertions of the publicity officer, the second aspect of communications has been less successful and the achievement of ELI is not as widely known as it should be.
56. There is no ready answer to this second issue, save to say that more needs to be done to make the profile of ELI more widely known through the media and social media and through conversations with institutions etc. It would be highly desirable for a communications strategy to be produced by the Secretariat so that the Executive Committee can review as a regular item at its meetings the work being done and the progress being made in implementing the strategy. The log of activities presently kept by the Secretariat should be assistance.



Lord Thomas of Cwmgiedd

1 August 2018