

Minutes of the Council Meeting

31 March – 1 April 2017
Mercure Hull Grange Park Hotel, Hull, United Kingdom

Present

Chair: Wallis, Diana (*proxy for Wierzbowski, Marek*)

Council Members:

Alunaru, Christian
Avgerinos, Yannis
Azizi, Josef (*proxy for Prunbauer, Marcella*)
Bargelli, Elena (*proxy for Infantino, Marta*)
Beale, Hugh
Caponi, Remo (*proxy for Micklitz, Hans-Wolfgang*) (only on 31 March)
Clément, Marc
Clough QC, Mark
Doralt, Walter (*proxy for Kaiafa-Gbandi, Maria*)
van Erp, Sjef (*proxy for Botusharova, Snezhana*)
Gilligan, Paul
Iamiceli, Paola (*proxy for Cafaggi, Fabrizio*)
Illescas-Ortiz, Rafael
Keglevic, Ana
Király, Miklós
Miller, Katharina (only on 1 April)
Philippe, Denis (only on 31 March)
Sabato, Raffaele (*proxy for Porchia, Ornella*)
Schulte-Nölke, Hans (*proxy for Schulze, Reiner*) (only on 31 March)
Sorabji, John
Storme, Matthias
Thomas, Lord John
Wendehorst, Christiane (*proxy for Graf von Westphalen, Friedrich*)
Zalar, Boštjan

Ex-Officio Council Members:

Lewis, Alasdair
Netten, Leo

Senate:

Jacobs, Sir Francis

Keepers of the Minutes (Secretariat):

Ólafsson, Daði
Foidl, Ines
Buchwald, Catherine

Meeting commenced on 31 March 2017 at 15:55.

I. Opening and Welcome

- (1) Diana Wallis opened the meeting and welcomed those present. She thanked those present for attending in her home town.

II. Approval of the Agenda

- (2) The agenda was approved.

III. Approval of Minutes of the September 2016 Council Meeting

- (3) The minutes were approved with an amendment by Josef Azizi to return point 9 to the previous version of the minutes.

IV. Report from the President

- (4) Diana Wallis highlighted the two projects she was involved in: the joint Project with the International Institute for the Unification of Private Law (UNIDROIT) (From Transnational Principles to European Rules of Civil Procedure) and the joint Project with the European Networks of Councils for the Judiciary (ENCJ) (The Principled Relationship of Formal and Informal Justice through the Courts and Alternative Dispute Resolution) and was pleased that they highlighted the great cooperation that the ELI has achieved and how much attention it has attracted. Just recently she was asked to present the civil procedure Project before the European Parliament, when the rapporteurs of this topic presented their results. Another highlight was her mission to Riga (Latvia) which will host the Annual Conference in 2018.
- (5) Diana Wallis pointed out that unfortunately Johan Gernandt, the ELI's treasurer, was unable to attend the current meeting, however, she wanted to draw Council members' attention to the possibility of a new Operating Grant with the Commission, which, this time, would be a four-year agreement. She also pointed out that it would be more demanding to achieve the funding this time. The Council would need to be aware of that, as it will take up a great portion of the Secretariat's time.
- (6) Diana Wallis also emphasised a meeting she had with the Fundamental Rights Agency, which could lead to a new Project on business and human rights and access to remedies when corporations have breached human rights. She noted that the Commission indicated that this was an exciting area to deal with. Matthias Storme cautioned that it was important that the terms of cooperation would guarantee enough autonomy but said he looked forward to this cooperation.

V. Elections

- (7) Diana Wallis reported on the search committee's proposal of putting Christiane Wendehorst forward as a candidate for President, as it can do so under the Statute. Christiane Wendehorst showed sincere gratitude to the Senate for its trust and said she was prepared to stand as a candidate among several and was aware of the challenging times ahead that would include securing new funding and maybe the need to negotiate with new host institutions.
- (8) Diana Wallis hoped for both consistency and renewal in the new Council and Executive Committee. Lord John Thomas mentioned that the institutions that compel people to retire after a short period of time are usually weaker for it by the loss of collective memory than those that allow continuity. He questioned whether this rigid rule was in the long-term interest of the ELI. Walter Doralt noted that Council Meetings following elections are usually packed, especially in a year where the President and the whole executive were to be elected. He cautioned that when the new Council elected the new Executive Committee, the composition in regard to continuity should be borne in mind. At most, there will be three continuing Executive Committee members.
- (9) Sjef van Erp commented that if there was real demand for change the ELI Statutes would require a formal amendment. Josef Azizi questioned whether the better use of Ex-Officio Council members could help bridge this. Paul Gilligan equally questioned the rationale of rotating out that much knowledge from the heart of the organisation and put forward an idea circulated among the Elections Committee about an increase of the Executive Committee which could also bridge this continuity problem.
- (10) Walter Doralt was less worried at this point because at least the departing Executive Committee members, for the moment, would remain on the Council for the next two years, providing their knowledge from a different perspective.
- (11) Diana Wallis reminded those present that usually institutional memory would rest with the Secretariat and the Secretary General and not with the Executive Committee, but with the most recent departure of Rosana Garcíandía, this has become difficult. However, Diana Wallis hoped that this would change in future.
- (12) On this occasion, Diana Wallis, announced the name of the new Secretary General, Dr Vanessa Wilcox, who would join the Secretariat on a part-time basis in May 2017 and on a full-time basis from June. After Diana Wallis and Christiane Wendehorst had interviewed several candidates, Vanessa Wilcox, who was currently with the Austrian Academy of Sciences' Institute for European Tort Law, was the most outstanding candidate. Diana Wallis was sure that in a long-term perspective, Vanessa Wilcox would help lead the ELI through new challenges. Christiane Wendehorst commented that that was a unanimous view and thanked the Secretariat staff for their support in arranging the interviews.

- (13) Returning to the topic of the continuity of the Council, Lord John Thomas wanted to know the names of those members of the Executive Committee who would consider running for another term. Diana Wallis mentioned the names of Sjef van Erp and John Sorabji. Josef Azizi offered the idea of adding or creating a limited number of honorary members (such as former presidents) to the Council. Sjef van Erp said he would consult the American Law Institute (ALI) Statutes for inspiration.
- (14) On a further issue, the matter of transitional reimbursements was raised for Council members at the Council Meeting in September, complicated by the (re) Election of half the Council. Christiane Wendehorst explained that the problem was raised that candidates would be coming to the meeting, not knowing if they got elected and would be reimbursed for their travel expenses, which might dissuade some from coming. Hans Schulte-Nölke gave the Executive Committee carte blanche to find a solution. Diana Wallis pointed out that the reimbursement guidelines were a matter for the General Assembly. There was a suggestion to simply reimburse half the expenses of incoming and outgoing Council Members.
- (15) Miklós Király suggested having two meetings, which Diana Wallis thought would be the most elegant way of dealing with this. However, the problem was one of finances and that the ELI cannot anticipate how many people will ask for reimbursement but this was a risk the ELI would have to take.

VI. Special Interest Groups

- (16) John Sorabji reported about the success stories of the ELI's Special Interest Groups (SIGs). 11 SIGs have now existed for 18 months and the vast majority was working well, which is reflected in the growth of memberships and activities. He highlighted four special cases: the Administrative Law SIG (which held a meeting in Ferrara and was convening a Conference in June in Budapest (Hungary)), the Business and Finance Law SIG (which also met in Ferrara and would be holding a workshop at the University of Vienna (Austria) in June), the Competition Law SIG (which had started a study by collecting country reports on competition law and which envisioned a regular reporting system, which John Sorabji hoped they may present at the next General Assembly) and the Digital Law SIG (which had also just convened a meeting on the margins of the ELI Conference on Digitalisation in Hull (UK)). Two areas where there is room for improvement is the EU Law SIG and the Civil Law SIG, which might merge with other SIGs.
- (17) Josef Azizi pointed out that theoretically all SIGs are EU Law SIGs and commended the Competition Law SIG for their important idea. He wondered if a committee could be established on yearly updates. Further, he thought it interesting to establish subgroups around the topics of e-government and e-justice, within the Digital Law SIG, as especially e-justice was so very important from the EU-side and there was a lot to be gained from e-government.

- (18) John Sorabji pointed out that it was the same case with the Civil Law SIG, as there was a lot of overlap with others.
- (19) As an EU SIG could have a lot to contribute right now, it might simply be a problem of organisation in that case.

VII. Council Decisions

- (20) Diana Wallis asked for permission to deal with two items (the Council Decisions) from tomorrow's agenda today (to ensure a quorum existed), as some colleagues were leaving early tomorrow morning. This was approved.
- (21) Criminal Law: Diana Wallis pointed to the special edition, which everyone had received as an aide accompanying the draft Instrument to help people in their decision. It was an important Project and a wonderful example of what the ELI should be doing as it gives clear legislative options. There was a **unanimous** decision to approve this Instrument by those present and voting (34 votes in favour). Approved.
- (22) Mandate to Apply for Grants: Diana Wallis highlighted the new call, which had recently been published by the European Commission for a new Framework Agreement covering the years 2018–2021. She asked for permission to apply. Marc Clément further explained how the framework agreement works, ie that each year the ELI could apply for an operating grant under the framework. Josef Azizi called on his fellow Council Members, who were in a position to take on grant initiatives that would not affect the independent status of the ELI, to come forward with ideas so more funding could be garnered, especially considering the positive grant approval from the Fritz Thyssen Foundation and the current inactivity of the Fundraising Committee.
- (23) All were in favour of the grant application, with two abstentions (32 votes in favour). Motion approved.

VIII. Membership Committee

- (24) Walter Doralt was positive about the current membership situation, especially considering the decision to terminate those who were in long-term payment arrears. Where Walter Doralt was not satisfied was in terms of courts (especially the German ones). If someone had a new point of contact, Walter Doralt, would welcome any suggestions. Raffaele Sabato wondered which countries were underrepresented in institutional terms. Walter indicated that any individual members were always welcome but in institutional terms, German courts were underrepresented. Especially, as Lord John Thomas pointed out, since the ELI should not be purely academic and needed to involve enough practitioners.

- (25) Elena Bargelli pointed out that she had experienced some resistance from institutions, strangely enough especially from those who were worried about fees but would be exempt anyway (such as constitutional bodies). Another point was that they did not understand whether the ELI could be useful for them in terms of training and education. She suggested that maybe a translation of the membership brochure could help. Diana Wallis reminded everyone that, as a principle, the working language of the ELI was English. She said that it was necessary to make institutions understand that the ELI does something very practical – it develops and improves European Law. It was important to work with the Council of Bars and Law Societies of Europe (CCBE) to have more lawyers and notaries in working groups, as an added value.
- (26) Lord John Thomas suggested a slight change of the template of the projects, which should also include the legal backgrounds the various people involved in projects came from. This was accepted as a very valuable inclusion. He also suggested heads of courts be contacted to let them know some support was needed and to invite them to propose some names to the ELI. Ideally, contact would come from a judicial member of the ELI.
- (27) Josef Azizi wondered whether the travels of the ELI President could be further used to raise the profile of the ELI. He also wondered why there were no members from Luxembourg, which seemed strange. Walter Doralt clarified that the Council report (unlike the Report presented to the GA) only reflected nationality, not residency; in the latter case, more people from Luxembourg would be shown. Diana Wallis mentioned that at every journey, such as the one to Latvia (which was so far underrepresented), many promises were made by the Latvians to apply for membership and get more members to join leading up to the Annual Conference that was happening there in 2018. Sjef van Erp further mentioned his and Johan Gernandt’s trip to Moscow recently, which had already sparked some membership applications as well.

IX. Report on Finances

- (28) As Johan Gernandt was unavailable, Ines Foidl from the ELI Secretariat made short remarks about the 2016 Draft Report on the Financial Situation on his behalf. The situation beyond 2017 was especially highlighted, as a new EU Framework Agreement would have to be applied for.

X. Report on EC Grant

- (29) Marc Clément further explained that Brexit should not have any immediate consequences for the ELI’s ability to apply for grants from the EU.

- (30) Walter Doralt mentioned that UK institutions could be interested in joining the ELI especially now, in order not to lose the European connection. From a financial point of view, Walter hoped that the ELI would receive the new grant opportunity but that it would also be wise to have a plan B and C.

First day of meetings concluded on 31 March at 18:00.

Second day of meetings commenced on 1 April at 09:10.

XI. Report on International Relations

- (31) Sjef van Erp highlighted the cooperation with the World Bank on its Law, Justice and Development Week, of which the ELI co-founded the Global Forum on Law, Justice and Development, where Sjef van Erp chaired a panel, by the request of the World Bank, on blockchain technology. Other international relational endeavours were mentioned by both the President and Sjef van Erp (see Annex II).

XII. Report on Projects

- (32) Christiane Wendehorst invited the Council to go through the projects one by one as some Reporters or Chairs of Members Consultative Committees (MCCs) had prepared presentations.

Statements

- (33) **ELI Statement on ‘Detention of Asylum Seekers and Irregular Migrants and the Rule of Law’**: Bostjan Zalar, the Reporter of this Project, presented the Project and noted that a slight delay in the publication was due to a need to be as up to date as possible in this very fast-changing area of law but which would in the end provide better results. He highlighted the awareness-raising efforts that he has done for the Project and provided input on the dissemination of the results through various channels (e.g. the European Union Agency for Fundamental Rights (FRA), the UN Refugee Agency (UNHCR) and the European Judicial Training Network). Lord John Thomas noted how important this Project was and Miklós Király remarked that as the ELI had an impressive number of courts and Supreme Courts among its Institutional Members, this would be another channel for dissemination. He wondered if it was possible to invite these to a roundtable and present the results to them, which could garner great publicity for this Project and the ELI.
- (34) **ELI-ENCJ Statement on ‘The Principled Relationship of Formal and Informal Justice through the Courts and Alternative Dispute Resolution’**: Diana Wallis, who is a Co-Reporter, indicated the milestones reached by this very fast-moving

Project. Its results will be presented at a Conference in Trier in cooperation with the Academy of European Law (ERA) at the end of the year.¹

- (35) **ELI Statement on ‘Research and Development Tax Incentives’**: Christiane Wendehorst briefed the Council on the recent developments in this Project, mainly that the European Union has gone ahead with legislation that would cover exactly what this Project was meant to deal with. Walter Doralt was concerned that this Commission’s proposal was surprising to the Project Team as there should have been indications from the Commission. The way forward would be to go back to the Project Team to ask them to work on the proposal to either see if there was indeed added value in continuing the Project as is or to change it.

Instruments

- (36) Christiane Wendehorst introduced ELI Instruments as being more proactive in nature than Statements and added that they require the approval of the General Assembly and the Council (as was shown just yesterday when the Council approved the Criminal Law Instrument and now still requires the Voting period for the GA to close before being approved as an ELI Instrument).
- (37) **Instrument on ‘Model Rules on Contractual Aspects of Online Intermediary Platforms’**: Christiane Wendehorst gave an introduction to the Project in absentia of Hans Schulte-Nölke.
- (38) Walter Doralt remarked that he hoped there will be a wider group of professions in the advisory group, which was still conclusively academic, which was not aligned with what the ELI did and was a fundamental issue, despite his admiration for the work already done, especially as the work seems quite advanced already. Diana Wallis noted that it was planned to involve stakeholders. Hugh Beale worried that the format still looked like a Directive, rather than Model Rules, which Raffaele Sabato echoed. Katharina Miller observed that as a legal practitioner it was sometimes difficult to have a voice in developing projects and thought practitioners and lawyers of all legal backgrounds should be there from the start. John Sorabji noted that the Project Team would surely be up for recommendations and asked Council members to recommend people they thought could be a part of this Project (ie in the Advisory Committee or the Team itself). Elena Bargelli wondered whether the Project Team was in contact with the Commission as there would be some overlap with the Commission’s work, which Christiane Wendehorst affirmed that it was the case. As the current plans of the Commission were to revise the Consumer Rights Directive before the full Project is published, the Commission might publish its results before the ELI but it was a different situation from that with the tax law Project. Dadi Olafsson spoke about some of the dangers in having industry stakeholders too close to the Project, while

¹ AN: 31 November-1 December, Trier.

Sjef van Erp remarked that the main trouble for judges was independence. Diana Wallis mentioned that a stakeholder consultation could happen at a later stage in a Project. However, it was very important to have practitioners involved from the very start.

- (39) **Instrument on ‘Rescue of Business in Insolvency Law’**: Matthias Storme, as Chair of the MCC, presented the preliminary outcome of the Project but noted that advisors had only met once physically, which worried Hugh Beale, as the impact of the Project is going to depend on the fact that it was approved by a wide range of people, albeit not part of the Team itself. The draft is currently undergoing a two-month consultation period with stakeholders. Hugh Beale said he would like more involvement from the Advisory Committee at various stages of Projects, at least by email. He further suggested moving towards a positive endorsement system as that would give more weight to the outcome of a Project. Mark Clough took this even one step further and said he would not have someone’s name in the Acknowledgements if no input was provided; however that could have some negative effects as well.
- (40) Sjef van Erp reported on a two-day conference in Leiden last November, which he attended as a representative of the Executive Committee, where stakeholders and judges met to discuss results of this Project. Diana Wallis noted that the Commission moved forward with a directive in November 2016, which drew upon the ELI’s work very heavily. Mark Clough noted that the current approach of the Instrument, that of a model law was very good as these recommendations could be easily converted into legal instruments. Hugh Beale was not worried about the overlap of work between the Commission and the ELI as he thought people would recognise the ELI’s work and how the ELI influenced Commission policy. He wondered if an annex could be added onto the ELI Instrument on how the proposed directive fits with the ELI’s Recommendations – rather than writing it in the document itself. Alasdair Lewis noted as a general observation that once a project was finished the European Land Registry Association (ELRA) provided a report on what went well, what did not, what could be learnt to improve other projects and capture that corporate knowledge and wondered if this was part of the ELI process. Diana Wallis thought it was a wonderful suggestion. Christiane Wendehorst urged the Team not to delay the Project too long. There could always be a follow-up supplement after waiting a certain period to see what happens but the adoption needed to happen in September.
- (41) **ELI-UNIDROIT Instrument on ‘From Transnational Principles to European Rules of Civil Procedure’**: Diana Wallis, as a member of the Steering Committee, noted that there might be a potential issue as this Project had already gained traction from the Commission to legislate, rather than provide soft law possibilities as envisioned by UNIDROIT (as happened with their previous cooperation with the

ALI). It would be prudent to have a brief statement as a reaction to the Parliament's proposal, in case this becomes necessary.

- (42) John Sorabji noted that this was one of the most diverse projects in terms of geographic and professional backgrounds and Diana Wallis noted that the working groups preferred not to have the discussion papers in the public domain at too early a stage so it was a bit difficult to involve a broad public.
- (43) **ELI Instrument 'Empowering European Families: Towards more Party Autonomy in European Family and Succession Law'**: Christiane Wendehorst, the Co-Reporter of this Project, mentioned that the Project benefited from an active MCC, chaired by Elena Bargelli. Also, there is a strong focus on practice in the Project. The only problem was the change in activities at Commission level.
- (44) **ELI-ULC Feasibility Study on 'Fiduciary Access to Digital Assets'**: Sjef van Erp reported on the current status of this possible feasibility study. The Council of the Notariats of the European Union (CNUE) wanted to have one of their notaries included, which had now happened (Clinton Bellizi). There would be a Skype meeting in May between the ELI and the Canadian and American Uniform Law Commissions' representatives.
- (45) **ALI-ELI Feasibility Study on 'Data as Assets and Tradeable Items in the 21st Century'**: Christiane Wendehorst, the principal investigator from the ELI's side, outlined the first steps of this Project, which would be presented to the ELI and ALI Councils so they would then decide if it is worthwhile to carry it forward as a project. A grant of €35.000,00 was received by the Fritz Thyssen Foundation to cover travel expenses and a conference in a second phase of this study. Similar to the ELI-UNIDROIT Project, representatives of the Commission indicated that there was interest to legislate while the ALI would prefer a more abstract approach with principles that could work worldwide. It served to underline that the ELI was choosing the right topics. After Walter Doralt inquired about the possible directions of the possible project, either to go along the path of the ALI or conform more to what the Commission was doing, Christiane Wendehorst replied that it was important to stay close to the legislative process on an informal basis and at the same time not to try to endanger the joint Project with the ALI. Matthias Storme also indicated that priority should be given to the cooperation with the ALI. Paola Iamiceli and Hugh Beale noted that the ELI had to move fast on this.

XIII. Report on negotiations with OUP

- (46) Sjef van Erp noted that the negotiations were for a book series on the one hand and a Journal on the other. Currently, two book projects were under review: one on insolvency, the other on criminal law. The Editor-In-Chief will be Herwig Hofmann and a Letter of intent would be signed by OUP soon. The title of the Journal proposed by Herwig Hofmann was, 'Emerging Legal Issues', which conveniently is an acronym for the ELI. On the financial side, the ELI would have to

pay €15 for every individual member and €100 for every paying institutional member, meaning that every member would get an automatic subscription. Should there be a profit from this cooperation, this would be a way to lower the amount. Walter Doralt wondered whether this €15 fee also included postage, if this was a total amount per member, if the amount was capped and if the Institutional Observers that did not pay a fee could also have access to the Journal. Sjef van Erp said he would consult OUP on this. Walter Doralt was very keen to mention that other options of sponsorship or funding should be explored first before thinking about raising the membership fee, which would take approval of the General Assembly², as this would most likely lead to the departure of some members. Diana Wallis thought that it would be necessary to have a discussion on membership fees at a future date in the Council.

XIV. Any Other Business

(47) No further business³.

Meeting concluded on 1 April at 13:00.

² AN: According to the ELI Statutes, Art. 8 (5): 'Membership fees shall be determined by the *Council*.'

³ Following the meeting, the ELI Secretariat received additional remarks from ELI Council member, Josef Azizi, of general importance for the ELI's future projects and in particular in respect of its 'Detention of Asylum Seekers and Irregular Migrants and the Rule of Law' Project. The comments were shared with ELI Council members via e-mail and on the MyELI platform on 24 April 2017. The subject was raised again shortly before the September 2017 Council meeting and the topic was further discussed at the meeting on 6 September 2017 in Vienna. Accordingly, the minutes of the latter meeting will reflect the substance of that discussion.