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Newsletter

September – October 2019

Bringing Legal Experts Together

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Message from Christiane Wendehorst Newly Re-Elected ELI President

Dear Members and Friends of ELI

It is a huge privilege for me to be serving this institution as a President for another two years, and I wish to thank the Council, who elected me, for their trust and confidence. I would also like to thank them for the wisdom of having elected such an amazing team for the Executive Committee, and it is because I can count on this team's guidance and support, as well as on the guidance and support of the Council and Membership, and by the Senate, that I am very much looking forward to the coming 24 months. My joy of having this privilege is mixed with a trace of sadness as three members of the Executive Committee, who served from 2017 to 2019, were no longer available for re-election. I am immensely grateful to former Vice-President Sjef van Erp, as well as to Hans Schulte-Nölke and Raffaele Sabato, for wonderful years of collaboration, and for everything they have done, and are continuing to do, for this institution.

Talking about priorities, I would like to mention ELI's project strategy for the coming years in the very first place. Several of ELI's flagship projects, which we are so proud of and which have developed extremely well under the guidance of our members, have now reached their final stage. This is a moment of joy for the institution, but it also means that important decisions need to be taken concerning the most attractive new projects to take on board. Your new Executive Committee will discuss ELI's project strategy for the coming years in November with a view to submitting it to the ELI Council very soon. We have received a series of thoughtful suggestions for new projects from our members. To an increasing extent, however, ELI is also defining particular tar

get areas and convening High Level Expert meetings, where some top brains of the respective target area come together and identify the most pressing topics to work on where ELI could make a real difference for Europe. The High Level Expert meetings we have so far held have yielded an amazing list of promising topics, and I am confident that the ELI Council will present an attractive package to the Membership very soon.

Another priority will be reaching out to institutions and individuals from outside Europe. It is in particular our projects in the area of digital law, and our ever-closer cooperation with international organisations such as United Nations Commission on International Trade Law (UNCITRAL) and International Institute for the Unification of Private Law (UNIDROIT) as well as with institutions from other continents such as the American Law Institute (ALI) or the Uniform Law Commission (ULC), which have confirmed the necessity of thinking more globally. Partners from, for instance, the Americas, Asia, and Africa are becoming ever more important in our joint quest for improving the law, in the interest of citizens and businesses worldwide.

Let me close by stressing that ELI is a membership-driven institution, and it is you, our members, who make and shape ELI, and who are ELI's biggest asset. It is the members that ELI is most proud of, and on whom the institution relies, and together we will continue working towards our vision of tackling the problems of our times, as far as the law can offer solutions, for the benefit of everyone.

With warmest regards



It is a huge privilege for me to be serving this institution as a President for another two years, and I wish to thank the Council, who elected me, for their trust and confidence.

Christiane Wendehorst



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ELI in Vienna

The 2019 ELI Annual Conference and Meetings took place in Vienna from 4–6 September. It was hosted by the City of Vienna, which opened its City Hall (*Rathaus*) to participants, and by the Faculty of Law (*Juridicum*) of the University of Vienna. The event was also supported by the European Union. To view the comprehensive Conference Brochure, please click [here](#).

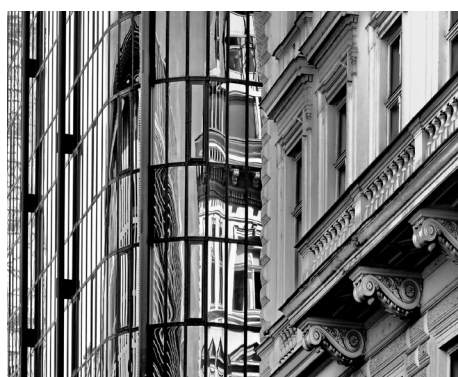
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New Cogs in ELI's Wheel: Election Results

17 panels, 91 panellists and 15 meetings

In addition to a joint Executive Committee-Senate meeting, several project and SIG and Hub meetings, ELI convened a Membership meeting on 4–5 September 2019 that was especially noteworthy in light of the ELI Council and Executive elections.

Newly Elected Council Members

Voting commenced on 4 and ran until 5 September. Elections were overseen by ELI's Returning Officer, Irmgard Griss, who is also Deputy Speaker of ELI's Senate, and Speaker of ELI's Senate, Reinhard Zimmermann. Special thanks are owed to them both. ELI is

pleased to announce the election of the following 28 new candidates to its Council and is grateful for their preparedness to advise and support their peers in ELI's Executive and to work towards developing ELI and its output further:

- Ross Gilbert Anderson
- Teresa Bielska-Sobkowicz
- Bénédicte Fauvarque-Cosson
- Julius Forschner
- Paul Gilligan
- Miguel Gimeno-Ribes
- Stefano Giubboni
- Tatjana Josipović
- Thomas Kadner Graziano
- Corrado Malberti
- William Martin McKechnie
- Matthias Simon Neumayr
- Fausto Pocar
- Meliha Powlakić

- Ilaria Pretelli
- Daria de Pretis
- Teresa Rodríguez de las Heras Ballell
- Jens Martin Scherpe
- Ulrich Gerd Schroeter
- Andrey Mikhailovitch Shirvindt
- Pietro Sirena
- François Maurice Tremosa
- Kaius Tapani Tuori
- Christian Willm Twigg-Flesner
- Aneta Dżenny Wiewiórowska-Domagalska
- Aleš Zalar
- Irina Zlătescu
- Fryderyk Andrzej Zoll

A full list of ELI Council members, that is including continuing members, can be found [here](#).

Newly Elected Executive Committee Members



ELI President

Christiane Wendehorst

Christiane Wendehorst is Professor of Law at the University of Vienna. She is a member of the ALL, the Academia Europea, the Austrian Academy of Sciences, the International Academy of Comparative Law and several international research groups. Wendehorst is one of the Founding Members of ELI and has previously served as Treasurer, President and Vice-President.



First Vice-President

Lord John Thomas

Lord John Thomas was former Lord Chief Justice of England and Wales (2013–2017). He is Chairman of the Welsh Government's Commission on Justice in Wales, Chairman of the UK Financial Markets Law Committee, Chancellor of Aberystwyth University, an Honorary Fellow of Trinity Hall, Cambridge, and a Fellow of the Universities of Bangor, Cardiff and Swansea. He is one of ELI's Founding Members.



Second Vice-President

Pascal Pichonnaz

Pascal Pichonnaz is Professor for Swiss contract law, Roman law, as well as European consumer law and comparative contract law at the University of Fribourg. Pichonnaz was Dean of the Law Faculty and President of the European Law Faculties Association (ELFA). He has published several books and is a member of several boards of legal periodicals. Pichonnaz also chairs the Swiss Federal Commission for Consumers.



Treasurer

Denis Philippe

Denis Philippe is Professor at the University of Louvain and Visiting Professor at the University of Paris Ouest. He is a lawyer at the Brussels and Luxemburg bar and managing partner of Philippe & Partners. He is one of ELI's Founding Members.



Member of the Executive Committee

Anne Birgitte Gammeljord

Anne Birgitte Gammeljord is a practising Danish Supreme Court lawyer. She is assistant lawyer in insolvency matters at the Maritime and Commercial Court in Denmark. She previously served on the Disciplinary Committee of the Danish Bar and Law Society and as a member of the Council of the Danish Bar and Law Society. She was President of the Council of Bars and Law Societies of Europe (CCBE) in 2009 and has been a member of the ELI Council and its Membership Committee since 2012.



Member of the Executive Committee

Pietro Sirena

Pietro Sirena is a Full Professor at Bocconi University. He has been Dean of Bocconi's School of Law since 2018. He is Director of the *Società Italiana per la Ricerca nel Diritto Comparato-SIRD* (since 2014), member of the Executive Board of the Society of European Contract Law (SECOLA) (since 2011), co-editor of the European Contract Law and Theory series (Intersentia) and *Cultura giuridica e rapporti giuridici* (Edizioni Scientifiche Italiane) and is a member of several associations and boards of journals.



Member of the Executive Committee

Fryderyk Zoll

Fryderyk Zoll is Professor at the Jagiellonian University of Cracow and the University of Osnabrück. Furthermore, he was a member of the Redaction Committee of the Acquis Group, the R Zimmermann team on comparative succession law, the Common Frame of Reference Team, the Polish Committee of Jurisprudence ('Komitet Nauk Prawnych PAN') and ELI's Online Platforms project. Additionally, he is an arbitrator at the Arbitration Tribunal at the Polish Chamber of Commerce.

Eight Years of Bringing Legal Experts Together

Welcome

ELI opened its doors to record numbers on 4–6 September 2019 at its Annual Conference and Meetings.

ELI President Wendehorst

Close to 400 legal experts from across Europe and beyond drew together to listen to, discuss and refine solutions to pressing legal issues. ELI President, Christiane Wendehorst, opened the Conference by welcoming those present to Vienna. Among other things, she highlighted ELI's decisive impact on legal development in Europe. This, she said, is visible from legislative changes that bear ELI's influence. Speaking on High Level Expert Groups recently instituted by ELI in various areas of law (to propose topics that complement ELI's current project portfolio), President Wendehorst explained: 'We get the top brains on a specific subject in Europe, lock them up in the room and do not let them out until they come up with ideas for projects, ranked according to merit'. President Wendehorst also focused on changes to ELI's Conference (with Friday devoted to sub-conferences organised by ELI Hubs and Special Interest Groups (SIGs), thus providing them with a platform for discourse on important legal themes).

Vice-Rector Tyran

Vice-Rector Jean-Robert Tyran branded ELI's mission of building bridges between scholarship and practice and its emphasis on practical output in its quest to improve the law and facilitate its application 'noble ones'. He was optimistic, given ELI's growth and the attention it increasingly draws, that the University of Vienna would continue to support the Institute. That one of the University's eminent professors is ELI's current President was something that Vice-Rector Tyran revealed the University is particularly proud of, as this has helped to position it and in particular



its law faculty in the international arena. The Vice-Rector closed by thanking Wendehorst for bringing the Conference to Vienna every other year and wished those present a pleasant Conference and stay in Vienna.

Dean Oberhammer

Although having opened hundreds of conferences and welcomed thousands of participants in his capacity as Dean, Oberhammer revealed that the welcome was more true in some cases, including in ELI's case, than in others. Extrapolating from the past, Dean Oberhammer predicted that the growing complexity of society and the law, digitalisation, and Europeanisation and globalisation of the law will be crucial topics in the near future, topics which the University of Vienna has already sought to tackle, in the latter case, through its support of ELI, among other things. Referring

to the recent extension of the ELI-University of Vienna Framework Co-Operation Agreement, Dean Oberhammer thanked Vice-Rector Tyran for his confidence in and support of ELI and he also thanked ELI President Wendehorst for all she has done.

4 September Panels

Day 1 of the Conference kicked off with panel sessions from several current and prospective ELI projects, namely on Principles for a Data Economy, European Rules of Civil Procedure and Artificial Intelligence and EU Administration.

Conference participants rounded up the first day of the Conference with an Evening Reception at the Austrian Ministry of Justice.



Evening Reception at the Austrian Ministry of Justice

ELI Branded 'Exemplary'

Vice-Chancellor's Welcome

Austrian Vice-Chancellor and Minister of Justice Clemens Jabloner cordially welcomed ELI Conference participants to the Ministry of Justice's premises at Palais Trautson. In his thought-provoking speech, the Vice-Chancellor thanked Rector of the University of Vienna, Hans Engl, for recognising and predicting with mathematical clarity how important it would be, not only for the University of Vienna but also for Austrian jurisprudence in general, to anchor such an institution as ELI in Austria.

In his speech, Vice-Chancellor Jabloner observed that the problems arising in individual jurisdictions are often quite similar despite differences in legal traditions and cultures. In contextualising ELI's work, he referred to the difficulties European legislation experiences – complex rules, inherent contradictions, incompatibility of regional rules with national legal traditions, linguistic difficulties, etc. 'For the most part,' Vice-Chancellor Jabloner continued, 'these difficulties are due to the spe-



cial circumstances that exist within the European legislative procedure. There are many players; several steps must be taken to achieve a common denominator. Frequently all this happens under severe time constraints and often under political pressure. This is augmented by reasons inherent

in institutions and by the limits of the competences of the EU.'

Despite this, the Vice-Chancellor concluded that the law of the EU has become of paramount importance for European citizens and for European companies: 'Many economic and so-



cial areas can no longer be regulated on a national level alone and require cross-border solutions and ELI has taken over this task and has put highly important subjects on its agenda.' For this, and the quality of its output, the Vice-Chancellor labelled ELI exemplary.

Having touched on the significance of several ELI projects, the Vice-Chancellor wished those present fruitful exchanges during the Conference.

ELI's Three Phases

President Wendehorst thanked the Ministry and Minister for hosting ELI and for their enduring support. In her speech, she recalled ELI's early days with several preparatory meetings in Amsterdam, in Prague, in Stockholm, in Frankfurt, in Hamburg, in Vienna and all the struggles that its Founding Members had to go through to establish it. She referred in particular to the defining meeting in Greece, which culminated in an agreement on ELI's Statute, and recounted the celebrations that followed at the Poseidon temple. 'Whereas ELI's future was uncertain then, eight years later ELI has not only survived, it is flourishing,' she observed. President Wendehorst recalled ELI's developments phases as the pasta phase, the consolidation phase and ELI's current phase. The pasta phase, President Wendehorst revealed, was a stage when there was no Secretariat and everything was done on her kitchen table. She ex-

plained that her children were at an age when pasta was the only thing they reliably ate and that pasta boiling time equated in her mind to time to update ELI's website and respond to ELI emails. The pasta phase was followed by a consolidation phase, when a Secretariat was installed. With respect to the current phase, President Wendehorst remarked on the incredible progress made by the Secretariat in the last year and the manner in which ELI now carries itself as a fully professional organisation ... and all this is rooted in its humble beginnings during the pasta period.

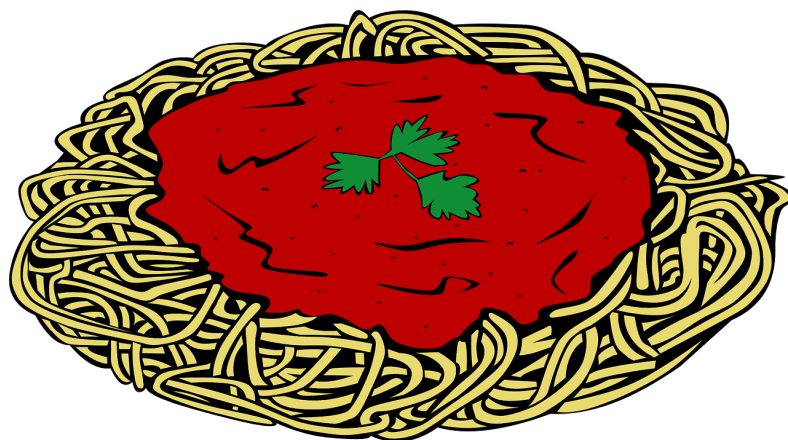
Recognising Key ELI Pillars

Before opening the buffet, President Wendehorst showed gratitude to outgoing Executive Committee members

Raffaele Sabato, Hans Schulte-Nölke and Sjef van Erp for their dedication to ELI and the sizeable impact they made. She underlined her sadness to lose all three – or to see them go on 'cooling-off periods', as she preferred to rationalise this – and presented each with an award.

In his acceptance speech, van Erp revealed that he was involved with ELI from its very foundation. He took full responsibility for ELI's long long url – 'europeanlawinstitute.eu' – since its acronym was no longer available and also recalled the emotions at the Poseidon temple once ELI's Statute was agreed upon. 'What I like about this Institute is its civility. That we respect one another,' was one of several poignant lines from van Erp's speech. That ELI's management would remain in the excellent hands of its current President, was one of several reasons van Erp revealed helped enable him to step down with confidence.

President Wendehorst read out the names of all the outgoing members of ELI's Council and thanked them immensely for the important role they played in ELI's development over the years. She drew particular attention to one Council member, Walter Doralt, who was also chair of ELI's Membership Committee, referring to him as a pillar. Doralt was also handed an award for his services to ELI.



Young Lawyers Shaping the Future of Law in Europe

The Evening Reception also served as the occasion for the handing over of the third YLA and the delivery of a speech by Luigi Buonanno on 'Civil Liability in the Era of New Technology: The Influence of Blockchain, Blockchain as the Backbone of a New Technology-Based Civil Liability Regime.' Both ELI Vice-President Sjef van Erp, who is chair of the Award and a Co-Reporter on ELI's Blockchain Technology and Smart Contracts project, and John North, President of Interleges that sponsored the Award, praised Buonanno, a doctoral candidate at Bocconi University, for his insightful contribution. Buonanno's award-winning paper can be accessed [here](#).



Recognising Exemplary ELI Hubs and SIGs

In 2019, ELI instituted Hub and SIG of the Year Awards to recognise the enormity of the contributions of these groups and the impact they have made in spreading the work of ELI further afield. Hub of the Year was difficult to decide. As such, the first award went to the Hub with the largest constituents of ELI members, the Italian Hub, chaired by Mario Comba and Riccardo de Caria. ELI's very active Spanish Hub, chaired by Carmen Jerez Delgado and Albert Ruda, was also recognised with an award. The SIG of the Year Award went to the Digital Law SIG, chaired by Alberto De Franceschi and Christoph Busch.

ELI is grateful for the dedication shown by the above groups in hosting various substantive events, in publishing their output and in working in tandem with ELI to achieve its core mission of contributing towards better law-making in Europe. A more detailed account on the awards to the above can be found [here](#).

Keynote by Anna Joubin-Bret on 5 September UNCITRAL



Day 2 of the Conference entailed panels on The Protection of Adults in International Situations, R&D Tax Incentives, Blockchain Technology and Smart Contracts, Common Constitutional Traditions in Europe, and a plenary session on Model Rules

on Online Intermediary Platforms, which sandwiched a keynote speech by Anna Joubin-Bret, Secretary of ELI Institutional Member, UNCITRAL. The Secretary emphasised UNCITRAL's longstanding working relationship with ELI and put this down not only to

UNCITRAL's high regard for ELI's processes and products but also because of the respect that both organisations share for integrating the achievements of diverse legal traditions in their work. Principally, however, Secretary Joubin-Bret put this down to the fact that many of ELI's current projects speak directly to UNCITRAL's mandate to 'promot[e] the progressive harmonization and unification of the law of international trade'.

Secretary Joubin-Bret briefed those present on UNCITRAL's ongoing and upcoming work programme. This includes its work on insolvency law, which was adopted by the Commission, and work on mediation and arbitration, all echoing the themes of ELI's completed projects on [insolvency](#) and [alternative dispute resolution](#). The overlap between UNCITRAL's and ELI's current and prospective work programmes are also evident in the digital sphere. In particular, Secretary Joubin-Bret referred to ELI's [On-line Platforms](#), [Blockchains](#) and [Data Economy](#) projects, projects which Secretary Joubin-Bret said UNCITRAL would follow closely.



A Sachertorte To Crown the Day

Founded in 1876, the Sacher Hotel, which has opened its doors to the likes of Emperor Franz Joseph, King Edward VIII and Wallis Simpson, Queen Elizabeth II and Prince Philip, added ELI Conference participants to that list. A three-course dinner at the renown Sacher Hotel was the perfect end to the second day of the Conference. The ultimate cherry on the top of course was the Sachertorte, a cake created in 1832 by Franz Sacher.

6 September Dedicated to Hubs and SIGs

The final day of the Conference marked a new initiative in which ELI Hubs and SIGs were given a platform to present and discuss their work. In total five panels on topics ranging from company law by the Business and Financial Law SIG to the impact of new technologies on law by the Italian Hub and from algorithmic regulation by the Digital Law SIG to new challenges facing Family and Succession Law by the

eponymously named SIG took place. A full-day session on remedies was also organised by the Intellectual Property Law SIG. ELI wishes to thank all the Hubs and SIGs that participated and in particular their chairs for taking on the momentous task for organising such informative panel sessions.

Conference guests concluded the evening with a meal at Pfarrwirt.



Top left: Business & Financial Law SIG Chairs, Yuri Biondi and Corrado Malberti; Top right: Italian Hub panellist, Diana Cerini; Centre left: Digital Law SIG panellist, Herbert Zech; Centre right: Family Law SIG panellist, Judge Matthias Neumayr; Bottom: Intellectual Property Law SIG Panellist, Alain Strowel

Note by ELI President to Secretariat

For me, this Annual Conference was a magnificent experience, and I have heard others say the same. This is thanks to our speakers, moderators and participants, but in the very first place to our amazing Secretary General, Dr Vanessa Wilcox, and her likewise amazing team, consisting of Tomasz Dudek, Aline Carruet, Zuzana Fačková, Katja Kolman, Žiga Luknar, Valesca Profefsner and Shonagh Hymers. Without their immense and enduring commitment and their professionalism, ELI could not have become what it is today.

On behalf of the entire Executive Committee, a big THANK YOU to the whole team!

ELI President
Christiane Wendehorst



From left to right: Žiga Luknar, Katja Kolman, Aline Carruet, Vanessa Wilcox, Zuzana Fačková and Tomasz Dudek

‘Common Constitutional Traditions’ in Europe: The Right to be Silent in an Administrative Procedures

by Giacinto della Cananea

Introduction

There are, not surprisingly, a variety of opinions about the existence of common constitutional traditions (CCT) within the EU. For some, ‘traditions’ inevitably look backwards and are thus bound by national history and culture. Others regard the reference to CCT, which is made by Article 6(3) of the Treaty on European Union (TEU), as something that does not add much to the rights recognised by the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the EU. There is still another strand of thought according to which that provision makes a renvoi and thus opens the path to a further block of rights to be added to those which already exist. Limits of space do not permit to consider the first two strands of thought. The objective of this note is therefore to consider two issues raised by the third strand. The discussion will begin by analysing Article 6 and will continue with a normative argument about the existence of both common and national traditions. The focus will then shift to one example of a right for which the discussion about CCT is both important and timely; that is, to borrow an old maxim, *nemo tenetur se detegere*, viewed in the context of administrative procedures.

Common and National Traditions

As is well known, Article 6(3) TEU provides that fundamental rights, as guaranteed by the ECHR and ‘[a]s they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. This clause must be interpreted both literally and systematically. In this latter respect, it is important

to be aware that Article 6 also refers to the Union’s Charter and attributes to it the same legal value of the treaties. There is an argument that can be drawn from this choice.

The argument is based on a traditional hermeneutical criterion; that is, when interpreting a legislative or treaty provision, we need to pay attention to all its parts and to try to give meaning and significance to them. Accordingly, the first argument that is based on the treaties themselves is that, when referring to fundamental rights, Article 6 considers CCT as a potential source of rights to be added to those which already exist on the basis of both the ECHR and the Union’s Charter. This argument is strengthened by a quick retrospective at the background of Article 6(3); that is, the doctrine that the European Court of Justice (ECJ) stated in *Internationale Handelsgesellschaft* (Case 11/70) and was refined in subsequent rulings. In its essence, such doctrine argued that ‘respect for fundamental rights’ formed ‘an essential part of the general principles of law’ of which the Court had to ensure the respect. The language used by the ECJ contributes to shed light on the distinctiveness of this source of rights, to which the Treaty makes a renvoi. It is clearly more complex to make this type of renvoi than to make it in respect of an existing legal document. But this legal technique is not unknown in EU law.

Indeed, the treaties do contain provisions that refer to the general principles of law common to the legal orders of the Member States, notably in the case of the non-contractual liability of the EU (Article 340).

That said, another argument must be made with regard to the existence of both common and national traditions. While all constitutions, both formally and materially intended, of the Member States share a certain list of rights and the underlying philosophic assumptions, there are important differences and variations on basic themes derived, in part, from history and culture and, in part, from political preferences. This argument, which is based on legal realities, is confirmed by the reference that the other treaty makes to national laws and traditions in the context of the European area of freedom and justice (Article 67 Treaty on the Functioning of the European Union (TFEU)).





Nemo tenetur se detegere?

It is precisely because the EU is an area characterised by both common and national traditions that it is both interesting and important to understand which rights may emerge from CCT. We may wonder, for example, whether the right to remain silent within an administrative procedure falls within this category. It was the Italian Constitutional Court (ICC) that has brought this right to the attention of the ECJ, as well as to legal scholars. In a recent preliminary reference, the ICC considered this right in the context of the treatment of persons (potentially) responsible for manipulating the market.

What is at issue is whether, when such persons are requested by the national financial regulator to disclose information that may directly or indirectly

lead to the imposition of sanctions on them, they have the right to keep silent. This right applies, as is universally acknowledged also by virtue of international covenants, in the context of a criminal trial. It is, of course, important to distinguish an administrative procedure from a criminal trial, since otherwise confusion will result.

However, when considering this preliminary reference, we should ask ourselves whether the distinction between process and procedure is either a distinction of grade or one of nature. This question is particularly important in the light of the settled case law of the European Court of Human Rights according to which there is a right against the imposition of both administrative and criminal sanctions for the same conducts. Whether or not there is a common constitutional tradition,

of course, is another question, and one of fundamental importance for both practical and theoretical reasons. The outcome of ELI's CCT project is therefore eagerly awaited and the upcoming [Seminar](#) on this theme in Milan will shed some light on preliminary findings.

The Author

Giacinto della Cananea is Professor of Law at the Law School of the Bocconi University. He was awarded an advanced grant by the European Research Council in July 2016 for a comparative research on 'The Common Core of European Administrative Laws', for a period of five years, on which he recently published an article with Mauro Bussani: *The Common Core of European Administrative Laws: A Framework for Analysis*, in *Maastricht Journal of European and Comparative Law*, 2019, pp 1–37. In June 2018, he received the first Prize in the 'Altiero Spinelli Outreach Prize', for ReNEUAL's 'Model Rules' on EU administrative procedures. Cananea was a CCT panellist at ELI's 2019 Annual Conference.



Giacinto della Cananea

Case Studies on Common Constitutional Traditions Project

Case Study 1

Samira is a Muslim receptionist in Belgium who was laid off by her company because of her wish to wear the Islamic headscarf at work, which run afoul of the company's policy to ban signs of political, philosophical or religious beliefs in the workplace.

Recital 1 of Council Directive 2000/78/EC of 27 November 2000 states that: 'In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

The Directive goes on to prohibit all discrimination on the basis, inter alia, of religion or belief: but what exactly is meant by 'religion'? The Court of Justice of the European Union (CJEU) answers this by referring to Article 9 of the ECHR and also to the constitutional traditions common to the Member States, as general principles of EU law.

The CJEU specifically referred to Article 10(1) of the Charter on the right to freedom of conscience and religion, which includes the right to manifest religion or belief, in worship, teaching, practice and observance. As such, the right guaranteed in Article 10(1) of the Charter corresponds with that in Article 9 ECHR and has the same broad meaning and scope.



The reflection on the notion of religion according to the constitutional traditions common to the Member States was a step in the CJEU's reasoning that led it to conclude that Samira had not been subject to direct discrimination, since the rule applied to all workers in a general and undifferentiated way by requiring them to dress neutrally, which precludes the wearing of visible signs of political, philosophical or religious beliefs.

That said, the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, and may constitute indirect discrimination, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary. The CJEU left this question to the referring court to ascertain.

Case Study 2

MAS and MB are two Italian citizens subject to criminal proceedings in Italy for alleged infringements relating to value added tax (VAT).

They tried to make use of the statute of limitations under the Italian Criminal Code, but the CJEU ruled that a national rule in relation to limitation periods for criminal offences is liable to have an adverse effect on the fulfilment of the Member States' obligations under Article 325(1) and (2) of the Treaty on the TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union.

However, the Italian Constitutional Court ruled in its turn that the statute of limitations is a bedrock of the Italian constitutional tradition, because it prevents the government from keeping criminal proceedings open for an

indefinite period of time. Is this constitutional tradition only an Italian one, or is it common to Member States?

The CJEU referred to Article 49 of the Charter on the principles of legality and proportionality of criminal offences and penalties and concluded that 'the principle that offences and penalties must be defined by law forms part of the constitutional traditions common to the Member States'.

Having done so, the CJEU referred to its case law and various international treaties and added that Article 49 of the Charter has the same meaning and scope as the right guaranteed by Article 7(1) of the ECHR on no punishment without law. It added that the requirements of foreseeability, precision of the law and non-retroactivity inherent in the principle that offences and penalties must be defined by law apply also, in the Italian legal system, to the limitation rules for criminal offences relating to VAT. The CJEU thus left it to the national court to decide whether to disapply the provisions of the Criminal Code at issue in light of the above constitutional traditions common to the Member States.

Case Study 3

Omega is a German company that was prohibited from operating an installation known as a 'laserdrome', because it was deemed to amount to a 'play at killing', and these purported 'acts of simulated homicide and the trivialisation of violence thereby engendered' infringed the principle of human dignity.

Omega challenged this decision before German administrative courts on the grounds that the prohibition infringed its freedom to provide services (and also impinged on the free movement of goods, as concerns the equipment used for the game).

The referring court stated that human dignity is a cardinal constitutional principle which cannot be waived in the context of entertainment. The court questioned whether a common legal conception in *all* Member States is a precondition for one of those States to be enabled to restrict, at its discretion, an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution and in doing so to violate a certain category of provisions of goods or services protected by the EC Treaty.

In reaching its conclusion, the CJEU drew inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, including the ECHR. It reasoned that it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.

The Court concluded that Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity. Omega's freedoms had to give way to the superior principle of human dignity, that was found to be part of the common constitutional traditions of Member States.



Progress on ALI-ELI Transnational Principles for a Data Economy

ALI-ELI Principles for a Data Economy Meetings on 3 September and 31 October 2019 in Vienna and Philadelphia Respectively

The meetings took place at the Law Faculty of the University of Vienna and at the ALI Conference Centre in Philadelphia and focused on revised Preliminary Draft No 2bis and Draft No 3 respectively. The latter draft took on board guidance received after a joint meeting with ALI and ELI Advisers, the ALI's Members Consultative Group (MCG) and ELI Members Consultative Committee (MCC) in Philadelphia on 22 February 2019. This included scrutiny undertaken by the Berlin based tech-company acs-plus

GmbH, suggestions from the industry, inspirations gained at a meeting hosted jointly by UNCITRAL and French governmental institutions in Paris on 15 March 2019 as well as at the 52nd UNCITRAL Commission session of 17 July 2019 in Vienna, among other things. Draft No 3 was revised following feedback received at the meeting of 3 September and the presentation of Preliminary Draft No 2bis at the ELI Annual Conference. It marks a huge milestone for the project, which is headed by ELI President Wendehorst

and Neil B Cohen on the ALI side. A revised draft will follow the meeting of 30 October, which was attended by the Project Team, Advisory Committee and ALI MCG members.



Second ELI High Level Expert Group Meeting

ELI Convenes Meeting of Top Experts in European Family Law for Advice on the Most Pressing Topic in the Field



The expert group, consisting of Tim Amos QC (mediator and barrister in international family law and head of Chambers at Queen Elizabeth Building), Elena Bargelli (Professor at the University of Pisa and chair of ELI's Family Law SIG), Margareta Brattström (Professor at Uppsala University and

Corresponding Member of the University of Cambridge's Family Law Centre), Anatol Dutta (Professor at the Ludwig Maximilians University of Munich and Corresponding Member of the University of Cambridge's Family Law Centre), Stephan Matyk d'Anjony (Head of International Af-

fairs at the Austrian Chamber of Civil Notaries), Wendy Schrama (Honorary Judge; Professor of family law and comparative law at Utrecht University; Director of the Utrecht Centre for European Research into Family Law (UCERF) and Corresponding Member of the University of Cambridge's Family Law Centre) worked through a list of pre-submitted themes for possible topics that ELI could embark on in the field of family law.

They were joined by ELI President, Christiane Wendehorst, and ELI Secretary General, Vanessa Wilcox.

ELI would like to thank the experts for their extremely valuable input and looks forward to the commencement of project(s) in the field.

The meeting follows an earlier one on administrative law. Two additional meetings in the field of criminal law and company law are yet to take place this year.

Dissemination of ELI's Empowering European Families (EEF) Project Output

ELI President at the Czech Ministry of Justice (MoJ)

ELI President Christiane Wendehorst, one of the Reporters of the EEF [project](#), met Junior Deputy Minister of Justice, Helena Klima Lisucha, and Director of the International Department for Civil Matters, Zuzana Fišerová, at the premises of the Czech MoJ on 20 September 2019. The meeting, which yielded fruitful exchanges, aimed at informing the MoJ of the output of ELI's EEF project and at exploring how best to disseminate the output to practitioners for the benefit of international couples in Europe.



ELI President Delivers EFF Seminar at the Slovenian MoJ and Engages with Danish Ministry of Social Affairs and the Interior on EEF Project

On 4 October President Christiane Wendehorst continued disseminating the output of the EEF project at the Slovenian MoJ, where she delivered a seminar to members of the Slovenian Bar Association and the Chamber of Notaries of Slovenia. After brief introductory remarks by State Secretary Mr Gregor Strojin, President Wendehorst informed those present about ELI and its projects in broad terms. Wendehorst discussed the three toolkits which were designed for married couples, registered partners and cou-

ples in informal relationships, with a view to assisting legal professions in advising international couples within the EU.

The ELI President did the same at the Danish Ministry on 24 October 2019, where she was welcomed by Lars Thøgersen, legal advisor and expert in family law matters. President Wendehorst welcomed all the insightful contributions gained from those present.



REPUBLIC OF SLOVENIA
MINISTRY OF JUSTICE



ministry of social
affairs and the interior

Blockchains and Land Registers

Former ELI Vice-President Contributes to European Land Registry Association (ELRA) Publication

ELI Institutional Member, ELRA, recently published 'The European Land Register Document (ELRD): A Common Semantic Model for Land Registers Interconnection' as part of its IMOLA (Interoperability Model for Land Registers) II Project. The project is developed by ELRA and supported by the Justice Program of the European Commission. More information about IMOLA II as

well as an e-book on the interoperability of land registries, which ELI Vice-President Sjef van Erp both edited and contributed towards, is available [here](#). Van Erp, who is a Co-Reporter for the ELI [project](#) on Blockchain Technologies and Smart Contracts, wrote about land registers in the context of blockchain and similar disruptive technologies.



Interoperability Model for Land Registers

Principles for a Data Economy Project Presented in Beijing

On 21 September, ELI President Wendehorst was a member of the opening panel of the '2nd International Forum on Computational Law' at Tsinghua University in Beijing.

She was invited both in her capacity as ALI-ELI project Co-Reporter and in her capacity as co-chair of the Data Ethics Commission, which is an advisory body to the German government. The body is due to sub-

mit its report to the government in the autumn this year. Wendehorst focused on the notion of data ethics, data governance principles, the theory of 'co-generated data' and the data rights model developed as part of the ALI-ELI project, which has greatly inspired the work of the Data Ethics Commission.

To read more about the ALI-ELI Principles for a Data Economy Project, please click [here](#).



Ambassador Lennkh Visits the ELI Secretariat in Vienna



On 8 October Ambassador Rudolf Lennkh (Head of the Council of Europe's office in Vienna) visited the ELI Secretariat at the proposal of former Council of Europe (CoE) Secretary General, Thorbjørn Jagland.

On the occasion, ELI President, Christiane Wendehorst, and ELI Secretary General, Vanessa Wilcox welcomed Ambassador Lennkh at ELI's headquarters in Vienna.

The meeting presented an opportunity to exchange updates on recent developments within their respective organisations and possible avenues to strengthen mutual aims.

ELI wishes to welcome Marija Pejčinović Burić as incoming CoE Secretary General and to congratulate the CoE as it celebrated its 70th this year.

Founded in 1949, the CoE is an international organisation whose stated aim is to uphold human rights, democracy and the rule of law in Europe. It has 47 Member States. The CoE's mandate expands to approximately 820 million people. It is based in Strasbourg.



Visit from a Chinese Delegation to the ELI Secretariat in Vienna



On 26 September a Jiangxi's delegation, including Le Shibiao, General Director of the Political Department, and Huang Aihe, Director of Judicial Education, visited the ELI Secretariat in Vienna.

On the occasion, ELI Secretary General Vanessa Wilcox welcomed the delegation. She elaborated on the Institute's goals and structure and explained the progress ELI has made in the eight years since its foundation. In

outlining its past and current projects, Wilcox emphasised the importance of building on the wealth of diverse legal traditions and on vocational and geographical diversity in the formation of Project Teams and the need for all ELI output to be of practical application and significance.

The Delegation was impressed of ELI's endorsement of the value of comparative knowledge and its drive to bring jurists from across Europe together.

A Meeting with the Representatives of Danish Bar and Law Society and the Association of Danish Law Firms in Copenhagen

On 24 October 2019, ELI President Wendehorst met different representatives from the Danish Bar and Law Society (an ELI Institutional Member) and the Association of Danish Law Firms at the premises of the Danish Bar and Law Society in Copenhagen.

President Wendehorst was joined by ELI Executive Committee member, Anne Birgitte Gammeljord, both of whom used the meeting to inform those present about ELI and its ongoing projects. Participants of the closed meeting included Andrew

Hjuler Crichton (newly appointed Secretary General of the Danish Bar and Law Society), Ulrikke W Krogbeck (Head of Strategy and Projects at the Association of Danish Law Firms), Nikolaj Linneballe (Attorney-at-law and member of the Council of the Danish Bar and Law Society) and Randi Bach Poulsen (Attorney-at-law and member of the Council of the Danish Bar and Law Society).

Lively and fruitful discussions were held among all participants.



**DANSKE
ADVOKATER**

Bridging Scholarship and Practice



**Czech Academy
of Sciences**

ELI President Wendehorst met senior representatives of the Institute of State and Law of the Czech Academy of Sciences on 20 September, where she informed them about ELI and its ongoing projects.

Participants of the meeting included Hana Müllerová (Head of the

Department of Public Law) Tomáš Doležal (Head of the Department of Private Law) and Michal Šejvl (Head of the Department of Legal Theory and Legal Philosophy).

The Academy was impressed by ELI's range of activities and will continue to monitor updates on ELI's projects.

ELI Welcomes its New Members

ELI is pleased to welcome the following whose membership applications were approved by the ELI Council recently.

New Individual Members

- Mario Abela
- Anar Ahmadov
- Pinar Aksoy
- Wojciech Bańczyk
- Jacek Barcik
- Noémia Bessa Vilela
- Marco De Benito
- Dario De Landro
- Yolanda De Lucchi
- Carlotta De Menech
- Rodger Peter Harris
- Sarah Houllier
- Alessandro Iazzetti
- Davor Jancic
- Teemu Juutilainen
- Thomas Klich
- Velibor Korać
- Katarzyna Królikowska
- Leander D Loacker
- Simone Lonati
- Attila Menyhárd
- Andrei Nicolae
- Bettina Nunner-Krautgasser
- Katarzyna Południak-Gierz
- Vagia Polyzoidou
- Alessio Reali
- Lee Schneider
- Anna Katharina Suzuki-Klasen
- Dariusz Jreweusz Szostek
- Andrea Venegoni

New Sustaining Members

ELI is grateful to its Sustaining Members who make a donation of EUR 60 per year (in addition to EUR 60 for membership fees), enabling ELI to embark on new initiatives that further its causes. This term, ELI is delighted to welcome the following new Sustaining Members:

- Sarah Bechaalany
- Bernhard Koch
- Manuel Medina Ortega
- Antonio Manuel Morales Moreno
- Jeffrey Stempel

New Institutional Members

Kenya Union of Judiciary Workers



The Kenya Union of Judiciary Workers is a workers' organisation established under the Labour Relations Act 2007, composed of and serving employees of the Kenyan Judicial Commission.

The Union is a non-profit, non-partisan organisation that has been representing the rights of workers and engaging in collective bargaining agreements to improve the conditions of work of its members for the last eight years.

The Union's activities became possible after the entry into force of the new Constitution of Kenya in 2010, which significantly improved the legal situation of judicial employees.

Previously, they were considered civil servants and were not allowed to join any trade union.

The main objectives of the Union are:

- To regulate and improve relations between employer and employees;
- To promote gender equity and equal opportunities without discrimination on any grounds including sex, race, religion, place of residence, ethnic social, political, economic affiliations or beliefs;
- To provide an instrument of cooperation among the judiciary's employees, labour unionisation, aggregation and articulation of their collective views, interests, opinions

and decisions upon matters affecting dispensation of justice;

- To participate in all matters aimed at improving delivery of justice in Kenya;
- To secure strategic and effective representation of judiciary workers in the government, public, and private organisations where such representation may be relevant and imperative; and
- To secure and maintain harmonised membership employment and service for all members.

Conference in Memory of Ole Lando

The Legal Community Remembers Ole Lando

At ELI's Annual Conference and Meetings 2019, a minute of silence was held for ELI members that passed away recently, including Ole Lando.

Professor Lando, who died on 5 April 2019 at the age of 96, was a Founding Member of the ELI.

He was a leading private international lawyer, but he is best known for the Principles of European Contract Law – it was Lando who established and led the three 'Commissions on European Contract Law' that produced the Principles. They have been highly in-

fluential in the development of both EU and national contract laws.

Ole Lando will also be remembered by his colleagues for his warmth, kindness and openness to ideas – and also for a wonderful sense of humor. All members of the ELI will miss him enormously and send deepest sympathy to his family.

A Conference in memory of Lando took place at Copenhagen Business School on 25 October. This was one of several ways to pay respect to one of the most influential figures in the

development of European private law to date. The event was attended by several ELI members including ELI President Wendehorst, ELI Executive Committee Member Anne Birgitte Gammeljord, Former ELI Council member Hugh Beale, who gave a lecture on Lando, ELI Senate Speaker Reinhard Zimmermann, who spoke on Lando's Principles of European Contract Law as the foundation of a European contract law, and Council Member Matthias Storme who focused on Lando's method of working. Members of Lando's family were also present at the event.



Ellen and Ole Lando at their home in Holte (Denmark) in 2016

Successful Launch of the Insurance Law SIG at Its Inaugural Conference



The ELI Insurance Law SIG, established at the end of 2018 by ELI members Christoph Brömmelmeyer and Helmut Heiss, held its Inaugural Conference on Systems of Governance in the European Insurance Industry on 10 October 2019 at the Law Faculty of the University of Vienna.

About 70 participants from different EU Member States and the USA discussed topical issues relating to the governance of the insurance industry from the perspective of academics, practitioners and regulators, including the system of governance according to Solvency II, the implementation of key functions of insurance undertakings in the EU, the effectiveness of the compliance function in the light of practical experience as well as the needs of the insurance industry and the expectations of supervisory authorities with regard to outsourcing.

The SIG would like to focus on different topics in the future, including governance and supervisory law, international liability law and insurance distribution as well as to cooperate with other partners and establish sub-groups dealing with different aspects of insurance law.

More information about the event is available on the [ELI website](#).

ELI German Hub Turns its Mind to the Protection of Legitimate Expectations in the Digital Age



The ELI German Hub, the Ernst von Caemmerer Foundation, the Institute for Law and Finance (ILF), and the Goethe University Frankfurt am Main co-hosted a Conference on the Protection of Legitimate Expectations in the Digital Age ('Vertrauensschutz im digitalen Zeitalter') in Frankfurt am Main on 11 October 2019.

The event brought together speakers from Germany and Switzerland (Uwe Blaurock (Freiburg University), Jan Lieder (Freiburg University), Alexander Roßnagel (Kassel University), Hans Schulte-Nölke (Osnabrück University/Radboud University Nijmegen), Gerald Spindler (Göttingen University) and Tizian Troxler (Basel University)) and about 50 participants.

A final version of the Conference proceedings will be published in the series of the Ernst von Caemmerer Foundation. For more information about the event and individual presentations please click [here](#).



The ELI Italian Hub's Conference on Class Action: The Italian Reform and European Perspectives



The ELI Italian Hub co-organised the above Conference on 17 and 18 October 2019 at the Department of Legal Science of the University of Florence. Speakers included professors, lawyers, judges and stakeholders with experience in class action proceedings in Italy as well as the Italian Minister of Justice, Alfonso Bonafede, who opened the morning session on 18 October.

The discussions focused on the analysis of the Italian reform of class action, introduced with Law No 31/2019, scheduled to enter into force in April 2020, and comparative remarks from the US, UK, France and the European perspective. Representatives of consumer and business associations, plaintiff and defendant attorneys and an appellate judge shared their insights and experience on class action proceedings during a round table.

More information about the event is available [here](#).



Call for Interest: EU Law SIG

Register Interest to Join SIG

It is proposed to set up, or rather re-activate, a Special Interest Group on EU Law. The proposers have been encouraged by the decision to set up the Belgio-Luxembourg Hub, since they consider that many of the activities of the new SIG are likely to take place in association with that Hub in Brussels and Luxembourg.

The relevance of such a SIG is self-evident given that the ELI's statute refers to evaluating and stimulating the development of EU law, legal policy, and practice, and in particular making proposals for the further development of the *acquis*. A EU Law SIG could make a real contribution to European integration and the harmonisation of national laws by nurturing new ELI projects for consideration by the EU institutions. The new legislature and the undertaking by the President of the Commission to give serious consideration to legislative proposals from the European Parliament afford a real opportunity for ELI and more than justify reviving the EU Law SIG.

The subjects potentially covered by the SIG are extremely varied, but it is suggested that the development of EU constitutional law and possible Treaty change might constitute an area of considerable interest with scope for research into how the nexus between the EU normative system and the Charter of Fundamental Rights and the European Convention on Human Rights is handled by the courts in the various Member States. Other areas of obvious interest are competition law and State aid.

The SIG would also afford an opportunity for ELI to get closer to the day-to-day work of the EU institutions.

Finally, the new SIG should work on general themes in EU law not covered by other SIGs, such as European citizenship and freedom of movement and commerce.

We would propose that the Chairs of the SIG should be Professor Laurence

Gormley, Professor Fausto Pocar and Professor Giuseppe Tesaro. Candidates for Advisory Board are: Francesco Avolio, Robert Bray, Mark Clough, Fabio Ferraro, Rita Giannini and Laura Guerzio.

The initiators would also suggest that Denis Philippe, Matthias Storme and Gregory Minne, as Chairs of the Belgio-Luxembourg Hub, should be closely involved with the running of the SIG.

Please contact the [ELI Secretariat](#) if you are interested in participating in this SIG.



Conference on the European R&D Tax Incentives: Contribution to the Emergence of a Tax Concept

6 December 2019, Lyon

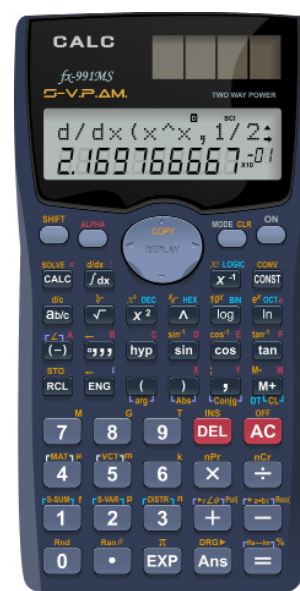
The ELI project on For a European Approach to R&D Expenses Qualifying for the Common Corporate Tax Base Super Deduction was presented for the last time at the ELI Annual Conference on 5 September.

The Team is now planning a Conference on 6 December 2019 in Lyon to disseminate the results and discuss steps forward.

Among the speakers will be Georges Cavalier, Project Reporter, as well as other members of the Project Team, Advisory Committee and National Correspondents. Participants

will discuss the emergence of a R&D concept in comparative and European tax law, including issues such as whether it should include basic research or research for commercial purposes, the novelty requirement and the scope of the concept.

The topic of R&D expenditure in comparative and European tax law, including issues such as capital expenditure, staff costs, other current expenditure and subcontracting, will also form part of the agenda. The tentative agenda and more information is available on ELI's [web-site](#).



Conference on Digital Content Directive and Digital Law SIG



12–13 December 2019, Milan

We are pleased to invite you to attend the Digital Law SIG Conference titled 'Contracts for the Supply of Digital Content and Digital Services', which will take place on 12–13 December at the Bocconi University in Milan. You can find the tentative agenda [here](#). A SIG meeting, which is open to SIG members only, is scheduled for 13 December.

International Conference on the Law of Obligations and ELI Global Private Law SIG Meeting

12–13 December 2019, Zagreb

The first Zagreb International Conference on the Law of Obligations (*Zagrebačka međunarodna konferencija o obveznom pravu*) will be organised by the Department of Law at the University of Zagreb, Faculty of Economics and Business. The Con-

ference takes place within the framework of celebrations by UNCITRAL of the 40th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG), and is organised in cooperation with the ELI Global Private Law SIG. You can find the tentative agenda [here](#).



Symposium on EU Citizenship 25 Years On: Civil and Economic Rights in Action

13 December 2019, Trento

Alongside the University of Trento and the University of Utrecht, the Italian Hub is co-organising a Symposium on EU Citizenship 25 Years On: Civil and Economic Rights in Action on 13 December 2019 at the University of Trento.

Participants will critically reflect on the first 25 years of EU citizenship in practice by discussing economic as well as civil rights and EU citizenship.

More information is available in the agenda [here](#).



European Law Institute

- Pan-European, democratic, membership-based organisation
- Uniting prominent jurists of all legal professions
- Aiming to improve the law in Europe
- Carrying out projects with immediate practical application

Members of ELI can contribute to its projects and gain access to an international network of jurists. Apart from other activities, ELI organises its Annual Conference and Meetings, bringing together Europe's leading experts in diverse fields of law.

Executive Committee

President:	Christiane Wendehorst
First Vice-President:	Lord John Thomas
Second Vice-President:	Pascal Pichonnaz
Treasurer:	Denis Philippe
Other Members:	Anne Birgitte Gammeljord
	Pietro Sirena
	Fryderyk Zoll

2020 ELI Conference

The 2020 ELI Annual Conference will take place from **9–11 September** in **Budapest (Hungary)**. Please take note of this date.

We look forward to seeing you there!

ELI in Vienna

The Secretariat of the ELI, which is hosted by the University of Vienna, is located in the heart of the Austrian capital, close to the main building of the University, the representation of the European Commission in Austria as well as the information office of the European Parliament.

We cordially invite you to visit us whenever you are in Vienna.



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