



ELI
EUROPEAN
LAW
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Issue 1: January–February 2022

Newsletter

Bringing Legal Experts Together



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Transition Towards the Digital Economy

Cover Director-General for the European Commission Directorate-General for Justice and Consumers (DG JUST), Ana Gallego

Dear ELI Members and Friends

Having taken the office of Director-General of the European Commission Directorate-General for Justice and Consumers (DG JUST) in November 2021, it is with great pleasure that I contribute to this ELI Newsletter. ELI's work and expertise provide a significant source of information for DG JUST. On the eve of emerging new cutting-edge ELI projects, like Automated Contracting and Enforcement in Consumer Cases, I am delighted to continue the fruitful collaboration between ELI and DG JUST.

The digital transition is a key objective of the European Commission. The European Data Strategy has put forward a comprehensive approach to enable the data economy which, together with enabling technologies like Artificial Intelligence (AI), allows developing innovative business models, permitting businesses and citizens to seize the potential of the digital transformation. The Commission aims at promoting the smooth transition towards the digital economy in order to reap economic and societal advantages, while providing a framework, which safeguards our essential values and our social market economy. Therefore, it is essential that private law, as part of this framework, is adapted to new technologies and allows innovation.

We are actually in a process where we – and that means not only the Commission or the European institutions, but also you, as members of an important stakeholder in this process – are writing an adapted private law for the digital economy. Among others, DG JUST is exploring in this

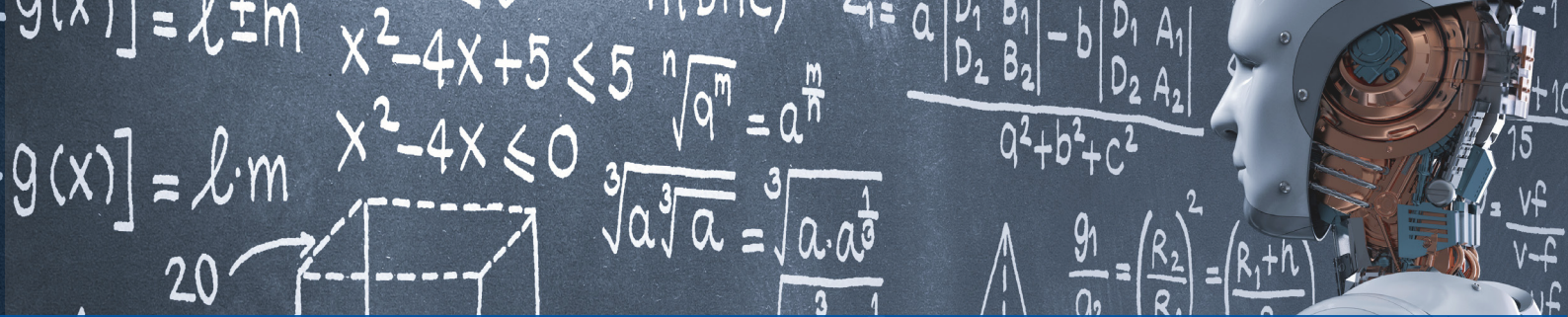
context novel forms of contracting. It is looking into contracts, where AI systems can conclude and implement contracts autonomously without, or with hardly any, human intervention (autonomous contracting), as well as smart contracts in the blockchain allowing the automatic execution of contracts. These contractual situations, where new technological solutions take up a role so far handled by human beings, may go beyond the normal development of the law keeping track of new technologies. Especially the rise of more developed AI may constitute a shift of paradigm because the autonomy feature may bring a new quality for which traditional contract law is not equipped. ELI's ongoing project on Blockchain Technology and Smart Contracts, and the upcoming project on Automated Contracting and Enforcement in Consumer Cases, therefore feed extremely well into this Commission's work.

Concerning autonomous contracting, DG JUST has similar aims as the upcoming ELI project. Some key questions are whether the elements necessary for the conclusion of a contract are all present, whether the actions of the AI system can be attributed to the human being using the program and under which conditions the human behind the AI system, especially if it is a consumer, should become legally

bound by the agreement. The latter aspect is particularly important for the roll out of the technology, which can be expected to happen on a large scale only if the human consumer keeps some level of ex-ante or ex-post control of the autonomous contracting process. Here, some discussion of adaptation of existing laws may be relevant. This may serve as a basis for reflection on the rules on avoidance of contracts; in autonomous contracting there are no errors/mistakes or the rules on agency/representation because AI does not have legal personality. For the same reason, the Commission may need to look at existing pre-contractual information requirements to examine whether they are adapted to autonomous contracting.

I am looking forward to DG JUST tightening its cooperation with ELI on these future-oriented projects. By working closely together, the Commission will benefit from ELI's expertise and ELI's research work will likely have real impact on the EU's legislative work. We have gladly taken up the invitation to act as an observer in the upcoming ELI project on Automated Contracting and Enforcement in Consumer Cases. I am confident this will be another of the very important ELI projects, which can have real influence on the EU policy development.





How to Govern Artificial Intelligence?

By Yannick Meneceur, Magistrate on Leave, Head of Division at the Council of Europe and Author of 'L'intelligence artificielle en procès' (Bruylant, 2020), Cercle Montesquieu Prize 2021¹

The speed with which our society and our lifestyles are being transformed by digital technologies is unprecedented. In this context, which is comparable to a new industrial revolution,² artificial intelligence ('AI') is one of the main drivers of these profound changes. By placing itself at the heart of a growing number of services that already populate our daily lives, 'AI' is generating great enthusiasm with the automation of complex tasks, but also many fears.

Although the use of computers has been widespread for several decades, the increasing use of algorithms to help decision-making is a new development. In public services, they are now used in areas as diverse as health, education, the fight against fraud and even in criminal matters. There seems to be no shortage of arguments for the promoters of algorithmic solutions: precision and predictability of results, reduction of processing times, the minimisation of human bias. However, there are concerns about what is sometimes described as 'solutionism'. Far from being reduced to a reaction to a change of a civilisational model, researchers (in the humanities and social sciences, but also in computer science) have documented in a con-

vergent and quite convincing manner the substantial impact of various applications of 'AI' on individuals and society, which may constitute severe attacks on human rights, democracy and the rule of law.

Thus, following in-depth consultation processes and the publication of ethical principles established by a group of independent experts, the European Commission intervened in April 2021 by proposing a draft regulation specific to 'AI', complementary to legal standards such as the RGPD.⁴ The idea for EU regulators is to use the law both as an instrument to stimulate and develop the internal market (the AI Act is indeed only one part of a whole regulatory package in the digital sphere) and as a tool to prevent violations of a number of the most fundamental rights and values.

Even if the target is moving fast and the discussions remain tough, the future of the governance of this technology is already taking shape with an approach seeking a balance between economic objectives, respect for human rights and ethical requirements. This trend is confirmed by the work of other intergovernmental organisations, such as the Council of Europe,

the Organisation for Economic Co-operation and Development (OECD) and United Nations Educational, Scientific and Cultural Organization (UNESCO), which seem to agree on the need to put in place mechanisms for verifying 'AI' before it is put into service or introduced onto the market.⁵

This is why the ELI's work on algorithmic decision-making in public administrations is to be warmly welcomed. The impact assessment project carried out by a large multidisciplinary community of experts will undoubtedly constitute an important building block for implementing, in a concrete and practical way, policies aimed at objectifying the real capabilities of AI and preventing possible harm.

This initiative also demonstrates that digital technologies and 'AI' are not to be considered as completely neutral tools. Affordances show us how these tools influence and restructure both our environment and our behaviour, potentially weakening the effectiveness of fundamental rights.⁶ We should therefore also reflect on how to adapt legal responses, with original ex-ante and ex-post mechanisms, to continue to protect both individuals and the whole of society.

¹ The views expressed here are those of the author and do not reflect any official position of the Council of Europe.

² K Schwab, *The Fourth Industrial Revolution*, Portfolio Penguin, 2017.

³ The acronym artificial intelligence will be presented in inverted commas for editorial convenience. The set of technologies covered by this term does not, of course, constitute an autonomous personality and, in order to avoid any anthropomorphism, it has been chosen to summarise the more appropriate terms 'artificial intelligence systems' or 'artificial intelligence applications' by the single term 'AI' in inverted commas.

⁴ Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence legislation) and amending certain Union legislation, COM/2021/206 final <<https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:52021PC0206&from=FR>>.

⁵ For an analysis of the legal frameworks of intergovernmental organisations, see Y Meneceur, *Les cadres juridiques des organisations intergouvernementales pour une régulation de l'intelligence artificielle*, *Revue pratique de la prospective et de l'innovation*, n°1, Juillet 2021, p 3.

⁶ J. Cohen, *Affording Fundamental Rights*, 4:1 *Critical Analysis of Law*, 2017, <<https://ssrn.com/abstract=2932396>>.

Updates on ELI's February Council Meeting

Below is an update on key developments that took place at the ELI February 2022 Council meeting.



ELI Council Resolution on Ukraine

On 24 February 2022, the ELI Council passed the following resolution on the situation in Ukraine.

'In the circumstances of the deployment of Russian armed forces into Ukraine, the European Law Institute (ELI), an entirely independent non-profit organisation established to provide practical guidance in relation to European legal development, and which has Fellows in Ukraine and Russia, wishes:

(a) to summarise three fundamental legal principles:

(1) All States must respect the fundamental obligations, values, principles and freedoms set out in the Charter of the United Nations, the Statute of the Council of Europe, the European Convention of Human Rights, and other

general principles of public international law.

(2) The use of armed forces by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, is a crime under international law, which was clearly defined in the Nuremberg Principles of 1945 and has been widely reflected in numerous charters and statutes including the Rome Statute of the International Criminal Court.

(3) Individual persons who commit or participate in such a crime are responsible under international law for their actions.

(b) to reiterate its unwavering support for Ukraine and its people.'



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ELI Launches a Ukrainian Hub

The establishment of the ELI Ukrainian Hub comes after several months of discussions. It coincided, however, with the deployment of Russian armed forces into Ukraine last week.

In light of recent developments the Hub will be headed by Vice-Dean of the Faculty of Law of West Ukrainian National University, Dr Svitlana Mazepa, who will assume the post of Interim-Chair, until members of the Hub are able to formally elect a Chair.

UKRAINIAN HUB

The ELI Council Adopts a Project on the Guiding Principles and Model Rules on Algorithmic Contracts

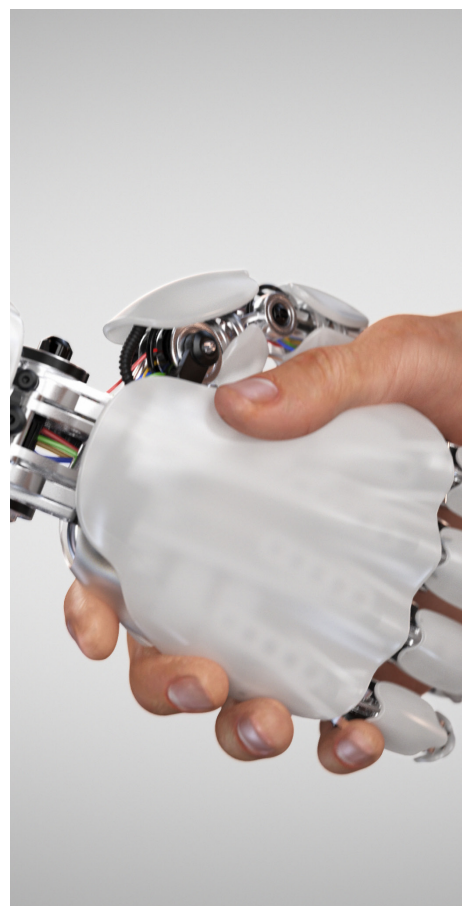
The above project emerged from the discussions of the High Level Expert Group on Automated Contracting and Enforcement in Consumer Cases that ELI assembled in November 2021 and takes forward the ideas and suggestions developed by the Group. Its focus is on the use of Algorithmic Decision-Making (ADM), particularly, AI-driven learning systems, in the various stages of the contract lifecycle. This approach comprises automated contracting generally, and autonomous contracting specifically.

The aim of the team, led by ELI Executive Committee member, Teresa Rodríguez de las Heras Ballell, ELI Council members, Christoph Busch and Christian Twigg-Flesner, as well as Dariusz Szostek, is to assess first the adequacy of the existing EU consum-

er law to the use of ADM in contracts and, subsequently, to identify gaps to fill and the necessary legal steps required to facilitate autonomous contracting in B2B, B2C, P2P and M2M transactions. To that end both Guiding Principles and Model Rules implementing those principles will be drafted.

The final output of the Guiding Principles and Model Rules Project will serve the EU Commission and national authorities wishing to reform existing legislation or adopt specific new provisions to enable the use of ADM in contracts in Europe.

Further information on this project is available [here](#).



ELI Council Adopts a Project Aimed at Amending the Product Liability Directive

After various consultations of and reviews on the desirability of amending Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (PLD), the European Commission is now committed to reform. Several challenges have been highlighted in recent debates which justify at least some changes to the Directive.

The ELI Council adopted a project on the Reform of the PLD. The project will be conducted by the same Team that drafted ELI's Response to the European Commission's 'Public Consultation on Civil Liability – Adapting Liability Rules to the Digital Age and Artificial Intelligence' (see page 6 of the Newsletter).

The current project, however, will be led by Professors Bernhard A Koch and Jean-Sébastien Borghetti who will take on the roles of Reporters, while Professor Christiane Wendehorst will assume the role of chair.

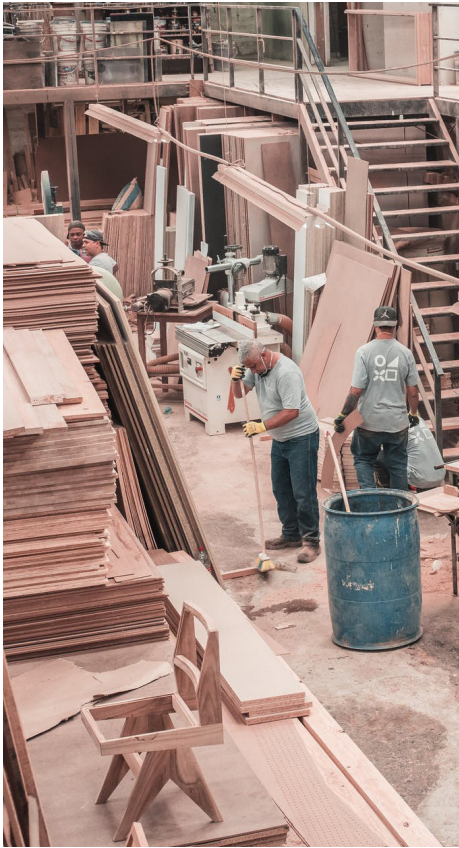
Several practitioners and stakeholders will advise the team which aims at improving the current wording of the 1985 Directive to make it adequate for current challenges particularly (but not limited to) the challenges brought about by the digital age. In doing so, they will seek to strive for an adequate distribution of risks between manufacturers and developers on the one hand and victims of defective products on the other.

Further information on this project is available [here](#).



Updates on ELI Projects

Below is an overview of project-related events that took place in January and February 2022.



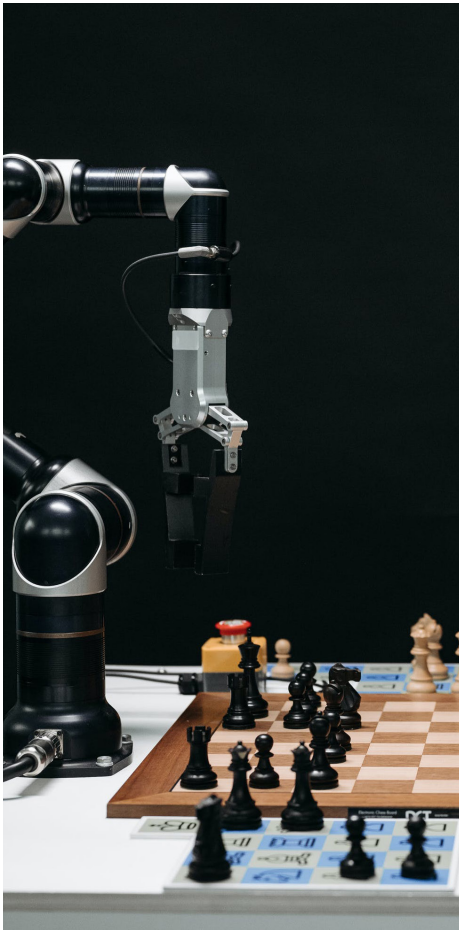
ELI Publishes Recommendations on Access to Justice and Effective Remedies in the Context of Business and Human Rights

The new [ELI Report](#) identifies a range of possible regulatory and/or soft-law options, at Member State level, at EU level and for non-Member States, intended to increase access to remedies in the EU and Member and non-Member States and to ensure compliance with human rights by business enterprises. In this context, human rights include rights in the broader sense of proper employment practices and care for the environment.

The ELI Report, prepared with input from the European Union Agency for Fundamental Rights (FRA), acknowledges that corporations, which can exercise economic and social influence that sometimes

rivals that of nation States, may engage in practices that negatively impact human rights. Access to justice by victims of such violations can often be hindered in practice by a number of factors, including the inherent imbalance of power between victims of human rights abuses and large companies. The ELI Report comes just as the European Commission launches its long awaited corporate due diligence proposal.

More information about the project and the full report are available [here](#). A webinar on the topic, open to the public free of charge, will take place on 29 March 2022 from 18:15–19:45 CET. To register, please click [here](#).



Response to the European Commission's Public Consultation on Civil Liability

ELI is pleased to submit a response to the European Commission's public consultation on Civil Liability – Adapting Liability Rules to the Digital Age and Artificial Intelligence.

The Response, adopted by the ELI Council, was drafted under the leadership of Bernhard A Koch (ELI Council Member; Professor, Innsbruck), in cooperation with Jean-Sébastien Borghetti (ELI Member; Professor, University Panthón-Assas Paris), Piotr Machnikowski (ELI Council Member; Professor, University of Wrocław; Lawyer, Dentons Europe), Pascal Pichonaz (ELI President; Professor, University of Fribourg; Arbitrator), Teresa Rodríguez de las Heras Ballell (ELI Executive Committee Member; Sir Roy Goode Scholar at the International Institute for the Unification of Private Law (UNIDROIT); Professor, University

Carlos III of Madrid; Arbitrator), Christian Twigg-Flesner (ELI Council Member; Professor, University of Warwick) and Christiane Wendehorst (ELI Scientific Director; Professor, University of Vienna).

The central issue covered in the response is the need to reform the [PLD](#), which remains largely unchanged since its adoption in 1985. A modernisation of the PLD is therefore much needed in light of technological and other developments.

The response further considers possible legislative intervention on liability for AI, as some applications of AI technology will fall outside the scope of the PLD and certain losses will not be indemnified under it.

The full response is available [here](#).

Further Updates on ELI Projects

ELI-Mount Scopus European Standards of Judicial Independence

Project Team Meeting with Advisors

The Project Team, Reporters and Advisors met remotely on 21 January 2022. Read more [here](#).

Corporate Sustainability, Financial Accounting and Share Capital

Meeting of the PT, AC and MCC

The Project Team, Advisory Committee and Members Consultative Committee met remotely on 25 January 2022. Read more [here](#).

Artificial Intelligence and Product Liability

Webinar

On 27 January 2022, ELI organised a Lunchtime Webinar on AI, Product Liability and ELI's Response to the EU Commission's Public Consultation. Read more [here](#).

Artificial Intelligence and Public Administration

Project Team Meeting

On 9 February 2022, the Project Team met remotely. Read more [here](#).

Corporate Sustainability, Financial Accounting and Share Capital

Meeting of the PT, AC and MCC

The Project Team, Reporters and Advisors will meet remotely on 6 April 2022. Read more [here](#).



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Call to Participants in an MCC

We are pleased to inform you that the ELI Council adopted several new ELI projects and that the Executive Committee established their respective Members Consultative Committees (MCCs).

ELI Members can currently join Members Consultative Committees of the following projects:

- Access to Digital Assets
- Admissibility of E-Evidence in Criminal Proceedings
- The Concept and the Role of Courts in Family and Succession Matters
- Corporate Sustainability, Financial Accounting and Share Capital

- ELI-Mount Scopus European Standards of Judicial Independence
- Fundamental Constitutional Principles
- Guiding Principles and Model Rules on Algorithmic Contracts
- Climate Justice – New Challenges for Law and Judges
- Ecocide

Interested ELI Members are invited to join the projects' MCCs and, thereby, help to shape their outcome.

MCC members will be invited for comments at various stages of the project, overall offering guidance and insight.

The level of involvement in the MCC is not predetermined and, thus, it is for each MCC member to decide how much time to devote to a project.

Typically, Project Reporters will submit drafts to the Members Consultative Committee at least twice per year, ahead of the ELI Council meeting in February and September, and invite comments.

You can notify your interest to join an MCC by sending a message to [ELI Secretariat](#).

Updates on ELI Hubs and SIGs

Below is an overview of events organised by ELI Hubs and SIGs that took place in January and February 2022.

ELI Croatian Hub

Eleventh Webinar in Hub's Series

On 18 January 2022, the Hub held its 11th webinar aimed at contributing to discussions on current ELI projects and at developments in Croatian and EU law. Read more [here](#).

ELI Belgio-Luxembourg Hub

Online Seminar

On 25 January 2022, the first seminar in the Belgio-Luxembourg Hub's Sustainability Lunchtime Seminar series took place. Read more [here](#).

ELI Austrian Hub

Lecture

The lecture on 'International Commercial Contracts and Dispute Resolution' took place on 3 February 2022. Read more [here](#).

ELI Italian Hub

Online Workshop

On 10 February 2022, the ELI Italian Hub co-organised an online workshop aimed at presenting and discussing 'E-Health Data Sharing.' Read more [here](#).

ELI Croatian Hub

Twelfth Webinar in Hub's Series

On 15 February 2022, the Hub held its 12th webinar aimed at contributing to discussions on recent developments in EU law. Read more [here](#).

ELI Belgio-Luxembourg Hub

Online Seminar

On 17 February 2022, the second seminar in the Belgio-Luxembourg Hub's Sustainability Lunchtime Seminar series took place. Read more [here](#).

ELI Environmental Law SIG

Online Seminar

On 17 February 2022, the ELI Environmental Law SIG held a seminar on 'Sustainable, Transparent and Responsible Supply Chains.' Read more [here](#).



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Updates on ELI Representation

Below is an overview of ELI's representational activities in January and February 2022.



ELI President Meets Newly Appointed Director-General for DG JUST

7 January 2022

ELI's President, Prof Dr Pascal Pichonnaz, held a fruitful remote meeting with Ana Gallego Torres, the recently appointed Director-General for the Directorate-General for Justice and Consumers. Read more [here](#).



ELI Presidency Holds an Informative Meeting with President of the CJEU

26 January 2022

The meeting was an opportunity to introduce the new ELI Presidency to President Lenaerts of the Court of Justice of the European Union (CJEU). It also served as a platform to inform him of ELI's work and seek his views. Read more [here](#).



ELI President Meets Deputy Director of the Institute of Law of the Chinese Academy of Social Sciences

27 January 2022

ELI President, Prof Dr Pascal Pichonnaz, was joined by ELI's Secretary General, Dr Vanessa Wilcox, in a meeting with Deputy Director of the Institute of Law of the Chinese Academy of Social Sciences, Prof Jibing Mo. Read more [here](#).



ELI Representatives Participate in UNCITRAL Working Group III Session

14–18 February 2022

ELI President, Prof Dr Pascal Pichonnaz, and ELI Executive Committee Member, Prof Dr Teresa Rodríguez de las Heras Ballel, represented ELI at the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Investor-State Dispute Settlement Reform) session: Read more [here](#).



ELI Presidency Holds Informative Talks with President of the ECtHR

17 February 2022

The meeting was an opportunity to introduce the new ELI Presidency to President Robert Spano of the European Court of Human Rights (ECtHR). It also served as an occasion to inform him of ELI's work and seek his views on how ELI might serve the development of law in Europe. Read more [here](#).



ELI President Explores Possible Avenues for Cooperation with President of the Swiss Supreme Court

17 February 2022

ELI President, Prof Dr Pascal Pichonnaz, had the pleasure of meeting President of the Swiss Supreme Court, Justice Martha Niquille, and Dr Lorenzo Egloff, Deputy Secretary General. Read more [here](#).



Fruitful Meeting between ELI and AEAJ Representatives

17 February 2022

ELI President, Prof Dr Pascal Pichonnaz, held a meeting with the Association of European Administrative Judges (AEAJ) President, Ms Edith Zelle, to discuss collaborative initiatives. The meeting served as an occasion to explore options for cooperation. Read more [here](#).



ELI Welcomes its New Members

ELI is pleased to inform you about its new individual and institutional Members.

New Individual Members:

Shawn Bayern, Florida State University, United States of America

Valeria Confortini, PhD Candidate/Lawyer, Italy

Iryna Dikovska, Taras Shevchenko National University of Kyiv, Ukraine

Elise Goossens, Vrije University Brussels, Belgium

Roksolana Khanyk-Pospolita, National University 'Kyiv-Mohyla Academy', Ukraine

Tetiana Korotenko, Local Court in Kyiv, Ukraine

Malvina Hrushko, Odesa Law Academy, Ukraine

Constanța Mătușescu, Valahia University of Târgoviște, Romania

Nataliia Mazaraki, Kyiv National Trade and Economics University, Ukraine

Paolo Mazzotti, Institute of International and Development Studies, Italy

Olena Mykolayivna Ovcharenko, Yaroslav Mudryi National Law University, Ukraine

Alessandro Palmieri, University of Siena, Italy

Yuriy Prytyka, Taras Shevchenko Kyiv National University, Ukraine

Lukas Rass-Masson, Toulouse European School of Law (TESL), France

Albertas Sekstelo, Vilnius University, Lithuania

Mykhailo Shumylo, Supreme Court of Ukraine, Ukraine

Oksana Uhrynovska, Ivan Franko National University of Lviv, Ukraine

New Sustaining Members:

Vlatka Adler, Law Office Adler, Croatia

Shawn Bayern, Florida State University, United States of America

Events Calendar At-A-Glance

Below is a list of upcoming ELI events. Please save the dates and stay updated by following our [website](#) and social media channels for more details.

Mar	10 Mar	Insurance Law SIG: Automobile Insurance Problems and Policies: A Transnational Comparison <i>Online</i>
	15 Mar	Croatian Hub: Non-Fungible Tokens as Financial Instruments <i>Online</i>
	22 Mar	Irish Hub: Event on Ecocide <i>Online</i>
	29 Mar	Belgio-Luxembourg Hub: Corporate Sustainability (Title to be finalised) <i>Online</i>
	29 Mar	ELI Webinar: Business and Human Rights: Access to Justice and Effective Remedies <i>Online</i>
Apr	6 Apr	ELI Webinar: Corporate Sustainability, Financial Accounting and Share Capital <i>Online</i>
	6 Apr	Italian Hub: International Conference on Public Contracts and Innovations. <i>Rome</i>
	12 Apr	Croatian Hub: The Main Challenges to a (More) Efficient Enforcement of Competition Rules in Croatia <i>Online</i>
	21–22 Apr	Environmental Law SIG: Conference on Servitization and Circular Economy: Economic and Legal Challenges <i>Online</i>
	25 Apr	Belgio-Luxembourg Hub: Sustainability and Competition Law <i>Online</i>
	Apr/May	Hungarian Hub: Book Launch—Lajos Vékás, András Osztovits, Zoltán Nemessányi (eds.) PIL Regulations in the Case Law of the European Court of Justice Green <i>Online</i>
Sep	5–8 Sep	Annual Conference 2022 <i>Universidad Carlos III de Madrid</i>



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6th ELI Young Lawyers Award

Submit Your Paper by 30 April 2022

Through the Young Lawyers Award, ELI gives voice to the next generation of legal experts. You are invited to share your ideas on legal issues that require urgent attention in Europe and submit your paper.

Who

Applicants must be students enrolled at a university, currently undertaking a university law degree (undergraduate or postgraduate) or individuals who are within five years of being awarded a law degree at the date by which entries must be submitted.

What & How

Candidates must submit a unique and original paper which was not previously published and which deals with a European legal issue that could benefit from improvement. A jury comprised of the ELI and other institutions determines the winner. The successful candidate will be invited to present their paper at the 2022 ELI Annual Conference, which will take place in Madrid (Spain) on 5–8 September 2022.

When

The paper must be submitted by 30 April 2022, alongside the application form, to the following address:
secretariat@europeanlawinstitute.eu

! Scan the QR codes to find out more:



General Info



Rules



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:	Pascal Pichonnaz
First Vice-President:	Lord John Thomas
Second Vice-President:	Anne Birgitte Gammeljord
Treasurer:	Pietro Sirena
Other Members:	Bénédicte Fauvarque-Cosson Teresa Rodríguez de las Heras Ballell Aneta Wiewiórowska-Domagalska

ELI in Vienna

The Secretariat of 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.



ELI Secretariat

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