

ELI Instrument

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

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Dear Members and Friends of the ELI,

On 8 January 2013, the ELI Council approved a proposal for a project titled 'Prevention and Settlement of Conflicts of Exercise of Jurisdiction in Criminal Law' and appointed Professors André Klip, Katalin Ligeti and John Vervaele as Project Reporters. The Project has been carried out at the University of Luxembourg in cooperation with the Max Planck Institute Luxembourg (MPI). The Project activity started in June 2014 and has been conducted by a dedicated team of experts, both academics and practitioners from the fields of criminal - and private law. Now, the team has finalised its draft Instrument and it is ready to be put to a vote of ELI Fellows and Members of the ELI Council.

We encourage all ELI Members to carefully read the draft Instrument, which also contains a detailed explanatory note that provides more specifics and background information.

The ELI is proud to send this special report, because it signifies a momentous occasion in the Institute's history: The first long-term ELI Project, concluding in an Instrument, is now ready to be voted on.



Aim and Purpose of the Project - The Problem of Conflicting Jurisdictions

One of the most important and difficult legal issues within transnational criminal law arises when national jurisdictions collide.

This happens when crimes cross national boundaries and have a connection to more than one state. Such cross-border crime has increased dramatically in recent years. This is the result of a number of factors such as more affordable transportation options, regulatory initiatives that aim at reducing border control and the rise of the Internet, which have led to an increase in all types of cross-border traffic.

International and transnational criminal justice is often confronted with situations where various states have legitimate jurisdiction over the same case. Traditionally, the exercise of jurisdiction was limited by a state's territory. Today, it extends beyond the principle of territoriality and states claim jurisdiction over crimes based on a number of criteria.

Cybercrime, for example, can be carried out by a citizen of state A, with accomplices in state X, through servers located in state B and affect victims in states C, D and E. All these states could potentially claim jurisdiction.

This situation can result in a conflict of jurisdiction and a situation where two or more states investigate, prosecute and adjudicate the same criminal conduct.



Panel at 2016 ELI Annual Conference, Ferrara, Italy.

Such parallel criminal proceedings can endanger the interests of the persons involved and lead to efforts and resources being wasted and to potentially arbitrary outcomes. They can also cause a situation where none of the states that have legitimate jurisdiction exercise it and criminal offences go unpunished.

These are the issues that this ambitious ELI Project seeks to address as it aims at preventing and settling conflicts of exercise of jurisdiction.



Katalin Ligeti

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It has been a privilege and a pleasure to coordinate this project, and to see it grow and reach fruition in cooperation with the European Law Institute in a first-of-its-kind long-term partnership. There is no doubt that the quality of our proposals has greatly benefitted from the ELI's expertise and commitment, which will in turn boost the chances of the project achieving real impact going forward. I am delighted to be able to submit this Instrument to the evaluation of ELI Fellows and Members of the Council, and very much hope it can help pave the way, for further collaborative work in the field of EU criminal justice.

Legislative Gap in EU Law - An Opportunity for Improvement

The problem of conflicting jurisdictions has not been sufficiently addressed at a European level. In the field of international civil procedure, parallel proceedings and conflicting jurisdictions have been addressed through various conventions and legal instrument, for example Regulation 1215/2012 (Brussels I). There have been attempts to address the issues in criminal law, but so far they have met with limited success.

The mechanisms that are in place focus on facilitating inter-state cooperation with legitimate jurisdiction and on establishing a procedural framework for reaching consensus between the relevant Member States. What they lack is binding criteria on how the decision should be made. Another shortcoming is that the outcome of these discussions is neither binding nor enforceable and there is no possibility to appeal or contest the decision.

Even though there are no binding mechanisms that resolve conflicts of jurisdiction in the EU, there are important limits to multiple Member States exercising their jurisdiction with regard to the same crime. These limitations are set by the principle of *ne bis in idem*, which is enshrined in the European Convention on Human Rights and the EU Charter of Fundamental Rights. It safeguards a person's right to not be judged and convicted twice for the same offence. Within the EU, the Court of Justice of the European Union has developed a transnational concept of *ne bis in idem*.



Panel at 2016 ELI Annual Conference, Ferrara, Italy.

This concept has the effect of establishing a sort of jurisdictional priority on a 'first come, first served basis'. Clearly that is not the ideal situation, since the Member State that ends up exercising jurisdiction may not be the most logical choice in terms of access to evidence and witnesses – in short not the State best equipped to adjudicate.

From this short description, it is clear that the legal landscape in Europe leaves a lot to be desired and that there is huge room for improvement. At this juncture, the proposed ELI Instrument comes into play.

Benefits of the ELI Instrument

The ELI Instrument contributes to this situation by developing a new legal instrument for preventing and resolving conflicts of exercise of jurisdiction. Such a framework will serve the interests of the good administration of justice in a broader sense and could avoid the random and arbitrary effects of the principle of *ne bis in idem*. It will also provide a

procedural framework that considers and balances all relevant interests. Finally, the framework can provide added value with regard to citizens' rights and a reasonably foreseeable forum. The framework will prevent multiple prosecutions of the same crime, and, on the other hand, prevent a failure to prosecute in any jurisdiction.

Methodology and Work Process

In its efforts to produce a new legal framework for the prevention and resolution of conflicts of jurisdiction in criminal matters, the Project Team considered a complex set of objectives that the framework has to achieve. At the very least it should: a) avoid that *ne bis in idem* remains the only rule to resolve jurisdictional conflicts; b) ensure a non-arbitrary choice of jurisdiction; c) avoid parallel prosecutions; and aim at d) ensuring the choice of the best forum.

In elaborating this new framework, the Project will improve EU Law, which is the core aim of all ELI work. The Project also embraced the other principles of the ELI, to provide a pan-European perspective on the subject matter and to ensure that the full diversity of European traditions and vocational backgrounds was represented in the work.

The Project Team is comprised of experts from different fields, backgrounds and legal traditions. In addition, representatives from the European institutions and agencies (European Commission, European Parliament, Eurojust) and from legal practice and civil society (European Criminal Bar Association) were involved in the discussion to ensure a broader understanding of the issue and of the interests at stake. The Project Team was also assisted by the

diverse team of specialists that formed the ELI Advisory Committee for the Project.

Five Project Team meetings were convened

during the course of the Project and several input papers prepared. In addition to that, the Project Reporters met on three additional occasions to refine the draft outputs. During this process, the Project Reporters have regularly provided updates to the ELI and its Members. The Project was first presented before the Members Consultative Committee on 4 September 2013 in Vienna, and later at the ELI Annual Conferences on 26 September 2014 in Zagreb, and on 4 September 2015 in Vienna. The Project and its progress were also presented to the ELI Council on 12 February 2016 in Vienna. Finally, a large panel was devoted to the Project at the ELI Annual Conference on 8 September in Ferrara.



André Klip

“When it comes to exercising criminal jurisdiction, the conventional thinking has always been to focus on the notion of national sovereignty. This kind of sectoral thinking does not sit comfortably with the idea of European citizenship or the notion that the European Union is to provide its citizens with an area of freedom, security and justice without internal frontiers. Even though it is customary to do things a certain way doesn’t mean it’s the right or the best way. Criminal justice shouldn’t necessarily have to be served as a breakfast buffet, on a first come first serve basis. That is one of the shortcomings of the current system that we want to remedy. All the draft instruments we prepared provide a clear procedural framework through which investigation and prosecution can be allocated to the most appropriate jurisdiction.”





John Vervaele

“There is a wide consensus that a legal framework for the prevention and settlement of conflicts of jurisdiction is essential for the functioning of a criminal justice area built on mutual recognition. Without it, positive and negative conflicts of jurisdiction undermine the mutual trust and the rights and liberties of the citizens. For certain areas of crime it is impossible to elaborate model rules for the choice of jurisdiction without taking into account the EU policies. Mechanisms to vest, to trigger and to choose jurisdiction not only protect national interests, but are inextricably related to the goals and means of the internal market and AFSJ. From this perspective the project team defined the main aims of the draft instruments. Firstly, they should avoid that jurisdictional conflicts are only resolved based on *ne bis in idem*; secondly, they should ensure that jurisdictional choice are not arbitrary; thirdly, they should avoid parallel prosecutions and lastly, ensure that the best forum is chosen. We came up with three different policy options and related legal frameworks, each with many different implementation options. By doing this we have ensured that whatever policy option is chosen by the legislator our project provides sound legal advice. In the end, each of our proposals will substantially improve European justice.”

Politics Aside - The Project Offers Solutions That Can Improve European Law

This area of the law touches upon matters that can be politically volatile, such as national sovereignty to exercise criminal jurisdiction. It is safe to assume that any legislative effort will face some opposition and the outcome is hard to anticipate. The Project Team conducted extensive field research, consulted with various experts and made thorough comparisons with international private law and came up with proposals for not one but three legislative models for preventing and solving conflicts of criminal jurisdiction. Each legislative model that the Project Team produced is an ideal-type with an inherent logic and corresponds to a broader regulatory approach, which it translates into a concrete legislative instrument.

Each of the legal instruments proposes building blocks for a future legislative text and contains the most important elements of each type of legislative

mechanism. This offers various implementation options for the EU legislator. In a sense, it can be said that whatever the political outcome will be, the ELI Project provides clear legal guidance.

The three legislative models reflect different levels of approximation and, thereby, three distinct policy options: a horizontal mechanism, a vertical mechanism and an allocation mechanism. The different models require differing levels of harmonisation. For example, the horizontal mechanism will only require minimum approximation of national criminal laws, while the mechanism for the allocation of the exercise of criminal jurisdiction in the EU requires uniform EU rules on forum choice and embodies a strong harmonisation. The vertical mechanism stands in between the two other regulatory models.

The Horizontal Mechanism

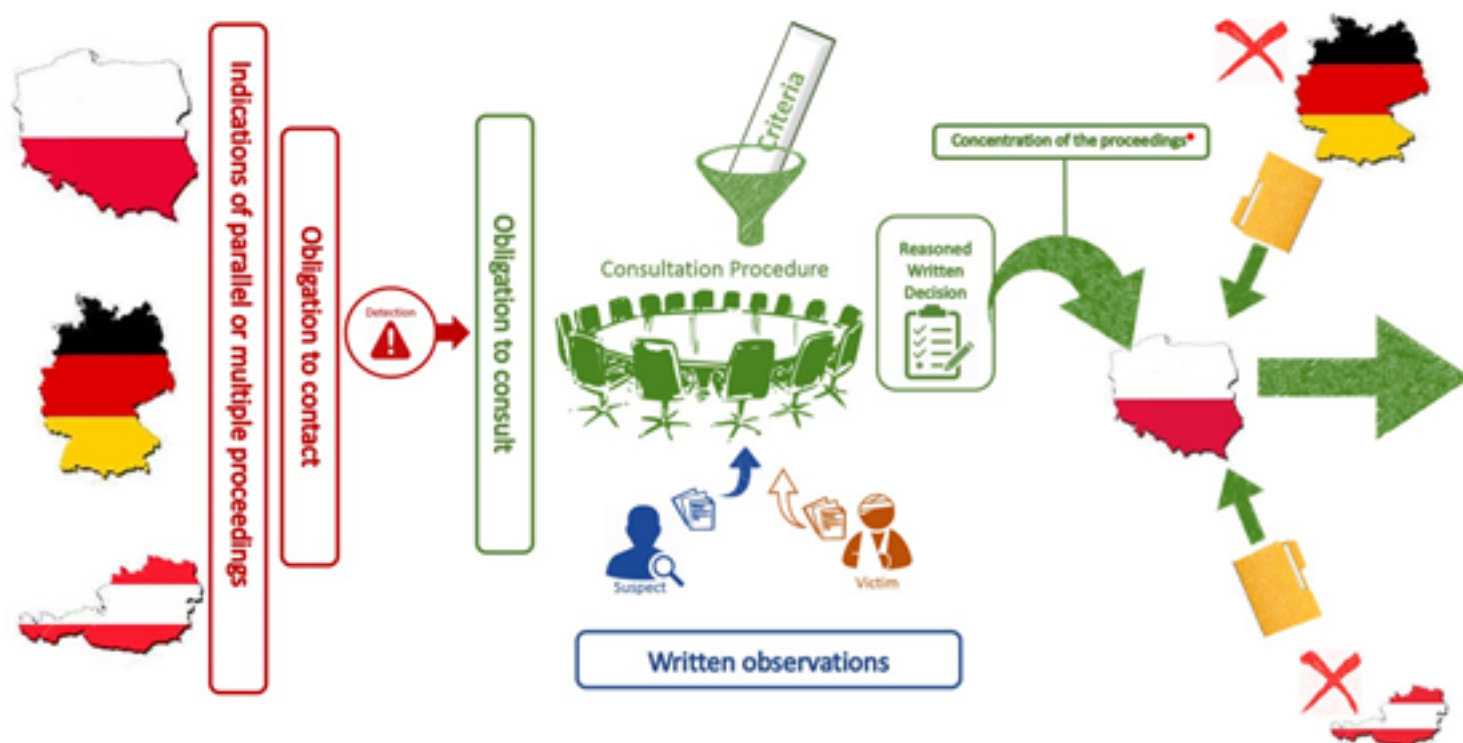
This proposal is based on the approach that conflicts of jurisdiction are solved between the national criminal justice authorities of the concerned Member States and thus relies on cooperation and coordination between the relevant authorities and is based on the principle of mutual trust between Member States. It implies the duty of national authorities to share information and to coordinate with each other as well as to notify each other about parallel proceedings in order to prevent and settle conflicts of jurisdiction.

The legislative model follows – as a starting point – the rationale of the Framework Decision and uses a consultation procedure to resolve conflicts of criminal jurisdiction. Within the model, several implementation options are possible, but the proposed legal instrument is built around certain implementation choices that best illustrate the features of this horizontal mechanism.

The proposal aims at ensuring a non-arbitrary choice of forum and applies to both actual and potential conflicts. It suggests amendments to the Eurojust Guidelines, and refers to them to assist in the assessment of the circumstances of each case. The instrument provides for the limited involvement of the suspect and the victim in the consultation procedure and places a direct obligation on national

authorities to conclude a formal agreement on the solution of the conflict. The procedure also envisages judicial review of the agreement and provides rules for the transfer of proceedings and evidence to the jurisdiction where prosecution will take place.

This greatly improves the current state of EU law, by providing for more consistency and legal certainty and by making the factors upon which a decision is based, subject to judicial review. The proposed Instrument also has a broader scope than the Framework Decision, as it is based on a broader understanding of the notion of ‘conflict’, and not only addresses parallel proceedings but also multiple ones, which is a great added value. Parallel proceedings refer to two or more proceedings against the same suspect or accused regarding the same set of facts which certainly lead to a *ne bis in idem* situation. Multiple proceedings, on the other hand, refer to proceedings that are either against the same suspects but relating to a different set of facts, or relating to the same set of facts but against different suspects. Multiple proceedings therefore do not violate *ne bis in idem*, but a decision to concentrate proceedings in a single Member State may still turn out to be opportune, both in the interests of the accused and of the good administration of justice.



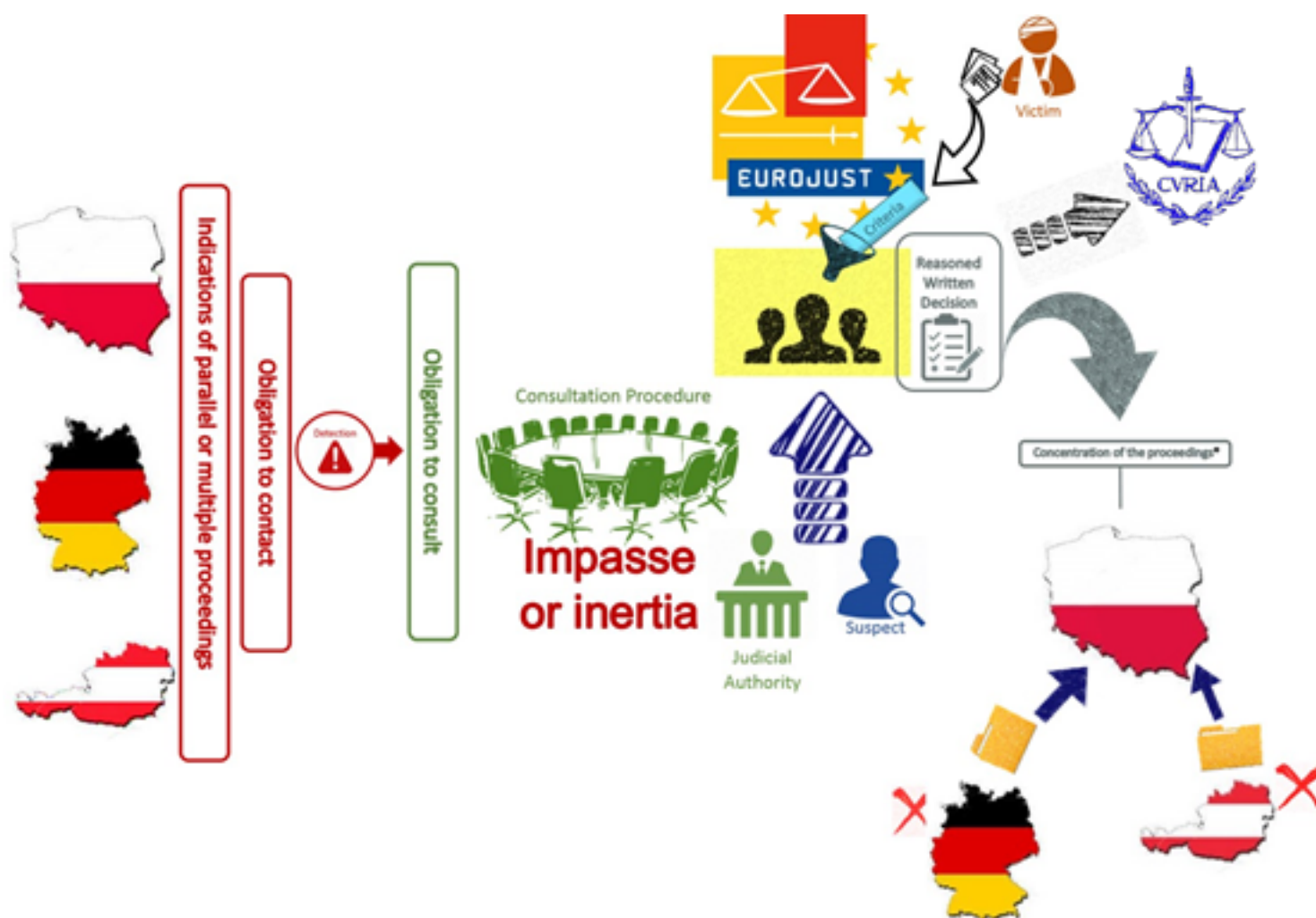
The Vertical Mechanism

The vertical mechanism goes beyond the horizontal philosophy of the current legal framework and of the first proposal. The vertical mechanism implies the duty of national authorities to share information and to coordinate with each other and with Eurojust, as well as to notify each other and Eurojust about parallel proceedings in order to prevent and solve conflicts of jurisdiction.

As in the first proposal, horizontal consultation is the first step, but that is complemented by a supranational procedure conducted by Eurojust in case of failure to reach an agreement to settle the conflict. The involvement of Eurojust can be triggered by either (or any) of the involved Member States or the suspect. The proposal envisages a binding judicial decision on the forum, taken in accordance with a detailed and transparent procedural framework provided in the model. The decision may then be subject to judicial review before the CJEU.

The proposed legislative model aims at ensuring a non-arbitrary choice of forum and maintains the preliminary horizontal consultation between Member State authorities. It empowers each of the involved authorities or the suspect to trigger a decision-making process at Eurojust if national authorities fail to reach consensus. The proposed instrument provides for a procedure that culminates in the adoption of a binding decision on jurisdiction to prosecute. The model also spells out a set of transparent factors for Eurojust's decision by referring to the amended Eurojust Guidelines as guidance, and grants the suspect and the victims the right to submit their views. It also provides for judicial review of Eurojust's decision.

This proposal greatly enhances legal certainty and consistency in the determination of the jurisdiction to prosecute.



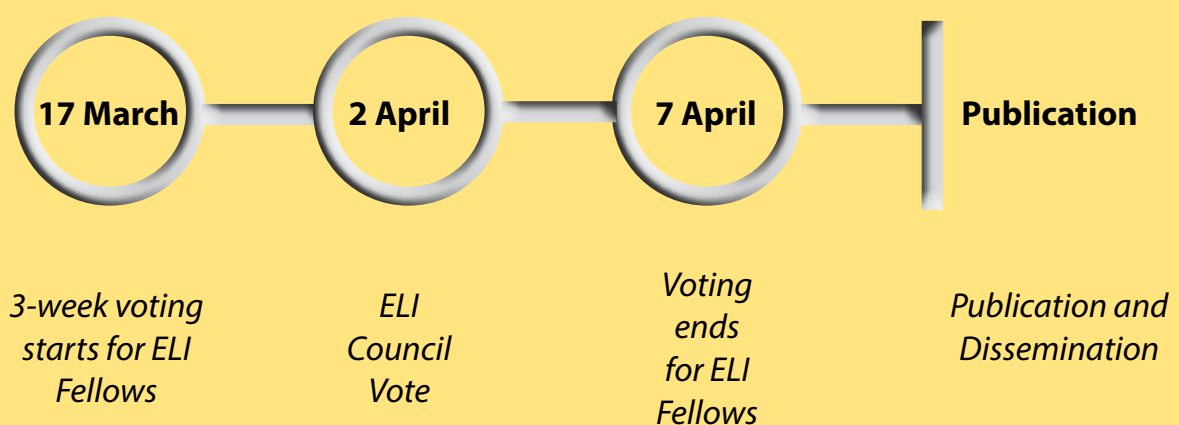
Mechanism for the Allocation of Criminal Jurisdiction in the AFSJ

The final legislative model aims at preventing conflicts of jurisdiction by establishing uniform European rules on the allocation of the exercise of criminal jurisdiction. The main difference between this and the other models is that it intends to reduce the possibility of conflicts of jurisdiction from the outset. Therefore, it proposes a reshaping of the grounds to exercise jurisdiction in criminal matters based on territoriality. The proposal suggests that Member States should no longer exercise jurisdiction on the basis of extraterritorial jurisdictional principles, such as active or passive nationality of the accused or the victim. The model also stipulates rules to allocate the exercise of jurisdiction to one Member State only in instances of multi-territorial offences. Another novel solution proposed in the instrument is that

it envisages situations where good administration of justice may indicate that a Member State other than the territorial Member State should exercise jurisdiction. The proposal provides for a transfer of the right to exercise jurisdiction in such cases. The legislative model grants judicial review of the determination of jurisdiction at the national level.

This legislative model goes furthest of the three options in establishing uniform rules on the exercise of jurisdiction. However, this Instrument does not aim at a full harmonisation of the national approaches to jurisdiction.

Timeline until Publication



MAR 2017

- **20 March, Vienna:** Workshop on 'Building a Data Economy'
- **30-31 March, Hull:** ELI Conference on Digitalisation; Meeting of the Digital Law SIG
- **31 March - 1 April, Hull:** ELI Council Meeting

APR 2017

- **27-28 April, Vienna:** ELI Conference on Business Rescue
- **28 April, Leuven:** Meeting of the Dispute Resolution SIG

MAY 2017

- **9 May, Granada:** Meeting of the Spanish HUB

JUN 2017

- **7-8 June, Budapest:** Administrative Law SIG Conference
- **18-20 June, Utrecht:** Public Workshop on Family Law
- **23 June, Vienna:** Business and Financial Law SIG Inaugural Workshop

JUL 2017

- **6-7 July, Bayreuth:** Conference on Platforms co-organised by the German HUB

SEP 2017

- **6-8 September, Vienna:** ELI 2017 Annual Conference and General Assembly

NOV 2017

- **16-17 November, Vienna:** UNIDROIT Meeting
- **30 November - 1 December, Trier:** Public Workshop on Family Law

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The ELI mission

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