

Draft Minutes of the ELI Council Meeting 1 December 2022

Venue: Remote via Zoom

Present:

Chair: Pichonnaz, Pascal (ELI President)

Council Members

Anagnostopoulou, Despoina
Anderson, Ross G
Augenhofer, Susanne
Bagińska, Ewa (proxy for Wiewiorowska-Domagalska, Aneta from 15:50)
Başoğlu, Başak (proxy for Bechaalany, Sarah from 15:50)
Bechaalany, Sarah
Bray, Robert
Calderai, Valentina
Craig QC (Hon), Paul
Dollani, Nada
Fountoulakis, Christiana (proxy for Scherpe, Jens from 15:50)
Gimeno-Ribes, Miguel (proxy for Shirvindt, Andrey from 15:50)
Grasso, Gianluca (proxy for Maugeri, Maria Rosaria)
Howells, Geraint
Jiménez Muñoz, Francisco Javier
Josipovic, Tatjana
Koch, Bernhard (proxy for Augenhofer, Susanne, when absent)

Kramer, Xandra
Lehmann, Matthias
Machnikowski, Piotr (proxy for Howells, Geraint from 16 :00)
Malberti, Corrado (proxy for de Pretis, Daria)
McKechne, William M
Neumayr, Matthias
Pocar, Fausto (proxy for Giubboni, Stefano)
Povlakic, Meliha
Pozzo, Barbara
Pretelli, Ilaria (proxy for Guercio, Laura)
Rodríguez de las Heras Ballell, Teresa (proxy for Bachmaier Winter, Lorena)
Santos Silva, Marta (proxy for Twigg-Flesner, Christian)
Scherpe, Jens
Schroeter, Ulrich G
Shirvindt, Andrey
Szabados, Tamás
Tot, Ivan
Tuori, Klaus
Vos, Sir Geoffrey
Wiewiorowska-Domagalska, Aneta

Ex-Officio Council Members

Gammeljord, Anne Birgitte
Pichonnaz, Pascal

Council of the Notariats of the European Union (CNUE), Raul-Mihai Radoi and Susanne Kraemer
Lord Thomas, John (proxy for Gilligan, Paul)

Other Attendees

Borghetti, Jean-Sébastien (for the part on Revised Product Liability Directive)

Ward, Adrian (for the part on Advance Choices for Future Disablement)

Wendehorst, Christiane (ELI Scientific Director)

Members of the ELI Secretariat

Dudek, Tomasz (keeper of the minutes)

Kolman, Katja

Vadehra, Zuzana

Wilcox, Vanessa

The meeting commenced at 15:00 CET.

I. Approval of the Agenda

- (1) The Agenda was approved.

II. Report from the ELI President

- (2) Pascal Pichonnaz presented the above and emphasised dissemination-related activities. Among other things, he noted that the ELI Principles for the Covid-19 Crisis were referred to in Advocate General Medina's Opinion in Case C-407/21 and that ELI organised a number of dissemination events and webinars. Furthermore, in line with Article 13(6) of ELI's Statute, ELI's second Self-Evaluation Report was published online. Pichonnaz mentioned that ELI was awarded an Operating Grant for 2023 from the European Commission, which stated that it could be usefully spent on extending ELI's staff base and on improving salary conditions. Given that operating grants provide general financial *operational support* to organisations whose statutory activities serve the strategic objectives of EU policies, the Commission emphasised the need for a reduction in project-related travel costs in favour of online or hybrid meetings. Action Grants are more appropriate for projects. Pichonnaz clarified that the Executive Committee is of the opinion that in person meetings may be organised at the beginning and end of the project and that interim meetings should be held remotely.

III. ELI Elections for Nominate Members of the Executive Committee

- (3) Pascal Pichonnaz reminded those present that the Executive Committee is composed of two types of members, ie nominate and innominate members. Nominate members (President, Vice-Presidents and Treasurer) need to be elected for a given position six months before taking office in order to prepare themselves. The next elections of nominate members will take place in February 2023 and the ELI Search Committee (composed of Irmgard Griss, Arthur Hartkamp, Lord Mance, Eddy Wymeersch and Reinhard Zimmermann) made the following non-binding recommendations to the Council. For the function of the President: Pascal Pichonnaz; First Vice-President: Anne Birgitte Gammeljord; Second Vice-President: Sir Geoffrey Vos; Treasurer: Pietro Sirena. Pichonnaz informed those present of the possibility to propose further names by 23 January 2023.

IV. Progress Reports on Projects and Similar Activities

- (4) Pascal Pichonnaz presented the above. He noted that there are more translations of ELI outputs into various languages. Some projects that initially would have been put to a vote at the December 2022 Council meeting will be voted on in February 2023. Similarly, some project proposals were postponed to next year, hence the reduction in the duration of the Council meeting. Pichonnaz thanked ELI Scientific Director, Christiane Wendehorst, for following all the projects and supporting the Reporters. He also thanked Project Officers, Tomasz Dudek, Katja Kolman and

Laura Papasodaro, for their work on ELI projects. He hoped that in future ELI will be able to expand the number of Project Officers, given the large number of current and future projects.

a) Feedback on the European Commission's Proposal for a Revised Product Liability Directive

- (5) Pascal Pichonnaz noted that the above is not a new project. He gave a summary of ELI's previous work on the topic. He added that the European Commission had asked ELI to provide feedback on their Proposal for the Product Liability Directive (PLD), which was published on 28 September 2022. The same group in charge of elaborating ELI's Draft of a Revised Product Liability Directive (except Christian Twigg-Flesner) immediately began work on the current draft, given that the deadline is 11 December 2022.
- (6) Bernhard A Koch presented the Feedback and noted that it is in line with ELI's previous output in the field. The document provides comments to the Commission's Proposal, including that on Artificial Intelligence (AI). Jean-Sébastien Borghetti added that members of the Team had exchanges with the Commission, but added that it is important for the Commission to have an official reaction. Among other things, he noted that the issue of refurbished products is a gap in the Commission's Proposal and that ELI chose different approaches to the problems of defences and damages.
- (7) A discussion followed. Ewa Bagińska and Geraint Howells (Assessors) observed that the Feedback is in line with the ELI Draft and supported the text. They provided some suggestions for further improvements of the text, upon which they were thanked. The others were invited to send further comments in.
- (8) **The ELI Council was of the view that ELI should respond to the Commission (37 votes in favour, one opposed and one abstention). The Feedback on the European Commission's Proposal for a Revised Product Liability Directive was approved under the Philippe Motion (36 votes in favour, three abstentions).**

b) Ecocide

- (9) Robert Bray, Project Co-Reporter, explained that he wishes the Council to approve the outcome under the Philippe Motion. The Reporters would implement comments already made by the Executive Committee and any to be made by the Council, and update the draft in accordance with recent amendments to the Belgian criminal code. He said that there is interest in the project in the European Parliament and therefore he wants to have it approved to ensure ELI could make an impact. Fausto Pocar provided further details on the draft including with regard to *actus reus* and *mens rea*.
- (10) A discussion followed. William McKechnie (Assessor) supported the outcome. Pascal Pichonnaz suggested that the information contained in the boxes should be deleted and it should be made clear which parts of the output are innovative and which are taken from the Commission's

proposal. In further discussions, the Council suggested that the type of conduct in Article 3(2) be qualified, eg by adding ‘substantially’. As regards Article 3(3)(b), the Council wished for the drafting to make it clear that the *mens rea* of the offence is limited to *dolus eventualis* and does not include negligence. The Council also sought clarification on an apparent contradiction of Article 4, on the insignificance of authorisations, etc, and Article 3(4) and (5), which seems to consider that only unlawful conduct qualifies as ecocide.

- (11) The Council was positive about the project as such but, **given that the text still requires some work, it decided that the project was not ready for approval (6 in favour, 24 opposed and 6 abstaining)**. The Reporters were asked to finalise the draft in accordance with the points raised and re-submit it to the Executive Committee, with a view to putting it up for approval at the February 2023 Council meeting or earlier if need be. As there was sympathy for the need for the text to be discussed with the European Parliament before Council approval, the Reporters were informed that they can do this but that they should include an appropriate disclaimer to the text and insert alternative provisions for the Articles mentioned above so as to reflect the discussions in the Council and to make it is clear that the ELI is yet to decide on the matter. Pascal Pichonnaz added that the Council is prepared to call an extraordinary meeting as soon as the document is revised so that it can vote on it, if it would be too late to wait until the February 2023 Council meeting to do so.

c) Advance Choices for Future Disablement

- (12) Adrian Ward and Christiana Fountoulakis presented the project proposal. They emphasised the need for legal progress in this field and that ELI can take a lead in Europe.
- (13) A discussion followed. Raul Radoi (The Council of the Notariats of the European Union) thanked ELI for its efforts in this field and supported the initiative. He stressed the importance of respecting the role of intermediate authorities (notaries). Jens Scherpe congratulated the proposers on the initiative and praised them for the Team they assembled. He wondered whether the output should be model laws, or rather guidelines or recommendations. He also emphasised the need for representatives from Eastern Europe and more civil lawyers to be added to the Team. Corrado Malberti wondered whether the proposed Team setup (ie two Reporters and an Advisory Committee) was unusual. Pascal Pichonnaz pointed to the ALI-ELI Data Economy project as an example of an ELI project without a Project Team and explained that ELI supports various setups.
- (14) **The Council adopted the project (29 in favour and five abstentions).**

d) Appointment of Assessors

- (15) Given that the Advance Choices for Future Disablement project was adopted, **the Council appointed its assessors: Valentina Calderai, Corrado Malberti, Ilaria Pretelli and Pietro Sirena.**

V. Revision of ELI Project Guidelines and Project Proposal and Feasibility Study Templates

- (16) Pascal Pichonnaz explained that the Project Guidelines should be regarded as work-in-progress and to be continuously amended in light of experience.
- (17) **The Council agreed that Secretariat and Scientific Director should have the primary function of amending the Project Guidelines in future, under the supervision and with the approval of the Executive Committee (29 in favour, 3 abstentions).**

VI. Finances

a) Appointment of Auditors

- (18) **The Council agreed to appoint Mag Wolfgang Eder and Mag Franz Schweiger of BF Auditing Wirtschaftsprüfungs-GmbH as auditors for ELI's EU grant audit and for the full audit of accounts, for a maximum period of three years (31 in favour and three abstentions).**

b) ELI Membership Fees

- (19) Pascal Pichonnaz reminded those present that ELI had not received the amount it had anticipated from the Commission for 2023, despite the fact that it has resumed physical gatherings, eg, the Annual Conference. He explained that after a thorough analysis of the financial situation of ELI and the potential consequences of an increase, the Executive Committee considered the need for Membership fees to be increased, in light of staggering levels of inflation. It proposed that the Regular Membership fee of EUR 60 should be increased to EUR 75 for all Individual Members. This is in particular as, since ELI was established in 2011, Membership fees have never been increased, despite the fact that the cumulative price change has risen by over 31% over the years. An increase of the Sustaining Membership fee from EUR 120 to EUR 175 was also proposed. There would be no increase for those on reduced fees.
- (20) Following a discussion, **the Council agreed to the above increase (21 in favour, four opposing and five abstentions).**

VII. Young Lawyers Award (YLA)

- (21) Pascal Pichonnaz said that Walter Doralt agreed to chair the Jury of the above, which now consists of Sarah Bechaalany, Lord Jonathan Mance, John North, Yuri van Steenwijk, Aneta Wiewiórowska-Domagalska and Reinhard Zimmerman. The 2023 Award offers more incentives for candidates to apply. He encouraged Council members to distribute the YLA flyer to eligible candidates.

VIII. Any Other Business

(22) Pascal Pichonnaz reported that a Team was set up to prepare a response on behalf of ELI to the European Commission's Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law. Peter Rott (DE), Karin Sein (EE) and Marie Jull Sørensen (DK) agreed to draft and Sergio Cámara Lapuente (ES) and Emilia Mišćenić (HR) agreed to act as Advisors. The Council will be approached in February 2023 to comment and vote on the draft response.

(23) Pascal Pichonnaz thanked the Secretary General and the entire Secretariat for their work.

The Council meeting ended at 18:20 CET.